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NOTES

CASTLES MADE OF SAND: THE DISAPPEARING FOURTH AMENDMENT RIGHTS OF PROBATIONERS AND PAROLEES

Sean P. Dawson*

*“A man’s home is his castle, and his home his safest refuge”—Sir Edward Coke¹
“And so castles made of sand, fall in the sea, eventually”—Jimi Hendrix²*

INTRODUCTION

There is currently a split among the federal circuit courts on the Fourth Amendment protections afforded to probationers and parolees³ against unreasonable searches and seizures. The specific constitutional issue is whether a condition of probation that a federal defendant permit a probation officer to visit him or her at any time, at home or elsewhere, and permit confiscation of any contraband observed in plain view of the probation officer *also* allows law enforcement officers to conduct

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¹ See *Markham v. Wolf*, 147 A.3d 1259, 1262 (Pa. Commw. Ct. 2016) (citing SIR EDWARD COKE, THIRD INSTITUTE OF THE LAWS OF ENGLAND 162 (1644)). In the original quote, the second phrase is in Latin—“*et domus cuique tutissimum refugium.*” *Id.*

² JIMI HENDRIX, *Castles Made of Sand*, on AXIS: BOLD AS LOVE (Track Records 1967).

³ This Note will refer to the rights of all individuals under supervision together. This is due to both having been repeatedly deemed to have lesser expectations of privacy due to their status. While there can be important differences between probationers and parolees in some cases, parsing the differences is not essential to, and is beyond the scope of this Note.

warrantless searches of their home based on mere reasonable suspicion⁴ of a violation of the supervised release. The ultimate answer to this question has significant implications for the constitutional rights of the nearly five million Americans under community supervision.⁵ But there is more to this issue than just this specific area of Fourth Amendment jurisprudence. It reflects an ongoing trend in American law in which the constitutional rights of probationers and parolees are increasingly discounted and their rehabilitation and successful reintegration into society is ignored in favor of traditional law enforcement objectives. The consequences of these rulings are not limited to convicted criminals either. These decisions echo across all of Fourth Amendment case law and implicate some of our most precious and closely guarded privacy interests as citizens: For if one's private home is not safe from warrantless searches and seizures, then perhaps nothing is.

Part I of this Note describes the current circuit split and the divergent approaches of each of the lower courts. Part II details the most important Supreme Court decisions in this area, illustrating the Court's evolving approach to the Fourth Amendment rights of probationers and parolees. Part III discusses the concept of rehabilitation as a sentencing goal and explores its potential neglect by courts in favor of other objectives such as retribution and deterrence. Finally, Part IV argues for a change to this prevailing trend in Fourth Amendment jurisprudence. Overall, this Note will attempt to shed light on a rarely discussed area of constitutional and criminal law.

I. THE CIRCUIT SPLIT

A. *United States v. Hill—Keeping the Warrant Requirement Alive*

The Fourth Circuit Court of Appeals considered this issue somewhat recently in *United States v. Hill*.⁶ In this case, Eric Barker, an individual on federal supervised release, was suspected of changing residences without notification, so law enforcement obtained a warrant for his arrest and executed it at his new home.⁷ As a

⁴ "Reasonable suspicion" is a lower standard than probable cause. Reasonable Suspicion is the level of suspicion necessary in order to conduct a "stop and frisk." See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵ Danielle Kaeble et al., *Correctional Populations in the United States*, BUREAU JUST. STAT. (Jan. 21, 2016), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5870> (estimating correctional population as of 2015).

⁶ 776 F.3d 243, 245 (4th Cir. 2015).

