

# NOTE

## INTERPRETING SEARCHES OF PRETRIAL RELEASEES THROUGH THE LENS OF THE FOURTH AMENDMENT SPECIAL NEEDS EXCEPTION

### I. INTRODUCTION

The Fourth Amendment of the United States Constitution, in pertinent part, guarantees, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and that “no Warrants<sup>1</sup> shall issue, but upon probable cause.”<sup>2</sup> The Supreme Court has interpreted the Amendment’s fundamental purpose as to protect an individual’s<sup>3</sup> privacy and security from “arbitrary invasions by government officials.”<sup>4</sup> The rights and freedoms protected by the Fourth Amendment are not absolute, often requiring courts to assess the constitutionality of a governmental search through a balancing test.<sup>5</sup> Although seemingly straightforward, the judiciary has struggled to establish a coherent body of Fourth Amendment jurisprudence.<sup>6</sup>

Although the Court has agreed that the “touchstone”<sup>7</sup> of Fourth Amendment analysis is “reasonableness in all the circumstances of the particular governmental invasion,”<sup>8</sup> it has endlessly debated its precise

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1. The purpose of a warrant is to advise a citizen that a search is legally valid and limited in permissible scope, and to allow a neutral magistrate to determine the parameters. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989).

2. U.S. CONST. amend. IV. “Probable cause exists where ‘the facts and circumstances within . . . [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

3. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”).

4. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

5. *See Samuel C. Rickless, The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. CIV. RTS. L.J. 261, 286 (2005) (“‘[B]alancing’ may be understood as a way to determine whether the benefits of abandoning formal requirements are sufficiently great to justify infringement of rights of varying degrees of stringency.”).

6. *See id.* at 261 (stating that “Fourth Amendment jurisprudence is a theoretical mess, full of doctrinal incoherence and inconsistency”); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) (describing Fourth Amendment jurisprudence as “a body of doctrine that is unstable and unconvincing”).

7. *United States v. Knights*, 534 U.S. 112, 118 (2001).

8. *Terry v. Ohio*, 392 U.S. 1, 19 (1968); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“Although the underlying command of the Fourth Amendment is always that searches and

meaning and application.<sup>9</sup> Protecting individual privacy rights inevitably generates tension with law enforcement's ability to detect and prevent crime. As such, the Court has not characterized probable cause as an indispensable element of a lawful search,<sup>10</sup> and has instead created various exceptions, whereby neither probable cause nor a warrant is required to satisfy constitutional standards.<sup>11</sup> The special needs search,<sup>12</sup> has been described as "[o]ne of the most striking and sweeping exceptions" to the warrant and probable cause requirements,<sup>13</sup> not only due to the reduced level of suspicion required to conduct a search, but also due to the numerous circumstances in which the Court has found it to apply.

The scope of the special needs exception was at issue in the recent Ninth Circuit opinion *United States v. Scott*,<sup>14</sup> where the majority held that the government's warrantless drug test<sup>15</sup> based upon reasonable suspicion violated the Fourth Amendment, regardless of the defendant's

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seizures be reasonable, what is reasonable depends on the context within which a search takes place.").

9. "The test of reasonableness . . . is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Albeit numerous exceptions exist, in *Jones v. United States*, the Court asserted that exceptions to the standard are "jealously and carefully drawn." 357 U.S. 493, 499 (1958).

10. *T.L.O.*, 469 U.S. at 340 (affirming that probable cause is "not an irreducible requirement of a valid search").

11. See David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 231 (2005). Steinberg states that despite the Court's rhetoric to the contrary, its recognition of such a large number of exceptions has effectively rendered the warrant requirement an exception rather than the rule. *Id.*

12. For other exceptions to the warrant and probable cause requirements, see *Atwater v. Lago Vista*, 532 U.S. 318, 323 (2001) (warrantless arrest); *Illinois v. Rodriguez*, 497 U.S. 177, 179, 188-89 (1990) (consent or perceived consent); *Horton v. California*, 496 U.S. 128, 133-34 (1990) ("plain view"); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (spot checks of automobiles); *Terry*, 392 U.S. at 30-31 ("stop and frisk"); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (exigent circumstances).

13. Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259 (2000); see also Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1017 n.142 (2003) (stating that in the context of the special needs exception, the Court allows the "evenhandedness of a search [to] substitute for the usual requirement of probable cause").

14. *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006). Note that the Ninth Circuit's earlier decision, *United States v. Scott*, 424 F.3d 888 (9th Cir. 2005), was withdrawn and superseded by the first citation listed above. In the amended opinion, seven judges dissented to the denial of a rehearing en banc. See *Scott*, 450 F.3d at 889-98.

15. The Court has held that drug testing constitutes a search within the meaning of the Fourth Amendment. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment.").

prior consent to such searches.<sup>16</sup> In this case, Scott, who was awaiting trial for drug charges,<sup>17</sup> consented to several conditions prior to his release, including warrantless drug and alcohol testing.<sup>18</sup> In this issue of first impression for any federal circuit,<sup>19</sup> the Ninth Circuit concluded that the drug test, which occurred during Scott's pretrial release, did not fall within the purview of the special needs exception and thus, required probable cause.<sup>20</sup>

The *Scott* decision illustrates the dire need for the Supreme Court to establish a consistent and logically sound special needs jurisprudence, as the Fourth Amendment freedoms enjoyed by an average law-abiding citizen vary greatly from those enjoyed by a convicted probationer or parolee.<sup>21</sup> Contingent upon one's relationship with the criminal justice system, these variations play an invaluable role in determining a search's constitutional validity; the government must possess a warrant and probable cause in the former situation, whereas it must only possess reasonable suspicion in the latter. Interestingly, the *Scott* court determined the constitutionality of a search conducted during the period of time prior to conviction but subsequent to being charged with a crime, by balancing the benefit of abandoning formal search requirements against the infringement imposed upon an individual's rights.<sup>22</sup> The prospective ramifications of both *Scott's* interpretation of the Fourth Amendment as well as its holding are enormous, as the court defined the constitutional boundaries of the government's freedom and an individual's rights in regard to warrantless searches of releasees while awaiting trial.

Using the *Scott* decision as a constant backdrop, this Note argues that the Ninth Circuit erroneously excluded searches of pretrial releasees<sup>23</sup> from its proper designation within the special needs doctrine.

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16. *Scott*, 450 F.3d at 874.

17. Scott had been charged with one felony and two misdemeanors in regard to possession of methamphetamine and drug paraphernalia. *Id.* at 875 (Bybee, J., dissenting).

18. *Id.* (Bybee, J., dissenting).

19. *Id.* at 864.

20. *Id.* at 874.

21. See *United States v. Knights*, 534 U.S. 112, 119 (2001); see also *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) (stating that the distinction between parolees and probationers is not constitutionally significant when evaluating the scope of a search). Like probationers, releasees do not "enjoy the absolute liberty to which every citizen is entitled." *Knights*, 534 U.S. at 119.

22. See *United States v. Scott*, 450 F.3d 863, 872 & n.10 (9th Cir. 2006); see also Rickless, *supra* note 5, at 286 (explaining that when using this balancing method, the Court assesses whether an individual forfeited or waived his or her Fourth Amendment rights).

23. Pretrial release operates as a component of the larger bail system. As such, unless expressly stated otherwise, when this Note refers to the bail system, it is also referring to pretrial release.

In Part II, the Note briefly discusses the special needs doctrine to provide a general background for a succeeding review of the *Scott* case. Then taking a broader doctrinal approach, Part III maintains that the government's interest in the bail system is clearly a "special need," as the Supreme Court has previously defined. Next, Part IV evaluates whether governmental searches based upon reasonable suspicion rather than probable cause are reasonable, by applying a special needs balancing test. Part V then objectively examines the "severe" and "far-reaching"<sup>24</sup> consequences of *Scott*'s ruling, concluding with several suggestions for jurisprudential reform that underscore the need for increased judicial clarity in describing and applying the special needs exception.

## II. THE DOCTRINE IN PRACTICE: *SCOTT*'S FLAWED APPLICATION

### A. *The Focal Elements of the Special Needs Standard*

The special needs exception was officially established by Justice Blackmun in his concurring opinion in *New Jersey v. T.L.O.*,<sup>25</sup> where he defined special needs as those, "beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable, [and thus entitle a court] to substitute its balancing of interests for that of the Framers."<sup>26</sup> This exception serves societal interests by authorizing searches and seizures that would otherwise be frustrated by the enforcement of the warrant and probable cause requirement.<sup>27</sup> As a threshold matter, a court first determines whether the government's proffered special need is qualitatively different from that of general law enforcement.<sup>28</sup> Once a special need is established, a "reasonableness" balancing test is employed, whereby the government's interest or need is weighed against the intrusion imposed upon an individual's reasonable expectation of privacy.<sup>29</sup> Beginning with administrative searches<sup>30</sup> of closely regulated businesses, the Court has

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24. *Scott*, 450 F.3d at 888 (Bybee, J., dissenting) ("[T]he implications of the majority's new *per se* rule could hardly be more severe or far-reaching.").

25. 469 U.S. 325 (1985) (Blackmun, J., concurring).

26. *Id.* at 351 (Blackmun, J., concurring).

27. See ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 75 (2003).

28. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

29. *Camara v. Mun. Court.*, 387 U.S. 523, 536-37 (1967).

30. Although the Court has classified administrative searches separately from special needs searches, there really is little reason to do so. They are beyond ordinary criminal investigations and use the same reasonableness balancing standard. I have therefore chosen to include the

continued to expand the exception to now include many other types of searches as well.<sup>31</sup> Although precise scope of the exception remains uncertain, an examination of its factors, as explained by the Supreme Court in several seminal cases, provides valuable insight into the accuracy of the Ninth Circuit's conclusion in *Scott*.

## B. United States v. Scott: *A General Overview*

### 1. The Facts

Raymond Lee Scott was arrested and charged with state-law offenses of felony possession of methamphetamine and misdemeanor possession of a controlled substance and drug paraphernalia.<sup>32</sup> He was subsequently released on his own recognizance, based upon his explicit consent to pretrial release conditions, including random and warrantless drug and alcohol testing by any peace officer, a prohibition on possessing a firearm, and supervision by the Department of Alternative Sentencing.<sup>33</sup>

However, when an officer from the Department of Alternative Sentencing<sup>34</sup> later conducted a compliance visit based upon an informant's tip that Scott possessed a gun as well as drug paraphernalia, he also administered a drug test, which field-tested positive for methamphetamine.<sup>35</sup> Arrested for violating the terms of his release, Scott was placed in handcuffs while officers searched his home and found a

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administrative search within the category of special needs searches.

31. See, e.g., *T.L.O.*, 469 U.S. at 325 (public school students); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroad employees); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (probationers).

32. *United States v. Scott*, 450 F.3d 863, 875 (9th Cir. 2006) (Bybee, J., dissenting).

33. *Id.* Interestingly, the district court held that even though the Nevada statute only gave the Department of Alternative Sentencing express authority to supervise probationers, nonetheless it still had implied authority to supervise pre-trial releasees. *United States v. Scott*, No. CR-N-03-0122, 2004 U.S. Dist. LEXIS 29753, at \*19-21 (D. Nev. Jan. 26, 2004). This issue was not raised on appeal, so this Note will assume the holding was correct. Although some states do not specifically have a state Pretrial Services Agency, many counties have considered developing one or have recently done so, due to over-crowded jails. See Neil R. Vance & Ronald J. Stupak, *Organizational Culture and the Placement of Pretrial Agencies in the Criminal Justice System*, 19 JUST. SYS. J. 51, 52 (1997) (stating that in 1997 there were more than 350 county-based pretrial release programs and 91 federal pretrial offices, either organized within the court system or probation departments). Interestingly, beginning in the 1980s, many pretrial release agencies began to be "administered by and located in corrections programs." *Id.*

34. He was also accompanied by a probation officer, narcotics agents, and several police officers. *Scott*, 450 F.3d at 876 (Bybee, J., dissenting).

