

CRIMINAL LAW — FOURTH AMENDMENT — NINTH CIRCUIT
HOLDS THAT SEARCH OF PRETRIAL RELEASEE IS UN-
CONSTITUTIONAL DESPITE RELEASEE'S CONSENT. — *United*
States v. Scott, 424 F.3d 888 (9th Cir. 2005).

The Fourth Amendment, as a vital check on the federal government and states, should not be subject to unilateral repeal by the authorities it purports to limit.¹ While this principle commands near universal agreement, disputes over its application arise when the government seeks to diminish or evade Fourth Amendment strictures by coercing or inducing consent.² Yet as the Supreme Court famously admonished in *Boyd v. United States*,³ “illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.”⁴ Recently, in *United States v. Scott*,⁵ the Ninth Circuit, in a case of first impression at the federal appeals court level, held that the government cannot diminish an individual's right to be free of unreasonable searches or seizures by charging an individual with a crime and then requiring blanket consent to searches as a condition of pretrial release.⁶ Although the court

¹ Cf. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”).

² See, e.g., Craig Bradley, *The Fourth Amendment: “Be Reasonable,”* in THE REHNQUIST LEGACY (Craig Bradley ed., forthcoming 2006) (manuscript at 15), available at <http://ssrn.com/abstract=693802> (“There is a way in which police can avoid [Fourth Amendment strictures], and create what I have called a ‘black hole into which Fourth Amendment rights are swallowed up and disappear.’ This is by getting the defendant to consent to the search in the first place.” (quoting Craig M. Bradley, *The Court's Curious Consent Search Doctrine*, TRIAL, Oct. 2002, at 72, 72)); cf., e.g., Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 795–96 (1999) (discussing administrative searches, which do not require the government to obtain a warrant or have probable cause but only an “arguably administrative or regulatory purpose”).

³ 116 U.S. 616 (1886). In *Boyd*, the Supreme Court condemned “the invasion of [an individual's] indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense.” *Id.* at 635. Justice Brandeis once described the *Boyd* decision as “a case that will be remembered as long as civil liberty lives in the United States.” *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

⁴ *Boyd*, 116 U.S. at 635.

⁵ 424 F.3d 888 (9th Cir. 2005).

⁶ This ruling is particularly important because “prosecutors are virtually immune from civil liability for their charging decisions.” Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1951 n.15 (2005). Thus, under current law, prosecutors face little sanction if they abuse their power by charging an individual with a crime solely to justify a later search more easily. In addition, “the doctrine of selective prosecution holds that . . . no one has a right to the benefit of nonprosecution for a crime, and random underenforcement is [generally] not constitutionally objectionable.” Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 719 (1996) (“The current flaw in

boldly sought to protect privacy and liberty rights “by preventing governmental end-runs around the barriers to direct commands,”⁷ its reasoning suffers from two significant limitations⁸ that undermine the effectiveness of the court’s efforts and provide a means for future courts to diminish the Fourth Amendment safeguards the court so daringly sought to protect.

Raymond Lee Scott was arrested for violating Nevada laws against the possession of methamphetamine and drug paraphernalia and was released on his own recognizance two days later.⁹ Among the conditions of his release, Scott was required to consent to “random drug testing, anytime of the day or night by any peace officer without a warrant,” and to having his home searched for drugs “anytime day or night without a warrant.”¹⁰ Following his release, officers conducted a “compliance visit” at Scott’s residence¹¹ and determined that he had been using methamphetamine.¹² The officers then arrested Scott, searched his house, and discovered an unregistered shotgun.¹³

A federal grand jury charged Scott with possession of an unregistered shotgun in violation of federal law, and Scott moved to suppress the evidence. The district court granted Scott’s motion, finding that probable cause was needed but, as the government conceded, lacking.¹⁴

the evolving power of the prosecutor is the failure to force her to face the full cost of prosecutorial decisions.”). If the government may diminish Fourth Amendment strictures through unilateral acts, one should expect that power to be used. For example, if blanket consent given as a condition of pretrial release were found fully effective, one might expect the government to prosecute individuals for generally underenforced crimes, not in the interest of enforcing that particular statute but instead solely to avoid Fourth Amendment strictures.

