

THE SURVEILLANCE OF SYSTEM-ADJACENT INDIVIDUALS

MARIAM A. HINDS*

ABSTRACT

Although the Fourth Amendment protects against “unreasonable searches and seizures,” this right is not enjoyed by all people equally. Supreme Court jurisprudence has curtailed the Fourth Amendment privacy rights of individuals under probation or parole supervision. In this line of cases, the Court concluded that the government’s interest in monitoring supervisees, reducing recidivism, and promoting public safety outweighed 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. Probation and parole capture adjacent individuals in the carceral surveillance net subjecting their homes and electronic devices to scrutiny and punitive control despite having been neither charged nor convicted of a crime. Such surveillance infringes upon their constitutional privacy rights by allowing the government to conduct warrantless, non-consensual searches of adjacent individuals’ residences and devices opening an undertheorized loophole in the Fourth Amendment.

This Article exposes how courts routinely deprive adjacent individuals of their Fourth Amendment privacy rights when they reside or share an electronic device with a supervisee subject to a probation or parole search condition. It proposes reinvigorating adjacent individuals’ privacy

* Clinical Associate Professor of Law, Fordham University School of Law. I extend my sincerest thanks to Bennett Capers, Kate Weisburd, Aliza Hochman Bloom, Nestor Davidson, Ian Weinstein, Jenny Roberts, Jocelyn Simonson, Amber Baylor, Daniel Harawa, Justin Murray, Kate Levine, Alma Magaña, Tanya Hernández, Jennifer Gordon, James Brudney, Benjamin Zipursky, Ela Leshem, Zina Makar, Alexis Hoag-Fordjour, Gautam Hans, Yvette Pappoe, Norrinda Brown, Chinmayi Sharma, John Pfaff, Nicholas Johnson, Tracy Higgins, Courtney Cox, and participants in the 2024 Clinical Law Review Workshop (Mira Edmonds, Jennifer Safstrom, Sarah Sallen, Rebecca Oyama, and Tim Casey), 2024 ABA-AALS Criminal Justice Section Roundtable (Sharon Brett, Ion Meyn, and Rachel Barkow), 2024 Lutie A. Lytle Workshop, 2024 Mid-Atlantic Clinical Conference, 2025 Stephen Ellmann Clinical Theory Workshop, and 2025 Clinical Law Review Workshop (Vincent Southerland, Lula Hagos, Nathan Rouse, and Anna VanCleave). I extend my heartfelt gratitude to my superb research assistants: Angelica Caballos, Sarina Chohan, Ruby Elwell, Serena Grewal, Yosub Kim, and Emilia McManus. Finally, special thanks to the editors of the *Washington University Law Review* for their exceptional edits.

protections by encouraging courts to incorporate previously overlooked factors in the constitutional balancing test. It further argues that, when properly applied, courts should routinely suppress evidence recovered during a residential or electronic probation or parole search, absent a warrant, when introduced against an adjacent individual in a criminal proceeding. Finally, in response to the privacy concerns arising from the advancement of surveillance technologies, it offers legislative and structural reforms that constrain probation and parole officers' search authority.

TABLE OF CONTENTS

INTRODUCTION580

I. SYSTEM-ADJACENT INDIVIDUALS AND CARCERAL SURVEILLANCE ...585

 A. *Probation and Parole Search Conditions*585

 B. *Diminished Privacy*588

 1. *Who are System-Adjacent Individuals?*.....589

 2. *System-Adjacent Individuals' Privacy Rights*.....592

II. LIVING UNDER SURVEILLANCE.....595

 A. *Residential Searches*.....596

 1. *Supervisees' Privacy Rights*.....597

 2. *System-Adjacent Individuals' Privacy Rights in Federal Courts* 599

 3. *System-Adjacent Individuals' Privacy Rights in State Courts*.....603

 4. *Law Enforcement's Discretion*608

 B. *Electronic Searches*610

III. THE DANGERS OF THE SECONDARY CARCERAL SURVEILLANCE NET.....617

 A. *Legal Harms*.....617

 1. *Caught in a Net*617

 2. *Criminal Prosecutions*619

 B. *Other Harms*.....619

 1. *Ruptured Bonds*.....620

 2. *Lost Dignity*.....621

 3. *The Surveillance Underclass*.....622

IV. RESTORING RIGHTS624

 A. *Barriers to a Remedy*.....626

 1. *Limited Access to Judicial Review*626

 2. *Consent and Assumption of Risk Doctrines as Obstacles to Challenging Searches*.....627

 B. *Rebalancing the Balancing Test*630

 C. *Beyond Balancing*.....633

 D. *Creating Data to Drive Reform*.....634

CONCLUSION636

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—matters 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, sixteen 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 and 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.¹

Community supervision models like probation and parole extend carceral control beyond the prison gates by tracking supervisees in their homes, cars, and neighborhoods. While this is well-known, probation and parole have a heretofore underdiagnosed infirmity—they extend the criminal legal system’s carceral gaze beyond the supervisees and peer into the bedrooms and digital lives of their families and communities. This Article coins the term system-adjacent individuals, which refers to people who are not themselves involved with the criminal legal system but exist in close proximity to those who are.² Although adjacent individuals are typically the relatives and partners of a system-involved person, the term is intended to be expansive and include those with more attenuated relationships such as roommates and even close friends.³

1. Although this vignette is not a direct quote from any one client, it represents a compilation of stories told to and observed by the Author during her career as a public defender.

2. The term system-adjacent individuals is an extension of a description introduced by Professor Zina Makar. See Zina Makar, *The Digital Prison Panopticon*, 38 HARV. J.L. & TECH. 961, 964 n.3 (2025) [hereinafter Makar, *Panopticon*] (“prison adjacent” individual). Prisoner-adjacent individuals refer to an incarcerated person’s friends, family, social networks, and community members who live in free society. In this Article, system-adjacent individuals is used interchangeably with other terms such as adjacent individual, adjacent person, third parties, and co-residents. See also Zina Makar, *The Datafication of Incarceration: Rethinking Carceral Privacy for Digital Spaces*, 135 YALE L.J. (forthcoming 2026) [hereinafter Makar, *Datafication*] (manuscript on file with author).

3. This Author is mindful of the importance of using person-first language, especially in the context of the criminal legal system where dehumanizing language is unfortunately customary. The use of the term system-adjacent individual is intended to combat the assumption that the erosion of privacy rights discussed herein only happens to a distant outgroup far removed from the daily reality of most

Probation and parole capture adjacent individuals in the carceral surveillance net, subjecting them to scrutiny and punitive control despite having been neither charged nor convicted of a crime. Such surveillance allows the government to conduct warrantless, non-consensual searches of adjacent individuals' homes and shared electronic devices, opening an undertheorized loophole in the Fourth Amendment.

This infringement occurs when supervision conditions for the person on probation or parole spill over to proximate third parties. While courts have held that a warrant is required, with some notable exceptions, to conduct a search of a private residence, they have also held that supervisees' privacy rights must yield to the government's interest in monitoring their conduct, reducing recidivism, and promoting public safety.⁴ Thus, in *Samson v. California*, the Supreme Court endorsed warrantless, suspicionless searches of people on parole,⁵ 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.⁶ As a result, 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. But, in practice, it is not only the supervisee's privacy rights that are diminished, but also the rights of those around him.

people's lives. It is meant to provoke an uncomfortable question: Are we all now or will we all soon be system-adjacent?

4. *Compare Florida v. Jardines*, 569 U.S. 1, 6 (2013) (affirming that the area immediately surrounding a home ("curtilage") is protected like the home itself and requires a warrant to be searched), *Kyllo v. United States*, 533 U.S. 27, 31 (2001), and *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that the Fourth Amendment prohibits the police from entering a person's home to make a routine felony arrest without a warrant), with *Samson v. California*, 547 U.S. 843, 853 (2006), and *United States v. Knights*, 534 U.S. 112, 119, 121 (2001).

5. 547 U.S. at 853.

6. 534 U.S. at 119, 121.

7. See *Samson*, 547 U.S. at 853; *Knights*, 534 U.S. at 119, 121; see also CAL. PENAL CODE § 3067(b)(3) (West 2025) ("[H]e or she 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."); ARK. CODE ANN. § 16-93-106(a)(1) (West 2025) ("A person who is placed on supervised probation or suspended imposition of sentence or is released on parole . . . is required to agree to a waiver . . . that allows any certified law enforcement officer . . . to conduct a warrantless search of his or her person, place of residence, motor vehicle, or other real or personal property, including without limitation a cellular or electronic device . . ."); PA. DEP'T OF CORR. & PA. PAROLE BD., HOME PLAN BROCHURE (2020), <https://www.pa.gov/content/dam/copapwp-pagov/en/parole/documents/archived-website-materials/publications/Home%20Plan%20brochure%20FINAL%20COLOR.pdf> [https://perma.cc/2UF3-NTV9]; Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 296 (2016) ("Probation officers can conduct unannounced visits to a probationer's home or work, for example, and can carry out warrantless searches of a probationer's person, home, or other personal property.").

This proximate curtailment of privacy rights remains undertheorized in the literature. Recently, a body of legal scholarship has emerged examining the extension of state surveillance and control into third parties' private domains through carceral surveillance mechanisms like digital prison tablets, policing practices, and familial DNA searching.⁸ In *The Shadow Defendants*, this Author examined how carceral involvement extracts resources, time, and labor specifically from women who have a system-involved loved one.⁹ It argued that these women become "shadow defendants" who experience secondary criminalization and are subjected to

8. See, e.g., Aliza Hochman Bloom, *Suspicion by Association*, 68 ARIZ. L. REV. 1 (2026); Makar, *Panopticon*, *supra* note 2; Makar, *Datafication*, *supra* note 2; Rachel Cox, Note, *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, Note, *Am I My Brother's Keeper?: Familial DNA Searches in the Twenty-First Century*, 86 NOTRE DAME L. REV. 381, 381 (2011). For a similar discussion in the family regulation system, see S. Lisa Washington, Essay, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. 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 re Sapphire W.*, 227 N.Y.S.3d 624 (N.Y. App. Div. 2025). 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. 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> (last visited Nov. 18, 2025) [hereinafter Columbia Symposium YouTube Video]; see also KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017) (describing and interrogating how poor mothers are routinely deprived of their constitutional privacy rights).

9. Mariam A. Hinds, *The Shadow Defendants*, 113 GEO. L.J. 823 (2025); see also G. Alex Sinha & Janani Umamaheswar, *Hidden Takings and the Communal Burden of Punishment*, 60 HARV. C.R.-C.L. L. REV. 517 (2025); Erin Eife & Beth E. Richie, *Punishment by Association: The Burden of Attending Court for Legal Bystanders*, 47 LAW & SOC. 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, ENDRIA RICHARDSON, LILY MANDLIN & BRITTANY FARR, *ESSIE JUSTICE GROUP, 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 [<https://perma.cc/GAL6-XVKK>]; Megan Comfort, *"A Twenty-Hour-a-Day Job": The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (2016) [hereinafter Comfort, *"A Twenty-Hour-a-Day Job"*]; 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., *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> [<https://perma.cc/R9M6-YHXZ>]; MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* (2007) [hereinafter COMFORT, *DOING TIME TOGETHER*]; Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271 (2007) [hereinafter Comfort, *Punishment Beyond*]; DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (1st paperback ed. 2007); Johnna Christian, Jeff Mellow & Shenique Thomas, *Social and Economic Implications of Family Connections to Prisoners*, 34 J. CRIM. JUST. 443 (2006); IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY (Othello Harris & R. Robin Miller eds., 2003).

carceral penalties and consequences.¹⁰ One such consequence discussed therein was the deprivation of privacy that shadow defendants who reside with a person under probation or parole supervision experience.¹¹

This Article builds on this prior work and turns to a doctrinal analysis of how community supervision programs like probation and parole permit the government to extend the carceral surveillance net and surveil non-accused third parties, expanding the reach of the penal state into private, uninvolved lives. This expanded carceral surveillance net has been maintained by court decisions that routinely erode third parties' constitutional privacy rights in their residences and electronic devices that are shared with a supervisee.¹²

To address this problem, this Article calls for courts to give due weight to adjacent individuals' constitutional privacy rights in deciding whether to permit searches of their shared residences or electronic devices, and whether to exclude evidence gathered therefrom. It examines how courts have applied the constitutional balancing test set out in *Knights* and *Samson*, reveals where courts have erred by improperly weighing and overlooking factors when applying the balancing test, and argues that, when properly applied, courts should routinely suppress evidence recovered during a residential or digital probation or parole search if the prosecution seeks to introduce it against a third party who is not subject to the applicable search condition.¹³

10. Hinds, *supra* note 9. Shadow defendants and system-adjacent individuals are terms that refer to populations that are distinct, but sometimes overlap. Shadow defendants, who are often women, experience the consequences of carceral involvement due to the labor they perform to support their system-involved loved one. By contrast, system-adjacent individuals are impacted by mere proximity to a person under carceral control therefore encompassing a larger population of people. Thus, shadow defendants are typically also system-adjacent individuals, but system-adjacent individuals are not always shadow defendants.

11. *Id.* at 868–70; see also Hochman Bloom, *supra* note 8; James M. Binnall, Note, *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); Dorothy K. Kagehiro, *Psycholegal Issues of Home Confinement*, 37 ST. LOUIS U. L.J. 647 (1993).

12. See *United States v. Harden*, 104 F.4th 830 (11th Cir. 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 277 (Ct. App. 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 (Ariz. Ct. App. 2007); *State v. Yule*, 905 So. 2d 251 (Fla. Dist. Ct. App. 2005); *People v. Pleasant*, 19 Cal. Rptr. 3d 796, 798 (Ct. App. 2004); *People v. Smith*, 116 Cal. Rptr. 2d 694 (Ct. App. 2002); *State v. West*, 517 N.W.2d 482 (Wis. 1994); *People v. Boyd*, 274 Cal. Rptr. 100 (Ct. App. 1990); *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. LaJocies*, 174 Cal. Rptr. 100 (Ct. App. 1981); *People v. Johnson*, 164 Cal. Rptr. 746 (Ct. App. 1980); *People v. Triche*, 306 P.2d 616 (Cal. Dist. Ct. App. 1957).

13. See *infra* Parts II, IV.

This rebalancing is particularly urgent given the rapid pace of technological innovation and its swift adoption and deployment for carceral ends. Electronic monitoring¹⁴ and artificial intelligence¹⁵ are but two contemporary surveillance innovations that threaten to surveil system-adjacent people—and perhaps all people—in a more invasive and intrusive manner.¹⁶ As carceral surveillance technology becomes increasingly sophisticated and ubiquitous, there is an opportunity to take preventative steps to protect the privacy interests of third parties. As the Sixth Circuit has recognized, “the Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish.”¹⁷

To be sure, though many adjacent individuals will find their privacy compromised through searches of their homes and devices, it is very likely that most of them will endure this privacy invasion without suffering further consequences. Contraband will not be found during a search or will be attributed to someone else in the household. They will not find themselves charged with a crime. And they will not find themselves desperate to suppress evidence obtained only because of their proximity to someone under criminal supervision. As such, most adjacent individuals will never need the primary remedy this Article proposes. Put differently, the primary remedy offered here is limited to those adjacent individuals unfairly caught in the state’s surveillance net and arrested as a result. That said, providing a remedy to these individuals is a start. Crafting a remedy for every adjacent person caught in the state’s surveillance is a project I leave for another day.

This Article proceeds in four parts. Part I surveys the interdisciplinary literature on third party privacy rights and considers what populations are most likely to be adjacent individuals. Part II turns to a doctrinal analysis of how courts assess adjacent individuals’ Fourth Amendment rights during

14. Although this Article focuses primarily on post-conviction community supervision models, namely, probation and parole, the observations and critiques contained herein are not limited to those contexts. Indeed, pre-trial electronic monitoring implicates nearly identical or even more acute privacy concerns for adjacent people. For example, the Ninth Circuit recently permitted the San Francisco Sheriff Department to reinstate a practice of requiring people on pre-trial electronic monitoring to submit to warrantless searches. *Simon v. City & Cnty. of S.F.*, 135 F.4th 784 (2025). In this context, these search conditions impact adjacent individuals residing with individuals who have not been convicted of a crime and to whom the presumption of innocence still applies. While evaluating the constitutional reasoning undergirding the *Simon* opinion is outside the scope of this Article, this is but one example of how technological advancements like electronic monitoring portend ever increasing privacy intrusions for third parties.

