TOOLS AND TARGETS: THE UNCONSTITUTIONAL SURVEILLANCE OF SYSTEM-ADJACENT INDIVIDUALS

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Although the Fourth Amendment protects against "unreasonable searches and seizures," this right is not enjoyed by all people equally. In Griffin v. Wisconsin, United States v. Knights, and Samson v. California, the Supreme Court curtailed the Fourth Amendment privacy rights of individuals under probation or parole supervision.[1] *In this line of cases, the Court concluded that the state's interest in monitoring supervisees and reducing recidivism outweighs their reasonable expectation of privacy.*

However, surveillance mechanisms like probation and parole extend the criminal legal system's carceral gaze beyond the supervisees and peer into the bedrooms and digital lives of their families, roommates, and communities, or who this Article calls system-adjacent individuals ("SAIs"). Probation and parole capture SAIs in the carceral surveillance net subjecting their homes, cars, and persons to scrutiny and punitive control. Once ensnared in the surveillance net, SAIs become not only targets of state surveillance, but are also deputized as surveillers responsible for monitoring and reporting on the supervisee's activities and behavior. This dual role – as both surveilled and surveiller or tool and target of surveillance – infringes upon their constitutional privacy rights.

This Article exposes how courts have extended Griffin, Knights, and Samson beyond the supervisee to routinely deprive SAIs of their Fourth Amendment privacy rights in two contexts: first, when an SAI resides with a supervisee subject to a probation or parole search condition; and second, when an SAI shares an electronic device with a supervisee subject to an electronic search condition. It proposes reinvigorating SAIs' constitutional privacy protections by suppressing evidence discovered during a residential or electronic probation or parole search when introduced against an SAI in

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[1] Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001); Griffin v. Wisconsin, 483 U.S. 868 (1987).

a criminal proceeding.

INTRODUCTION

I hear my mom walking the parole agent through the house from my open bedroom door. He asks about all the doors and windows leading in and out of the house – manners of egress he calls them – marking each down on a diagram. I hear my name as Mom runs through all the people who live in the house. When she gets to me – son, 16 years old, high school student, no, no trouble with him. I hear the rules as the parole agent lists them out in a gruff, condescending tone, "We can show up at any time...you must permit us access to the home...we can search without reasonable suspicion...internet must remain connected."

Later, I see the black box attached to our Wi-Fi router with its blinking blue lights. I'm glad my father is home, but I wish that him getting out of prison didn't mean that our house had to be transformed into one.[2]

As mass incarceration ushered in a period of exploding arrest numbers,

[2] Although this vignette is not a direct quote from any one client, it represents a compilation of stories and observations made by the Author during her career as a public defender.

growing jail and prison populations, and the world's most punitive criminal legal, probation and parole have evolved into prominent decarceration and alternative to incarceration strategies.[3] There are 2.9 million people on probation and more than 800,000 people on parole, "nearly twice the number of people who are incarcerated in jails and prisons combined."[4] Community supervision models like probation and parole relocate surveillance from correctional facilities to the community and extend carceral control beyond the prison gates by tracking supervisees in their homes, cars, and neighborhoods.[5]

However, surveillance mechanisms like probation and parole extend the criminal legal system's carceral gaze beyond the supervisees and peer into the bedrooms and digital lives of their families, roommates, and communities, or who this Article calls system-adjacent individuals ("SAIs").[6] Probation and parole capture SAIs in the carceral surveillance net subjecting their homes, cars, and persons to scrutiny and punitive control. SAIs become not only targets of state surveillance but are also deputized as surveillers responsible for monitoring and reporting on the supervisee's activities and

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[3] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing the rise of mass incarceration in the United States); JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 60 (2003) ("[R]elease on parole, as a 'back end' solution to prison crowding, was important from the beginning."); *Mass Incarceration*, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration (last visited Jan. 31, 2025). Decarceration as used herein refers to efforts to reduce the jail and prison population.

[4] Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023.html.

[5] Despite critiques for prioritizing punitiveness and cost reductions over rehabilitation, reliance on community corrections programs continues to expand and, as technology advances, capitalize on more advanced and invasive surveillance devices like electronic monitoring. *See* Chaz Arnett, *From Decarceration to E-Carceration*, 41 Cardozo L. Rev. 641, 663-65 (2019) ("[A] movement toward decarceration, driven by cost reductions, is not necessarily a movement away from punitiveness or the desire for control of "troubled populations" through deepening of the carceral state. In fact, current decarceration efforts have sought the easing of the burden of correctional costs while readily catering to new methods that do not seek to further rehabilitation, but rather to expand the carceral state. These two goals have been pursued over the past decade through promotion of "community corrections" programs that simultaneously seek to reduce costs and intensify surveillance as a measure of control.").

[6] The term system-adjacent individuals is an extension of a description introduced by Professor Zina Makar, prison-adjacent individual. *See* Zina Makar, *The Digital Panopticon,* 3 n.3 (forthcoming) (manuscript on file with author). Prison-adjacent individuals refers to an incarcerated people's friends, families, social networks, and communities who live in free society. In this Article, system-adjacent individuals is used interchangeably with other terms such as third parties and co-residents.

behavior. This dual role – as both surveilled and surveiller or tools and targets of surveillance – ensnares SAIs in a carceral surveillance web that infringes upon their constitutional privacy rights.

This infringement occurs when supervision conditions for the person on probation or parole spill over to proximate third parties. Notably, both probation and parole require supervisees to submit to searches of their residences, persons, vehicles, and sometimes, their electronic devices like cell phones.[7] In other words, the Fourth Amendment's prohibition on warrantless searches and seizures, is limited for supervisees. In *Samson v. California*, the Supreme Court endorsed warrantless, suspicionless searches of people on parole[8] and in *United States v. Knights*, the Court held that only reasonable suspicion, not probable cause, is required for a residential search of a person on probation.[9] In sum, supervisees enjoy a reduced expectation of privacy because their privacy interests yield to the state's interest in detecting crime and promoting rehabilitation.[10]

Legal scholars have analyzed and critiqued how probation and parole conditions infringe on supervisees' familial integrity rights and convert their residences into a "carceral home," subject to state surveillance and intervention.[11] Scholars in several disciplines, especially the social sciences, have long studied how probation and parole impact recidivism rates while warning against the net-widening impact of alternatives to incarceration and decarceration measures.[12] Other research centers third parties and investigates how carceral involvement impacts a system-involved person's

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[7] *See* Samson v. California, 547 U.S. 843, 853 (2006); United States v. Knights, 534 U.S. 112, 119, 121 (2001). *See also* Home Plan Brochure, The Pennsylvania Department of Corrections and Pennsylvania Parole Board (2020), available at https://www.parole.pa.gov/Information/Documents/Publications/Home%20Plan%20brochure%20FINAL%20COLOR.pdf.

[8] 547 U.S. 843, 853 (2006).

[9] 534 U.S. 112, 119, 121 (2001).

[10] *See supra* notes 8 and 9.

[11] *See* Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 653 (2022); *see generally* Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879 (2023).

[12] *See* STANLEY COHEN, VISION OF SOCIAL CONTROL (1st ed. 1991). *See also* Phelps, supra note 25, at 262; *See also* Michelle S. Phelps, *Ending Mass Probation: Sentencing Supervision, and Revocation*, 28 THE FUTURE OF CHILDREN 125 (2018); Michelle S. Phelps, *The Paradox of Probation Community Supervision in the Age of Mass Incarceration*, 28 FED. SENT. RPTR. 283, 288-89 (2016); Marcelo F. Aebi et.al., *Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?*, 17 PUNISH. & SOC'Y 575 (2014).

family, friends, and communities.[13]

Recently, a body of legal scholarship has emerged examining the extension of state surveillance and control into third parties' private domains. For example, family law scholars analyze how parents who are not the subject of a pending abuse or neglect investigation are routinely subjected to invasive family regulation system surveillance.[14] Scholars like Dorothy Roberts argue that the family regulation system uses the threat of child removal to "impose intensive surveillance and regulation" on Black and Brown families.[15]

Criminal law scholars level similar critiques against carceral surveillance and investigate how surveillance and policing practices deprive SAIs of their

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[13] *See e.g.,* G. Alex Sinha & Janani Umamaheswar, *Hidden Takings and the Communal Burden of Punishment*, 60 HARV. C.R.-C.L. L. REV. (forthcoming 2025); Mariam Hinds, *The Shadow Defendants,* 113 GEO. L.J. (2025) (forthcoming); Erin Eife and Beth E. Richie, *Punishment by Association: The Burden of Attending Court for Legal Bystanders*, 47 LAW & SOCIAL INQUIRY 584 (2022); Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCI. 291(2021); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 150 (2019); GINA CLAYTON ET AL., ESSIE JUST. GRP., BECAUSE SHE'S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES 11 (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf; Megan Comfort, *"A Twenty-Hour-a-Day Job:" The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS OF THE AMER. ACAD. 63 (2016); Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638 (2015); Saneta deVuono-Powell, et al., CTR. FOR HUM. RTS, FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015), https://static.prisonpolicy.org/scans/who-pays%20Ella%20Baker%20report.pdf; Megan Comfort, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON (2007); Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271 (2007); DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (1st paperback ed. 2007); Johnna Christian et. al., *Social and Economic Implications of Family Connections to Prisoners,* 34 J. CRIM. JUST. 443 (2006); R. ROBIN MILLER ET AL., IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY (Othello Harris & R. Robin Miller eds., 2003); JOE BLAKE, SENTENCED BY ASSOCIATION: THE NEEDS OF PRISONERS' FAMILIES (1990).

[14] S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System,* 122 COLUMBIA L. REV. 1097, 1105-06 (2022). A recent New York state appellate court condemned the New York City Administration for Children's Service's practice of supervising and surveilling nonrespondent parents against whom there is no allegation of wrongdoing when the respondent parent is the subject of an ACS investigation. In the Matter of Sapphire W., __ A.D.3d __ (N.Y. App. Div. 2025).

[15] Columbia Journal of Race and Law, *Strengthened Bonds Symposium Introductions, Keynote, and Responses,* YOUTUBE (July 13, 2021), https://www.youtube.com/watch?v=NMZffrsE-b8 [hereinafter Columbia Symposium Youtube Video].

constitutional and privacy rights. In *Suspicion Companions*, Aliza Hochman Bloom highlights how SAIs' Fourth Amendment rights are diminished during street stops when suspicion about a companion is impermissibly imputed to the SAI.[16] Zina Makar considers a similar pattern in a different context: digital tablets in jails and prisons.[17] *The Digital Panopticon* investigates how the prolific use of digital tablets in correctional facilities extends carceral surveillance beyond the incarcerated person and captures the data and information of those with whom they communicate.[18] She argues that current prison law is ill-equipped to regulate this expansion of carceral surveillance that further subordinates marginalized communities.[19] Other scholars highlight how familial DNA searching implicates SAIs through genetic surveillance practices.[20]

This Article extends this strand of legal scholarship, positing that through community supervision programs like probation and parole, the state has extended the carceral surveillance net and both surveils and conscripts non-accused third parties expanding the reach of the penal state into private, uninvolved lives. This surveillance net has been maintained by court decisions that routinely erode third parties' constitutional and privacy rights by affording them a reduced expectation of privacy in their residences and digital devices that are shared with a supervisee.[21] SAIs are simultaneously

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[16] *See* Aliza Hochman Bloom, *Suspicious Companions,* ___ ____ (forthcoming) (manuscript on file with author).

[17] Makar, *supra* note 6.

[18] *Id.*

[19] *Id.* at 32-41.

[20] *See* Rachel Cox, Unethical Intrusion: The Disproportionate Impact of Law Enforcement DNA Sampling on Minority Populations, 52 AM. CRIM. L. REV. 155 (2015); Dorothy Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 HOW. L.J. 567, 574 (2011); Mary McCarthy, *Am I My Brother's Keeper?: Familial DNA Searches in the Twenty-First Century*, 86 NOTRE DAME L. REV. 381, 381 (2011).

[21] *See* United States v. Harden*,* 104 F.4th 830 (2024); State v. Green, 349 So. 3d 503 (Fla. Dist. Ct. App. 2022); State v. Phipps, 454 P.3d 1084, 1091(Idaho 2019); Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017); State v. Kline, 891 N.W.2d 780 (S.D. 2017); State v. Bursch, 905 N.W.2d 884 (Minn. Ct. App. 2017); People v. Ermi, 156 Cal.Rptr.3d 848 (2013); State v. Finley, 260 P.3d 175 (Mont. 2011); State v. Adams, 788 N.W.2d 619 (N.D. 2010); State v. Hurt, 743 N.W.2d 102 (N.D. 2007); State v. Walker, 158 P.3d 220 (Az. Ct. App. 2007); State v. Yule, 905 So. 2d 251 (Fla. Dist. Ct. App. 2005); People v. Pleasant, 123 Cal.Rptr.3d 796, 798 (Ct. App. 2004); People v. Smith, 116 Cal.Rptr.2d 694 (Ct. of App. 2002); State v. West, 517 N.W.2d 482 (WI Sup. Ct. 1994); People v. Boyd, 274 Cal.Rptr. 100 (Ct. of App. 1990); People v. LaJocies, 174 Cal.Rptr. 100 (Ct. App. 1981); People v.

conscripted as surveillance deputies responsible for monitoring supervisees' behavior. This Article endorses a constitutional rebalancing of SAIs' privacy rights by suppressing evidence recovered, absent a warrant, during a residential or digital probation or parole search if the state seeks to introduce it against a third party who is not subject to the applicable search condition.

This rebalancing is timely given the rapid pace of technological innovation and its swift adoption and deployment for carceral ends. CCTV, electronic monitoring, automatic license plate readers, facial recognition software, and drones, are but a few contemporary surveillance innovations that implicate the constitutional and privacy rights of not only system-involved people, but anyone with whom they associate. As carceral surveillance technology becomes increasingly invasive and ubiquitous, there is an opportunity to revive the privacy interests of third parties. Because before long, this technology will surveil every person who encounters a system-involved person and extend the carceral surveillance net beyond SAIs and to society as a whole.[22]

This Article proceeds in four parts. Part I surveys the interdisciplinary literature on SAIs' privacy rights, net-widening, and deputized surveillance. Part II turns to a doctrinal analysis of how courts assess SAIs' Fourth Amendment rights during residential and digital probation and parole searches and routinely afford them fewer privacy protections. It then considers how SAIs are deputized as surveillers, especially in the context of juvenile probation. Part III evaluates the attendant harms of occupying the dual role of surveilled and surveiller noting the intended and unintended adverse consequences. Finally, Part IV encourages reviving SAIs' privacy rights and proposes viable doctrinal reform.

I. SYSTEM-ADJACENT INDIVIDUALS AND CARCERAL SURVEILLANCE

Probation and parole have a ripple effect that extends beyond the direct supervisee. Section I.A. provides background information on the frequency and scope of residential and electronic search conditions for people on probation and parole. Section I.B. turns to SAIs explaining who they are and reviewing existing literature on how their privacy is diminished in four contexts: street stops, probation and parole, correctional facilities, and DNA

Johnson, 164 Cal.Rptr 746 (Ct. App. 1980); State v. Johnson, 748 P.2d 1069 (Utah 1987), abrogated on other grounds by State v. Doporto, 935 P.2d 484 (Utah 1997); People v. Triche, 306 P.2d 616 (Cal. Ct. App. 1957).

[22] *See e.g.*, Norfolk, VA Camera Surveillance, INST. FOR JUST., https://ij.org/case/norfolk-virginia-camera-surveillance/.

and genetic testing. Finally, Section I.C. highlights two sociological concepts, net-widening and surveillance deputization, that animate observations and critiques made in Part III.