⁷ Sullivan, *supra* note 6, at 1492. Of course, the desire to protect privacy and liberty interests does not always result in such protection as a matter of fact. And courts may find themselves wrestling with having to decide *whose* competing privacy and liberty interests should be protected. *Cf. infra* note 38.

⁸ Granted, in light of the Supreme Court’s inconsistency on Fourth Amendment issues, harsh criticism of any lower court’s reasoning is somewhat unfair in this context. *See* Luna, *supra* note 2, at 799–800; Samuel J. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. CIV. RTS. L.J. 261, 261 (2005) (“[O]rthodox Fourth Amendment jurisprudence is a theoretical mess, full of doctrinal incoherence and inconsistency.”); David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. (forthcoming 2006) (manuscript at 19), available at <http://ssrn.com/abstract=822267> (“Fourth Amendment law today is arbitrary, unpredictable, and sometimes incoherent . . .”).

⁹ Scott, 424 F.3d at 889.

¹⁰ *Id.* (internal quotation marks and alterations omitted).

¹¹ The “compliance visit” was motivated by an informant’s tip, but the government admitted the tip did not establish probable cause. *Id.* at 890.

¹² *Id.* at 899 (Bybee, J., dissenting). The court noted that although Scott’s urine sample tested positive, a later test on the same sample using the more accurate gas chromatography/mass spectrometry method came back negative. *Id.* at 890 n.3 (majority opinion).

¹³ *Id.* at 890 (majority opinion).

¹⁴ *Id.*

The Ninth Circuit affirmed. Writing for the panel, Judge Kozinski¹⁵ framed the issue as “whether police may conduct a search based on less than probable cause of an individual released while awaiting trial,” and noted that the issue was one “of first impression in any federal circuit and the vast majority of state courts.”¹⁶ Judge Kozinski found that probable cause was needed, reasoning that Scott’s consent did not render the drug test and search of Scott’s house valid because the “unconstitutional conditions” doctrine — which “limits the government’s ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary”¹⁷ — precluded the government from “*induc[ing]* Scott to waive his Fourth Amendment rights by conditioning pretrial release on such a waiver.”¹⁸ While conceding that the “government may sometimes condition benefits on waiver of Fourth Amendment rights,” Judge Kozinski asserted that “its power to do so is not unlimited.”¹⁹ He concluded that “Scott’s consent to any search is only valid if the search in question (taking the fact of consent into account) was reasonable.”²⁰

Turning to the issue of “reasonableness,” Judge Kozinski explained that, while a search or seizure must ordinarily be supported by probable cause, “special needs, beyond the normal need for law enforcement,” may lead to a relaxing of this requirement.²¹ While noting that the government offered two separate rationales in support of its search regime, Judge Kozinski concluded that neither amounted to a special need sufficient to reduce the probable cause requirement.²² First, Judge Kozinski flatly rejected the government’s claim that testing pretrial releasees for drugs served the special need of “protecting the community from criminal defendants released pending trial,”²³ stating that this was “a quintessential general law enforcement purpose.”²⁴ Second, Judge Kozinski rejected the government’s argument that the search regime would ensure “that defendants show up at trial,” finding that the state had failed to prove “the connection between the object of the test (drug use) and the harm to be avoided (nonappearance in

¹⁵ Judge William Fletcher joined the opinion.

¹⁶ *Scott*, 424 F.3d at 889.

¹⁷ *Id.* at 890; *cf.* *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (discussing the unconstitutional conditions doctrine in the takings context). *See generally* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 21–25 (1988); Sullivan, *supra* note 6.

¹⁸ *Scott*, 424 F.3d at 890 n.5, 890–93.

¹⁹ *Id.* at 892.

²⁰ *Id.* at 893.

²¹ *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (internal quotation marks omitted).

²² *See id.* at 893–97.

²³ *Id.* at 893.