15. Jake Zuckerman, *Ohio Prisons to Use AI to Listen in on ‘All Inmate’ Calls*, SIGNAL (July 25, 2025), <https://signalohio.org/ohio-prisons-to-use-ai-to-listen-in-on-all-inmate-calls/#:~:text=Posted%20inGovernment,Ohio%20prisons%20to%20use%20AI%20to%20listen%20in%20on%20'all,those%20incarcerated%20in%20state%20facilities> [https://perma.cc/R5V8-YBAP].

16. See, e.g., *Norfolk, VA Camera Surveillance*, INST. FOR JUST., <https://ij.org/case/norfolk-virginia-camera-surveillance/> [https://perma.cc/T7XZ-N6KG].

17. *United States v. Warshak*, 631 F.3d 266, 285 (6th Cir. 2010).

residential and digital probation and parole searches. Part III evaluates the attendant harms noting the adverse consequences of this search regime. Finally, Part IV encourages reviving adjacent individuals' privacy rights and proposes viable doctrinal reform. More ambitiously, Part IV argues that privacy harms against adjacent individuals, especially those arising from surveillance technologies, can help us rethink the scope of probation and parole search conditions more broadly.

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 scope of residential and electronic search conditions for people on probation and parole. Section I.B turns to system-adjacent individuals—explaining who they are, reviewing existing literature on how their privacy is diminished by the criminal legal system, and surfacing shared critiques.

A. Probation and Parole Search Conditions

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.”¹⁸ 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.¹⁹ While there is some variation from state to state, probation and parole conditions share many similarities. 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.²⁰ People on probation are typically assigned a probation agent, instructed to attend

18. Press Release, Leah Wang, Prison Pol’y Initiative, Punishment Beyond Prisons 2023: Incarceration and Supervision by State (May 2023), https://www.prisonpolicy.org/reports/correctional_control2023.html [https://perma.cc/R4U8-JWHR].

19. Jake Horowitz, *Number of U.S. Adults on Probation or Parole Continues to Decline*, PEW CHARITABLE TRS. (Feb. 7, 2024), <http://pewtrusts.org/en/research-and-analysis/articles/2023/12/14/number-of-us-adults-on-probation-or-parole-continues-to-decline> [https://perma.cc/G548-UHRR].

20. 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); Doherty, *supra* note 7. Additionally, while this Article focuses on the privacy implications of probation and parole supervision for third parties, there are significant financial consequences as well. For example, supervisees must often pay supervision fees that drain familial resources. For a discussion of those fees, see Weisburd, *supra*, at 18–19. See also Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1544–45 (2020); Page & Soss, *supra* note 9; Katzenstein & Waller, *supra* note 9; DEVUONO-POWELL ET AL., *supra* note 9.

periodic 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.²¹ While probation occurs in lieu of incarceration, parole follows incarceration.²² People on parole have served a period of incarceration and are subsequently released to serve a portion of their sentence in the community.²³ Parole supervision is even more stringent than probation with closer supervision and surveillance, more frequent contact with parole agents, and more extensive and intrusive conditions.²⁴

Both probation and parole frequently impose search conditions allowing law enforcement to search supervisees' homes, vehicles, persons, and, sometimes, their electronic devices.²⁵ In a study of probation, parole, and electronic monitoring supervision conditions, Professor Kate Weisburd examined 187 records of court supervision rules and detailed the frequency, scope, and nature of residential and electronic search conditions.²⁶ 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

21. Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision*, 3 ANN. REV. CRIMINOLOGY 261, 267 (2020) [hereinafter Phelps, *Micro to Macro*]; Doherty, *supra* note 7 (reviewing and critiquing standard probation conditions).

22. See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 55 (2003).

23. *Id.*

24. See Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 422 (2011) (analyzing how longstanding supervision models have failed to support successful reintegration because contemporary parole is overly oriented toward surveillance and control rather than rehabilitation); see also *Samson v. California*, 547 U.S. 843, 850 (2006) (“[P]arolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.”).

25. Weisburd, *supra* note 20, at 10–11; see, e.g., CAL. PENAL CODE § 3067(a), (b)(1) (West 2025); OHIO REV. CODE ANN. § 2967.131(C) (West 2025); PA. DEP'T OF CORR. & PA. PAROLE BD., *supra* note 7. For a discussion of which law enforcement officials are permitted to conduct these searches, see *infra* Section I.A.1 and note 112. The term “law enforcement” is used throughout this Article to refer to police officers, probation, and parole agents. When it is important to differentiate between these three types of law enforcement officials, this Article will specify which it is referring to by using police officer, probation agent/officer, or parole agent/officer.

26. Weisburd, *supra* note 20, at 3.

property.²⁷

In the study, electronic search conditions were also quite common. Nearly 25% included an electronic search condition and of those with a cell phone search condition, 80% allowed suspicionless searches.²⁸ Notably, some of these electronic search conditions extend to the supervisee’s social media accounts.²⁹

A few examples are illustrative of the scope and breadth of search conditions. In California, for instance, parole supervisees are given notice that they can be searched or seized “at any time of the day or night” without a search warrant or any cause.³⁰ An Ohio statute authorizes searches of a parole supervisee’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.³¹ One county in Arizona permits searches of all social media accounts and requires the supervisee to furnish all of their passwords and login information.³²

There is a distinct lack of available data regarding how frequently searches are in fact conducted, the nature and extent of the searches, and how often contraband is recovered. Two studies provide limited insight and data. A 2018 study of field contacts and home visits—not necessarily searches—in community supervision concluded that “field contacts result in noticeable reductions in recidivism,” but there was variation amongst high- and low-risk supervisees.³³ However, in one of the study’s sites (Ohio), “[r]egular contact with the family member of offenders by an agent seems to increase recidivism.”³⁴ In the other site (Minnesota), searches were uncommon.³⁵

A 2019 study of federal probation and supervised release³⁶ found that searches were conducted on a small percentage (5%) of supervisees and that

27. *Id.* at 10 (citations omitted).

28. *Id.* at 11 (citations omitted).

29. *Id.*

30. CAL. PENAL CODE § 3067(a), (b)(3) (West 2025).

31. OHIO REV. CODE ANN. § 2967.131(C)(1)(a) (West 2025).

32. Weisburd, *supra* note 20, at 11 (citation omitted).

33. ABT ASSOCS., EVALUATING THE IMPACT OF PROBATION AND PAROLE HOME VISITS 31 (2018), https://www.abtglobal.com/sites/default/files/2024-09/Home%2520and%2520Field%2520Contact%2520Study_Final%2520Report.pdf [<https://perma.cc/22V9-CPCJ>].

34. *Id.* at 28.

35. *Id.* at 25.

36. Here, federal supervised release refers to a period of supervision in the community following a term of incarceration. See Thomas H. Cohen, *An Empirical Overview of Searches and Seizures for Persons on Federal Post-Conviction Supervision*, 83 FED. PROBATION 14, 14 n.2 (2019).

contraband was recovered in about two-thirds of non-computer searches.³⁷ The researchers concluded that searches had “mixed effects” on community safety because while contraband was recovered in most of the non-computer searches, “searches were not correlated with improved recidivism outcomes.”³⁸ Notably, in over half of the searches, officers “handled” third parties.³⁹

However, one must be cautious before extrapolating sweeping conclusions from these studies. The 2018 study focused on field contacts and home visits, not searches, and collected quantitative data in only two states.⁴⁰ The 2019 study focused on federal practices, but the number of people on federal probation or post-release supervision is dwarfed by those under state and local community supervision.⁴¹ Additionally, in federal court, judges (not parole boards) set post-release supervision conditions and decide whether to authorize residential, electronic, or other searches.⁴² Thus, search conditions may not be imposed on all or even most people on federal post-release supervision, whereas Professor Weisburd’s study suggests that it is frequently imposed at the state level. Also, there is variation amongst states and counties in the terms, nature, and execution of supervision conditions.⁴³

Absent robust state and local data, it is difficult to discern the overall frequency and outcomes of probation and parole searches. This lack of data and transparency is itself troubling. Courts are diminishing both supervisees’ and adjacent individuals’ constitutional privacy rights without sufficient data regarding the extent of the public safety concern or robust evidence that these search conditions mitigate the perceived danger. This critique will be explored in further detail in Part IV.

B. Diminished Privacy

Having been granted such wide discretion, it is unsurprising that expansive search conditions and the reduced expectation of privacy they confer spill over to supervisees’ families, social networks, and communities.

37. *Id.* at 17, 22. In addition to computer searches, this figure also omits plain view searches since contraband is recovered in 100% of plain view searches. *Id.* at 22.

38. *Id.* at 25–26.

39. *Id.* at 22.

40. While the study conducted a survey of the probation and parole agencies in all fifty states, the quantitative data was gathered from Ohio and Minnesota. ABT ASSOCS., *supra* note 33, at 5–9.

41. See DANIELLE KAEBLE, U.S. DEP’T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2022, at 19–20 (2024), <https://bjs.ojp.gov/document/ppus22.pdf> [<https://perma.cc/GMZ9-ZEHA>].

42. Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649, 659–60 (2022).

43. See, e.g., Weisburd, *supra* note 20, at 7–22.

This Section begins by introducing system-adjacent individuals and describing who is disproportionately represented amongst their ranks. It then surveys the trajectory of legal research studying adjacent individuals and teases out common lessons that have emerged. Next, this Section reviews legal scholarship on their privacy rights when residing with a person on probation and parole and highlights how this Article extends this strand of research.

1. *Who are System-Adjacent Individuals?*

To gain an understanding of who system-adjacent individuals 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 poor minorities being disproportionately represented amongst supervisees on probation or parole.⁴⁴ In 2022, amongst adult supervisees with known characteristics, the Bureau of Justice Statistics found that 31% of people on probation and 35% of people on parole were Black, which far outstrips their representation in the general population.⁴⁵ Supervisees identifying as Hispanic were similarly overrepresented; they composed 14% of people on probation and 19% of people on parole.⁴⁶

Many supervisees rely on family, friends, and loved ones—adjacent community members—to provide housing, especially those returning to the community following a period of incarceration.⁴⁷ A study examining who financially supports system-involved individuals reported that nearly 60% of survey participants returning home from a term of incarceration lived with family members.⁴⁸ Women especially are often primarily responsible

44. See Aliza Hochman Bloom, *A Mere Hunch*, INQUEST (Dec. 17, 2024), <https://inquest.org/a-mere-hunch/> [<https://perma.cc/2Z4P-VZHQ>] (“Black and Hispanic people are more likely to be on probation relative to their representation in the population, more likely to have longer terms of supervision, and more likely to face violations and to have their probation revoked.”); Doherty, *supra* note 7, at 296 (“[P]robationers are mostly poor and are disproportionately racial minorities[.]” (citations omitted)).

45. See KAEBLE, *supra* note 41, at 7–8.

46. *Id.*

47. See CECELIA KLINGELE, U.S. DEP’T OF JUST., THE ROLE OF HUMAN SERVICE PROVIDERS DURING COMMUNITY SUPERVISION 3 (2021), <https://www.ojp.gov/pdffiles1/nij/302099.pdf> [<https://perma.cc/DF58-4V2P>] (“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.”).

48. See DEVUONO-POWELL ET AL., *supra* note 9, at 26 (finding that “58% of survey participants were currently living with family members while only 9% were living in transitional housing”).

for supporting their system-involved loved ones and providing housing upon release.⁴⁹

Additionally, low-income individuals are generally more likely to live in shared or communal residences.⁵⁰ These realities converge and paint a picture of what groups are likely overrepresented in the system-adjacent population: low-income Black people or other people of color.⁵¹ Given the housing and other support that women provide for their system-involved loved ones, they may also be more likely to be system-adjacent.⁵² Although this Article focuses on adjacent people who are most proximate to supervisees such as co-residents, other groups can also be counted amongst their ranks. Employers and coworkers, for example, fall within the surveillance ambit when probation or parole agents conduct workplace visits or require check-ins with an employer.⁵³

Although the aforementioned populations may be more likely to be system-adjacent today, the adoption of increasingly advanced surveillance technologies foreshadows more widespread privacy invasions and a larger future adjacent population. Take electronic monitoring, for example.⁵⁴

49. See, e.g., Hinds, *supra* note 9, at 823; Cory Fischer-Hoffman, *The Quadruple Burden: Reproductive Labor & Prison Visitation in Venezuela*, 24 PUNISHMENT & SOC'Y 95, 108 (2022); Page & Soss, *supra* note 9; Page et al., *supra* note 9; CLAYTON ET AL., *supra* note 9; DEVUONO-POWELL ET AL., *supra* note 9; COMFORT, DOING TIME TOGETHER, *supra* note 9; 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 (1990).

50. Tim White & David Madden, *Housing Ideology and Urban Residential Change: The Rise of Co-living in the Financialized City*, 56 ENV'T & PLAN. A: ECON. & SPACE 1368 (2024). A report from the U.S. Department of Housing and Urban Development found that "economic factors are the main motivating factor for shared housing." OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., ASSESSMENT OF SHARED HOUSING IN THE UNITED STATES (2021), <https://www.huduser.gov/portal/sites/default/files/pdf/Insights-of-Housing.pdf> [<https://perma.cc/7MDC-T485>].

Additionally, Supreme Court cases considering the Fourth Amendment protections afforded to the curtilage of one's home exemplify how wealth and access to economic resources afford more privacy. See, e.g., *Collins v. Virginia*, 584 U.S. 586, 593 (2018) (holding that a motorcycle parked at the top of a driveway was within the home's curtilage and could not be searched under the automobile exception to the warrant requirement); *Florida v. Jardines*, 569 U.S. 1, 6–8 (2013) (holding that a front porch is "curtilage"). Wealthier people who can afford large, sloping lawns with homes that sit further back from the road or sidewalk benefit from the protections afforded to their curtilage while many others who reside in apartment buildings or other dwellings that abut sidewalks and public thoroughfares do not benefit from such wide-reaching curtilage.

51. See BRIDGES, *supra* note 8.

52. See *id.*

53. Weisburd, *supra* note 20, at 22–23.

54. Although electronic monitoring has been touted as an alternative to incarceration, scholars have begun to demonstrate that it is often imposed as a condition of a sentence in cases where incarceration would otherwise not have been a possibility. A 2024 study by the Vera Institute of Justice examined the size and scope of electronic monitoring. JESS ZHANG, JACOB KANG-BROWN & ARI KOTLER, VERA INST. OF JUST., PEOPLE ON ELECTRONIC MONITORING 17 (2024), <https://www.vera.org/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf> [<https://perma.cc/6HJB-P7BQ>].

Several aspects of electronic monitoring implicate third parties' privacy. First, a survey of electronic monitoring terms, conditions, contracts, and policies found that, in some jurisdictions, people on electronic monitors must submit to suspicionless searches of electronic devices, including smartphones.⁵⁵ Such a condition authorizes specified law enforcement officials to inspect and peruse phone logs, text message conversations, social media interactions, notes, browsing histories, and more.⁵⁶ Additionally, in around 40% of studied jurisdictions, people on electronic monitors are subject to suspicionless searches "subjecting people who live with them to searches as well."⁵⁷ Finally, some electronic monitors are equipped with audio and listening capabilities.⁵⁸ Although electronic monitoring companies deny utilizing the audio and listening feature, the devices *are* equipped with the technology to do so, warranting concern.⁵⁹ Electronic monitoring thus has the potential to increase the portion of the population that is system-adjacent—surveillance will no longer be limited

The study concluded that "[i]n many jurisdictions, [electronic monitoring] is not used as a mechanism for reducing jail populations. Rather, it is often a crucial component of highly punitive, deeply entrenched criminal legal systems. This challenges the dominant narrative that [electronic monitoring] is an 'alternative to incarceration.'" *Id.* at 25; *see also* Taylor Tiamoyo Harris, *Amid Calls to Reform Bail, Judges in St. Louis Embrace Ankle Monitors*, N.Y. TIMES (Apr. 11, 2025), <https://www.nytimes.com/2025/04/10/us/st-louis-ankle-monitors.html> [<https://perma.cc/P73T-EJ8A>]; Gabriela Kirk, *Pains of Privacy: Mapping Carceral Practices onto Electronic Monitoring*, 29 THEORETICAL CRIMINOLOGY 179 (2024); Gabriela Kirk, *The Limits of Expectations and the Minimization of Collateral Consequences: The Experience of Electronic Home Monitoring*, 68 SOC. PROBS. 642 (2021).

55. Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 159–61 (2022).

56. *See generally id.*

57. KATE WEISBURD ET AL., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM 12 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930296 [<https://perma.cc/M73F-7TME>].