A. Probation and Parole Search Conditions

With one in sixty-nine adults on probation or parole, these community supervision mechanisms shape our society by regulating the lives of supervisees in intimate and innumerable ways.[23] Probation and parole conditions dictate where supervisees can live, work, or travel, with whom they may associate, how they spend their time and money, and how they behave.[24] People on probation are typically assigned a probation agent, attend period check-ins, and are required to abide by conditions such as being employed, participating in drug, alcohol, anger management, or other programming, and desisting from crime, drug, and alcohol use.[25] While probation occurs in lieu of incarceration, parole follows incarceration.[26] People on parole have served a period of incarceration and are subsequently released to serve a portion of their sentence in the community.[27] Parole supervision is more stringent than probation with closer supervision and surveillance, more frequent contact with parole agents, and more extensive conditions.[28]

Both probation and parole frequently impose search conditions allowing monitoring agents to search supervisees' homes, vehicles, persons, and,

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[23] *Number of U.S. Adults on Probation or Parole Continues to Decline*, PEW CHARITABLE TRUSTS (2024), http://pewtrusts.org/en/research-and-analysis/articles/2023/12/14/number-of-us-adults-on-probation-or-parole-continues-to-decline.

[24] For an overview of common probation and parole conditions, see generally Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1 (2023).

[25] Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision*, 3 ANNUAL REVIEW OF CRIMINOLOGY 261, 267 (2020). There are different approaches used in jurisdictions across the nation, including offering sentencing judges varying probation supervision levels. For example, in Maryland, judges can sentence someone to supervised or unsupervised probation. Supervised probation requires reporting to a probation agent and abiding by other conditions while those on unsupervised probation must only avoid rearrest.

[26] *See* PETERSILIA, *supra* note 3, at 55.

[27] *Id.*

[28] Samson v. California, 547 U.S. 843, 850, 126 S. Ct. 2193, 2198 (2006) ("parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.")

sometimes, their electronic devices.[29] In a study of probation, parole, and electronic monitoring supervision conditions, Kate Weisburd examined 187 records and detailed the frequency, scope, and nature of residential and electronic search conditions.[30] With respect to residential searches, she found:

> Home searches are among the most common conditions of court supervision. In this study, the majority of the programs (65%) provide for physical searches of homes. Of the programs that include search provisions, most (70%) have no limitations on the search, and in 30% of programs, there is some limitation, such as requiring reasonable suspicion. The scope of these searches is usually wide and includes people's homes, cars, and other personal property.[31]

In the study, electronic search conditions were also quite common. Nearly 25% of the records included an electronic search condition and "[o]f the programs that allow for cell phone searches, most (80%) have no limitations on the search, whereas 20% include some form of limitation, such as requiring reasonable suspicion."[32] Notably, some of these electronic search conditions extend to the supervisee's social media accounts.[33]

A few examples are illustrative of the scope and breadth of search conditions. In California, for instance, parolees are given notice that he "is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause."[34] Likewise, a brochure provided by the Pennsylvania Department of Corrections and Pennsylvania Parole Board provides that "[y]ou, your residence (where you live or stay) and your possessions can be searched at any time of the day or night, with or without a warrant, and with or without a reason, by any parole agent or police officer."[35] A Ohio statute authorizes searches of a parolee's person, residence, motor vehicle, or personal property if an officer has "reasonable grounds" to suspect a violation of the law or the terms of parole.[36] "[T]he rules for probation in Pima County, Arizona, state: 'I understand all social media accounts (e.g., Facebook, Snapchat, Twitter, etc.) are subject to search. I will provide all passcodes, usernames, and login information necessary as directed by the IPS team.'"[37]

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[29] Weisburd, *supra* note 24, at 10-11. *See e.g.*, CAL. PENAL CODE § 3067(a), (b)(1); OH ST § 2967.131(C); Home Plan Brochure, *supra* note 7.

[30] *Id.* at 3.

[31] *Id.* at 10 (internal citations omitted).

[32] *Id.* at 11 (internal citations omitted).

[33] *Id.*

[34] CAL. PENAL CODE § 3067(a), (b)(1).

[35] Home Plan Brochure, *supra* note 7.

[36] OH ST § 2967.131(C).

[37] Weisburd, *supra* note 24, at 11 (internal citation omitted).

Having been granted such wide discretion, it is unsurprising that these expansive search conditions are contagious and spill over to supervisees' families, social networks, and communities.

B. Diminished Privacy

The existing literature on SAIs spans several disciplines including legal scholarship, sociology, and criminology and different legal subject areas such as criminal law, family law, and immigration law. Scholars have noted how proximity to and providing support for a system-involved person imposes a significant economic burden on SAIs who pay bail, fines and fees, visitation costs, jail and prison call costs, and commissary deposits.[38] Other scholars highlight the time SAIs invest to attend court appearances, visit, or otherwise provide resources for their system involved loved ones.[39] Social scientists and other researchers have studied how having a loved one under carceral control disturbs every aspect of family life[40] as well as SAIs' physical health, mental wellbeing, and social relationships.[41] This Section introduces SAIs and describes who is disproportionately represented amongst their ranks before surveying legal scholarship that attends specifically to SAIs' privacy rights

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[38] *See, e.g.,* G. Alex Sinha & Janani Umamaheswar, *Hidden Takings and the Communal Burden of Punishment*, 60 HARV. C.R.-C.L. L. REV. (forthcoming 2025); Joshua Page & Joe Soss, *The Predatory Dimensions of Criminal Justice*, 374 SCI. 291(2021); Joshua Page, Victoria Piehowski & Joe Soss, *A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation*, 5 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 150 (2019); Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSPS. ON POL. 638 (2015); SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR. FOR HUM. RTS, FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015), https://static.prisonpolicy.org/scans/who-pays%20Ella%20Baker%20report.pdf; Johnna Christian et. al., *Social and Economic Implications of Family Connections to Prisoners,* 34 J. CRIM. JUST. 443 (2006).

[39] *See, e.g.,* Mariam Hinds, *The Shadow Defendants,* 113 GEO. L.J. X (2025) (forthcoming); Erin Eife and Beth E. Richie, *Punishment by Association: The Burden of Attending Court for Legal Bystanders*, 47 LAW & SOCIAL INQUIRY 584 (2022).

[40] *See, e.g.,* Megan Comfort, *"A Twenty-Hour-a-Day Job:" The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS OF THE AMER. ACAD. 63 (2016); Donald Braman, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (1st paperback ed. 2007); R. Robin Miller et al., IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY (Othello Harris & R. Robin Miller eds., 2003); JOE BLAKE, SENTENCED BY ASSOCIATION: THE NEEDS OF PRISONERS' FAMILIES (1990).

[41] *See, e.g.,* Gina Clayton et al., ESSIE JUST. GRP., BECAUSE SHE'S POWERFUL: THE POLITICAL ISOLATION AND RESISTANCE OF WOMEN WITH INCARCERATED LOVED ONES 11 (2018), https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf.

during street stops, when on probation and parole, when in correctional facilities, and during DNA or other genetic testing.[42]

1. Who Are SAIs?

To gain an understanding of who SAIs are, it is helpful to begin by examining what populations of people are on probation and parole before turning to those who stand beside them. The geographic concentration of policing and prosecution in low-income neighborhoods of color leads to these populations being disproportionately represented amongst supervisees on probation or parole.[43] In 2022, amongst adult supervisees with known characteristics, the Bureau of Justice Statistics found that thirty-one percent of probationers and thirty-five percent of parolees were Black, which far outstrips their representation in the general population.[44]

Many supervisees rely on family, friends, and loved ones – SAIs – to provide housing, especially those returning to the community following a period of incarceration.[45] A study examining who financially supports system-involved individuals reported that "[m]ore than half (58%) [of the survey participants] lived with family members when they returned to the community."[46] Scholars have detailed how women are often primarily

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[42] This article also draws from sociological research that explores the social dimension and lived experience of SAIs who experience these privacy intrusions. *See e.g.,* Megan Comfort, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON (2007); Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271 (2007).

[43] A recent report mapping the movement of ten thousand police officers in twenty-one U.S. cities found officers spent considerably more time in Black neighborhoods than in areas with similar socioeconomic status. *See* Keith Chen, et al., *Smartphone Data Reveal Neighborhood-Level Racial Disparities in Police Presence,* THE REVIEW OF ECONOMICS AND STATISTICS (2023) https://direct.mit.edu/rest/article/doi/10.1162/rest_a_01370/117710/Smartphone-Data-Reveal-Neighborhood-Level-Racial. These "patterns of police presence" lead to higher arrests rates in neighborhoods with more Black people. *See id.* Excessive policing of Black and Brown neighborhoods and a higher likelihood of resident contact with the police has ramifications for the entire community. *See* Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing,* THE SENTENCING PROJECT (Nov. 2023) https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/.

[44] *See* Danielle Kaeble, *Probation and Parole in the United States, 2022*, U.S. DEPT. OF JUST. 1, 7-8 (Aug. 22, 2024), https://bjs.ojp.gov/document/ppus22.pdf.

[45] *See* Cecelia Klingele, *The Role of Human Service Providers During Community Supervision,* U.S. DEP'T JUST., 3 (2021), https://www.ojp.gov/pdffiles1/nij/302099.pdf ("Stable, long-term housing is difficult to come by for people on supervision, especially those who have experienced incarceration. Many recently released people live with family or friends; few have means to live alone.").

[46] CLAYTON ET AL., *supra* note 41, AT 27.

responsible for supporting their system-involved loved ones and providing housing upon release.[47]

Additionally, low-income individuals are generally more likely to live in shared or communal residences.[48] These realities converge and paint a picture of what populations are likely overrepresented in SAIs' ranks: low-income Black people or other people of color. Women may also be more likely to be SAIs. Although this Article focuses on SAIs who are most proximate to supervisees, other groups can also be counted amongst their ranks. Employers, for example, fall within the surveillance ambit when monitoring agents conduct workplace visits, require check ins with the employer, or restrict a supervisees work schedule.[49]

Although the aforementioned populations may be more likely to be SAIs today, the adoption of increasingly advanced surveillance technologies foreshadows more widespread privacy invasions and a larger future population of SAIs. Take electronic monitoring, for example. Several aspects of electronic monitoring implicate SAIs' privacy. First, in a survey of electronic monitoring terms, conditions, contracts, and policies, Professor Kate Weisburd found that, in some jurisdictions, a condition of electronic monitoring is submitting to suspicionless searches of electronic devices, including smartphones.[50] Such a condition authorizes state agents to inspect and peruse phone logs, text message conversations, social media interactions, notes, browsing histories, and more.[51] Additionally, "[i]n about 40% of jurisdictions in the study, people on monitors are subject to searches at any time without reasonable suspicion or probable cause, subjecting people who live with them to searches as well."[52] Finally, some electronic monitors are

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[47] *See e.g.*, Hinds, *supra* note __, at __; Cory Fischer-Hoffman, *The Quadruple Burden: Reproductive Labor & Prison Visitation in Venezuela*, 24 PUNISHMENT & SOC'Y 95, 108 (2022); Page & Soss, *supra* note 38; Page et. al., *supra* note 38; CLAYTON ET AL., *supra* note 41; DEVUONO-POWELL ET. AL., *supra* note 38; COMFORT, *supra* note 42; LORI B. GIRSHICK, SOLEDAD WOMEN: WIVES OF PRISONERS SPEAK OUT (1996); LAURA T. FISHMAN, WOMEN AT THE WALL: A STUDY OF PRISONERS' WIVES DOING TIME ON THE OUTSIDE (State University of New York Press 1990).

[48] A report from the U.S. Department of Housing and Urban Development found that "economic factors are the main motivating factor for shared housing." Office of Policy Development and Research, U.S. DEP'T HOUSING AND URBAN DEVELOPMENT, *Assessment of Shared Housing in the United States* (June 2021) https://www.huduser.gov/portal/sites/default/files/pdf/Insights-of-Housing.pdf.

[49] Weisburd, *supra* note 24, at 22-23.

[50] Kate Weisburd, *Punitive Surveillance,* 108 VIRG. L. REV. 147, 159 (2002).

[51] *Id.* at 159-61.

[52] Kate Weisburd, Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System at 12 (Geo. Wash. U. L. Sch. 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930296.

equipped with audio and listening capabilities.[53] Although electronic monitoring companies deny utilizing the audio and listening feature, the devices *are* equipped with the technology to do so warranting concern.[54] Electronic monitoring thus has the potential to increase the portion of the population that is system-adjacent – surveillance is no longer limited to who a system-involved person resides with; it's now also anyone they converse or come within conversing distance of.

2. Street Stops

In *Suspicious Companions*, Hochman Bloom examines police-initiated street encounters.[55] She argues that despite the Fourth Amendment demanding *individualized* and *particularized* reasonable suspicion, routinely "police suspicion regarding an individual is unconstitutionally transferred to the company they keep."[56] She exposes two contexts when this impermissible erosion of SAIs' Fourth Amendment privacy rights occurs: first, when one person's acquiescence to a police officer's demand casts suspicion on a SAI's refusal to consent, and second, "when a police officer's criminal suspicion regarding one individual may be valid but is inappropriately reflected on all other companions."[57] Professor Bloom identifies other contexts where the particularity requirement is diminished, including gang databases and when community supervision of one individual spills over to proximate SAIs.[58] These scenarios evidence "a doctrinal shift" away from fundamental Fourth Amendment precedent that requires individualized and particularized suspicion.[59] This shift undermines relationships, "compounds the racial impact of policing", and "has an outsized impact on young and poor people in marginalized communities."[60]

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[53] Weisburd (Punitive Surveillance), *supra* note __, at 155; Weisburd (Electronic Prisons), *supra* note __, at 2; Joshua Kaplan, D.C. Defendants Wear Ankle Monitors That Can Record Their Every Word and Motion, Wash. City Paper (Oct. 8, 2019), https://washingtoncitypaper.com/article/178161/dc-agencypurchases-ankle-monitors-that-can-record-defendants-every-word-and-motion; Kira Lerner, Chicago Is Tracking Kids with GPS Monitors That Can Call and Record Them Without Consent, Appeal (Apr. 8, 2019), https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles/.

[54] Weisburd (Punitive Surveillance), *supra* note __, at 165-66.

[55] Aliza Hochman Bloom, *Suspicious Companions,* ___ ____ (forthcoming) (manuscript on file with author).

[56] *Id.* at 1 (emphasis added).

[57] *Id.* at 7, 9.

[58] *Id.* at 9.

[59] *Id.* at 51-52.

[60] *Id.* at 52-57.

3. Probation and Parole

A few scholars have analyzed SAIs' Fourth Amendment privacy rights in the parole and home confinement context directly. In an Essay, James M. Binnall, a former parolee, explores the potential promise of the Supreme Court's decision in *Georgia v. Randolph*.[61] In *Randolph*, the Court held that a present co-occupant's nonconsent to a search overrides another co-occupant's consent.[62] Binnall advocated for extending the Randolph holding to third parties residing with parolees enabling them to withhold consent for a parole search of a shared residence.[63] As discussed below, courts have declined to extend Randolph to third parties residing with probationers or parolees and, instead, have continued to hold that supervisees' co-residents enjoy a reduced expectation of privacy in their shared homes.[64]

In a 1993 article, Dorothy K. Kagehiro sounded the alarm on home confinement's impact on co-residents.[65] Kagehiro stated that "[h]ome confinement represents a government invasion and a conversion of a citizen's home into a place of confinement . . . for individuals who have committed no act justifying official scrutiny, the coresidents."[66] She notes how home visits, searches, and other restrictions impact co-residents and calls for more research on whether the co-residents receive adequate notice of how home confinement may affect their lives and privacy interests.[67] She also warns of the potential curtailment of a co-residents freedom of association.[68]

4. Correctional Facilities

SAIs' privacy rights are impacted even when a system-involved loved one is not at liberty because they enjoy a severely reduced expectation of privacy when communicating with an incarcerated individual. It is well settled that incarcerated individuals have no reasonable expectation of

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[61] 547 U.S. 103 (2006); *see* James M. Binnall, *He's on Parole.. But You Still Can't Come in: A Parolee's Reaction to Georgia v. Randolph*, 13 GEO. J. ON POVERTY L. & POL'Y 341 (2006).

[62] 547 U.S. 103 (2006).

[63] *See Id.* at 350-56.

[64] Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017) (declining to apply Randolph to a probation search where police suspected the probationer of participating in a violent, serious offense); State v. Bursch, 905 N.W.2d 884 (Minn. Ct. App. 2017); State v. Hurt, 743 N.W.2d 102 (N.D. 2007).

[65] *See* Dorothy K. Kagehiro, *Psycholegal Issues of Home Confinement*, 37 ST. LOUIS L.J. 647 (1993).