²⁴ *Id.* at 895.

court).²⁵ Such a connection, Judge Kozinski warned, “must be established empirically by the government that seeks to impose the drug testing condition.”²⁶

Finally, Judge Kozinski held that the search was not reasonable under “a more general ‘totality of the circumstances’ approach.”²⁷ In *United States v. Knights*,²⁸ the Supreme Court upheld as reasonable the search of a probationer’s house when blanket consent to searches was a condition of probation.²⁹ The Court explained that “the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”³⁰ Judge Kozinski found the search unreasonable under this approach because Scott’s “privacy and liberty interests were far greater than a probationer’s,” and the government’s argument “that Scott was more likely to commit crimes than other members of the public is contradicted by the presumption of innocence.”³¹

Judge Bybee dissented. He rejected “the majority’s new *per se* rule”³² that “probable cause is required for the warrantless search of the person or home of a pretrial releasee,”³³ and argued instead for an “individualized inquiry” into whether “the particular condition imposed is, in fact, ‘reasonable.’”³⁴ Echoing *Knights*, Judge Bybee “weigh[ed] the legitimate interests of the state against the individual privacy interests at stake.”³⁵ With regard to the state’s interest, Judge Bybee argued that warrantless searches of a probationer could serve a “more general purpose” and did not have to serve a “special need.”³⁶ Furthermore, the state could legitimately be more concerned about Scott committing crimes than about the average citizen doing so. “[T]he presumption of innocence [is] a trial right,” so it has “no application to a determination of the rights of a pretrial detainee during

²⁵ *Id.* at 895–96.

²⁶ *Id.* at 895.

²⁷ *Id.* at 897.

²⁸ 534 U.S. 112 (2001).

²⁹ *See id.* at 122.

³⁰ *Id.* at 118–19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

³¹ *Scott*, 424 F.3d at 898.

³² *Id.* at 899 (Bybee, J., dissenting).

³³ *Id.* at 898. Judge Bybee may have sought to signal the tension between the majority’s new rule and the Supreme Court’s position that it has “consistently eschewed bright-line rules” in the Fourth Amendment context. *Ohio v. Robinette*, 519 U.S. 33, 34 (1996).

³⁴ *Scott*, 424 F.3d at 899 (Bybee, J., dissenting) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)) (per curiam).

³⁵ *Id.*

³⁶ *Id.* at 906.

confinement before his trial has even begun.”³⁷ Turning to Scott’s privacy interests, Judge Bybee concluded that Scott’s reasonable expectation of privacy was “less than that of an ‘ordinary citizen’” by reason of his arrest and indictment, and that this expectation was further diminished by his consent to such searches as a condition of pretrial release.³⁸ For these reasons, Judge Bybee would have declared valid the search and subsequent arrest of Scott.³⁹

Although the Ninth Circuit’s decision in *Scott* boldly sought to protect against the “downward ratchet of privacy rights,”⁴⁰ two significant limitations in the court’s reasoning may open the way for future courts to significantly diminish the Fourth Amendment safeguards the court sought to protect. First, while the court did invoke the unconstitutional conditions doctrine and assert that Scott’s “consent to any search is only valid if the search in question . . . was reasonable,” it also reasoned that it should take “consent into account” in determining whether a search was “reasonable.”⁴¹ Mechanically following the Supreme Court’s decisions in *National Treasury Employees Union v. Von Raab*⁴² and *Knights* — decisions in which the Court did not rule on whether consent was valid, but nevertheless took the fact of consent into account in concluding that searches were reasonable — the Ninth Circuit allowed consent to diminish an individual’s subjective privacy expectations even if consent is “invalid,” that is, even if it is insufficient to waive all privacy rights.

Yet the Supreme Court has rejected the view that inquiry into an individual’s subjective privacy expectations must necessarily be a factual one, announcing that “influences alien to well-recognized Fourth Amendment freedoms” should not be allowed to “play [any] meaningful role in ascertaining . . . the scope of Fourth Amendment protection.”⁴³ Consent that has not yet been determined “valid” should play

³⁷ *Id.* (emphasis omitted) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533 (1979)) (internal quotation mark omitted).