35. *Scott*, 450 F.3d at 865. The court notes, however, that the same urine sample came back negative when tested with a more accurate method. *Id.* at 865 n.2.

sawed-off shotgun.<sup>36</sup> When he was subsequently indicted under federal law for his possession of the firearm during pretrial release,<sup>37</sup> Scott moved to suppress the evidence, alleging the search had violated his Fourth Amendment rights.<sup>38</sup> Although the government conceded a lack of probable cause,<sup>39</sup> it argued that the search fell within the ambit of the special needs exception, under which a search's constitutional validity is determined by a finding of reasonable suspicion.<sup>40</sup>

## 2. The Majority Opinion

On appeal to the Ninth Circuit, Judge Kozinski, writing for the majority, held that the search required probable cause, and was therefore unconstitutional.<sup>41</sup> After dismissing the government's interest in protecting community safety as a "quintessential general law enforcement purpose,"<sup>42</sup> Judge Kozinski concluded that a governmental interest in ensuring a defendant's appearance at court, including the need to guarantee the efficient functioning and integrity of the judicial system, is a special need.<sup>43</sup>

Judge Kozinski then analyzed the connection between the object for the search and the harm to be avoided—the reasonableness as compared to the government purpose.<sup>44</sup> Holding the relationship as attenuated, he first remarked that although these constituted "conceivable justifications," the government had failed to produce evidence that drug use actually hindered courtroom appearance, rendering the intrusion imposed upon a defendant's privacy rights unjustified.<sup>45</sup> Absent this evidence, he opined that the government was effectively arguing for a "hypothetical hazard," which precluded a conclusion that the search was necessary to further the government's object.<sup>46</sup>

He also reasoned that the Fourth Amendment rights of probationers and pretrial releasees were not sufficiently analogous because probationers, unlike pretrial releasees, maintain a lesser expectation of privacy arising from their being in the state's custody throughout

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36. *Id.* at 876 (Bybee, J., dissenting).

37. Scott was indicted for violating 26 U.S.C. § 5861(d). *Id.* (Bybee, J., dissenting). The statute makes it unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d) (2000).

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

39. *Id.* (Bybee, J., dissenting).

40. *Id.* at 869.

41. *Id.* at 874.

42. *Id.* at 870.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 870-71.

probation.<sup>47</sup> The majority concluded that since the government failed to substantiate both its “generalized need to protect the community” as well as its “blanket assertion” that drug-testing was necessary to ensure courtroom appearance, the search required probable cause rather than reasonable suspicion.<sup>48</sup>

### 3. The Dissenting Opinion

In his virulent dissent, Judge Bybee expounded upon the majority’s misapplication of the special needs doctrine. Particularly, he noted and continued to use the close analogy provided by the circumstances of a probationer, stating that the distinctions between the two are not “constitutionally relevant” in a special needs analysis.<sup>49</sup>

Stating that protecting the safety of a community as well as ensuring courtroom appearance are both valid special needs beyond those of general law enforcement, he explained that “[b]y failing to recognize these interests, the majority grossly misrepresents the government’s interest in protecting the public through supervising individuals on pretrial release.”<sup>50</sup> Judge Bybee concluded that both the search program and government object were sufficiently related to one another, and then further rebuked the majority’s short-sighted rejection of the relationship between assuring appearance at trial and drug testing. Drug testing, he explicated, provides greater assurance that an individual is physically and mentally prepared for trial, which in turn reduces any ensuing contentions by a defendant that he or she was unable to understand the proceedings or participate in his or her defense.<sup>51</sup>

Furthermore, Scott, like a probationer, had a lesser expectation of privacy than that of an ordinary citizen.<sup>52</sup> Conceding that his situation is not identical to a probationer’s (there had been no “judicial abridgment of [Scott’s] constitutional rights”), he explained that a “person facing pending charges and released on their own recognizance is [still] ‘required to appear in court at the state’s command[,] [and] is often subject, as in this case, to the condition that he seek formal permission from the court . . . before exercising . . . his unquestioned right to travel outside the jurisdiction.’”<sup>53</sup> Moreover, Scott had agreed to his release

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47. *Id.* at 872 (citing *Ferguson v. City of Charleston*, 532 U.S. 67, 80 n.15 (2001) and discussing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

48. *Id.*

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

50. *Id.* at 884 (Bybee, J., dissenting).

51. *Id.* (Bybee, J., dissenting).

52. *Id.* at 885 (Bybee, J., dissenting).

53. *Id.* (Bybee, J., dissenting) (emphasis omitted) (quoting *Albright v. Oliver*, 510 U.S. 266, 278-79 (1994) (Ginsburg, J., concurring)).

conditions, further curtailing his reasonable expectation of privacy.<sup>54</sup> Although Judge Bybee acknowledged that Scott was still presumed innocent, he emphasized that the warrantless searches did not affect his rights prior to trial.<sup>55</sup>

Since Scott's pretrial release status placed him in a different position than that of a law-abiding citizen, the meaning of "unreasonable" was modified to reflect the fact that he was actually in the constructive custody of the court pending trial.<sup>56</sup> Judge Bybee then looked to the way that Congress and many other states have modified arrestee release criteria such as bail reform, and utilized it to reinforce his argument.<sup>57</sup> After balancing the competing interests, he concluded that the government's interests outweighed Scott's privacy interests, rendering reasonable suspicion the proper constitutional standard.<sup>58</sup>

### III. A SPECIAL NEED BEYOND GENERAL LAW ENFORCEMENT: A THIN LINE OF CONSTITUTIONAL SIGNIFICANCE<sup>59</sup>

When employing a special needs analysis, a court must initially determine that the government's purported need substantively diverges from that of general law enforcement as well as that of detecting criminal wrongdoing.<sup>60</sup> In special needs cases, the government's regulatory goal is facilitative or paternalistic in nature, whereas searches pursuant to general law enforcement purposes are primarily driven by retributive or prosecutorial motives to obtain evidence of criminal

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54. *Id.* (Bybee, J., dissenting).

55. "[T]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . [b]ut it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id.* at 883 (quoting *Bell v. Wolfish*, 441 U.S. 520, 533 (1979)). Judge Bybee also noted another federal case, in which the court upheld a statute that subjected pretrial releasees to more severe punishment for crimes committed pending trial than ordinary citizens, as it did not violate the presumption of innocence. *Id.* (explaining *Speight v. United States*, 569 A.2d 124 (D.C. 1989)).

56. *See Hensley v. Mun. Court*, 411 U.S. 345, 349 (1973) (concluding that a pretrial releasee is in custody for habeas corpus purposes); *In re Floyd*, 413 F. Supp. 574, 576 (D. Nev. 1976) (recognizing the same concept).

57. *United States v. Scott*, 450 F.3d 863, 888 (9th Cir. 2006) (Bybee, J., dissenting).

58. *Id.* at 889 (Bybee, J., dissenting).

59. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 19.01, at 323 (3d ed. 2002).

60. *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 353 (1985) (Blackmun, J., concurring) (articulating that the government's special need to respond immediately to behavior that could threaten the safety of the students and teachers or the educational process itself, demonstrated the need to substitute a balancing test rather than conduct an analysis involving the warrant and probable cause requirements). *But cf. Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (holding that since the government's purpose was to generate evidence for law enforcement purposes, a special needs analysis was inapplicable).



activity.<sup>61</sup> To aid in ascertaining the genuine character of a search program, the Court typically looks for a primary or programmatic purpose,<sup>62</sup> such as the need to maintain public safety by supervising probationers,<sup>63</sup> or the need to deter illicit drug use among public employees by testing them.<sup>64</sup> When making this determination, the Court not only evaluates the context, the specific facts,<sup>65</sup> and all available evidence in each individual case,<sup>66</sup> but also inquires whether the fruits of such searches were used in successive criminal prosecutions.<sup>67</sup> Despite the fact that the Court has recognized the rigorous “challenges inherent in a purpose inquiry,” it has nevertheless found it a necessary “means of sifting abusive governmental conduct from that which is lawful.”<sup>68</sup>

*A. The Probation System’s Innate Function as a Governmental Special Need*

The Court has firmly established that the nature of the probation system inherently creates a special governmental need. In *Griffin v.*

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61. CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 313 (2d ed. 1993).

62. Discerning a programmatic purpose does not entail inquiry into the subjective intent of the individuals conducting the search. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (underscoring that the purpose inquiry is “not an invitation to probe the minds of individual officers acting at the scene”); *see also* Lucinda Clements, Note, *Ferguson v. City of Charleston: Gatekeeper of the Fourth Amendment’s “Special Needs” Exception*, 24 CAMPBELL L. REV. 263, 278 (2002) (maintaining further that these purposes are “best determined by documents memorializing a search or seizure policy, the parties and the method creating the policy, and the way the policy is administered”).

63. *United States v. Knights*, 534 U.S. 112, 117 (2001) (discussing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

64. *Skinner v. Ry. Labor Executives’ Ass’n.*, 489 U.S. 602, 620 (1989).

65. *Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002); *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (stating that “courts must undertake a context-specific inquiry”); *see also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (explaining that although the suspicionless drug testing program at issue was found constitutional, the Court warned “against the assumption that [such a testing program] will readily pass constitutional muster in other contexts”).

66. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001).

67. *See id.* at 85-86 (“The stark and unique fact that characterizes this case is that [the search policy] was designed to obtain evidence of criminal conduct . . . that would be turned over to the police and that could be admissible in subsequent criminal prosecutions.”); *see also* David E. Steinberg, *High School Drug Testing and the Original Understanding of the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 263, 270 (2003) (stating that in “upholding random drug tests, the Court typically has focused on . . . representations that the drug test results will not be used in criminal prosecutions”).

68. *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000). Purpose inquiries, besides being particularly challenging, may also produce the “odd result of proscribing programs motivated by illicit purposes, while comparable programs carrying out similar searches or seizures will be allowed if motivated by proper purposes.” Clements, *supra* note 62, at 277 (citation omitted).

*Wisconsin*,<sup>69</sup> the Supreme Court pronounced that both the State's operation of, and the intrinsic nature of the probation system presented "special needs beyond normal law enforcement."<sup>70</sup> In this case, Joseph Griffin was placed on probation subject to Wisconsin's probation regulations, which permitted a probation officer, after receiving supervisory approval, to conduct a warrantless search based upon "reasonable grounds" to believe contraband was present.<sup>71</sup> When two probation officers searched Griffin's home due to suspected gun possession in violation of his probation conditions, officers indeed found such a weapon.<sup>72</sup> In an attempt to suppress this evidence, Griffin alleged that his Fourth Amendment rights were violated because the officers conducted the search without first securing a warrant.<sup>73</sup>

The Supreme Court did not agree with Mr. Griffin, and upheld the warrantless search as within the boundaries of the special needs exception. In determining whether the state's interest was truly "special," the Court explained that the probation system's dual goals of rehabilitating criminal offenders and protecting the community from potential harm caused by such individuals, created the State's special need to supervise compliance with probation conditions.<sup>74</sup> This valid supervisory purpose arises from the notion that a probationer, as a convicted criminal, is more likely than an ordinary citizen to commit a crime.<sup>75</sup> Moreover, a probationer has an ongoing rehabilitative and supervisory relationship with a probation officer, who should have the probationer's welfare and best interests in mind.<sup>76</sup> This of course differs from a police officer, who conducts searches against the ordinary

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69. 483 U.S. 868 (1987).

70. *Id.* at 873-74. Justice Blackmun, although dissenting, agreed that the State's special need should invoke the balancing test, but criticized the majority for overlooking the "feeble justification" for the search that did not rise to reasonable suspicion. *Id.* at 881, 890 (Blackmun, J., dissenting). Therefore, he argues to retain a warrant requirement based upon less than probable cause. *Id.* at 882 (Blackmun, J., dissenting).

71. *Id.* at 870-71. The regulation provided for the consideration of a number of factors in determining whether reasonable grounds exist, such as: information provided by an informant, the reliability and specificity of such information, the reliability of the informant, the officer's own experience with the probationer, and the "need to verify compliance with rules of supervision and state and federal law." *Id.* at 871 (citing WISC. ADMIN. CODE § 328.21(7) (1987)). The Court comments that the particular section of the Wisconsin Administrative Code, to which the opinion cites, was repealed and repromulgated with different numbering but without "relevant substantive changes." *Id.* at 871 n.1.

72. *Id.* at 871.

73. *Id.* at 872.

74. *Id.* at 875; *see also* *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir. 1975) (characterizing the State's parole interests as "special and unique").

75. *Griffin*, 483 U.S. at 880; *see also* *Latta*, 521 F.2d at 249 (explicating the same principle in the context of parole).

76. *Griffin*, 483 U.S. at 876-77, 879.

citizen.<sup>77</sup> Therefore, the Court concluded that “in such a setting, [it is] reasonable to dispense with the warrant requirement.”<sup>78</sup>

*B. The Bail and Pretrial Release System’s Function as Qualitatively Distinct From That of General Law Enforcement*

A warrantless search of a pretrial releasee,<sup>79</sup> much like that of a probationer, is directly related to the government’s supervisory and regulatory interests in the bail system rather than in general law enforcement. These facilitative interests are rooted in the nature and operation of the bail system. For example, after being arrested and charged with a crime, an individual’s first release opportunity occurs at a first appearance,<sup>80</sup> where an impartial judicial officer such as a magistrate, decides whether the defendant should be released on his or her own recognizance,<sup>81</sup> or if bail or a combination of conditions should be imposed.<sup>82</sup> If a defendant is charged with a particularly serious crime, a magistrate decides if pretrial detention is necessary<sup>83</sup> at a bail hearing.<sup>84</sup> However, when making these determinations, the Bail Reform Act of 1984, applicable in federal courts, only permits the imposition of the “least restrictive further condition, or combinations of conditions,

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77. *Id.* at 876. In Wisconsin, a probation officer is an employee of the State Department of Health and Social Services. *Id.*; see also *Reynolds v. City of Anchorage*, 225 F. Supp. 2d 754 (D. Ky. 2002) (juvenile detention center employee).

