

COMPUTER SEARCHES OF PROBATIONERS—Diminished Privacies, “Special Needs” & “*Whilst*’ Quiet Pedophiles”—Plugging the Fourth Amendment into the “Virtual Home Visit”

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INTRODUCTION

The Fourth Amendment, expressly designed to afford privacy¹ to an individuals' “persons, houses, papers, and ef-

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¹ I use the term “privacy” to describe the protections of the Fourth Amendment because of the United States Supreme Court's general and current reliance on “privacy” as its primary basis for analysis. See *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (“The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined `by assessing, on the one hand, the degree to which it intrudes upon an individual's *privacy*” (emphasis added) (citations omitted); see also Melissa Arbus, Note, *A Legal U-Turn: The Rehnquist Court Changes Direction and Steers Back to the Privacy Norms of the Warren Era*, 89 VA. L. REV. 1729 (2003) (discussing how cases involving modern surveillance (namely *Bond* and *Kyllo*) indicate the Rehnquist's Court's return back to a more “privacy”-focused Fourth Amendment doctrine.). I agree with Thomas K. Clancy that, especially with regards to emerging technology, *security* is the best measure of what is actually protected by the Fourth Amendment. See Thomas K. Clancy, Essay, *Coping with Technological Change: Kyllo and the Proper Analytical Structure to Measure the Scope of*

fects”² must now delineate the limits of constitutionally-protected privacies against unreasonable searches and seizures in a world that is spacial instead of geographic; digital instead of physical. The evolution from an industrial age to an information age is no less dramatic than from an agrarian society to an industrial one more than a century ago.³ These “switches in time”⁴ reveal the struggle of the Bill of Rights to adapt to an

Fourth Amendment Rights, 72 MISS. L.J. 525, 536 (2002) (“The Fourth Amendment speaks of the right to be secure and, in my view, is the proper measure of the protection afforded by the Amendment.”).

² U.S. CONST. amend. IV. The Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

³ From the Court’s earliest consideration of new technology, certain Justices have been cognizant of the expansive governmental surveillance power which could result and the challenge it would pose for the Fourth Amendment. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting) (“Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”).

Moreover, “in the application of a constitution, our contemplation cannot be only of what has been but of what may be.” The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. “That places the liberty of every man in the hands of every petty officer” was said by James Otis of much lesser intrusions than these.

Id. at 474; see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths & the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004) (noting as somewhat problematic the “popular view” that the courts should play a more aggressive role than the legislature in addressing rapidly changing technology). “When technology threatens privacy, the thinking goes, the courts and the Constitution should offer the primary response. While Congress and state legislatures may have a limited role regulating government investigations involving new technologies, the real work must be done by judicial interpretations of the Fourth Amendment.” *Id.* at 802. See generally Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996).

⁴ The phrase “switches in time” is usually used to denote a dramatic shift in American culture, either gradual or instantaneous, that significantly impacts legal jurisprudence in a manner that can be

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ever-advancing technological culture within the express language of each Amendment.⁵

directly attributed to a certain trend or event. A good example of the "switch in time" is the effect that the Great Depression had on the United States Supreme Court's interpretation of the Commerce Clause and other parts of the Constitution. *See, e.g.,* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2563 (2005) ("After 1937, the Court essentially abandoned attempts to enforce a constitutional division of functions that constrained Congress's ability to regulate in areas of traditional local concern."). In the modern era, both gradual (relatively speaking) and dramatic shifts in time include rapid advances in technology and monitoring and search capabilities by the government, as well as the events of September 11, 2001, which set in motion a crucial and ongoing effort to balance rights and freedoms with safety and order. *See, e.g.,* John M. Burkoff, "A Flame of Fire": *The Fourth Amendment in Perilous Times*, 74 MISS. L.J. 631 (2004).

We *can* do this. We *can* respect individual rights and we *can* protect ourselves, at the very same time, from the awful threats that now face us.

Indeed, not only *can* we do this, it is, as Americans, just precisely what we *must* do. We must keep the balance true, we must keep the constitutional fire aflame even, *perhaps especially*, in perilous times.

Id. at 680; David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 143-44 (2002) ("Recently these questions have become more pressing. The atrocities of September 11, 2001, along with many of the law enforcement measures taken in response, have properly prompted wide reconsideration of the appropriate balance between liberty and security in modern-day America."); *see also* AMITAI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT, FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM 1 (2004) ("[T]he starting point of any reasonable deliberation about our national security is the recognition that we face two profound commitments: protecting our homeland and safeguarding our rights."); David A. Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1702 (2005) ("As for the trade-offs, we sometimes talk as though effective policing is like trains running on time: something we need to sacrifice a little if we wish to live in a democracy. The goal is to strike the right balance between letting the police do their job and preserving our democratic liberties.").

⁵ Recently, my mother, a computer science professor at Georgia Tech, mentioned that computer science students are now required to complete "CS 4001D *Computing, Society, & Professionalism*." Interestingly, at the same time lawyers, attuned to the world of arguments instead of answers, attempt to deal with the information and Internet age from a legal standpoint, computer science students and professionals face a similar challenge to understand esoteric notions of ethics, including feminine ethics, law, privacy, utilitarianism, and consequentialism. The title of the course text, SARA BAASE, *A GIFT OF FIRE* (2d ed. 2002), is a somewhat telling allusion to the widespread advantages and detriments of modern technology. The struggle to keep sight of the text of the Fourth Amendment in the context of emerging technology is certainly not new. *See* *Katz v. United States*, 389 U.S. 347, 364-65 (1967) (Black, J., dissenting) (emphasis added).

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) *I do not believe that it is the proper role of this*

From the outset, I must admit that perpetrators convicted of sexually abusing, exploiting or victimizing children disgust me.⁶ As this is the case, considering, researching, discussing or

Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that maybe people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution.

Id. (emphasis added). "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001); see also *United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004).

The freedoms established in the Bill of Rights—including the Fourth Amendment right to be free from unreasonable governmental searches and seizures—were meant to endure. Advances in science and technology recurrently exert pressure on the scope and meaning of the Fourth Amendment, but the privacy and security protected by the Fourth Amendment should not depend on innovations in technology.

Tracey Maclin, Katz, *Kyllo*, and *Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 Miss. L.J. 51, 51 (2002). See also James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 Miss. L.J. 317, 317-18 (2002) ("The notion that technological developments are mixed blessings is hardly a novel or recent revelation. Others have observed that the enhancements of human abilities afforded by innovative technologies are quite typically swords with two very sharp edges.").

⁶ Particularly disturbing is the manner in which the Internet has acted to normalize deviant sexual activity with children in the warped minds of offenders. Specifically, the Internet has the effect of lowering offenders' inhibitions and their belief that their behavior violates cultural taboos.

The following quote was taken from a pedophilic web site: "*The exaggerated statistics and lies about the extent of child pornography on the Internet has been the Trojan horse to suspend privacy rights and the freedom of speech for everyone. Sexually sick moral crusaders and totalitarian authorities have defined children's bodies as obscene. They aren't!*"

Distorted views like the one above have become commonplace in bulletin boards, chat rooms, and on personal and organization child pornography web sites. Twenty years ago people holding such beliefs were hard pressed to locate others with similar views. Today, in a few minutes on the Internet, they can find reaffirmation of their beliefs, no matter how unhealthy, immoral, or destructive they may be. Pedophiles can easily find confirmation that child pornography and adult-child sex is not immoral, is not harmful to children, and is not government's business.

Sen. Joseph L. Bruno, Majority Leader, *Child Pornography, Prostitution and Predators: Has the Internet Placed Our Children at Risk?—A Report by the New York State Senate Majority*, at 13 (2003); see also Victor Cline, *Witness Statement to the Commission on Child Online Protection*, San Jose State Univ., Aug. 3, 2000.

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even defending their “rights” is a task I must approach from an academic standpoint, constantly reminding myself that all constitutional rights have aggregate and interrelated value.⁷

Child pornography is particularly pernicious because the child victims (whether sexually abused while being photographed, or exposed to it as part of their seduction) are relatively powerless (due to their young age and immaturity) as well as not fully understanding the harmful potential. Their frequent willingness to trust an older person who appears to be kind and accepting of them makes more easy prey.

Id. at 2. I like the novel punishment mentioned by Circuit Court Judge Dorothy M. Baker (Multnomah Co., OR) in apparent “frustration and [legitimate] hostility towards child molesters: ‘One time, I thought of dyeing all [child molesters] green and telling children to stay away from green people.’” Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1366 (1989). For my purposes, I will adopt Ken Lanning’s definition of child pornography as “any visual or print medium depicting sexually explicit conduct involving a child.” Kenneth V. Lanning, *Collectors*, in, CHILD PORNOGRAPHY AND SEX RINGS 83 (Ann Wolbert Burgess ed., 1984); see also William R. Graham, Jr., Comment, *Uncovering and Eliminating Child Pornography Rings on the Internet: Issues Regarding and Avenues Facilitating Law Enforcement’s Access to ‘Wonderland,’* 2000 MICH. ST. L. REV. 457, 459 (2000) (“[Child pornography] is associated with violence against children in two significant ways. The primary harm, is, of course, the actual sexual abuse of the children depicted in the making of the pornography. The secondary harm, though not as immediately evident, is just as horrific.”); see also *United States v. Yuknavich*, 419 F.3d 1302 (11th Cir. 2005).

It goes without saying that possession of child pornography is not a victimless crime. A child somewhere was used to produce the images downloaded by [Defendant], in large part, because individuals like [Defendant] exist to download the images. “Sex offenders are a serious threat in this Nation . . . States thus have a vital interest in rehabilitating convicted sex offenders.”

Id. at 1310 (quoting *McKune v. Lile*, 536 U.S. 24, 32-33 (2002)).

⁷ See, e.g., *Skinner v. Ry. Labor Executive Ass’n*, 489 U.S. 602, 650 (1989) (Marshall, J., dissenting).

But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this specter reflects our shared belief that even beneficent governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to a “resolute loyalty to constitutional safeguards.” The Constitution demands no less loyalty here.

Id. (citation omitted). I adopted this idea of assigning aggregate importance to Fourth Amendment principles related to intrusions that might appear *de minimis* to the public-at-large from Scott Sundby. See Scott E.

Ironically, I spend a great deal of time and energy exploring the rights of people I could personally care less about. Sound familiar?⁸

This article will address the specific question: what effect does the Fourth Amendment have on government actors who wish to “search”⁹ the computer of a probationer convicted of producing, viewing, possessing or trafficking Internet-related child pornography?¹⁰ It further explores how the resulting analysis fits into the larger Fourth Amendment jurisprudence and provides information related to the legal background and practical application of computer monitoring of probationers.

This article makes the assumption that when the government searches and/or monitors a probationer's computer, the

Sundby, *Protecting the Citizen “Whilst He is Quiet”*: *Suspicionless Searches, “Special Needs” and General Warrants*, 74 Miss. L.J. 501, 504 (2004).

⁸ It should. With regards to considering and defending ideas with which we do not agree, see Burton Caine, “*The Liberal Agenda*”: *Biblical Values and the First Amendment*, 14 *TOURO L. REV.* 129, 147 (1997) (“Justice Cardozo understood the necessity for defending speech ‘that we hate’: ‘Aglow even yet, after the cooling time of a century or more, is the coal from the fire that was the mind of Voltaire: ‘I do not believe in a word you say, but I will defend to the death your right to say it.’”) (citations omitted); see also *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”).

⁹ I am using the term “search” generally at this juncture—“search” will encompass discussion and analysis that will distinguish between search and seizure and computer searches and computer monitoring.

¹⁰ See generally *Sex Offenders and the Internet*, SPECIAL NEEDS OFFENDERS BULLETIN, No. 3, Sept. 1998, at 16 (indicating early recognition by federal probation authorities of the challenges the Internet poses to the supervision of child-sex offenders on probation). Probation computer monitoring is notably distinct from other technology-based search and surveillance types of cases (e.g., thermal imaging, pen-registers, wiretaps, etc.) in that most Fourth Amendment cases involve the gathering of information and/or evidence through serendipitous methods. This is not necessarily the case with the monitoring (or, in some cases, searching) of probationers' computers. In the vast majority of cases, probationers are clearly told that their computers will be searched and/or monitored. This is because the goal is not only detection, but deterrence. For example, the Court, in *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) stated, “the usefulness of electronic surveillance depends on lack of notice to the suspect.” (citation omitted). This is not the norm in computer monitoring of probationers as they have previously agreed to be “searched” in the first place.

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protections of the Fourth Amendment are relevant and analysis under the Fourth Amendment becomes necessary.¹¹ Next, this article seeks to determine whether the protections of the Fourth Amendment have been validly “waived” in the context of a probation condition. It further examines the rationales between the two landmark United States Supreme Court decisions related to warrantless searches of probationers, attempts to explain the correlation and intersection of these two cases, and decipher the resulting Fourth Amendment legal framework which exists and acts to impact the manner in which the government can search and/or monitor Internet usage of probationers with a conviction for Internet-related child pornography.

The article can be summed up in three primary steps: Assuming that probationer has some level of protection under the Fourth Amendment:¹² (1) have these constitutional protections been waived; (2) if the protections have not been waived, what limitations does the Fourth Amendment place on this type of government intrusion; and (3) how does this type of probationary searching and/or monitoring fit into a historical perspective of Fourth Amendment jurisprudence? The remaining parts provide practical and background information to supplement the Fourth Amendment analysis with an eye towards “real-world” application.

Part I discusses the scope and certain assumptions I must make in proceeding with my overall analysis. Part II provides an overview of probation as a legal and constitutionally-relevant status and the manner in which this status acts to diminish or extinguish certain individual rights. Part III examines the role of “consent” and “waiver” in relation to the overall

¹¹ See *infra* Parts IV, V, & VI and accompanying text (discussing applicability of Fourth Amendment). But see *infra* Part X (for information on severe restrictions and deprivations of computer use by probationers that are relevant, but do not directly invoke the Fourth Amendment as there is not “search” or “seizure” and the conditions are reviewed for “reasonableness” in accordance with probation statute and not the Fourth Amendment).

¹² See *infra* Part V.

Fourth Amendment analysis. Part IV provides a general overview of the legal framework of warrantless searches of probationers and sets forth two separate “tracks,” or bases for Fourth Amendment analysis. Part V discusses Track 1—the general “reasonableness” test applied to determine the constitutionality of a child-sex-offender computer search and/or monitoring. Part VI discusses Track 2—the Fourth Amendment exception (“special needs”) analysis as relevant to child-sex-offender computer searches and/or monitoring. Part VII examines this type of search and/or monitoring in the historical context of the Fourth Amendment, specifically whether this type of computer search and/or monitoring is analogous to the traditionally-suspect “general warrant” or “writ of assistance.” Part VIII discusses a mandatory application of the “Warrant-Preference” Model when the search intrudes upon the home, regardless of how diminished the occupant’s reasonable expectation of privacy where obtaining the warrant would not be “impracticable.” Part IX provides an overview of the manner in which the government is implementing computer monitoring as a condition of probation for relevant offenders. Finally, Part X details caselaw relevant to the circuit split which exists with regards to outright deprivation or severe limitation on Internet access generally as a condition of probation.

PART I. VARIABLES & SCOPE

i. Variables

There is a constant and several variables which become important to the following discussion and analysis. In order to establish the relevant scope of this article, I have to distinguish, at the outset, among many of the possible variables

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that can exist when the government seeks to search¹³ a probationer's computer.

The constant is that there is an individual who is on probation related to a conviction for producing, viewing, possessing or trafficking Internet-related child pornography and the computer at issue is located inside the offender's home.¹⁴ This constant becomes relevant in distinguishing the analysis, not between the two fact-patterns¹⁵ but between warrantless probationary searches and/or monitoring generally, and those involving probationers with a conviction for Internet-related

¹³ See *supra* note 9 and accompanying text.

¹⁴ The protections of the Fourth Amendment are at their most potent when the government must enter an individual's home to search. See *Silverman v. United States*, 365 U.S. 505, 511-12 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (citation omitted).

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Id. at 511-12 n.4 (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)); see *Steagald v. United States*, 451 U.S. 204 (1981) (strongly re-affirming that the pinnacle of Fourth Amendment protections exist when the government wishes to search a private home); *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 464 (1952) ("However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."); see also *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 530-31 (1967) ("For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . .") (emphasis added). *But see Steagald*, 451 U.S. at 229-30 (Rehnquist, J., dissenting).

The basic error in the Court's treatment of the common law is its reliance on the adage that "a man's home is his castle." Though there is undoubtedly early case support for this in the common law, it cannot be accepted as an uncritical statement of black letter law which answers all questions in this area. William Pitt, when he was Prime Minister of England, used it with telling effect in a speech on the floor of the House of Commons; but parliamentary speaking ability and analytical legal ability ought not to be equated with one another.

Id.

¹⁵ See *infra* Part ii.

child pornography.

The variables involve the following: (1) what type of government agency is searching the probationer's computer; (2) how do they plan to use the information or evidence they find; and (3) what type of suspicion did they have at the time they initiated the warrantless search?

ii. Scope

This article requires me to establish two general fact patterns in order to proceed.¹⁶

(1) Agents or officers of a governmental law enforcement agency,¹⁷ based on at least reasonable suspicion,¹⁸ enter such a probationer's home, for the purpose of searching his/her computer to discover evidence of criminal activity to be used against the offender in a criminal proceeding to obtain a subsequent conviction (hereinafter "FP1");

Note on FP1: This hypothetical most closely resembles

¹⁶ Admittedly and obviously, there are numerous other fact patterns that could be relevant for analysis. I focus here, for purposes of clarity and comparison, on what I consider to be the basic fact patterns necessary for my inquiry.

¹⁷ This could be either a probation agency or another type of law enforcement agency, but, not a strictly administrative agency which may possess quasi law enforcement powers. In *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530 (1967), the Court recognized that while "a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime."

[E]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.
Id. at 530-31.

¹⁸ See *United States v. Yuknavitch*, 419 F.3d 1302, 1311 (11th Cir. 2005) (providing exhaustive detail as to the applicable "reasonable suspicion" standard).

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United States v. Knights, where the Court found that the sheriff's deputy conducting the search of Mark James Knight's (a probationer) apartment was doing so with a "reasonable suspicion" level of individualized suspicion.¹⁹ "Reasonable suspicion" is a lower standard than probable cause. The law enforcement agency involved was attempting to discover evidence to be used in a criminal prosecution of a new crime.²⁰

(2) Agents or officers of a probation department, without any level of individualized suspicion, and pursuant to an express probation condition set forth by a court of competent jurisdiction enter such a probationer's home, for the purpose of searching/monitoring his or her computer to discover evidence or information related to whether the offender is complying with his or her conditions of probation or supervised release (hereinafter "FP2").²¹

Note on FP2: In this hypothetical, agents of a probation agency, acting on more of a supervisory than investigatory basis, monitor or search an offender's computer as part of their normal course of duties.²²

¹⁹ *United States v. Knights*, 534 U.S. 112, 121-22 (2001).

²⁰ *Id.* at 114-15.

²¹ See *Griffin v. Wisconsin*, 483 U.S. 868, 885 (1987) (Blackmun, J., dissenting). Although the discussion here is for comparison purposes, it appears relatively clear generally that searches that are part of ordinary home visits will be upheld absent extreme circumstances. *Id.* "The search in this case was not the result of an ordinary home visit by petitioner's probation agent for which no warrant is required." *Id.*

²² See NICHOLAS N. KITTRIE ET AL., *SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY, AND PRACTICE* 1008 (2d ed. 2002)

Seeing the parolee at home is a time-honored method of checking tips and maintaining contact. About one fourth of the parole officers interviewed believed in dropping in at parolee's home without prior notice. The others preferred to tell the parolee when they were coming, either specifically or perhaps "some evening next week" or "some Tuesday evening soon." The unexpected visit can be considered good surveillance because the parole officer may catch the parolee at home when he is supposed to be working or going to school. The parole officer may

This may be with specific information about the offender or may be merely as part of a scheduled home-visit. The probation agency involved is gathering information primarily to determine whether the offender is complying with the terms of probation. Additionally, it is important to remember that the overall scope and intended aim of the probation searching and/or monitoring is conceptually different from a search for evidence of a particular crime to be introduced at a criminal trial. In the course of conducting a home visit generally or computer monitoring specifically, the scope of what the probation officers can look at will be almost limitless.²³ As such, anything that

[even], in some states, search the premises for weapons, drugs, or other evidence of criminal activity. One of the parole officers we interviewed collects urine samples during surprise home visits if they have reason to believe that there may be a violation of parole.

If the parolee is not at home his mother, father, wife or girl friend may give the parole officer some useful information. Parole officers gave us numerous examples of relatives who reported incidents showing that the parolee was getting into trouble. Some relatives will do this in an effort to keep the offender from new crimes; others will lie or cover up for him. The more positive home visits are those when the parole officer and parolee have a chance to discuss progress and problems.

And if family members are present the parole officer gets some understanding of relationships in the home that may be good or bad for the parolee.

Id. (discussing in context of parole but very similar to home-visit in probation context).

²³ Part of the reason the "scope" of home-visits and monitoring protocols is so broad is that the probation officer is looking for more than evidence of a specific crime. For example, there may be items that, if in possession of a regular citizen, would not be contraband but for the purposes of probation conditions are forbidden. To illustrate, there is certainly nothing illegal about subscribing or possessing *MAXIM Magazine*. If the police (through a search warrant or in "plain view" in some collateral situation) found a copy at my house, they couldn't arrest me or do anything to me. However, if the same magazine is found by a probation officer in the possession of a probationer, and such a magazine violates the terms of that individual's probation, that probation could be revoked. Men's Magazine prompts Florida Sex Offender Arrest, AP, CNN.com, at <http://www.cnn.com/2005/LAW/07/18/adult.reading.material.ap> (last visited July 2, 2005) ("Authorities in Florida are sending convicted sex offenders to jail for violating the terms of their probation by having men's magazines such as Maxim."). "In another case, sex offender Joseph Conte, 56, was arrested when the authorities found a copy of a sex manual in a drawer next to the bed the former schoolteacher shares with his wife." *Id.*

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they see will be in plain view.²⁴ Upon viewing contraband or evidence of the new crime the probation officer will likely take two distinct steps: (1) call the police so that they can charge the individual with the new crime; (the police will probably use the testimonial evidence from the probation officer to establish probable cause); and (2) take appropriate measures to revoke the offenders' probation based on the fact that the evidence constitutes a violation of the offender's probation. There is an important distinction between probation officers working with the police to search a residence where some level of individualized suspicion exists at the time the search is initiated (FP1) and probation officers discovering evidence during a routine monitoring/home visit/inspection, performed as part of the normal course of probation and not with any specific individualized suspicion prior to the search,²⁵ and turning it over to law enforcement for prosecution in criminal court of a new crime.²⁶ Howev-

²⁴ See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 466-67 (1971); *Horton v. California*, 496 U.S. 128, 133-37 (1990) (cases discussing doctrine generally and specifics of "immediately apparent" requirement); *Minnesota v. Dickerson*, 508 U.S. 366, 374-79 (1993); *Arizona v. Hicks*, 480 U.S. 321, 325-29 (1987); *Texas v. Brown*, 460 U.S. 730, 736-43 (1983).