⁷ *Id.*

condition of his supervised release, Barker had agreed to notify his probation officer if he moved, and to allow probation officers to visit him at his home at any time and seize any contraband in plain view.⁸ While conducting a protective sweep of the area, the officers forced open a locked bedroom door and found Robert Hill and another individual, both of whom were also on probation, inside.⁹ Suspicious of other probation violations afoot, the officers led a drug-detection dog around the apartment, and only after the dog “alerted” did they seek a search warrant.¹⁰ A second search, made pursuant to the warrant, turned up a variety of contraband, including heroin, prescription pills, and drug use paraphernalia.¹¹ The three defendants moved to suppress this evidence as “fruit of the poisonous tree,” contending that the original dog sniff was an illegal search, tainting the contraband later found pursuant to the search warrant.¹² The Fourth Circuit Court agreed, recognizing that “the governmental interest in supervision is great and the [probationer’s] privacy interest is diminished,” and that society has an “interest in having the [probationer] closely and properly supervised,” but ultimately holding that these considerations did *not* excuse compliance with the Fourth Amendment’s warrant requirement.¹³ The court stressed that while defendants had all separately agreed to home visits by probation officers, which would allow the officers to confiscate any contraband found in plain view, they did *not* consent to warrantless searches of their homes as a condition of probation.¹⁴ Without such a condition explicitly agreed upon, the court held that law enforcement may not search the home of a probationer without a search warrant supported by probable cause.¹⁵

B. Keith and Yuknavich—No Warrant Necessary

The Fifth Circuit, considering the same question in *United States v. Keith* about a decade earlier, came to the opposite conclusion, however, upholding a warrantless search (based on reasonable suspicion alone) of probationer Keith’s home as

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 246.

¹² *Id.*

¹³ *Id.* at 248 (quoting *United States v. Bradley*, 571 F.2d 787, 788 (4th Cir. 1978)).

¹⁴ *Hill*, 776 F.3d at 248.

¹⁵ *Id.* at 249.

“reasonable” under the Fourth Amendment.¹⁶ Though the court conceded that Keith had never agreed to such warrantless searches of his home, even as a condition of probation, and that no state laws or regulations authorized them either, it upheld the search nonetheless.¹⁷

The Fifth Circuit is not alone in making this logical leap, though. About a year later, in *United States v. Yuknavich*, the Eleventh Circuit joined in and similarly held that reasonable suspicion alone was enough to justify the search of a probationer’s home.¹⁸ It reasoned that whether the probationer actually agreed to such a search condition ahead of time was not determinative, but merely a “salient circumstance” in the overall reasonableness analysis, and even cited *Keith* as persuasive authority in helping to justify its decision.¹⁹

So, the battle lines are drawn, with the Fourth Circuit on one side and the Fifth and Eleventh Circuits on the other. While the writing is not on the wall just yet, the Supreme Court appears to have laid the groundwork for an eventual decision effectively overruling *Hill*, however, recognizing outcomes like in *Keith* and *Yuknavich* as the general rule.

II. THE SUPREME COURT CASES

A. *Griffin v. Wisconsin—Special Needs Trump the Warrant and Probable Cause Requirements*

The most important Supreme Court decision in this area is probably *Griffin v. Wisconsin*.²⁰ In *Griffin*, defendant Joseph Griffin, a probationer, was suspected of illegally possessing a firearm, so multiple probation and police officers showed up at his apartment to search for the prohibited weapon.²¹ Wisconsin law subjected all probationers to numerous rules and regulations, including one permitting any probation officer to search a probationer’s home without a warrant if there are “reasonable grounds” to believe contraband or any items the probationer is

¹⁶ 375 F.3d 346, 349–51 (5th Cir. 2004).

¹⁷ *Id.* at 350.

¹⁸ 419 F.3d 1302, 1309, 1311 (11th Cir. 2005).

¹⁹ *Id.* at 1309 (citing *Keith*, 375 F.3d at 350).

²⁰ 483 U.S. 868 (1987).

²¹ *Id.* at 871.

prohibited from possessing under the conditions of his probation may be found.²² Another state regulation made it a violation of Griffin's terms of probation to refuse to consent to such a search.²³ As suspected, a search of Griffin's home turned up a handgun, and he was charged with felony possession of a firearm.²⁴ The trial court denied Griffin's motion to suppress the evidence, concluding that no warrant was necessary because the search of his home was "reasonable" within the meaning of the Fourth Amendment.²⁵ The Supreme Court, in a 5-4 majority opinion authored by Justice Antonin Scalia, agreed.²⁶

The Court acknowledged that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be reasonable," which normally requires that such a search only be conducted pursuant to a search warrant (supported by probable cause and issued by a neutral and detached magistrate).²⁷ However, the Court concluded that Wisconsin's operation of a probation system presented "special needs" beyond normal law enforcement, making the warrant and probable cause requirements "impracticable" in this context.²⁸