78. *Id.* at 877.

79. When this Note refers to “warrantless” searches of pretrial releasees it is referring to searches based upon an individualized determination of reasonable suspicion and not suspicionless searches. For a discussion of why this is an important distinction, see *infra* Part III.B.3 and discussion of both the *Edmond* and *Ferguson* cases.

80. At the first appearance, a defendant hears the charges read, is advised of his or her rights, and a magistrate determines bail. BLACK’S LAW DICTIONARY 107 (8th ed. 2004) (“initial appearance”). Note that if the defendant is only charged with a misdemeanor, the initial appearance may be combined with the arraignment. *Id.*

81. Release on personal recognizance is defined as:

The release of a defendant in a criminal case in which the court takes the defendant’s word that he or she will appear for a scheduled matter or when told to appear. This type of release dispenses with the necessity of the person’s posting money or having a surety sign a bond with the court.

*Id.* at 1299 (“personal recognizance”).

82. 18 U.S.C. § 3142(a) (2000).

83. As stated in 18 U.S.C. § 3142(e), a judicial officer may only detain an arrestee pending trial if he/she finds that “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” 18 U.S.C. § 3142(e) (2000). The judicial officer’s conclusion must be supported by “clear and convincing evidence.” *Id.* § 3142(f).

84. If a defendant is charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, a drug offense for which the maximum imprisonment is ten years or more, or any other felony committed by a person previously convicted of two or more of the above offenses, there must be a detention hearing. *Id.* § 3142(f)(1).

that [a] judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community.”<sup>85</sup> The 1984 Act was primarily enacted to redress the prior statutory limitation of the Bail Reform Act of 1966, which only permitted a judicial officer to consider a defendant’s risk of flight when determining bail.<sup>86</sup> Due to growing public concern over increased crime and a correlation between crime and defendants released on bail, the governmental interest in the bail system, as set forth in the Bail Reform Act of 1984<sup>87</sup> and in most state statutes, is to ensure courtroom appearance and protect community safety.<sup>88</sup>

A pretrial service agency’s supervisory interest, to ensure compliance with the release conditions, is clearly a regulatory special need.<sup>89</sup> The “primary manager of and service provider to defendants

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85. *Id.* § 3142(c)(B). Nevada’s statute governing this matter permits the court to “impose such conditions as it deems necessary to protect the health, safety and welfare of the community and to ensure that he will appear at all times and places ordered by the court.” NEV. REV. STAT. ANN. § 178.4851(2) (LexisNexis 2006).

86. *See* *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985) (explaining that one of “[t]he major differences between the superseded Bail Reform Act and the 1984 Act pretrial release provisions . . . [is] the authorization to consider in determining release conditions . . . the danger a defendant may pose to the community or certain individuals”). The court further articulates that this statutory alteration may “eliminate the judicial practice of employing high bail to detain defendants considered dangerous and substitute a procedure allowing the judicial officer openly to consider the threat a defendant may pose.” *Id.*

87. *Id.* The legislative history of the 1984 Act provides:

[T]he Committee’s determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released. The adoption of these changes marks a significant departure from the basic philosophy of the [Superseded Bail Reform Act of 1966], which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.

S. REP. NO. 98-225, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3185-86.

88. *See* *United States v. Scott*, 450 F.3d 863, 888 (9th Cir. 2006) (Bybee, J., dissenting) (asserting that every state in the Ninth Circuit has a rule permitting such considerations, and quoting each of the statutes).

89. “Conditional release has historically been a central feature of the American bail system. The pretrial services program is a modern expression of a traditional idea—that of the personal surety as security for the defendant’s appearance at and good behavior prior to trial.” Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 323 (1987). Note that in some states the agency is combined with the Probation Agency, in others it is combined with the Department of Alternative Sentencing. *See* 18 U.S.C. § 3153(b) (2000) (“The chief probation officer in all districts in which pretrial services are established . . . shall designate personnel appointed . . . to perform pretrial services.”); *see also* James R. Marsh, *Performing Pretrial Services: A Challenge in the Federal Criminal Justice System*, 58 FED. PROBATION 3, 3 (1994) (stating that albeit “pretrial services agencies are not truly correctional agencies, as the mission of pretrial services is not to correct, they are generally classified as part of corrections”).

placed on pretrial supervision,” pretrial services agencies provide a range of “dynamic” activities, which differ from general law enforcement activities.<sup>90</sup> For example, to monitor the defendant’s compliance with release conditions, a pretrial release agent may make “field contacts” to directly observe the “activities of and circumstances surrounding the defendant,” but may also maintain contact through telephone calls.<sup>91</sup> Also, pretrial services agents are permitted by statute to help defendants obtain employment, or medical, legal, or social services regardless of the specific conditions of release.<sup>92</sup> Performing substantially different functions than police officers, pretrial service agents lack the authority to punish or make arrests, as they do not “enforce conditions of release,” but only reasonably ensure that the defendant complies with release conditions pending trial.<sup>93</sup>

Although only charged with a crime and still presumed innocent, regulatory conditions during pretrial release are premised upon the fact that the state or federal government’s interest in such an individual differs from that of a law-abiding citizen. Unlike probation, bail conditions and pretrial detention, as set forth in the Bail Reform Act of 1984, are not punitive measures, but are regulatory in nature.<sup>94</sup> Furthermore, it is important to note at the outset of this discussion that pretrial detention and other release conditions do not violate a defendant’s presumption of innocence prior to trial. In the context of pretrial detention, the Court has clarified that this doctrine, which solely allocates the burden of proof in criminal trials, has “no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”<sup>95</sup> Although the presumption of innocence may serve as caution to a fact finder determining guilt or innocence based upon evidence adduced at trial, it has *no* application to

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90. Donald S. Miller & James R. Marsh, *United States Pretrial Services Supervision*, 59 FED. PROBATION 28, 30 (1995).

91. *Id.* at 30-31.

92. 18 U.S.C. § 3154(7) (2000).

93. Marsh, *supra* note 89, at 3. Pretrial Services may also “[o]perate or contract for the operation of appropriate facilities for the custody or care of persons released . . . including residential halfway houses, addict and alcoholic treatment centers, and counseling services.” 18 U.S.C. § 3154(4).

94. *United States v. Salerno*, 481 U.S. 739, 747 (1987). The Court was “unwilling to say that [Congress’s determination under the Bail Reform Act of 1984], based as it is upon that primary concern of every government—a concern for the safety and indeed the lives of its citizens—on its face violates . . . the [U.S. Constitution].” *Id.* at 755.

95. *Bell v. Wolfish*, 441 U.S. 520, 532-33 (1979) (holding that pretrial detention and subsequent loss of privacy and freedom are governmental regulatory measures and do not constitute punishment for prior acts or violate the Fourth or Fourteenth Amendments); *see also* 18 U.S.C. § 3142(j) (2000) (stating that “[n]othing in this section shall be construed as modifying or limiting the presumption of innocence”).

the basis of suspicions arising from arrest, indictment, or custody prior to trial.<sup>96</sup> In fact, competent adults may face “substantial liberty restrictions as a result of the operation of our criminal justice system.”<sup>97</sup> In certain situations the law has always treated arrestees differently from ordinary members of the public without disturbing the presumption of innocence.<sup>98</sup> Thus, reasonable suspicion search standards, operating as regulatory measures, have neither bearing nor effect upon a pretrial releasee’s presumption of innocence.<sup>99</sup>

### 1. The Special Need to Ensure the Integrity of the Judicial System

The governmental interest in assuring that defendants attend all courtroom appearances is clearly an activity that is not primarily motivated by general law enforcement purposes.<sup>100</sup> Most pretrial agencies monitor compliance with conditions of release, remind defendants of court dates, advise them of the penalties of violation,<sup>101</sup> and if prescribed by the court, also arrange for or administer drug monitoring and testing.<sup>102</sup> In carrying out these duties, the agency is not motivated by a desire to procure criminal evidence to use for any upcoming prosecution and is not authorized to enforce release conditions or exercise other law enforcement powers.<sup>103</sup>

A pretrial release program’s central objective is to “[r]educ[e] the failure to appear rate and risk to the community.”<sup>104</sup> In striving to achieve this goal, pretrial release agents are involved in an arrestee’s case from its inception; agents interview defendants, investigate their background, and present their findings to the magistrate determining that

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96. *Bell*, 441 U.S. at 533. (emphasis added).

97. *Salerno*, 481 U.S. at 749. For example, police who suspect someone of a crime may “arrest and hold him until a neutral magistrate determines whether probable cause exists.” *Id.* (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)).

98. *See Speight v. United States*, 569 A.2d 124, 128 (D.C. 1989) (holding that presumption of innocence was not intruded upon by a local statute that punished crimes committed by an indicted individual greater than if committed by an ordinary citizen). The court emphasized that “Congress could rationally impose a greater penalty” upon those individuals convicted of a crime while on pretrial release. *Id.*

99. *See, e.g., In re York*, 892 P.2d 804, 813 (Cal. 1995) (concluding that whether a pretrial detainee is released with or without conditions has no bearing upon the presumption of innocence, which the individual is entitled to at trial).

100. Note that failure to appear in court is a criminal offense. *See, e.g., NEV. REV. STAT. ANN.* § 199.335 (LexisNexis 2006).

101. Pretrial Services Agency (Oct. 1995), <http://www.nal.usda.gov/pavnet/ce/ceptsra.htm>.

102. PreTrial Release Program, Pretrial Release Service Program, <http://www.pretrialrelease.com> (last visited Oct. 26, 2006) [hereinafter PreTrial Release Services].

103. *See supra* notes 90-93 and accompanying text.

104. *See* PreTrial Release Services, *supra* note 102.

individual's release conditions.<sup>105</sup> The agent plays an integral role in conducting this pretrial services investigation, completed "before the defendant is brought before the court," as this is when the "foundation of supervision is established."<sup>106</sup> Specifically, a judge's determination that, to ensure appearance, a defendant's pretrial release must be conditioned upon abstention from drug or alcohol use creates the State's special interest in supervising compliance with such conditions.

For example, in *Maine v. Ullring*, the court held that a bail condition permitting warrantless searches was constitutional under the Fourth Amendment, so long as only imposed when reasonably necessary.<sup>107</sup> Reasoning that the bail system was analogous in its needs and purposes to the probation system,<sup>108</sup> the court articulated that bail conditions proscribing drug use and authorizing warrantless searches ensure that defendants, whose background and charges reveal substance abuse as a considerable problem, will appear in court.<sup>109</sup>

Undoubtedly, ensuring a defendant's courtroom appearance presents a special governmental interest. The *Scott* majority actually conceded that this governmental interest is separate and divorced from general crime prevention, as it "implicates the efficient functioning and integrity of the judicial system."<sup>110</sup> Solely resting upon this significant need allows the government to satisfy this threshold query. However, even if the Court fails to agree with this conclusion, the second focal goal of the bail system, to protect community safety, presents a complementary special need.

## 2. The Special Need to Protect the Safety of the Community

The *Scott* majority inaccurately characterized the second governmental interest, to protect community safety, as a "quintessential general law enforcement purpose."<sup>111</sup> Of foremost significance, the Bail

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105. Pretrial Services agents must:

Collect, verify, and report to the judicial officer . . . information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release . . . .

18 U.S.C. § 3154(1) (2000).

106. See *Miller & Marsh*, *supra* note 90, at 28.

107. 741 A.2d 1065, 1073 (Me. 1999).

108. *Id.* at 1072.

109. *Id.*

110. *United States v. Scott*, 450 F.3d 863, 870 (9th Cir. 2006).

111. *Id.* Bybee disparages the majority's mischaracterization of the State's interest in protecting community safety, because after conceding that the interest is indeed compelling, the

Reform Act of 1984 expressly instructs a judicial officer making a bail determination to consider whether a defendant will “endanger the safety of any other person or the community,”<sup>112</sup> and to thereafter impose pretrial release conditions to prevent this.<sup>113</sup> The community safety factor arises from the notion that certain pretrial releasees, like probationers, are more likely than the ordinary citizen to commit a crime. Congress, in recognition of the “‘alarming problem of crimes committed by persons on release’ . . . formulated the Bail Reform Act of 1984 . . . to ‘give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.’”<sup>114</sup> In fact, “[r]ecidivism was a substantial motivating factor leading to the Congressional enactment of the Bail Reform Act,”<sup>115</sup> as it was a response to the “growing public concern over increased crime and the perceived connection between crime and defendants released on bail.”<sup>116</sup> Consequently, the government maintains a special interest in supervising adherence to those reasonable and individualized pretrial release conditions determined by an impartial

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majority rashly dismisses it as the “exact opposite of a special need.” *Id.* However, as Bybee points out, this “point might be well taken if the courts were authorizing random searches of the general population.” *Id.* at 884 (Bybee, J., dissenting). However, because the State was not undertaking such a search program, the majority “misrepresents [the special interest] in protecting the public through supervising individuals on pretrial release.” *Id.* (Bybee, J., dissenting).