58. *Id.* at 2; *see also* Weisburd, *supra* note 55, at 155; 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> [<https://perma.cc/CVU3-P9YU>]; Kira Lerner, *Chicago Is Tracking Kids With GPS Monitors That Can Call and Record Them Without Consent*, THE APPEAL (Apr. 8, 2019), <https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles/> [<https://perma.cc/Q2JW-MXN4>].

59. Weisburd, *supra* note 55, at 160. There is always a risk that technology will be used in impermissible or unintended ways. For example, high school students in Pennsylvania were provided with laptops whose webcams could be remotely activated. *See* Press Release, ACLU Pa., *ACLU Seeks to Protect Students' Privacy in Lower Merion School District Laptop Lawsuit* (Apr. 5, 2010), <https://www.aclupa.org/press-releases/aclu-seeks-protect-students-privacy-lower-merion-school-district-laptop-lawsuit/> [<https://perma.cc/H2EN-TEC5>]; *Robbins v. Lower Merion Sch. Dist.*, No. 10-665, 2010 WL 1957103 (E.D. Pa. 2010). Pictures were taken in the bedrooms of several high school students. *Id.* Probation and parole officers use technology in a manner that creators did not intend as well. For example, probation officers in Indiana used an anti-porn application whose developers explicitly warned that the app was not for use in the criminal legal system. *See* Dhruv Mehrotra, *An Anti-Porn App Put Him in Jail and His Family Under Surveillance*, WIRED (June 12, 2023, 6:00 AM), <https://www.wired.com/story/anti-porn-covenant-eyes-bond-revoked/> [<https://perma.cc/L6LV-KLKT>].

to people who a system-involved person resides with; it may also soon be anyone with whom they converse or come within conversing distance of.

2. System-Adjacent Individuals' Privacy Rights

The existing literature on system- adjacent individuals spans several disciplines including legal scholarship, sociology, and criminology and different legal disciplines such as criminal law, family law, disability law, and immigration law.⁶⁰ The legal academy and courts have been most prolific in examining adjacent people's privacy rights. Scholars have investigated how adjacent people experience diminished privacy when their associates are ensnared in different stages of the criminal legal process such as during police-initiated street encounters,⁶¹ when using digital tablets in prisons and jails,⁶² and through familial DNA searches.⁶³

60. See, e.g., sources cited *supra* note 9; Prianka Nair, Essay, *Surveilling Disability, Harming Integration*, 124 COLUM. L. REV. 197, 228–41 (2024) (observing how surveilling people with disabilities also results in the monitoring of home health aides and service providers).

61. Hochman Bloom, *supra* note 8. Professor Hochman Bloom argues that despite the Fourth Amendment demanding individualized and particularized reasonable suspicion, routinely, “police suspicion regarding an individual [during a street stop] is unconstitutionally transferred to the company they keep.” *Id.* at 1.

62. In her article, *The Digital Prison Panopticon*, Professor Zina Makar considers another example of how adjacent people's privacy rights are compromised in the carceral context: their privacy rights in data gathered from communications with incarcerated people through digital tablets. Makar, *Panopticon*, *supra* note 2. Professor Makar notes how “tablets draw society closer to prisons, severely constricting the rights of nonincarcerated individuals in unprecedented ways that cannot be temporally limited as it was when the spatial barrier [between prisons and free society] existed.” *Id.* at 979. She rings the warning bell about the potential harms to adjacent individuals: “With the ability to capture unlimited amounts of information and biometric data from the surveillance of prisoners' tablets — the way a person texts, talks, which apps they use, what zip codes their networks live in, etc. — the panoptical range of carceral surveillance far exceeds prison boundaries and has the potential for further entrenching subordinated populations resulting in greater racial and social stratification.” *Id.* at 1008; see also Makar, *Datafication*, *supra* note 2.

63. Finally, with the emergence and proliferation of DNA data banking, activists are alarmed by how genetic surveillance implicates third parties through the process of familial searching. Cox, *supra*, note 8; Roberts, *supra*, note 8 (“[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.”); McCarthy, *supra*, note 8, at 574. Scholars have enumerated several concerns with how familial DNA searching implicates adjacent individuals' 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. Roberts, *supra* note 8, at 574; Eli Rosenberg, *Family DNA Searches Seen as Crime-Solving Tool, and Intrusion on Rights*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/nyregion/familial-dna-searching-karina-vefrano.html> [<https://perma.cc/T62P-NPCL>]. Second, family members become “genetic informants” who provide information to law enforcement, sometimes unknowingly and without consent, about their relatives. Ellen Nakashima, *From DNA of Family, a Tool to Make Arrests*, WASH. POST (Apr. 20, 2008), <https://www.washingtonpost.com/archive/national/2008/04/21/from-dna-of-family-a-tool-to-make-arrests/bf845a91-c987-421d-9cfe-82fbe935c86b/> [<https://perma.cc/P8DK-CPTN>]; see also Cox, *supra*

Common critiques and similar harms emerge from this body of literature. Two are particularly salient here. First, this surveillance interferes with familial relationships by exposing bystanders to carceral monitoring through their electronic data, genetic matter, or physical proximity to others in public.⁶⁴ Second, this surveillance disproportionately impacts minority communities who are already targets for policing and surveillance.⁶⁵

Scholars have also offered potential solutions. In 2006, James M. Binnall, now a Professor, explored the potential promise of the Supreme Court's decision in *Georgia v. Randolph*.⁶⁶ In *Randolph*, the Court held that a physically present co-occupant's nonconsent to a search overrides another co-occupant's consent.⁶⁷ Professor Binnall advocated for extending the *Randolph* holding to third parties residing with parole supervisees, enabling them to withhold consent for a parole search of a shared residence.⁶⁸ He emphasized how such a reform could incentivize family members to provide housing to supervisees returning to their communities after a period of incarceration, thus reducing recidivism.⁶⁹ Unfortunately, as discussed below, courts have declined to extend *Randolph* to third parties residing with supervisees and, instead, have continued to reduce their expectation of privacy in their shared homes.⁷⁰

Recently, other legal scholars have revived this line of legal inquiry.⁷¹ In an article exploring the gendered provision of care in the criminal legal system, I highlighted how probation and parole conditions intrude on women's privacy rights through intrusive interviews, background checks, and searches.⁷² In *Suspicion by Association*, Professor Hochman Bloom also identified how community supervision of one individual spills over to proximate third parties and posited that such an extension further

note 8, at 172; McCarthy, *supra* note 8, at 400. Finally, "DNA evidence is not immune from human error," which can lead to inaccurate allegations, false arrests, and wrongful convictions. See Rosenberg, *supra*.

64. Makar, *Panopticon*, *supra* note 2; Hochman Bloom, *supra* note 8, at 52–57; McCarthy, *supra* note 8, at 400.

65. See Hochman Bloom, *supra* note 8, at 52–57; see also Rosenberg, *supra* note 63; Cox, *supra* note 8, at 172–73; McCarthy, *supra* note 8, at 401–02.

66. Binnall, *supra* note 11; see 547 U.S. 103 (2006).

67. 547 U.S. at 120.

68. See Binnall, *supra* note 11, at 350–56.

69. *Id.* at 355–56.

70. Smith v. City of Santa Clara, 876 F.3d 987, 993–94 (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, 891 (Minn. Ct. App. 2017); State v. Hurt, 743 N.W.2d 102, 106, 109 (N.D. 2007).

71. See Hinds, *supra* note 9, at 868–72; Hochman Bloom, *supra* note 8.

72. Hinds, *supra* note 9, at 868–72.

exemplifies the diminishment of the Fourth Amendment's demand for individualized and particularized suspicion.⁷³

But what is missing in the literature is a rigorous analysis of the body of case law permitting the curtailment of adjacent individuals' privacy rights during residential and electronic probation and parole searches, and careful scrutiny of courts' reasoning and justifications. This Article fills this gap by: (1) examining how contemporary courts—having discarded consent as the primary justification for limiting adjacent individuals' privacy rights during these searches—now apply an alternative constitutional test post-*Randolph* (a totality of the circumstances balancing test); (2) analyzing how courts' reasoning regarding adjacent individuals' privacy rights during residential searches has and likely will translate to electronic and digital searches; and (3) contemplating doctrinal and legislative reforms.

* * *

A couple descriptive examples are illustrative of system-adjacent individuals' lived experiences. Social scientists studying how supervisees' reduced expectations of privacy spill over to proximate loved ones have interviewed adjacent individuals and documented their experiences.⁷⁴ In one study, Professor Megan Comfort recalls a participant's 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!⁷⁵

Beyond searches, background checks, lists of prohibited items, and invasive questioning all compromise an adjacent person's privacy.⁷⁶

73. See generally Hochman Bloom, *supra* note 8.

74. See generally COMFORT, DOING TIME TOGETHER, *supra* note 9; 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/ [https://perma.cc/8YDN-KHZW].

75. COMFORT, DOING TIME TOGETHER, *supra* note 9, at 190.

76. Hinds, *supra* note 9, at 866–72; Comfort, *Punishment Beyond*, *supra* note 9, at 277; Juan R. Sandoval, "Everyone Is on Supervision": *The Function of Home Visits in Structuring Family Dynamics and Exerting Continuous Control*, 59 J. OFFENDER REHAB. 177, 189–90 (2020); PA. DEP'T OF CORR. & PA. PAROLE BD., *supra* note 7.

An adjacent person residing with a supervisee subject to electronic search conditions shares these same, or even more acute, privacy invasions. For example, in Indiana, a man on probation for a sex offense was required to install an application, Covenant Eyes, on his electronic devices.⁷⁷ Covenant Eyes is a surveillance tool that takes at least one screenshot of a device’s screen per minute and transmits the screenshots to an accountability partner.⁷⁸ Not only was the supervisee required to install it on his devices, but his wife, 80-year-old mother, and two minor children were also required to install it on their electronic devices.⁷⁹ “From images of YouTube videos watched by her 14-year-old daughter to online underwear purchases made by her 80-year-old mother-in-law, the family’s entire digital life [was] scrutinized by county authorities.”⁸⁰ Though the application explicitly warns against use in criminal cases, as of 2023, at least five states had used Covenant Eyes in court proceedings.⁸¹

Building on these examples, and on legal scholarship critiquing the diminishment of adjacent individuals’ privacy rights across several contexts, the next Part interrogates the legal doctrine and case law that strips them of their Fourth Amendment protections during probation and parole searches.

II. LIVING UNDER SURVEILLANCE

Carceral surveillance erodes system- adjacent individuals’ constitutional rights by enveloping them in the carceral surveillance net and affording them fewer privacy protections than their non-adjacent 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 reviews and critiques how the relevant legal doctrine evolved to subordinate adjacent communities into a privacy underclass whose Fourth Amendment protections are curtailed.⁸²

77. Mehrotra, *supra* note 59.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. This Article primarily focuses on Fourth Amendment challenges to contraband recovered during probation and parole searches. It also considers Section 1983 claims, which impute the same Fourth Amendment analysis into their reasoning. Unfortunately, other constitutional challenges grounded in the Equal Protection Clause are unlikely to prevail. Courts would likely demand that adjacent people demonstrate discriminatory purpose in the execution of residential or electronic probation and parole searches—a standard that would be difficult to meet. *See McClesky v. Kemp*, 481 U.S. 279, 292 (1987) (demanding that McClesky demonstrate that actors in his death penalty case had a discriminatory purpose to prevail on a Fourteenth Amendment Equal Protection challenge).

Before beginning, it is important to recognize the skewing effect of case law analysis. Most of the cases and opinions that follow arose *only because* law enforcement recovered contraband which led to a criminal prosecution.⁸³ Thus, these cases are only a small sample of instances where adjacent people's privacy rights were curtailed because of their proximity to a supervisee. This limitation "creates an inaccurate perception of police infallibility" because courts are not reviewing circumstances where, for example, a search was conducted but no contraband was recovered from an adjacent individual.⁸⁴

A. Residential Searches

Normally, citizens enjoy a high expectation of privacy in their home, residence, or dwelling. The Supreme Court has consistently emphasized the sacredness of the home: "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from governmental intrusion.'"⁸⁵ Accordingly, only a compelling government

83. 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 adjacent person, (3) a search was conducted, contraband was found, an adjacent person was prosecuted, and the charges against the adjacent person were later dismissed or the adjacent person was acquitted, or (4) a search was conducted, contraband was found, an adjacent person was prosecuted and convicted, but did not appeal. *See, e.g.*, *People v. Alders*, 151 Cal. Rptr. 77, 78 (Ct. App. 1978) (dismissing charges against a woman who was seated on a couch in a room where police discovered contraband under a bed during a probation search).

84. *Hochman Bloom*, *supra* note 8, at 6 (quoting *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting)).

85. *Florida v. Jardines*, 569 U.S. 1, 7–8 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). The Supreme Court expressed this sentiment in an especially poignant manner in 1886 stating,

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 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.

Boyd v. United States, 116 U.S. 616, 630 (1886); *see also* *Payton v. New York*, 445 U.S. 573, 601 (1980) (emphasizing the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); *People v. Britton*, 202 Cal. Rptr. 882, 887 (Ct. App. 1984) ("We acknowledge a strong bias in the law against governmental physical entry into one's home."). *See generally* *Weisburd*, *supra* note 20 (showing that despite criminal procedure jurisprudence proclaiming the home as a sacred space warranting special protection, such deference is not granted to the homes of people under criminal court surveillance).

interest is supposed to excuse invading the privacy of the home, and warrantless intrusions are generally prohibited absent a specific exception.⁸⁶

But this protection of the home is not enjoyed by all citizens equally. Supervisees' privacy rights are significantly curtailed during their supervision period. Moreover, residential and electronic search conditions imposed on supervisees spill over to third parties. When this occurs, adjacent individuals' residential and electronic privacy rights under the Fourth Amendment are involuntarily sacrificed, not because of their own criminal conduct or misbehavior, but rather as a consequence of their physical proximity to supervisees. A survey of court decisions in the sections that follow reveals consistent patterns and lines of reasoning used to reduce adjacent individuals' expectation of privacy in their homes and electronic devices when residing with, visiting, or sharing electronics with a supervisee.

1. *Supervisees' Privacy Rights*

Before examining how the law curtails adjacent people's privacy rights, reviewing supervisees' 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,"⁸⁷ 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 probation supervisee's residence.⁸⁸ Invoking the special needs doctrine, the Court concluded that neither a warrant nor probable cause is required to search a probation supervisee's residence.⁸⁹ It reasoned that people on probation "do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special probation restrictions."⁹⁰ Because the probation agent searched Griffin's residence pursuant to Wisconsin's probation regulatory scheme, the Court upheld the search.⁹¹

86. *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), *United States v. Matlock*, 415 U.S. 164 (1974), *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), and exigent circumstances, see *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978).

87. *Kyllo*, 533 U.S. at 40 (citing *Payton*, 445 U.S. at 590).

88. 483 U.S. 868 (1987).

89. *Id.* at 875–80; see also *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (applying *Griffin*).

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

91. *Id.* at 880.

The Court later held in *United States v. Knights* that a search of a probation supervisee's residence need only be supported by reasonable suspicion.⁹² Notably, *Knights* extends *Griffin* by permitting searches supported by reasonable cause even when they are conducted by police officers, not probation officers, for investigatory purposes rather than for the primary purpose of furthering the probation supervision.⁹³ Thus, the *Knights* Court eschewed the special needs doctrine and, instead, assessed the reasonableness of the search by looking at the totality of the circumstances and conducting a balancing test.⁹⁴ The Court weighed the probation supervisee's privacy interest against the government's interests in reintegration and apprehending people who commit criminal offenses.⁹⁵ It reasoned that a probation supervisee 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.⁹⁶ The Court specifically noted that the suspicion would need to be *individualized*, stating that "[t]he 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."⁹⁷

Although the Court set a reasonable suspicion standard for searching probation supervisees, courts have since tacitly approved the practice of requiring a probation supervisee to consent to suspicionless searches.⁹⁸ In exchange for escaping a harsher sentence like incarceration, judges reason, probation supervisees can be required to submit to increased surveillance

92. 534 U.S. 112, 119, 121 (2001); *see also* State v. Cowans, 717 N.E.2d 298, 306 (Ohio 1999) (stating that officers do not need a warrant and may search a probation supervisee's residence with "less than probable cause").

93. *Knights*, 534 U.S. at 116–18.

94. *Id.* at 118–21.

95. *Id.*

96. *Id.*

97. *Id.* at 121.