²⁵ See *supra* Part I(ii)(2) (relevant fact pattern).

²⁶ Admittedly, certain states' probation officers have both supervisory and arrest powers. For present purposes, I distinguish probation officers and police depending on the *primary* purpose of their duties. See also *United States v. Brown*, 346 F.3d 808, 810-11 (8th Cir. 2004).

Relying upon *United States v. McFarland*, [Defendant] argues that the trial judge should have suppressed the evidence because the probationary search was no more than a "rule for police investigation." Stated differently, he argues that [the probation officer] was only a "stalking horse" for law enforcement. The government counterargues that *United States v. Knights* eliminates this stalking horse theory. We agree with the government.

i. Probationary Searches

In *McFarland*, we "agree[d] that a parole search is unlawful when it is nothing more than a ruse for police investigation." We also noted that parole officers may work with police officers provided the parole officers are pursuing parole-related objectives. But, the *Knights* case teaches that traditional Fourth Amendment analysis—not official purpose—determines whether a probationary

er, *Knights* generally diminished the effectiveness of any defense based on the primary purpose of the law enforcement agency.²⁷

Although it leads to some redundancy, I will discuss both factual situations in sections V and VI, *infra*, related to the two overall Fourth Amendment doctrines at play: special needs and reasonableness.

PART II. PROBATION AS A LEGAL STATUS

The concept of denying individual rights to probationers²⁸ is hardly unique to the privacy²⁹ rights couched in the Fourth Amendment.³⁰ For example, thirty-one states prohibit felons

search is constitutional.

Id. (citations omitted).

²⁷ *Id.*

²⁸ See Devon A. Corneal, Comment, *Limiting the Right to Procreate: State v. Oakley and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 455 (2003).

Surprisingly, the American probationary system began, not with a legislative enactment, but with the actions of a cobbler. Probation in the United States first started when John Augustus convinced the Boston Police Court to release a drunk to his custody rather than to jail him. In his lifetime, Augustus arranged the bail of nearly 2,000 defendants, and earned the titles of "inventor" and "father" of probation. Augustus's *ad hoc* system ended in 1878 when Massachusetts passed the first probation statute; other states and the federal government followed suit. Today, probation statutes affect millions of individuals.

Id.

²⁹ See *supra* note 1 and accompanying text.

³⁰ See Brief of the Criminal Justice Legal Foundation as Amicus Curiae Supporting Petitioner, *United States v. Knights*, 534 U.S. 112 (2001) ("Public safety is the Achilles' heel of any probation system. While society can reap substantial benefits from this less costly and more rehabilitative alternative to prison, having convicted criminals serve their sentence in society gambles with public safety. A probation system that cannot protect will lose support."). There is a marked distinction between an examination of the express "right of privacy" created by the Fourth Amendment and the misinterpretations that have resulted in a long line of "penumbral privacy rights" and unenumerated "fundamental" rights.

[T]he key to discovering whether [a right] is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be

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found by weighing whether education is as important as the right to travel. Rather, the answer lies in asserting whether there is a right to education *explicitly or implicitly guaranteed by the Constitution*.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (emphasis added). See, e.g., Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (marriage); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) (contraception); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (procreation); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (procreation); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (contraception); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (child rearing and education); see also Katz v. United States, 389 U.S. 347, 350 (1967) ("[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"). I disagree, in concept, practice, and application with the idea that both "explicit" and "implicit" "guarantees" found (or *discovered*, I guess) in the text of the Constitution (assuming that there is any validity, at all, to the idea of *implicit* commands or "guarantees" in a written document) are somehow afforded equal weight in quashing the intentions set forth by legitimate acts of democratic government such as those found in the cases above. If notions of "drafter's intent" or *expressio unius est exclusio alterius* have any validity, (and I think they do) the fact that the Framers explicitly set forth "privacy" rights in the Third and Fourth Amendments discredits the idea that it was their simultaneous intention to set forth a general "penumbral" right of privacy without any mention of it at all. A full discussion of the disturbing trend blurring the lines between penumbral privacy, substantive due process, and rights couched as "liberty" which elude any and all legitimate aims of democratic government is outside the scope of this article. However, because the analysis set forth herein is, in large part, contingent on the fact that the computer at issue is located in the probationer's house, some discussion of this trend of judicial creationism becomes necessary. A particularly disturbing example of "judicial creationism" can be found in the Court's holding in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), authored by Justice Kennedy:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. *In our tradition the State is not omnipresent in the home*. And there are other spheres of our lives and existence, *outside the home*, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Id. (emphasis added). While this type of "liberty," personal "autonomy," and privacy may be desirable, or perhaps even increasingly necessary with advances in technology and the ability of the government to collect and warehouse information about all aspects of our lives, if this type of "spatial" or transcendental liberty is to emerge, it should be after full and robust debate by the people (in the form of an Amendment or other applicable democratic assertion) and not at the whim of at least five lawyers with life terms. Justice Kennedy's prose, while somewhat eloquent, is misplaced in the context of interpreting a static Constitution. See David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214-15 (1991) (reviewing STEVEN H. SHIFFAIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990)) ("[Metaphor] liberates the author from some of the rigidity of exposition, but also from the demands of precision and clarity. The subtlety that makes the poet's boon can be

from voting while they are on probation³¹ and a majority of states prohibit probationers from owning or possessing a firearm³² or associating with certain people and groups of people.³³ Other restrictions blur the line between constitutional rights and basic human rights or expectations such as procreation and marriage.³⁴

Simply put, an individual on probation is not “free” and “do[es] not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on

the lawyer's bane . . .”). Perhaps this type of spatial zone of liberty and privacy should be the next step of an evolving nation. The question is not, *should the United States evolve?* The question is: *are the courts or the legislature the proper means of this “evolution”?*

There is plenty of room within this system for “evolving standards of decency” but the instrument of evolution—or, if you are more tolerant of the Court's approach, the herald that evolution has occurred—is not the nine lawyers who sit on the Supreme Court of the United States, but the Congress of the United States and the legislatures of the fifty states . . .

Antonin Scalia, Associate Justice, United States Supreme Court, from remarks given at a conference by the Pew Forum on Religion and Public Life at the University of Chicago Divinity School, <http://pewforum.org/deathpenalty/resources/transcript3.php3> (last visited Oct. 8, 2005); *see also* *Planned Parenthood v. Casey*, 505 U.S. 833, 989-90 (1992) (Scalia, J., dissenting) (“It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.”).

³¹ *See* The Sentencing Project *Felony Disenfranchisement Laws in the United States*, at http://www.sentencingproject.org/pub_D5.cfm (last visited June 27, 2005).

³² U.S. CONST. amend. II.

³³ U.S. CONST. amend. I.

³⁴ *See* Jennifer Levi, *Probation Restrictions Impacting the Right to Procreate: the Oakley Error*, 26 W. NEW ENG. L. REV. 81, 82 (2004) (detailing 4-3 ruling by state court upholding a probation condition restricting probationer's right to have children as constitutional.); Shana Weiss, *A Penny For Your Thoughts: Revisiting Commonwealth v. Power*, 17 LOY. L.A. ENT. L. REV. 201, 202-03 (1996) (generally discussing different types of probation restrictions which interfere with varying levels of civil and constitutional rights); Steven S. Spitz, *The Norplant Debate: Birth Control or Woman Control*, 25 COLUM. HUM. RTS. L. REV. 131 (1993) (discussing compulsory use of Norplant contraceptive by courts as condition for female probationers); *see also* Rebecca L. Miles, *Criminal Consequences for Making Babies: Probation Conditions that Restrict Procreation*, 59 WASH. & LEE L. REV. 1545 (2002) (interesting contextual argument related to the distinction between punishing individuals for their past actions versus punishing them by restricting ability to make future choices on fundamental, personal matters).

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observance of special [probation] restrictions."³⁵ Then why is such a thorough analysis of the relationship between the Fourth Amendment and searches involving probationers necessary? The primary reason stems from the fact that when other types of probation conditions are not followed, the governmental action involves only the probation department and any punitive³⁶ action is purely administrative (i.e., a revocation of probation). The Supreme Court has traditionally given wide deference to this type of administrative proceeding. Further, the Court has held that the exclusionary rule is not applicable and evidence collected in violation of the Fourth Amendment is admissible for purposes of parole revocation hearings, and the majority of reviewing courts, both state and federal, have extended this doctrine to probation revocation hearings.³⁷

When people make irresponsible choices, courts customarily hold them accountable for their actions through civil or criminal sanctions. However, occasionally courts punish criminal defendants who have made irresponsible choices by removing or restricting their ability to choose again. Operating pursuant to probation statutes, courts occasionally have burdened probation sentences with conditions that restrict probationers' most personal decisionmaking.

Id. at 1545-46; see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (discussing role of constitutional, privacy and human rights in context of procreation rights).

³⁵ *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)); see also *United States v. Knights*, 534 U.S. 112, 119 (2001) ("Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.").

³⁶ Punitive in this context being something that is detrimental to the probationer generally. As revocation of probation does not amount to additional "jeopardy" it is not truly punitive in legal or double jeopardy sense. See U.S. CONST. amend. V.

³⁷ See *Pennsylvania Bd. of Probation & Parole*, 524 U.S. 357, 369 (1998) (emphasis added) (citations omitted).

We have long been averse to imposing federal requirements upon the parole systems of the States. A federal requirement that parole boards apply the exclusionary rule, which is itself a "grud[g]ingly taken medicament," would severely disrupt the traditionally informal administrative process of parole revocation. The marginal deterrence of unreasonable searches and seizures is insufficient to justify such an intrusion.

Limitations of probationers' Fourth Amendment privacies³⁸ are unique in the overall context of diminished rights

Id. (citations omitted); see also 77 A.L.R. 3d 636 § 2:

These courts have looked to the purpose of the [exclusionary] rule as their guide, and in those proceedings where the exclusion of such evidence would not serve to deter illegal searches, they have felt free to allow the evidence to be used. Acting on this principle, most courts have refused to extend the exclusionary rule to probation revocation proceedings.

Id. See, e.g., *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (D.C. La 1970); see also *Ex parte Caffie*, 516 So. 2d 831 (Ala. Crim. 1987); *Holcomb v. State*, 644 So. 2d 46 (Ala. Crim. App. 1994); *Chenault v. State*, 777 So. 2d 314 (Ala. Crim. App. 2000); *State v. Alfaro*, 623 P.2d 8 (Ariz. Ct. 1980); *State v. Towle*, 609 P.2d 1097 (Ariz. Ct. App. 1980); *McGhee v. State*, 752 S.W.2d 303 (Ark. Ct. App. 1988); *Harris v. State*, 606 S.W.2d 93 (Ark. Ct. App. 1980); *People v. Coleman*, 533 P.2d 1024 (Cal. 1975); *People v. Vanella*, 71 Cal. Rptr. 152 (Cal. Ct. App. 1968); *People v. Hayko*, 86 Cal. Rptr. 726 (Cal. Ct. App. 1970); *People v. Rafter*, 116 Cal. Rptr. 281 (Cal. Ct. App. 1974); *People v. Fuller*, 210 Cal. Rptr. 1 (Cal. Ct. App. 1983); *People v. Willis*, 197 Cal. Rptr. 281 (Cal. App. Dep't Super. Ct. 1983); *People v. Calais*, 111 Cal. Rptr. 654 (Cal. Ct. App. 1974); *People v. Atencio*, 525 P.2d 461 (Colo. 1974); *People v. Wilkerson*, 541 P.2d 896 (Colo. 1975); *People v. Ressin*, 620 P.2d 717 (Colo. 1980); *Brill v. State*, 32 So. 2d 607 (Fla. 1947); *Bernhardt v. State*, 288 So. 2d 490 (Fla. 1974); *State ex rel. Ard v. Shelby*, 97 So. 2d 631 (Fla. Dist. Ct. App. 1957); *Singletary v. State*, 290 So. 2d 116 (Fla. Dist. Ct. App. 1974); *Owens v. State*, 354 So. 2d 118 (Fla. Dist. Ct. App. 1978); *Latham v. State*, 360 So. 2d 127 (Fla. Dist. Ct. App. 1978); *Kinzer v. State*, 366 So. 2d 874 (Fla. Dist. Ct. App. 1979); *State v. Dodd*, 396 So. 2d 1205 (Fla. Dist. Ct. App. 1981); *Huppertz v. State*, 399 So. 2d 992 (Fla. Dist. Ct. App. 1981); *Bruno v. State*, 343 So. 2d 1335 (Fla. Dist. Ct. App. 1977); *People v. Dowery*, 312 N.E.2d 682 (Ill. App. Ct. 1974); *People v. Swanks*, 339 N.E.2d 469 (Ill. App. Ct. 1975); *People v. Holliday*, 743 N.E.2d 587 (Ill. App. Ct. 2001); *Dulin v. State*, 346 N.E.2d 746 (Ind. App. 1976); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky. Ct. App. 1986); *State v. Caron*, 334 A.2d 495 (Me. 1975); *Chase v. State*, 522 A.2d 1348 (Md. 1987); *Commonwealth v. Olsen*, 541 N.E.2d 1003 (Mass. 1989); *People v. Perry*, 505 N.W.2d 909 (Mich. App. 1993); *State v. Martin*, 595 N.W.2d 214 (Minn. Ct. App. 1999); *State v. Thorsness*, 528 P.2d 692 (Mont. 1974); *Stone v. Shea*, 304 A.2d 647 (N.H. 1973); *State v. Field*, 571 A.2d 1276 (N.H. 1990); *State ex rel. Corgan v. King*, 868 P.2d 743 (Okla. Crim. App. 1994); *State v. Ray*, 598 P.2d 1293 (Or. Ct. App. 1979); *Commonwealth v. Davis*, 336 A.2d 616 (Pa. Super. Ct. 1975); *State v. Spratt*, 386 A.2d 1094 (R.I. 1978); *Johnson v. Commonwealth*, 462 S.E.2d 907 (Va. Ct. App. 1995); *State v. Kuhn*, 499 P.2d 49 (Wash. Ct. App. 1972). For a recent example, see, *Jones v. Superior Court*, 8 Cal. Rptr. 3d 687 (Cal. Ct. App. 2004) (holding that the exclusionary rule does not apply to a probation revocation hearing). Some jurisdictions rule that the exclusionary rule does apply to probation revocation hearings due to the belief that evidence obtained via unreasonable search and seizure should not be used for any purpose "imperative of judicial integrity." See e.g., *State v. Scarlet*, 800 So. 2d 220 (Fla. 2001); *State v. Marquart*, 945 P.2d 1027 (N.M. Ct. App. 1997); *State v. Lampman*, 724 P.2d 1092 (Wash. Ct. App. 1986).

³⁸

See *supra* note 1 and accompanying text.

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given a probationer's legal status. If the government seeks to introduce evidence of a new crime against the individual in a judicial proceeding, and this evidence was collected unlawfully, it will be suppressed.³⁹ Conceptually, it is the affirmative action of the government to prosecute the probationer for a new crime, and the remedy which exists, that creates the primary constitutional cause of action discussed herein.⁴⁰

PART III. "CONSENT" AND "WAIVER"

One common, and somewhat intuitive, explanation for the right of government officials to monitor and/or search the computer of an individual with a prior child pornography conviction is simply that the probationer previously agreed to the terms of probation and has thus consented⁴¹ to the future search⁴² and has waived⁴³ any constitutional claims.⁴⁴

³⁹ See *Weeks v. United States*, 232 U.S. 383, 391-93 (1914) (suppression doctrine applied to federal authorities); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore constitutional in origin, we can no longer permit that right to remain an empty promise.").

⁴⁰ *But see United States v. Lifshitz*, 369 F.3d 173, 188-93 (2d Cir. 2004) (where there was no actual search and facial challenge of probation condition (prior to any application by the government against probationer) was sustained.).

⁴¹ See *Ferguson v. City of Charleston*, 532 U.S. 67, 93 (2001) (Scalia, J., dissenting) ("It is rudimentary Fourth Amendment law that a search which has been consented to is not unreasonable.").

⁴² See *supra* note 9 and accompanying text.

⁴³ See generally Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011 (2000).

The doctrine of criminal waiver currently suffers under a tremendous weight of "theory-guilt." Legal scholars have struggled mightily to explain why, during the course of a criminal prosecution, the defendant may waive most, though not all, of his fundamental constitutional and statutory rights. Waiver in the disposition of criminal charges is so frequently invoked that commentators have long suggested that "[i]t is waiver of rights the permits the system of criminal justice to work at all."

Id.

⁴⁴ *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967), *superseded by statute* 18 U.S.C.

Consent carries with it an important conceptual historical underpinning. If we understand the Bill of Rights, the first ten amendments to the Constitution, to be important limitations on the power of the federal government, and in so being, a grant of individual “rights to the people” and citizens of the various states, implicit and intrinsic in the grant of any “right” is an individual's power to waive it.⁴⁵ It would be a shallow concession on the part of the government to convey “rights” which are not truly at the control of the very citizenry they are meant to empower.⁴⁶

§ 2510 (2000). The United States Supreme Court, in progressing from a property analysis to a privacy analysis with regards to the scope of the Fourth Amendment, has always been cognizant of the role of “consent” to the application of the Amendment to individuals. *Id.* at 350-51. For example, in the Court's expansive landmark ruling, *Katz v. United States*, the Court expressly stated that “[a] search to which an individual consents meets Fourth Amendment requirements.” *Katz*, 389 U.S. at 358 n.22. See Marc R. Lewis, *Lost in Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L. REV. 1703, 1723 (2004) (“The Supreme Court has been clear in holding that ‘consent’ and ‘waiver’ are established exceptions to the Fourth Amendment's warrant requirement. But because the concepts are inexorably linked, courts and commentators have had some difficulty distinguishing consent from waiver. For example, consider the following sentence: ‘[C]onsent is a voluntary waiver of a person's Fourth Amendment rights.’ While this is undoubtedly true—consent is a voluntary waiver of certain protections—using ‘waiver’ to define ‘consent’ reflects the fundamental confusion between the two doctrines. Accordingly . . . [the following definition provided]: [t]he language in probation agreements creates a waiver of Fourth Amendment rights whereby a probationer consents to future searches.”); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 242-43 (1973) (“Nor can it even be said that a search, as opposed to an eventual trial, is somehow ‘unfair’ if a person consents to a search. While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant.”). See generally *Davis v. United States*, 328 U.S. 582, 593-94 (1946) (early case recognizing “consent” as valid exception to both warrant and probable cause).

⁴⁵ See LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 146 (1988) (“The Bill of Rights did just that: it was a bill of restraints on the United States. Congress submitted those restraining amendments to the states for ratification on September 25, 1789, and the requisite number of state legislatures ratified them by December 15, 1791.”).

⁴⁶ It would be either a shallow concession by the government, or a hollow victory by the people, depending on one's view of the Bill of Rights. See LEVY, *supra* note 45, at 146 (“The triumph of individual liberty against government power is one of our history's noblest themes, epitomized by the Bill of Rights.”). But see *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (finding that although most

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For example, the freedom to speak does not mean one *must* speak.⁴⁷ The right to bear arms does not necessarily mean that I must own a gun.⁴⁸ Simply because the government cannot quarter soldiers in my home during peacetime, it does not necessarily follow that I cannot invite them in to stay, if I so choose.⁴⁹ I have a right to (non-excessive) bail, but I can certainly choose to sit in jail instead.⁵⁰ It is not clear that I can choose cruel or unusual punishment, my guess is that few have tried, but you get the point.⁵¹

The most crucial rights we possess as Americans are strengthened, not weakened, by the fact that we can waive or choose *not* to exercise them.⁵² For example, the *Miranda*

protections within a criminal prosecution are waivable, some may be so integral to the fact-finding process that they cannot be waived, e.g., right to conflict-free counsel); *United States v. Gambino*, 59 F.3d 353, 359-60 (2d Cir. 1995) (ruling consistently with every circuit that has ruled on the issue, due to the great interest in a speedy-trial, defendants cannot waive the protections of the Speedy Trial Act).

⁴⁷ See generally U.S. CONST. amend. I. See, e.g., *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (case restricting government's right to "compel" speech and speech-conduct).

⁴⁸ See generally U.S. CONST. amend. II. A small number of communities and counties have enacted legislation that requires the head of each household to own at least one firearm with ammunition. For example, such an ordinance was passed in Kennesaw, Georgia in 1982. See Jonathan Hamilton & David Burch, *Gun Ownership—It's the Law in Kennesaw*, Marietta Daily (available at <http://www.rense.com/general9/gunlaw.htm>) (last visited July 27, 2005). *Id.* The law was passed to "protect the safety, security and general welfare of the city and its inhabitants." *Id.* After the ACLU challenged the law in federal court, the city added a "conscientious objector" exemption. *Id.*

⁴⁹ See generally U.S. CONST. amend. III.

⁵⁰ See generally U.S. CONST. amend. VIII.

⁵¹ *Id.*

⁵² See *United States v. Drayton*, 536 U.S. 194 (2002).

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Id. at 207. But see Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005).

So, were the actions of the government agents "reasonable" in *Drayton*? This is a question the

Court never directly answered, although the Court at times wrote as though this were the question it meant to answer. Instead, the opinion keeps returning to the question of voluntariness. As a result, the Court ended up defending the search not because the search was "reasonable" (which was arguably true) but rather because the Court claimed the defendants acted "voluntarily" (which was almost certainly not true). The consequence of this misdirection was a firestorm of academic criticism and a scathing reception by the public at large. It is no exaggeration to say that the nearly unanimous condemnation of the Court's rulings on consensual searches is creating a problem of legitimacy which threatens to undermine the integrity of judicial review of police behavior. What has gone wrong?