112. 18 U.S.C. § 3142(c) (2000). The Bail Reform Act of 1984, a “watershed in the criminal law,” extensively transformed the preexisting bail system, authorizing pretrial detention for those charged with serious felonies due to dangerousness, which was a “ground theretofore not cognizable.” *United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990). The Bail Reform Act of 1966, which governed prior to the Bail Reform Act of 1984, only permitted a judicial officer to consider courtroom appearance when setting bail conditions. *See Speight v. United States*, 569 A.2d 124, 126 (D.C. 1989) (“The infirmity perceived in the Bail Reform Act [of 1966] was that . . . it made likelihood of flight the sole criterion in release determinations.”). Conditional release remained underutilized, and the Act received enormous criticism in the 1970s due to heightened concern over rising crime rates, especially among those released prior to trial. S. REP. NO. 98-225, at 5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3187-88. Judicial officers, not officially permitted to consider a defendant’s dangerousness, were setting very high bail rates or detaining defendants until trial, increasing the U.S. jail population. *See PRETRIAL SERVS. RES. CTR., THE SUPERVISED RELEASE PRIMER 6* (July 1999), <http://www.pretrial.org/supervised%20release%20primer.pdf> (stating that from 1978-1983, the number of people in U.S. jails increased 41%; the number of pretrial detainees increased by 47%) (citing JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS BULLETIN: THE 1983 JAIL CENSUS, (Toborg Associates, Washington, D.C.), Nov. 1984, at 1); *see also supra* notes 86-87 and accompanying text.

113. 18 U.S.C. § 3142(c).

114. *United States v. Salerno*, 481 U.S. 739, 742 (1987) (quoting S. REP. NO. 98-225, at 3 (1983)).

115. *United States v. Carswell*, 144 F. Supp. 123, 128 (N.D.N.Y. 2001); *see also United States v. Selby*, 333 F. Supp. 367, 372 (D. Md. 2004) (“The problem of recidivism was a major motivating factor inspiring the passage of the Bail Reform Act of 1984.”).

116. *United States v. Orta*, 760 F.2d 887, 890 (8th Cir. 1985).



magistrate, whether they proscribe illegal activity or not.<sup>117</sup>

Moreover, in *United States v. Salerno*, the Supreme Court upheld the bail and pretrial detention considerations authorized under the Bail Reform Act as valid on its face under both the Fifth and Eighth Amendments of the U.S. Constitution.<sup>118</sup> Claiming that the Act authorized unconstitutional punishment before trial and violated the Due Process clause,<sup>119</sup> the respondents averred that bail determinations should be grounded exclusively upon the potential for flight.<sup>120</sup> The Court not only designated the government's interest in preventing arrestee crime as compelling<sup>121</sup> but also characterized its interests in protecting community safety as incontrovertibly legitimate, preventive regulatory concerns, rather than punitive interests,<sup>122</sup> as "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest."<sup>123</sup>

A central principle, which was analyzed by the *Griffin* Court in the context of probation officers, also applies to pretrial release agents: although not an impartial magistrate, an agent is not a police officer conducting a search of an ordinary citizen. Instead, an agent has the welfare and best interests of the pretrial releasee in mind.<sup>124</sup> An agent's duties foster a supportive relationship with pretrial releasees, commencing prior to a release hearing and continuing until trial.<sup>125</sup>

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117. Judge Kozinski mischaracterized the government's need by only presuming it was interested in protecting the public from releasee crime. In the opinion, he states that "[t]he government's first identified purpose, protecting the community, presumably means protecting it from the criminal activities of pretrial releasees generally." *United States v. Scott*, 450 F.3d 863, 870 (9th Cir. 2006). Instead, the government interest arises from the bail conditions set by a neutral magistrate, who determines what will assure the community safety and courtroom appearance. Therefore, if a judge only imposes a curfew and travel stipulation upon a defendant, a supervisory agent would be monitoring these conditions, which only proscribe legal activity.

118. *Salerno*, 481 U.S. at 755.

119. *Id.* at 746. Due Process mandates that "the state may not punish an offender without a complete trial and due process of law." Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 357 (1990) (citing *Bell v. Wolfish*, 441 U.S. 520, 535-46 (1979)).

120. *Salerno*, 481 U.S. at 752-53.

121. *Id.* at 749. The Court also characterized the government's interests in this "particularly acute problem" as "overwhelming." *Id.* at 750.

122. *Id.* at 747; *United States v. Selby*, 333 F. Supp. 367, 371 (D. Md. 2004) (interpreting *United States v. Salerno*, 481 U.S. 739 (1987)); see also Miller & Guggenheim, *supra* note 119, at 353 (explaining that the Bail Reform Act of 1984, a congressional response to the "pressing societal problem of crime," was "merely a regulatory weapon for the 'War on Crime'").

123. *Salerno*, 481 U.S. at 750. Also of importance, the Court noted that there is nothing intrinsically unattainable about predicting an arrestee's likelihood to engage in future criminal conduct, which the Bail Reform Act requires a magistrate to do. *Id.* at 751 (citing *Schall v. Martin*, 467 U.S. 253, 278 (1984)).

124. *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

125. See 18 U.S.C. § 3154 (2000). The relationship also ends if the charges against the releasee

While on pretrial release, an agent not only supervises but also may assist the defendant in securing employment, or any needed medical, legal, or social services.<sup>126</sup> In addition, since a pretrial services agency usually works as an “arm of the court”<sup>127</sup> rather than a law enforcement agency, it abides by “the qualities inherent in the judicial process—neutrality and objectivity.”<sup>128</sup>

Aiming to maximize arrestee freedom prior to trial, pretrial release agencies also seek to reduce taxpayer burdens imposed by the incarceration of pretrial detainees.<sup>129</sup> For instance, in September of 2000, the Justice Department’s Bureau of Justice Assistance endowed Kalamazoo County with a grant to establish a pretrial services program to deal with prison overcrowding problems, predominantly arising from system-wide delays and an increasing number of inmates detained pending trial.<sup>130</sup> The County, which did not then have a pretrial services agency, planned to not only use agents to screen arrestees, verify information, and make recommendations to the court regarding bail, but also to supervise defendants based on their conditions of release while also recommending vocational training, educational services, and substance abuse treatment as needed.<sup>131</sup> This Note simply provides further proof of a pretrial service agency’s disconnect from general law enforcement while also reinforcing its legitimate special need.

### 3. The Court’s Attempts to Construct a Limit: Where the Government Failed to Cross the Critical Threshold

The Supreme Court does not blindly defer to a purported special need, and in three relatively recent opinions, it resolved that the governmental interest in each case did not truly deviate from general law enforcement goals, and thereby ended the special needs analytical

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are dropped.

126. 18 U.S.C. § 3154(7).

127. See Marsh, *supra* note 89, at 3 (“Pretrial services is perhaps more of an administrative arm of the United States district courts than a correctional or law enforcement agency.”).

128. *Id.* Quoting a statement by the National Association of Pretrial Services Agencies, the article underscores that “pretrial services agenc[ies] should be structured to insure independence” and “strive to avoid any bias toward the defense or the prosecution.” *Id.* (quoting NAT’L ASS’N OF PRETRIAL SERVS. AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE AND DIVERSION: PRETRIAL RELEASE 53 (1978)).

129. See PreTrial Release Services, *supra* note 102.

130. Press Release, Bureau of Justice Assistance Office, Kalamazoo County Receives Justice Department Grant to Pursue Innovative Solutions to Local Problems; Over \$2.5 Million is Awarded to 22 Communities Nationwide (Sept. 7, 2000), <http://www.ojp.usdoj.gov/pressreleases/2000/sept7-6.htm>.

131. *Id.*

paradigm.<sup>132</sup> These cases exhibit the Court's repudiation of the government's claim of a special need as a pretext to subvert the warrant and probable cause requirements<sup>133</sup> and of using the exception as a ruse for an ordinary police investigation. However, a careful evaluation of each case reveals numerous factors that distinguish them from pretrial releasees; they do not modify or control the special need assessment here.

First, in *Chandler v. Miller*, the Court invalidated a state statute requiring all candidates for public office to submit to scheduled drug tests. Although the State alleged a special need, the Court determined its true object was to publicly display a "commitment to the struggle against drug abuse."<sup>134</sup> Remarking that the respondents had already conceded that the statute was not a response to any fear or suspicion of drug use by state officials, the Court expounded that although evidence of a prior drug problem is not dispositive in all circumstances,<sup>135</sup> proof of this kind bolsters a special need claim, especially for suspicionless search programs.<sup>136</sup> In addition to the lack of a prior drug abuse problem, the testing regime was inadequate in identifying and deterring drug use among candidates running for election.<sup>137</sup> After considering all of the above matters, the Court found that the contended special need was merely a symbolic shell.<sup>138</sup>

Second, in *City of Indianapolis v. Edmond*, the Court invalidated a warrantless highway checkpoint program since its primary objective, to discover and interdict illegal narcotics, did not constitute a special

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132. See *Ferguson v. City of Charleston*, 532 U.S. 67, 80 (2001) (stating that the government had not asserted a special need and further noting that the "central and indispensable feature of the policy [at issue] from its inception was the use of law enforcement"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (holding that because the primary objective of the search program at issue was to "uncover evidence of ordinary criminal wrongdoing," the government had failed to set forth a special need); *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (characterizing the governmental need as "symbolic" rather than special).

133. ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 350 (1997) (explaining this concept in regard to administrative search programs).

134. *Chandler*, 520 U.S. at 321 ("What is left, after close review of Georgia's scheme, is the image the State seeks to project.").

135. See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671 (1989) (explicating that "ensuring against the creation of this dangerous risk will itself further Fourth Amendment values").

136. *Chandler*, 520 U.S. at 319 (reasoning that although evidence of a prior drug problem is not always necessary, it "would shore up an assertion of special need for a suspicionless general search program" and corroborate the "precise hazards posed").

137. *Id.* at 319-20 (stressing that the drug testing program was not a "credible means to deter illicit drug users," as individuals could easily avoid detection").

138. *Id.* at 322. The Court notes that the asserted governmental concern was more likely a "hypothetical" hazard, intended for the State's polity. *Id.* at 319.

need.<sup>139</sup> In explaining the government's actual endeavor as detecting ordinary criminal wrongdoing, the Court distinguished a prior case where it upheld a highway sobriety checkpoint program under the special needs exception.<sup>140</sup> In that case the Court found that the government's predominant purpose in improving highway safety was validly executed through a highway sobriety checkpoint program, which was sufficiently focused upon decreasing the direct menace that drunk drivers present to the public.<sup>141</sup> However, in *Edmond*, an unconvinced Court, "particularly reluctant to recognize exceptions to the general rule of individualized suspicion," rationalized the government could broadly characterize any criminal detection activity as protecting community safety.<sup>142</sup> Although the majority failed to find a special need, it cautiously restricted its holding by noting that its decision did not restrict a police officer's capacity to respond to evidence properly attained during the course of a search with a legitimate primary purpose.<sup>143</sup> This remains true even when doing so entails arresting a driver for an offense unrelated to that lawful purpose.<sup>144</sup>

Third, in *Ferguson v. City of Charleston*, the Court held that a hospital's warrantless drug testing program did not present a special need, rendering it unconstitutional.<sup>145</sup> In this case, the state hospital had conducted warrantless and nonconsensual cocaine tests on maternity patients, whereby positive results were furnished to law enforcement officials without the knowledge of the patients.<sup>146</sup> The Court clarified that while the contended special need, to protect the health of both mother and child, was an ultimate goal, the immediate, "central and indispensable" objective of the program was to use law enforcement to force patients into treatment programs.<sup>147</sup>

Importantly, the Court differentiated the challenged testing regime, which purposely sought to attain incriminating evidence, from situations where a physician in the course of a routine medical procedure, "comes

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139. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

140. *Id.* at 39 (distinguishing *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)).

141. *Id.* (explaining *Sitz*, 496 U.S. 444).

142. *Id.* at 42-43.

143. *Id.* at 48.

144. *Id.*

145. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001).