[66] *Id.* at 660-61.

[67] *Id.* at 661.

[68] *Id.* at 661-64.

privacy in their telephone communications.[69] Since there must be a non-inmate party to these conversations, SAIs communicating with an incarcerated person suffer from a reduced expectation of privacy as well. The Second Circuit considered a non-inmate SAI's privacy rights when communicating with an incarcerated person in *United States v. Willoughby*.[70] Willoughby, a non-inmate, was convicted after an incriminatory phone call recording made to his incarcerated co-defendants was introduced at trial.[71] Willoughby moved to suppress the phone call arguing, in part, that as a non-inmate, recording the phone call at issue violated his Fourth Amendment privacy rights.[72] The Court rejected this argument finding that the "institution's strong interest in preserving security" outweighed Willoughby's privacy interest and that he was on notice that his phone calls were recorded.[73] The court held, "Contacts between inmates and noninmates may justify otherwise impermissible intrusions into the noninmates' privacy."[74]

Thus, the boundaries of carceral surveillance extend beyond the prison gates and capture SAIs through the regulation of jail and prison calls. In her article, The Digital Panopticon, Zina Makar considers SAIs' privacy rights in data gathered from communications with incarcerated people through digital tablets.[75] In response to visiting limitations imposed during the COVID-19 pandemic, correctional officials turned to digital tablets as an alternative means for connecting incarcerated people with their social networks and communities.[76] Since then, the use of digital tablets has rapidly increased in jails and prisons across the nation.[77]

For some SAIs, digital tablets are beneficial. They enjoy more frequent and intimate connectivity with their incarcerated loved ones through video

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[69] *See e.g.,* United States v. Workman, 80 F.3d 688 (2d Cir. 1996); United States v. Amen, 831 F.2d 373 (2d Cir. 1987)

[70] 860 F.2d 15 (2d Cir. 1988).

[71] Willoughby, 860 F.2d at 18-19.

[72] *Id.*

[73] *Id.* at 21-22.

[74] *Id.* at 21.

[75] Makar, *supra* note 6.

[76] U.S. DEP'T OF JUSTICE, PREPARING FOR THE NEXT PANDEMIC: LESSONS LEARNED FROM COVID-19 IN CONFINEMENT FACILITIES 43 https://bja.ojp.gov/doc/covid-lessons-learned.pdf.

[77] Alissa Johnson, *Free Prison Tablets: In Promise and In Practice*, EPIC (Aug. 29, 2024), https://epic.org/free-prison-tablets-in-promise-and-in-practice/ ("as of 2022, at least 25 states have deployed tablets in their prisons—and within states with free tablet contracts, rollout across correctional facilities continues to expand").

calls and text messaging.[78] Additionally, digital tablets can ease the burden of in person visitation. Many SAIs must travel significant distances, often on public transportation, and expend precious financial resources to reach the correctional facilities where their loved ones are incarcerated.[79] Digital tablets can ease that financial and time burden.

However, with greater connection and intimacy comes heightened surveillance and intrusion. The speed and frequency of text message exchanges generate a greater volume of communications that correctional officials can access and review. Video calls allow third parties to not only eavesdrop on auditory conversations, but also provide visual access to SAIs' homes, cars, offices, bedrooms, or any other location where they take a video call. As Professor Makar notes:

> [T]he technology behind these tablets significantly amplifies the nature, scope, and reach of the information it captures even where the activity conducted (communication through text or call) remains relatively unchanged. In most cases we think of technology as expanding one's ability to engage without limits, but here, the technology used simultaneously restricts the users' boundaries by casting a broad sphere of surveillance over prisoners and prisoner-adjacent communities.[80]

Makar illustrates how SAIs are swept into the surveillance net through digital tablets using Securus – one of the major prison tablet service providers – as an example. She highlights four categories of information that Securus can capture and share: (1) information that allows family members to be robocalled, (2) communications between family members that can be accessed by family counselor providers, (3) SAIs' data and e-commerce

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[78] Text messaging is a quick and informal means of communication that permits incarcerated people and SAIs to exchange a greater volume of messages more frequently. This facilitates greater intimacy in these exchanges because they can communicate nearly in real-time and "[b]y sharing messages about the simplicities of life, prisoners maintain a semblance of closeness and connection that was hard to establish with sporadic phone calls that might often amount to providing only essential information." *Id.* At 8-9. Similarly, incarcerated people can see their loved ones' faces, expressions, body language, and physical locations while hearing their voices, intonations, and tone through video calls. While falling short of an in-person conversation or visit, video calls allow for greater connection than phone calls.

[79] *See* Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons,* PRISON POL'Y INITIATIVE (Oct. 20, 2015) https://www.prisonpolicy.org/reports/prisonvisits.html; Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison,* THE MARSHALL PROJECT (Dec. 18, 2019) https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison.

[80] Makar, *supra* note 6, at 13.

accounts; and (4) "electronic speech detection technology used for voice identification."[81] She notes how "tablets draw free society closer to prisons, severely constricting the rights of nonincarcerated individuals in unprecedented ways that cannot be temporally limited when the spatial barrier [between prisons and free society] existed."[82] She rings the warning bells about the potential harms to SAIs: "But unregulated, the operation of prison tablets has the ability to expand the carceral panopticon by further entrenching subordinated communities in key ways—from indiscriminate surveillance compounded by datamining and AI learning of prison- adjacent communities to rampant financial exploitation."[83]

5. Genetic Surveillance

Finally, with the emergence and proliferation of DNA data banking, scholars are sounding the alarm on how genetic surveillance implicates SAIs through the process of familial searching.[84] "'[F]amilial DNA searches' compare crime scene DNA evidence to offender profiles already in a DNA database, searching for a partial DNA match in the hopes that the perpetrator is a relative of an offender whose profile is already present in the database."[85] Scholars have enumerated several concerns with how familial DNA searching implicates SAIs' privacy rights. First, "[g]athering samples from family members extends state surveillance to yet another category of innocent citizens . . . suspicion based on familial association," that may subject them to searches and other state intrusion.[86] Second, family members become "genetic informants" who provide information to law enforcement, sometimes unknowingly and without consent, about their relatives.[87] Third, familial DNA searching can interfere with familial relationships by engendering anger or resentment against the original family member who provided the DNA sample or by revealing "a previously unknown genetic

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[81] *Id.* at 13.

[82] *Id.* at 15.

[83] *Id.* at 32.

[84] Rachel Cox, Unethical Intrusion: The Disproportionate Impact of Law Enforcement DNA Sampling on Minority Populations, 52 AM. CRIM. L. REV. 155 (2015); Dorothy Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 HOW. L.J. 567, 574 (2011).

[85] Mary McCarthy, *Am I My Brother's Keeper?: Familial DNA Searches in the Twenty-First Century*, 86 NOTRE DAME L. REV. 381, 381 (2011).

[86] Roberts, *supra* note 20, at 574; Eli Rosenberg, *Family DNA Searches Seen as Crime-Solving Tool, and Intrusion on Rights*, N.Y. TIMES (Jan. 27, 2017).

[87] Ellen Nakashima, *From DNA of Family, a Tool to Make Arrests*, WASH. POST, Apr. 21, 2008, http://www.washingtonpost.com/wp dyn/content/article/2008/04/20/AR2008042002388.html. *See also* Cox, *supra* note 20, at 172; McCarthy, *supra* note 85, at 400.

connection," a "lack of a genetic connection between persons thought to have been related," or "unknown medical information."[88] Fourth, "DNA evidence is not immune from human error," which can lead to inaccurate allegations, false arrests, and wrongful convictions.[89] Finally, Roberts and others are particularly alarmed by how familial DNA searching disproportionately impacts minority communities who are already targets for policing and prosecution.[90]

C. Borrowed Lessons: Net-widening and Surveillance Deputization

The concerns regarding SAIs' privacy rights in each of the aforementioned contexts are exacerbated by the sheer scope of the criminal legal system. The 1970s heralded the beginning of the nation's march towards mass incarceration.[91] Over the next forty years, the War on Drugs, punitive sentencing regimes, and tough on crime policies caused a dramatic increase in jail and prison populations.[92] As the devastating consequences of mass incarceration became apparent,[93] the criminal legal system began to rely on community surveillance strategies and alternatives to incarceration to manage

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[88] McCarthy, *supra* note 85, at 400.

[89] *See* Rosenberg, *supra* note 86.

[90] Roberts, *supra* note 20, at 574. *See also* Rosenberg, *supra* note 86, Cox, *supra* note 20, at 171-73; McCarthy, *supra* note 85, at 401-02.

[91] *See* Ashley Nellis, THE SENTENCING PROJECT, *Mass Incarceration Trends*, (2024), https://www.sentencingproject.org/reports/mass-incarceration-trends/.

[92] Nellis, *supra* note **Error! Bookmark not defined.**. The prison population grew seven-fold from 1973 to 2009 and four times as many people are incarcerated now than in 1980. Nellis, *supra* note **Error! Bookmark not defined.**; Brian Elderbloom et. al., *Every Second: The Impact of the Incarceration Crisis on America's Families*, FWD.US 21 (2018), *available at* https://static.prisonpolicy.org/scans/EverySecond.fwd.us.pdf.

[93] These consequences have become axiomatic. Nearly two million people are incarcerated in jails and prisons today. Nellis, *supra* note **Error! Bookmark not defined.**. Spending on policing, court systems, and corrections has soared. State and Local Backgrounders, Urban Institute (finding that from 1977 to 2020, state and local government spending on police increased 189 percent while corrections expenditures increased 346%. From 1992 to 2021, court spending increased 65%), *available at* https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures#Question3Police. Rampant racial disparities abound. Nellis, *supra* note **Error! Bookmark not defined.** (finding that nearly 7 in 10 people incarcerated in prisons are people of color and "one in 81 Black adults in the United States is serving time in state prison."). Approximately one in three adults has a criminal record. Criminal Records and Reentry Toolkit, NCSL (Mar. 31, 2023), available at https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit#:~:text=Approximately%2077%20million%20Americans%2C%20or,housing%2C%20and%20higher%20education%20opportunities. And two percent of the adult population is disenfranchised. Nellis, *supra* note __.

jail and prison populations. Scholars have been vigilant about the unintended consequences of popular reforms, especially those intended to decarcerate, including net-widening and surveillance deputization. This section considers each in turn.

1. Net-widening: Wider and Different Nets

Over fifty years ago, sociologist Stanley Cohen explored the concept of net-widening and examined three mechanisms that drive it:

> (1) [T]here is an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously (wider nets); (2) there is an increase in the overall intensity of intervention, with old and new deviants being subject to levels of intervention (including traditional institutionalization) which they might not have previously received (denser nets); (3) new agencies and services are supplementing rather than replacing the original set of control mechanisms (different nets).[94]

As early as the 1970s, sociologists began to sound the alarm on the net-widening impact of diversion programs. At that time, diversion programs were gaining popularity as a smart and more humane solution to increasing crime rates.[95] Diversion programs were expected to reduce recidivism by rehabilitating the accused, promote judicial economy, and give prosecutors more options for resolving cases.[96]

Cohen's examination of diversion programs illustrates each of these three net-widening mechanisms. Important here are his wider nets and different nets critiques. He described how a focus on treatment and prevention led to people uninvolved with the criminal legal system being screened and targeted for early intervention.[97] This practice led to a wider net of social control being cast upon "at risk" people who would otherwise have existed beyond the criminal legal systems reach and gaze.[98]

Net-widening critiques have also been leveled against other criminal justice reform measures, including probation.[99] Scholars observed that while "probation is typically defined as an alternative sanction that diverts people from prison, it also serves as a net widener that increases punishment for

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[94] STANLEY COHEN, VISION OF SOCIAL CONTROL (1st ed. 1991).

[95] *See* Kenneth W. Macke, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 INDIANA L.J. 783, 784 (1975).

[96] Macke, *supra* note 95, at 784-85; *Pretrial Diversion from the Criminal Process,* 83 YALE L.J. 827, 827 (1974).

[97] COHEN, *supra* note 94, at 53.

[98] *Id.*

[99] *Id.*

lower-level offenses where there was never the possibility of long-term incarceration."[100] In Cohen's terms, probation can also be described as a "different net" given the rapid adoption and expansion of probation agencies and departments following its formal introduction in Massachusetts in 1878.[101]

SAIs becoming entangled in the criminal legal system through carceral surveillance mechanisms like probation and parole exemplifies net-widening in practice. Wider nets that expand carceral control are not only cast by targeting at risk populations for intervention and services. Wider nets are also cast when carceral surveillance extends beyond the accused or convicted person and spills over to the family, friends, and communities beside them. Similarly, different nets are not only cast by new agencies (e.g. probation departments) that are supplementing rather than replacing other control mechanisms. Different nets are also cast by deputizing new surveillers, SAIs, to behave as the criminal legal system's eyes and ears.

2. Surveillance Deputization: Peers as Watchdogs

SAIs occupy two distinct roles in the criminal legal system's surveillance apparatus: the surveilled and the surveiller. In addition to using technology and monitoring agents to surveil system-involved people, the criminal legal system outsources its surveillance needs to civilians who gather and report information.

This phenomenon is not new. Professor Sarah Brayne and colleagues developed the term "surveillance deputization" to "describe when ordinary people use their labor and economic resources to engage in surveillance activities on behalf of the state."[102] Brayne provides several historical and contemporary examples of surveillance deputization in the criminal legal system, including Indian constables, slave patrols, neighborhood watches, and ring doorcams.

In the United States, surveillance deputization has been selectively

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[100] Phelps, *supra* note 25, at 262. *See also* Phelps, *supra* note 12, at 125 ("Originally designed and promoted as an alternative to imprisonment that would spare promising individuals from the ravages of institutionalization, probation has often served instead as a net-widener that expands formal supervision for low-level cases."); Michelle S. Phelps, *The Paradox of Probation Community Supervision in the Age of Mass Incarceration*, 28 FED. SENT. RPTR. 283, 288-89 (2016); Marcelo F. Aebi et.al., *Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?*, 17 PUNISH. & SOC'Y 575 (2014).

[101] Ryan Labrecque, *Probation in the United States: A Historical and Modern Perspective,* HANDBOOK OF CORRECTIONS IN THE UNITED STATES 7 (2017).

[102] Sarah Brayne et al., *Surveillance Deputies: When Ordinary People Surveil for the State*, 57 LAW & SOC'Y 462, 463 (2023).

deployed against racial, ethnic, and political minorities. There is a long history of encouraging neighbor to report on neighbor and "early efforts at crowdsourcing surveillance were deeply entwined with racist policies and the maintenance of white social and racial order."[103] The Fugitive Slave Act of 1850 is one such example.

The Fugitive Slave Act of 1850 explicitly deputized the public to aid in the capture and return of enslaved people who sought freedom. Section 5 states, "and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose."[104] At the state and federal level through an evolving system of both formal and informal deputization, a culture of surveillance was created that forced all to monitor enslaved communities to find and capture people seeking freedom, patrol areas between plantations, monitor social gatherings, inspect passes, and even issue lashings.[105]

While the Fugitive Slave Act of 1850 may feel far removed from the carceral surveillance mechanisms used today, it situates current deputized surveillance practices in a broader history of marginalization and subordination.[106] For a more contemporary example of surveillance deputization in the criminal legal system, consider sociologist Faith M. Deckard's research on the commercial bail industry.[107] In the study, Professor Deckard observed how, by cosigning on bail contracts for the accused, family

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[103] *See id.* at 464.

[104] Fugitive Slave Act of 1850, ch. 60, § 5, 9 Stat. 462 (repealed 1864).