98. *United States v. Harden*, 104 F.4th 830 (11th Cir. 2024); *State v. Norman*, 21 N.E.3d 1153, 1164 (Ohio Ct. App. 2014); *State v. Adams*, 788 N.W.2d 619 (N.D. 2010); *People v. Baker*, 79 Cal. Rptr. 3d 858, 863 (Ct. App. 2008); *People v. Pleasant*, 19 Cal. Rptr. 3d 796 (Ct. App. 2004); *People v. Smith*, 116 Cal. Rptr. 2d 694, 697 (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))). However, some jurisdictions limit how evidence recovered during a warrantless, suspicionless probation search may be used. For example, in Florida, such evidence may be used in a probation revocation proceeding, but "may not be used to support new criminal charges unless the search otherwise satisfies the requirements of the Fourth Amendment." *State v. Green*, 349 So. 3d 503, 507 (Fla. Dist. Ct. App. 2022) (citing *Grubbs v. State*, 373 So. 2d 905, 907 (Fla. 1979)). In *Green*, probation officers searched Green's (a non-supervisee) bedroom that she shared with a person on probation. *Id.* at 505. Upon discovering drug paraphernalia, the probation officers collaborated with local law enforcement to obtain a warrant and conduct a more thorough search. *Id.* Concluding that evidence recovered during a valid probation search could be used as a basis to obtain a search warrant, the court upheld the search. *Id.* at 508.

and more rigorous search conditions.⁹⁹ 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.¹⁰⁰

Parole supervisees enjoy even fewer Fourth Amendment protections.¹⁰¹ In *Samson v. California*, the Court upheld a warrantless, suspicionless search of a parole supervisee reasoning that “a State’s interests . . . warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.”¹⁰² Beyond this, as discussed in Part I, many states require parole supervisees to sign agreements consenting to suspicionless searches of their person, possessions, and residences.

2. System-Adjacent Individuals’ Privacy Rights in Federal Courts

How then, does dispensing with the probable cause and warrant requirement for supervisees affect adjacent co-residents? The Supreme Court has only addressed how its holding impacts third parties’ 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.”¹⁰³ 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.”¹⁰⁴

The *Samson* Court’s reasoning for disregarding adjacent individuals’ privacy interests is rather baffling. It reasoned that an adjacent person 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 Fourth Amendment affords varying levels of protection against intrusion by the government. A brief consideration of

99. See, e.g., *Knights*, 534 U.S. at 119 (“Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.”).

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

101. See *Samson v. California*, 547 U.S. 843, 850 (2006) (“On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.”).

102. *Id.* at 853.

103. Brief for the Petitioner at 16, *Samson v. California*, 547 U.S. 843 (2006) (No. 04-9728).

104. *Samson*, 547 U.S. at 856–57.

these levels is instructive. One purpose of the Fourth Amendment was to prohibit “general warrants” which granted British officers unchecked power to engage in suspicionless searches.¹⁰⁵ It was thus intended to “secure the privacies of life against arbitrary power.”¹⁰⁶ The warrant requirement provides this security by requiring “probable cause, particularity, and sworn support,” subjecting the government’s evidence to scrutiny by a neutral third-party, and requiring ex-ante examination of the sufficiency of the government’s evidence before the privacy intrusion occurs.¹⁰⁷ The particularity requirement also requires officers to articulate what is being sought and from where and judges can limit the scope of the search when issuing the warrant.¹⁰⁸ The hope is that, in practice, the warrant requirement slows down the potential intrusion, requires officers to deliberate and articulate their observations, and can reduce the frequency of unconstitutional searches.

While reasonable suspicion is a less robust standard than a probable cause and warrant requirement, it still acts as a necessary check on police behavior and is intended to protect against improper government overreach.¹⁰⁹ Devaluing the difference between reasonable suspicion and a suspicionless standard undermines the constitutional protection—however minimal—that requiring reasonable suspicion affords. When defining reasonable suspicion, the Supreme Court has emphasized that “a mere ‘hunch’ is insufficient,”¹¹⁰ and, instead, has required the officer to identify “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the intrusion.¹¹¹ A suspicionless

105. *Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)).

106. *Id.* at 305 (internal citations and quotation marks omitted).

107. Miguel F.P. de Figueiredo, Brett Hashimoto & Dane Thorley, *Unwarranted Warrants? An Empirical Analysis of Judicial Review in Search and Seizure*, 138 HARV. L. REV. 1959, 1963 (2025) (“[T]he law enforcement officer must submit an affidavit under oath to be vetted by a ‘neutral and detached magistrate’ who can narrow the scope or deny it.”); Warren Buff & Brandon Hasbrouck, *Policing As General Warrants*, 173 U. PA. L. REV. 1735, 1761 (2025) (explaining that “any suspicion sufficient to support a search or seizure must be strong enough to survive the scrutiny of a judicial officer and to support a solemn oath or affirmation”); Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 352 (2004).

108. Adam M. Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 597–98 (2016) (explaining that the particularity requirement forces police officers to describe what they are looking for and where they would be searching).

109. Caroline E. Lewis, Note, *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.”).

110. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

111. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

standard affords none of these minimal protections and permits an officer to act for any reason or no reason at all. 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 adjacent individuals will inevitably have their privacy rights curtailed irrespective of the applicable standard and fails to engage with the foundational question of whether *any* intrusion is appropriate. In other words, the Court does not consider whether adjacent people who reside with a person on parole should have fewer Fourth Amendment protections than their non-adjacent peers in the first place.

State and lower federal courts have taken up this question both pre- and post-*Samson* and have typically afforded adjacent people fewer privacy protections in their homes than their non-system adjacent peers.¹¹² However, federal circuit courts have been more circumspect in their review of third parties’ privacy rights during residential probation and parole searches. The Ninth Circuit explicitly addressed this issue in *Smith v. City of Santa Clara*.¹¹³ In that case, Justine Smith was on probation and suspected of involvement in a car theft and stabbing incident.¹¹⁴ Justine had previously listed both adjoining units of her mother’s duplex as her residence, but had informed her probation officer that she was moving out.¹¹⁵ 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 to consent to a search, and demanded a search warrant before permitting

112. While courts do not want to chill or preclude interagency cooperation, they are aware of the possibility that probation and parole officers can be used “to help police avoid the warrant requirement.” *United States v. Neves*, No. 24-cr-00090, 2025 WL 1000928, at *8 (D. Me. Apr. 3, 2025). Thus, for example, the First Circuit examines who the “decision-maker” was when police and probation or parole officers collaborate and conduct a search. *Id.* (citing *United States v. Cardona*, 903 F.2d 60, 65 (1st Cir. 1990); *United States v. Scott*, 566 F.3d 242, 248 (1st Cir. 2009); *United States v. Giannetta*, 909 F.2d 571, 581 (1st Cir. 1990)). Which law enforcement agents—police officers, probation officers, or parole officers—are empowered to conduct searches are often specified by statute or in the supervisee’s written supervision conditions. *Compare* IDAHO CODE ANN. § 20-1007(2) (West 2025) (parole supervisees consent to “warrantless search and seizure . . . at any time, day or night, with or without cause, by a probation and parole officer, county probation officer, or peace officer”), *with* N.J. ADMIN. CODE § 10A:71-6.4(a)(20) (West 2025) (person on parole must “[s]ubmit to a search conducted by a parole officer” with reasonable, articulable suspicion), *and* COLO. REV. STAT. ANN. § 17-2-201 (5)(f)(I)(D) (West 2025) (“[T]he parolee shall permit residential visits by the community parole officer and allow the community parole officer to make searches of the parolee’s person, residence, or vehicle.”). However, recall that the *Knights* Court permitted an investigatory search conducted by a police officer, not a probation or parole officer, and thus applied the balancing test rather than relying on the special needs doctrine. *United States v. Knights*, 534 U.S. 112, 116–18 (2001).

113. 876 F.3d 987 (9th Cir. 2017).

114. *Id.* at 988.

115. *Id.* at 989.

entry.¹¹⁶ Over her objection, officers searched the residence and, after threatening to force entry into the adjoining unit of the duplex, searched the second unit.¹¹⁷ Justine was not found in either unit.¹¹⁸

The mother brought a Section 1983 suit for violating her constitutional rights under state and federal law.¹¹⁹ In its decision, the Ninth Circuit balanced the adjacent individual's reasonable expectation of privacy against the government's interest in monitoring supervisees.¹²⁰ 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."¹²¹ However, the court emphasized that the government's interest in this particular case was "heightened" because Justine was on felony probation for a serious offense and was "still at large" for her alleged participation in a violent new offense at the time of the search.¹²² The court further limited the precedential value of its holding by stressing that their "conclusion is limited to the facts of this case," and "expressing no view" of the appropriate outcome in a case where the supervisee is not on probation for a serious, violent offense nor suspected of committing another serious, violent offense.¹²³

Similarly, in *United States v. Harden*, the Eleventh Circuit recently upheld a trial court's decision not to suppress evidence introduced against an adjacent individual that was recovered during a residential probation search.¹²⁴ Like the Ninth Circuit in *Smith*, the *Harden* court emphasized that the supervisee here was on probation for a serious offense and had violated his probation terms before the contested search.¹²⁵ The court was careful to stress that Harden was aware that her boyfriend was on probation (a point that will be addressed in further detail below), the officers had reasonable suspicion to conduct a search because they detected the odor of marijuana, and the supervisee agreed to a warrantless search condition.¹²⁶

Although the *Harden* court reached the same outcome as the Ninth Circuit in *Smith*, it did not exercise the same restraint in limiting its holding. Rather, the opinion's general tone is rather dismissive of the adjacent

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 989–90. This is one of the few instances referenced at the beginning of Part II where a court reviewed a search where no contraband was recovered.

120. *Id.* at 994.

121. *Id.*

122. *Id.*

123. *Id.*

124. 104 F.4th 830 (11th Cir. 2024)

125. *See id.* at 837.

126. *See id.* at 837–39.

individual's independent privacy rights, repeatedly referring to their shared residence as "the probationer's home" and emphasizing the supervisee's reduced expectation of privacy.

3. *System-Adjacent Individuals' Privacy Rights in State Courts*

Before and after *Samson*, state courts have curtailed third parties' privacy rights during probation searches¹²⁷ and parole searches.¹²⁸ A review of this strand of case law reveals notable insights.¹²⁹ First, and most importantly,

127. *State v. Green*, 349 So. 3d 503 (Fla. Dist. Ct. App. 2022) (upholding the search of a master bedroom shared between Green and a person on probation); *State v. Nelson*, No. C-150650, 2016 WL 4268769 (Ohio Ct. App. Aug. 12, 2016) (upholding a search of the third floor of a shared residence where Nelson resided with a person on probation); *People v. Ermi*, 156 Cal. Rptr. 3d 848 (Ct. App. 2013) (upholding the search of probation supervisee'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 probation supervisee's roommate); *State v. Hurt*, 743 N.W.2d 102 (N.D. 2007) (upholding the search of a common area shared between probation supervisee and roommate in which drug paraphernalia was found); *State v. Walker*, 158 P.3d 220 (Ariz. Ct. App. 2007) (upholding the search of a trunk-like box in the living room of an apartment shared by a probation supervisee and her 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 a probation supervisee's home); *People v. Pleasant*, 19 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, stating: "Persons who live with probationers cannot reasonably expect privacy in areas of a residence that they share with probationers."); *People v. Smith*, 116 Cal. Rptr. 2d 694, 699 (Ct. App. 2002) (upholding the search of a feminine purse located within a bedroom shared by Smith and a male probation supervisee because officers were reasonable in believing that "the bedroom was being used for a criminal enterprise" and the probation supervisee had control or access to the purse).

128. *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 where a guest admitted to possessing a methamphetamine pipe during such a search); *State v. Kline*, 891 N.W.2d 780 (S.D. 2017) (upholding a parole search of parole supervisee'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 (Wis. 1994) (upholding a search of and recovery of stolen property from an apartment that a woman shared with her boyfriend who was on parole); *People v. Boyd*, 274 Cal. Rptr. 100 (Ct. App. 1990) (upholding a search of Boyd's purse which was located within a parole supervisee's trailer); *State v. Johnson*, 748 P.2d 1069 (Utah 1987) (upholding a search of a hall closet in a residence the parole supervisee shared with his mother), *abrogated on other grounds by State v. Doperto*, 935 P.2d 484 (Utah 1997); *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 a search of Johnson's residence that led to the recovery of marijuana plants and other paraphernalia because a guest who was on parole consented to residential searches); *People v. Triche*, 306 P.2d 616 (Cal. Dist. Ct. App. 1957) (upholding the search of a closet in a home shared between a parole supervisee and her boyfriend).

129. A large proportion of these cases come from California state courts, which have opinions on this issue dating back nearly seventy-five years. *See, e.g., Triche*, 306 P.2d 616. Although it is unclear why California specifically has such a robust body of case law here, perhaps its relatively protective

both federal and state courts usually conclude that adjacent people's privacy interests must yield to the government's interest in monitoring individuals on probation and parole.¹³⁰ However, to reach this conclusion, courts improperly impute and attribute the supervisee's risk of reoffending to the adjacent person. In *Griffin*, *Knights*, and *Samson*, the Court reasoned that the supervisee's reduced expectation of privacy was justified by their past violation of the law and the government's need to surveil their conduct.¹³¹ The *Knights* Court specifically emphasized how the reasonable suspicion needed to warrant a residential search of a person on probation must be *individualized*.¹³² Yet when balancing the government's interest against a co-resident's interest, courts find that the scales tip in the government's favor not because of the adjacent individual's own misconduct or wrongdoing, but rather that of the company they keep. In Professor Hochman Bloom's framing, this is a further illustration of the systematic diminishment of the individualized suspicion requirement.¹³³ To intrude upon an adjacent individual's residential privacy, the reasonable suspicion regarding their co-resident is weaponized against the adjacent person to

stance on privacy rights generally influenced the development and trajectory of the doctrine. Indeed, California is one of only eleven states to have a right to privacy in its state constitution. Tiffany C. Li, *State Constitutional Rights to Privacy*, 59 GA. L. REV. 1307 (2025).

130. Over the last fifty years, state and federal courts have applied different tests when evaluating supervisees' and third parties' privacy rights during probation and parole searches. In *Griffin v. Wisconsin*, the Supreme Court used the special needs doctrine to conclude that law enforcement does not need a warrant or probable cause to perform a probation search. 483 U.S. 868 (1987). In *People v. Woods*, the California Supreme Court analyzed an adjacent person's privacy rights during a probation search using a consent analysis. 981 P.2d 1019 (Cal. 1999); see also *State v. Norman*, 21 N.E.3d 1153, 1164 (Ohio Ct. App. 2014). However, since the Supreme Court's decisions in *Knights* and *Samson*, federal courts have typically employed a totality of the circumstances balancing test. See, e.g., *United States v. Neves*, No. 24-cr-00090, 2025 WL 1000928 (D. Me. Apr. 3, 2025); *United States v. Harden*, 104 F.4th 830 (11th Cir. 2024); *Smith v. City of Santa Clara*, 876 F.3d 987, 994 (9th Cir. 2017); *United States v. Carter*, 566 F.3d 970 (11th Cir. 2009). By contrast, state courts have used both the balancing test and consent. Compare *Norman*, 21 N.E.3d 1153 (using a consent analysis), and *People v. Baker*, 79 Cal. Rptr. 3d 858, 863–64 (Ct. App. 2008) (using a consent analysis), with *Bursch*, 905 N.W.2d 884 (using the balancing test). It is noteworthy that regardless of what test courts use, recently, they almost uniformly concluded that an adjacent person's Fourth Amendment rights were not per se violated if a residence they shared with a supervisee was searched pursuant to a probation or parole search condition.

131. *Griffin*, 483 U.S. at 880 (“[B]ecause 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, 121 (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, 854 (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.”).

132. *Knights*, 534 U.S. at 121.

133. Hochman Bloom, *supra* note 8.

justify an invasion of their sanctified space. In other words, the past criminal conduct of the supervisee is held against the adjacent person—there is no suspicion of wrongdoing for the third party, individualized or otherwise, yet their constitutional entitlements must yield.

The impact of these holdings on adjacent people is particularly acute given the legal standard courts use to assess the reasonableness of the challenged search. While courts pay lip service to protecting adjacent people's reasonable expectations 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.¹³⁴

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.¹³⁵ The terms "access or control" are interpreted as any area that the supervisee can conceivably reach or access. Such a permissive interpretation grants law enforcement, in practice, unfettered authority to search nearly all areas of a shared residence, even those from which co-residents have taken pains to keep separate and private.

Consider the facts in *People v. Pleasant*.¹³⁶ Pleasant resided with his mother who had signed a search waiver as a condition of her probation.¹³⁷ Officers searched Pleasant's *locked* bedroom during a probation search of their shared residence.¹³⁸ The court upheld the search because the mother had access to the keys to the bedroom.¹³⁹ Similarly, in *State v. Finley*,

134. *People v. Robles*, 3 P.3d 311, 317 (Cal. 2000) (internal citations omitted).