Id. at 774-75. I cannot join in this "unanimous condemnation" of the Court's voluntariness rulings without accepting a type of paternalistic approach which views citizens as being helpless to interact with the police, specifically, or government, generally, to assert or waive their constitutional rights. See *supra* note 44 and accompanying text. In his article, Professor Simmons criticizes the United States Supreme Court for failing to adopt a consistent "test" that "fully comports with the real-life confrontations occurring on the street." Simmons, *supra*, at 773. This common misconception, that people, (*especially* criminals like Brown and Drayton who smuggle 483 grams and 295 grams of cocaine, respectively, *Drayton*, 536 U.S. at 199) have no "power" to assert their Fourth Amendment rights because they are so afraid of the police that it should make a constitutional difference is more misleading as to what really goes on in police-citizen encounters "on the street" than the school of thought, whether stated or unstated, that can only accept or comprehend consent in some context of coercion. It is this type of paternalism, not the actions of the police, which strip these individuals of their constitutional significance. A true "civil-libertarian," in this context, would be equally cognizant and interested in defending the collective power citizens maintain when they are free to control the destiny of their rights through assertion or waiver. Regardless of my conclusion as to the merits of this "school of thought" and some skepticism that any condemnation of the Court is, in fact, unanimous, (or even close to it) it seems clear that a significant academic backlash does exist towards the Court's use of voluntariness generally and the *Drayton* opinion specifically. In this "backlash" I sense three primary themes: (1) proponents seek some type of "academic street-cred" (short for credibility) by believing that the view from their ivory tower is somehow superior to the view from the High Court chambers of what really occurs "in the street"; (2) an ostensible concern for the "rights" of the "coerced" which is, in actuality, a paternalistic view of people who need to be "saved" by academics from making their own constitutional decisions; and (3) a myopic belief that police are a cure worse than the disease and societal problem of crime. See Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535 (2002). For example, with reference to number three, above, "I do not mean to suggest that the officer is always, or even usually, lying. Those caught with drugs have a great deal of incentive to lie, and their credibility should be at least as suspect as the police officer's." *Id.* at 556 (emphasis added). Also disturbing is the ongoing inability of certain academics to accept that there could be cooperation between the police and citizenry in regards to consent searches. While it may seem naïve to believe that, in a democratic society where the majority of the people *should* agree with the laws that govern them, a consent search could be "salutary" this type of consent search goes on everyday "on the street." Professor Loewy seems to doubt the very existence of the "consent-search" in the real world because he only

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seems to view it through the prism of those who do, in fact, have something to hide. *Id.* at 552-53.

The concept of a consent search sounds salutary. The conflict between police officer and citizen is gone, and the two are working together for the common goal of creating a better society. [The scenario] . . . might look something like this:

Police officer: You were going thirty-five mph in a twenty-five mph zone. We really can't have that.

You: I understand officer. Thanks for calling it to my attention.

Police officer: While I have you stopped do you mind if I look in the trunk of your car? You don't have to, but it would be helpful to me if you would consent.

You: I don't have anything in there, but if you want to look, it's fine with me.

Police officer (after viewing empty trunk): Thanks for your help. Now remember no more speeding.

The problem is that the hypothesized scenario is not what typically happens. Instead, a truly voluntary consent, while perhaps not oxymoronic, certainly does not seem to be the rule, *at least according to the defendants in the litigated cases.*

Id. (emphasis added). Why does there have to be inevitable "conflict" between the police and the citizen? Is it impossible to believe that an innocent person could work with the police? The police officer told the occupant, "You don't have to." *Id.* at 552. Apparently, even when the occupant is told "you don't have to consent," they are somehow powerless to either assert or waive their constitutional rights. This is telling of the paternalistic view of citizenry that pervades much of the "backlash" against the *Drayton* opinion and the Court's voluntariness doctrine. *See also* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 222 (2002) ("If this is the determination that underlies the decision in *Drayton*, then the Court should have explicitly stated it and justified it—rather than relying on the implausible assertion that bus passengers, when they are individually confronted by armed police officers who want to search them, feel free to ignore the police or outright refuse their requests.). Here, the author counters what she considers to be implausible logic in one direction with implausible logic in the reverse direction. Following this logic, there is not *any* person who, when confronted by "armed police officers" (do Americans have any experience, at all, with unarmed police officers?) feels free to either assert their Fourth Amendment rights or exercise their rights through affirmative waiver? For example, if F. Lee Bailey and the late Johnny Cochran are traveling together by Greyhound, and are placed in the same situation as Brown and Drayton, do they similarly lack the capacity to exercise their constitutional rights? Would their waiver also be *per se* coercive because of their fear of bus-riding, gun-toting cops? I do not believe that the Court should inquire into the subjective feeling of "free[dom]" individuals have when dealing with police. This seems too far skewed towards concluding that all police-citizen encounters are coercive simply by the presence of an armed police officer. The idea that "ignorance of your rights" should invalidate a waiver of a right has no more plausibility to criminal procedure jurisprudence as the general notion that "ignorance of the law" should be a valid defense. *See generally*, David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941 (1997); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133 (2003). Although he would disagree with my overall conclusion, George C. Thomas, III, asks a similar question while coming to the opposite conclusion:

I suppose it is more difficult to work up enthusiasm to protect those who are carrying almost 800 grams (twenty-seven ounces) of cocaine. After all, atheists may challenge our belief structure, but drug dealers threaten us and our children with addiction and death. Yet I cannot resist the conclusion that Drayton's "consent" is consent only in the most academic sense. Defining "consent" as the lack of overt coercion is a pretty impoverished notion when one is facing armed police who appear to be blocking egress from a bus. Given what we are learning about the reaction of citizens to civilian authority, and remembering that the ones requesting consent in drug cases are officers who carry guns and have the power to arrest, a definition of consent that includes every noncoerced act is unrealistic. Moreover, Janice Nadler raises the provocative possibility that while the police officer perceives a friendly conversation, the suspect may perceive coercion. *So whose perspective "counts"?*

George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1510-11 (2005) (emphasis added); *see also* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 34-37 (2002). Professor Harris is undoubtedly one of the preeminent experts and scholars with regards to "racial profiling." In the following passage from his book, Professor Harris concludes that, even where individuals are expressly told that they can refuse, their consent is not voluntary but instead given "because that is how people respond to authority." *Id.* at 34.

In recently completed doctoral work, Ilya Lichtenberg of Rutgers University tested the idea of the voluntariness of consent to search. Using data from Ohio and Maryland, which together included more than nine thousand consent searches, Lichtenberg's findings directly contradict the Supreme Court's assumptions. Lichtenberg found that about 90 percent of drivers who were asked for consent gave it—rates far higher than in any of the classic psychology experiments on compliance with authority. There were no significant differences in the rates of consent when the data were broken down by sex, by age, or by race. Basically, almost everyone consents; few people—just one out of ten—refuse. Even the use of a warning—telling the suspect that he or she was free to go before asking for consent—made no difference. All in all, Lichtenberg's work raises considerable doubt that these interactions can ever be considered voluntary. People who agree to searches do not make a free choice to grant consent. Rather, they consent because that is how people respond to authority. Calling such an interaction voluntary is at best misleading and at worst completely wrong.

Id. Again, I would reiterate my belief that, especially where people are expressly told "you are free to leave—you do not have to give consent" or something similar, assuming that citizens cannot affirmatively assert their rights is a type of "save-people-from-themselves" paternalism that is misplaced both generally and in any type of Constitutional analysis. However, Professor Harris is correct in identifying a related, but separate, problem related to police-citizen encounters. Sometimes the police do not adhere to the citizen's assertion of their rights through refusing the officer's request to conduct a "consent-search." Obviously, the police must abide by a citizen's refusal to allow them to search if consent is the only applicable basis. Simply the fact that

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warnings, which most can likely recite verbatim (or close) from television and movies,⁵³ include many of the crucial individual rights Americans hold dear.⁵⁴ However, what makes them *individual rights* is, in part, the fact that the individual can choose not to assert them. For example, you do not have to remain silent; you can refuse an attorney; you can even confess.⁵⁵ Just as stupid laws are not always unconstitution-

certain rogue officers may not follow these rules should not invalidate consent searches any more than the simple existence of coerced, non-voluntary confessions should invalidate *all* confessions. Interestingly, even when the police do affirmatively inform individuals of their right to refuse consent (similar to the manner in which the *Miranda* warnings provide individuals with notice of other rights) this is apparently not enough, and consent searches are somehow thought to be *per se* involuntary based on a numerical determination of how many consent versus how many refuse. If it all boils down to just "how people respond to authority" why would this same criticism not apply to countless other situations where individuals waive their constitutional rights? If the police do not act appropriately and honor a citizen's assertion of his or her right not to consent (given the overall circumstance), then this is an independent constitutional violation and should be dealt with accordingly. However, it should not act to invalidate all consent searches.

⁵³ See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."). I have always found it personally perplexing that Chief Justice Rehnquist, historically a critic of *Miranda*, wrote the majority opinion in *Dickerson*, a 7-2 case in which Justices Scalia and Thomas (predictably) dissented. *Id.* at 430. For some insight into why the Chief Justice chose to author the opinion, and vote with the majority, see, Yale Kasimar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 889-90 (2001).

⁵⁴ "*Miranda* warnings" refers to warnings stemming from the United States Supreme Court's ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966), *superseded by statute* 18 U.S.C. § 3501 (2000), and later re-affirmed in the Court's ruling in *Dickerson v. United States*, 530 U.S. 428 (2000). See also Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad but Shallow*, 43 WM. & MARY L. REV. 1 (2001); Yale Kasimar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 930-36 (2000).

⁵⁵ See generally U.S. CONST. amend. V & VI. It is important to remember that there is a slightly different type of "waiver" that takes place with rights that are and are not enumerated in the *Miranda* warnings from those subject to custodial interrogation. See *United States v. Barnett*, 2004 WL 391830, at *4 (S.D. Ill. Feb. 27, 2004) ("However, the judge who considers the validity of a consent search of a home only needs to know if the rightful occupant of the search said yes when asked for consent and not whether that person was first advised of all her rights in detail as alluded to with the Fifth and Sixth Amendment rights above.") (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). See *United States v. Drayton*, 536 U.S. 194, 206 (2002) ("The Court has rejected in specific terms the suggestion that police officers must always

al,⁵⁶ stupid decisions (especially in hindsight) on the part of individuals are not necessarily the by-product of government coercion.⁵⁷

In almost every case, the alternative to the relevant conditions of probation is incarceration.⁵⁸ Certain academics and

inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."); see also *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Schneekloth v. Butsamonte*, 412 U.S. 218, 227 (1973).

Several commentators have supported a requirement that the police warn citizens of their right to refuse a request to search. They argue that the coercion citizens feel arises, at least in part, from the lack of knowledge of their right to refuse the request. One cannot refuse if one is not aware that refusal is an option. By requiring police to advise suspects that they can refuse to cooperate with the request to search, the argument goes, we remove the coercive aspect of the request and allow citizens to make a free and informed choice. The assumption is that if police are required to issue *Miranda*-type warnings in consent search cases, the compliance rate will necessarily decrease because, armed with the knowledge that refusal is an option, some people will choose to refuse. In fact, the majority in *Schneekloth* appears to have assumed that if warnings were required, virtually all citizens would refuse to consent to a search.

That assumption turns out to be mistaken, at least in instances where it has been explicitly examined. A study of all Ohio highway stops conducted between 1995 and 1997 found no decrease in consent rates after police were required to advise motorists of their right to refuse to cooperate with a request for consent to search.

Nadler, *supra* note 52, at 204-05.

⁵⁶ See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring) ("But a law can be both economic folly and constitutional.").

⁵⁷ This statement is especially convincing in the context of probation where it is hard to say that accepting restrictive terms that may, at a later time, get one into further trouble, is a stupid or coerced decision when the alternative is prison. See *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005) ("Here, given the alternative facing him of a prison sentence, Barnett gave up nothing."). Even in hindsight, the decision to avoid incarceration at all costs seems logical. How many inmates, even after the fact, would find it more appealing (or logical) to accept incarceration instead of the privilege of probation.

⁵⁸ See *Barnett*, 415 F.3d at 692 (noting that claims made by offenders related to unreasonable searches must be viewed in light of fact that the greater deprivation of prison is the alternative to probation); *United States v. Lifshitz*, 369 F.3d 173, 179 (2d Cir. 2004) ("While upholding Fourth Amendment protections against unreasonable searches, we must therefore also remember that the alternative facing [probationer] in the absence of a computer monitoring probation condition might well be the more extreme deprivation of privacy wrought by imprisonment."). For comparative purposes, also see *Griffin*, 483 U.S. at 874 n.2 ("We have recently held that prison regulations allegedly infringing constitutional rights are themselves constitutional as long as they are reasonably related to legitimate penological interests." (quoting *O'Lone v.*

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practitioners have asserted that the agreement between a probationer, probation officials and court is the equivalent of a “probation contract” through which probationer effectively waives Fourth Amendment rights in exchange for the “consideration” of being placed on probation instead of going to prison.⁵⁹

In this context, this argument can be referred to as the “California Approach” because of that State's longstanding acceptance of consent as a basis for the legality of broad-based probationary search conditions.⁶⁰

In *United States v. Knights*⁶¹ (discussed in detail in Part V.), the United States Supreme Court acknowledged the con-

Estate of Shabazz, 482 U.S. 342, 349 (1987)).

⁵⁹ In many cases, this consent argument stems from the fact that, if they do not want to choose probation, they can simply go to jail. Historically, this basic theory has been tagged the “Act of Grace” theory. See, e.g., Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 188-91 (1967) (arguing that “Act of Grace” theory includes the notion that constitutional limitations do not exist if the defendant is granted the *privilege* of probation.). But see Brilliant, *supra* note 6, at 1367 n.61 (attempting to discredit “contract” theory of probation on the basis that an individual cannot consent to an illegal contract). It is completely unclear from the article what would make probation conditions that an offender agreed to in order to avoid the undoubtedly more restrictive option of incarceration *per se* “unconstitutional,” “unreasonable,” or illegal.

⁶⁰ See, e.g., *People v. Mason*, 488 P.2d 630, 631 (Cal. 1971) (indicating California's longstanding approach going back over thirty years; case cited for historical relevance—negative history affects ruling's precedential value to date—however, bulk of related negative history is unpublished and noncitable), *overruled by* *People v. Lent*, 541 P.2d 545 (Cal. 1975). The California Supreme Court expressly acknowledges that an offender can refuse to consent to conditions of probation and simply go to jail. *Id.* at 632. (“If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence.”); see also *People v. Bravo*, 738 P.2d 336, 339-40 (Cal. 1987). The court, in *Bravo*, held that defendant's waiver of Fourth Amendment rights should be viewed in light of an objective, not subjective, test. *Id.* Further, the court held that such searches cannot be for reasons of harassment or searches for arbitrary or capricious reasons. *Id.* at 342-43. “We do not suggest that searches of probationers may be conducted for reasons unrelated to the rehabilitative and reformatory purposes of probation or other legitimate law enforcement purposes. A waiver of Fourth Amendment rights as a condition of probation does not permit searches for arbitrary or capricious reasons.” *Id.* (citations omitted); see also *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998); *In re Tyrell J.*, 876 P.2d 519, 521 (Cal. 1994).

⁶¹ 534 U.S. 112 (2001).

sent argument but did not reach the merits of it. “We need not decide whether Knights' acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach”⁶²

While the United States Supreme Court has not addressed this question directly, a recent Seventh Circuit opinion, *United States v. Barnett*,⁶³ specifically addressed the question that *Knights* left open: “whether the waiver alone could justify the search.”⁶⁴

After being convicted in an Illinois state court of aggravated fleeing from police, criminal damage to state property, and damage to property, Barnett was “sentenced to a year of ‘Intensive Probation Supervision’ [IPS] in lieu of prison” as part of a plea bargain.⁶⁵

One of the conditions of IPS required Barnett to “[S]ubmit to searches of [his] person, residence, papers, automobile and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings.”⁶⁶

⁶² *Id.* at 118.

⁶³ 415 F.3d 690 (7th Cir. 2005). The decision is authored by Circuit Judge Posner, one of this Nation's most noted jurists. *Id.* at 691.

⁶⁴ *Id.* The court also refers to this question as one of “the validity of a blanket waiver of Fourth Amendment rights as a condition of probation.” *Id.*; see also *United States v. Lifshitz*, 369 F.3d 173, 182 (2d Cir. 2004) (relating to question left by Court in *Knights*); *United States v. Brown*, 346 F.3d 808, 812 (8th Cir. 2003) (same); *United States v. Vaval*, 404 F.3d 144, 152-53 (2d Cir. 2005) (“[B]ecause plea bargains require defendants to waive fundamental constitutional rights, prosecutors are held to meticulous standards of performance.” (citing *United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999))).

⁶⁵ *Barnett*, 415 F.3d at 691. “[Barnett's] lawyer acknowledges having bargained for this disposition, which Barnett preferred to a prison sentence.” *Id.* These charges are the underlying charges for which Barnett was on a term of probation. The instant case, and the Seventh Circuit ruling, stem from an attempt to suppress evidence revealed in a search related to a charge of being a felon in possession of a gun. *Id.*

⁶⁶ *Id.* at 691-92. Obviously, where consent is the basis for Fourth Amendment waiver, the express language of the probation condition would control the breadth and scope of the waiver. *Id.* at 692.

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During his period of probation, Barnett's home was searched by a probation officer.⁶⁷ During this search, a gun was discovered and Barnett was charged with being a felon in possession of a firearm.⁶⁸

Judge Posner's opinion in *Barnett* is dually-rooted in two

⁶⁷ The probation officer was accompanied by two sheriff's deputies. *United States v. Barnett*, No. 03-CR-30170, 2004 WL 391830, at *2 (S.D. Ill. Feb. 27, 2004) (footnote omitted).

⁶⁸ *Id.* As indicated *supra* note 40 and accompanying text, where consent is at issue, the surrounding facts and circumstances, as well as the express condition previously agreed to, must be considered. The facts of the warrantless search at issue in *Barnett* are as follows:

On April 15, 2003, George Chester, the supervisor of the Intensive Probation Supervision Unit of the Probation Department, sought authority from the St. Clair County State's Attorney's Office to conduct a warrantless search of Barnett's residence. Chester felt that Barnett's actions in his office that day established reasonable suspicion of illegal contraband or activity. His [sic] based his belief on Barnett's reaction to an arrest effected that day for Barnett's failure to appear in court on some undisclosed matter. Chester testified that Barnett "overreacted" to that arrest, for the purported reason that Barnett had a woman in his car whom he did not want his wife to discover. Following the encounter with Barnett, Chester looked more fully into Barnett's criminal background and found five felony convictions and numerous domestic battery issues. Based on these findings, Chester determined that there was reasonable suspicion that illegal contraband or activity was to be found at Barnett's house. On the strength of that hunch, Chester received permission to search Barnett's home from the State's Attorney's Office.

Consequently, in the evening hours of the same day, Probation Officer Rodney Skinner was directed to conduct a search of Barnett's residence. Officer Skinner, accompanied by two sheriff's deputies for assistance, went to Barnett's home.

Id. at *2 (footnote omitted). This "search" falls into several grey areas for the purposes of the factual scenarios set forth in Part I(ii), *supra*. It appears that this "search" has elements of FP1—depending on the level of suspicion that was present at the time the search was initiated. Although Supervisor Chester acted on a "hunch" that may or may not have risen to the level of "reasonable suspicion," the government itself did not claim that "reasonable suspicion" existed at the time instructions were issued to probation officer Skinner. See *Barnett*, 2004 WL 391830, at *2. "Secondly, while not suggesting the reasonable suspicion existed when the instructions were issued by Supervisor Chester to Officer Skinner for the search . . ." *Id.* Here, the evidence was used to prosecute Barnett for a new crime (possession of firearm by felon) and not simply to administratively revoke his probation. *Id.* Also, although it appears that the sheriff's deputies accompanied P.O. Skinner to execute the search, it appears that this action was taken unilaterally by probation authorities (with the permission of the State's Attorney's Office). *Id.* ("accompanied by two Sheriff's Department deputies for assistance . . .") (emphasis added).

primary themes: (1) Constitutional rights can be waived;⁶⁹ and (2) “[p]lea bargains are a form of contract.”⁷⁰

i. Waiver

The issue of whether Constitutional rights can be waived is settled law;⁷¹ however, the specific question addressed in *Barnett* is “whether the waiver alone could justify the search.”⁷² While the semantic error is likely harmless overall, the Seventh Circuit’s “sufficiency” inquiry into the waiver doctrine appears misplaced. The question is actually: (1) does the Fourth Amendment apply;⁷³ (2) if so, does consent to a probation condition allowing a certain type of search amount to “waiver;” and, (3) if so, did the individual with Fourth Amendment standing waive his/her right(s) under the Amendment by consenting? The question is whether there was, in fact, a waiver, not whether there was sufficiency of such a waiver assuming it exists.⁷⁴

⁶⁹ See *Barnett*, 415 F.3d at 691. “Constitutional rights like other rights can be waived, provided that the waiver is knowing and intelligent, as it was here.” *Id.*

⁷⁰ *Id.* at 692. “Plea bargains are a form of contract, and like other contracts are presumed to make both parties better off and do no harm to third parties, and so they are enforceable and enforced. Here, given the alternative facing him of a prison sentence, Barnett gave up nothing.” *Id.* (citations omitted).

⁷¹ “Waiver of [a specific constitutional right], as of constitutional rights in the criminal process generally, must be a knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances.” *Halbert v. Michigan*, 125 S. Ct. 2582, 2594 (2005) (citations omitted); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The Court does not favor “waiver” of fundamental rights. See *Carnley v. Cochran*, 369 U.S. 506 (1962); *Ohio Bell Tel. Co. v. Public Utils. Comm’n*, 301 U.S. 292, 307 (1937); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (courts should “indulge every reasonable presumption against waiver.”).

⁷² *Barnett*, 415 F.3d at 691.

⁷³ The Fourth Amendment only applies when a search is conducted that infringes upon an individual’s reasonable expectation of privacy. *United States v. Reyes*, 283 F.3d 446, 471 (2002). For an individual’s expectation of privacy to be legitimate, she must exhibit “an actual (subjective) expectation of privacy and the expectation must be one that society is prepared to recognize as reasonable.” *Id.* at 457 (internal quotations omitted).