Justice Scalia then embarked on somewhat of a tirade against basic tenets of the Fourth Amendment as applied to the probation system. He stressed that a warrant requirement would unduly interfere with probation, substituting a magistrate for the probation officer as the judge of a probationer's supervision.²⁹ He further argued that the delay involved in obtaining a search warrant would make it more difficult for probation officials to quickly respond to evidence of misconduct, which could reduce the deterrent effect of supervision.³⁰ Justice Scalia also alleged that the probable cause requirement would unduly disrupt the probation system by further reducing the deterrent effect of supervision, as the probationer would then feel more comfortable in concealing illegal activities, apparently due to knowledge that it would take more than mere reasonable suspicion for probation officials to search his

²² *Id.* at 870–71 (citing WIS. ADMIN. CODE HSS §§ 328.21(4), 328.16(1) (1981)).

²³ *Id.* at 871 (citing HSS § 328.04(3)(k)).

²⁴ *Id.* at 871–72.

²⁵ *Id.* at 872.

²⁶ *Id.*

²⁷ *Id.* at 873.

²⁸ *Id.* at 876.

²⁹ *Id.*

³⁰ *Id.*

home.³¹ He asserted that it was “both unrealistic and destructive” of the probation relationship as a whole to require the degree of certainty and reliability of supporting information that the Fourth Amendment normally demands.³² Finally, as further justification, he reasoned that, in essence, probationers and parolees do not enjoy the absolute liberty that a regular citizen does, but rather only conditional liberty contingent upon certain conditions, so dispensing with parts of their Fourth Amendment rights should not come as a surprise to them.³³

Central to the Court’s decision, however, was the nature of the relationship between probation officer and probationer. Justice Scalia analogized this relationship to that of a parent and child, comparing “how parental custodial authority would be impaired by requiring judicial approval for search of a minor child’s room” to the effect of a warrant requirement on searches of probationers’ private homes.³⁴ He went on to state that, “[a]lthough a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen.”³⁵ Rather, “[h]e is an employee of the State Department of Health and Social Services who, while assuredly charged with protecting the public interest, is also supposed to have in mind the welfare of the probationer.”³⁶ This distinction between probation officers and regular law enforcement was central to the Court’s conclusion that, on balance, the interests at stake weighed in favor of dispensing with the warrant requirement in these circumstances.

In a dissent joined by Justices Marshall, Brennan, and Stevens, Justice Blackmun acknowledged much of the majority’s rationale as reasonable, but strongly disagreed with their conclusion. Justice Blackmun decried the Court’s decision as another step diminishing the protection given by the Fourth Amendment to the “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,” and argued that a person’s probationary status

³¹ *Id.* at 878.

³² *Id.* at 879.

³³ *See id.* at 874 (reasoning that probationers would not have a reasonable expectation of privacy in these circumstances because they do not enjoy “the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.”).

³⁴ *Id.* at 876.

³⁵ *Id.*

³⁶ *Id.*

in no way justified abandoning the warrant requirement.³⁷ He agreed that the special needs of the probation system justified a search by a probation officer of a probationer's home based on a reduced level of suspicion.³⁸ In particular, he acknowledged that supervision of probationers provides a crucial means of advancing rehabilitation by allowing probation officers to intervene at the first sign of trouble.³⁹ However, Justice Blackmun reasoned that this consideration was not enough to support an exception to the warrant requirement, which he would have retained as a critical method of protecting a probationer's privacy.⁴⁰

The four dissenters emphasized that “the search in this case was conducted in [Griffin's] *home*, the place that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment.”⁴¹ Justice Blackmun highlighted the Court's history of decisions holding that “warrantless searches and seizures in [the] home violate the Fourth Amendment, absent consent or exigent circumstances.”⁴² He further stressed that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed” and that the primary protection against unnecessary intrusions into the home is the warrant requirement.⁴³ Moreover, the Court had held in the past that, as a basic principle of Fourth Amendment law, searches and seizures inside a home without a warrant are presumptively unreasonable.⁴⁴ For Justice Blackmun, this was not just an incorrect decision, but one that directly contradicted longstanding Fourth Amendment precedent.