146. *Id.* at 77. Although discussed in dicta, the Court was extremely concerned with the extensive invasion of privacy involved in this search program. *See id.* at 78. While in the hospital, a typical patient maintains a reasonable expectation of privacy that test results will not be shared with non-medical personnel prior to a patient's consent. *Id.* Here, the patients were not afforded any protection against test results being supplied to other parties, most importantly law enforcement. *Id.*

147. *Id.* at 80.

across information that under rules of law or ethics” must be reported.<sup>148</sup> In the former situation, the government has a “special obligation to make sure . . . patients are fully informed about their constitutional rights.”<sup>149</sup> After highlighting that the program focused on arrest and prosecution, the Court asserted that the program’s unconstitutionality arose from its immediate aim, to engender evidence for *law enforcement purposes*, in order to achieve its ultimate facilitative goal.<sup>150</sup> If such a program were permitted, all nonconsensual and suspicionless searches could easily find shelter under the special needs umbrella by likewise highlighting an ultimate goal, thereby transgressing constitutional boundaries.<sup>151</sup>

While the aforementioned cases confer guidance with which to discern a governmental special need, the three cases differ materially from the situation at bar. First of all, *Chandler*, *Edmond*, and *Ferguson* involved suspicionless searches, an exception to the individualized suspicion requirement, triggering a more rigorous judicial evaluation.<sup>152</sup> In contrast, a warrantless search of a pretrial releasee should rest upon individualized reasonable suspicion, mandating that an agent possess a rational inference of a release violation based upon objective, precise and “articulable facts.”<sup>153</sup> This standard requires the government to provide a valid reason prior to intruding upon an individual’s privacy interests.<sup>154</sup> This critical deviation renders these delineated restrictions for suspicionless searches inapplicable to searches of pretrial releasees.

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148. *Id.* at 80-81.

149. *Id.* at 84-85.

150. *Id.* at 82-84. For example, the codifying document describing the policy lacked any discussion of the “different courses of medical treatment for either mother or infant, aside from treatment for the mother’s addiction.” *Id.* at 82.

151. *Id.* at 84.

152. Under these circumstances, “the proffered special need for drug testing must be . . . sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” *Chandler v. Miller*, 520 U.S. 305, 318 (1997). Individualized suspicion aims to “preclude arbitrary and general searches and seizures and mandates specific justification for each intrusion.” Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 996.

153. *United States v. Tucker*, 305 F.3d 1193, 1200 (10th Cir. 2002); *see also United States v. Boyce*, 351 F.3d 1102, 1107 (11th Cir. 2003) (stating that an officer must “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”) (quoting *United States v. Tapia*, 912 F.2d 1367, 1370 (11th Cir. 1990)). Note that “[o]fficers may rely upon information from third parties in order to form reasonable suspicion.” *Commonwealth v. Altadonna*, 817 A.2d 1145, 1152 (Pa. Super. Ct. 2003).

154. *See Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (“While ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification . . .”); *Alabama v. White*, 496 U.S. 325, 330 (1990) (“Reasonable suspicion is a less demanding standard than probable cause . . . [because it] can be established with information that is different in quantity or content . . . [and because it] can arise from [less reliable] information . . .”).

Nonetheless, if arguing in the alternative, the fundamental and prevailing concerns raised in the three prior cases fail to alter the legitimate special needs created by the bail system. For example, the fact that the statute in *Chandler* was not enacted due to any actual or perceived drug problem was of paramount importance. The Bail Reform Act, however, was passed due to a widely-recognized and genuine concern with crimes being committed by pretrial releasees while awaiting trial. Specifically finding that these individuals are “far more likely to be responsible for dangerous acts in the community after arrest,” Congress responded to an exceptionally dire problem in which it had an overwhelming interest.<sup>155</sup>

In *Oliver v. United States*,<sup>156</sup> the plaintiff alleged that because the Washington D.C. bail statute did not expressly list warrantless searches along with other conditions of pretrial release,<sup>157</sup> his pretrial drug testing, arising from a consented-to release stipulation was improper and impermissibly intruded upon his Fourth Amendment rights.<sup>158</sup> Considering another provision of the bail statute that expressly authorized the imposition of *any other condition* “reasonably necessary,”<sup>159</sup> the court resolved that the drug testing condition was statutorily acceptable.<sup>160</sup> While the Bail Reform Act does not specifically provide for a drug testing condition,<sup>161</sup> it includes a catch-all provision sanctioning the imposition of those conditions “reasonably necessary” to assure appearance and community safety,<sup>162</sup> thus impliedly authorizing such a release provision in appropriate circumstances. In *United States v. Knights*, the Supreme Court employed a totality of the circumstances analysis to uphold the constitutionality of a probationer’s search condition not specifically authorized under the California bail statute.<sup>163</sup> The Court reasoned that a probation officer’s reasonable suspicion of a probationer’s criminal activity rendered that search reasonable.<sup>164</sup> These cases exemplify that the reasonable suspicion search condition, although not expressly set forth in the Bail Reform

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155. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

156. 682 A.2d 186 (D.C. 1996).

157. *See id.* at 188 (quoting D.C. CODE § 23-1321 (1996 Repl.)).

158. *Id.* at 187.

159. *Id.* at 188 (quoting D.C. CODE § 23-1321(C)(1)(B)(xiv) (1996 Repl.)).

160. *Id.* at 189.

161. The Nevada bail statute in *Scott* similarly empowered a court to impose conditions “as it deems necessary to protect the health, safety and welfare of the community and to ensure that [the defendant] will appear at all times and places ordered by the court . . .” NEV. REV. STAT. ANN. § 178.4851(2) (LexisNexis 2006).

162. 18 U.S.C. § 3142(c)(B)(xiv) (2000).

163. *United States v. Knights*, 534 U.S. 112, 122 (2001).

164. *Id.* at 121.

Act, sufficiently relates to as well as connotes the special need for warrantless compliance searches, which quells contentions that the need is a pretext.

Both *Edmonds* and *Ferguson* manifest the Court's resolve not to find a special interest where its primary object is to gather incriminating evidence to use or threaten to use in arrest and prosecution. Notably, the Court has carefully sketched out a reporting exception, under which an otherwise valid primary purpose is not affected.<sup>165</sup> Additionally, in *New York v. Burger*,<sup>166</sup> the Supreme Court upheld the warrantless search of an automobile junkyard pursuant to a regulatory statute,<sup>167</sup> notwithstanding its ultimate purpose—to deter ordinary criminal activity.<sup>168</sup> In particular, the search was not held invalid due to the inspecting officer's (accompanied by police officers) authorization to arrest violators during an otherwise proper inspection, and due to the inevitability of simultaneously discovering regulatory and penal violations.<sup>169</sup> The Court concluded that since the statute pertained exclusively to administrative searches and was designed to obviate the social and economic burdens of automobile theft, detection of criminal evidence was simply incidental.<sup>170</sup> Observing the distinctive auxiliary goals and implementation schemes of both administrative and penal laws,<sup>171</sup> the Court resolutely affirmed that the government's regulatory program was constitutionally valid.<sup>172</sup>

A pretrial release violation, if also a criminal offense,<sup>173</sup> does not adulterate a supervising agent's authority to monitor a releasee's compliance. The *Burger* rationale applies in this case, as the Bail

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165. See *Ferguson v. City of Charleston*, 532 U.S. 67, 80-81 (2001) (distinguishing the testing program from reporting requirements and reiterating that neither of the parties in the case had challenged the validity of relevant reporting requirements); see also Clements, *supra* note 62, at 278 (“*Ferguson*’s holding in no way prevents physicians from sharing independently obtained information with police under existing mandatory reporting requirements.”).

166. 482 U.S. 691 (1987).

167. *Id.* at 704-05, 708 (discussing N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986)).

168. *Id.* at 713-14. The ultimate purpose of the challenged regulatory statute and the state penal law were identical. *Id.* at 693.

169. *Id.* at 716-17.

170. *Id.* at 708, 716. The Court commented that the “discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.” *Id.* at 716.

171. Administrative statutes establish and enforce industry operating rules guiding conduct whereas penal laws focus on punishment. *Id.* at 712-13. Here, the regulatory statute’s purpose was to render the operation of illegal junkyards unprofitable. *Id.* at 714.

172. *Id.* at 716-17 n.27. The Court referred to legislative history to ascertain the regulatory purpose. See *id.*

173. Non-criminal violations might include alcohol consumption, travel outside a particular jurisdiction, and violation of certain employment requirements and travel restrictions. See 18 U.S.C. § 3142(c) (2000) for a complete list of possible pretrial release conditions.

Reform Act was deliberately designed to address a “pressing societal problem”<sup>174</sup> rather than to supply law enforcement with incriminating evidence. In the present situation, the discovery of criminal wrongdoing is incidental to valid primary purposes. Furthermore, a pretrial services agent only monitors those conditions as prescribed by the court.<sup>175</sup> Tailored to each individual’s circumstances, release conditions may include requiring a defendant to: actively seek employment; commence an educational program; abide by restrictions on personal associations or travel; periodically report to a pretrial services agency; comply with a curfew; abstain from use of any controlled substances or excessive use of alcohol; undergo medical, psychological, or psychiatric treatment; or “*satisfy any other condition . . . reasonably necessary to assure the [individual’s] appearance . . . and to assure the safety of . . . the community.*”<sup>176</sup>

If, for example, a court imposed a curfew or particular travel restrictions upon a defendant, a pretrial release agent would principally oversee compliance with those restrictions, as opposed to general criminal activity.<sup>177</sup> If while in the midst of monitoring compliance, an agent procures incriminating evidence, he or she would only then hand it over to law enforcement as well as report the discovery to the district attorney and judiciary.<sup>178</sup> Note that a releasee is not punished for breaching release conditions,<sup>179</sup> but for a criminal offense,<sup>180</sup> which only

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174. *United States v. Salerno*, 481 U.S. 739, 747 (1987).

175. *See supra* note 93 and accompanying text.

176. 18 U.S.C. § 3142(c)(B)(i)-(xiv) (2000) (emphasis added). Many state statutes have similar “catch-all” provisions that permit the imposition of “any other reasonably necessary condition.” *See United States v. Scott*, 450 F.3d 863, 888 (9th Cir. 2006) (Bybee, J., dissenting).

177. Under *Burger*, one could also argue that although the two may have the same ultimate purpose of increasing public safety, the bail and penal system sustain different ancillary goals as well as divergent implementation strategies: the bail system and warrantless searches establish and enforce releasee conduct, whereas the penal system punishes for specific actions. *See New York v. Burger*, 482 U.S. 691, 712-13 (1987).

178. Perhaps due to this “reporting” requirement, proof of criminal activity obtained during a special needs search, and later introduced as evidence in subsequent criminal proceedings does not invalidate the government’s special need. *State v. Roch*, 681 A.2d 472, 472 (Me. 1996). *See also Burger*, 482 U.S. at 716 (stating that a search scheme is not unconstitutional merely because, “in the course of enforcing it, an inspecting officer may discover evidence of crimes,” and then discussing *United States v. Biswell*, 406 U.S. 311 (1972), in which a pawnshop operator was charged with regulatory and criminal offenses during the course of an inspection).

179. Notably, *Salerno* established that a detention pending trial is not punitive. *Salerno*, 481 U.S. at 748 (concluding that the “pretrial detention contemplated by the Bail Reform Act is regulatory in nature and does not constitute punishment before trial in violation of the Due Process Clause”). Additionally, the revocation of parole is “not part of a criminal prosecution,” as it only deprives an individual of the “conditional liberty properly dependent on observance of special parole restrictions.” *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

180. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 870 (explaining that the gun discovered



further corroborates the fundamental distinctions between the bail system and general law enforcement.

Additionally, police participation in a search does not necessarily invalidate an otherwise acceptable search objective, as state police officers have many responsibilities in addition to “traditional police work.”<sup>181</sup> Obviously, police officers may not utilize probation officers or officials from the pretrial services agency as “stalking horses” to abuse the reasonable suspicion standard.<sup>182</sup> However, as long as police officers refrain from directly controlling, implementing, or involving themselves extensively in the daily implementation of a search program,<sup>183</sup> their assistance does not affect an otherwise valid search, especially where police officers accompany probation officers due to personal safety concerns. Similarly, police accompaniment arising from genuine safety risks to agents does not affect the validity of a compliance search unless predominantly initiated, designed, and implemented by law enforcement officers.<sup>184</sup>

For example, in *Latta v. Fitzharris*, the Ninth Circuit upheld the use of evidence obtained during a parole compliance search to later prosecute the parolee for an unrelated crime.<sup>185</sup> The search of the parolee’s home, which was conducted by a parole officer and several police officers to expedite the procedure, was upheld as a special needs search.<sup>186</sup> The parole system’s aim, to provide parolees with an

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during compliance search of probationer’s home was subsequently used to convict him of a state-law weapons offense); *Scott*, 450 F.3d at 876 (explaining that the shotgun found during the search at issue, which Scott moved to suppress, was used by the government to later prosecute him).