⁷⁴ While after-the-fact “sufficiency” of an established waiver is irrelevant in my view, as the constitutional inquiry is over, one still must determine whether the waiver ever came into existence in the first

ii. Contract-law analogy/analysis

Plea bargains are a crucial part of the American criminal justice system.⁷⁵ The Seventh Circuit held that the plea bargain can be viewed, and reviewed, as “a form of contract.”⁷⁶ The use of contract law for the basis of analysis in reviewing plea bargains has also been used when the government is accused of “breach.”⁷⁷

The Seventh Circuit correctly identifies the “bargain” that takes place in a plea bargain, stating, “[o]ften a big part of the value of a right is what one can get in exchange for giving it up.”⁷⁸ The court also dismisses what is basically a general

place, i.e., whether it is a valid waiver. Constitutional rights can be waived. *See generally*, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

⁷⁵ *See Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978) (“We have recently had occasion to observe: ‘[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned.’”) (citations omitted). “Plea bargaining flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial.” *Bordenkircher*, 434 U.S. at 363 (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)).

⁷⁶ *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). (“Plea bargains are a form of contract . . .”). Other circuits have similarly applied the contract analysis when reviewing plea bargains. *See United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005) (quoting *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002)) (“We review interpretations of plea agreements de novo and in accordance with principles of contract law.”).

⁷⁷ *See, e.g., Vaval*, 404 F.3d at 152-53.

Further, we construe plea agreements strictly against the government and do not “hesitate to scrutinize the government’s conduct to ensure that it comports with the highest standard of fairness.” *United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999). “To determine whether a plea agreement has been breached, a court must look to what the parties reasonably understood to be the terms of the agreement.” *Id.* at 636 (internal quotation marks and citation omitted). Moreover, because plea bargains require defendants to waive fundamental constitutional rights, prosecutors are held to meticulous standards of performance. *Id.*

Id.

⁷⁸ *Barnett*, 415 F.3d at 692.

warrant claim⁷⁹ based on theories of contract law:

[C]ontracts (. . . remember that the plea bargain, containing the consent to searches, is to be interpreted as a contract) contain implicit as well as explicit terms. Especially implicit terms necessary to head off absurdities.⁸⁰

In *Barnett*, the Seventh Circuit, finding that a plea bargain which amounts to a waiver of Fourth Amendment rights should be reviewed under the tenets of contract law, firmly answered the question left open by the Supreme Court in *Knights*, finding that “waiver [alone] could justify the search.”⁸¹ Obviously, if waiver under contract law is to control, the express terms of the condition become *extremely* important.⁸² With regards to the

⁷⁹ See, e.g., *Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) (“This Court has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance, 7 & 8 Wm. III, c. 22, § 6 (1696), was the moving force behind the Fourth Amendment.”).

⁸⁰ *Barnett*, 415 F.3d at 692. (citations omitted). “[A] contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely have agreed to seek.” *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 860 (7th Cir. 2002). Other contract law limitations (duress, mistake, unconscionability, and public policy concerns) could come into play in a contract-based analysis. See *Blank*, *supra* note 43 and accompanying text.

⁸¹ See *supra* Part III(i) “waiver” for explanation of why I do not believe the “alone” here is relevant. If the right is validly waived, then the protections of the Fourth Amendment do not apply for purposes of analysis, and the defendant has no standing to assert the waived rights. I reject what I believe is a type of “sufficiency of waiver” inquiry. It does appear that certain types of “waiver of rights” doctrine might fail under contract law analysis. See, e.g., *Blank*, *supra* note 43, at 2074.

Thus, the contract principles of adhesion, duress, mistake, unconscionability, and public policy all suggest that, even if the practice of plea bargaining as a whole can pass constitutional muster under contract analysis, waivers of the right to disclosure of *Brady* material cannot. Accordingly, under a contract-based approach, a defendant may not waive his *Brady* rights as part of a plea bargain.

Id.

⁸² For an example of the United States Supreme Court returning to the express language of the probation condition for guidance, see the Court's unanimous opinion in *United States v. Knights*, 534 U.S. 112, 116 (2001) (“Certainly nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more. The search condition provides that *Knights* will submit to

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two factual scenarios set forth in Part I(ii), *supra*, what type of government agency can search, what they can look for, and what they can do with what they discover with regards to a given probationer will depend on the terms of the contract the offender entered into and the scope of search anticipated in that contract. Returning briefly to Judge Posner's opinion in *Barnett*, "contracts are presumed to make both parties better off and do no harm to third parties,⁸³ and so they are enforceable and enforced."⁸⁴ The person can go to prison, if he or she so choose.

a search "by any probation officer or law enforcement officer" and does not mention anything about purpose."); see also *United States v. Stanfield*, 360 F.3d 1346, 1353-54 (D.C. Cir. 2004) (example of vague condition hindering analysis by reviewing court).

We are reluctant to address the validity of the internet restriction in the absence of a clearer understanding of its scope; we need more solid footing before deciding where we stand. The evolutionary process the internet restriction has undergone in this case—involving challenges by the defendant, redefinition by the district court without providing notice to or hearing argument from the defendant, and sporadic concessions by the government—has culminated in a lack of clarity about what exactly is before us. That is problematic enough as a general matter; neither the defendant nor the probation office and district court should have to consult the judgment, the briefs before this court, and the transcript of oral argument to determine the scope of the condition. Subsection (f) of 18 U.S.C. § 3583 specifies that:

The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

See also *United States v. Simmons*, 343 F.3d 72, 81 (2d Cir. 2003) ("Due process requires that the conditions of supervised release be sufficiently clear to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly") (internal quotation marks and citations omitted).

Stanfield, 360 F.3d at 1353-54.

⁸³ There is a fascinating collateral issue to this analysis that is outside the scope of this article. Given that contracts are generally enforceable when they "do no harm to third parties," what if the victim (or victim's family) in a case do not agree with the plea bargain and believe that the defendant is getting off too "light"? Should the victim's detriment, as a third party under contract law, invalidate the plea agreement (contract) and render it void?

⁸⁴ *Barnett*, 415 F.3d at 692. The Seventh Circuit details this tenet within the facts of the instant case.

It is a bad option, and some will say that this smacks of being a contract of adhesion.⁸⁵ Nonsense, it is a bad option because the person (for some reason, believing it to be to their advantage) has just pled guilty to a charge involving Internet-related child pornography.⁸⁶ Are we, as a society, really concerned with providing good options for this individual? The fact that the option (or contract) of probation exists at all amounts to a *privilege* and not a right.⁸⁷ I believe that the Court, at some point, will answer the question it left open in 2001 in accordance with the Seventh Circuit's opinion in *Barnett*.⁸⁸

Barnett didn't want to go to prison. He preferred to sacrifice the limited privacy to which he would have been entitled had he been on ordinary as distinct from intensive probation (as we'll see), just as convicted defendants prefer home confinement to confinement in a jail or prison even if the home confinement involves monitoring the defendant's activities inside the home and thus invades his privacy. And since imprisonment is a *greater* invasion of personal privacy than being exposed to searches of one's home on demand, the bargain that Barnett struck was not only advantageous to him but actually more protective of Fourth Amendment values than the alternative of prison would have been. It was also advantageous to the government, which wouldn't have agreed to it otherwise.

Id. at 691-92.

⁸⁵ See, e.g., *United States v. Messanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) ("As the Government conceded during oral argument, defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice."). They are in a position—they can assert their right to trial to be found not guilty if they are maintaining their innocence. If they are conceding guilt, *yes, there is no good choice*; the only question is which is the best option within a host of "bad" choices. This does not make their exercise of bargaining for the best possible option a contract of adhesion. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1922 (1992) (noting contrasting characteristics between plea bargains and contracts of adhesion).

⁸⁶ The person may also be found guilty and the only comparison is probation (regardless of how restrictive) and prison.

⁸⁷ See, e.g., *Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935) ("Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions . . .") (citing *Burns v. United States*, 287 U.S. 216 (1932)).

⁸⁸ See *supra* notes 62-64 and accompanying text. The Court expressly reserved two major questions in *Knights*: (1) whether probation "so diminished or completely eliminated [offenders'] reasonable expectation of privacy"; or (2) whether accepting the terms of probation "constituted consent." *United States v. Knights*, 534 U.S. 114, 120 n.6 (2001).

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However, in the meantime, or if I am simply wrong, analysis under the Fourth Amendment becomes necessary.

PART IV. FOURTH AMENDMENT FRAMEWORK--GENERALLY

Under the Fourth Amendment, the “ultimate measure of the constitutionality of a governmental search is `reasonable-ness.’”⁸⁹ To determine whether a search meets the reasonable-ness standard, “it is judged by `balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.’”⁹⁰ Generally, for a search conducted by law enforcement to be “reasonable” under the Fourth Amendment, a warrant is required.⁹¹ The Fourth Amendment only applies when a search is conducted that infringes upon an individual's reasonable expectation of privacy.⁹² For an individual's expectation of privacy to be legitimate, she must exhibit “an actual (subjective) expectation of privacy and the expectation [must] be one that society is prepared to recognize as `reasonable.’”⁹³

In 2001, in a unanimous opinion, the Court basically commanded the broad strokes of the framework I detail in parts V & VI. The two primary Supreme Court cases are expressly distinguished from one another and leave open the possibility that either a general standard of reasonableness or the Fourth

⁸⁹ *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995).

⁹⁰ *Id.* at 652-53 (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

⁹¹ *Id.*

⁹² The modern Fourth Amendment privacy definition was set forth in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁹³ *Id.*; see also *United States v. Reyes*, 283 F.3d 446, 457 (2d Cir. 2002); WEAVER ET AL, *PRINCIPLES OF CRIMINAL PROCEDURE* 82-88 (2004). It seems settled that probationers have, at most, a “significantly diminished . . . reasonable expectation of privacy.” *Knights*, 534 U.S. at 119-20. “We do not decide whether the probation condition so diminished, or completely eliminated, [probationer's] reasonable expectation of privacy” *Id.* at 120 n.6. Similar to a situation where the United States Supreme Court holds the issue of waiver, considered above, if the Court would hold that probationer's simply have no reasonable expectation of privacy in relation to such searches, the analysis would be effectively over.

Amendment exception under the special needs doctrine will be utilized and, therefore, applicable:

In *Knights*' view, apparently shared by the Court of Appeals, a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in *Griffin*, *i.e.*, a "special needs" search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions. This dubious logic—that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary to *Griffin*'s express statement that its "special needs" holding made it "unnecessary to consider whether" warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.⁹⁴

In other words, because the Court based its ruling in *Knights* on reasonableness, it did not consider the alternative "special needs" analysis under *Griffin*; because the *Griffin* Court found the special needs analysis adequate, it found it "unnecessary" to consider warrantless probationary searches under a standard of general reasonableness.⁹⁵

PART V. "TRACK I" REASONABLENESS

The landmark, and most relevant, case for "Track I" analysis in the context of warrantless probationary searches is *United States v. Knights*.⁹⁶ In *Knights*, a unanimous United States Supreme Court held that the probationary search in question was supported by "reasonable suspicion" and was therefore "reasonable" under general Fourth Amendment analysis.⁹⁷

⁹⁴ *Knights*, 534 U.S. at 117-18 (citations omitted).

⁹⁵ *Id.*

⁹⁶ 534 U.S. 112 (2001).

⁹⁷ *Knights*, 534 U.S. at 122 ("Because our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search, . . ."); *see also id.* at 118 ("[W]e conclude that the search of *Knights* was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance.") (citation omitted).

2005] *COMPUTER SEARCHES OF PROBATIONERS* 309*i. Facts-United States v. Knights*

Mark James Knights was on probation for a drug offense.⁹⁸ The terms of probation included the condition, "That Knights would \[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."⁹⁹ Between 1996 and 1998, the facilities of the Pacific Gas and Electric Company (PG&E) in Napa County, California were vandalized over thirty times.¹⁰⁰ Because the vandalism began after Knights' electric service was discontinued and the incidents coincided with his court appearances over his theft of power from PG&E, suspicion focused on Knights.¹⁰¹ On June 3, 1998, the local sheriff's department set up surveillance on Knights' apartment.¹⁰² Steven Simoneau, a friend of Knights, was seen leaving the apartment carrying what appeared to be three pipe bombs.¹⁰³ Simoneau was next seen crossing the street to a river, where he deposited the suspected pipe bombs.¹⁰⁴ A detective followed Simoneau's truck until it pulled into a driveway.¹⁰⁵ After Simoneau exited and walked away from the truck, the detective was able to look at the truck unobserved.¹⁰⁶ In and around the

⁹⁸ *Knights*, 534 U.S. at 114.

⁹⁹ *Id.* This is a broad probation condition in this context as it allows not only the warrantless search, but also that the search can be conducted by either probation or law enforcement officers generally. *Id.* "Knights signed the probation order, which stated immediately above his signature that 'I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME.' App. 49.").

¹⁰⁰ *United States v. Knights*, 219 F.3d 1138, 1140 (9th Cir. 2000), *rev'd*, 534 U.S. 112 (2001).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

truck, the detective found a Molotov cocktail, explosive materials, a gasoline can, and two brass padlocks.¹⁰⁷ The sheriff's department seized the truck, impounded it and searched it pursuant to a warrant at a later time.¹⁰⁸ Knowing the connection between Simoneau and Knights, the fact that he had come directly from Knights' apartment and the fact that he was a probationer whose probation included a general law-enforcement search term, Detective Hancock decided to conduct a warrantless search of Knights' apartment.¹⁰⁹ The search "turned up detonation cord, ammunition, unidentified liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, photographs and blueprints stolen from the burglarized building, and a brass padlock stamped PG&E."¹¹⁰ Knights was indicted in federal court for "conspiracy to commit arson, for possession of an unregistered destructive device, and for being a felon in possession of ammunition."¹¹¹

¹⁰⁷ *Id.* These padlocks fit the description of padlocks removed from a recently-vandalized electric transformer. *Id.*

¹⁰⁸ *Id.* Although a warrant was secured in this instance, if the vehicle was impounded legitimately, the "inventory" exception could have come into play. *See, e.g.,* South Dakota v. Opperman, 428 U.S. 364 (1976).

¹⁰⁹ *Knights*, 219 F.3d at 1140-41. Prior to conducting the search, Detective Hancock received permission from his supervisor. *Id.* "Detective Hancock was aware of the search condition in Knights' probation order and thus believed that a warrant was not necessary." *Knights*, 534 U.S. at 115. "Hancock had seen a copy of the probation order when he was checking Knights' file in the Sheriff's Department office." *Id.* at n.1. In this context, I am acknowledging, but not going to address in detail, whether the "good-faith" exception would apply to this type of situation. If the officer believes in "good-faith" that he is acting pursuant to a statute, in this instance one that would allow a warrantless search, and that statute is later found unconstitutional, a "good faith" exception can apply for statutes similar to the one found in the *Leon*-exception for warrants. *See* Illinois v. Krull, 480 U.S. 340 (1987). Given that explosives were involved, and the large-scale damage this type of vandalism can create, there is a possibility that exigency could be the basis of a warrantless search of Knights' apartment. *See* McDonald v. United States, 335 U.S. 451, 454 (1948); People v. Sirhan, 497 P.2d 1121, 1138-39 (1972), *overruled by* Hawkins v. Superior Court, 586 P.2d 916 (Cal. 1978).

¹¹⁰ *Knights*, 219 F.3d at 1141.

¹¹¹ *Id.* *See* 18 U.S.C. §§ 371, 922(g); 26 U.S.C. § 5861(g). The district court suppressed the evidence seized from Knights' apartment, holding that the "probation search was really a subterfuge for an

ii. The “Reasonableness” Approach

Any approach based on how reasonable something is (or is not) in a particular context, whether it is to review the actions or inactions of a “reasonable person” or to review whether the government has conducted a “reasonable” warrantless search is inherently subjective.¹¹²

In *Knights*, the Court expressly declined to apply any type of “special needs” analysis (set forth in detail in Part VI) and instead applied a general balancing of interests to determine whether the search passed constitutional muster.¹¹³

Similar to the importance of the de facto review of the express probation condition if a contract analysis is to be applied (Part IV(ii)) a reasonableness analysis must make a de facto review of all of the relevant facts and circumstances surrounding the search at issue. For this reason, even given that it is a recent, unanimous, opinion of the Supreme Court, *Knights* can only reveal how the Court rules on a particular search.¹¹⁴ Our

investigative search.” *Knights*, 219 F.3d at 1141. The Ninth Circuit upheld the district court’s ruling. *Id.* at 1145. *Certiorari* was granted on May 14, 2001.

¹¹² See Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643, 1677 (2005) (“If the terms of a law are sufficiently clear to guide a reasonable person in her conduct, then the law will overdeter, stopping people from engaging in conduct because they are unsure of the law’s sweep.”).

¹¹³ *Knights*, 534 U.S. at 117-18.

In *Knights*’ view, apparently shared by the Court of Appeals, a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in *Griffin*—i.e., a “special needs” search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions. This dubious logic—that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary to *Griffin*’s express statement that its “special needs” holding made it “unnecessary to consider whether” warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.

Id. (citations and footnotes omitted). For an exhaustive review of the concept of reasonableness, see generally, Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977 (2004).

¹¹⁴ *Knights*, 534 U.S. at 121 (“We hold that the balance of these considerations requires no

analysis is based, therefore, on analogizing a future, hypothetical search that might be challenged under the *Knights* ruling and the framework the Court applied.

The Court recognizes reasonableness as “[t]he touchstone of the Fourth Amendment” and states that the balance to be considered is “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.”¹¹⁵

In the context of probation, the Court clearly identified the “balance” it would utilize:

Knights’ status as a probationer subject to a search condition informs both sides of that balance. “Probation, like incarceration, is `a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.’” Probation is “one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.” Inherent in the very nature of probation is that probationers “do not enjoy `the absolute liberty to which every citizen is entitled.’”¹¹⁶

After determining that the search condition was relevant within the larger framework of *Knights*’ probation, properly limiting his rights in relation to his status as a probationer, the Court concluded that the search provision “would further the two primary goals of probation—rehabilitation and protecting society from future criminal violations.”¹¹⁷

Although the Court does not reach the full merits of the consent argument,¹¹⁸ it ruled that, due to the fact that “*Knights* was unambiguously informed of [the search condition],” the information acted to significantly diminish “his expectation of privacy.”¹¹⁹ After determining that *Knights* did have some

more than reasonable suspicion to conduct a search of *this probationer’s* house.”) (emphasis added).

¹¹⁵ *Id.* at 118 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

¹¹⁶ *Id.* at 119 (citations omitted).

¹¹⁷ *Id.*

¹¹⁸ See *supra* note 62 and accompanying text.

¹¹⁹ *Knights*, 534 U.S. at 119-20.

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reasonable expectation of privacy with regards to the search of his home,¹²⁰ the Court assessed the governmental interest in the balancing test.¹²¹ Finding that probationers are more likely to violate the law, generally, the Court held that “the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house.”¹²²

This reasonableness inquiry is, by nature, an *ad hoc* analysis. For general comparison purposes, it appears clear, after

¹²⁰ *Id.* at 118-19. The Court did not make this determination in the positive. Similar to its decision not to rule decisively on the consent/waiver aspect of the case, *see supra* note 62 and accompanying text, the Court similarly does not rule on whether the probation condition completely eliminated Knights' reasonable expectation of privacy in the context of the Fourth Amendment. *Knights*, 534 U.S. at 120 n.6.

We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy (or constituted consent, *see supra*, at 118) that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.

Id.

¹²¹ *Id.* at 120-21. The Court provided additional details about the “balance” at issue:

The State has a dual concern with a probationer. On the one hand is the hope that he will successfully complete probation and be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community. The view of the Court of Appeals in this case would require the State to shut its eyes to the latter concern and concentrate only on the former. But we hold that the Fourth Amendment does not put the State to such a choice. Its interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen.

Id.

¹²² *Id.* at 121; *see supra* note 109 and accompanying text. The Court was cognizant that “probable cause” was the ordinary level of probability necessary to satisfy the Fourth Amendment, but “a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.” *Knights*, 534 U.S. at 121 (citing *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignon-Ponce*, 422 U.S. 873 (1975)). “In *Knights*, however, the Court refrained from upholding generally the search condition that had been imposed—which, on its face, would have permitted suspicionless searches—and decided only that the particular search at issue met the requirements of the Fourth Amendment” *United States v. Lifshitz*, 369 F.3d 173, 180 (2d Cir. 2004).

Knights, that the search in FP1¹²³ would be reasonable so long as the government was acting with “reasonable suspicion.”¹²⁴ FP2 would also likely be deemed reasonable, if challenged at all, because the search and/or monitoring is conducted pursuant to a valid probation condition and any evidence gathered is only intended for use at an administrative probation revocation hearing.

PART VI. TRACK II SPECIAL NEEDS

i. The “Special Needs” Approach

Although the predominant rule requires a judicial warrant based on probable cause,¹²⁵ the Court has recognized exceptions to this rule “when *special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause re-

¹²³ See *supra* Part I(ii)(1).

¹²⁴ As the exclusionary rule does not apply to probation revocation hearings, FP2 is also the least likely to be contested given that any evidence gathered will be suppressed and inadmissible in a judicial hearing and there is no remedy which would allow it to be directly appealed for purposes of revocation generally. In *United States v. Yuknavich*, 419 F.3d 1302, 1309-10 (11th Cir. 2005), the Eleventh Circuit applied the *Knights* balancing test where there was not a specific condition related to warrantless searches.

The only major difference between the case before us and *Knights* is that *Knights*' probation agreement contained a provision explicitly requiring him to submit to warrantless searches, whereas no such provision is present here. We must consider whether, in this case, the lack of search condition upsets the *Knights* balancing test so as to require more than reasonable suspicion to justify a search of Yuknavich's computer. Cf. *United States v. Brown*, 346 F.3d 808, 812 (8th Cir. 2003) (considering “whether, given the scope of Brown's probationary condition, the presence of the additional personnel sway[ed] the [*Knights*] balancing test”).

....

In sum, assuming the lack of a search condition heightened Yuknavich's expectation of privacy, it did not sway the *Knights* balancing test such that the probation officers needed more than reasonable suspicion to conduct a search of Yuknavich's computer.

Id. at 1309, 1311.

¹²⁵ See, e.g., *Payton v. New York*, 445 U.S. 573, 588 n.26 (1980).