[105] *See id. See also* Antonio T. Bly, *Indentured Servant and Slave Patrols in Virginia,* Encyclopedia Virginia (Aug. Aug. 2024), *available at* encyclopediavirginia.org/entries/servant-and-slave-patrols-in-virginia/. Indeed, the deputization of white citizens to assist in the subordination of enslaved people through surveillance, terror, and capture predated the 1850s amendment to the Fugitive Slave Act. In the 1600s, Virginia enacted legislation promising any citizen who captured an escaped enslaved person or indentured servant between 200 and 1,000 pounds of tobacco, a valuable commodity. *Id.* Later, Native Americans were enlisted as additional surveillers and promised currency and goods in exchange for their aid. *Id.* As fear of slave revolts grew, the Virginia legislature enacted more formal conscription measures. *Id.* Constables were empowered to "raise forces" to capture enslaved people and later, militias were authorized and formed for the same purpose. *Id.* "Leaders were permitted to deputize as many people as they deemed necessary to apprehend a runway and patrol officers were allowed to commandeer boats, guns, and ammunition." *Id.* "Over time, the patrols' responsibilities were expanded to include regular surveillance of the enslaved population." *Id.*

[106] Scholars have argued that the criminal legal system is a contemporary reimagination of historical systems of racial subordination like slavery and Jim Crow. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[107] *See, e.g.,* Faith M. Deckard, *Surveilling Sureties: How Privately Mediated Monetary Sanctions Enroll and Responsibilize Families*, SOCIAL PROBLEMS (2024).

members become both "fraught instrument[s] of surveillance" and "subjects of surveillance and carceral control."[108] Through threats, reminders, and not-so-gentle urging, bail bond agents ensure that cosigners fulfill their obligation to guarantee that the accused attends court.[109] Concerned with the potential financial loss and threat of jail time if the accused fails to appear, cosigners are incentivized to monitor or keep a close eye on the accused.[110] Through this process, we see a form of "double deputization" – the criminal legal system outsources surveillance of the accused to private bail companies who then outsources surveillance to cosigners.

Cosigners themselves become subjects of the carceral gaze through intrusive, invasive, and ongoing questioning and tracking. One study participant summarized it as follows:

> They wanted to know how much I paid for my apartment; they wanted to know my license plate number... what kind of car I had, the car make and model, year, coup, and hatchback. Driver license of course... they asked for my last five addresses... how much I make, my job, my supervisor, they asked that too, the address of my job…"[111]

For probationers and parolees, surveillance deputies reside close to home. In fact, they may reside within one's home. Despite the literature studying these examples and others, the surveillance deputization of SAIs in the context of probation and parole remains an undertheorized surveillance mechanism employed by the state. We will return to this mechanism in Part II after considering how residential and digital search conditions erode SAIs' privacy rights.

II. LIVING UNDER SURVEILLANCE: HOW FOURTH AMENDMENT PROTECTIONS ARE DIMINISHED IN PROBATION AND PAROLE SEARCHES

Carceral surveillance erodes SAIs' constitution rights enveloping them in the carceral surveillance net and affording them fewer privacy protections than their non-SAI peers. This Part considers how probation and parole expand the population of people subject to observation and monitoring by the criminal legal system and convert them into targets of carceral surveillance. It provides a descriptive account of these practices and how they impact SAIs before turning to how the relevant legal doctrine evolved to subordinate SAIs into a privacy underclass whose Fourth Amendment protections are curtailed. It then examines the probation and parole practices and mechanisms that

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[108] *Id.* at 10-13.
[109] *Id.* at 9-10.
[110] *Id.* at 10-11.
[111] *Id.* at 12.

deputize SAIs into additional surveillers.

Before beginning, it is important to recognize the skewing effect of caselaw analysis. Hochman Bloom describes the selection bias inherent in her analysis of street stops:

> Because of the nature of our judicial process, the only police-citizen interactions reviewed by a court are those where contraband was found. Given this selection bias, the Court recognizes that "it is easy to forget that [the Court's] interpretations of such rights apply to the innocent and the guilty alike." This bias creates an inaccurate perception of police infallibility whereby courts do not review cases of the hundreds of people stopped and searched daily where criminal charges do not arise.[112]

Such a criticism applies equally to this analysis. Most of the cases and opinions that follow arose *only because* state agents recovered contraband which led to a criminal prosecution. With only a couple of exceptions, this sample lacks instances where (1) a search was conducted and no contraband was recovered, (2) a search was conducted and any contraband was attributed to someone other than the SAI, (3) a search was conducted, contraband was found, an SAI was prosecuted, and the charges against the SAI were later dismissed or the SAI was acquitted,[113] or (4) a search was conducted, contraband was found, an SAI was prosecuted and convicted, and the SAI did not appeal. The cases that follow are only a small sample of instances where SAIs' privacy rights are curtailed because of their proximity to a supervisee.

A. Residential Searches

Citizens with no or limited proximity to the criminal legal system enjoy a high expectation of privacy in their home, residence, or dwelling. The Supreme Court has consistently emphasized the sacredness of the home:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion

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[112] Hochman Bloom, *supra* note 16, at 5 (citing United States v. Sokolow, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting)).

[113] *See e.g.,* People v. Alders, 151 Cal.Rptr 77, 78 (Ct. of App. 1978) (during a probation search police discovered contraband was discovered under a bed. A woman seated on a couch in the room where the contraband was discovered was originally charged. Those charges were later dismissed.).

> of his indefeasible right of personal security, personal liberty. and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of [the] judgment.[114]

Accordingly, only a compelling government interest will excuse invading the privacy of the home and warrantless intrusions are generally prohibited absent a specific exception.[115] Scholars have highlighted the preferential treatment afforded to the home and the unique deference granted to ensuring its sanctity.[116]

This protectionism of the home is not enjoyed by all citizens equally. Probationers' and parolees' privacy rights are significantly curtailed during their supervision period. Residential and electronic search conditions imposed on supervisees spill over to SAIs. When this occurs, SAIs' residential and digital privacy rights under the Fourth Amendment are involuntarily sacrificed not because of their own criminal conduct or misbehavior, but rather as a consequence for the company they keep. A survey of court decisions in the sections that follow reveals consistent patterns and lines of reasoning that, with near uniformity, reduce SAIs' expectation of privacy in their homes and digital devices when residing with, visiting, or sharing electronics with a supervisee.

Probation and parole share a common condition: probationers and parolees must submit to searches of their persons, property, and residences.[117] When SAIs reside with a probationer or parolee, the supervisee's reduced expectation of privacy transfers to the SAI diminishing the level of suspicion

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[114] Boyd v. United States, 116 U.S. 616, 630 (1886). *See also* People v. Britton, 156 Cal.App.3d 689, 697 (Cal. Ct. App. 1984) ("We acknowledge a strong bias in the law against governmental physical entry into one's home."); Payton v. New York, 445 U.S. 573, 660 (1980) (emphasizing the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); Silverman v. United States, 365 U.S. 505, 511 (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.").

[115] Kyllo v. United States, 533 U.S. 27, 31 (2001). Such exceptions include consent to search, *see* Illinois v. Rodriguez, 497 U.S. 177 (1990), Scheneckloth v. Bustamonte, 412 U.S. 218 (1973), United States v. Matlock, 415 U.S. 164 (1974), and exigent circumstances, *see* Mincey v. Arizona, 437 U.S. 385, 393-94 (1978).

[116] JENNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 82-96 (Yale University Press 2009) (highlighting the historical and jurisprudential deference granted to the home while reviewing how the criminal law has slowly infiltrated the home to regulate and respond to domestic violence). District of Columbia v. Heller, 554 U.S. 570 (2008) (emphasizing that the right to bear arms to protect the home is a fundamental cornerstone of personal liberty).

[117] The relevant legal doctrine and caselaw are discussed in detail in Part II.A.1.

necessary to search the SAI's property and home.[118] Social scientists studying this spillover effect have interviewed SAIs and documented their experiences.[119] In one study, Professor Megan Comfort recalls a participants' reflection on residing with a spouse on parole:

> We could be just getting done ...having our little intimate time, and here comes somebody knocking at the door at seven o'clock in the morning .... They have a key to our gate at the bottom of the [stairs], cuz it's like there's a gate and then there's the upstairs where you can come in, so [the parole officer] has the key, so he comes and he knocks on our door, and so by then I'm like, man! You feel so violated, you just feel like God! I can't even have no privacy![120]

Proximity to a person on probation or parole intrudes upon SAIs' privacy in other ways. When residing with a supervisee, agents will interview the homeowner inquiring about sources of income and any history of domestic violence or abuse.[121] They will run background checks on each co-resident and prohibit anyone in the home from possessing alcohol, drugs, weapons, and even certain innocuous items like household knives or tools.[122]

Before examining how the law curtails SAIs' privacy rights, reviewing probationers' and parolees' expectation of privacy in their residences is instructive. Although, the Fourth Amendment protects against "unreasonable searches and seizures" and draws "'a firm line at the entrance to the house,'"[123] courts have curtailed the reasonable expectation of privacy for people on probation and parole. In *Griffin v. Wisconsin*, the Supreme Court considered whether a warrant based upon probable cause is required before searching a probationer's residence.[124] The Court concluded that neither a warrant nor probable cause are required to search a probationer's residence.[125] It reasoned that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only ... conditional liberty properly

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[118] *See infra* Part II.

[119] *See generally* COMFORT, *supra* note 42; Leah Wang, *Both Sides of the Bars: How Mass Incarceration Punishes Families*, PRISON POL'Y INITIATIVE, Aug. 11, 2022, https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration/.

[120] Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 277 (2007) (citing MEGAN COMFORT, DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON 190 (2007)).

[121] Home Plan Brochure, *supra* note 7

[122] Mariam Hinds, *The Shadow Defendants,* 113 GEO. L.J. __, __ (2025); Home Plan Brochure, *supra* note 7; Comfort, *supra* note 120, at 277.

[123] Kyllo v. United States, 533 U.S. 27, 40 (2001) (citing Payton v. New York, 445 U.S. 573, 590 (1980)).

[124] 483 U.S. 868 (1987).

[125] Griffin, 483 U.S. at 875-80. *See also* U.S. v. Hill, 967 F.2d 902 (3d Cir. 1992) (applying Griffin).

dependent on observance of special [probation] restrictions.'"[126] Because the probation agent searched Griffin's residence pursuant to Wisconsin's probation regulatory scheme, the Court found the search reasonable under the Fourth Amendment.[127]

The Court later held in *United States v. Knights* that a search of a probationer's residence need only be supported by reasonable suspicion and approved the "impos[ition of] reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."[128] Looking at the totality of the circumstances and applying a reasonableness standard, the Court weighed the probationer's privacy interest against the government's interest in apprehending offenders.[129] It reasoned that a probationer is more likely to violate the law and is incentivized to conceal any unlawful activity, thus justifying a lower degree of suspicion to defend a search.[130] The Court specifically noted that the suspicion would need to be *individualized* stating, "The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable."[131]

Although the Court set a reasonable suspicion standard for probation searches, courts have since tacitly approved the practice of requiring a probationer to consent to suspicionless searches.[132] In exchange for escaping a harsher sentence like incarceration, judges reason, probationers can be required to submit to increased surveillance and more rigorous search conditions.[133] Indeed, the Eleventh Circuit has dispensed with the requirement that a supervisee agree to a specific search condition before conducting a warrantless search and simply requires reasonable suspicion.[134]

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[126] Griffin, 483 U.S. at 874 (quoting Morrissey v. Brewer, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

[127] Griffin, 483 U.S. at 880.

[128] 534 U.S. 112, 119, 121 (2001). *See also* State v. Cowans, 717 N.E.2d 298, 307 (Ohio Sup. Ct. 1999) (stating that officers do not need a warrant and may search a probationer's residence with "less than probable cause").

[129] *See* 534 U.S. at 118-21.

[130] *Id.*

[131] *Id.* at 121.

[132] United States v. Harden, 104 F.4th 830 (2024); State v. Norman, 21 N.E.3d 1153, 1164 (OH. Sup. Ct. 2014); State v. Adams, 788 N.W.2d 619 (N.D. 2010); People v. Baker, 79 Cal.Rptr.3d 858, 863 (2008); People v. Pleasant, 123 Cal. App. 4th 194 (Cal. Ct. App. 2004); People v. Smith, 95 Cal. App. 4th 912, 916 (Cal. Ct. App. 2002) ("In this state, a probationer may validly consent in advance to a warrantless search of his home in exchange for the opportunity to avoid state prison incarceration) (citing People v. Robles, 3 P.3d 311 (Cal. 2000)).

[133] *See supra* note 132.

[134] *See* United States v. Carter, 566 F.3d 970 (11th Cir. 2009).

Parolees enjoy even fewer Fourth Amendment protections in their residences. In *Samson v. California*, the Court upheld a warrantless, suspicionless search of a parolee reasoning that "a State's interests . . . warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment."[135] Consequently, as discussed in Part I, many states require parolees to sign agreements consenting to suspicionless searches of their person, possessions, and residences.

How then, does dispensing with the warrant requirement for probationers and parolees affect SAIs who are co-residents and visitors? The Court cursorily addressed how its holding impacts SAIs' privacy rights in a single sentence in *Samson*. In his brief, Samson argued that "California's suspicionless search regime also results in serious invasions of the privacy rights of persons who live with parolees,"[136] and emphasized that other states require some degree of suspicion to justify a search of a parolee.[137] The Court disagreed, concluding that "petitioner's concern that California's suspicionless search law frustrates reintegration efforts by permitting intrusions into the privacy interests of third parties is also unavailing because that concern would arise under a suspicion-based regime as well."[138]

The *Samson* Court's reasoning for disregarding SAIs' privacy interests is rather baffling. It reasoned that SAIs would enjoy a reduced expectation of privacy if a reasonable suspicion standard was imposed so requiring no suspicion was immaterial and made little difference. This reasoning is flawed for at least two reasons. First, it diminishes the difference between a reasonable suspicion and a suspicionless standard. The reasonable suspicion standard acts as a necessary check on police behavior protecting citizens from improper state overreach.[139] Devaluing the difference between reasonable suspicion and a suspicionless standard undermines the constitutional protection that requiring reasonable suspicion affords. Pragmatically, given the option to retain some expectation of privacy in their home or no expectation of privacy, most citizens would choose the former.

Second, the Court's reasoning presupposes that SAIs will inevitably have their privacy rights curtailed irrespective of the applicable standard without engaging with the foundational question of whether *any* intrusion is

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[135] 547 U.S. 843, 853 (2006).

[136] Brief for Petitioner at 16, Samson v. California, 547 U.S. 843 (2006) (No. 04-9728).

[137] Samson, 547 U.S. at 855.

[138] Samson, 547 U.S. at 856.

[139] Caroline E. Lewis, *Fourth Amendment Infringement Is Afoot: Revitalizing Particularized Reasonable Suspicion for Terry Stops Based on Vague or Discrepant Suspect Descriptions*, 63 WM. & MARY L. REV. 1797, 1822 (2022) ("The Fourth Amendment serves to limit police conduct toward individuals, keeping citizens protected from unreasonable intrusion").

appropriate. In other words, the Court does not consider whether SAIs who reside with a person on parole should have their Fourth Amendment rights curtailed in the first place.