135. *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.")

136. 19 Cal. Rptr. 3d 796 (Ct. App. 2004).

137. *Id.* at 798.

138. *Id.* at 797.

139. *Id.* at 798. But in *People v. Carreon*, a California appellate court suppressed drugs recovered

officers searched a safe in a bedroom that Finley shared with his wife who was on probation.¹⁴⁰ 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.¹⁴¹ Regardless, the court upheld the search of the safe.¹⁴²

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 the area.¹⁴³ Thus, the burden falls on the adjacent person to not only bar a supervisee from accessing an area to prevent it from being searched, but also to ensure that "there is no basis for officers to reasonably believe the probationer has authority over those areas."¹⁴⁴ If a locked bedroom or a safe are insufficient, then it is difficult to imagine how an adjacent person would meet such a standard. Perhaps a separate room that is locked and never happens to be ajar or unlocked during the time a search is randomly conducted where the adjacent person has the sole key would pass muster. However, those who have resided in a shared residence or space—especially with curious young children—can appreciate the difficulty of both objectively and subjectively excluding co-residents from areas of a home. And again, we will likely never know if an adjacent person successfully meets this standard because of the selection bias inherent in criminal cases and the law they build.

To illustrate how liberally courts currently apply this standard, consider how California courts review officers' assessments of who exercises authority over a gendered item or container and how their analysis has

from the converted garage unit of a residence. 203 Cal. Rptr. 3d 857, 870 (Ct. App. 2016). The garage unit was in a residence leased by a person on probation and accessed through the laundry room. *Id.* at 860. 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." *Id.* at 867; see also *People v. Alders*, 151 Cal. Rptr. 77, 79 (Ct. App. 1978) (finding that officers acted improperly by searching a woman's coat during a search of a male probation supervisee's residence since "there was no reason to suppose that a distinctly female coat was jointly shared by her [and the probation supervisee].").

140. *State v. Finley*, 260 P.3d 175, 176 (Mont. 2011).

141. *Id.*

142. *Id.* at 177.

143. *State v. Norman*, 21 N.E.3d 1153, 1164 (Ohio Ct. App. 2014) (finding that officers erred when they searched a basement unit leased to Norman by a probation supervisee because the supervisee was "physically incapable of entering the basement as he lacked a key to the key lock and the combination to the number-pad lock"); see also *State v. Nelson*, No. C-150650, 2016 WL 4268769, at *3 (Ohio Ct. App. Aug. 12, 2016) (upholding a search of a third party's separate floor of a residence shared with a supervisee where it was reasonable to conclude that the supervisee had "common authority over the searched area"). *But see Carreon*, 203 Cal. Rptr. 3d at 890–67.

144. *People v. Robles*, 3 P.3d 311, 317 (Cal. 2000) (internal citations omitted).

evolved over time. In the 1970s and 1980s, there was a string of California appellate court cases that frequently suppressed evidence recovered during the search of a gendered item.¹⁴⁵ These cases typically involved a male supervisee and a female co-resident's purse or clothing item. In these cases, courts recognized the "distinctly female" nature of the item and noted the lack of any indicia that it was "jointly shared" between the male supervisee and female adjacent individual.¹⁴⁶ 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."¹⁴⁷

However, by the early 2000s, California courts reversed course. For example, in *People v. Ermi*, an officer searched a makeup bag within a purse located on a chair in the probation supervisee and adjacent individual's shared bedroom.¹⁴⁸ The search yielded drugs and other paraphernalia.¹⁴⁹ Despite the purse and makeup bag being a "distinctly female depository," the court reasoned that "[people] who live with probationers cannot reasonably expect privacy in these circumstances" and concluded that the purse was a container over which the probation supervisee had access or control.¹⁵⁰ Other courts have reached similar conclusions.¹⁵¹

The access or control reasoning for residential searches extends to vehicular searches. Law enforcement is authorized to search supervisees' vehicles as a condition of their supervision.¹⁵² The California Supreme Court has held that law enforcement can search areas in the passenger compartment of a car where a parole supervisee can stow belongings,

145. See *People v. Montoya*, 170 Cal. Rptr. 624 (Ct. App. 1981) (suppressing evidence found in Montoya's pants pocket because police subjectively believed that they did not belong to the probation supervisee, but one of her guests); *People v. Veronica*, 166 Cal. Rptr. 109 (Ct. App. 1980) (suppressing evidence found in a distinctly feminine purse during the search of a parole supervisee's residence that he shared with his wife); *People v. Alders*, 151 Cal. Rptr. 77, 79 (Ct. App. 1978) (finding that officers acted improperly by searching a woman's coat during a search of a male probation supervisee's residence since "there was no reason to suppose that a distinctly female coat was jointly shared by her [and the probation supervisee].").

146. *Veronica*, 166 Cal. Rptr. 109; *Alders*, 151 Cal. Rptr. 77.

147. *People v. Baker*, 79 Cal. Rptr. 3d 858, 863–64 (Ct. App. 2008); see also *Veronica*, 166 Cal. Rptr. 109 (suppressing evidence found in a distinctly feminine purse during the search of a parole supervisee's residence that he shared with his wife).

148. *People v. Ermi*, 156 Cal. Rptr. 3d 848, 849 (Ct. App. 2013).

149. *Id.* at 849.

150. *Id.* at 849–50.

151. See *People v. Smith*, 116 Cal. Rptr. 2d 694, 699 (Ct. App. 2002) (upholding a search of a feminine purse located within a bedroom shared by Smith and a probation supervisee because officers were reasonable in believing that "the bedroom was being used for a criminal enterprise" and the probation supervisee has control or access to the purse); *People v. Boyd*, 274 Cal. Rptr. 100, 108–09 (Ct. App. 1990) (upholding a search of a gender-neutral handbag that police could have reasonably believed the parole supervisee owned or controlled).

152. See *supra* note 7.

discard items, or objects the supervisee owns or controls.¹⁵³ Applying this standard, the court upheld a search of a third party's car based on the front passenger's status as a parolee.¹⁵⁴

4. Law Enforcement's Discretion

State courts also grant significant deference to law enforcement by rejecting a duty to inquire and authorizing pretextual searches. In other words, searching officers or agents 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."¹⁵⁵ 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 person on probation could access, and no one informed the searching officers prior to the search whether the safe belonged to the third party or the probation supervisee.¹⁵⁶

Law enforcement is also permitted to conduct pretextual searches because courts apply an objective standard when assessing the reasonableness of police conduct and disregard their subjective intent.¹⁵⁷ The California Supreme Court confronted this situation in *People v. Woods*.¹⁵⁸ In *Woods*, Gayla Loza was on probation and resided with Cheryl Woods and William Benson.¹⁵⁹ As a condition of her probation, Loza agreed to warrantless searches of her residence.¹⁶⁰ A police officer conducted a search of Loza's residence *to obtain evidence against Loza's boyfriend*.¹⁶¹ The court upheld the constitutionality of the search and disregarded the

153. *People v. Schmitz*, 288 P.3d 1259, 1263 (Cal. 2012).

154. *Id.*

155. *People v. Carreon*, 203 Cal. Rptr. 3d 857, 866 (Ct. App. 2016); *see also* *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991); *Boyd*, 274 Cal. Rptr. at 106–08. Again, beginning in the 1990s, California courts began to restrict third parties' privacy rights during probation and parole residential searches. There is an old line of cases where courts imposed a duty to inquire. *See People v. Montoya*, 170 Cal. Rptr. 624, 627 (Ct. App. 1981) ("Clearly, when there was but a 50-50 chance that the jeans and contraband belonged to appellant, Agent Heberle was under a duty to inquire as to who owned the jeans before searching them."); *People v. Tidalgo*, 176 Cal. Rptr. 463 (Ct. App. 1981). However, courts discarded that duty to inquire beginning in the 1990s. *See Davis*, 932 F.2d at 758 (discussing this evolution in California case law); *Boyd*, 274 Cal. Rptr. at 106–08.

156. *State v. Adams*, 788 N.W.2d 619, 621–23 (N.D. 2010).

157. *People v. Woods*, 981 P.2d 1019, 1021 (Cal. 1999). *But see* *People v. Robles*, 3 P.3d 311, 320 (Cal. 2000) (Kennard, J., concurring) ("[T]he 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)).

158. 981 P.2d at 1021.

159. *Id.*

160. *Id.*

161. *Id.* at 1022.

officer's subjective intent—attempting to discover evidence of the boyfriend's wrongdoing—in conducting the search.¹⁶²

Other Fourth Amendment doctrines intersect with probation and parole searches to further diminish adjacent people's expectation of privacy when residing with people under community supervision. Consider the plain view and 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.¹⁶³ This occurred in *People v. Johnson*.¹⁶⁴ Johnson permitted a friend on parole to stay in his residence.¹⁶⁵ While waiting in the driveway as a fellow officer and parole agent searched the parole supervisee's bedroom, an officer observed marijuana plants growing in the yard and later charged Johnson for cultivating marijuana.¹⁶⁶ 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 parole supervisee's residence.¹⁶⁷

Protective sweeps have a similar effect. In *State v. Bursch*, the court concluded that a sheriff's deputy was authorized to conduct a protective sweep of an adjacent individual's bedroom during a probation search.¹⁶⁸ Accordingly, even when an area is not under the supervisee's custody or control, law enforcement can still gain access through protective sweeps.

Residential searches not only curtail adjacent individuals' privacy rights in the physical spaces and containers within the residence. Adjacent people 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.¹⁶⁹ In *State v. Phipps*,

162. *Id.* at 1027–28; 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, see Rachel E. Barkow, *Of Two Minds: The Supreme Court's Divergent Approach to Constitutional Mens Rea* (Feb. 11, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5131014 [<https://perma.cc/AM7Q-7B54>].

163. See, e.g., *United States v. Harden*, 104 F.4th 830 (11th Cir. 2024) (upholding a search of an adjacent person's residence that was shared with a probation supervisee where officers smelled a strong odor of marijuana); *State v. Green*, 349 So. 3d 503 (Fla. Dist. Ct. App. 2022); *Bursch*, 905 N.W.2d 884 (upholding a search of a third party's bedroom where officer's observed a gun through his open bedroom door); *State v. Nelson*, No. C-150650, 2016 WL 4268769 (Ohio Ct. App. Aug. 12, 2016); *State v. Walker*, 158 P.3d 220 (Ariz. Ct. App. 2007); *People v. Johnson*, 164 Cal. Rptr. 746, 746 (Ct. App. 1980).

164. 164 Cal. Rptr. at 746.

165. *Id.* at 747.

166. *Id.* at 747–48.

167. *Id.* at 749.

168. *Bursch*, 905 N.W.2d at 893–94.

169. *State v. Phipps*, 454 P.3d 1084, 1091 (Idaho 2019); *Commonwealth v. Mathis*, 125 A.3d 780

Phipps was merely present in a residence when parole officers arrived to conduct a search.¹⁷⁰ Although she did not reside with the parole supervisee, she was detained in the living room and asked “whether there was anything in the apartment that they should know about.”¹⁷¹ Phipps admitted to possessing a methamphetamine pipe in her backpack, which was later recovered.¹⁷² 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.”¹⁷³

Finally, adjacent individuals’ 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 police officers destroying a third party’s safe located in a bedroom a probation supervisee could access.¹⁷⁴

The key takeaway here is not that the law enforcement officials in these examples behaved unlawfully or overstepped their constitutional permissions. Indeed, that their actions pass Fourth Amendment muster is the point. Adjacent people are subjected to government surveillance because of their proximity to a person under carceral surveillance that a non-adjacent person is not. To make matters worse, courts have molded Fourth Amendment doctrine to permit or endorse such disparate treatment.

B. Electronic 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.¹⁷⁵ The Court distinguished inspecting a cell phone from other searches:

(Pa. Super. Ct. 2015); *People v. Rios*, 122 Cal. Rptr. 3d 96 (Ct. App. 2011); *State v. Jones*, 78 So. 3d 274 (La. Ct. 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. 2012).

170. *Phipps*, 454 P.3d at 1085.

171. *Id.*

172. *Id.* at 1085–86.

173. *Id.* at 1091 (citations omitted).

174. 788 N.W.2d 619, 625 (N.D. 2010); *see also State v. Walker*, 158 P.3d 220 (Ariz. Ct. App. 2007) (upholding a search where officers cut off a lock on a trunk located in the supervisee’s residence she shared with Walker).

175. 573 U.S. 373 (2014).

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[.]”¹⁷⁶

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.¹⁷⁷

Such considerations are not limited solely to cell phone searches. Courts have reached similar conclusions with respect to searches of other electronic devices such as computers and computer hard drives.¹⁷⁸ When analyzing a search of a digital copy of a man’s hard drive, the Maryland Supreme Court extended *Riley*’s reasoning to other electronic devices, noting that “[d]ata stored on electronic devices is both qualitatively and quantitatively different from physical analogues.”¹⁷⁹

Unlike ordinary citizens, people on probation and parole do not enjoy the same expectation of privacy in their electronic devices. Like residential search conditions, probation and parole may impose electronic search conditions on supervisees.¹⁸⁰ These search conditions grant law enforcement authority to search electronic devices such as computers, cell phones, and social media accounts.¹⁸¹ Courts reviewing the propriety of

176. *Riley*, 573 U.S. at 395, 403 (internal citations omitted).

177. *Id.* at 386.

178. *State v. McDonnell*, 297 A.3d 1114, 1130 (Md. 2023); *United States v. Lichtenberger*, 786 F.3d 478, 488, 491 (6th Cir. 2015) (reasoning that “under *Riley*, the nature of the electronic device greatly increases the potential privacy interests at stake” and holding that an officer’s search of a laptop exceeded the scope of a private search conducted by Lichtenberger’s girlfriend); *see also* *Warshak v. United States*, 490 F.3d 455, 478 (6th Cir. 2007) (holding that law enforcement must secure a warrant based on probable cause to compel disclosure of emails stored with an internet service provider); *Carpenter v. United States*, 585 U.S. 296, 320 (2018) (requiring law enforcement to secure a warrant before collecting cell-site location information given its “deeply revealing nature . . . , its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection”).

179. *McDonnell*, 297 A.3d at 1130 (citing *Riley*, 573 U.S. at 393–94, 396–97).

180. *See, e.g.*, *People v. Castellanos*, 265 Cal. Rptr. 3d 47 (Ct. App. 2020) (reviewing a probation search condition allowing officers to search any electronic device); *People v. Appleton*, 199 Cal. Rptr. 3d 637 (Ct. 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 probation supervisee’s computer and software).

181. *See* Weisburd, *supra* note 20, at 3, 10–11.

these electronic search conditions balance the government's interest in crime detection and reducing recidivism against the supervisee's expectation of privacy in their electronic devices.¹⁸² 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 supervisee.¹⁸³

When courts, probation, or parole 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, adjacent individuals' privacy rights are implicated.¹⁸⁴ A shared computer or tablet likely contains an adjacent person'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.¹⁸⁵

Thus, in *In re Malik J.*, a court modified a probation condition requiring third parties to furnish their electronic devices for inspection.¹⁸⁶ There, a juvenile admitted to violating the terms of his probation by committing three robberies with other individuals and possessing marijuana.¹⁸⁷ 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.¹⁸⁸ In the hearing, the judge "added additional probation conditions

182. *State v. Phillips*, 266 So. 3d 873 (Fla. Dist. Ct. App. 2019); *Herndon*, 501 F.3d 683.

183. *See supra* citations contained in note 180.

184. *See, e.g., In re Malik J.*, 193 Cal. Rptr. 3d 370 (Ct. App. 2015) (upholding an electronic search condition of a juvenile's cell phone); *see also* *People v. Valdivia*, 225 Cal. Rptr. 3d 181 (Ct. App. 2017) (declining to consider a supervisee's challenge to the imposition of an electronic search condition where the supervisee raised the potential impact on third parties' privacy rights because this argument was not raised in the trial court).

185. *In re T.L.*, No. A150035, 2018 WL 4026286, at *8–9 (Cal. Ct. App. 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 at 378 (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 case law 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. *Compare id.* (challenging the terms of the electronic search condition), *with* *United States v. Harden*, 104 F.4th 830 (11th Cir. 2024) (challenging the validity of a probation search).

186. 193 Cal. Rptr. 3d 370.

187. *Id.* at 372–73.