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quirement impracticable."¹²⁶ "Special needs" have been recognized in a variety of contexts including "[t]he Government's interest in . . . its supervision of probationers."¹²⁷

Tracey Maclin has stated, correctly in my view, that "[w]hile the Court has issued several rulings under its 'special needs' analysis, these cases do not form a coherent doctrine."¹²⁸

In the context of warrantless searches, the "special needs" exception gained a head of steam between 1989 and 1995 and seemed poised to emerge as the rule instead of the exception. The Court appeared to have abandoned the original constructs (1) that "*special needs*" be beyond the normal need for law enforcement;" and (2) the type of search at issue "make the warrant and probable-cause requirement impracticable."¹²⁹

¹²⁶ Skinner v. Ry Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (citation omitted) (emphasis added).

¹²⁷ *Id.* at 620; see also Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002) (applying Fourth Amendment "special needs" doctrine to school drug testing of students involved in extracurricular activities); Chandler v. Miller, 520 U.S. 305 (1997) (applying Fourth Amendment "special needs" doctrine to mandatory drug testing for political candidates); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (applying Fourth Amendment "special needs" doctrine to school drug testing of student-athletes); New Jersey v. T.L.O., 469 U.S. 325 (1985) (applying Fourth Amendment "special needs" doctrine to in-school searches of students conducted by faculty).

¹²⁸ Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 107 (2005); see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 597 (1994) (indicating some confusion in the name and actual application of the doctrine).

The Supreme Court has also not required individualized suspicion when a "special need" of the government is present. The term "special need," however, is misleading. The Court is not referring to any "need" in the sense of necessity; rather, it speaks of a special *interest*. Also, although the initial cases adopting the concept involved governmental regulatory interests unrelated to criminal penalties, the Court has now excised from the definition of a special need the requirement that the interest must be unrelated to criminal law enforcement. What is considered a special need has evolved to include some very mundane criminal law enforcement concerns.

Id. (emphasis added).

¹²⁹ See *supra* note 126 and accompanying text.

However, in 1995, the Court, in *Chandler v. Miller*,¹³⁰ appeared to want to “cabin the earlier decisions upholding suspicionless searches as belonging to a ‘closely guarded category’ of cases ‘involving limited circumstances.’”¹³¹ If *Chandler* slowed the “special needs” train, the Court, in *City of Indianapolis v. Edmond*¹³² and *Ferguson v. City of Charleston*,¹³³ seemed to want to return the “special needs” doctrine to its roots.¹³⁴ Viewed collectively, *Edmond* and *Ferguson*, set forth a “primary purpose” test: “What is the *primary purpose* to which the government intends to put the results of the search?”¹³⁵ If the answer is to collect evidence for law enforcement purposes, the “special needs” will not be applicable.¹³⁶ At first glance, the

¹³⁰ 520 U.S. 305 (1997) (striking law that required drug testing for all candidates seeking certain state offices).

¹³¹ Sundby, *supra* note 7, at 516. “The *Chandler* Court thus made a strenuous effort to characterize its prior “special needs” cases as the exception rather than the rule.” *Id.* at 517.

¹³² 531 U.S. 32 (2000); see Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 97-98 (1992) (“Since noncriminal penalties are assessed against citizens detected in administrative searches, and since these searches are primarily intended to advance government policy rather than to criminally punish, the Supreme Court has had little difficulty embracing the constitutionality of administrative searches premised on decreasing levels of suspicion.”).

¹³³ 532 U.S. 67 (2001) (striking down law where hospital employees and law enforcement cooperated to test pregnant women for drugs via urine samples and turn over results to police); see Christopher Mebane, Note, *Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 HOUS. L. REV. 177, 209 (2003).

¹³⁴ The roots: The term “special needs” first appeared in Justice Blackmun’s concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Justice Blackmun agreed with the Court that there are “limited exceptions to the probable-cause requirement” in which reasonableness is determined by “a careful balancing of governmental and privacy interests,” but concluded that such a test should only be applied “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Id.* Interestingly, Justice Blackmun dissented in *Griffin* as he was the author of the concurrence that formed the basis for the “special needs” doctrine in *T.L.O.*

¹³⁵ Jonathon Kravis, Comment, *A Better Interpretation of “Special Needs” Doctrine After Edmond and Ferguson*, 112 YALE L.J. 2591, 2593-94 (2003) (emphasis added).

¹³⁶ *Id.*

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“primary purpose” test would appear to be the death knoll (under “special needs”) for searches of probationer's homes where the primary purpose is to generate evidence for use in a criminal proceeding.¹³⁷ While criminal investigatory searches (i.e., FP1) would seem, at first glance, to fail in light of *Edmond* and *Ferguson*, routine (administrative) probationary searches (i.e., FP2) would likely survive, for they fit the original model of the “special needs” warrantless search.¹³⁸

ii. A Return to Griffin After Ferguson

While the general momentum of “special needs” seemed to be harnessed by *Edmunds* and *Ferguson*,¹³⁹ a lone footnote in *Ferguson* makes all the difference to our inquiry and returns the “special needs” analysis in the context of probationers directly back to *Griffin*.¹⁴⁰ Although lengthy, the text of “Footnote 15” is worth including in its entirety because of the Court's analysis in relation to the “special needs” doctrine and probationers:

As THE CHIEF JUSTICE recently noted: “The ‘special needs’ doctrine which has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.” *Indianapolis v.*

¹³⁷ See *supra* Part I(ii)—basically, this type of search would be indicated in FP1; see also *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395 (5th Cir. 2002).

¹³⁸ See *supra* note 124 and accompanying text.

¹³⁹ See *Mebane*, *supra* note 133, at 209 (“For practitioners and administrators, *Ferguson* means that special needs search regimes must be insulated from law enforcement entanglement, at least to the extent that a policy or program becomes indistinguishable from the general interest in crime control.”). But see *Ferguson*, 532 U.S. at 100 (Scalia, J., dissenting) (“But that is quite impossible, since the special-needs doctrine was developed, and is ordinarily employed, precisely to enable searches by law enforcement officials who, of course, ordinarily have a law enforcement objective.”). I honestly cannot figure out what Justice Scalia means by this probation in the context of the history of the “special needs” doctrine. Scalia then cites to *Griffin, id.*, which is more the exception to the “special needs” doctrine than the rule, and does not explain how the doctrine was developed by law enforcement officials in any other context.

¹⁴⁰ *Ferguson*, 532 U.S. at 79 n.15.

Edmond, 531 U.S. 32, 54 (2000) (dissenting opinion); see also nn. 16-17, *infra*. In *T.L.O.*, we made a point of distinguishing searches “carried out by school authorities acting alone and on their own authority” from those conducted “in conjunction with or at the behest of law enforcement agencies.” 469 U.S., at 341, n.7.

The dissent, however, relying on *Griffin v. Wisconsin*, 483 U.S. 868 (1987), argues that the special needs doctrine “is ordinarily employe[d], precisely, to enable searches by law enforcement officials who, of course, have a law enforcement objective.” *Post*, at 1300. Viewed in the context of our special needs case law and even viewed in isolation, *Griffin* does not support the proposition for which the dissent invokes it. In other special needs cases, we have tolerated suspension of the Fourth Amendment’s warrant or probable-cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any entanglement with law enforcement. See *Skinner*, 489 U.S. at 620-621; *Von Raab*, 489 U.S. at 665-666; *Acton*, 515 U.S., at 658. Moreover, after our decision in *Griffin*, we reserved the question whether “routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise, impugn the administrative nature of the . . . program.” *Skinner*, 489 U.S., at 621 n.5. In *Griffin* itself, this Court noted that “[a]lthough a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen.” 483 U.S., at 876. Finally, we agree with petitioners that *Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large. *Id.* 874-875.¹⁴¹

“Footnote 15” seems to maintain the viability of the “special needs” test in the context of probationary searches and/or monitoring. Two primary, relevant themes are set forth:

- (1) The question left open: whether the “routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise, impugn the administrative nature of the . . . program” goes to the heart of the distinction between the two “Fact Patterns” set forth in Part I(ii). Given that the evidence being collected is for “routine use in criminal prosecutions,” the question is left open as to FP1. FP2 seems to survive, and even flourish, under the “reigned in” view of “special needs” set forth in *Ferguson*, as it fits the original

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conception of "special needs."¹⁴²

(2) Next, the Court provides itself an "out" by providing that *Griffin* is a special, "special needs" case because "probationers have a lesser expectation of privacy than the public at large."¹⁴³

Ferguson basically separates *Griffin* from the rest of the cases that make up the "special needs" doctrine.¹⁴⁴ As such, and due to its continued viability in the "special needs" area for probationers in light of *Ferguson*, a detailed examination of *Griffin* continues to be necessary.

iii. Griffin v. Wisconsin

On September 4, 1980, Joseph G. Griffin, a convicted felon, "was convicted in Wisconsin state court of resisting arrest, disorderly conduct, and obstructing an officer."¹⁴⁵ He was placed on probation.¹⁴⁶ One of the probation department's regulations, and thus one of the conditions of Griffin's probation permitted "any probation officer to search a probationer's home without a warrant as long as his supervisor approves and as long as there are 'reasonable grounds' to believe the presence of contraband—including any item that the probationer cannot

¹⁴² See *supra* note 127 and 139 and accompanying text. A probation officer, conducting computer monitoring as part of the regular supervision of an offender, where evidence and information collected will be used administratively instead of for the "law enforcement" purpose of criminal prosecution, and getting a warrant every time a probation officer conducted a routine "home visit" would both qualify as impracticable.

¹⁴³ See *supra* note 134 and Part VIII(ii) related to the warrant requirement and "special needs." This diminished reasonable expectation of privacy is asserted in numerous contexts as the reason that a warrant is not necessary even to search a private home.

¹⁴⁴ See *Ferguson*, 532 U.S. at 79 n.15. The "rules" do not apply because Footnote 15 makes the "primary purpose" test inapplicable to the "special needs" analysis set forth in *Griffin* for probationers.

¹⁴⁵ *Griffin v. Wisconsin*, 483 U.S. 868, 870 (1987).

¹⁴⁶ *Id.* "Wisconsin law puts probationers in the legal custody of the State Department of Health and Social Services and renders them 'subject . . . to . . . conditions set by the court and rules and regulations established by the department.'" *Id.* (citation omitted).

possess under the probation conditions."¹⁴⁷

In April 1983, while Griffin was on probation, a supervisor from the probation department received word from a local police detective that "there were or might be guns in Griffin's apartment."¹⁴⁸

The supervisor, who was unable to locate Griffin's regularly-assigned probation officer, went to Griffin's apartment accompanied by another probation officer and three plainclothes police officers.¹⁴⁹ Griffin answered the door, and the probation officers identified themselves and stated "that they were going to search his home."¹⁵⁰ A handgun was recovered during the search.¹⁵¹

"Griffin was charged with possession of a firearm by a convicted felon."¹⁵² Griffin's motion to suppress the evidence was denied by the trial court, and he was convicted by a jury and sentenced to two years imprisonment.¹⁵³

The Wisconsin Supreme Court affirmed Griffin's conviction and found the denial of suppression proper, holding that the probation officer had "reasonable grounds" based on the tip of

¹⁴⁷ *Id.* at 870-71 (citing Wis. ADMIN. CODE HSS §§ 328.21(4), 328.16(1) (1981)).

The rule provides that an officer should consider a variety of factors in determining whether "reasonable grounds" exist, among which are information provided by an informant, the reliability and specificity of that information, the reliability of the informant (including whether the informant has any incentive to supply inaccurate information), the officer's own experience with the probationer, and the "need to verify compliance with rules of supervision and state and federal law." HSS § 328.21(7) Another regulation makes it a violation of the terms of probation to refuse to consent to a home search. HSS § 328.04(3)(k).

Id. at 871.

¹⁴⁸ *Id.* Is not this statement really the same thing as simply saying, "There might be guns in Griffin's apartment."?

¹⁴⁹ *Id.* Apparently, the police officers were involved only to provide protection for the two probation officers.

¹⁵⁰ *Id.* The search was "carried out entirely by the probation officers under the authority of Wisconsin's probation regulation." *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 872. This possession charge is, itself, a felony. *Id.*

¹⁵³ *Id.* His conviction was affirmed by the Wisconsin Court of Appeals. *Id.*

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the informant detective.¹⁵⁴ The United States Supreme Court, in a 5-4 opinion authored by Justice Scalia, agreed with the Wisconsin Supreme Court's ruling that the search did not violate the Fourth Amendment; however, the Court rejected a "new principle of law . . . that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal 'reasonable grounds' standard."¹⁵⁵

The Court held that the search was constitutional because "it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under *well-established principles*."¹⁵⁶

The "well-established principles" Justice Scalia referred to was the "special needs" doctrine, which first peered up, like a gopher from a hole, in the Court's Fourth Amendment jurisprudence just two years earlier in *New Jersey v. T.L.O.*¹⁵⁷ Regardless, a

¹⁵⁴ *Id.*

On further appeal, the Wisconsin Supreme Court also affirmed. It found denial of the suppression motion proper because probation diminishes a probationer's reasonable expectation of privacy—so that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only "reasonable grounds" (not probable cause) to believe that contraband is present. It held that the "reasonable grounds" standard of Wisconsin's search regulation satisfied this "reasonable grounds" standard of the Federal Constitution, and that the detective's tip established "reasonable grounds" within the meaning of the regulation, since it came from someone who had no reason to supply inaccurate information, specifically identified Griffin, and suggested a need to verify Griffin's compliance with state law.

Id.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 873 (emphasis added); see *supra* note 124 and accompanying text. To call the "special needs" doctrine, especially in 1987, two years after its "birth," "well-established" is a stretch.

¹⁵⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). *T.L.O.* seems strikingly different from *Griffin* as it related to the "high-stakes" world of a high school principal searching a bratty fourteen-year-old girl's purse for cigarettes. *Id.* at 328. The search did become somewhat "high[er]-stakes" as it was revealed later that the freshmen girl (T.L.O.) not only had cigarettes, but also a "a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing." *Id.* at 328 (majority opinion). Okay, so she is not really a smart drug

bare majority held that, due to the “special needs” of probation, a warrant was not required to search the home of a probationer in light of the circumstances at issue in *Griffin*.¹⁵⁸

The Court's holding, overall, that the search of a probationer, because of the “special needs” of supervising probationers generally, was “reasonable” for purposes of Fourth Amendment analysis, because “it was conducted pursuant to a valid regulation governing probationers.”¹⁵⁹

This broad holding would indicate that if a state enacts a regulation governing offenders with a conviction for Internet-related child pornography that is facially valid under the Fourth Amendment, due to the “special needs” of supervising probationers, it would pass constitutional muster under *Griffin*.

Three factors call into question this seemingly simple conclusion. First, the holding was by a bare 5-4 majority.¹⁶⁰ Next, in *Knights*, the Court could have seemingly applied the “special needs” precedent set forth in *Griffin*, but instead chose to review the search of Knights' apartment under a general “reasonableness” standard.¹⁶¹ Finally, an unfortunate (in both name and holding) Second Circuit ruling, *United States v. Lifshitz*¹⁶² muddies the seemingly clear waters of applying the “special

dealer, just a drug dealer. An interesting intersection between the law and popular culture occurred in 1985, with Motley Crue's smash hit remake of *Smokin' in the Boy's Room* released July 13, 1985 the same year as the Court's ruling in *T.L.O.* Obviously, 1985 was the crescendo year for smoking in high school bathrooms for both girls and boys.

¹⁵⁸ *Griffin*, 483 U.S. at 873.

¹⁵⁹ *Id.* at 880. “This conclusion makes it unnecessary to consider whether, as the court below held and the State urges, any search of a probationer's home by a probation officer is lawful when there are ‘reasonable grounds’ to believe contraband is present.” *Id.* (emphasis added).

¹⁶⁰ *Id.* at 868. This may be becoming less relevant as Justice O'Connor joined this slight majority back in 1987 and her replacement, be it Judge Roberts or someone else will likely be more, not less, likely to affirm the holding in this case if applied to a future set of facts. The Justices dissenting in several written and joined dissents were Blackmun, Marshall, Brennan and Stevens. Obviously, only Justice Stevens remains on the bench from this group.

¹⁶¹ *Knights*, 534 U.S. at 118.

¹⁶² 369 F.3d 173 (2d Cir. 2004).

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needs" doctrine to a warrantless probationary search of a home pursuant to a condition of probation.

iv. United States v. Lifshitz

In early 2001, as part of an investigation related to the source of certain transmissions of child pornography, FBI agents visited the home of Brandon Lifshitz.¹⁶³ The Lifshitzs consented to a search of a computer located in the home and also cooperated with FBI agents by submitting voluntarily to interviews.¹⁶⁴ During the interviews, Lifshitz admitted that he had both downloaded and transmitted child pornography since the year 2000.¹⁶⁵

Lifshitz was indicted for two counts of violating federal child pornography law.¹⁶⁶ Pursuant to a plea bargain, Lifshitz pled guilty to one count of receiving child pornography in exchange for the government's agreement to drop the remaining count.¹⁶⁷

As a matter of right, defense counsel submitted a letter requesting that the court depart downward to a non-custodial sentence.¹⁶⁸ After hearing the evidence, Judge Patterson, the

¹⁶³ *Id.* at 175. The Lifshitz household included Brandon, then thirty years old, his mother, sister and niece. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Brandon's mother "corroborated this account, indicating that she had observed him examining these materials on the computer and repeatedly requested that he delete them." *Id.* It is clear that this is not exactly the Walton's, looking at child porn with Mom looking on. The court notes: "The history of [Brandon's] past relationships was not, however, reassuring. As a teenager, he had initiated an incestuous liaison with his sister, and he had, more recently, pursued a correspondence over the Internet with an 18-year-old woman in Michigan to whom he ultimately paid a visit." *Id.* at 176.

¹⁶⁶ *Id.* at 175. "The first count alleged that he had 'unlawfully, willingly, and knowingly received [on his computer] child pornography . . . which had traveled in interstate commerce,' and the second stated that he had also 'unlawfully, willingly, and knowingly distributed child pornography . . . in interstate commerce.'" *Id.*

¹⁶⁷ *Id.* at 176.

¹⁶⁸ *Id.* Defense's request for "downward departure" was based on the claim that "Lifshitz's capacity was diminished at the time of the offense because he lacked the ability to control behavior that he knew was wrong." The defense entered three letters prepared by psychiatrists who interviewed Brandon. *Id.*

trial court judge, sentenced Lifshitz to three years probation rather than send him to prison.¹⁶⁹

However, while deciding not to send Lifshitz to prison, the Judge expressly enumerated other requirements.¹⁷⁰ It seems clear that if this type of monitoring was not available to the court, the Judge may well have sentenced Lifshitz to prison.¹⁷¹ It should be noted that the trial Judge imposed the additional probation condition "at the same time" he granted the ten-level downward departure which allowed Lifshitz to avoid prison.¹⁷² This timing indicates that the Judge felt this type of monitoring was crucial if Lifshitz was not to be incarcerated.¹⁷³

The relevant probation condition at issue in Lifshitz's appeal reads:

[T]he defendant shall consent to the installation of systems that will enable the Probation office or its designee to monitor and filter computer use on a regular or random basis and any computer owned or controlled by the defendant. The defendant shall consent to unannounced examinations of any computer equipment owned or controlled by the defendant which may result in the retrieval and copying of all data from the computer and any internal or external peripherals and may involve removal of such equipment for the purpose of conducting a more thorough investigation.¹⁷⁴

Unlike the Supreme Court rulings in *Griffin* and *Knights*, the Second Circuit, in *Lifshitz*, dealt specifically with a particular condition of probation: "computer monitoring . . . imposed upon

¹⁶⁹ *Id.* at 177. Judge Patterson stated: "I think the most important thing for the defendant is continued treatment and I don't think that for the variety of psychological problems that he has, not the least of which is his problem with attraction to children under the age of 18, . . . sentencing to prison will accomplish that objective." *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* "At the same time as it granted this ten-level downward departure, the court imposed certain probation conditions, one of which underlies Lifshitz's appeal." *Id.* (emphasis added).

¹⁷² *Id.*

¹⁷³ It also seems that if the defense did not intend to comply with the conditions of probation they could have instead asked the judge to incarcerate Lifshitz. Defense counsel did "vigorously object[] to this condition;" however, they did not instead choose incarceration. *Id.*

¹⁷⁴ *Id.*

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a probationer¹⁷⁵ and whether the condition “infringes upon his right to be free of unreasonable searches.”¹⁷⁶ As such, the facts in *Lifshitz* are closer in several respects to the fact pattern set forth in Part I(ii)(2), *supra*.

The ruling in *Lifshitz* is straightforward. The court “holds that the ‘special needs’ of a probation system may render a computer monitoring reasonable” generally under the Fourth Amendment; however, in this particular case the specific monitoring condition “may be overbroad.”¹⁷⁷ Due to the possible overbreadth of the condition at issue in *Lifshitz*, the Second Circuit remanded the case to the district court for the “imposition of a condition consistent with this opinion.”¹⁷⁸

The *Lifshitz* court, after expressly holding that the “special needs” doctrine should apply, ruled in a manner that totally eviscerated the reality of what probation is and why probation officers search probationer's dwellings or conduct home visits in the first place. Stated differently, the Second Circuit, in applying the “special needs” doctrine totally forgot about what makes supervising probationers “special” in the first place and why it is treated distinctly under the Supreme Court's Fourth Amendment jurisprudence.¹⁷⁹

To evaluate the constitutionality of the type of computer monitoring at issue in *Lifshitz*, the Second Circuit sought to “discern[] the kind of search to which computer monitoring bears the closest resemblance.”¹⁸⁰ The court concluded that

¹⁷⁵ *Id.* at 175. In this instance a probationer with a previous conviction for Internet-related Child Pornography. *Id.* at 173.

¹⁷⁶ *Id.* at 175. Other sections of this article will deal with the initial question as to whether this condition is “imposed” upon a probationer when the alternative is jail. *See supra* Part III.

¹⁷⁷ *Id.* at 175. The holding that this type of monitoring is “overbroad” can be viewed as somewhat inconsistent with the Second Circuit's ruling, two years earlier, in *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002).

¹⁷⁸ *Id.* at 175.

¹⁷⁹ *See supra* Part VI(i).