The dissent also noted that application of the warrantless administrative search doctrine to the search of an individual's home was an unprecedented move.⁴⁵ Past Supreme Court cases in this area had concerned the lesser expectation of privacy inherent in “closely regulated” businesses such as junkyards, mines, and gun

³⁷ *Id.* at 881 (Blackmun, J., dissenting).

³⁸ *Id.* at 882.

³⁹ *Id.* at 883.

⁴⁰ *See id.* at 882.

⁴¹ *Id.* at 883 (emphasis in original).

⁴² *Id.* (citing *United States v. Karo*, 468 U.S. 705, 714–15 (1984); *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980)).

⁴³ *Griffin*, 483 U.S. at 884 (Blackmun, J., dissenting).

⁴⁴ *Id.* (citing *Payton*, 445 U.S. at 586; *Welsh v. Wisconsin*, 466 U.S. 740, 748–49 (1984)).

⁴⁵ *See id.*

dealers.⁴⁶ The key rationale in such cases was that the expectation of privacy in highly regulated commercial premises was distinctly different from, and significantly less than that *in an individual's home*.⁴⁷ The dissent urged that this logic was directly contrary to precedent and simply did not extend to “the invasion of the special privacy the Court has recognized for the home.”⁴⁸

Justice Blackmun argued that probationers usually live at home and often, as here, with a family, so they retain a legitimate privacy interest in that home that must be respected as long as it is not incompatible with substantial government needs.⁴⁹ He contended that nothing about the *status* of probation itself justified a special exception to the warrant requirement.⁵⁰ If a situation arose where there existed a compelling need to search a probationer's home without delay, he argued, then the already established exception for exigent circumstances would apply, and a warrant would be unnecessary.⁵¹ This existing narrow exception, Blackmun stressed, already provided probation officers with all of the flexibility they reasonably need.⁵² By needlessly creating a separate, broad warrant exception for probationers, the Court perhaps went too far, applying a massive “solution” to a narrow problem.

B. Jardines and Griffin—Strange Bedfellows in Fourth Amendment Jurisprudence

As for *Griffin's* majority opinion, it is somewhat hard to believe that it was authored by the same Justice Scalia who would later write for the Court in *Florida v. Jardines*.⁵³ Although *Jardines* did not specifically involve the rights of probationers or parolees, it delivered a powerful message as to the scope of Fourth Amendment protections, particularly protection of the home, that transcends the specific facts before the Court. In *Jardines*, defendant Joelis Jardines challenged the Miami-Dade Police Department's actions as a violation of his Fourth Amendment

⁴⁶ *Id.* (citing *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972)).

⁴⁷ *Burger*, 482 U.S. at 700 (emphasis added).

⁴⁸ *Griffin*, 483 U.S. at 844 (Blackmun, J., dissenting).

⁴⁹ *Id.*

⁵⁰ *Id.* at 885.

⁵¹ *See id.*

⁵² *Id.*

⁵³ 560 U.S. 1 (2013).

rights after police, without a warrant, brought a drug sniffing dog onto his front porch based on an unverified tip that Jardines was growing marijuana inside his home.⁵⁴ There, the dog “alerted,” indicating the possible presence of marijuana inside, and police used this information to obtain a search warrant for Jardines’ home.⁵⁵ The search turned up multiple marijuana plants, and Jardines was arrested and charged with drug trafficking.⁵⁶ At trial, Jardines moved to suppress the marijuana plants on the grounds that they were the product of an unconstitutional warrantless search.⁵⁷ Jardines’ motion was granted, but after a back-and-forth appellate history, the case wound up before the United States Supreme Court, with the question presented of whether the police officers’ conduct constituted a “search” for Fourth Amendment purposes (and therefore, as it was conducted without a warrant, violated Jardines’ Fourth Amendment rights).⁵⁸

Justice Scalia’s answer, in an opinion joined by Justices from both ends of the Court’s political spectrum (including Justices Thomas, Ginsburg, Sotomayor, and Kagan), was an emphatic “yes.”⁵⁹ The Court held that Jardines’ front porch, as part of the “curtilage” of his home, was entitled to the same protection as the home itself, and therefore the uninvited dog sniff was certainly a “search” within the meaning of the Fourth Amendment.⁶⁰ However, what makes this decision notable is not its somewhat narrow holding, but rather the broad, sweeping language it uses to describe the Fourth Amendment’s protection of the home.