State and federal courts have taken up this question both pre- and post-*Samson* and afford SAIs, with near uniformity, fewer privacy protections in their homes than their non-system adjacent peers. The Ninth Circuit explicitly addressed SAIs' privacy rights during residential probation searches in *Smith v. City of Santa Clara.*[140] In that case, Justine Smith was on probation and suspected of involvement in a theft and stabbing incident.[141] Justine had previously listed both addresses of her mother's duplex as her residence, but had informed her probation officer that "she was in the process of moving out of her mother's house."[142] When police officers went to her mother's house to conduct a probation search, her mother informed the officers that Justine did not live there, refused consent to search, and demanded a search warrant before permitting entry.[143] Over her objection, officers searched the residence and, after threatening to force entry into the adjoining unit of the duplex, searched the other unit.[144] Justine was not found in either unit.[145]

The mother brought a Section 1983 suit for violating her constitutional rights under state and federal law.[146] In its decision, the Ninth Circuit balanced the SAIs' reasonable expectation of privacy against the state's interest in monitoring supervisees.[147] It held that "the governmental interests at stake were sufficiently great that the warrantless search of the duplex over [the mother's] objection was reasonable."[148] The Eleventh Circuit recently reached the same holding in *United States v. Harden*, but was careful to emphasize that the SAI was aware that their co-resident was on probation, a point that will be addressed in further detail below.[149] Before and after *Samson*, other courts have reached similar holdings when reviewing third

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[140] *See* Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017).
[141] *Id.* at 988.
[142] *Id.* at 989.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 989-90.
[147] *Id.* at 994.
[148] *Id.*
[149] 104 F.4th at 837.

parties' privacy rights during probation searches[150] and parole searches.[151]

A review of this strand of caselaw reveals notable insights. First, and most importantly, courts conclude that SAIs' privacy interests must yield to the government's interest in monitoring individuals on probation and parole. However, to reach this conclusion, courts improperly impute and attribute the probationer or parolee's risk of reoffending to the SAI. In *Griffin*, *Knights*, and *Samson*, the Court reasoned that the probationer or parolees' reduced

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[150] United States v. Harden, 104 F.4th 830 (2024) (upholding a probation search of a closet a probationer shared with his girlfriend); State v. Green, 349 So. 3d 503 (Fla. Dist. Ct. App. 2022) (upholding the search of a master bedroom shared between Green and a probation); Smith v. City of Santa Clara, 876 F.3d 987 (9th Cir. 2017); People v. Ermi, 216 Cal. App. 4th 277 (Ct. App. 2013) (upholding the search of probationer's girlfriend's purse found in a shared bedroom); State v. Finley, 260 P.3d 175 (Mont. 2011) (upholding a search of an unlocked and open safe in a bedroom shared with Finley's wife who was on probation); State v. Adams, 788 N.W.2d 619 (N.D. 2010) (upholding a search of a locked safe in the bedroom of probationer's roommate); State v. Hurt, 743 N.W.2d 102 (N.D. 2007) (upholding the search of a common area shared between probationer and roommate in which drug paraphernalia was found); State v. Walker, 158 P.3d 220 (Az. Ct. App. 2007) (upholding the search of a trunk-like box in the living room of an apartment shared by probationer and probationer's boyfriend); State v. Yule, 905 So. 2d 251 (Fla. Dist. Ct. App. 2005) (upholding the search and seizure of a pen cartridge resembling drug paraphernalia found on an individual inside of probationer's home); People v. Pleasant, 123 Cal.Rptr.3d 796, 798 (Ct. App. 2004) (upholding a search of defendant's locked bedroom because his mother consented to a search waiver as a condition of her probation and had access to the keys to the bedroom. The court stated, "Persons who live with probationer's cannot reasonably expect privacy in areas of a residence that they share with probationers."); People v. Smith, 95 Cal. App. 4th 912 (Cal. Ct. App. 2002) (upholding the search of a feminine purse located within a bedroom shared by Smith and probationer because officers were reasonable in believe that the bedroom was "being used for criminal enterprise" and the probationer has control of access to the purse").

[151] State v. Phipps, 454 P.3d 1084 (Idaho 2019) (holding that officers have the categorical authority to detain and question all occupants of a residence incident to a lawful parole or probation search that led to the admission of one guest possessing a methamphetamine pipe); State v. Kline, 891 N.W.2d 780 (S.D. 2017) (upholding a parole search of parolee's shared motel room with girlfriend); State v. Bursch, 905 N.W.2d 884 (Minn. Ct. App. 2017) (upholding the seizure of firearms found in a non-probationer's private room in a home shared with two people on probation); State v. West, 517 N.W.2d 482 (WI Sup. Ct. 1994); People v. Boyd, 274 Cal.Rptr. 100 (Ct. of App. 1990) (upholding search of Boyd's purse which was located within a parolee's trailer); People v. LaJocies, 174 Cal.Rptr. 100 (Ct. App. 1981) (upholding a firearms possession conviction where the firearm was recovered after a search of a woman's residence that was justified by her husband's parole search conditions); People v. Johnson, 164 Cal.Rptr 746 (Ct. App. 1980) (upholding search of defendant's residence that led to the recovery of marijuana plants and other paraphernalia because a guest who was on parole consented to residential searches); State v. Johnson, 748 P.2d 1069 (Utah 1987), abrogated on other grounds by State v. Doporto, 935 P.2d 484 (Utah 1997) (upholding a search of a hall closet in a residence the parolee shared with his mother); People v. Triche, 306 P.2d 616 (Cal. Ct. App. 1957) (upholding the search of a closet in a home shared between parolee and her boyfriend).

expectation of privacy was justified by their past violation of the law and the government's need to surveil their conduct.[152] The *Knights* Court specifically emphasized how the reasonable suspicion needed to warrant a residential search of a probationer must be *individualized*.[153] Yet when balancing the government's interest against an SAI co-resident, courts find that the scales tip in the government's favor not because of an SAIs' own misconduct or wrongdoing, but rather that of the company they keep. In Hochman Bloom's framing, this is a further illustration of the systematic diminishment of the individualized suspicion requirement.[154] To intrude upon an SAI's privacy in their home, the reasonable suspicion regarding their co-resident is weaponized against the SAI to justify an invasion of their sanctified space. In other words, the past criminal conduct of the probationer or parolee is held against the SAI – there is no suspicion of wrongdoing for the SAI, individualized or otherwise, yet their constitutional entitlements must yield.

The impact of these holdings on SAIs is particularly acute given the legal standard courts use to assess the reasonableness of the challenged search. While courts pay lip service to protecting SAIs' reasonable expectation of privacy in their homes, they interpret their own standards in a manner that severely restricts such liberties.

> Even though a person subject to a search condition has a severely diminished expectation of privacy over his or her person and property, there is no doubt that those who reside with such a person enjoy measurably greater privacy expectations in the eyes of society. For example, those who live with a probationer maintain normal expectations of privacy over their persons. In addition, they retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe the probationer has authority over those areas. That persons under the same roof may legitimately harbor differing expectations of privacy is consistent with the principle that one's ability to claim the protection of the Fourth Amendment depends upon the reasonableness of his or her individual

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[152] Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 3171 (1987) ("it is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law, we think it enough if the information provided indicates, as it did here, only the likelihood ('had or might have guns') of facts justifying the search."); United States v. Knights, 534 U.S. 112, 122 S. Ct. 587, 592 (2001) ("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.); Samson v. California, 547 U.S. 843, 126 S. Ct. 2193, 2200-01 (2006) ("The California Legislature has concluded that, given the number of inmates the State paroles and its high recidivism rate, a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public from criminal acts by reoffenders.")

[153] Knights, 534 U.S. at 121.

[154] Hochman Bloom, *supra* note 16.

expectations.[155]

Despite these assurances, courts take a liberal view of what areas of a residence are under the supervisee's joint or exclusive control and thus what areas officials may search.[156] The terms "access or control" or "custody or control" are interpreted as any area that the supervisee can conceivably reach or access. Such a permissive interpretation grants officers, in practice, unfettered authority to search nearly all areas of a shared residence, even those from which co-residents have taken pains to exclude the supervisee.

Consider the facts in *People v. Pleasant*.[157] Pleasant resided with his mother who had signed a search waiver as a condition of her probation.[158] Officers searched Pleasant's *locked* bedroom during a probation search of their shared residence.[159] The court upheld the search because the mother had access to the keys to the bedroom.[160] Similarly, in *State v. Finley*, officers searched a safe in a bedroom that Finley shared with his probationer wife.[161] Although the safe was open at the time of the search, Finley contended that he purchased the safe to maintain a private space that was not accessible during a probation search, his wife did not have the combination or access to the safe, and he opened the safe only after his wife left for work and intended to close it prior to her return.[162] Regardless, the court upheld the search of the safe.[163]

In some instances, courts will find that an area is under a third party's exclusive control only if the supervisee is "physically incapable" of accessing

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[155] People v. Robles, 97 Cal.Rptr.2d 914, 920-21 (Sup. Ct. 2000) (internal citations omitted).

[156] *See e.g.*, State v. West, 517 N.W.2d 482, 492 (Wis. 1994) ("So long as the authorities have reasonable cause for the search and a reasonable basis for believing that the premises or items searched belong to or are used in common by the parolee, there is no violation of the Fourth Amendment either against the parolee or against the nonparolee.")

[157] People v. Pleasant, 123 Cal.App.4th 194 (Cal. Ct. App. 2004).

[158] *Id.* at 798.

[159] *Id.* at 797.

[160] *Id.* at 798. *But see* People v. Carreon, 203 Cal.Rptr.3d 857, 866 (Ct. of App. 2016) (suppressing drugs recovered from a converted garage unit of a residence. The garage unit was in a residence owned by a probationer and accessed through the laundry room in the main house by a closed, but not locked door. Despite its earlier ruling in *Pleasant*, the court stated, "[i]n our opinion, it flouts widely held social expectations to define joint access as simply having the physical ability to open a door, walk into a room, and open drawers."); People v. Alders, 151 Cal.Rptr. 77 (Ct. of App. 1978) (finding that officers acted improperly by searching a woman's coat during a search of a male probationer's residence since "there was no reason to suppose that a distinctly female coat was jointly shared by her [and the probationer].").

[161] State v. Finley, 260 P.3d 175, 176 (Mont. 2011).

[162] *Id.*

[163] *Id.*

the area.[164] Thus, the burden falls on SAIs to not only bar a supervisee from accessing an area to prevent it from being subject to a residential search, but also to ensure that "there is no basis for officers to reasonably believe the probationer has authority over those areas."[165]

To illustrate how liberally courts apply this standard, consider how courts review officers' assessments of who exercises authority over a gendered item or container. These cases typically involve a male supervisee and a female co-resident's purse or clothing item. Purses have been recognized "as an inherently private repository for personal items" that is "not generally an object for which two or more persons share common use or authority.[166] However, in People v. Ermi, an officer searched a makeup bag within a purse located on a chair in the probationer and SAI's shared bedroom.[167] The search yielded drugs and other paraphernalia.[168] Despite the purse and makeup bag being a "distinctly female depository," the court reasoned that "[p]eople who live with probationers cannot reasonably expect privacy in these circumstances" and concluded that the purse was a container over which the probationer had access or control.[169] Other courts have reached similar conclusions.[170]

The courts' reasoning leads to paradoxical results. Traditionally, citizens

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[164] State v. Norman, 21 N.E.3d 1153, 1164 (OH. Sup. Ct. 2014) (finding that officers erred when they searched a basement unit leased to the defendant by a probationer because the probationer was "physically incapable of entering the basement as he lacked a key to the key lock and the combination to the number-pad lock"). *But see* Carreon, 203 Cal.Rptr.3d at 866.

[165] People v. Robles, 97 Cal.Rptr.2d 914, 920-21 (Sup. Ct. 2000) (internal citations omitted).

[166] People v. Baker, 79 Cal.Rptr.3d 858, 863-64 (2008). *See also* People v. Veronica, 166 Cal.Rptr. 109 (Ct. of App. 1980) (suppressing evidence found in a distinctly feminine purse during the search of a parolee's residence that he shared with his wife).

[167] People v. Ermi, 216 Cal.App.4th 277, 280 (Cal. Ct. App. 2013).

[168] *Id.*

[169] *Id.* at 282.

[170] *See* People v. Smith, 95 Cal.App.4th 912 (Cal. Ct. App. 2002) (upholding search of a feminine purse located within a bedroom shared by Smith and a probationer because officers were reasonable in believing that the bedroom "was being used for a criminal enterprise" and the probationer has control or access to the purse); People v. Boyd, 274 Cal.Rptr. 100, 108-09 (Ct. of App. 1990) (upholding search of a gender-neutral handbag that police could have reasonably believed the parolee owned or controlled). *But see* People v. Montoya, 114 Cal.App.3d 556 (1981) (suppressing evidence found in Montoya's pants pocket because police subjectively believed that they did not belong to the probationer, but one of her guests); People v. Veronica, 166 Cal.Rptr. 109 (Ct. of App. 1980) (suppressing evidence found in a distinctly feminine purse during the search of a parolee's residence that he shared with his wife); People v. Alders, 87 Cal. App. 3d 313 (Cal. Ct. App. 1978) (finding that officers acted improperly by searching a woman's coat during a search of a male probationer's residence since "there was no reason to suppose that a distinctly female coat was jointly shared by her [and the probationer].")

enjoy a greater expectation of privacy in their homes than their motor vehicles.[171] This pattern is upended for SAIs. Police, probation, and parole officers are authorized to search supervisees' vehicles as a condition of their supervision.[172] In *People v. Schmitz*, the California Supreme Court held:

> [T]he Constitution permits a search of those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity. Additionally, the officer may search personal property located in those areas if the officer reasonably believes that the parolee owns those items or has the ability to exert control over them.[173]

Thus, unsurprisingly, the "custody or control" reasoning for residential searches extends to vehicular searches. The *Schmitz* court upheld a search of the SAI's car based on the front passenger's parolee status.[174]

However, in some circumstances, SAIs enjoy a greater expectation of privacy in a shared vehicle than a shared residence because of the gendered nature of certain containers. For example, in People v. Baker, a police officer pulled over a car driven by a person on parole for speeding.[175] Baker was seated in the front passenger seat and had a purse on the floor.[176] The officer searched the purse and recovered drugs.[177] In suppressing the drugs, the court specifically noted the "distinctly feminine" nature of the purse, that Baker was seated in the front passenger seat, and that the purse was located at her feet.[178] On these facts, the court concluded that "there could be no reasonable suspicion that the purse belonged to the driver, that the driver exercised control or possession of the purse, or that the purse contained anything belonging to the driver."[179] Paradoxically, while a purse is likely searchable when located in a residence shared with a person under supervision, it may

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[171] Hochman Bloom, *supra* note 16, at 15. Maryland v. Pringle, 540 U.S. 366, 372 (2003). *See also* United States v. Ross, 456 U.S. 798, 805, 102 S. Ct. 2157, 2162-63 (1982) ("The Court noted that historically warrantless searches of vessels, wagons, and carriages -- as opposed to fixed premises such as a home or other building had been considered reasonable by Congress.")

[172] *See supra* note 7.

[173] People v. Schmitz, 288 P.3d 1259, 1263 (Cal. 2012).

[174] *Id.*

[175] 79 Cal.Rptr.3d 858, 861 (2008).

[176] *Id.*

[177] *Id.*

[178] *Id.* at 864.

[179] *Id. But see* People v. Veronica, 166 Cal.Rptr. 109 (Ct. of App. 1980) (suppressing evidence found in a distinctly feminine purse during the search of a parolee's residence that he shared with his wife).

be more protected when located in a shared vehicle.[180]

Courts also grant significant deference to officers' by rejecting a duty to inquire and authorizing pretextual searches. In other words, officers are not required to ask residents about what areas supervisees can access nor must they rely on the supervisee's word. Instead, "[s]earching officers are entitled to rely on appearances."[181] This was the case in *State v. Adams* where the court upheld a search of a locked safe because it was in a bedroom that the probationer could access and no one informed the searching officers prior to the search whether the safe belonged to the third party or the probationer.[182]

Officers are also permitted to conduct pretextual searches because courts apply an objective standard when assessing the reasonableness of police conduct and disregard their subjective intent.[183] The California Supreme Court confronted this situation in *People v. Woods.*[184] In Woods, Gayla Loza was on probation and resided with Cheryl Woods and William Benson.[185] As a condition of her probation, Loza agreed to warrantless searches of her residence.[186] Police officers conducted a search of Loza's residence *to obtain evidence against Loza's boyfriend*.[187] During the search, officers entered the only bedroom and discovered its occupants, Woods and Benson, along with drugs and guns.[188] The court upheld the constitutionality of the search and disregarded the officer's subjective intent – attempting to discover evidence of the boyfriend's wrongdoing – in conducting the search.[189]

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[180] *Compare* People v. Baker, 79 Cal.Rptr.3d 858, 861 (2008) *with* People v. Ermi, 156 Cal.Rptr.3d 848 (2013); People v. Smith, 116 Cal. Rptr.2d 694 (Ct. of Appeal 2002); People v. Boyd, 274 Cal.Rptr. 100, 108-09 (Ct. of App. 1990).

[181] People v. Carreon, 203 Cal.Rptr.3d 857, 866 (Ct. of App. 2016). *See also* US v. Davis, 932 F.2d 752, 758 (9th Cir. 1991); People v. Boyd, 274 Cal.Rptr.100, 106-08 (Ct. of App. 1990). *But see* People v. Tidalgo, 176 Cal.Rptr. 463 (1981); People v. Montoya, 114 Cal.App.3d 556 (1981).

[182] State v. Adams, 788 N.W.2d 619, 623 (N.D. 2010).