¹⁸⁰ *Id.* at 182. (“Considering the contours of special needs searches is instructive as to the permissible extent of such searches under the Fourth Amendment.”). *Id.*

computer monitoring “bears the closest resemblance” to drug testing in the special needs context.¹⁸¹

While drug testing may be analogous in certain ways,¹⁸² there are several distinctions, both theoretical and technological, which question the value of the court's use of this analogy.¹⁸³

The court speaks specifically to the degree of “narrow tailoring” available in computer monitoring:

In order to comply with the requirements of the Fourth Amendment, the monitoring condition must be narrowly tailored, and not sweep so broadly as to draw a wide swath of extraneous material into its net. Drug testing procedures provide the relevant point of comparison here. As the Supreme Court has consistently emphasized, urinalysis and other means of determining drug use should be precisely targeted to ascertain only whether an individual has used illegal substances.¹⁸⁴

In other words, the court believes that monitoring should be “narrowly tailored” in a manner that the probation officers would somehow monitor or examine a computer and only learn whether the probationer has looked at child porn and learn nothing else about their viewing habits or history.¹⁸⁵ While it may be possible to draw blood or urine and test it in a manner that only gives a “positive” or “negative” as to whether marijuana (THC) or cocaine is present, no technology currently

¹⁸¹ *Id.* The court noted that “[t]he government insisted in both its brief and at oral argument that drug testing conditions constituted an apt analogy to the computer monitoring condition” *Id.*

¹⁸² *Id.* at 189. “As we have previously observed . . . there is a high rate of recidivism among sex offenders like drug users.” *Id.* (citation omitted).

¹⁸³ *But see id.* at 182 (The government agreed that this was a proper analogy).

¹⁸⁴ *Id.* at 190.

¹⁸⁵ *Id.*; see Thomas K. Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 Miss. L.J. 193 (2005).

Such close tailoring analysis is, however, inappropriate in the Fourth Amendment context, which, instead of barring governmental intrusions, requires only that the intrusion be reasonable. This is to say that reasonableness is a more forgiving concept than a least intrusive means analysis allows. In accordance with that mandate, the means need be only reasonably related to the justification for the intrusion.

Id. at 215.

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exists that will simply give a “positive” or “negative” as to whether an offender viewed or downloaded child porn without providing additional, and in many cases, “extraneous[,] material[s]” to the officer monitoring the offender.¹⁸⁶ In a probation setting, the “extraneous materials” are relevant as the goal of supervised release is to determine how the individual is living, not necessarily whether they are breaking particular criminal laws.¹⁸⁷ Further, if such technology did exist, while it would be extremely valuable in performing forensic computer examinations, because of the goals of supervised release, a simple yes or no to the question of whether child pornography is present on the computer does not fully meet the needs of probation. Further, the court is also seemingly mixing apples and oranges by interchanging the concepts of “testing” and “monitoring.”

In *Lifshitz*, the court states that the computer monitoring

¹⁸⁶ *But see infra* Part IX.

¹⁸⁷ *See supra* note 21 and accompanying text. This distinction, between revealing only criminal activity and “extraneous information” or “information about perfectly lawful activity,” while not directly relevant in the probation context, has been considered twice recently by the United States Supreme Court. *See Illinois v. Caballes*, 125 S. Ct. 834 (2005); *Kyllo v. United States*, 533 U.S. 27 (2001).

Accordingly, the use of a well-trained narcotics-detection-dog, one that “does not expose noncontraband items that otherwise would remain hidden from public view,” during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally recognized infringement.

This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as “at what hour each night the lady of the house takes her daily sauna and bath.” The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 125 S. Ct. at 838 (citations omitted).

“must . . . remain narrow.”¹⁸⁸ In identifying the relation of computer monitoring to other types of “special needs” searches, the court identifies that, for permissible warrantless testing the following three requirements must be met:

1. Reduced expectation of privacy on the testing subject;
2. Random or otherwise non-discretionary implementation of the testing program; and
3. Narrowness of the scope of testing.¹⁸⁹

While this might appear to be an accurate test for suspicionless drug testing in the areas of education¹⁹⁰ and certain types of employment,¹⁹¹ the application of these requirements in a probation setting is misplaced. Although, in the context of probation No. 1, above, will always be met, the second two parameters have nothing to do with the supervisory activities of a probation department and are misplaced within the parameters of why the “special needs” doctrine was created, and applied to probation supervision, to begin with.¹⁹²

v. The Special Needs Approach—Continued Viability

The *Lifshitz* anomaly aside,¹⁹³ the “special needs” doctrine remains viable as a relevant analysis for court's to apply in reviewing the search and/or monitoring of a probationer's computer.¹⁹⁴ Using “special needs” as the basis for reasonableness

¹⁸⁸ *Lifshitz*, 369 F.3d at 189.

¹⁸⁹ *Id.* at 183.

¹⁹⁰ See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

¹⁹¹ See, e.g., *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹⁹² See *supra* Part VI.

¹⁹³ An additional reason that *Lifshitz* seems to be an anomaly is that it is what appears to be a facial Fourth Amendment challenge. In other words, *Lifshitz* has not been subject to a particular search for a court to review, instead, he is challenging the general validity of the probation condition prior to any actual search being conducted pursuant to it.

¹⁹⁴ See *supra* Part VI.

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under *Griffin* appears strongest when the government actors are probation officers and the search and/or monitoring is pursuant to an otherwise valid probation regulation.¹⁹⁵ This is most akin to FP2.¹⁹⁶ The validity of “special needs” weakens in FP1 because of both the level of individualized suspicion and the fact that these searches are in conflict with the two primary bases of “special needs,” that the search be for a non-law enforcement purpose and obtaining a warrant would be “impracticable.”¹⁹⁷

PART VII. PLACING PROBATIONARY COMPUTER SEARCHES OF SEX OFFENDERS IN THE HISTORICAL CONTEXT OF THE FOURTH AMENDMENT: GENERAL WARRANTS, “WRITS OF ASSISTANCE” AND THE “RIGHT TO BE LEFT ALONE”

Gauging modern search and seizure conundrums in the context of James Otis¹⁹⁸ and the oppressive English practices of general warrants¹⁹⁹ and “writs of assistance” is an important return to the basic premises that underlie our Fourth Amendment.²⁰⁰ George C. Thomas, III was correct in his statement “[h]istory has probably been used (and misused) more frequently in

¹⁹⁵ See *supra* note 24.

¹⁹⁶ See *supra* part I(ii)(2).

¹⁹⁷ See *supra* note 133 and accompanying text.

¹⁹⁸ See generally, Thomas K. Clancy, *Introduction to James Otis Lectures*, 74 MISS. L.J. 627, 628-29 (2004) (“Otis would become one of the greatest patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will forever remain first among America’s Fourth Amendment advocates.”).

¹⁹⁹ Sundby, *supra* note 7, at 511 (“Not surprisingly, the Court’s growing receptivity to the idea that a search or seizure can be “reasonable” outside the traditional requirements of the Warrant Clause has had important ramifications. For our purposes of thinking about a rebirth of concern over general warrants, . . .”).

²⁰⁰ See John M. Burkoff, *The Fourth Amendment and Terrorism*, 109 PENN ST. L. REV. 911, 912 (2005) (“In short, the protections enshrined in the Fourth Amendment are important not only because they are the law, and not only because they are part of our Bill of Rights, but also because they are a vital and significant part of our history, our self-identity, our democracy, and our national culture.”).

seeking to understand the Fourth Amendment than all other criminal procedure rights combined.”²⁰¹ The general story of Otis, and his dramatic oratory that sparked the birth of “child Independence”²⁰² is well-documented in Fourth Amendment lore.²⁰³

²⁰¹ George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1460 (2005).

²⁰² NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 59 (1937).

²⁰³ See generally, Alison L. LaCroix, “Bound Fast and Brought Under the Yoke”: John Adams and the Regulation of Privacy at the Founding, 72 FORDHAM L. REV. 2331, 2350 (2004); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN. DIEGO L. REV. 227, 260-61 (2005). See also Scott E. Sundby, *Protecting Citizen “Whilst He is Quiet”*: Suspicionless Searches, “Special Needs” and General Warrants, 74 MISS. L.J. 501, 538-43 (2004) (discussion of Otis’s argument against “writs of assistance” as well as full-text of speech that author correctly asserts “is a speech that every student of criminal procedure should be exposed to at least once”); *United States v. Rabinowitz*, 339 U.S. 56, 69-72 (1950) (Frankfurter, J., dissenting) (detailing Otis’s argument as a “clue” to the meaning and scope of Fourth Amendment), *overruled on other grounds by*, *Chimel v. California*, 395 U.S. 752, 768 (1969).

In February 1761, Otis delivered his famous speech against the Writs of Assistance in the council chamber at Boston’s Old State House. He spoke for four hours before a panel of judges including Lieutenant Governor and chief Justice Thomas Hutchinson. In those four hours lit the spark of revolution in his compatriots’ hearts. John Adams, who was present when Otis delivered his speech, later stated, “Mr. Otis’ oration breathed into this nation the breath of life . . . then and there was the first scene of the first act of the opposition to the arbitrary claims of Great Britain . . . American independence was then and there born.”

In his speech Otis argued that the British writs were not constitutional. But his arguments transcended the issues of common law. He maintained that the writs were in violation of natural law, elevating the issues at hand to political and philosophical levels. He even spoke of human rights and used the speech to denounce slavery.

Though no copies of the speech have survived, those who heard it described it as “eloquent,” “impassioned,” “monumentous,” and the product of “conclusive reasoning.” Adams did take notes during the speech and 60 years later attempted to reconstruct what he could of Otis’ oration. He later said, “Otis was a flame of fire” and that he had “a prophetic glance of his eyes into futurity.”²⁰⁴ Otis even made reference to “my country” when referring to the colonies, marking the first instance of anyone conceiving of a nation separate and independent from the crown.

James “Patriot” Otis, available at <http://www.otismac.com/HISJamesThePatriot.htm> (last visited Aug. 23, 2005) [as with anything dating back to 1761, certain details and exactness of quotes differs in the passage included on

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I maintain that probationary computer searches (and monitoring) can be distinguished (at least conceptually) from the highly-despised general warrants²⁰⁴ and “writs of assistance” of Otis’s times based on two primary bases: (1) legal status of probationer; and (2) searches are not directly pursuant to legislative action.²⁰⁵

i. Legal status of the Child Pornographer / Probationer

Otis’s oft-quoted words: “A man’s house is his castle—and [*whilst*] he is quiet, he is as well guarded as a prince in his castle.”²⁰⁶ While the context of the search at issue is in the home,²⁰⁷ an individual convicted of Internet-related child pornography who is on probation instead of being incarcerated is hardly the type of “quiet” citizen Otis likely envisioned.²⁰⁸

the www.otismac.com website from other sources I have read and cited herein].

²⁰⁴ See *supra* note 80 and accompanying text for contract analysis applied to dismiss what was basically a “general warrant” argument.

²⁰⁵ “[T]he history of the [Fourth] Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate. In stark contrast, the Framers did not fear that judicial officers . . . posed a serious threat to Fourth Amendment values.” *Illinois v. Krull*, 480 U.S. 340, 364 (1987) (O’Connor, J., dissenting). “The distinction drawn between the legislator and the judicial officer is sound. The judicial role is particularized, fact specific, and nonpolitical.” *Id.* But see CASS R. SUNSTEIN & RICHARD A. EPSTEIN (editors), *THE VOTE—BUSH, GORE & THE SUPREME COURT* 1-266 (2001) (for a series of eleven essays, and additional commentary, on the role of the United States Supreme Court (both positive and negative views) in the 2000 presidential election and the resulting case, *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*)); Editorial, *Judge Roberts’s Record*, WASH. POST, July 25, 2005 at A18 (one example of the highly politicized nature of United States Supreme Court nomination and confirmation).

²⁰⁶ James Otis, *Against the Writs of Assistance* (1761), reprinted in M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 548, 554 (1978) (emphasis added). I have to mention and thank my colleague David Case for humorously reminding me of the irony in the “whilst he is quiet” language. Sometimes when people are too quiet is when you must worry about them the most.

²⁰⁷ See *supra* note 14 and accompanying text.

²⁰⁸ The Seventh Circuit seemed to reject a general warrant argument on behalf of a probationer generally based on the fact that the offender could be incarcerated which would be more restrictive than even a general warrant. *Barnett*, 415 F.3d at 692.

Barnett argues that to enforce such a blanket consent would invite abuse—for what if the

Further, the idea of “retreat[ing] thence” into ones “castle’ is somehow lost in the context of the pedophile hooked up to almost instantaneous international access via high-speed Internet connection.²⁰⁹ The idea of the home as a “sanctuary”²¹⁰ may be increasingly misplaced in a technological time where an individual is physically and geographically in their home, but virtually and digitally “out in public.”²¹¹

Another Fourth Amendment and privacy standby, the unenumerated, but ever-popular, right “to be left alone”²¹² is also problematic for individuals on probation. Can a sex offender who is on probation, who could be incarcerated instead, really expect “to be left alone”?²¹³

probation officer decided to camp in Barnett’s home and search him every five minutes? This argument ignores not only the alternative facing Barnett—the greater deprivation of privacy entailed by most forms of imprisonment, though this depends on the specific rules and conditions of the particular prison

Id.

²⁰⁹ See Christa M. Book, *Do You Really Know Who is On the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children*, 14 ALB. L.J. SCI. & TECH. 749, 750 (2004) (“Pedophiles have easier access to children in the age of the Internet; they can literally enter a child’s home and not be detected.”).

²¹⁰ See, e.g., *Segura v. United States*, 468 U.S. 796, 810 (1984) (“The sanctity of the home is not to be disputed.”); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (noting “sanctity of the home”).

²¹¹ A full discussion of this distinction is outside the scope of this article.

²¹² See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); see also THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888) (“The right to one’s person may be said to be a right of complete immunity: to be left alone.”) (in the context of assault and battery, not government searches); Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 MISS. L.J. 553, 554-55 (2004).

²¹³ It seems increasingly unrealistic. See, e.g., Jennifer B. Siverts, *Punishing Thoughts Too Close to Reality: A New Solution to Protect Children from Pedophiles*, 27 T. JEFFERSON L. REV. 393 (2005).

Creative measures affecting pedophiles have been implemented at each stage of the criminal justice process. At the trial stage, Federal Rules of Evidence 414 and 415 allows evidence of past, similar acts of child molestation to be admitted in criminal and civil cases where the accused faces a child molestation allegation. This renders prosecution much easier. At the sentencing stage, some states offer or even require as a condition of probation, administration of the drug Depo-Provera, which renders a person impotent, thereby eliminating the threat repeat sex offend-

2005] *COMPUTER SEARCHES OF PROBATIONERS* 333*ii. "Search" Not Pursuant to Legislative Action*

"[L]egislative abuse was precisely the evil the Fourth Amendment was intended to eliminate. In stark contrast, the Framers did not fear that judicial officers, the state actors at issue in *Leon*, posed a serious threat to Fourth Amendment values."²¹⁴ The analysis here is somewhat skewed. In many cases what is being challenged is law enforcement action taken pursuant to legislative enactment that is imposed²¹⁵ and applied by the judiciary. Otis's words relating to particularity and its effect on the manner in which the public is intruded upon are relevant:

In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses &c. specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the

ers pose. Once an offender is released from treatment or prison, he then must register as a convicted sex offender with the local police department. These listings are available to the public and are used by the police to investigate future cases of crimes against children.

Id. at 399; see also Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355 (2005).

The legal system does not function in a vacuum. Some acts that are governed by legal rules are also governed by social norms. In many cases, these social norms are enforced by a set of non-legal sanctions, which include internal sanctions such as guilt and external sanctions such as the refusal to interact with an offender.

Id. at 355.

SORNs, commonly known as Megan's Laws, reflect a significant change in the landscape of American criminal law. In general, these laws require convicted sex offenders who are released into the community to register as offenders and provide for some level of public notification as to the presence of a sex offender in a community. Currently, all fifty states and the District of Columbia have enacted their own SORNs.

Id. at 378.

²¹⁴ Illinois v. Krull, 480 U.S. 340, 364 (1987) (O'Connor, J., dissenting).

²¹⁵ See *supra* Part III. My view is that they are not imposed but "bargained for" and waived via consent, assuming the consent is otherwise valid.

person who asks it, that he suspects such goods to be concealed in those very places he desires to search.²¹⁶

Here, the comparison must be done by analogy, but it remains relevant. Terms of probation subsequent to a conviction are dissimilar to a general warrant that subjects all people equally to governmental intrusion without any individualized suspicion. The judicial imposition of such conditions²¹⁷ upon a certain subset of people who have been convicted of a heinous crime against children and are, therefore, subject to continuous and legitimate governmental scrutiny during the term of their probation, is far removed from the general warrants which prompted both Otis's ire and the American Revolution.

PART VIII. PROPOSAL OF MANDATORY "WARRANT-PREFERENCE"
MODEL REGARDLESS OF OCCUPANT'S REASONABLE
EXPECTATION OF PRIVACY APPLYING "PRACTICABILITY" AS
CONTROLLING STANDARD

Under either the "reasonableness" track (that the search at issue is "reasonable" under the applicable balancing) or "special needs" track (that the "special needs" exception applies and therefore the Fourth Amendment is not violated), the first prong of the Fourth Amendment: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (Reasonableness clause),²¹⁸ appears satisfied.²¹⁹ However, the second prong, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation" (Warrant clause), becomes problematic when the search at issue takes place in the home,²²⁰ and ob-

²¹⁶ *Krull*, 480 U.S. at 364-65 (O'Connor, J., dissenting) (citing 2 WORKS OF JOHN ADAMS 523 (C. Adams ed., 1850)).

²¹⁷ See *supra* note 213 and accompanying text.

²¹⁸ U.S. CONST. amend. IV.

²¹⁹ See *supra* parts V & VI.

²²⁰ See *supra* note 14 and accompanying text. This is a "constant" in both factual scenarios

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taining a warrant is not “impracticable.”²²¹

i. Reasonableness and the Warrant Clause in Context of Warrantless Probationary Searches

Fortunately, I am not required to totally “re-invent the wheel” with regards to the meaning of the “reasonableness” clause of the Fourth Amendment due to Thomas K. Clancy's exhaustive research and scholarship on the subject.²²² For the purposes of this section, I will follow the five principal models set forth in Professor Clancy's article generally.²²³ I would maintain, given that the search at issue in this analysis always involves intrusions into an individual's home,²²⁴ the warrant preference rule should apply. In the context of routine probation home-visits and the like, (i.e., FP2), the fact that a warrant is not needed is settled law.²²⁵

However, in FP1, where there is the requisite level of individualized suspicion, the fact that the “dwelling” is the home

(FP1 & FP2).

²²¹ This is the case in FP1. See *supra* Part I(ii)(1).

There is nothing about the *status* of probation that justifies a special exception to the warrant requirement under these circumstances. If in a particular case there is a compelling need to search the home of a probationer without delay, then it is possible for a search to be conducted immediately under the established exception for exigent circumstances. There is no need to create a separate warrant exception for probationers. The existing exception provides a probation agent with all the flexibility the agent needs.

Griffin v. Wisconsin, 483 U.S. 868, 885 (1987) (Blackmun, J., dissenting).

²²² See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977 (2004).

²²³ *Id.* at 978 (“The Court chooses from at least five principal models to measure reasonableness: the warrant preference model, the individualized suspicion model, the totality of the circumstances test, the balancing test, and a hybrid model that gives dispositive weight to the common law.”).

²²⁴ See *supra* Part I(i).

²²⁵ This is due to the routine standard operating procedures of federal and state probation agencies or the fact that it would amount to a “strong governmental interest” (supervision of probationers). See *Clancy*, *supra* note 223, at 1029. Further, remember that even if a Fourth Amendment violation should occur, the exclusionary rule would not apply in the context of FP3. See *supra* note 26 and accompanying text.

should override the diminished reasonable expectation of privacy, the warrant preference model should apply, and a warrant should be obtained. Similar to my analysis in the context of waiver, I believe that the protections of the Fourth Amendment either do or do not apply. Until the United States Supreme Court states affirmatively that a probationer has no reasonable expectation of privacy²²⁶ given that they could instead be incarcerated, the protections of the Amendment apply, and, when the target is a private home, a warrant should be secured. Obviously, the facts at hand may indicate a separate basis for a warrantless intrusion into the dwelling (i.e., exigency, “hot-pursuit”, etc.), but, simply based on the fact that the individual is on probation, and nothing more, the “castle-doctrine” should apply and the warrant-preference model should govern.²²⁷ Also, given the advantageous “fluid” nature of the Fourth Amendment generally, the relevant factor of probation,²²⁸ the high recidivism rate of child pornography offenders,²²⁹ and similar factor, will be taken into account in the calculation of probable cause. However, a warrant should still be required to enter a home.²³⁰ Any home.²³¹

²²⁶ See *United States v. Knights*, 534 U.S. 112, 120 n.6 (2001) (“We do not decide whether the probation condition so diminished, or completely eliminated, Knights’ reasonable expectation of privacy . . .”). The idea of “diminished” or “eliminated” reasonable expectations of privacy seems like a double-dipping of the same test. Isn’t this just the same way of saying, “until we decide that a probationer’s expectation of privacy is unreasonable.” Under *Knights*, until they say it is “unreasonable” or “diminished” or “eliminated,” the Fourth Amendment would appear to continue to apply. It either meets the lowest threshold of reasonableness or it does not.

²²⁷ I would assert that the “warrant preference rule” is the correct approach when the target of the search involves intrusion into a private home. See Clancy, *supra* note 223, at 1028-29 (“Next in order is the warrant preference rule. That rule does not have general applicability; it is, instead, limited to intrusions into buildings, a person’s body, and speech-related concerns.”).

²²⁸ See *supra* Part II.

²²⁹ *United States v. Lifshitz*, 369 F.3d 173, 189 (2d Cir. 2004) (“[T]here is a high rate of recidivism among sex offenders.”).

²³⁰ See *Griffin v. Wisconsin*, 483 U.S. 868, 882 (1987) (Blackmun, J., dissenting).

My application of the balancing test leads me to conclude that special law enforcement needs justify a search by a probation agent of the home of a probation on the basis of a reduced level of

2005] *COMPUTER SEARCHES OF PROBATIONERS* 337ii. *“Special Needs” Doctrine and the Warrant Clause in Context of Warrantless Probationary Searches*

While I agree with Maclin, Sundby, and many others that the special needs doctrine is both incoherent²³² and policy driven,²³³ I must heed to the adage “it is easier to criticize than construct.”²³⁴ If the “special needs” doctrine is to continue to exist, the Court should continue the trend in *Edmund* and *Ferguson* and reign the doctrine back to its original “root” application.²³⁵ Like other exception doctrines, such as the “pat-and-frisk” doctrine set forth under *Terry v. Ohio*²³⁶ and the application of the “secondary effects” doctrine in the First Amendment,²³⁷ the “special needs” doctrine has evolved into an increasingly unsound, incoherent, and over-expansive doctrine that has strayed far from its intended application.²³⁸

Returning to the “roots” of the “special needs” doctrine, the

suspicion. *The acknowledged need for supervision, however, does not also justify an exception to the warrant requirement, and I would retain this means of protecting a probationer's privacy. Moreover, the necessity for the neutral check provided by the warrant requirement is demonstrated by this case, in which the search was conducted on the basis of information that did not begin to approach the level of “reasonable grounds.”*

Id. (emphasis added).