³⁸ *Id.* at 908. Judge Bybee also warned the majority that “in the end today’s opinion is not a liberty-enhancing decision.” *Id.* at 911. Asserting that “the implications of the majority’s new *per se* rule could hardly be more severe or far-reaching,” *id.*, Judge Bybee regretted that, while “pretrial detainees might well have ‘prefer[red] to give up some rights in order to sleep in their own beds while awaiting trial,’ . . . under the majority’s decision, their Fourth Amendment rights will be secure while they rest in the county jail,” *id.* at 912.

³⁹ *See id.* at 913.

⁴⁰ *Id.* at 892 (majority opinion).

⁴¹ *Id.* at 893.

⁴² 489 U.S. 656 (1989).

⁴³ *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979). The *Smith* Court noted:

[I]f the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual’s subjective expectations had been “conditioned” by influences alien to well-recognized Fourth Amendment freedoms, those

no role in the “reasonableness” analysis, given that such analysis, under the Ninth Circuit’s approach, is intended to determine whether it was appropriate to extract the consent in the first place.⁴⁴ As the Ninth Circuit acknowledged, in determining an individual’s “legitimate expectation of privacy” a “normative inquiry” — rather than a factual one — may well be needed.⁴⁵

Taking this route would have been consistent with a more careful reading of *Von Raab* and *Knights*. In each of those cases, there were important safeguards limiting the extent to which induced or coerced consent could threaten privacy and liberty interests.⁴⁶ In *Von Raab*, the Court upheld a drug testing policy for U.S. Customs Service employees who sought transfer or promotion to positions directly involving drug interdiction or requiring the employee to carry a firearm.⁴⁷ But such individuals have substantial bargaining power vis-à-vis the government, and their willingness to grant blanket consent presents little risk that, in that context, the blanket consent could be exacted unreasonably and unilaterally. Thus, the Ninth Circuit should have concluded that blanket consent exacted from a pretrial releasee only plays into the reasonableness analysis when it is being exacted from a narrowly defined group with meaningful bargaining power.⁴⁸ Neither criterion was met in *Scott*.⁴⁹ On the other hand, *Knights* involved

subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.

Id.

⁴⁴ See *Scott*, 424 F.3d at 893.

⁴⁵ See *id.* at 892 (quoting *Smith*, 442 U.S. at 740 n.5) (internal quotation marks omitted). Of course, this would in effect mean that Scott’s pretrial blanket consent would have had no legal effect. That, however, merely reflects the fact that Judge Kozinski’s criteria for whether consent is valid — that is, whether the search is reasonable — is actually the ultimate question at issue, such that, once a court has determined that a particular search was reasonable, it does not matter whether or not the consent was valid. See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (finding that when the police reasonably believed they obtained valid consent, the search was reasonable even if in fact no valid consent was given).

⁴⁶ The Ninth Circuit in *Scott* recognized the importance of distinguishing and limiting a potentially relevant Supreme Court precedent when its application to the facts of a case *sub judice* would allow that precedent to be unbound from “important safeguards” that constrained its scope within its proper context. See *Scott*, 424 F.3d at 898 (“While it is true that the Supreme Court has upheld the constitutionality of pre-trial detention on grounds of dangerousness, the Court stressed that the statute it was upholding contained important safeguards . . .”).

⁴⁷ 489 U.S. at 660–61, 664–65.

⁴⁸ Cf. Epstein, *supra* note 17 (arguing that the unconstitutional conditions doctrine should aim to prevent the government from exercising monopoly power in situations in which there is no potential for strategic bargaining). This interpretation of *Von Raab* would provide an important safeguard against abuse.