[183] People v. Woods, 981 P.2d 1019, 1021 (Cal. 1999). *But see* People v. Robles, 3 P.3d 311 (Cal. 2000), Kennard J. *concurring* ("the Fourth Amendment does not permit 'police to use a probation search condition, which authorizes the warrantless, suspicionless search of a probationer, as authority to search a home for the express purpose of seeking evidence against nonprobationers who share the residence with the probationer.'") (citation omitted).

[184] 981 P.2d 1019, 1021 (Cal. 1999).

[185] *Id.* at 671.

[186] *Id.* at 672.

[187] *Id.* at 672-73.

[188] *Id.* at 672-73.

[189] *Id.* at 681-82. *See also* State v. Bursch, 905 N.W.2d 884, 894 (Minn. Ct. App. 2017) (disregarding the officer's actual motivations for searching a third party's bedroom during a probation search and, instead, applying an objective standard). For an examination of how courts selectively apply objective versus subjective standards when reviewing government actors' behaviors to benefit the state, see Rachel E. Barkow, *Of Two Minds: The Supreme Court's Divergent Approach to Constitutional Mens Rea* (manuscript on file with author).

Other Fourth Amendment doctrines intersect with probation and parole searches to further diminish SAIs' expectation of privacy when residing with persons under carceral surveillance. For example, the plain view or plain smell doctrines. Once searching officers have lawful access to a private residence because of a probation or parole search condition, anything observed in plain view or plain smell is fair game.[190] This occurred in *People v. Johnson*.[191] Johnson permitted a friend on parole to stay in his residence.[192] While waiting in the driveway as a fellow officer searched the parolee's bedroom, an officer observed marijuana plants growing in the yard and later charged Johnson for cultivating marijuana.[193] The court upheld the denial of the motion to suppress because the officer had observed the marijuana plants in plain view while conducting a lawful search of the parolee's residence.[194] Another relevant legal doctrine is protective sweeps. In *State v. Bursch*, the court concluded that an officer was authorized to conduct a protective sweep of an SAI's bedroom during a probation search.[195] Accordingly, even when an area is not under the probationer or parolee's custody or control, police can still gain access through protective sweeps.

Residential searches not only curtail SAIs' privacy rights in the physical spaces and containers within the residence. SAIs who are merely present on the premises, even solely as guests, can be physically detained, handcuffed, frisked, and subjected to questioning during the execution of a probation or parole search.[196] In *State v. Phipps*, Phipps was merely present in a residence when officers arrived to conduct a parole search.[197] Although she did not reside with the parolee, she was detained in the living room and asked "whether there was anything in the apartment that they should know about."[198] Phipps admitted to possessing a methamphetamine pipe in her

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[190] *See, e.g.,* United States v. Harden, 104 F.4th 830 (2024) (upholding a search of an SAI's residence that was shared with a probationer where officers smelled a strong odor of marijuana); State v. Green, 349 So. 3d 503 (Fla. Dist. Ct. App. 2022); State v. Bursch, 905 N.W.2d 884 (Minn. Ct. App. 2017) (upholding search of a third party's bedroom where officer's observed a gun through his open bedroom door); State v. Walker, 158 P.3d 220 (Az. Ct. App. 2007); Johnson, 164 Cal.Rptr at 746.

[191] Johnson, 164 Cal.Rptr at 746.

[192] *Id.* at 887.

[193] *Id.*

[194] *Id.*

[195] State v. Bursch, 905 N.W.2d 884, 893-94 (Minn. Ct. App. 2017).

[196] State v. Phipps, 454 P.3d 1084, 1091(Idaho 2019); Com. v. Mathis, 125 A.3d 780 (Pa.Super. 2015); People v. Rios, 122 Cal.Rptr.3d 96 (2011); State v. Jones, 78 So.3d 274 (La.App.2011); Sanchez v. Canales, 574 F.3d 1169 (9th Cir. 2009), overruled on other grounds by United States v. King, 687 F.3d 1189 (9th Cir. 2009); Ohio v. Barnes, 1996 WL 501464 (Ohio App. 2 Dist.1996).

[197] Phipps, 454 P.3d at 1085.

[198] *Id.*

backpack, which was later recovered.[199] The *Phipps* court found that the government interest in "(1) preventing flight, (2) minimizing the risk of harm to the officers, and (3) the orderly completion of the search" outweighed the intrusion on the third party's Fourth Amendment rights and held that "officers have the categorical authority to detain all occupants of a residence incident to a lawful parole or probation search and to question them as long as the detention is not prolonged by the questioning."[200]

Finally, SAIs' property can be destroyed during a residential search. In *State v. Adams*, the court concluded that a search was conducted in a reasonable manner despite officers destroying an SAI's safe located in a bedroom a probationer could access.[201]

The key takeaway here is not that the police in these examples behaved unlawfully or overstepped their constitutional permissions. Indeed, that the officer's actions pass Fourth Amendment muster is the point. SAIs are subjected to a level of scrutiny and state surveillance because of their proximity to a person under carceral surveillance that a non-SAI citizen is not and Fourth Amendment doctrine has evolved to permit or endorse such disparate treatment.

B. Digital Searches

As with residential searches, courts have recognized that citizens enjoy a high expectation of privacy in their digital and electronic devices. In *Riley v. California,* the Supreme Court considered whether the Fourth Amendment requires police officers to obtain a warrant before searching an arrestee's cell phone incident to a lawful arrest.[202] The Court distinguished inspecting a cell phone from other searches:

> Today . . . it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case. . . . Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life[.]'[203]

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[199] *Id.* at 1085-86.

[200] *Id.* at 1091.

[201] 788 N.W.2d 619 (N.D. 2010). *See also* State v. Walker, 215 Ariz. 91, 158 P.3d 220 (2007).

[202] Riley v. California, 573 U.S. 373 (2014).

[203] Riley, 573 U.S. at 395, 403 (internal citations omitted).

Balancing the arrestee's significant expectation of privacy in their cell phone against the government's interest in officer safety and preventing the destruction of evidence, the *Riley* Court required officers to obtain a warrant before inspecting the contents of an arrestee's cell phone.[204]

Unlike ordinary citizens, people on probation and parole often enjoy a reduced expectation of privacy in their digital devices. Like residential search conditions, probation and parole may impose electronic search conditions on supervisees.[205] These search conditions grant state agents authority to search electronic devices such as computers, cell phones, or social media accounts.[206] Courts reviewing the propriety of these electronic search conditions balance the government's interest in crime detection, crime prevention, and ensuring compliance with probation and parole terms against the supervisee's expectation of privacy in their electronic devices.[207] Courts recognize the substantial expectation of privacy in a person's electronic devices, especially cell phones post-*Riley*, but also conclude that this expectation is diminished by their status as a probationer or parolee.[208] In California, courts review the probation search conditions for overbreadth and require such conditions to be narrowly tailored.[209]

Out of deference to the sheer breadth of information unrelated to criminal conduct that is available on many electronic devices (e.g. financial information, medical history, etc.), California courts in particular appear more skeptical of broad electronic search conditions and routinely narrow their scope.[210] For example, in *In re Ricardo P.*, the California Supreme Court reviewed a probation condition for a juvenile who admitted to two felony burglaries.[211] The probation condition required him to "submit to warrantless searches of his electronic devices, including electronic accounts that could be

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[204] *Id.* at 386.

[205] *See, e.g.*, People v. Castellanos, 265 Cal. Rptr. 3d 47 (Ct. of App. 2020) (reviewing a probation search condition allowing officers to search any electronic device); People v. Appleton, 199 Cal. Rptr. 3d 637 (Ct. of App. 2016) (reviewing a probation search condition of computers and electronic devices); United States v. Herndon, 501 F.3d 683 (6th Cir. 2007) (reviewing a probation condition authorizing law enforcement to search the probationer's computer and software).

[206] *See supra* note 205.

[207] State v. Phillips, 266 So. 3d 873 (Fla. Dist. Ct. App. 2019); United States v. Herndon, 501 F.3d 683 (6th Cir. 2007)

[208] *See supra* note 207.

[209] People v. Castellanos, 265 Cal. Rptr. 3d 47 (Ct. of App. 2020); In re Ricardo P., 251 Cal.Rptr.3d 104 (Sup. Ct. 2019); People v. Appleton, 199 Cal. Rptr. 3d 637, 644 (Ct. of App. 2016); In re Malik J., 193 Cal. Rptr. 3d 370 (Cal. App. 2015).

[210] In re Ricardo P., 251 Cal.Rptr.3d 104 (Sup. Ct. 2019); In re T.L., No. A150035, 2018 Cal. App. Unpub. LEXIS 5747, at *8-9 (Aug. 23, 2018); People v. Appleton, 199 Cal. Rptr. 3d 637, 644 (Ct. of App. 2016); In re Malik J., 193 Cal. Rptr. 3d 370 (Cal. App. 2015).

[211] In re Ricardo P., 251 Cal.Rptr.3d 104, 107 (Sup. Ct. 2019)

accessed through these devices."[212] The court struck the electronic search condition because there was "no indication that Ricardo had used or will use electronic devices in connection with drugs or any illegal activity," and found that the condition was "not reasonably related to future criminality."[213]

When agents impose electronic search conditions that grant access to the supervisee's electronic devices, which can include family or shared computers, tablets, and cell phones, SAIs' privacy rights are implicated.[214] A shared computer or tablet likely contains an SAI's personal information, including their emails, browser history, medical information, grades, work or school assignments, photos, social media history, and correspondence. How courts evaluate electronic search conditions is substantially similar to how they evaluate residential searches; digital search conditions generally encompass any device that the supervisee can access or that are within their custody or control.[215]

Thus, in *In re Malik J.,* a court modified a probation condition requiring third parties to furnish their electronic devices for inspection.[216] There, a juvenile admitted to violating the terms of his probation by committing three robberies with other individuals and possessing marijuana.[217] At a probation violation hearing, the prosecutor argued that because Malik committed the robberies with others, they may have used electronic devices to coordinate the crimes and that some of the electronic devices that he had may be stolen.[218] "In response, over a defense objection, the court added additional probation conditions that required Malik and possibly his family to provide all passwords and submit to searches of electronic devices and social media sites."[219] The court found that although juvenile courts retain broad discretion to fashion probation terms that aid in the juvenile's rehabilitation, the

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[212] *Id.*

[213] *Id.*

[214] *See, e.g.,* In re Malik J., 193 Cal.Rptr.3d 370 (Ct. of App. 2015) (upholding an electronic search condition of a juvenile's cell phone).

[215] In re T.L., No. A150035, 2018 Cal. App. Unpub. LEXIS 5747, at *8-9 (Aug. 23, 2018) (modifying an electronic search condition to permit inspection of "[a]ny electronic data storage and/or communication device under the Minor's control and/or which the Minor has shared, partial or limited access, is subject to a full and complete search"); In re Malik J., 193 Cal.Rptr.3d 370, 378 (Ct. of App. 2015) (modifying an electronic search condition to permit "warrantless searches of electronic devices in Malik's custody and control"). One notable difference between residential and digital search caselaw is that cases reviewing electronic search conditions arise when a supervisee attacks the probation or parole terms or conditions whereas cases reviewing residential searches do not attack the actual terms or conditions, but rather how the search was conducted.

[216] 193 Cal.Rptr.3d 370 (Ct. of App. 2015).

[217] *Id.* at 372-73.

[218] *Id.* at 373.

[219] *Id.*

condition at issue "encroach[ed] on his and potentially third parties' constitutional rights of privacy and free speech."[220] The court limited the search conditions for Malik and struck any reference to his family from the conditions reasoning that such conditions violated his family's Fourth Amendment and Due Process rights since they are not subject to the juvenile court's jurisdiction.[221]

Unlike residential searches, this Author has been unable to find any cases brought by a third party challenging an electronic search condition. Thus, there are few court decisions directly addressing SAIs' privacy interests during electronic searches. *Malik* is an exception. In *Malik,* the court acknowledged that there may be overlap between electronic devices that belong to family members and those that Malik has custody or control over.[222] The court held that it is unconstitutional to require family members "to submit to warrantless searches of their electronic devices or turn over their passwords to police on demand."[223]

Nevertheless, because the court allowed the condition requiring Malik to submit to warrantless searches of devices under his custody and control (after disabling the internet or cellular connection), police may presumably intrude upon third parties' privacy rights in shared electronic devices as long as the device is in Malik's custody and control and he is the individual providing entry to the device. The *Malik* court attempts to limit the intrusion on SAIs' privacy rights in this situation by requiring officers to "show due regard for information that may be beyond the probationer's custody or control or implicate the privacy rights of third parties" by disabling the Internet and cellular connection and forbidding officers from conducting "a forensic examination of the device utilizing specialized equipment that would allow them to retrieve deleted information that is not readily accessible to users of the device without such equipment."[224] These limitations, while appropriate, do not prevent officers from accessing and examining an SAIs' email correspondence, text history, notes, folders, and other information stored on the shared device.

Many important questions then linger. Once an officer has access to a shared device, do third parties retain any privacy rights in the content of the device? How analogous is this to a physical search of a residence? If the third party has taken measures to block Malik's access, through passwords or Face

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[220] *Id.* at 374-75.

[221] *Id.* at 377.

[222] *Id.* at 377 (positing that the probation condition was included "to ensure that passwords for any devices in Malik's custody or control, even if owned by a family member, would be provided to peace officers when requested.)

[223] *Id.* at 377-78.

[224] *Id.* at 376.

ID or a thumbprint, would the analysis change? What if there is a password protected folder, but Malik knows his parent's go to password? These questions are no less salient in the digital world than during a physical search. Indeed, given the scope of personal information available on a cell phone or other electronic device, the third party's privacy interest may be higher than with a physical search. Yet, given how courts thus far analogize the scope of electronic searches to the scope of residential searches, it seems likely that any folder, conversation, note, email, or message that the supervisee can access, perhaps after cellular and internet access have been disabled, would be fodder for examination and inspection.

However, the following observation in *Riley* should distinguish digital from residential searches:

> Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."[225]

If this is true, courts should be more concerned with the privacy intrusion that digital searches impose on SAIs. When evaluating the reasonableness of the Fourth Amendment intrusion, an SAI's expectation of privacy in their digital devices should weigh heavily against the government's interest in crime detection and prevention, perhaps even more so than during a residential search. With courts' sensitivity to the unique invasions of privacy inherent in digital cell phone searches, there is a narrow window of opportunity here to reinvigorate SAIs' privacy rights at least in the digital realm. Such a possibility is explored in further detail in Part IV.

C. SAIs as Surveillance Deputies

In addition to becoming subjects of carceral surveillance through their proximity to a person on probation or parole, SAIs also become tools of surveillance when they are recruited to monitor and report on a probationer or parolee's behavior. This conscription occurs for both adults and juveniles

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[225] Riley v. California, 573 U.S. 373, 396 (2014). *See also* People v. Appleton, 199 Cal. Rptr. 3d 637, 644 (Ct. of App. 2016) (acknowledging that a probation condition "allowing warrantless searches of all of defendant's computers and electronic devices," would "sweepmore broadly than the standard three-way search condition allowing for searches of probationers' persons, vehicles, and homes" because "the condition allows for searches of items outside his home or vehicle, or devices not in his custody—e.g., computers or devices he may leave at work or with a friend or relative [and] the scope of a digital search is extremely wide").

under carceral surveillance. In the federal system, for example, probation agents are instructed to recruit SAIs as sources of information. The Administrative Office of the United States Courts publishes a set of guidelines outlining "the most common discretionary conditions of federal post-conviction supervision," which states, "Probation officers may work with defendants on supervision*, family members, neighbors, other community members*, and law enforcement agencies *to structure and monitor* the defendant's routine activities and reduce the extent to which defendants come into contact with criminal opportunities."[226]

A stark example of the state coopting private citizens into acting as additional surveillers arises in the juvenile justice system. Many cases in the juvenile justice system resolve with the youth being placed on probation.[227] The probation agent is responsible for monitoring the youth's behavior, deciding on conditions and rules, imposing consequences for noncompliance, and reporting to the court.[228] Thus, a primary component of probation agents' job involves surveilling the youth and, by extension, their families.[229] Here, parents are conscripted by probation agents to monitor their child's behavior and comportment.