²³¹ Obviously, other valid exceptions to the warrant requirement could still apply (i.e., exigency, “hot-pursuit”).

²³² See *supra* note 128 and accompanying text.

²³³ Sundby, *supra* note 7, at 551 (detailing special needs doctrine as allowing the court to act as a “policy magistrate”).

²³⁴ Clancy, *supra* note 223, at 1043.

²³⁵ See *supra* note 125 and accompanying text.

²³⁶ 392 U.S. 1 (1968). See generally Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 911 (1998).

²³⁷ See Marc M. Harrold, *Stripping Away at the Constitution: The Increasingly Paternal Voice of Our ‘Living’ Constitution*, 32 U. MEM. L. REV. 403, 431 (2002) (“Possibly the boldest step of all, taken by the United States Supreme Court in *Pap's* was the expansion of the ‘secondary effects’ doctrine to the point of an absolute ban, in this case, of nude dancing.”) (without any ample alternative).

²³⁸ See *supra* note 128 and accompanying text.

analysis is straightforward within the context of our two stated factual scenarios.²³⁹ Given that the “special needs” doctrine has generally applied where the warrantless search is for a non-law enforcement purpose and obtaining a warrant would be impracticable, FP2, the activities of probation officers in their normal duties, fits nicely into the model, even in light of the “tempered” “special needs” doctrine post-*Edmunds* and *Ferguson*.²⁴⁰ In this fact pattern, the primary purpose of the search and/or monitoring activity is to gauge compliance with probation conditions. Any evidence gathered is to be used at an administrative probation revocation hearing; the “primary purpose” is not general law enforcement. It is impracticable to obtain a warrant to do every home visit where the search and/or monitoring is part of the regularly scheduled procedure of the probation department and not based on individual suspicion of a particular probationer.

However, in FP1, where the probation or other law enforcement agency is acting on some level of individualized suspicion to obtain evidence for an admitted law-enforcement purpose (e.g., as evidence in a criminal prosecution), the special needs doctrine should not apply. The sticking point, of course, is “Footnote 15” set forth in *Ferguson*.²⁴¹ The fact that probationers clearly have a “lesser expectation of privacy than the public at large” is relevant in the “fluid” determination of probable cause to issue a warrant. However, it is not valid as a blanket determination to dismiss the core-values of special needs: non-law enforcement basis or impracticability.²⁴²

The “purpose” is not affected per se by the diminished expectation of privacy, nor does this diminished expectation of privacy create a general presumption of impracticability.

²³⁹ See *supra* part I(ii)(1 & 2).

²⁴⁰ In a more limited manner, see *Chandler v. Georgia*, 520 U.S. 305 (1995); see also *supra* notes 132-36 and accompanying text.

²⁴¹ See *supra* note 140 and accompanying text.

²⁴² See *supra* note 134 and accompanying text.

PART IX. PRACTICAL APPLICATIONS OF
COMPUTER MONITORING

In this section, it becomes necessary to depart from the collective analysis of computer forensic searches and probationary computer “monitoring” and focus exclusively on the latter. The field of practical methods for computer forensic data recovery and analysis generally is well-documented, and a full discussion is outside the scope of this article.²⁴³ However, the practice of probationary computer monitoring is not as well developed in legal and technical literature

This section will provide an *overview* of the existing technology relevant to computer monitoring in the probation context and of the existing practical approaches (including a brief overview of prominent software) currently being utilized by probation agencies.²⁴⁴ Although this article deals specifically with computer monitoring of a probationer with a previous conviction for one type of sex offense (Internet-related child pornography) the information in this section deals with monitoring sex offender computers generally within the context of probation.

Probationary computer monitoring is part of an overall goal of containment.²⁴⁵ As such, it is distinguishable from traditional

²⁴³ An excellent resource is the “*CCIPS Manual: Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*,” published by the Computer Crime and Intellectual Property Section, (CCIPS) Criminal Division, U.S. Department of Justice (July 2002), available at <http://www.usdoj.gov/criminal/cybercrime/s&smanual2002.htm> (last visited July 30, 2005).

²⁴⁴ A complete examination of these topics is extensive and outside the scope of this brief section. A portion of this material stems from materials (PowerPoint slides and accompanying documents) prepared by Dr. James L. Tanner for his presentation at the University of Mississippi School of Law on February 16, 2005 (materials on file with author).

²⁴⁵ Containment is (1) an individual who has admitted the compulsion or deviant act(s); (2) an individual who actively takes steps to reduce the destructive behavior; (3) an individual who has external support for continued resistance to destructive urges; and (4) an individual who recognizes risk and has a plan for dealing with it. Early attempts to deal with probationers who had used computers to victimize children was in the form of an outright deprivation towards either all computers generally or any computer with Internet

computer forensics. The primary distinction is that computer forensics looks backwards in time to collect evidence to convict an individual for a particular offense, while computer management, including computer monitoring, looks forward to determine the manner in which an individual is living while on probation and whether this manner is consistent with the terms of probation.²⁴⁶

a. Management / Monitoring Software

There are four basic approaches to existing management (monitoring) software.²⁴⁷ The first is “filtering software.” Filtering software blocks access to certain websites and logs a user's usage. Next, there are two types of “system resident” approaches. The first type requires that the probation official actually be at the probationer's computer in order to monitor the usage (Type I). There is also “system resident” software that e-mails reports back to the probation official (Type II). The official does not physically have to be at the offender's computer. The last type is the “forced gateway” software that can be reviewed remotely by probation officials.²⁴⁸ The next section details three management forensic “models” distinguished primarily on whether the “managing” forensic examiner is employed directly by the government (probation official), privately by the offender, or a combination of the two, as part of their court-ordered rehabilitation/treatment (Tx) regime.

access. As this was an outright deprivation, and not a “search” or “monitoring program” the Fourth Amendment did not apply. However, the resulting “Circuit-split” that emerged is indicative and instructive as to how different Circuits, and different courts, view computer restrictions in the probation context generally. *See infra* Part X.

²⁴⁶ Computer management only looks backwards in order to gain information as to what to watch for in the future.

²⁴⁷ Two of the primary goals of monitoring software is to detect patterns of pornography viewing (or “TRAPS”) and identify “Red Flags.” “TRAPS”: (T)hemes—the content or interest areas of pornography viewing and/or usage; what proportion of times was spent on which type(s) of material; (R)atio—the proportion of “porn surfing” to total Internet/computer usage; (A)mount—the total amount of time

2005] *COMPUTER SEARCHES OF PROBATIONERS* 341*b. "Model" Solution I: "Internal" Management Forensics*

Internal Management Forensics, or IMF, involves forensic examinations performed directly by government actors (probation officer or official) as part of the offenders' probation/supervised release. Information gathered through IMF is immediately in the hands of the probation department.

c. "Model" Solution II: "External" Management Forensics

A second proposed solution or model is what I will refer to as

spent surfing pornography sites; (P)ace—the speed with which one moves from site to site and image to image; and (S)ession—the length of the average sessions, frequency of surfing, how deeply into the various sites the offender delved? There are several "Red Flags". The seven major "Red Flags" are:

1. Nude or sexual pictures of the offender;
2. Nude or sexual pictures taken by the offender;
3. Images of a victim;
4. "Trophy" materials from victims;
5. Bestiality images in any significant number;
6. Non-consensual or coercion sites (e.g., www.bangbus.com); and
7. Sexually explicit stories written by the offender.

Other relevant monitoring technology that exists outside the four primary software monitoring classifications (include "WHOIS" (a free web-based tool that enables officers to look up a registered domain name and obtain information about the owner of a particular website; popular sites of this type include Better-Whois and VeriSign Global Registry Services); SamSpade.org (This site helps officers monitor the activities of offenders who have their own websites. The site provides "ping" WHOIS, trace route information and shows how to use this information, and also the information needed to find the owner of the website and the site's location); Anonymizer (application allows officers to visit offender Websites anonymously without having any unwanted files or code placed on the offenders' computer and without revealing the officer's IP address. This application serves primarily as a deterrent by creating the fear that the officer could be watching at any time). Relevant forensic tools (full description outside scope of article) include EnCase, ComputerCop Professional P3, ComputerCop Forensic and iLook Investigator.

²⁴⁸ The primary differences between Type II "System Resident" and "Forced Gateway" are inherent to the software itself. The two classifications are very similar in result.

“External Management Forensics” (EMF). EMF is conducted by a private forensic examiner not directly employed by the government and is part of the offender's treatment program. EMF has several advantages and follows a strict protocol. As such, the information gathered through EMF is not reported directly to probation officials. Instead, it is reported directly to authorities of the treatment program in which the offender is enrolled (Tx).

The advantages are that EMF: (1) can be accomplished in about 90 minutes; (2) works “live” on the offender's computer; (3) works within the offender's environment; (4) captures approximately 85% of what full computer-forensics captures; and (5) if done properly, is strongly supported by the courts.

EMF is a five step process:

1. Written permission is obtained from the offender;²⁴⁹
2. Examine offender's computer for historical use—the goal is to gain information for the offender's treatment (Tx) team;
3. “Sniff” system for keyloggers and look for relevant hardware installed on offender's computer;
4. Install monitoring software and set parameters in accordance with case information and previous findings; and
5. Wipe free and slack space—this increases the chance of proving a future violation.

d. “Model” Solution III: “Hybrid” Management Forensics

The third “model” solution is a hybrid between models I & II. The monitoring is directly conducted by probation officials as in model I; however, a private company provides monitoring “controls, report generation, server maintenance and data management.”²⁵⁰ The best example of this model is Internet Probation and Parole, Inc. (IPPC) through their service, Impulse

²⁴⁹ The offender pays for the “monitoring” as part of a larger treatment model.

²⁵⁰ Internet Probation & Parole Control, Inc. (IPPC) Services Brochure, <http://www.impulseccontrol.net> (last visited Mar. 29, 2005).

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ControlTM:

Impulse ControlTM offers remote monitoring technology, specifically, data is not saved to the offenders system requiring onsite retrieval, rather it is sent in real-time to a controlled environment for review. Officers can easily and conveniently view activity 24/7 remotely. Specialized reports are generated weekly by IPPC and forwarded to members of the supervision team.²⁵¹

²⁵¹ *Id.* (the monitoring covers: Websites visited, files transferred, inbound and outbound communications, Instant messengers, newsgroups/chats, and offline activity and includes keyword restrictions, Internet medium controls, time control restrictions and 24/7 remote access.).

Four Basic Approaches to Management Software:

<u>TYPE</u>	<u>MAJOR BRAND</u>	<u>ADVANTAGES</u>	<u>DISADVANTAGES</u>
Filtering Software	Cyber Sentinel®	Blocks access to certain sites and logs offender's usage.	
System Resident Type I	Spector Pro® True Active®	Spector Pro® is a screen-recording program. It is installed on a drive and configured to 'capture' screen images; it can store up to 5 or 6 days of activity. Spector Pro® works on Windows® and Mac®.	Must be physically present at offender's computer to review usage, etc. Cannot be reviewed remotely.
System Resident Type II	E-Blaster® (accompanaies Spector Pro®)	The software e-mails usage reports to Official. Physical presence at computer is not necessary.	Use of system II creates certain time-limitations on the monitoring official— information must be retrieved frequently or the file may become too large and delete 'old' information. The information is actually stored on the offender's drive and therefore can be susceptible to alteration/deletion. Unlike Spector Pro® which works on Windows® and Mac®, E-Blaster® only works

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on Windows® applica-
tions.

PART X. RELEVANT BACKGROUND CASELAW

The relevant “split” in the opinions of the various federal appellate circuits is primarily related to a “special restriction” imposed on certain individuals on probation related to either an outright ban on access to the Internet or the requirement that they receive prior permission from a probation officer before doing so.

It is important to remember that the “split” detailed in this section does not involve cases addressing the monitoring of an individual's Internet activity; but, instead involves whether a particular probationer can access the Internet at all or under severely restrictive terms.²⁵² Although certain aspects of the following cases contain inconsistencies, due to the distinct sets of facts, a review of the entire line of cases becomes necessary to provide adequate background.²⁵³

²⁵² This line of cases also primarily deals with whether the “special restriction” at issue is reasonable and thus enforceable under the applicable federal statute and will not directly involve Fourth Amendment analysis.

²⁵³ The following section details cases that are representative of the “split” on this issue currently in the federal circuit courts. See, e.g., *United States v. Cabot*, 325 F.3d 384 (2d Cir. 2003) (condition of offender's supervised release prohibiting Internet access or other similar computer networks without prior approval from probation officer constituted greater deprivation on offender's liberty than was reasonably necessary); *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003) (offender previously convicted of operating child porn website and distributing child porn. Special condition of supervised release prohibited offender from owning or operating any photographic equipment, including computers, scanners, and printers and from having Internet access at his home. Offender also prohibited from owning a computer without prior approval from probation authorities. Special condition upheld as reasonably related to statutory objectives of supervised release); *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003) (special condition of supervised release prohibiting offender, convicted of receipt and possession of child pornography, from using or possessing a computer or accessing the Internet without prior (written) approval from the probation department was overly broad and involved a greater deprivation of liberty than reasonably necessary to deter future criminal conduct and protect the public); *United States v. Harding*, 57 F. App'x 506 (3d Cir. 2003) (computer restriction

*United States v. Crandon*²⁵⁴

In *Crandon*, the Third Circuit addressed Crandon's challenge to the district court's decision to limit his Internet access during his term of supervised release.²⁵⁵ Crandon had been previously convicted of one count of receiving child pornography.²⁵⁶ He was prohibited from any access to the Internet unless it was specifically approved by the U.S. Probation Office.²⁵⁷ As such, the restriction was broad but did not amount to an outright

condition upheld during period of supervised release because condition imposed to deter future criminal conduct and protect the public); *United States v. Holm*, 326 F.3d 872 (7th Cir.) (supervised release condition banning offender for Internet access held to be a greater deprivation of liberty to serve goals of supervised release), *cert. denied*, 540 U.S. 894 (2003); *United States v. Rearden*, 349 F.3d 608 (9th Cir. 2003) (condition of supervised release that offender not possess or use a computer with Internet access without prior approval from his probation officer upheld as condition was not absolute and did not plainly [plain error standard] involve greater deprivation of liberty than was reasonably necessary for its purpose), *cert. denied*, 125 S. Ct. 32 (2004); *United States v. Ristine*, 335 F.3d 692 (8th Cir. 2003) (district court did not commit plain error in restricting offender's use of a computer and Internet access as condition of supervised release); *United States v. Taylor*, 338 F.3d 1280 (11th Cir.) (special condition on offender's supervised release prohibiting him from using or possessing a computer with Internet access was not unreasonable or overbroad given the underlying conviction), *cert. denied*, 540 U.S. 1066 (2003); *United States v. Zinn*, 321 F.3d 1084 (11th Cir.) (limited restriction on sex offender's Internet usage while on supervised release was reasonably related to legitimate sentencing considerations and did not overly burden offender's First Amendment rights), *cert. denied*, 540 U.S. 839 (2003); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001) (district court did not commit plain error in imposing a special condition of supervised release barring offender from using the Internet without prior approval). For an example of relevant state cases, see *M.G. v. Travis*, 667 N.Y.S.2d 11 (N.Y. App. Div. 1997); *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002); *State v. Combs*, 10 P.3d 1101 (Wash. Ct. App. 2000); *State v. Wardle*, 53 P.3d 1227 (Idaho Ct. App. 2002).

²⁵⁴ 173 F.3d 122 (3d Cir. 1999).

²⁵⁵ *Id.* at 127 ("The defendant shall not possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the U.S. Probation Office.").

²⁵⁶ *Id.* at 125. Crandon, a thirty-nine year-old resident of New Jersey, met a fourteen year-old girl over the Internet and traveled to Minnesota to meet her. *Id.* While in Minnesota, Crandon engaged in sexual relations with the minor and took approximately forty-eight pictures of her. *Id.* Two of the photos taken during the three-day trip were sexually explicit; one showed Crandon and the girl engaged in oral sex. *Id.*

²⁵⁷ *Id.*

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ban.²⁵⁸

The court upheld the broad restriction and held that it was “narrowly tailored” and “reasonably related” to “Crandon's criminal activities.”²⁵⁹ The court, in reviewing the district court's ruling for abuse of discretion, weighed the validity of the condition of supervised release according to 18 U.S.C. § 3583.²⁶⁰

Pursuant to 18 U.S.C. § 3583, a district court may order any appropriate condition to the extent that it:

- (1) is reasonably related to certain factors, including:
 - (a) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (b) deterring further criminal conduct by the defendant; or
 - (c) protecting the public from further criminal conduct by the defendant; and
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence and protection of the public.²⁶¹

*United States v. White*²⁶²

In *United States v. White*, the Tenth Circuit addressed a probationer's challenge to the restriction that he “shall not possess a computer with Internet access throughout his period of supervised release.”²⁶³ White had previously been convicted of receiving child pornography.²⁶⁴

²⁵⁸ *Id.* at 127-28.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 127 (“The validity of a condition of supervised release is governed by 18 U.S.C. § 3583.”). The court expressly noted that in this context, the “abuse of discretion” standard was even more relaxed within the context of probation. *Id.* at 128. “We believe that the District Court carefully considered Crandon's prior conduct and the need to protect the public and did not abuse its *broad discretion* when it prohibited Crandon from accessing the Internet or other similar computer networks without prior approval” *Id.* (emphasis added).

²⁶¹ *Id.* See also 18 U.S.C. §§ 3583(d), 3553(a) (2000).

²⁶² 244 F.3d 1199 (10th Cir. 2001).

²⁶³ *Id.* at 1205.

²⁶⁴ *Id.* at 1201. In 1996, White (using the e-mail address Lech23@aol.com) responded to an

The court was critical of the wording of this restriction and found that it did not appear to meet its intended goal:

As worded, the prohibition does not bar Mr. White's access to the Internet; only his possession of a computer with Internet access. The distinction is not without a difference. Despite the apparent constraint, Mr. White may visit a library, cybercafe, even an airport, and log onto the Internet. The Internet is also accessible *via* web-t.v. by attaching an electronic device to a television. Consequently, if the district court targeted this special condition at the nature and circumstances of the offense and Mr. White's history and characteristics to prevent using the Internet to order child pornography, it missed the mark.²⁶⁵

The court held that if the district court intended an outright ban on Internet access by equating the term "possess" with any Internet access or use at all, then the restriction was overreaching and "greater than necessary" under the federal statute.²⁶⁶ The court reasons that if this were the case the probationer would not be able to use "a computer at a library to do any research, get a weather forecast, or read a newspaper online."²⁶⁷

As expected, the court in *White* appears to disfavor any special restriction that imposes an outright ban on Internet access, especially given the increasing role the Internet plays in American life.²⁶⁸ The court's analogy of the Internet to a telephone indicates that, at least in certain courts, access to the Internet will be deemed a modern necessity.

The court also indicates that, due to the vastness of the

advertisement placed by United States Customs officers and placed an order for three videos of young girls engaged in fondling and sexual intercourse with adult men. *Id.* White was arrested after taking delivery of the videos. *Id.*

²⁶⁵ *Id.* at 1205. The court noted in a footnote that there was some question as to exactly when a computer has Internet access. *Id.* at 1205 n.7.

²⁶⁶ *Id.* at 1206 ("Under these circumstances, the special condition is "greater than necessary," 18 U.S.C. § 3553(a), and fails to balance the competing interests the sentencing court must consider.").

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1207 ("Given the openness of cyberspace, if the court instead chooses to prohibit [probationer from] using any computer, we must caution against this broad sweep . . .").

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Internet generally, and the manner in which it can be easily accessed, an outright ban is not only legally problematic but also realistically unenforceable:

[The Internet's] instant link to information is akin to opening a book. Indeed cyberspace defies boundaries; it offers unlimited access. "[T]he openness of this architecture means this: That there is no 'natural' or simple or 'automatic' way to keep people out because there are no natural or real borders that close off access to those who should not have access."²⁶⁹

The court held that the special condition was "neither reasoned nor reasonable" and remanded the case to the district court to define exactly what is meant by "possession of a computer with access to the Internet"²⁷⁰

*United States v. Peterson*²⁷¹

In *United States v. Peterson*, the Second Circuit held that an outright ban that "prohibit[s] the defendant outright from possessing or using a computer that includes either a modem, an Internet account, a mass storage device, or a writable or re-writable CD Rom"²⁷² was not "reasonably related" to "the nature and circumstances of the offense" or probationer's "history and characteristics."²⁷³

The district court imposed the computer and Internet restrictions not based on the underlying crime of bank larceny, but instead, on an earlier conviction for incest.²⁷⁴ The court expressly noted that "[t]here is no indication that Peterson's past incest offense had any connection to computers or to the

²⁶⁹ *Id.* (citing Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 887 (1996)).

²⁷⁰ *Id.* at 1207.

²⁷¹ 248 F.3d 79 (2d Cir. 2001).

²⁷² *Id.* at 82-83.

²⁷³ *Id.* (citing 18 U.S.C. §§ 3563(b) & 3553). *See also* 18 U.S.C. §§ 3553(a)(2), 3563(b) (2000).

²⁷⁴ *Peterson*, 248 F.3d at 82-83.

Internet."²⁷⁵ Given the lack of a relationship between the underlying sexual offense (incest) and computers or the Internet, the court held that the necessary standard of "reasonably related" had not been met.²⁷⁶

The Second Circuit followed the Tenth Circuit's lead in *White* and re-emphasized the "virtually indispensable" nature of Internet access in modern life: "Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering. The fact that a computer with Internet access offers the possibility of abusive use for illegitimate purposes does not, at least in this case, justify so broad a prohibition."²⁷⁷

Had the Second Circuit affirmed the lower court's restriction, holding that the previous crime of incest was sufficient to allow for an outright ban, a rule might emerge (at least in the Second Circuit) that *any* sexual offense would pave the way for a special restriction banning Internet access. In *Peterson*, it appears that even a serious sexual offense (like incest) has to have been committed in such a way that links the criminal activity to access to the Internet.²⁷⁸ The court appears to leave open, by distinguishing the case through the use of the phrase "in this case," that it may not continue, in all circumstances, to adhere to the *per se* rule established in *White*.²⁷⁹ Instead, the Second Circuit leaves open the possibility that in certain cases an outright Internet ban may be allowable based on the relationship between the underlying sexual offense and Internet

²⁷⁵ *Id.* at 83.