The Court, in powerful dicta, declared that “when it comes to the Fourth Amendment, the home is first among equals.”⁶¹ It went on to proclaim that “[a]t the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable government intrusion.’”⁶² This resounding message is arguably hard to reconcile with the notion in *Griffin* that a probationer’s home has so little constitutional protection that it may be searched not only without a warrant,

⁵⁴ *Id.* at 3–4.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4–5.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.* at 11–12.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 6.

⁶² *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

but also on mere reasonable suspicion alone.⁶³ Perhaps the easiest explanation for the stark difference of treatment between the two opinions might have been that the composition of the Court changed between the two decisions. Yet, Antonin Scalia wrote for the Court in both cases: The same Justice Scalia who also declared in *Kyllo v. United States* that the Fourth Amendment draws a firm, bright line at the entrance to the house.⁶⁴ These ringing proclamations of the importance and scope of Fourth Amendment protections seem at odds with the theory that they could be so easily discarded when the individual who invokes them has a recent conviction on his or her record.

C. Criticism of Griffin

Criticism of the Court's reasoning in *Griffin* is not limited to this Note, however. In *Commonwealth v. La France*, the Massachusetts Supreme Court forcefully rejected *Griffin*'s approach, siding with Justice Blackmun's dissent instead.⁶⁵ The Massachusetts court repudiated *Griffin*'s use of the special needs inquiry, thoroughly unconvinced by the Court's analogy to warrantless administrative searches of closely regulated businesses.⁶⁶ The court went on to stress that requiring a warrant to search a probationer's home "is not an undue burden on the probation officer and provides the protection for the probationer guaranteed by [the Constitution]."⁶⁷ It also stated that requiring a probation officer to articulate reasons for the search acts as a deterrent to impulsive or arbitrary government conduct, which is what the Fourth Amendment is all about.⁶⁸ The court further stated that upholding the warrant requirement for searches of a probationer's home "does not impede the dual goals of probation"—"protecting the public and rehabilitation."⁶⁹ Before turning to additional criticism of the Court's reasoning in *Griffin*, though, it is necessary to follow the rest of this judicial trend, which picked up again fourteen years later.⁷⁰

⁶³ See *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

⁶⁴ 533 U.S. 27, 40 (2001).

⁶⁵ 525 N.E.2d 379, 382 (Mass. 1988).

⁶⁶ See *id.*

⁶⁷ *Id.* at 382–83.

⁶⁸ *Id.* at 383.

⁶⁹ *Id.*

⁷⁰ See also Howard P. Schneiderman, *Conflicting Perspectives from the Bench and the Field on Probationer Home Searches—Griffin v. Wisconsin Reconsidered*, 1989 WIS. L. REV. 607, 664 (1989)

D. United States v. Knights—*Cutting Griffin off from its Rationale*

Griffin was only the beginning of this shift in the Supreme Court’s jurisprudence. In 2001, the Court decided *United States v. Knights*, a ruling that went even further than *Griffin* in diminishing the rights of probationers and parolees.⁷¹ The defendant, Mark Knights, was sentenced to probation for a drug offense on the condition that he “submit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime [sic] with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.”⁷² Later, after a string of minor fires and explosions in the area, police, suspicious of Knights and aware of the search condition, conducted a warrantless search of Knights’ apartment.⁷³ Police found evidence in the apartment linking Knights to the recent crimes, and he was subsequently arrested and indicted for conspiracy to commit arson, possession of an unregistered destructive device, and being a felon in possession of ammunition.⁷⁴ Knights moved to suppress the evidence, contending that the search was invalid as a “special needs” search under *Griffin*.⁷⁵ The lower state courts agreed with Knights, holding the search invalid because it was conducted for the investigatory purposes of regular law enforcement and not as part of the probationary relationship.⁷⁶ But, the Supreme Court disagreed.