Research suggests that parental involvement for youth enmeshed in the juvenile justice system is critically important.[230] Probation agents cannot always be present and often rely on parents to act as their eyes and ears, which requires a cooperative, positive relationship between the parent and probation agent. Parents are enlisted to monitor their children's compliance with

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[226] Overview of Probation and Supervised Release Conditions, Administrative Office of the United States Courts Probation and Pretrial Services Office, 1, 25 (2016) (emphasis added), available at https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf.

[227] *See, e.g.,* Tina Maschi, Craig Schwalbe & Jennifer Ristow, *In Pursuit of the Ideal Parent in Juvenile Justice: A Qualitative Investigation of Probation Officers' Experiences with Parents of Juvenile Offenders,* 52 J. OFFENDER REHAB 470, 471 (2013).

[228] *See, e.g.,* Sarah Vidal & Jennifer Woolard, *Parents' Perceptions of Juvenile Probation: Relationship and Interaction with Juvenile Probation Officers, Parent Strategies, and Youth's Compliance on Probation*, CHILDREN AND YOUTH SERV. REV. 1, 2 (2016).

[229] *See* Vidal and Woolard, *supra* note 228, at 2; David S. Tanenhaus, *The Evolution Of Juvenile Courts In The Early Twentieth Century: Beyond The Myth Of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE __ (Margaret K. Rosenheim et al. eds., 2002).

[230] Vidal and Woolard, *supra* note 228, at 1 (finding that family-driven initiatives in the juvenile justice system "underscore the importance of parental involvement in successful rehabilitation of at-risk and offending youth"); Jeffrey D. Burke et al., *The Challenge and Opportunity of Parental Involvement in Juvenile Justice Services,* 39 CHILD YOUTH SERV. REV. 39, 40 (2014); Maschi et. al., *supra* note 227, at 471-73 ("[T]he justice system benefits when family members share first hand information about their children to aid in treatment planning and in holding youths accountable.").

probation-imposed rules including curfews, school attendance, program participation, electronic monitoring, and court attendance.[231] In a study that investigated parental perceptions of juvenile probation, researchers found that "parent-officer contacts were primarily oriented toward monitoring and surveillance, with a majority of topics covering a general check-up on the youth and youth's compliance on probation."[232] With probation agents acting as intermediaries between the court and parents, [233] parents become tasked with three duties: (1) a duty to surveil and monitor, (2) a duty to respond to and impose consequences for noncompliance thereby converting the parent into a co-enforcer of the court or probation's rules, and (3) a duty to report by informing the probation officer of rule violations.[234]

While these duties impact parents and families in many ways, two are particularly salient here. First, juvenile probation increases surveillance of not only the youth, but of the entire family more acutely than adult probation. Juvenile courts are vested with a great deal of authority to supervise and regulate juvenile behavior and "ha[ve] broad discretion to formulate probation conditions. . . . Indeed, a juvenile court may impose a condition of probation that would be unconstitutional in an adult context so long as it is tailored to specifically meet the needs of the juvenile."[235] These conditions can heighten surveillance of the entire family as officers conduct home visits and check ins.[236] In a study of juvenile probation, researchers concluded that a youth's involvement with the juvenile justice system "not only brought the state into his or her life, but also opened up the family home to state intervention and extended supervision."[237] In addition to being surveilled, parents may also find *themselves* the subject of recommended services and

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[231] Vidal and Woolard, *supra* note 228, at 2; Burke et al., *supra* note 230, at 42; Maschi et. al., *supra* note 227, at 473; Michele Peterson-Badali & Julia Broeking, *Parents' Involvement In The Youth Justice System: A View From The Trenches*, 51 CANADIAN J. OF CRIMINOLOGY AND CRIM. JUST. 255, 263 (2009) (finding in a study of Canada's Youth Criminal Justice Act that "parents can help address offending behavior by monitoring the youths' behavior [and] serv[ing] as a link between youth and the system."); Tanenhaus, *supra* note 228, at __.

[232] Vidal and Woolard, *supra* note 228, at 6.

[233] *Id.* at 2.

[234] Maschi et. al., *supra* note 227, at 477-78.

[235] In re Malik J., 193 Cal.Rptr.3d 370, 373-74 (Ct. of App. 2015) (internal citation and quotation marks omitted).

[236] Vidal and Woolard, *supra* note 228, at 2 ("[S]ome parents may view probation as an intrusive sanction, interfering with family affairs. That view may be reinforced by perceptions (or the reality) that system officials blame parents for their children's misbehavior.") (internal citation omitted); Burke et al., *supra* note 230, at 42 ("Developing a fully collaborative model for family involvement . . . is a challenge, since family members can well be reluctant to have the regularities of their family life and relationship with their adolescent open for scrutiny in court hearings.").

[237] Tanenhaus, *supra* note 228, at __.

treatments.[238]

Furthermore, there are consequences for both parents who acquiesce to co-surveillance and those who decline to do so. Parents who are perceived to be cooperative with probation risk diminishing trust with their children during a time when robust parental emotional support can mitigate further misbehavior. Parents may be asked or required to take on additional duties such as driving their child to appointments or court dates that interfere with work, child rearing, or other responsibilities. Or, parents can be strongarmed into agreeing to treatment plans, release conditions, or services that they do not believe are in the best interest of their child. In other words, their parental authority and autonomy may be limited, constrained, or overridden by probation's authority.

So too are there consequences for parents who do not yield to probation's authority and agree to act as co-surveillants. Pressuring parents to report or "snitch" on their children can erode relations between probation officers and parents.[239] Some parents are not forthcoming about their children's behavior to protect the child from trouble.[240] This inclination is not without merit. Parents may have witnessed their child being arrested, handcuffed, interrogated, and detained in horrible conditions. Although the juvenile justice system attempts to maintain a façade of rehabilitative aspirations, parents may perceive it as an inherently punitive, racist, and violent institution.

Some probation agents perceive parental hesitation or distancing as uncooperativeness that hinders or threatens the youth's success.[241] Parents can be sidelined from the process and probation agents will employ a single partner strategy that focuses solely on the youth.[242] If parents are unable or unwilling to conduct the surveillance themselves, probation officers may also compensate by imposing more intense monitoring and surveillance.[243] This could mean more frequent home visits and phone check ins.[244] In more extreme cases, probation officers can file a court order and a judge can "revok[e] the child's probation, hav[e] the parents pay the detention bill to house their child, and/or order[] the child to be removed from the home."[245]

By deputizing parents, friends or family members as co-monitors and surveillants, the criminal legal system extends its eyes and ears even further into supervisees' homes and lives and changes the nature and fabric of these

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[238] Vidal and Woolard, *supra* note 228, at 2.
[239] Maschi et. al., *supra* note 227, at 473.
[240] *Id.* at 485-86.
[241] *Id.* at 485.
[242] *Id.* at 487.
[243] *Id.* at 487-88.
[244] *Id.*at 487-88.
[245] *Id.*at 488.

intimate relationships. In the next Part, we consider the consequences of occupying the dual role of surveilled and surveiller.

III. THE DANGERS OF THE SECONDARY CARCERAL SURVEILLANCE NET

"You shouldn't have fewer civil rights because you're related to someone who broke the law." – Professor Erin E. Murphy[246]

Significant harms befall SAIs who reside with or share an electronic device with a person under supervision and, unfortunately, there are limited avenues to seek redress. This Part applies Cohen's net-widening critiques to residential and electronic probation and parole searches and evaluates the interpersonal injuries that arise.

A. Caught In a Net

Cohen's concern about diversion programs capturing bystanders in "wider nets" applies equally to probation and parole conditions. The cases reviewed in Part II demonstrate how residential and digital search conditions sweep SAIs into the criminal legal system when officials are granted access to their private spaces through their system-involved co-residents. Mere proximity to a supervisee exposes SAIs to more frequent and intrusive scrutiny by state actors than their non-SAI peers. In other words, probation and parole's surveillance net is not particularly individualized; instead, it captures anyone unlucky enough to fall within the net's circumference. Wider nets indeed.

With increased scrutiny comes a heightened risk of prosecution. Critics may argue that this is not an undesirable outcome – people who commit crimes always run the risk of having their misdeeds detected and isn't that the police's primary goal? This critique ignores the careful bargain struck in Fourth Amendment jurisprudence, which seeks to balance individuals' privacy interests against the government's interest in investigating crime. The Constitution tolerates a degree of under detection as the price paid to prevent state overreach, hence the prohibition on warrantless searches and seizure. In the words of the Supreme Court in *Riley*, "Privacy comes at a cost."[247] Or, as the California Court of Appeal put it when reviewing a probation search's impact on an SAI's privacy rights, "One of the consequences of the right to be free of unreasonable searches and seizures is that, absent probable cause, contraband is often unreachable. This may not be a positive consequence of

[246] Rosenberg, *supra* note 86.
[247] Riley v. California, 573 U.S. 373, 401 (2014).

the right but it is an inevitable one."[248]

Even when SAIs are not prosecuted, there are other risks associated with carceral surveillance, including being included in gang databases or simply being "known to" the police. Many scholars have written about the overinclusive nature of gang databases and how they capture innocent people based on their associations – with friends, family members, associates, neighbors, co-residents, neighbors, or even classmates.[249] Severe consequences arise from inclusion on a gang database, including school suspension or expulsion, deportation, sentencing enhancements, stigma, or higher bail or remand without bail.[250] Scholars and advocates argue that gang databases violate the First Amendment's right to associate and the Fourth Amendment's demand for individualized, particularized suspicion.[251] SAIs who experience more frequent and intrusive police interactions may be more susceptible to inclusion within these databases based upon their proximity to or association with their system-involved peers.

This Article seeks to reveal how courts' interpretation of SAIs' Fourth Amendment rights has created a surveillance underclass who have systematically had their privacy rights stripped away. SAIs are transformed into secondary surveillance citizens who are afforded fewer constitutional protections despite a clear lack of any wrongdoing. The Constitution tolerates a loss of privacy protections for those convicted and sentenced to probation

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[248] People v. Alders, 151 Cal. Rptr. 77, 80 (Ct. App. 1978).

[249] Hochman Bloom, *supra* note 16, at 36-44 (discussing how police depend on factors such as physical appearance or social association in neighborhoods to make determinations about gang affiliations by criminalizing innocent and non-criminal behavior); Victor M. Flores, *Challenging Guilt by Association: Rethinking Youths' First Amendment Right to Associate and Their Protection from Gang Databases*, 107 CORNELL L. REV. 847, 850 (2022) ("Police often include youths in low-income neighborhoods in these databases based on their association with family, neighbors, and classmates.") *see Unmasking the Boston Police Department's Gang Database: How an Arbitrary System Criminalizes Innocent Conduct,* 137 Harvard L. Rev. 1381, 1381 (March 2024) ("Yet, despite the gravity of being categorized in the [Boston Police Department's] gang database, it relies on seemingly arbitrary factors…innocent conduct… can be sufficient to verify someone as a gang member.").

[250] Hochman Bloom, *supra* note 16, at 36-44; Flores, *supra* note 249, at 862-63. *see* Nate Jarvis, *Nobody Told Me: The Consequences of Unregulated Gang Databases,* Richmond Public Interest L. Rev. (2024) https://pilr.richmond.edu/2024/11/04/nobody-told-me-the-consequences-of-unregulated-gang-databases/.

[251] *See generally* Flores, *supra* note 249; *see* City of Indianapolis v. Edmond 531 U.S. 32, 42 (2000) ("We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."); *see* Chandler v. Miller 520 U.S. 306, 308 (1997) ("The Fourth Amendment requires government to respect 'the right of people to be secure in their persons… against unreasonable searches and seizures.' This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion.").

or parole based upon the government's heightened public safety concerns. This justification is inapplicable to the systematic stripping of constitutional protections from SAIs. The injury here is not just the humiliation of having your handbag, bedroom, or search history riffled through; it is the indignity of having such treatment endorsed by courts. Their Fourth Amendment rights are curtailed though they have done nothing to lose this privilege.

As discussed in Part I, these harms intersect with race and economic class such that this permanent surveillance underclass is disproportionately poor, Black, or people of color.[252]

B. Ruptured Bonds

Eroding SAIs' expectations of privacy risks further isolating system-involved people from mainstream society. The California Supreme Court recognized this risk nearly twenty-five years ago in People v. Robles.[253] The Robles court suppressed evidence discovered in the warrantless search of a garage shared between Robles and his probationer brother.[254] The court stressed the link between community ties and public safety:

> Many law-abiding citizens might choose not to open their homes to probationers if doing so were to result in the validation of arbitrary police action. If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the "optimum successful functioning" of the probation system.[255]

For recently incarcerated people, finding stable housing and maintaining strong family and community ties reduces recidivism. [256] As the Robles court

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[252] See *supra* Section I.B.1.

[253] 97 Cal.Rptr.2d 914, 921 (2000).

[254] *Id.* at 916-17, 923.

[255] Robles, 97 Cal.Rptr.2d at 921.

[256] For research on the link between housing and recidivism, see Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism*, 47 Crim. Just. & Behav. 1097, 1111 (2020); David S. Kirk et al., *The Impact of Residential Change and Housing Stability on Recidivism: Pilot Results from the Maryland Opportunities Through Vouchers Experiment (MOVE)*, 14 J. EXPERIMENTAL CRIMINOLOGY 213, 213 (2018); KATHARINE H. BRADLEY ET AL., CMTY. RES. FOR JUST., NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 1 (2001). For studies examining social ties and recidivism, see Ryan Shanahan & Sandra Villalobos Agudelo, *The Family and Recidivism*, AM. JAILS, Sept.–Oct. 2012, at 17, 17; Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 385 (2010); MARTA NELSON, PERRY DEESS & CHARLOTTE ALLEN, VERA INST. OF JUST., THE FIRST MONTH OUT: POST-

acknowledged, when SAIs' privacy interests are diminished by their proximity to a system-involved person, this disincentivizes family, friends, roommates, and even landlords in shared houses from renting to or supporting people on probation or parole.[257]

This effect is exacerbated by decisions such as *Department of Housing and Urban Development v. Rucker.*[258] In Rucker, the Supreme Court upheld a public housing authority ("PHA") statute that grants PHAs the authority to evict tenants whose household members engage in drug activity.[259] Thus, an SAI who houses a system-involved person not only loses their privacy rights, but also risks eviction if that person engages in drug activity. Understandably, some SAIs may be reluctant to take that risk. But capturing SAIs in the carceral surveillance web in this manner risks relegating supervisees to social pariah status. If surveillance and the accompanying consequences are contagious, then isolation becomes the remedy. Excluding supervisees from housing opportunities and their social networks risks relegating them to the fringes of mainstream society and increases the risk of recidivism.

Setting aside the housing and recidivism implications, probation and parole's impact on SAIs impairs communal and familial bonds. Professor Karteron argues that probation and parole conditions that limit or prohibit a monitored person from interacting with their family "frequently violate familial integrity rights protected by due process."[260] She posits that these conditions can harm children who are often traumatized by parental separation, negatively impact adult couples who cannot interact with one another, hinder successful rehabilitation, and "disproportionately impact Black supervisees and their families."[261]

Deputizing SAIs has a similarly negative impact on familial bonds and exemplifies Cohen's "different nets" theory of net-widening. Rather than creating a new agency or department, deputized surveillance recruits new informants into the carceral surveillance apparatus. Having a probation or parole officer conduct home visits and require check ins is one thing; having a parent, sister, or roommate acting as probation's eyes and ears in your

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INCARCERATION EXPERIENCES IN NEW YORK CITY 10 (1999); Creasie Finney Hairston, *Family Ties during Imprisonment: Do They Influence Future Criminal Activity?*, 52 FED. PROB. 48, 51 (1988); Sheldon Ekland-Olson et al*., Postrelease Depression and the Importance of Familial Support*, 21 CRIMINOLOGY 253, 258 (1983).

[257] Binnall, *supra* note __, at 343, 346-47.

[258] 535 U.S. 125, 130 (2002).

[259] *Id.*

[260] Karteron, *supra* note 11, at 653.