²⁷⁶ *Id.* ("Nor is the ban on computer or Internet use reasonably necessary to protect the public or Peterson's family from future crimes, or to any of the numerous broad sentencing grounds set forth in § 3553(a)(2).").

²⁷⁷ *Id.* (citing *United States v. White*, 244 F.3d 1199, 1206 (10th Cir. 2001)). This is the portion of the *White* opinion that the Fifth Circuit rejects in *United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001).

²⁷⁸ *Peterson*, 248 F.3d at 83.

²⁷⁹ *Id.*

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access.²⁸⁰

*United States v. Paul*²⁸¹

In *United States v. Paul*, the Fifth Circuit addressed the following broad probation restriction: “[Paul] . . . shall not have [,] possess or have access to computers, the Internet, photographic equipment, audio/video equipment, or any item capable of producing a visual image.”²⁸²

Paul pled guilty to one charge of “knowingly possessing a computer hard drive with three or more images of child pornography that traveled in interstate commerce”²⁸³ Paul also had a previous 1986 conviction involving child pornography and, at the time his residence was searched, also possessed assorted materials related to child pornography, a large bag of children's clothes, and several children's swimsuits covered with sand.²⁸⁴ Further, a review of Paul's computer revealed e-mail messages that discussed “sources of child pornography, including websites, chat rooms, and newsgroups that allowed both receiving and sending pornographic images.”²⁸⁵ One particularly disturbing e-mail discussed “how easy it was to find ‘young friends’ by scouting single, dysfunctional parents through Alcoholics Anonymous or local welfare offices and winning their friendship, thereby securing access to their young sons.”²⁸⁶

²⁸⁰ *Id.* at 83-84.

²⁸¹ 274 F.3d 155 (5th Cir. 2001).

²⁸² *Id.* at 160.

²⁸³ *Id.* at 158.

²⁸⁴ *Id.* (“Additionally, the agents seized a medical bag containing basic medical supplies and Spanish-language flyers advertising lice removal for children. In the flyers, Paul informed parents that he would spray their children with a product that kills lice. The flyers also stated that Paul would conduct a complete physical examination on each child for ‘overall health,’ which necessarily required the child to completely undress.”).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

Paul appealed the special restriction contending that a “blanket prohibition on computer or Internet use is excessively broad” and could not be justified solely on the fact that his underlying crime involved a computer and the Internet.²⁸⁷ The court, noting that Paul's computer contained over 1200 images of child pornography and evidence that Paul had used the Internet to “scout' single, dysfunctional parents and gain access to their children,” upheld the restriction and held that the district court had not abused its discretion in imposing it.²⁸⁸

The court, citing *Crandon*, held that given the underlying facts the special restriction in both cases was “reasonably related to [probationer's] offense and to the need to prevent recidivism and protect the public.”²⁸⁹ The court acknowledged that the special restriction in *Paul* was broader than the one at issue in *Crandon* because “it contains no proviso permitting Paul to use these resources with the approval of his probation office.”²⁹⁰

²⁸⁷ *Id.* at 168.

²⁸⁸ *Id.* at 168-70.

²⁸⁹ *Id.* at 169. “The record reveals that Paul has in the past used the Internet to encourage exploitation of children by seeking out fellow ‘boy lovers’ and providing them with advice on how to find and obtain access to ‘young friends.’” *Id.* The court, in addition to citing *Crandon* as an example of courts that had upheld Internet and computer restrictions as conditions of supervised release, also cited *United States v. Mitnick*, 145 F.3d 1342 (9th Cir. 1998) (unpublished table decision). In *Mitnick*, the Ninth Circuit “reject[ed] [probationer's] specific contention that the supervised release conditions impermissibly restrict the exercise of his First Amendment rights. *Mitnick*, 145 F.3d at 1342 (citing *United States v. Bolinger*, 940 F.2d 478, 480-81 (9th Cir. 1991)). *Bolinger* upheld a probation condition which restricted defendant's freedom of association. The court in *Paul* also distinguished the Second Circuit's opinion in *United States v. Peterson*, 248 F.3d 79, 81-83 (2d Cir. 2001). *Paul*, 274 F.3d at 168 n.15. The distinction in *Peterson* involved special conditions involving computer and Internet access that were actually related to a previous sex offense and not the applicable underlying charge of bank larceny. *Id.*

²⁹⁰ *Paul*, 274 F.3d at 169; see also *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003). In *Fields*, the Eighth Circuit upheld extremely restrictive terms of supervised release related to Internet access and computer use. *Fields*, 324 F.3d at 1027. The court expressly stated that the conditions did not amount to an outright ban because “[H]e may use and even possess a computer with the permission of his probation officer.” *Id.* The court distinguished the Second Circuit's ruling in *Sofsky* which involved “simple possession of child pornography” and cited to cases where more significant exploitation of children was found. *Id.* The court found the obvious, the that *Fields*'s crime involved more than simple possession of child pornography. *Id.* “In

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The Fifth Circuit expressly rejected the Tenth Circuit's reasoning in *White*, "that an absolute prohibition on accessing computers or the Internet is per se an unacceptable condition of supervised release, simply because such a prohibition might prevent a defendant from using a computer at the library to 'get a weather forecast' or to 'read a newspaper online.'"²⁹¹

In *United States v. Sofsky*, the Second Circuit, expressly noting its earlier ruling in *Peterson*,²⁹² held that:

Although the condition prohibiting Sofsky from accessing a computer or the Internet without his probation officer's approval is reasonably related to the purposes of his sentencing, in light of the nature of his offense, we hold that the condition inflicts a greater deprivation of privacy on Sofsky's liberty than is reasonably necessary.²⁹³

Sofsky also serves as a transitional case. While re-affirming the Second Circuit's general holding in *Peterson*, its ruling is somewhat confusing when read in conjunction with the Second Circuit's ruling in *United States v. Lifshitz* two years later.²⁹⁴

Sofsky seems to explicitly endorse computer monitoring

the summer of 2001 Fields created lolitgirls.com, an internet [sic] site that provided subscribers access to 'hard to find' and 'shocking' nude pictures of 'girls age 12-17.'" *Id.* at 1026. Three months later, the Eighth Circuit ruled similarly in *United States v. Ristine*, 335 F.3d 692 (8th Cir. 2003). Holding that the exploitation of young girls in Ristine's crime was "of the same degree" as Fields's crime, the court upheld the restrictive terms of supervised release. *Ristine*, 335 F.3d at 696. Another similarity in both cases is that neither defendant objected to the terms of supervised release of sentencing and therefore the court would review the terms of release for "plain error" instead of "abuse of discretion." *Fields*, 324 F.3d at 1026; *Ristine*, 335 F.3d at 694. It is unclear whether the court would have ruled differently if reviewing the terms for "abuse of discretion." The court hinted that it might make a difference under certain circumstances, "[w]ere we reviewing this special condition for an abuse of discretion, we might be forced to select the line of reasoning we find more compelling, but the standard here is plain error." *Ristine*, 335 F.3d at 695.

²⁹¹ *Paul*, 274 F.3d at 169-70.

²⁹² *Sofsky*, 287 F.3d at 126 ("We previously considered a sentencing component that prohibited access to a computer or the Internet in *United States v. Peterson*, 248 F.3d 79, 82-83 (2d Cir. 2001)).

²⁹³ *Id.*

²⁹⁴ 369 F.3d 173 (2d Cir. 2002).

because it provides a less-restrictive means of monitoring computer use and Internet access than banning access altogether or with prior governmental permission.

The Government contended at oral argument that the [computer use/monitoring] restriction must be broad because a restriction limited to accessing pornography would be extremely difficult for the probation officer to enforce without constant monitoring of Sofsky's use of his computer. There are several responses. First, to the extent that even a broad restriction would be enforced by the probation officer, monitoring (presumably unannounced) of Sofsky would be required to check if he was using a computer at all. Second, a more focused restriction, limited to pornography sites and images, *can be enforced by unannounced inspections of Sofsky's premises and examination of material stored on his hard drive or removable disks.*²⁹⁵

The court continued in Footnote 4, “[o]ne of the standard conditions of supervised release imposed on Sofsky requires him to permit a probation officer to visit him . . . at any time at home or elsewhere.”²⁹⁶

CONCLUSION

How the Fourth Amendment acts to limit the actions of government actors who want to search and/or monitor the computers of probationers with a conviction for Internet-related child pornography may come down to footnotes. While footnote 15 in *Ferguson* and footnote 6 in *Knights* will not likely rise to the prominence of footnote 4 in *United States v. Carolene Products Co.*,²⁹⁷ for our purposes they are the best indicators to an-

²⁹⁵ Sofsky, 287 F.3d at 126-27 (emphasis added).

²⁹⁶ *Id.* at 127. It seems that the Second Circuit held that there were less restrictive means to accomplish the legitimate policy aims of probation (*Peterson, Sofsky*) but then also struck down the express ‘less-restrictive mean[s]’ of monitoring instead of the outright Internet-access ban (*Lifshitz*).

²⁹⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (Justice Stone's famous footnote referring to “discrete and insular minorities”).

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swer the question: *what next?*

The “special needs” doctrine is a totally incoherent doctrine that is not driven by “special needs” but instead by “special interests,”²⁹⁸ that allows the reviewing court to act as a “policy Magistrate.”²⁹⁹

However, given the application of “special needs” by the Second Circuit in *Lifshitz*, (a case dealing specifically with computer monitoring in the probation context) and footnote 15 in *Ferguson*, the “`special needs' of probationers doctrine” continues to appear as the most viable, and most prominent, analysis for the Court to apply when reviewing the `reasonableness' of a warrantless search in the probationary context. However, if `special needs' does not get the Court where it wants to go, the more general reasonableness inquiry applied in *Knights* remains as a separate, and potent, alternative for application by a results-oriented judiciary.

With regards to reasonableness as the appropriate inquiry, the possibility remains, albeit unlikely, that the Court will answer the second question left open in *Knights'* footnote 6 and rule that probationers simply have either no “reasonable expectation of privacy” or one so diminished that a warrantless search would be considered *per se* reasonable. If this occurs, similar to a finding of waiver, the Fourth Amendment inquiry would end.

Turning to how this type of warrantless search fits into the larger history, context and jurisprudence of the Fourth Amendment, it appears likely that whatever approach applied by the Court: waiver, reasonableness, or “special needs,” will be viewed in light of the new and explosive era of Internet-related crime against children that will likely join the wars on drugs and terror as a type of societal threat able to re-define what is objectively and subjectively “reasonable” within our culture.

To create a hierarchy of the proper analysis between the three,

²⁹⁸ See *supra* note 128 and accompanying text.

²⁹⁹ See Sundby, *supra* note 7, at 550-51 (“The question for the future is whether the Court will continue in its role as an active `policy magistrate' . . .”).

this article proposes that the Seventh Circuit was correct in *Barnett*, in its holding that (valid) waiver alone justifies the warrantless search of a probationer's home, or a computer located in the home, pursuant to the express language of the conditions of probation and, as such, that the United States Supreme Court should follow this reasoning.

That is what the Court should do. However, in the shorter-term, I believe that the Court's strategy is to constantly create and then interchange doctrines and "balancing tests" so that it can reach any result it favors in the minute fraction of cases it chooses to hear.

In closing, I am pragmatic and join Professor Maclin's opinion that at times the Court creates a "Good for this Day and Train Only theory" to reach its intended results.³⁰⁰ Although I maintain that the "special needs" analysis will most likely govern this type of search, and guide its relative place in Fourth Amendment jurisprudence, the most recent on-point case is *Knights*, and therefore it cannot be seen as anything but a close second. In *Knights*, the Court turned to a "totality" or "general reasonableness model," a "standardless formula that permits a majority of the Court to do what it pleases without having to justify its results or reasoning under traditional Fourth Amendment doctrine."³⁰¹ As this is the case, the Court's future decisions in this area become almost impossible to predict as we are left in the dark as to which test will be applied under any particular set of circumstances.

"Liberty finds no refuge in a jurisprudence of doubt" were the Court Majority's hollow, and intellectually dishonest, opening words in its oft-criticized 1992 decision *Planned Parenthood v. Casey*.³⁰² Although these words dramatically failed to start the

³⁰⁰ Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 118 n.261 (2005).

³⁰¹ *Id.*

³⁰² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

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Court on a new road to consistency in 1992,³⁰³ and are nonsensical in the context they were penned, standing alone, they are true.

The Court needs to focus on eliminating its “jurisprudence of doubt” not only between new cases and precedent they would affect, or overrule, generally, but also within the text of its decisions specifically. The inexplicable and interchangeable use of legal formulae, standardless standards and balancing tests that are not even inherently balanced has led to a “jurisprudence of doubt” at the whim of this Nation's least representative branch of government.³⁰⁴

³⁰³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

That was the Court's sententious response, barely more than a decade ago, to those seeking to overrule *Roe v. Wade*, 410 U.S. 113 (1973). The Court's response today, to those who have engaged in a 17-year crusade to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986), is very different. The need for stability and certainty presents no barrier.

Id.

³⁰⁴ See *supra* note 109 and accompanying text.

APPENDIX I
Relevant State Statutes

STATE STATUTES

California

CAL. PENAL CODE § 1203.047 (West 2004). Conviction of computer crime; probation

A person convicted of certain enumerated computer crimes may be granted probation, but, . . . [d]uring the period of probation, that person shall not accept employment where that person would use a computer connected by any means to any other computer, except upon approval of the court and notice to and opportunity to be heard by the prosecuting attorney, probation department, prospective employer, and the convicted person. Court approval shall not be given unless the court finds that the proposed employment would not pose a risk to the public.

Florida

FLA. STAT. ANN. § 948.03(5)(a)(7) (West 2001). Terms and conditions of probation or community control

(5)(a)(7). Unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, a prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.

Illinois

725 ILL. COMP. STAT. ANN. § 207/40(b)(5)(T) (West Supp. 2005). Commitment

(b)(5) An order for conditional release places the person in the custody, care, and control of the Department. The court shall order the person be subject to the following rules of conditional release, in addition to any other conditions ordered, and the person shall be given a certificate setting forth the conditions of conditional release. These conditions shall be that the person:

(T) neither possess or have under his or her control any material that is pornographic, sexually oriented, or sexually stimulating, or that depicts or alludes to sexual activity or depicts minors under the age of 18, including but not limited to visual, auditory, telephonic, electronic media, or any matter obtained through access to any computer or material linked to computer access use.

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MINN. STAT. ANN. § 243.055 (West 2003). Computer Restrictions

Subdivision 1. Restrictions to use of online services. If the commissioner believes a significant risk exists that a parolee, state-supervised probationer, or individual on supervised release may use an Internet service or online service to engage in criminal activity or to associate with individuals who are likely to encourage the individual to engage in criminal activity, the commissioner may impose one or more of the following conditions:

- (1) prohibit the individual from possessing or using a computer with access to an Internet service or online service without the prior written approval of the commissioner;
- (2) prohibit the individual from possessing or using any data encryption technique or program;
- (3) require the individual to consent to periodic unannounced examinations of the individual's computer equipment by a parole or probation agent, including the retrieval and copying of all data from the computer and any internal or external peripherals and removal of such equipment to conduct a more thorough inspection;
- (4) require consent of the individual to have installed on the individual's computer, at the individual's expense, one or more hardware or software systems to monitor computer use; and
- (5) any other restrictions the commissioner deems necessary.

Subd. 2. Restrictions on computer use. If the commissioner believes a significant risk exists that a parolee, state-supervised probationer, or individual on supervised release may use a computer to engage in criminal activity or to associate with individuals who are likely to encourage the individual to engage in criminal activity, the commissioner may impose one or more of the following restrictions:

- (1) prohibit the individual from accessing through a computer any material, information, or data that relates to the activity involved in the offense for which the individual is on probation, parole, or supervised release;
- (2) require the individual to maintain a daily log of all addresses the individual accesses through computer other than for authorized employment and to make this log available to the individual's parole or probation agent;
- (3) provide all personal and business telephone records to the individual's parole or probation agent upon request, including written authorization allowing the agent to request a record of all of the individual's outgoing and incoming telephone calls from any telephone service provider;
- (4) prohibit the individual from possessing or using a computer that contains an internal modem and from possessing or using an external modem without the prior written consent of the commissioner;

(5) prohibit the individual from possessing or using any computer, except that the individual may, with the prior approval of the individual's parole or probation agent, use a computer in connection with authorized employment;

(6) require the individual to consent to disclosure of the computer-related restrictions that the commissioner has imposed to any employer or potential employer; and

(7) any other restrictions the commissioner deems necessary.

Subd. 3. Limits on restriction. In imposing restrictions, the commissioner shall take into account that computers are used for numerous, legitimate purposes and that, in imposing restrictions, the least restrictive condition appropriate to the individual shall be used.

Nevada

NEV. REV. STAT. ANN. § 176A.413 (LexisNexis Supp. 2001). Restrictions relating to computers and use of Internet and other electronic means of communication; powers and duties of court; exceptions.

1. Except as otherwise provided in subsection 2, if a defendant is convicted of stalking with the use of an Internet or network site or electronic mail or any other similar means of communication pursuant to subsection 3 of NRS 200.575, an offense involving pornography and a minor pursuant to NRS 200.710 to 200.730, inclusive, or luring a child or mentally ill person through the use of a computer, system or network pursuant to paragraph (a) or (b) of subsection 4 of NRS 201.560 and the court grants probation or suspends the sentence, the court shall, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension that the defendant not own or use a computer, including, without limitation, use electronic mail, a chat room or the Internet.

2. The court is not required to impose a condition of probation or suspension of sentence set forth in subsection 1 if the court finds that:

(a) The use of a computer by the defendant will assist a law enforcement agency or officer in a criminal investigation;

(b) The defendant will use the computer to provide technological training concerning technology of which the defendant has a unique knowledge; or

(c) The use of the computer by the defendant will assist companies that require the use of the specific technological knowledge of the defendant that is unique and is otherwise unavailable to the company.

3. Except as otherwise provided in subsection 1, if a defendant is convicted of an offense that involved the use of a computer, system or network and the court grants probation or suspends the sentence, the court may, in addition to any other condition ordered pursuant to NRS 176A.400, order as a condition of probation or suspension that the defendant not own or use a computer, including, without limitation, use electronic mail, a chat room or the Internet.

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4. As used in this section:

- (a) "Computer" has the meaning ascribed to it in NRS 205.4735.
- (b) "Network" has the meaning ascribed to it in NRS 205.4745.
- (c) "System" has the meaning ascribed to it in NRS 205. 476.

NEV. REV. STAT. ANN. § 213.1258 (LexisNexis 2005). Conditions relating to computers and use of Internet and other electronic means of communication; powers and duties of board; exceptions.

1. Except as otherwise provided in subsection 2, if the Board releases on parole a prisoner convicted of stalking with the use of an Internet or network site or electronic mail or any other similar means of communication pursuant to subsection 3 of NRS 200.575, an offense involving pornography and a minor pursuant to NRS 200.710 to 200.730, inclusive, or luring a child or mentally ill person through the use of a computer, system or network pursuant to paragraph (a) or (b) of subsection 4 of NRS 201.560, the Board shall, in addition to any other condition of parole, require as a condition of parole that the parolee not own or use a computer, including, without limitation, use electronic mail, a chat room or the Internet.

2. The Board is not required to impose a condition of parole set forth in subsection 1 if the Board finds that:

- (a) The use of a computer by the parolee will assist a law enforcement agency or officer in a criminal investigation;
- (b) The parolee will use the computer to provide technological training concerning technology of which the defendant has a unique knowledge; or
- (c) The use of the computer by the parolee will assist companies that require the use of the specific technological knowledge of the parolee that is unique and is otherwise unavailable to the company.

3. Except as otherwise provided in subsection 1, if the Board releases on parole a prisoner convicted of an offense that involved the use of a computer, system or network, the Board may, in addition to any other condition of parole, require as a condition of parole that the parolee not own or use a computer, including, without limitation, use electronic mail, a chat room or the Internet.

4. As used in this section:

- (a) "Computer" has the meaning ascribed to it in NRS 205.4735.
- (b) "Network" has the meaning ascribed to it in NRS 205.4745.
- (c) "System" has the meaning ascribed to it in NRS 205. 476.

North Dakota

N.D. CENT. CODE § 12.1-32-07(4)(r) (Supp. 2005). Supervision of probationer—Conditions of probation—Revocation.

4. When imposing a sentence to probation, probation in conjunction with imprisonment, or probation in conjunction with suspended execution or deferred imposition of sentence, the court may impose such conditions as it deems appropriate and may include any one or more of the following: r. Refrain from any subscription to, access to, or use of the Internet.

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General Statutory Overview
Warrantless Searches Pursuant to
Probation or Parole
(Not necessarily related to Computer Monitoring)

State Statutes

Alaska	ALASKA STAT. § 33.16.150(b)(3)
California	CAL. PENAL CODE § 3067(a)
Colorado	COLO. REV. STAT. §17-2-201(5)(f)(l)(D)
Florida	FLA. STAT. ANN. § 48.03(1)(5)(a)(10)
Illinois	730 ILL. COMP. STAT. § 5/3-3-7(a)(10)
Indiana	IND. CODE § 11-13-3-7 (7)(a)(6)
Maine	ME. REV. STAT. ANN. tit. 17-A, § 1264(2)(C)
Nevada	NEV. REV. STAT. § 4.373(1)(g)
New York	N.Y. CRIM PROC. LAW § 410.50
North Carolina	N.C. GEN. STAT. § 15A-1343(b1)(7) N.C. GEN. STAT. § 15A-1374(b)(11)
North Dakota	N.D. CENT. CODE § 12.1-32-07(4)(n)
Ohio	OHIO REV. CODE ANN. § 2951.02 OHIO REV. CODE ANN. § 2967.131(C) OHIO REV. CODE ANN. § 2971.07(C)
Oregon	OR. REV. STAT. § 137.540(1)(i) OR. REV. STAT. § 144.102(3)(b)(H)
Pennsylvania	61 PA. CONS. STAT. ANN. § 331.27a 61 PA. CONST. STAT. ANN. § 331.27b

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