181. *Burger*, 482 U.S. at 717 (“[W]e fail to see any constitutional significance in the fact that police officers, rather than ‘administrative’ agents, [conduct the search].”). The Court also mentions that many states may not have enough resources to assign agents other than police officers to enforce a regulatory scheme. *Id.*; see also *People v. Mackie*, 71 Cal. Rptr. 350, 352 (Ct. App. 1968) (upholding search where parole officer was accompanied by police officers, as it was “perfectly proper and reasonable” to do so). The court also emphasized that if illegal contraband is found during the course of a regulatory compliance search, there is “no necessity” for the officers to “gloss over and neglect to see” it. *Id.*

182. *Commonwealth v. Altadonna*, 817 A.2d 1145, 1148, 1153 (Pa. Super. Ct. 2003).

183. Note that the *Ferguson* Court did not absolutely proscribe law enforcement participation in search programs. See *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001) (noting that law enforcement’s involvement in the development and application of the drug testing program was “pervasive”).

184. See *Latta v. Fitzharris*, 521 F.2d 246, 247 (9th Cir. 1975) (“There is nothing in the record to suggest that the officers accompanied the parole officer for any reason other than to expedite the search, or that they initiated it in any way. Thus, this case is not one in which the parole officer was a stalking horse for the police.”).

185. *Id.* at 252-53.

186. *Id.* at 249 (“The fact that crimes are detected during the administration of the parole system does not convert what is essentially a supervisory and regulatory program into a subterfuge for criminal investigations.”).

opportunity to serve part of their sentence as community members, also involves a parolee's compliance with supervisory conditions. Restricting criminal or non-criminal conduct in this manner facilitates rehabilitation.<sup>187</sup> Therefore, crimes discovered during a compliance search do not automatically convert the intrinsically regulatory program<sup>188</sup> into a "subterfuge for criminal investigation."<sup>189</sup>

A pretrial agent's warrantless search, maintaining a narrow regulatory objective to monitor compliance with release conditions, is either mandated on a release order or imposed pursuant to statute.<sup>190</sup> In addition, supervision is solely targeted to the specific population of releasees that the court has determined are in need of monitoring. The *Latta* case clearly held that whether the parole stipulations specifically proscribe legal or illegal activity is immaterial and ancillary to the system's true goals.<sup>191</sup>

The foregoing plainly demonstrates that the nature and objectives of the bail system—ensuring the integrity of the judicial system and protecting the safety of the community—present a legitimate special need for supervision. These purposes virtually guarantee that the government's special interest in the bail system satisfies this threshold inquiry. Lastly, even if a court mischaracterizes one objective as insufficient, the other equally significant interest remains, which inevitably grants entrance into the world of special needs balancing.

#### IV. THE REASONABLENESS BALANCING TEST'S ASSESSMENT OF THE OPPOSING INTERESTS

Once the government's special need has been established, the Court assesses a search's constitutionality by determining if it is reasonable.<sup>192</sup> To evaluate reasonableness, the Court employs a balancing test whereby the intrusion upon an individual's privacy expectation is weighed against the government's asserted need.<sup>193</sup> By balancing the governmental and

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187. *Id.* Note that although criminal activity is usually sufficient to revoke parole, it could also be revoked for violation of conditions that proscribe legal activity. *Id.*

188. Parole, a corrective institution, does not employ parole agents to act as police officers. When a parolee violates parole conditions, the "parole agent's higher duty is to protect the parole system and to protect the public" from harm caused by the parolee. *Id.*

189. *Id.*

190. Compare *Griffin v. Wisconsin*, 483 U.S. 868, 870-71 (1987) (allowing searches permitted by Wisconsin regulation), with *United States v. Knights*, 534 U.S. 112, 114 (2001) (finding that a probation order explicitly authorized warrantless searches).

191. *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir. 1975).

192. "For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

193. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

privacy interests, the Court contemplates the practicality of the warrant and probable cause requirements in a precise context.<sup>194</sup>

*A. The Spectrum of Reasonable Privacy Interests and Their  
Correlation to an Individual's Relationship to the  
Criminal Justice System*

The Fourth Amendment only safeguards those privacy interests that are reasonable. In *Katz v. United States*, Justice Harlan defined a judicially-recognizable privacy expectation as an “actual (subjective) expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”<sup>195</sup> This standard permits the ambit of constitutional reasonableness to shift in conjunction with an individual’s affiliation to the government and the effect of those respective expectations.<sup>196</sup> An individual’s prior voluntary consent<sup>197</sup> to a search also modifies the analysis.<sup>198</sup> Over the years, the Court has constructed a “spectrum” of

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194. *Skinner*, 489 U.S. at 619 (“When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”).

195. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining, for example, that “conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable”). *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (“[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell . . . [and it] cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.”). The Court ordinarily considers subjective intentions to be analytically immaterial. *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

196. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) (discussing the effect of a school’s custodial and tutelary responsibility for children, and its corresponding effect on students’ privacy expectations).

197. To establish that consent was truly voluntary, the government must demonstrate that consent was given without coercion. *TASLITZ & PARIS, supra* note 133, at 383. Note that an “essential, distinguishing feature of the special needs cases is that the person searched has consented, though the usual voluntariness analysis is altered because adverse consequences . . . will follow from refusal.” *Ferguson v. City of Charleston*, 532 U.S. 67, 90-91 (2001) (Kennedy, J., concurring). Thus, albeit the individual searched has provided consent, it was not “voluntary in the full sense of the word.” *Id.* at 91. *See, e.g., Vernonia*, 515 U.S. at 650 (explaining that the search policy at issue mandated all students participating in interscholastic athletics to consent to the drug testing procedures); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 661 (1989) (explaining that the Customs Department’s drug testing program made employment “contingent upon successful completion of drug screening”). It is beyond the scope of this Note to fully discuss the nature of consent in regard to pretrial release and probation. Therefore, for the purposes of this Note, unless noted otherwise, the reader should assume that constitutionally adequate consent was given.

198. “[T]he question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *see also United States v. Knights*, 534 U.S. 112, 119-20 (2001).

privacy expectations,<sup>199</sup> measured by using an objective fact-specific balancing analysis.<sup>200</sup>

In *Skinner v. Railway Labor Executives' Ass'n*, the majority upheld a Federal Railroad Administration policy mandating drug testing, which included blood, urine, and breath samples, for certain railroad employees.<sup>201</sup> The majority first recognized that an employment environment reduces certain privacy interests, as employees must generally consent<sup>202</sup> to vast restrictions on "freedom of movement" during work hours.<sup>203</sup> Particularly, the majority characterized the railroad employees' expectations as severely curtailed, largely due to their involvement in the extensively regulated railroad industry.<sup>204</sup> Thus, the threats to any justifiable expectations imposed by the searches were merely minimal intrusions.<sup>205</sup>

### 1. The Significantly Diminished Privacy Interests of Probationers and Parolees

Although probationers and parolees do not enjoy the same privacy expectations as an ordinary citizen, their expectations are not wholly extinguished.<sup>206</sup> Permitted to reside within the community, a probationer or parolee remains under state supervision while serving the remainder of a criminal sentence.<sup>207</sup> In *Griffin*, the Court determined that

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199. TASILTZ & PARIS, *supra* note 133, at 121.

200. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). After identifying a special need, courts weigh the "governmental interest against the invasion on an individual's privacy," considering the "strength of [that] individual's privacy expectation in the affected location or act, the invasiveness of the search, the existence of an adversarial . . . or supervisory relationship between the searcher and individual, the use to be made of collected information," the practicality of obtaining a warrant, and the search's efficacy in resolving or preventing the problem that resulted in the special need in the first place. *Clements*, *supra* note 62, at 268-69 (citations omitted).

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

202. The employee's assent is only a factor in determining the strength of the employee's expectation of privacy. *See, e.g., Von Raab*, 489 U.S. at 672 n.2.

203. *Skinner*, 489 U.S. at 624-25. The Court then articulated that the extra interference with an employee's freedom of movement, transpiring within the "time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe [upon] significant privacy interests." *Id.* at 625.

204. *Id.* at 627. Congress, various state governments, and the industry itself have all promulgated or enacted regulations, as achieving public safety is dependent upon employee fitness. *Id.*

205. *Id.* at 628.

206. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (noting the reduced privacy expectations of probationers); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975) (noting the reduced privacy expectations of parolees).

207. "Probation, like incarceration, is a 'form of criminal sanction imposed . . . upon an offender after verdict, finding, or plea of guilty,' [rendering it] . . . simply one point . . . on a continuum of possible punishments ranging from solitary confinement . . . to a few hours of mandatory community service." *Griffin*, 483 U.S. at 874. Similarly, a parolee, "still serving his

probationers do not possess “absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.”<sup>208</sup> Since Griffin, as a probationer, remained in the “legal custody” of the state, he retained diminished privacy expectations.<sup>209</sup> Although the search was conducted in his home, where one typically expects greater privacy,<sup>210</sup> Griffin’s reduced privacy expectations, inherent in his custodial relationship with the state, significantly outweighed this slight increase.<sup>211</sup>

The *Knights* Court, also evaluating a probationer’s privacy interests, cited *Griffin* to note that reduced expectations result from the intrinsic nature of a probationer’s relationship with the state.<sup>212</sup> It then placed great import upon the fact that Knights had been “unambiguously informed” of the search condition prior to his release.<sup>213</sup> Under these circumstances, his reasonable expectation of privacy was “significantly diminished.”<sup>214</sup> Furthermore, in *Latta v. Fitzharris*, while observing that parole officers do not possess “unfettered” discretion to conduct a warrantless search, the majority nevertheless held that a parolee’s privacy expectation is “severely diminished”<sup>215</sup> due to the state’s imposition of liberty restrictions, many of which he may otherwise be entitled to preserve as an ordinary citizen.<sup>216</sup> Interestingly, parolees, who have been released from prior incarceration, possess greater privacy expectations than those still behind bars,<sup>217</sup> including pretrial

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sentence . . . remains under the ultimate control of [the state] and the immediate control of his parole officer.” *Latta*, 521 F.2d at 249. An individual who has been convicted but is awaiting sentencing is also “entitled only to a conditional liberty,” and is analogous to a probationer or parolee. *United States v. Killa Enemy*, 3 F.3d 1201, 1203 (8th Cir. 1993).

208. *Griffin*, 483 U.S. at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

209. *Id.* at 872-73; *see also* *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001) (stating that “probationers have a lesser expectation of privacy than the public at large”).

210. *Griffin*, 483 U.S. at 873 (“A probationer’s home, like anyone else’s, is protected by the Fourth Amendment’s requirement that searches be ‘reasonable.’”). The *Scott* majority reiterated that a home is a place where one “‘expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.’” *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006) (quoting *United States v. Karo*, 468 U.S. 705, 714 (1984)).

211. *Griffin*, 483 U.S. at 880.

212. *United States v. Knights*, 534 U.S. 112, 119 (2001) (“Just as other punishments for criminal convictions curtail an offender’s freedoms, . . . probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.”).

213. *Id.*

214. *Id.* at 120.

215. *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir. 1975).

216. *Id.* at 250; *see also* *State v. Shrader*, 593 So. 2d 457, 459 (La. Ct. App. 1992) (explaining that parolees, like probationers, do not enjoy the same freedom from governmental intrusion as an ordinary citizen).

217. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

detainees.<sup>218</sup>

## 2. The Curtailed Reasonable Privacy Interests of a Pretrial Releasee

“[A] defendant [released pretrial] is scarcely at liberty . . . .”<sup>219</sup> Having only been charged with a crime and not yet convicted, pretrial releasees are situated differently from probationers or parolees, who remain in the legal custody of the state as convicted offenders. A pretrial releasee is in a rather unique position; having already been introduced into the criminal justice system, such an individual does not enjoy the same privacy expectations as an ordinary citizen.<sup>220</sup> In fact, after reiterating that a significant number of courts, if not a majority, “have concluded that a person released on bail or in his own recognizance may be ‘in custody,’ within the meaning of the [particular State] statute,” the Supreme Court sustained this conception as the “sounder view.”<sup>221</sup> An arrest involves taking an individual into custody to hold or detain that person to answer the criminal charge, and acts to “vindicate society’s interest in having its laws obeyed.”<sup>222</sup> As the first stage of prosecution, an arrest is inevitably accompanied by future interference with freedom of movement, regardless of trial or an ultimate conviction.<sup>223</sup> In addition, a releasee, who has already been arrested and indicted, is further subject to restraint through the jurisdictional authority of the courts pending trial.<sup>224</sup>

First, like probationers and parolees, pretrial releasees are subject to release conditions that restrict their activities, some of which are legal, beyond those restrictions ordinarily imposed by law.<sup>225</sup> A releasee’s

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218. See *Bell v. Wolfish*, 441 U.S. 520, 557 (1979). Interestingly, in *Bell*, the Court elaborated that pretrial detainees, although not yet tried, had diminished privacy expectations, arising from the realities of institutional confinement. *Id.*

219. *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) (explaining that such an individual “remains apprehended, arrested in his movements, indeed ‘seized’ for trial, so long as he is bound to appear in court and answer the state’s charges”).