188. *Id.* at 373.

that required Malik and possibly his family to provide all passwords and submit to searches of electronic devices and social media sites.”¹⁸⁹ The appellate court found that although juvenile courts retain broad discretion to fashion probation terms that aid in the juvenile’s rehabilitation, the condition at issue inappropriately curtailed Malik and his family’s privacy and free speech rights.¹⁹⁰ The appellate 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 were not subject to the juvenile court’s jurisdiction.¹⁹¹

Unlike residential searches, there is a dearth of case law brought by a third party challenging an electronic search condition. Thus, there are few court decisions directly addressing third parties’ privacy interests during electronic searches. *Malik J.* is an exception. In *Malik J.*, 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.¹⁹² 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.”¹⁹³

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), law enforcement 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 attempted to limit the intrusion on adjacent people’s privacy rights in this situation by requiring officers to disable the Internet and cellular connection and forbidding officers from conducting a forensic examination of the device.¹⁹⁴ These limitations, while appropriate, do not prevent officers from accessing and examining an adjacent person’s email correspondence, text history, notes, folders, and other information stored on a shared device.¹⁹⁵

189. *Id.*

190. *Id.* at 374–75.

191. *Id.* at 377.

192. *Id.* (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”).

193. *Id.* at 377–78.

194. *Id.* at 376.

195. This Article’s analysis is limited to *shared* electronic devices in which the adjacent individual arguably has some reasonable expectation of privacy. Anyone who sends a text message or email to a person whose cell phone is later searched by police risks having their communications monitored. Such

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 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.¹⁹⁶ 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 electronic 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.¹⁹⁷

situations are governed by the third-party doctrine and are largely outside the scope of this Article. See *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”). However, it is worth noting Professor Weisburd's premonition that the Supreme Court's decisions in *Carpenter* and *Ferguson v. City of Charleston* “arguably signal an opportunity for courts to reconsider when someone has a choice and when they don't—at least in some situations.” Kate Weisburd, *Criminal Procedure Without Consent*, 113 CALIF. L. REV. 697, 719 (2025). In *Carpenter v. United States*, the Supreme Court rejected the application of the third-party doctrine to cell site data recovered from a person's cell phone. 585 U.S. 296 (2018). In *Ferguson v. City of Charleston*, “the Court rejected the notion that the plaintiffs—pregnant women at a local hospital—had consented to sharing drug test results with police.” Weisburd, *supra*, at 718 (citing 532 U.S. 67 (2001)). For a discussion of the challenges arising from reconciling the third-party doctrine with digital technology, see generally Michael W. Price, *Rethinking Privacy: Fourth Amendment “Papers” and the Third-Party Doctrine*, 8 J. NAT'L SEC. L. & POL'Y 247 (2016). For a defense of the third-party doctrine, see generally Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

196. *United States v. Lichtenberger*, 786 F.3d 478, 487 (6th Cir. 2015) (“[S]earches of physical spaces and the items they contain differ in significant ways from searches of complex electronic devices under the Fourth Amendment.”).

197. *Riley v. California*, 573 U.S. 373, 396–97 (2014); see also *People v. Appleton*, 199 Cal. Rptr. 3d 637, 644 (Ct. App. 2016) (acknowledging that a probation condition “allowing warrantless searches of all of defendant's computers and electronic devices,” would “sweep[] more broadly than the standard

If this is true, courts should be more concerned with the privacy intrusion that electronic searches impose on adjacent individuals. Some courts appear to scrutinize blanket electronic search conditions more carefully than residential search conditions imposed on supervisees and, in some cases, will narrow or strike the condition.¹⁹⁸ This skepticism of electronic search conditions may signal a judicial willingness to hear and consider arguments about the privacy intrusions these electronic search conditions impose on third parties.¹⁹⁹ When weighing the reasonableness of the Fourth Amendment intrusion, an adjacent individual's expectation of privacy in their electronic 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 adjacent people's privacy rights, at least in the digital realm. Such a possibility is explored in further detail in Part IV.

* * *

Malik J. is illustrative of a larger trend: namely, that juvenile probation terms subject the supervisee's parents and family to particularly acute, invasive, and intense carceral scrutiny. Many cases in the juvenile system resolve with the youth being placed on probation.²⁰⁰ The probation agent is responsible for monitoring the youth's behavior, deciding on appropriate conditions and rules, imposing consequences for noncompliance, and

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").

198. See, e.g., *United States v. Lenhart*, No. 22-3111, 2023 WL 5524851 (6th Cir. Aug. 23, 2023); *In re Ricardo P.*, 446 P.3d 747 (Cal. 2019); *In re T.L.*, No. A150035, 2018 WL 4026286, at *8–9 (Cal. Ct. App. Aug. 23, 2018); *Appleton*, 199 Cal. Rptr. 3d at 644; see also *In re Stevens*, 15 Cal. Rptr. 3d 168 (Ct. App. 2004) (striking a parole condition prohibiting a supervisee from using a computer or accessing the internet). 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 or computer and internet use prohibitions and routinely narrow their scope. See *In re Ricardo P.*, 446 P.3d at 104; *In re T.L.*, No. A150035, 2018 WL 4026286, at *8–9; *Appleton*, 199 Cal. Rptr. 3d at 644; *In re Stevens*, 15 Cal. Rptr. 3d at 176.

199. But see *United States v. Belden*, No. 23-CR-16, 2023 WL 3721201, at *1 (E.D. Tex. May 30, 2023) (imposing a condition requiring third parties residing with a supervisee to install tracking software on their computers that monitors "keystrokes, application information, Internet use history, e-mail correspondence, and chat conversations").

200. 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).

reporting to the court.²⁰¹ Thus, a primary component of probation agents' jobs involves surveilling youth and, by extension, their families.²⁰²

Juvenile probation increases surveillance not only of the youth but also 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.²⁰³ These conditions can heighten surveillance of the entire family as officers conduct home visits and check-ins.²⁰⁴ 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."²⁰⁵ In addition to being surveilled, parents may also find *themselves* the subject of recommended services and treatments.²⁰⁶

There is a second dimension to this heightened surveillance. Juvenile probation officers have limited capacity and cannot always be present to conduct supervision. Instead, they rely on parents to act as their eyes and ears in the home on a daily basis.²⁰⁷ This conscription of parents into the role of a co-monitor is an example of surveillance deputization at work where "ordinary people use their labor and economic resources to engage in surveillance activities on behalf of the state."²⁰⁸ While a full exploration of the consequences of occupying this dual role of surveilled and surveiller is

201. 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*, 66 CHILD. & YOUTH SERVS. REV. 1, 2 (2016).

202. *Id.*; 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 42 (Margaret K. Rosenheim et al. eds., 2002).

203. See, e.g., *In re Malik J.*, 193 Cal. Rptr. 3d 370, 373–74 (Ct. App. 2015) ("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." (internal quotation marks omitted)).

204. Vidal & Woolard, *supra* note 201, 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)); Jeffrey D. Burke, Edward P. Mulvey, Carol A. Schubert & Sara R. Garbin, *The Challenge and Opportunity of Parental Involvement in Juvenile Justice Services*, 39 CHILD. & YOUTH SERVS. REV. 39, 42 (2014) ("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.").

205. Tanenhaus, *supra* note 202, at 53–54.

206. Vidal & Woolard, *supra* note 201, at 2.

207. *Id.* at 6 ("[P]arent-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."). See generally Nila Bala, *Policing Children's Data*, 103 WASH. U. L. REV. 249 (2025) (exploring how parents become sources of information, data, and evidence that is used against their children through outdated principles of child coverture).

208. Sarah Brayne, Sarah Lageson & Karen Levy, *Surveillance Deputies: When Ordinary People Surveil for the State*, 57 LAW & SOC'Y REV. 462, 463 (2023). See generally Sandoval, *supra* note 76.

beyond the scope of this Article, future work will investigate this and other examples of surveillance deputization in the criminal legal system.

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.”*²⁰⁹

Significant harms befall adjacent individuals who reside with or share an electronic device with a person under supervision and, unfortunately, there are limited avenues of redress. This Part reviews and applies net-widening critiques, explores other legal harms, and evaluates the interpersonal injuries that adjacent people and communities suffer.

A. Legal Harms

Perhaps the most salient consequences of proximity to a supervisee arise when it leads to entanglement with the criminal legal or other legal systems. Though it is difficult to quantify the pervasiveness of these consequences, their severity warrants particular attention. This Section begins by evaluating the overall net-widening impact of community supervision search conditions before examining how this surveillance ensnares adjacent individuals in criminal prosecutions.

1. Caught in a Net

Concerns regarding third parties’ privacy rights are exacerbated by the sheer scope of the criminal legal system. Following the dramatic increase in incarceration rates beginning in the 1970s and the devastating consequences that resulted, the criminal legal system began to rely on community surveillance mechanisms and alternatives to incarceration to manage jail and prison populations.²¹⁰ Scholars have been vigilant about the unintended

209. Rosenberg, *supra* note 63 (quoting Professor Erin E. Murphy).

210. See ASHLEY NELLIS, SENT’G PROJECT, MASS INCARCERATION TRENDS (2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends/> [<https://perma.cc/5E5L-BU2A>]. The prison population grew seven-fold from 1973 to 2009 and four times as many people are incarcerated now than in 1980. *Id.* at 1; FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES 21 (2018), <https://static.prisonpolicy.org/scans/EverySecond.fwd.us.pdf> [<https://perma.cc/FP5A-MHT7>]. These consequences have become axiomatic. Nearly two million people are incarcerated in jails and prisons today. NELLIS, *supra*. Spending on policing, court systems, and corrections has soared. *State and Local Backgrounders: Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST. (Apr. 26, 2024), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditur>

consequences of these mechanisms and alternatives, especially those intended to decarcerate, including net-widening.

Over fifty years ago, sociologist Stanley Cohen explored the concept of net-widening and examined three mechanisms that drive it: wider nets that envelop more people in the criminal legal system, denser nets that intensify the system's intervention in people's lives, and different nets that expand the number of "agencies and services [that] supplement[] rather than replac[e] the original set of control mechanisms."²¹¹

Net-widening critiques have also been leveled against criminal supervision models like probation.²¹² 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 lower-level offenses where there was never the possibility of long-term incarceration."²¹³ 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 1878.²¹⁴

Adjacent individuals becoming entangled in the criminal legal system through carceral surveillance mechanisms like probation and parole exemplifies net-widening in practice. Wider nets are cast when carceral surveillance extends beyond the accused or convicted person and spills over to the family, friends, and communities beside them. Similarly, different

es#Question3Police [<https://perma.cc/857G-RLS8>] (finding that from 1977 to 2020, state and local government spending on police increased 189 percent while corrections expenditures increased 346% and that from 1992 to 2021, court spending increased 65%). Rampant racial disparities abound. NELLIS, *supra*, at 6 (finding that nearly seven in ten 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*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 18, 2025), <https://www.ncsl.org/civil-and-criminal-justice/criminal-records-and-reentry-toolkit> [<https://perma.cc/6XGP-3ZDZ>]. And 2% of the adult population is disenfranchised. NELLIS, *supra*.

211. STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 44 (1st ed. 1985).

212. *Id.* at 53.

213. Phelps, *Micro to Macro*, *supra* note 21, at 262; see also Michelle S. Phelps, *Ending Mass Probation: Sentencing, Supervision, and Revocation*, 28 *FUTURE CHILD* 125, 126 (2018) ("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'G RPTR.* 283, 288–89 (2016); Marcelo F. Aebi, Natalia Delgrande & Yann Marguet, *Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?*, 17 *PUNISHMENT & SOC'Y* 575 (2014).

214. Ryan Labrecque, *Probation in the United States: A Historical and Modern Perspective*, in *ROUTLEDGE HANDBOOK OF CORRECTIONS IN THE UNITED STATES* 155 (O. Hayden Griffin III & Vanessa H. Woodward eds., 2018).

nets are cast by new agencies (e.g. probation departments) that are supplementing rather than replacing other control mechanisms.

The cases reviewed in Part II demonstrate how residential and electronic search conditions sweep adjacent people into the criminal legal system when officials are granted access to their private spaces through their system-involved co-residents or shared devices. Mere proximity to a supervisee exposes adjacent individuals to more frequent and intrusive scrutiny by government actors than their non-system-adjacent 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.²¹⁵ Wider nets indeed.

2. *Criminal Prosecutions*

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 law enforcement'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 government overreach, hence the prohibition on warrantless searches and seizure.²¹⁶ In the words of the Supreme Court in *Riley*: "Privacy comes at a cost."²¹⁷ Or, as the California Court of Appeal put it when reviewing a probation search's impact on an adjacent individual's privacy rights, "[o]ne 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 the right, but it is an inevitable one."²¹⁸

B. *Other Harms*

Though the legal harms arising from proximity to a supervisee may be most salient, they are by no means the only—or even most—damaging. The

215. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1456 (2016).

216. See *Carpenter v. United States*, 585 U.S. 296, 304–05 (2018) ("[T]he [Fourth] Amendment seeks to secure 'the privacies of life' against 'arbitrary power' . . . a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance.'" (internal citations omitted)).

217. *Riley v. California*, 573 U.S. 373, 401 (2014).

218. *People v. Alders*, 151 Cal. Rptr. 77, 80 (Ct. App. 1978).

interpersonal injuries, loss of dignity, and population-wide impacts warrant particular concern because they are so often overlooked.

1. *Ruptured Bonds*

Understandably, some adjacent people may be reluctant to take the risk of prosecution or other legal entanglement associated with residing with a supervisee. Capturing adjacent individuals in the carceral surveillance web risks converting supervisees into social pariahs. 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.

For recently incarcerated people, finding stable housing and maintaining strong family and community ties reduce recidivism.²¹⁹ When adjacent individuals' 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.²²⁰

Even setting aside recidivism concerns, probation and parole conditions affect other constitutionally protected rights and privileges. Professor Alexis Karteron argues that probation and parole conditions that limit or prohibit supervisees from interacting with their families "frequently violate familial integrity rights protected by due process."²²¹ She posits that these conditions can harm children who are often traumatized by parental separation, negatively impact adult couples who cannot interact with one

219. For research on the link between housing and recidivism, see Leah A. Jacobs & Aaron Gottlieb, *The Effect of Housing Circumstances on Recidivism: Evidence from a Sample of People on Probation in San Francisco*, 47 CRIM. JUST. & BEHAV. 1097, 1111 (2020); KATHARINE H. BRADLEY, R.B. MICHAEL OLIVER, NOEL C. RICHARDSON & ELSPETH M. SLAYTER, 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; 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 (2011); MARTA NELSON, PERRY DEESS & CHARLOTTE ALLEN, VERA INST. OF JUST., THE FIRST MONTH OUT: POST-INCARCERATION EXPERIENCES IN NEW YORK CITY 10 (1999); Creasia Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity?*, 52 FED. PROBATION 48, 51 (1988); Sheldon Ekland-Olson, Michael Supancic, James Campbell & Kenneth J. Lenihan, *Postrelease Depression and the Importance of Familial Support*, 21 CRIMINOLOGY 253, 258 (1983).

220. Binnall, *supra* note 11, at 343, 346–47; see also Sandoval, *supra* note 76, at 189–90.

221. Karteron, *supra* note 42, at 653.

another, hinder successful rehabilitation, and “disproportionately impact Black supervisees and their families.”²²²

And of course, stripping adjacent individuals of their privacy rights changes the structure and dynamics of any familial or communal relationship between the supervisee and adjacent person. Privacy intrusions and law enforcement surveillance can breed bitterness, frustration, and familial tension. The anecdote that began this Article illustrates how probation and parole supervision complicate family dynamics and engender complex feelings—not always for the better.

2. *Lost Dignity*

Even adjacent people who emerge from a period of supervision otherwise unscathed suffer from the harm of surveillance itself. Monitoring third parties as a byproduct of supervision conditions infringes upon “the right to be let alone,” and creates an overbearing government presence in adjacent people’s lives.²²³ The constant fear of being searched and the anxiety it provokes can take a toll on a person’s psychological, mental, and emotional wellbeing. We are all familiar with the spike in alertness we feel as we are driving past a police car, even knowing that we haven’t committed any traffic offenses or otherwise engaged in any unlawful activity. Now imagine living in a constant state of such alertness.

There is a dignitary injury inflicted on adjacent individuals in these circumstances. The Supreme Court “seems to acknowledge that unreasonable searches inflict dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society.”²²⁴ These harms are not limited to the supervisees and certainly extend to adjacent individuals. This Article seeks to reveal how courts’ interpretations of third parties’ Fourth Amendment rights has created a surveillance underclass who have systematically, yet quietly, had their privacy rights stripped away. Adjacent people are transformed into secondary surveillance citizens who are afforded fewer constitutional protections despite a clear lack of any wrongdoing. The Constitution

222. *Id.* at 689–90.

223. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

224. *Samson v. California*, 547 U.S. 843, 865 (2006) (Stevens, J., dissenting) (cleaned up). For a discussion of dignitary harms inflicted in prison law, see Zina Makar, *The Absence of Dignity in Prison Law*, 85 MD. L. REV. 387 (2025). For discussions of the Supreme Court’s treatment of dignity rights in different contexts, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50, 776–87 (2011); Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 15–16 (2015); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 207–17 (2011); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 220 (2011); see also Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107 (2011).

tolerates a loss of privacy protections for those convicted and sentenced to probation or parole based upon the government's heightened public safety concerns. This justification is inapplicable to the systematic stripping of constitutional protections from adjacent individuals. The injury here is not just the humiliation of having your handbag, bedroom, or search history rifled 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 constitutional entitlement.

3. *The Surveillance Underclass*

To make matters worse, these harms intersect with race and economic class such that this permanent surveillance underclass is disproportionately poor, Black, or people of color.²²⁵ People residing in neighborhoods and communities with a high geographic concentration of supervisees are often already overpoliced and oversurveilled.²²⁶ For them, their home may be their only sanctuary away from the pervasive surveillance in their neighborhoods. But adjacent people living with supervisees are then required to invite law enforcement into their homes and bedrooms with little protection against prosecution and other harms. They live under a taint of illegality and are treated as presumptive co-conspirators not because of their own conduct, but rather due to who they reside with or are related to.

Arguably, this is a feature, not a bug of this jurisprudence. Professor Paul Butler argues that many of the problems in the criminal legal system such as police violence and the disproportionate representation of African-American men amongst arrestees are not unintended consequences, but rather intentional features or “how the system is supposed to work.”²²⁷ This critique suggests that probation and parole search conditions permitting law enforcement to surveil supervisees' family members and close associates is not an unfortunate consequence of necessary monitoring. Rather, it is another “superpower” granted to law enforcement that allows them to circumvent the Fourth Amendment's warrant requirement and expand the reach of police surveillance over impoverished communities of color.

Given felon disenfranchisement laws that prevent supervisees from voting, impacted populations may lack the political power to lobby for additional protections for adjacent individuals. Even with sufficient resources and political will, the lack of transparency and data regarding the

225. See *supra* Section I.B.1.

226. Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103 (2020).

227. See Butler, *supra* note 215, at 1456. See generally DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022).

number of residential or electronic searches that are conducted, how many searches successfully yield contraband, how many supervisees reside with others, how many adjacent individuals are searched during these searches, and many other critical pieces of information makes mounting an advocacy campaign extremely difficult. This lack of data will be addressed in further detail in Part IV.

* * *

Of course, the division between legal and other harms is not an impermeable one. These harms overlap, intersect, and co-occur. A hypothetical example is illustrative. 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 arrest both Dave and Mary despite her protestations of innocence. Both are charged.²²⁸

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 promise during plea negotiations to dismiss the charges against Mary if Dave takes responsibility for the contraband and pleads guilty.²²⁹

During this time, Mary must bear the consequences that accompany being a criminal defendant. She could lose her housing under *Department of Housing & Urban Development v. Rucker*, which granted public housing authorities the power to evict tenants whose household members engage in drug activity.²³⁰ Mary 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 which can jeopardize her

228. Laura G. Abelson, *The Ties that Shackle 1* (Sept. 3, 2025) (unpublished manuscript) (on file with author) (examining how family members are often overcharged and how familial relationships are used as leverage to "induce guilty pleas, sometimes at the expense of fairness and proportionality").

229. *Id.* at 24–31 (discussing "wired pleas" where a favorable resolution of one co-defendant's case is offered if another co-defendant accepts a plea).

230. 535 U.S. 125, 130 (2002).

employment prospects, housing eligibility, voting rights, education, public benefits eligibility, and more.²³¹

IV. RESTORING RIGHTS

Given these concerns, Judge Dykman, writing in a Wisconsin Court of Appeals dissent more than thirty years ago, properly framed the question: “whether a person forfeits his or her fourth amendment protections by choosing to live with a probationer or parolee.”²³² Setting aside the assumption that one always has a choice in their living arrangements, the answer must be no.

While today’s system-adjacent population may predominantly be the live-in family members and roommates of supervisees who are geographically concentrated in low-income communities of color, we are all at risk of becoming tomorrow’s adjacent individuals. Three intersecting trends make this a possibility. First, the sheer size of the criminal legal system means that nearly half of Americans already have an immediate family member who has been incarcerated.²³³ Note that this figure does not capture the number of people with a family member on probation or parole.

Second, technology increases the capacity to monitor an individual more closely and continuously—his movements, his steps, his conversations, his keystrokes, his finances, his browsing history. Finally, the system’s default inclination toward more surveillance and more monitoring leads to the rapid adoption of surveillance technology for carceral ends. These co-occurring trends create a perfect storm for capturing more people in the carceral surveillance net.²³⁴ Rather than having to physically go to a correctional facility to be system-adjacent, one only has to communicate with someone

231. 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); 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* (Thomson Reuters 2021–2022 ed.). As an example, the New 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*, N.Y. STATE UNIFIED CT. SYS. (Dec. 7, 2023), <https://www.nycourts.gov/courthelp/criminal/collateralConsequencesBasics.shtml> [perma.cc/GJH9-G7TP].

232. *State v. West*, 507 N.W.2d 343, 350 (Wis. Ct. App. 1993) (Dykman, J., dissenting).

233. Peter K. Enns et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS)*, 5 SOCIUS: SOCIO. RSCH. FOR DYNAMIC WORLD 1, 1 (2019).

234. Elizabeth Daniel Vasquez, Opinion, *The N.Y.P.D. Is Teaching America How to Track Everyone Every Day Forever*, N.Y. TIMES (Sept. 15, 2025), <https://www.nytimes.com/interactive/2025/09/15/opinion/nypd-surveillance.html> [https://perma.cc/ETK6-7VH8].

using a digital prison tablet. Instead of sharing a device with a supervisee subject to an electronic search condition, maybe you are close enough to a supervisee such that his probation officer wants you to install Covenant Eyes on your phone.

We are in a singular moment where courts, legislatures, and advocates are grappling with balancing the potential benefits of technological advancement against the accompanying privacy intrusions they confer which soon may affect us all.²³⁵ Some courts appear skeptical and protective when reviewing surveillance technologies deployed in policing and the criminal legal system.²³⁶ 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.”²³⁷ In *Carpenter v. United States*, the Supreme Court rejected the application of the third-party doctrine to cell site data recovered from a person’s cell phone recognizing that “[t]here is a world of difference between the limited types of personal information addressed in [prior cases] and the exhaustive chronicle of location information casually collected by wireless carriers today.”²³⁸ The Sixth Circuit in *United States v. Warshak* ruled that a person has a reasonable expectation of privacy in his emails that are stored with an internet service provider, and the government must secure a warrant based on probable cause to compel their disclosure.²³⁹ And again, some courts appear wary of, carefully inspect, and sometimes narrow blanket electronic search conditions imposed on supervisees.²⁴⁰

This wariness is not limited to courts. Scholars, legislatures, and activists have all sounded the alarm on technology’s capacity to surveil indiscriminately.²⁴¹ Such concerns have led to a nationwide advocacy effort

235. *Carpenter v. United States*, 585 U.S. 296, 305 (2018) (“As technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to ‘assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001))).

236. See Weisburd, *supra* note 195, at 22–23. “The Supreme Court has been particularly concerned with ‘th[e] power of technology to shrink the realm of guaranteed privacy.’” *State v. McDonnell*, 297 A.3d 1114, 1129 (Md. 2023) (quoting *Kyllo*, 533 U.S. at 34).

237. *Riley v. California*, 573 U.S. 373, 393 (2014).

238. *Carpenter*, 585 U.S. at 314.

239. 631 F.3d 266, 288 (2010).

240. See *supra* note 198 and accompanying text.

241. See, e.g., Press Release, N.Y. City Council, City Council Passes Expanded POST Act Legislative Package to Strengthen Transparency and Oversight of NYPD Surveillance Technology (Apr. 15, 2025), <https://council.nyc.gov/amanda-farias/2025/04/15/city-council-passes-expanded-post-act-legislative-package-to-strengthen-transparency-and-oversight-of-nypd-surveillance-technology/> [<https://perma.cc/FTW5-2XB5>]; Aaron A. Bengart, Note, *Always a Suspect: Law Enforcement’s Violative Use of Geofence Warrants and Geolocation Data in Criminal Investigations and Proceedings*,

known as the Community Control Over Police Surveillance (CCOPS) campaign, which encourages city councils to pass laws providing civilian oversight over how police use surveillance technology in their communities.²⁴²

This momentum is motivated, in part, by a dawning realization that technology has raised the specter of near-total, panoptic government surveillance that captures us all. This may open the door to doctrinal, legislative, and community reforms that forestall future harms to adjacent individuals.

Section A considers barriers that adjacent individuals face when attempting to vindicate their Fourth Amendment rights under the current doctrinal landscape. Section B offers a modest interim proposal to revisit the balancing test, which could provide relief for adjacent people being prosecuted today and eventually provide evidence for and help pave the road to more ambitious reform. However, given the scope and magnitude of the threat to third parties' privacy rights identified herein, a long term, systemic, and multi-faceted solution will be required. Section C offers some preliminary recommendations for such a long-term vision.

A. Barriers to a Remedy

Under the current doctrinal landscape, adjacent individuals face two important barriers to redressing privacy intrusions: limited access to judicial review and the obstacles created by the consent and assumption of risk doctrines. Let us consider each in turn.

1. Limited Access to Judicial Review

There are two mechanisms for adjacent people to challenge a probation or parole search. First, they may challenge the propriety of the search as a defendant in a criminal case.²⁴³ This presumes that contraband was recovered, the adjacent individual was arrested, and the government initiated a prosecution. As discussed above, 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 adjacent

7 CARDOZO INT'L & COMPAR. L. REV. 639, 647 (2024) (arguing for legislative checks on law enforcement's use of digital location history in criminal investigations); *see also* *Community Control Over Police Surveillance*, ACLU, <https://www.aclu.org/community-control-over-police-surveillance> [<https://perma.cc/LLH5-LXXF>].

242. *Community Control Over Police Surveillance*, *supra* note 241.

243. *See generally* cases cited *supra* Part II.

person is arrested and charged, but the case is dismissed; or when a case is resolved with a plea or other disposition (as happens in over 95% of cases), and the adjacent person does not challenge the underlying search. Because the vast majority of adjacent individuals have no contraband or are charged but never tried, the case law in this area represents a small fraction of instances where third parties suffer a privacy intrusion, thus allowing law enforcement's behavior to often elude judicial review.²⁴⁴

The second mechanism for adjacent people who wish to challenge a probation or parole search is by initiating a Section 1983 claim, which allows individuals to file a lawsuit against a state or local government official for violating their constitutional rights.²⁴⁵ Despite having this avenue of relief available, there are several barriers for adjacent individuals seeking to successfully plead a case under Section 1983.²⁴⁶ System-adjacent individuals are disproportionately members of marginalized groups and a lower socioeconomic class, and may lack the financial resources, legal knowledge, or will (time and energy) to initiate such a proceeding. Indeed, scrupulous attorneys may dissuade the rare adjacent person who seeks consultation from pursuing such a claim given the unlikelihood of success. And that is the very point. Even if an adjacent person does get her day in court, this Article demonstrates that she is unlikely to prevail because Fourth Amendment jurisprudence affirmatively endorses and approves of her diminished privacy rights and expectations. The lack of a viable path to redress under current legal doctrine may dissuade adjacent individuals from challenging the privacy intrusions in the first place.

2. *Consent and Assumption of Risk Doctrines as Obstacles to Challenging Searches*

The second barrier to vindicating adjacent individuals' privacy rights is consent. Consent to a search vitiates a Fourth Amendment claim. Because of the search conditions imposed on supervisees, adjacent people rarely

244. 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.").

245. See, e.g., *Smith v. City of Santa Clara*, 876 F.3d 987, 994 (9th Cir. 2017); *Taylor v. Brontoli*, No. 04-CV-0487, 2007 WL 1359713 (N.D.N.Y. May 8, 2007).

246. See, e.g., Dani Kritter, *The Overlooked Barrier to Section 1983 Claims: State Catch All Statutes of Limitations*, *CALIF. L. REV. BLOG* (Mar. 2021), <https://www.californialawreview.org/online/the-overlooked-barrier-to-section-1983-claims-state-catch-all-statutes-of-limitations> [<https://perma.cc/L8J6-5KSU>].

have the opportunity to withhold consent, and thus are often foreclosed from even contemplating a Fourth Amendment challenge.²⁴⁷

Ordinarily, police may search a residence without a warrant if one co-occupant consents even when the other occupant is not on the premises and thus, does not provide consent.²⁴⁸ Additionally, “one joint occupant who is away from the premises may not authorize police officers to enter and search the premises over the objection of another joint occupant who is present at the time.”²⁴⁹ This holding was ratified in *Randolph* when the Supreme Court held that officers must respect a physically present occupant’s nonconsent to search even when a co-occupant provides consent.²⁵⁰ In other words, under ordinary circumstances, a present occupant can withhold consent and prevent law enforcement from searching a shared residence.²⁵¹

However, adjacent individuals residing with supervisees subject to a probation or parole search condition are not afforded this right to withhold consent. The Ninth Circuit in *Smith* rejected the use of a *Randolph*-based consent analysis when evaluating a third party’s privacy rights during a probation search.²⁵² Instead, the *Smith* court applied the totality of the circumstances balancing test used in *Knights* and *Samson*.²⁵³ This shift away from a bright-line-rule based on consent is a telling choice. Had the *Smith* court treated adjacent individuals the same as their non-adjacent peers with respect to consent, the mother in *Smith* would have had the authority to halt law enforcement at the threshold of her home and prevent the search from taking place. This risk could have animated the *Smith* court’s decision to eschew consent as the rationale for upholding the search.

247. For critiques of consent in criminal procedure jurisprudence, see generally Stephen E. Henderson & Guha Krishnamurthi, *A Wolf in Sheep’s Attire: How Consent Enfeebles Our Fourth Amendment*, 85 OHIO STATE L.J. 33 (2024); Weisburd, *supra* note 195.

248. See *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *United States v. Matlock*, 415 U.S. 164 (1974); *Georgia v. Randolph*, 547 U.S. 103 (2006).

249. *Tompkins v. Superior Ct.*, 378 P.2d 113, 116 (Cal. 1963).

250. *Randolph*, 547 U.S. at 108.

251. *Id.*

252. *Smith v. City of Santa Clara*, 876 F.3d 987 (9th Cir. 2017); see also *State v. Hurt*, 743 N.W.2d 102 (N.D. 2007). Prior to the Supreme Court’s decisions in *Knights* and *Samson*, some courts evaluated an adjacent individual’s privacy rights during a probation or parole search using a consent analysis. See, e.g., *id.*; *People v. Woods*, 981 P.2d 1019 (Cal. 1999). In these cases, courts routinely held that because the supervisee agreed to a probation or parole search condition, his consent applied to subsequent searches of the shared residence. *Smith* rejects this consent analysis.

253. *Smith*, 876 F.3d at 994. It is notable that the *Knights* and *Samson* Courts also rejected consent as the basis for evaluating the propriety of the probation and parole searches when challenged by the supervisee. See *United States v. Knights*, 534 U.S. 112, 118 (2001); *Samson v. California*, 547 U.S. 843, 852 n.3 (2006); see also Weisburd, *supra* note 195, at 19–20 (finding that *Samson* and *Knights* are the only cases where the Supreme Court has alluded to “the question of consent as a justification to deprive people of rights in the post-conviction setting”).

A further impediment to adjacent individuals vindicating their Fourth Amendment rights is the position taken by some courts that adjacent individuals have knowingly assumed the risk of being subject to a probation or parole search by associating with a supervisee. Courts disagree on this issue. In *United States v. Harden*, the Eleventh Circuit upheld a search of an adjacent individual's residence that she shared with a person on probation emphasizing that she knew about her co-resident's status as a supervisee and thus her corresponding reduced expectation of privacy in the supervisee's home.²⁵⁴ Similarly, the *Adams* court stressed that the third party *voluntarily* elected to live with a supervisee and thus assumed the risk of having reduced Fourth Amendment privacy rights in shared spaces.²⁵⁵ These courts emphasize that the adjacent individual acted knowingly, and ignore the fact that many adjacent people—again, disproportionately poor and minority—have no choice in where or how they live.