⁴⁹ Such an analysis is consistent with Judge Posner’s opinion in *United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005), in which he reasoned that “the plea bargain, containing the consent to searches, is to be interpreted as a contract.” *Id.* at 692. Individuals plea bargaining with the government have a degree of bargaining power. See generally Stephanos Bibos, *Plea Bargaining Out-*

consent extracted from a probationer rather than an individual charged with, but not yet convicted of, a crime. The requirement that the government obtain a conviction by a jury of one's peers limits the government's ability to diminish privacy interests through consent; by contrast, if induced consent serves to diminish the privacy interests of pretrial releasees, there is no effective safeguard limiting the scope of this governmental power.⁵⁰

The second limitation in the Ninth Circuit's reasoning builds upon the first: by taking the fact of consent into account in determining whether the search was reasonable,⁵¹ the court undermined its bold assertion that induced blanket consent to searches should not "by itself make an otherwise unreasonable search reasonable."⁵² If consent is to be taken into account, only three conclusions are possible: the search is reasonable without regard to the consent; the search would be unreasonable *but for* the consent that has been factored into the reasonableness analysis and that has had the effect of making reasonable the otherwise unreasonable search; or the search is unreasonable, even taking the fact of consent into account (which is where *Scott* itself falls). In the first and third categories, the fact of consent is immaterial, and it would be harmless to hold instead that consent should not be taken into account; indeed, so holding would have been more consistent with a careful reading of *Von Raab* and *Knights*, as noted above. In the second category, however, it is clear that the result would conflict with the Ninth Circuit's assertion that induced blanket consent should not have the effect of making reasonable an unreasonable search conducted pursuant to such consent. The formal difference — that in the second category, the court has not declared the search unreasonable before it concludes that the consent makes it otherwise — does not save the court from putting its privacy-protective assertion at risk.

Both of these significant limitations in the Ninth Circuit's opinion are not merely of academic concern. By taking consent into account in

side the Shadow of Trial, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

⁵⁰ See *supra* note 6; cf. *Chandler v. Miller*, 520 U.S. 305, 317 (1997) ("We are aware of no precedent suggesting that a State's . . . sovereign power to prosecute crime [] diminishes the constraints on state action imposed by the Fourth Amendment."). As an alternative safeguard, the Ninth Circuit cited *Von Raab* for the proposition that an individual's induced consent can never eliminate his subjective privacy interests in their entirety. See *Scott*, 424 F.3d at 892. But this is only effectively true if the search is deemed unreasonable; if future courts were to give greater weight to consent in determining reasonableness — especially under the *Knights* balancing test — the *Von Raab* limitation would have little effect.

⁵¹ Judge Kozinski wrote in full: "We have already noted that *Scott's* assent to his release conditions does not by itself make an otherwise unreasonable search reasonable; to the extent his assent decreased his reasonable expectation of privacy, we hold that the decrease was insufficient to eliminate his expectation of privacy in his home." *Scott*, 424 F.3d at 896.

⁵² *Id.*

determining whether the search was reasonable, the court's reasoning is in tension with two privacy-protective positions: first, that induced consent should expand governmental power only to the extent that safeguards are in place; and second, that induced consent cannot make reasonable an otherwise unreasonable search. By taking consent into account, the Ninth Circuit made it possible for future courts to give greater weight to the fact of consent — indeed, that is precisely what the dissent in *Scott* did.⁵³ Of course, the majority in *Scott* gave little weight to the fact of consent in determining whether the search was reasonable in this particular case. The importance of an opinion, however, often lies not in the specific outcome it reaches, but rather in the framework it lays down for the resolution of future cases. Thus, while the court's holding purported to protect privacy and liberty interests “by preventing governmental end-runs around the barriers to direct commands,”⁵⁴ its reasoning threatens that aim.

⁵³ “The [release] condition thus significantly diminished [Scott's] reasonable expectation of privacy.” *Id.* at 908 (Bybee, J., dissenting) (alterations in original) (quoting *United States v. Knights*, 534 U.S. 112, 119–20 (2001)) (internal quotation marks omitted). The dissent in *Scott*, however, moved radically beyond this and concluded that there is no “constitutionally relevant” distinction between probationers (who have already been convicted of a crime) and pretrial releaseses (who have not). *See id.* at 907 (Bybee, J., dissenting). As the majority opinion noted, such an extreme view “overlooks both common sense and . . . caselaw.” *Id.* at 897 (majority opinion).

⁵⁴ Sullivan, *supra* note 6, at 1492.