220. Although technically a pretrial releasee has not been judicially abridged of any constitutional rights, such an individual does retain a reduced expectation of privacy, as a releasee “suffers great burdens.” *United States v. Scott*, 450 F.3d 863, 885 (9th Cir. 2006) (Bybee, J., dissenting).

221. *Hensley v. Mun. Court*, 411 U.S. 345, 349 (1973).

222. *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

223. *Id.*

224. *Albright*, 510 U.S. at 278 (explicating that a pretrial releasee, “hardly freed from the state’s control[.], . . . is required to appear in court at the state’s command”); *State v. Fisher*, 35 P.3d 366, 375 (Wash. 2001) (“An accused’s liberty is subject to restraint through an arrest and the jurisdiction of the courts.”).

225. See *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972) (explaining that typically, parolees are forbidden to drink liquor, correspond with certain “undesirable persons,” and must seek permission

privacy interest is indisputably greater than if detained until trial.<sup>226</sup> Nevertheless, pretrial liberty, which is firmly grounded upon a releasee's adherence to the release conditions set forth by the court, also reduces reasonable expectations of privacy.<sup>227</sup> For example, "a defendant who is unable to post reasonable bail has no constitutional right to be free from confinement prior to trial and therefore lacks the reasonable expectation of privacy possessed by a person unfettered by such confinement."<sup>228</sup> A common bail restraint requires releasees to attain judicial permission prior to traveling outside the jurisdiction.<sup>229</sup> Other non-criminal release conditions may include specified curfews, abstention from drugs or alcohol, employment and education instructions, as well as supervisory compliance searches.<sup>230</sup> If a defendant signs and presumably executes a valid consent to a conditional release form authorizing warrantless searches, his or her reasonable privacy expectations are then diminished even further.<sup>231</sup>

Although particular governmentally-imposed conditions may differ in severity, the reasonable privacy expectations of probationers, parolees, and pretrial releasees are inherently curtailed because of them. A pretrial releasee is not under the government's legal custody per se, but is still "constructively" under the government's custody for all practical purposes. The degree of liberty granted to a releasee, as defined by a magistrate's release conditions, renders an individual's reasonable expectations of privacy more analogous to those of a probationer or parolee than to an ordinary citizen.

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prior to changing employment, changing residence, or traveling outside the community).

226. *United States v. Scott*, 450 F.3d 863, 885 (9th Cir. 2006) (Bybee, J., dissenting) ("A defendant who could not post bail or obtain release . . . faces a much larger deprivation of liberty by being confined pending trial."); *see also* *Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984) ("A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."); *Bell v. Wolfish*, 441 U.S. 520, 557 (1979) (explaining a detainee's reasonable expectation of privacy as diminished due to the realities of institutional confinement).

227. *See In re York*, 892 P.2d 804, 813 (Cal. 1995) (emphasizing that pretrial releasees do not retain the "same reasonable expectations of privacy as that enjoyed by persons not charged with any crime").

228. *Id.*

229. *See Albright*, 510 U.S. at 278 (Ginsburg, J., concurring) (stating that generally, a pretrial releasee must "seek formal permission from the court" prior to traveling outside the jurisdiction).

230. *See* 18 U.S.C. § 3142(c)(1)(B) (2000).

231. *See United States v. Knights*, 534 U.S. 112, 119 (2001) (concluding that the consent form, which "clearly expressed" the particular search condition, and of which the defendant was "unambiguously informed," drastically reduced his reasonable expectation of privacy). The search condition was a "salient circumstance" in the Court's Fourth Amendment analysis. *Id.* at 118.

### B. *The Government's Interest in a Warrantless Search Program*

Having already classified the government's interest as "special," the analysis now turns to defining the precise contours of the government's need as well as the efficacy of the means selected to address it. This not only requires inquiry into the "nature and immediacy of the governmental concern," but also into the efficiency and intrusiveness of the search program,<sup>232</sup> including any procedural restraints placed upon government actors,<sup>233</sup> and the availability of other practical and less intrusive alternative schemes.<sup>234</sup> Although using the least intrusive means could fortify a government's contention,<sup>235</sup> it does not control the analytical outcome,<sup>236</sup> as regarding it this way "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."<sup>237</sup> Essentially, such a rigid paradigm would preordain all search programs to fail; judges using *post hoc* review could almost always hypothesize a slightly less invasive way to address an objective.<sup>238</sup> Thus, the Court has rejected the need for a search to be the least intrusive alternative to be "reasonable" under the Fourth Amendment.<sup>239</sup>

Procedural regulations limiting the "unbridled discretion" of

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232. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660 (1995).

233. *See, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989) (noting the "standardized nature of the tests and the minimal discretion vested in those charged with administering the [suspicionless drug testing] program").

234. *See id.* at 629-30. In *Von Raab*, for example, the Court upheld the federal government's suspicionless drug testing program as an effective way to deter drug use among customs agents seeking promotion to sensitive positions. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). The random testing was an adequate deterrence, as the only way to absolutely avoid a positive result was to permanently abstain from drug use. *Id.* at 676. Thus, the Court found that the program bore a "close and substantial relation" to the government's goal of "detering drug users from seeking promotion to sensitive positions." *Id.*

235. Conversely, the presence of obviously less intrusive means of realizing the same objective may insinuate a search is unreasonable. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (explaining that the "alternative mechanisms available, both those in use and those that might be adopted," rendered the program invalid).

236. *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002) ("[T]his Court has repeatedly stated that reasonableness . . . does not require employing the least intrusive means."); *Skinner*, 489 U.S. at 629 n.9 (emphasizing that reasonableness "does not necessarily or invariably turn on the existence of alternative 'less intrusive means,'" as this would involve second-guessing the conclusions made by the government "after years of investigation and study"). *But see* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1260-66 (1988) (arguing that the Court should only find those government search programs that employ the least intrusive alternative as reasonable because it is an essential component to Fourth Amendment balancing analysis).

237. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976).

238. *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985).

239. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995).



government actors better ensures against potential abuse. In *Skinner*, when evaluating the government's employee drug testing program, the Court gave weight to the standardized nature of the tests and minimal discretion of those actors administering the program, as they provided safeguards against the possibility of discretionary abuse.<sup>240</sup> Admittedly, some level of discretion may be unavoidable, but granting search administrators an unconfined exercise of choice could too easily result in discrimination. The government's interest is "at its strongest when . . . 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'"<sup>241</sup> This occurs in certain drug testing cases, where the "delay necessary to procure a warrant . . . may result in the destruction of valuable evidence," as drugs only remain in the body for a limited period of time.<sup>242</sup> Also, in order for many administrative searches to be "effective and serve as a credible deterrent, unannounced . . . [and] frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection."<sup>243</sup>

*C. The Government's Interest in Warrantless Probation and Parole Searches*

The government has a heightened interest in monitoring the behavior of a parolee or probationer, as they are more likely to violate the law.<sup>244</sup> In fact, if a warrant or probable cause standard were required, "[t]he probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected."<sup>245</sup> Moreover, in reinforcing the need for supervision to assure compliance with probation restrictions, the *Knights* Court recognized probationers' "heightened incentive to conceal their criminal activities and quickly dispose of incriminating evidence," as they could not only face new criminal charges, but also revocation of probation and incarceration in proceedings where "the trial rights of a

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240. *Skinner*, 489 U.S. at 622.

241. *Id.* at 623 (quoting *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967)).

242. *Id.*

243. *United States v. Biswell*, 406 U.S. 311, 316 (1972) (discussing *See v. City of Seattle*, 387 U.S. 541 (1967)).

244. *United States v. Tucker*, 305 F.3d 1193, 1199 (10th Cir. 2002) (stating that the state has a "heightened interest in monitoring the behavior of a parolee, because, a parolee is more likely to violate the law than an ordinary citizen"); *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987) ("[I]t is the very assumption of . . . probation that the probationer is . . . more likely than the ordinary citizen to violate the law.").

245. *Griffin*, 483 U.S. at 878.

jury and proof beyond a reasonable doubt . . . do not apply.”<sup>246</sup>

Probation officers, who cannot possibly maintain personal surveillance of every client at all times, must act upon a “lesser degree of certainty” to intervene before the probationer harms himself or society.<sup>247</sup> In light of this concern, an officer must be able to act based upon the officer’s entire experience—to “assess probabilities” in light of personal knowledge of a probationer’s “life, character, and circumstances.”<sup>248</sup> Where time is truly of the essence, it is impractical to demand an officer to first question and then authenticate a tip of a probation violation.<sup>249</sup>

*D. The Government’s Compelling Interest in Warrantless Searches of Pretrial Releasees*

Although the majority in the *Scott* decision found that ensuring trial appearance was a special need, it erroneously concluded that the warrantless searches did not sufficiently relate to that goal. In *Oliver v. United States*, the court upheld a pretrial release condition authorizing drug testing, reasoning there was “abundant evidence” describing the link between “drug use and recidivism and nonappearance in court.”<sup>250</sup> In *Maine v. Ullring*, the Supreme Court of Maine upheld a pretrial release condition that authorized warrantless searches.<sup>251</sup> In ascertaining the correlation between the search program and courtroom appearance, the *Ullring* court concluded that it was “reasonable to expect that a defendant who maintains sobriety is more likely to appear in court . . . than a defendant who is under the influence of drugs or alcohol.”<sup>252</sup> Indirectly, a state has a “strong interest in preserving its judicial resources. Drug testing helps ensure that the accused is physically and mentally prepared for trial, so that there are no delays or claims that the defendant was unable to understand the proceedings or participate in his defense.”<sup>253</sup> Therefore, warrantless searches reasonably relate to ensuring a defendant’s courtroom appearance.

Protecting the community from releasee crime, a concern

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246. *United States v. Knights*, 534 U.S. 112, 120 (2001).

247. *Griffin*, 483 U.S. at 879.

248. *Id.*

249. *Id.* (characterizing it as “both unrealistic and destructive of the whole object of the continuing probation relationship to insist upon the same degree . . . of certainty of violation, as is required in other contexts”).

250. *Oliver v. United States*, 682 A.2d 186, 193 (D.C. 1996).

251. *Maine v. Ullring*, 741 A.2d 1065, 1073 (Me. 1999).

252. *Id.* at 1072-73.

253. *United States v. Scott*, 450 F.3d 863, 884 (9th Cir. 2006) (Bybee, J., dissenting).

motivating the searches at issue,<sup>254</sup> has been identified by the Court as “both legitimate and compelling.”<sup>255</sup> Specifically, drug use is “one of the most serious problems confronting our society today,”<sup>256</sup> with drug abusers “head[ing] the list of those endangering public safety. Therefore, effective measures must bar pretrial releasees from violating the restrictions deemed necessary by the court to assure appearance and community safety. The “wealth of evidence” showing a substantial problem of “widespread use of drugs among those arrested for serious nondrug felonies” provides “reasonable cause to suspect drug use and to test for it among those coming into the criminal justice system.”<sup>257</sup>

“If a court may order abstention from illegal drug use,” it also must have the power to enforce compliance through testing.<sup>258</sup> Otherwise there will be no “reasonable means” to discern whether releasees have complied with such release conditions.<sup>259</sup> A reasonable suspicion standard properly limits governmental discretion by mandating individualized and objective criteria outside the government’s control to determine an intrusion’s propriety,<sup>260</sup> without sacrificing an agent’s ability to monitor a releasee. Determining the presence of drugs through urine samples, as the government did in *Scott*, is less intrusive than blood tests, and considerably less intrusive than pretrial detention.<sup>261</sup> Alternative methods such as self-reporting or scheduled drug testing do not adequately serve the government’s interest, as defendants can easily circumvent compliance with release conditions.<sup>262</sup> Indeed, the warrantless compliance searches are not only minimally intrusive when weighed against public safety,<sup>263</sup> but are likely the least intrusive and reliable means available to combat this legitimate and compelling concern.

Requiring a search warrant and probable cause would inexorably

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254. In his dissent, Judge Bybee heatedly refers to the “majority’s lack of consideration for the state’s expressed interests [as] especially irresponsible in cases involving drugs or illegal weapons.” *Id.* at 883. He opined that the majority’s holding effectively “ties the hands of states in preventing crimes and protecting the public.” *Id.* at 884.