Other courts have gone even further. The California Court of Appeals in *People v. Carreon* concluded that a person may unknowingly assume the risk of being searched by associating with a supervisee.²⁵⁶ In other words, third parties assume the risk of enjoying a reduced expectation of privacy when they reside with supervisees *even if the adjacent individual 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 adjacent individual because she

254. 104 F.4th 830, 837 (11th Cir. 2024) (emphasis added).

255. *State v. Adams*, 788 N.W.2d 619, 624 (N.D. 2010) (emphasis added); *see also State v. Bursch*, 905 N.W.2d 884, 891 (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 (Ct. App. 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. App. 2002) (finding that co-inhabitants assume the risk that one inhabitant may consent to the search of a common area).

256. 203 Cal. Rptr. 3d 857, 865 (Ct. App. 2016); *see also State v. Walker*, 158 P.3d 220, 224 (Ariz. Ct. App. 2007) (“Additionally, when one allows a third party to use or control his property, he ‘assume[s] the risk’ that the property will be seen by additional parties.” (quoting *Matlock v. United States*, 415 U.S. 164 (1974))). Let us contrast 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 (2d Cir. 1988) (“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)).

was *unaware* of her co-resident's status as a supervisee. Thus, adjacent individuals 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 based on their association with a supervisee.²⁵⁷

B. Rebalancing the Balancing Test

Given the extensive intrusions on adjacent individuals' privacy due to their proximity to supervisees, and the seriousness of the prosecutorial harms that follow, it is time to reconsider the propriety of the courts' interpretations of their Fourth Amendment rights during residential and electronic probation and parole searches, at least in cases where assumption of risk does not present a barrier.²⁵⁸ Indeed, such a reconsideration is urgent given the rapid progression of technological advancements that will undoubtedly intrude upon adjacent individuals' privacy in a more invasive manner.²⁵⁹

However, by offering a remedy grounded in Fourth Amendment jurisprudence, this Article does not concede that the Fourth Amendment is sufficient to curb government overreach and adequately protect third parties' privacy rights during these searches. Indeed, "while the Fourth Amendment is presumed to check the state's power to surveil, it often facilitates the very practices it should limit."²⁶⁰ This doctrinal remedy is offered pragmatically as an interim solution to mitigate some of the most salient harms befalling adjacent individuals today.

To fashion a doctrinal remedy, the balancing test that courts currently apply when determining what expectation of privacy adjacent individuals are entitled to when they reside with a supervisee is a potential starting point. Under the test set out in *Knights*, a court will examine the totality of the circumstances and balance the third party's privacy rights against the government's interests.²⁶¹ As discussed in Part II, while courts currently

257. It is worth noting that the reliance on assumption of risk doctrine places Fourth Amendment jurisprudence out of lockstep with other legal disciplines. In tort law, for example, this doctrine has been heavily criticized as being unworkable, confusing, and in conflict with other concepts like comparative fault and contributory negligence. *See, e.g.*, Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833 (1997). In many states, assumption of risk as a complete bar to recovery has been narrowed or abandoned entirely. *See, e.g.*, *Simmons v. Porter*, 312 P.3d 345 (Kan. 2013).

258. While beyond the scope of this Article, Professor Hochman Bloom advocates for the extension of the exclusionary rule in another context: when evidence is obtained in violation of the Fourth Amendment, yet the state seeks to introduce it in probation and parole revocation proceedings. Hochman Bloom, *supra* note 44.

259. *See supra* Section I.B.1.

260. Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. REV. 1384, 1384 (2023).

261. *Smith v. City of Santa Clara*, 876 F.3d 987, 994 (9th Cir. 2017); *see also United States v. Harden*, 104 F.4th 830, 834–38 (11th Cir. 2024).

may acknowledge adjacent individuals' substantial privacy rights in their homes, they almost invariably find that they are outweighed by "the government's interest in reducing recidivism and thereby promoting reintegration and positive citizenship."²⁶²

Were courts instead to conduct a truly *individualized* application of this balancing test that considers whether factors in the particular case, including the degree of the offense and the reason for the search, the balancing test would often tip the other way. The *Smith* court's analysis and restraint is instructive. There, the court carefully highlighted how its decision rested on the particular facts of the case; namely, that police officers were attempting to locate and arrest a supervisee on felony probation who was alleged to have committed another serious, violent offense. Given those facts, the court did not suppress the evidence, but it hinted that under less exigent circumstances, the balance may tip toward suppression.

Furthermore, both *Smith* and other courts have failed to account for the government's professed interest in reducing recidivism and promoting reintegration as they balance the interests under the *Knights* test. As discussed above, stable housing and community ties are two of the three most important factors for reducing recidivism. Curtailing adjacent individuals' privacy rights could disincentivize third parties from providing the housing and communal support that contribute to supervisees' success.

The California Supreme Court recognized this risk nearly twenty-five years ago in *People v. Robles*.²⁶³ The *Robles* court suppressed evidence discovered in the warrantless search of a garage shared between Robles and his brother who was on probation.²⁶⁴ 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.²⁶⁵

262. *Harden*, 104 F.4th at 838 (cleaned up) (citing *Samson v. California*, 547 U.S. 843, 853 (2006)).

263. 3 P.3d 311, 317–18 (Cal. 2000).

264. *Id.* at 313–14, 319.

265. *Id.* at 317.

Thus, the government's interest in reducing recidivism and promoting reintegration can weigh at least partially in favor of suppression.²⁶⁶

Under *Knights*, the government's interest is weighed against the adjacent individual's privacy interest. Although courts often acknowledge that adjacent people's privacy interests in their homes and electronic devices are high, some courts also conclude that third parties cannot "reasonably" expect privacy when those areas are shared with a supervisee. As to the supervisees themselves, Professor Karteron notes: "The primary justification for this incredibly anemic view of parolees' and probationers' Fourth Amendment rights is that parolees and probationers are on a "continuum" of state-imposed punishments,' and their rights are therefore rightfully curtailed as part of that punishment."²⁶⁷ Such reasoning does not apply to adjacent people who are not under criminal court supervision and have not committed a crime. Adjacent individuals' robust privacy interests tip the scale even more heavily in favor of suppression.

Were courts to appropriately weigh these factors, suppression would be warranted in many scenarios where contraband is recovered only because an adjacent individual resides with or shares an electronic device with a supervisee. Such was the case in *United States v. Neves*, where a Maine federal district court recently suppressed evidence recovered during a probation search when prosecutors sought to introduce it against an adjacent individual, but not the supervisee. After conducting an appropriately individualized inquiry, the *Neves* court reasoned:

With regard to their security within their own homes, nonprobationers should be protected by the Fourth Amendment's warrant requirement fully, without what is otherwise effectively absolute dilution of their privacy rights due to the residency of a probationer, at least insofar as a house-wide, exploratory search for evidence of a crime is concerned, even though their personal interest

266. There are broader, community-wide considerations as well. "The Supreme Court has recognized that 'the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security.'" *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556–57 (S.D.N.Y. 2013) (citing *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968)). Litigation in *Turner v. Safley*, 482 U.S. 78 (1987), *Procurier v. Martinez*, 416 U.S. 396 (1974), and *In re Marcus Reid*, demonstrate the concerns that community members have regarding third parties' privacy rights. Petition, *In re Marcus Reid v. N.Y. City Dep't of Corr.*, No. 806245/2024E (N.Y. Sup. Ct. filed Apr. 15, 2024).

267. Karteron, *supra* note 42, at 683 (internal citations omitted); *see also* *Samson v. California*, 547 U.S. 843, 864 n.5 (2006) (Stevens, J., dissenting) ("This is a vestige of the long-discredited 'act of grace' theory of parole."); Weisburd, *supra* note 195, at 19 (noting that while some lower courts have rejected the notion that defendants must trade rights in exchange for avoiding prison, these courts are in the minority).

must give way—to a degree—to permit a probation officer to have reasonable access to and supervision over a probationer.²⁶⁸

As such, the *Neves* court would require officers to obtain a warrant before conducting a search of an adjacent individual’s residence if officers wish to use any contraband recovered against the third party.²⁶⁹

Such an outcome vindicates third parties’ Fourth Amendment protections without interfering with the government’s interest in public safety and reintegration. Adjacent individuals would enjoy more protection of their constitutional privacy rights and the government’s ability to monitor and surveil supervisees would remain unimpeded. If the justification for affording adjacent individuals 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 adjacent people suffer should be tethered to the justification for said intrusion.

C. *Beyond Balancing*

Ideally, community supervision models would strike an appropriate balance between surveilling the supervisee no more than is necessary to achieve the government’s interests in public safety and rehabilitation while also eliminating the intrusion on third parties’ privacy rights. Several reforms draw us closer to that vision. Some reach beyond the adjacent individual’s privacy rights and enhance those of the supervisees as well. But recognizing the current and oncoming onslaught of privacy intrusions adjacent people suffer suggests that it is time to revisit and, perhaps constrain, the scope of probation and parole searches even before officers reach the front door.

At the state level, legislatures can provide more protection than the federal constitutional floor by requiring probation and parole officers to have probable cause or, at a minimum, reasonable suspicion that a supervisee is engaged in criminal activity or violating the terms of their supervision before conducting a warrantless search of their home or cell phone. This is the approach that some state statutes and federal judges take when imposing search conditions on supervisees.²⁷⁰ For example, the search

268. *United States v. Neves*, No. 24-cr-00090, 2025 WL 1000928, at *11 (D. Me. Apr. 3, 2025).

269. *Id.* at *9.

270. *See Weisburd*, *supra* note 20, at 44 app. B.8 (listing jurisdictions that (1) permit home searches with no limitations, (2) require reasonable suspicion or probable cause for a home search, (3)

condition in *Neves* authorized probation officers to conduct searches, “if the officer reasonably suspects that the defendant has violated a condition of supervised release and reasonably suspects that evidence of the violation will be found in the areas to be searched.”²⁷¹ Though this change would not protect adjacent individuals from all searches, it would place a meaningful limit on an officer’s authority to cross the threshold of their front door.

States can also follow the federal example by requiring judges, rather than parole boards or other administrative agencies, to decide whether to impose a search condition as a condition of supervision. While state court judges often set the terms of probation, “parole conditions are almost always set by a board or administrative agency.”²⁷² By contrast, in federal court, judges set the terms of both probation and post-release supervision.²⁷³ Having judges decide the extent of the government’s search power in each case would demand an individualized inquiry into whether such a condition is necessary and narrowly tailored to achieve the espoused goals of community supervision. For electronic search conditions, judges can leverage how customizable technology is to grant access to only certain applications, data, or information.²⁷⁴ Rather than being the default, a search condition would be tethered to each supervisee’s particular offense, case, and conduct.

D. Creating Data to Drive Reform

Finally, for adjacent individuals interested in reform, case law is—as noted above—an inadequate basis for demonstrating the extent and harmfulness of the violations of their privacy rights permitted by current probation and parole search conditions. Robust data is required, but almost entirely lacking, especially at the state level. There is a dearth of centralized state-level data on the number of searches that are conducted; the types of searches that are conducted; how often third parties are detained, questioned, or searched during a search; how often contraband is recovered; how often searches lead to criminal prosecutions of supervisees or adjacent individuals; how often searches lead to violation of probation or parole proceedings; or even how often searches yield nothing at all.

permit electronic searches with no limitations, and (4) require reasonable suspicion or probable cause for an electronic search).

271. *Neves*, 2025 WL 1000928, at *2.

272. *Karteron*, *supra* note 42, at 658.

273. *Id.* at 659–60.

274. *But see* Gershowitz, *supra* note 108 (finding that judges are not issuing sufficiently narrow search warrants for cell phones post-*Riley*).

Without this data, it is impossible to evaluate the effectiveness of probation or parole searches. In constitutional terms, it is difficult to discern whether these searches in fact further the government's stated interests in improving public safety, reducing recidivism, and promoting reintegration. From a public policy perspective, how can stakeholders weigh whether these searches are worth the harms imposed on supervisees, adjacent individuals, and communities without robust data regarding their efficacy? Even more fundamentally, such data would shed light on the question of whether more surveillance and monitoring make us safer, and if so, at what cost.²⁷⁵ Research finding that supervision can actually have a criminogenic effect makes this need especially acute.²⁷⁶

The central role that data played in litigation challenging how the NYPD conducted *Terry* stops illustrates the importance and potential impact of its collection. In *Floyd v. City of New York*, individuals challenged the NYPD's stop and frisk practices.²⁷⁷ In the court's lengthy opinion, it highlighted the low "hit rate" of these stops noting, for example:

[I]n 98.5% of the 2.3 million frisks, no weapon was found.

8% of all stops led to a search into the stopped person's clothing. . . .
In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not. In 14% of these searches, the felt object was in fact contraband. 86% of the time it was not. . . .

275. The dissent in *Samson* expresses skepticism of the majority's implicit assertion that warrantless parole searches reduce recidivism. *Samson v. California*, 547 U.S. 843, 865 n.6 (2006) (Stevens, J., dissenting). There is some data in other contexts that is instructive. Professor Weisburd, in an article investigating the role consent plays in criminal procedure, found that some "research confirms that more consent searches do not lead to greater recovery of contraband." Weisburd, *supra* note 195, at 13 (citing Megan Dias, Derek A. Epp, Marcel Roman & Hannah L. Walker, *Consent Searches: Evaluating the Usefulness of a Common and Highly Discretionary Police Practice*, 21 J. EMPIRICAL LEGAL STUDS. 35 (2024)). She also found that "[i]n California, for example, data shows that during a period of time when consent searches were banned, police were more successful in finding contraband, suggesting that police were conducting searches only when they had reason to (beyond consent)." Weisburd, *supra* note 195, at 13.

276. COLUM. UNIV. JUST. LAB, *TOO BIG TO SUCCEED: THE IMPACT OF THE GROWTH OF COMMUNITY CORRECTIONS AND WHAT SHOULD BE DONE ABOUT IT* (2018); David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen & Shawn D. Bushway, *Short- and Long-Term Effects of Imprisonment on Future Felony Convictions and Prison Admissions*, 114 PROC. NAT'L ACAD. SCIS. 11103 (2017); Merry Morash, Deborah A. Kashy, Sandi W. Smith & Jennifer E. Cobbina, *The Effects of Probation or Parole Agent Relationship Style and Women Offenders' Criminogenic Needs on Offenders' Responses to Supervision Interactions*, 42 CRIM. JUST. & BEHAV. 412, 429 (2015) (noting that a punitive supervision style is ineffective, or even counterproductive, to rehabilitation).

277. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

Weapons were seized in 1.0% of the stops of [B]lacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of [W]hites.²⁷⁸

Additionally, “88% of the 4.4 million stops resulted in no further law enforcement action.”²⁷⁹ Having data demonstrating how infrequently contraband was recovered factored heavily into the court’s reasoning for imposing liability on the City for violating the plaintiffs’ Fourth and Fourteenth Amendment rights.²⁸⁰

Having comparable data on residential and electronic probation and parole searches would be invaluable for evaluating their efficacy and challenging their necessity.²⁸¹ As an initial step, probation and parole officers could be required to fill out a standard form—similar to the UF-250 form used by the NYPD for *Terry* stops—that captures the name of the supervisee; what offense they are on supervision for; the date of the search; the location of the search; who conducted the search; the reason for conducting the search; the area, location, and people searched; whether contraband was recovered; whether any other violations were observed; and the actions taken following the search. These forms could be compiled, anonymized, and released to facilitate rigorous study and analysis.

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 non-system-adjacent individuals. However, the carceral surveillance net has encroached on their privacy rights creating a subordinate class entitled to fewer privacy protections than their non-adjacent peers. Probation and parole search conditions of both physical and electronic spaces imposed on their loved ones permit government officials to search adjacent individuals’ locked bedrooms, and access and inspect shared electronic devices over their objection and without their consent. Such an intrusion is a violation of their fundamental constitutional rights.

Instead, courts, legislatures, and advocates should champion reforms that limit how probation and parole search conditions injure adjacent people and communities. They should also consider how new technology-driven privacy intrusions may warrant renewed efforts to cabin probation and

278. *Id.* at 558–59.

279. *Id.* at 559.

280. *Id.* at 658–67.

281. It is worth noting that the Court relied on an NYPD form, UF-250s, which officers were supposed to fill out after each stop. *See generally id.* Although these forms were often incomplete or not filled out, they provided the basis for the court’s findings and conclusions.

parole searches altogether. With sophisticated surveillance technologies emerging every day, unless the privacy rights of those in closest proximity to individuals on probation and parole are explicitly protected by the law, we are facing a future where soon we will all be system adjacent.