[261] *Id.* at 689-90.

bedroom, bathroom, and living room is quite another. Professor Deckard describes SAIs' experiences as a "process of responsibilization" that "induce[s] feelings of personal accountability and obligation to act."[262] While SAIs whose loved ones are on probation or parole are not susceptible to the financial and carceral threats overhanging participants in Professor Deckard's study, they may feel a similar obligation born of familial duty or concern.

But deputizing SAIs and stripping them of their privacy rights changes the structure and dynamics of any familial or communal relationship between the supervisee and SAI. Consider for example, how prosecutors can use an SAI's prosecution as leverage against their co-defendants; especially those who may be the real target of prosecution. In a hypothetical scenario, let's say that Dave is married to and resides with his wife, Mary. Dave is on parole after serving a short stint in state prison for possession with intent to distribute a controlled substance. The police conduct a search of Dave and Mary's shared residence and discover drug contraband in shared spaces. The officers exercise their discretion and arrest both Dave and Mary despite her protestations of innocence. Both are charged.

In this scenario, prosecutors wield a tremendous amount of power over Mary. In some instances, despite doubting that the contraband seized from their shared residence belongs to Mary and having reservations about their ability to prove possession beyond a reasonable doubt, prosecutors will continue with her prosecution in order to maintain leverage over Dave. They may explicitly state during plea negotiations that they will dismiss the charges against Mary if Dave takes responsibility for the contraband and pleads guilty.

During this time, Mary must bear the consequences that accompany being a criminal defendant. She could lose her housing under *Rucker*, she could miss out on employment opportunities when a background check reveals an open felony case, she may be held on bail pending prosecution, or deportation proceedings can be initiated against her. Mary may take a plea to escape the harshest consequences and be saddled with a criminal record for the rest of her life.[263]

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[262] Deckard, *supra* note 107, at 9.

[263] For a review of the coercive nature of pleas and plea bargaining, *see generally* Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 81–84 (Erik Luna ed., 2017) (discussing the coercive nature of plea bargaining). *See also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011). For a review of the collateral consequences of a criminal conviction, see generally MARGARET COLGATE LOVE, JENNY ROBERTS, & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY, AND PRACTICE (Thomas Reuters 2021-2022 ed.). As an example, the New

IV. RESTORING RIGHTS

Having reviewed the ill effects of converting SAIs into both targets and tools of surveillance, it is time to examine how to remediate this constitutional violation. This Part first considers two barriers that SAIs face when attempting to vindicate their Fourth Amendment rights. Finally, it revisits the Court's balancing test and proposes a doctrinal solution that mitigates the impact of probation and parole searches on SAIs.

A. Barriers to a Remedy

Under the current doctrinal landscape, SAIs face two additional barriers to redressing privacy intrusions: limited access to judicial review and the weaponization of assumption of risk. Let us consider each in turn. There are two mechanisms for SAIs to challenge a probation or parole search. First, they may challenge the propriety of the search as a defendant in a criminal case.[264] This presumes that contraband was recovered, the SAI was arrested, and a prosecution was initiated. As discussed supra, there are many scenarios where such an intrusion does not result in an arrest or prosecution or otherwise eludes judicial review. This occurs when no contraband is found during a search; contraband is found and attributed to another person; an SAI is arrested and charged, but the case is dismissed; or when a case is resolved with a plea or other disposition and the SAI does not challenge the underlying search. With over 95% of cases resolving in a plea agreement, the cases reviewed in Part II represent a small fraction of instances where SAIs suffer a privacy intrusion, thus allowing the behavior of police officers and other monitoring agents to often elude judicial review.[265]

The second mechanism for SAIs who wish to challenge a probation or parole search is by initiating a 1983 claim.[266] Despite having this avenue of relief available, there are several barriers for SAIs seeking to bring such a claim. Scholars have detailed the many obstacles one must overcome to

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York Courts discuss the collateral consequences of a criminal conviction as potentially harming an individual's current job, future job, housing choices, and immigration status. *See generally* Collateral Consequences Basics, NEW YORK STATE UNIFIED COURT SYSTEM https://www.nycourts.gov/courthelp/criminal/collateralConsequencesBasics.shtml.

[264] See cases cited in Part II.

[265] Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1136 (2004) ("About ninety-five percent of criminal cases end not with trials, but in plea bargains.").

[266] *See e.g.*, Smith v. City of Santa Clara, 876 F.3d 987, 994 (9th Cir. 2017); Taylor v. Brontoli, 2007 WL 1359713 (N.D.N.Y. 2007)

successfully plead a case under Section 1983.[267] SAIs, who are disproportionately members of marginalized groups and a lower socioeconomic class, may lack the financial resources, legal knowledge, or will (time and energy) to initiate such a proceeding. Indeed, scrupulous attorneys may dissuade the rare SAI who seeks a consultation from pursuing such a claim given the unlikelihood of success. And that is the very point. Even if SAIs do get their day in court, this Article demonstrates that they are unlikely to prevail because Fourth Amendment jurisprudence affirmatively endorses and approves of their diminished privacy rights and expectations. The legal doctrine may dissuade SAIs from challenging the privacy intrusion in the first place.

The second barrier to vindicating SAIs' privacy rights is the weaponization of assumption of risk doctrine in judicial review of these scenarios. Courts disagree on whether an SAI must *knowingly* assume the risk of being subject to a probation or parole search by associating with a supervisee. On the one hand, in United States v. Harden, the Eleventh Circuit upheld a search of an SAI's residence that she shared with a probationer and specifically found that "where the occupant *knows about* the probation, as Harden did here, she understands that she has a diminished expectation of privacy inside the probationer's home."[268] Similarly, the *Adams* court emphasized, "[the third party] *voluntarily* chose to live with a probationer, and he assumed the risk that he too would have diminished Fourth Amendment rights in areas shared with her."[269] These courts stress that the SAI acted knowingly.

By contrast, the California Court of Appeal in *People v. Carreon*, concluded that "[a] person may assume the risk of search by associating with a probationer without knowing his or her associate is on probation."[270] In

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[267] *See e.g.*, Dani Kritter, *The Overlooked Barrier to Section 1983 Claims: State Catch All Statutes of Limitations*, CAL. L. REV. BLOG (2021), https://www.californialawreview.org/online/the-overlooked-barrier-to-section-1983-claims-state-catch-all-statutes-of-limitations.

[268] 104 F.4th at 837.

[269] State v. Adams, 788 N.W.2d 619, 624 (N.D. 2010). *See also* State v. Bursch, 905 N.W.2d 884 (Minn. Ct. App. 2017) (holding that "a non-probationer who knowingly lives with a probationer has a diminished expectation of privacy in areas of the residence shared with the probationer" because they have assumed the risk "that one of their number might permit the common area to be searched."); People v. Baker, 79 Cal.Rptr.3d 858, 863 (2008) ("While those who associate with parolees or probationers must assume the risk that when they share ownership or possession with a parolee or probationer their privacy in these items might be violated, they do not abdicate all expectations of privacy in all personal property."); People v. Smith, 116 Cal.Rptr.2d 694 (Ct. of App. 2002) (finding that co-inhabitants assume the risk that one inhabitant may consent to the search of a common area).

[270] People v. Carreon, 203 Cal.Rptr.3d 857, 865 (Ct. of Appeal 2016). Let us contrast

other words, third parties assume the risk of enjoying a reduced expectation of privacy when they reside with supervisees *even if the SAI is unaware of the supervisee's status on probation or parole.* Regardless of what approach courts take, this Author has not encountered any judicial decision suppressing evidence introduced against an SAI because the SAI was unaware of their co-resident's status as a probationer or parolee. Thus, SAIs who reside with a supervisee and challenge the legality of a probation or parole search risk having courts conclude that they have assumed the risk of a search by residing or sharing electronic access with a supervisee.

B. Escaping the Net By Suppressing Evidence, Not Rights

Given the consequences and harms that befall SAIs due to their proximity to supervisees, it is time to reconsider the propriety of the courts' interpretation of their Fourth Amendment rights during residential and digital probation and parole searches. This is especially sensible given the rapid progression of technological advancements that will undoubtedly intrude upon SAIs' privacy in a more intrusive and invasive manner.[271]

To fashion a remedy, it is prudent to return to the balancing test that courts apply when determining what expectation of privacy SAIs are entitled to when they reside with a supervisee. A court will examine the totality of the circumstances and, applying the *Knights* test*,* "balance the degree to which the search intrudes upon the third party's privacy against the degree to which the search is needed for the promotion of legitimate governmental interests.[272] As discussed in Part II, while courts acknowledge SAIs' substantial privacy rights in their homes, they find that it is outweighed by "[t]he government's 'interest[ ] in reducing recidivism and thereby promoting

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this position with the emphasis placed on providing adequate notice in the correctional facility visitation or phone calls settings. In cases reviewing correctional facilities' visitor search and phone call recording policies, courts emphasize that visitors and callers are put on notice through signage, verbal warnings, and written visitation policies and guidelines that they will be searched and their phone calls recorded. *See e.g.*, Spear v. Sowders, 71 F.3d 626, 633 (6th Cir. 1995) ("We cannot say that the Constitution requires individualized suspicion to search a car on prison grounds *particularly if the visitor has been warned that the car is subject to search*.") (emphasis added); United States v. Willoughby, 860 F.2d 15, 22 (2nd Cir. 1998) ("With respect to telephone communications, *the public is on notice* pursuant to regulations published in [the Code of Federal Regulations] that prison officials are required to establish procedures for monitoring inmates' calls to noninmates.") (emphasis added).

[271] *See supra* Section I.B.1.

[272] Smith v. City of Santa Clara, 876 F.3d 987, 994 (9th Cir. 2017). *See also* United States v. Harden*,* 104 F.4th 830 (2024).

reintegration and positive citizenship [of a] probationer[ ].'"[273]

However, there is another option: suppress evidence discovered during a residential or digital probation or parole search when introduced against a third party in a criminal proceeding if officers lacked a warrant. Applying the exclusionary rule to such evidence vindicates third parties' Fourth Amendment protections without interfering with the government's interest in public safety and reintegration. SAIs would enjoy the full protection of their constitutional privacy rights and the government's ability to monitor and surveil supervisees would not be hampered. If the justification for granting SAIs a reduced expectation of privacy is the government's interest in surveilling, monitoring, and rehabilitating supervisees, then any evidence discovered during a probation or parole search should be limited to use for those purposes only. In other words, the remedy for the privacy intrusion SAIs suffer should be tethered to the justification for said intrusion.

The Supreme Court of Wisconsin considered this argument over thirty years ago in *State v. West*.[274] It declined to suppress evidence from being introduced against a third party because (1) the search was actually targeting the supervisee and was not a pretext to search a third party; and (2) third parties could claim possession of any evidence to protect the supervisees.[275] Let us consider each reason in turn.

The *West* court's reasoning turned on the search *not* being pretextual stating, "Were it shown that the police were really after Ms. West all along and had simply concocted the parole search so as to get at Ms. West while evading the normal warrant requirement, we would have a much different case."[276] However, since *West* was decided, courts have endorsed pretextual probation and parole searches.[277] While the Supreme Court has never considered pretextual searches in this context, it has endorsed pretextual police conduct in other scenarios such as vehicle stops.[278] In *Whren v. United States*, the Court disregarded officers' subjective intent for conducting a traffic stop because the officers had the requisite probable cause to pull over

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[273] United States v. Harden, 104 F.4th 830, 838 (2024) (citing Samson v. California, 547 U.S. 843, 853 (2006)).

[274] State v. West, 517 N.W.2d 482, 487 (Wis. 1994).

[275] *Id.*

[276] *Id.*

[277] *See* People v. Woods, 981 P.2d 1019, 1021 (Cal. 1999). *See also* Whren v. United States, 517 U.S. 806 (1996) (upholding a vehicle search after a traffic stop because the officers had probable cause to believe a traffic violation occurred, and the subsequent discovery of illegal drugs was deemed lawful despite the officers' potential ulterior motives); *see* Arizona v. Johnson, 555 U.S. 323 (2009) (upholding the authority of police officers to frisk a car passenger during a lawful traffic stop if there is reasonable suspicion that the passenger is armed and dangerous).

[278] Whren v. United States, 517 U.S. 806 (1996).

the driver for, among other trivial traffic violations, stopping too long at a stop sign.[279] Given the Court's tolerance for pretextual police conduct, it seems likely that reviewing courts would similarly disregard an officer's subjective intent for conducting a probation or parole search.[280]

The *West* court's second argument is also unpersuasive. The court is concerned that applying the exclusionary rule would constrain the police and render them ineffective because a supervisee need only convince a third party to accept responsibility for any recovered contraband to escape arrest. However, the police retain the investigative tools that have always been available to them, including fingerprint analysis, DNA analysis, and digital forensics along with their own observations and deductive reasoning skills. If the police have probable cause to believe that any recovered contraband belongs to a supervisee, *irrespective of who claims responsibility for it*, officers retain authority to arrest and charge the supervisee for possession of the contraband.

Judge Dykman, in a dissenting opinion in the court of appeals decision, argued that "the question is not, as the majority suggests, whether we should apply Griffin 's reasoning to West, but whether a person forfeits his or her fourth amendment protections by choosing to live with a probationer or parolee."[281] Judge Dykman conducts the Fourth Amendment analysis without considering the supervisee's status as a probationer:

> The proper analysis is not difficult. Three police officers and a probation and parole agent searched West's residence without a warrant, without exigent circumstances, and without West's permission. That is exactly the type of search prohibited by the fourth amendment. The result is that the evidence seized in the search must be suppressed insofar as the state seeks to use it against West.[282]

Judge Dykman also notes that police can always seek a warrant to search the third party's residence:

> If the police have probable cause to believe that a person has contraband or stolen items in his or her home, there is no reason why the police cannot obtain a warrant to search that person's home. That the occupant lives with a probationer or parolee is no reason to invent an exception to the fourth

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[279] *Id.* at 811, 819.

[280] *See generally* Barkow, *supra* note 189.

[281] State v. West, 507 N.W.2d 343, 350 (1993) (J. Dykman dissenting).

[282] *Id.* This was also the position that the ACLU, who filed an amicus brief, advocated for stating, "The expectation of privacy in one's own home is a strong one, protected in the law. There is no reason to sacrifice it in this case to save the ability to supervise those on probation or parole. Both values can be reconciled by adopting a rule that prohibits the use of evidence seized without a warrant against the person who is not on supervision." Brief for the ACLU of Wisconsin, p. 8, State v. West, 507 N.W.2d 343, 350 (1993).

> amendment. Here, the police apparently had no belief that West possessed stolen goods when they entered her home without a warrant and without her permission. She was in no different position from that of most of Wisconsin's residents except that, unknown to the police, she possessed stolen goods. That is not enough for a warrantless search of anyone's residence.[283]

Judge Dykman's analysis appropriately balances SAIs' privacy rights and the legitimate government interest in maintaining public safety. Such a rule could similarly be applied in the context of digital probation and parole searches. Recall how the *Riley* Court emphasized the unique character of a cell phone search stating, "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[284] An SAI's expectation of privacy in a shared cell phone, computer, or other electronic device is high and deserving of protection. Should evidence implicating a third party be discovered during a probation or parole search of a shared device without a warrant, the evidence should also be suppressed as to the third party.

CONCLUSION

System-adjacent individuals are ordinary citizens entitled to the full protection of the law. They should be afforded the same reasonable expectation of privacy as their non-system-adjacent peers. However, the carceral surveillance net has slowly encroached on their privacy rights and effectively relegated them to a subordinate class entitled to fewer privacy protections than their non-system-adjacent peers. Probation and parole search conditions of both physical and digital spaces imposed on their loved ones invite state officials to search SAIs' locked bedrooms and access and inspect shared electronic devices over their objection and without their consent. Such an intrusion is unnecessary. Instead, courts should prohibit evidence recovered during a probation or parole search absent a warrant from being introduced against a third party.

With more sophisticated surveillance technologies emerging every day, SAIs and advocates should seize the opportunity to ensure that appropriate guardrails are constructed to protect SAIs' privacy rights from further diminishment and intrusion. Because if we do not, carceral surveillance will not only spill over and capture SAIs. Instead, in the not-so-distant future, no one will know who may be watching.

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[283] *Id.*

[284] Riley v. California, 573 U.S. 373, 393 (2014).