255. *United States v. Salerno*, 481 U.S. 739, 749 (1987). The Court also identified the Bail Reform Act of 1984 as addressing a “particularly acute problem.” *Id.* at 750.

256. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989).

257. *Id.*

258. *Oliver v. United States*, 682 A.2d 186, 189 (D.C. 1996).

259. *Id.*

260. *Clancy*, *supra* note 152, at 996.

261. *Oliver*, 682 A.2d at 192.

262. *Chandler v. Miller*, 520 U.S. 305, 319-20 (1997) (explaining that prescheduled testing would not serve as an effective or credible deterrent against drug use); *Oliver*, 682 A.2d at 192 & n.16 (noting that studies indicate that urine tests provide more reliable results than self-disclosure).

263. *Oliver*, 682 A.2d at 190.

cause delays and frustrate a pretrial services agency's ability to adequately respond to information about violations of release conditions, including preventable criminal activity.<sup>264</sup> Correspondingly, warrant and probable cause requirements would greatly reduce the integrity of the search program, as the "deterrent effect," resulting from the "possibility of expeditious searches" would in effect vanish.<sup>265</sup> In order to manage the inherent noncompliance risks in every release decision, the government must have supervisory authority to visit a releasee's home, and if substantiated by reasonable suspicion that he or she has violated a term of the release, to immediately conduct a search. The Court has acknowledged, in the context of suspicionless search regimes, that traditional probable cause is unhelpful where the government, as here, "seeks to *prevent* the development of hazardous conditions."<sup>266</sup> A probable cause standard severely cripples the ability of pretrial services agents to advance the government's interest in both community safety and the integrity and efficient functioning of the bail system.

"Drug abuse tends to flourish because it is surreptitious."<sup>267</sup> Hence, there is a compelling need for responsive and close supervision of releasees charged with drug possession or distribution, as detection is the "key to reducing illicit drug consumption and controlling the high-risk behavior of abusers."<sup>268</sup> The effects of addiction,<sup>269</sup> as well as the covert nature of drug use and sales, underscore the need for a reasonable suspicion standard to address concerns regarding the "hazards drugs pose to public safety."<sup>270</sup> Due to the rate at which drugs and alcohol

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264. See *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

265. *Id.*

266. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989). The Court also reasoned that where the "possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance [that] goal." *Id.* at 674-75; see also *Camara v. Mun. Court*, 387 U.S. 523, 535 (1967) ("The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety.").

267. James K. Stewart, *Quid Pro Quo; Stay Drug-free and Stay on Release*, 57 GEO. WASH. L. REV. 68, 68 (1988).

268. *Id.*

269. Addiction may not only lead to erratic and irrational behavior, but can also lead to violent crimes. For example, Scott was arrested for methamphetamine possession, a highly addictive and inexpensive drug that can produce "violent and psychotic behavior." Fay W. Boozman, *Methamphetamine: Tools and Partnerships to Fight the Threat*, 32 J.L. MED. & ETHICS 104, 104 (2004).

270. Stewart, *supra* note 267, at 69. Research and studies both indicate that "[f]requent use of hard drugs," generally accepted as a "high-danger element in criminal careers," increases an individual's "crime rate." *Id.* at 70. For example, a Baltimore study confirmed that individuals committed six times as many crimes while heavily abusing narcotics than when "they were relatively drug free." *Id.* (citing John C. Ball et al., *The Criminality of Heroin Addicts: When Addicted and When Off Opiates*, in 5 THE DRUGS-CRIME CONNECTION 39, 52 (James A. Inciardi

leave the body, tests must be administered as soon as possible; the delay necessary to procure a warrant could result in the destruction of valuable evidence.<sup>271</sup>

Similar to probation and parole, a monitoring officer may have reason to believe, based upon personal knowledge and experience with the releasee, that the individual is violating release conditions.<sup>272</sup> Although “tips” that are frequently provided, either anonymously or by family members, employers or neighbors, fail to satisfy a probable cause standard, they likely will meet a reasonable suspicion standard, allowing a monitoring agent to take action before a releasee hurts himself or another member of the community. It is impracticable for a monitoring agent, as it is for a probation officer, to authenticate a violation tip, “where time is truly of the essence,” and the agent can proceed based upon knowledge and experience with the releasee. Pretrial services agents, rather than engage in an adversarial relationship with releasees, often serve as “catalyst[s] for change[,] . . . [as they] must quickly identify the defendant’s problem or problems and begin to find a resolution.”<sup>273</sup> Thus, like probation or parole officers, pretrial release agents act in a facilitative capacity and work to assure that releasees abide by release conditions pending trial.

Releasee compliance is essential to furthering the aims of the bail system. The deterrent effect of compliance searches in drug cases would be completely lost if a warrant were required.<sup>274</sup> The conditions an impartial magistrate determines as necessary are ineffectual if a pretrial services agency lacks sufficient means through which to monitor compliance with those conditions.<sup>275</sup> Defendants on conditional release, like probationers, have more incentive than an ordinary criminal to conceal illegal activities due to the risk of pretrial detention. If a pretrial services agent is unable to effectively monitor and enforce releasee compliance, the safety of the community is thrown into jeopardy while conditional pretrial release itself becomes meaningless. “[F]ailing to

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ed., 1981)).

271. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 623 (1989).

272. *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987) (probationers); *Latta v. Fitzharris*, 521 F.2d 246, 250 (9th Cir. 1975) (parolees).

273. *Marsh*, *supra* note 89, at 7.

274. This is especially true for drug possession because if a search is not executed swiftly, it will not be effective, as drugs may be flushed down the toilet, swallowed, or thrown out the window. LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME* 251 n.10 (1967).

275. This would render pretrial services agencies ineffectual, as the agency is supposed to “develop and provide appropriate and effective supervision for all persons released pending adjudication who are assigned supervision as a condition of release.” ABA CRIMINAL JUSTICE STANDARDS ON PRETRIAL RELEASE § 10-1.10(c) (2002), available at [http://www.abanet.org/crimjust/standards/pretrialrelease\\_blk.html](http://www.abanet.org/crimjust/standards/pretrialrelease_blk.html).

recognize these interests . . . grossly misrepresents the government's interest in protecting the public through supervising individuals on pretrial release."<sup>276</sup>

*E. The Scales Declare the Victor: A Comparison Between the Government's and Pretrial Releasees' Disparate Interests*

After delineating the strength of both the individual and government interests at stake, the court must weigh them against one another to determine which prevails.

In the present case, the government's compelling interest would even justify a search that is "relatively intrusive upon a genuine expectation of privacy."<sup>277</sup> The need to adequately ensure compliance with bail conditions clearly outweighs the minimal intrusion upon a pretrial releasee's already reduced privacy expectations.

V. CONCLUSION: APPLYING THE PROPER CATEGORICAL DISTINCTION TO REMEDY SPECIAL NEEDS JURISPRUDENCE

Using the special need's reasonable suspicion standard to conduct searches of pretrial releasees is clearly in the best interests of the pretrial releasee, whose liberty is substantially enhanced.<sup>278</sup> As set forth above, the government's purpose in operating a pretrial release program not only justifies but mandates the supervision of releasees to assure that reasonable release conditions are observed. Having already been charged with a criminal offense, a releasee's privacy expectations are reduced and his or her liberty pending trial depends upon complying with those conditions.

A magistrate wavering between supervised release and detention is more likely to order the former if a warrantless search provision adequately ensures compliance. A releasee remaining in the community but subject to warrantless searches does not suffer the curtailment of freedom of choice and privacy incurred in pretrial detention. Pretrial supervision could be a rehabilitative experience, and if convicted, defendants could use their successful record to demonstrate their reliability.<sup>279</sup>

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276. *United States v. Scott*, 450 F.3d 863, 884 (9th Cir. 2006) (Bybee, J., dissenting).

277. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

278. See William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 555 (1992) ("Rational people in the position of these search targets would likely agree to such a regime, because they get something in return: a reduced likelihood that the government will exercise other, worse alternatives.").

279. See Stewart, *supra* note 267, at 76 (explaining that at sentencing, a defendant who can

Rigidly applying a probable cause standard may have the unintended effect of increasing this country's perpetual "overcrowded jail" epidemic under the guise of protecting Fourth Amendment liberties. Aware that a compliance search may only rest upon probable cause, judges may hesitate, if not refuse, to release defendants on the cusp of being either released or detained.<sup>280</sup> An increased number of defendants in pretrial detention also increases society's burden as taxpayers. However, defendants suffer the heaviest burden, as "[p]retrial confinement may imperil [a] suspect's job, interrupt his source of income, and impair his family relationships."<sup>281</sup> Additionally, a defendant may be unable to obtain adequate access to his attorney or witnesses, and could experience a "permanent stigma and loss of reputation" due to pretrial incarceration.<sup>282</sup> The danger of the *Scott* holding lies in its prospective impact: "[It] may free Scott from the consequences of the state's discovery of [the gun] in his home, but in the end [the] opinion is not a liberty-enhancing decision."<sup>283</sup>

Incorporating searches of pretrial releasees into the special needs doctrine certainly does not condone blanket abuse, as searches must relate to reasonable release stipulations, and the balancing test ensures against arbitrary or harassing searches. The reasonable suspicion standard serves as a moderate standard between suspicionless searches

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"point out that he has been verified as drug-free under court-supervised testing . . . establishes that he is a better risk for community supervision and may convince the court to release him on his own recognizance rather than having to serve time in jail").

280. A defendant requesting pretrial release on his own recognizance is essentially asking the court as well as the public to trust him. *Id.* at 74. Drug testing programs during pretrial release allow the court to "extend that trust" and "make responsible decisions based on objective information." *Id.* Pursuant to the Bail Reform Act of 1984, a judicial officer must determine whether any of the codified conditions, or combination thereof, will reasonably assure appearance and community safety. "The wide range of restrictions available ensures, as Congress intended, that very few defendants will be subject to pretrial detention." *United States v. Orta*, 760 F.2d 887, 890-91 (8th Cir. 1985).

281. *Scott*, 450 F.3d at 885 (Bybee, J., dissenting) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

282. *United States v. Motamedi*, 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J., concurring and dissenting in part) ("[I]njuries consequent upon pretrial confinement may not be reparable upon a subsequent acquittal. Society has no mechanism to recompense an individual for income lost or damages to a career due to pretrial confinement. Nor do we compensate the individual and his family for their mental suffering and loss of reputation due to pretrial incarceration.").

283. *Scott*, 450 F.3d at 887 (Bybee, J., dissenting). Judge Bybee also notes that the majority's decision flies in the face of national bail legislation (The Bail Reform Act). *Id.* at 888. Also, the standard pretrial release form used by federal courts across the nation requires, as a condition for release, that the defendant "submit to any method of testing required by the pretrial services office or the supervising officer for determining whether the defendant is using a prohibited substance . . . with random frequency . . . [through] any form of prohibited substance screening or testing." FEDERAL PROCEDURAL FORMS § 20.110(7)(q), at 201 (2003).

and those requiring probable cause, as the latter overemphasizes the individual's privacy interests, whereas reasonable suspicion accommodates the interests of the government and the individual equally.<sup>284</sup> Thus, reasonable suspicion as well as state regulations adequately safeguard the rights of releasees.

For example, in *Griffin*, the court considered a state regulation that required a probation officer to not only have reasonable suspicion that a search would reveal evidence of a release violation or produce contraband, but also mandated that the officer receive approval from a supervisor prior to conducting a search.<sup>285</sup> Implementing similar regulations to apply to searches of pretrial releasees would limit potential abuse rather than permit it. Recently, in *Samson v. California*, in upholding a California law authorizing the warrantless and suspicionless search of parolees, the Court rejected the contention that the state regulation would lead to a "blanket grant of discretion untethered by any procedural safeguards," or that it would allow "capricious searches conducted at the unchecked 'whim' of law enforcement officers."<sup>286</sup> Such a claim in regard to searching pretrial releasees, which requires individualized reasonable suspicion, must also be rejected as meritless.

As mentioned above, the touchstone of Fourth Amendment determinations is reasonableness in all matters. This analysis has demonstrated that there is nothing more reasonable or coherent than incorporating pretrial releasees, who are constitutionally analogous to probationers and parolees, into the special needs exception. It is in this manner that the judiciary may reduce the jurisprudential uncertainty and clarify its scope and application.<sup>287</sup>

Melissa Weiss\*

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284. SLOBOGIN, *supra* note 61, at 252-53.

285. *Griffin v. Wisconsin*, 483 U.S. 868, 870-71 (1987).

286. *Samson v. California*, No. 04-9728, slip op. at 11-12 (U.S. June 19, 2006).

287. See Stuntz, *supra* note 278, at 554 (asserting that the Court has made "little or no effort . . . to explain what these 'special needs' are; the term turns out to be no more than a label that indicates when a lax standard will apply").

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