Writing for a unanimous Court, Chief Justice Rehnquist rejected Knights’ argument and held that only reasonable suspicion is necessary to conduct a constitutional search of a probationer’s home, even for purely law enforcement purposes.⁷⁷ The Court reasoned that, on balance, the “special needs” of a state probation system outweighed Knights’ significantly diminished reasonable expectation of privacy, thereby justifying a full search of his home without a warrant

(noting survey results demonstrating that a warrant requirement would not unduly burden the Wisconsin probation department, directly contrary to the Court’s reasoning in *Griffin*).

⁷¹ 534 U.S. 112 (2001).

⁷² *Id.* at 114 (emphasis added).

⁷³ *Id.* at 114–15.

⁷⁴ *Id.* at 115–16.

⁷⁵ *Id.* at 116–17.

⁷⁶ *Id.* at 116.

⁷⁷ *See id.* at 121.

or even probable cause to search.⁷⁸ The cornerstone of the Chief Justice's rationale was probationers' lesser expectation of privacy, however, *not* the special relationship with their probation officer which *Griffin*'s reasoning hinged upon.⁷⁹

It is at this point in the Court's jurisprudence where the major shift in its approach to the constitutional protections for probationers can be seen. The *Knights* opinion severed *Griffin*'s holding from its primary rationale: the special relationship between probationers and their probation officers. This move closely mirrors the *Griffin* Majority's decision to divorce the administrative search exception to the warrant requirement from its history of near exclusive application to heavily regulated businesses.⁸⁰ The result is another significant reduction of the Fourth Amendment rights of a population of nearly five million Americans.⁸¹ Going forward, *Knights* made it clear that ordinary law enforcement purposes are all it takes to justify slashing the Fourth Amendment rights of probationers with similar probation agreements. This point is made clear in Justice Souter's concurring opinion, which states, "[W]e now hold that law-enforcement searches of probationers who have been informed of a search condition are permissible upon individualized suspicion of criminal behavior committed during the probationary period, thus removing any issue of the subjective intention of the investigating officers from the case."⁸² *Knights* has led to significant confusion among the lower courts, creating uncertainty over whether to follow a "special needs" analysis ala *Griffin*, or a just a Fourth Amendment "reasonableness" inquiry as in *Knights*.⁸³

E. Samson v. California—*No Suspicion Necessary*

Capping off this trend in the Court's jurisprudence (for now) is *Samson v. California*, where the Court took its weakening of probationers' and parolees'

⁷⁸ *Id.* at 120–21.

⁷⁹ *See id.* at 118 n.3; *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

⁸⁰ *See Griffin*, 483 U.S. at 884 (Blackmun, J., dissenting).

⁸¹ Kaeble et al., *supra* note 5.

⁸² *Knights*, 534 U.S. at 122–23 (Souter, J., concurring).

⁸³ *See, e.g.*, *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006) (noting that a majority of Circuits, such as the Third, Fourth, Fifth, Ninth, and Eleventh, follow the *Knights* reasonableness approach, while a minority, such as the Second, Seventh, and Tenth, use the *Griffin* special needs inquiry instead); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (also describing the circuit split on whether to follow *Knights* or *Griffin*, particularly in addressing the constitutionality of statutes concerning collection of DNA samples).

constitutional rights to a new level.⁸⁴ The defendant, Donald Samson, was on state parole in California after a conviction for felony possession of a firearm.⁸⁵ As Samson was walking down the street with two companions, a woman and child, a police officer stopped him.⁸⁶ Even after confirming that Samson had no outstanding warrants, and with no evidence that he was involved in any criminal activity, the officer decided to search Samson anyway, solely on the grounds that Samson was a parolee.⁸⁷ The search turned up a plastic baggie of methamphetamine, and Samson was subsequently charged with possession.⁸⁸ Samson's motion to suppress was denied, as California law authorized suspicion-less searches of parolees.⁸⁹ In a 6-3 decision authored by Justice Clarence Thomas, the Court upheld this law, rejecting Samson's claim that it violated his Fourth Amendment rights.⁹⁰

On balance, the Court held that the government's "overwhelming" law enforcement interests in supervising parolees and preventing recidivism outweighed the privacy interests of those parolees.⁹¹ With law enforcement interests classified as "overwhelming" in this equation, it is hard to imagine individual privacy rights standing a chance, let alone those of probationers and parolees, with their purported lesser expectation of privacy. The Court went even further than this, however: Justice Thomas made the bold claim that warrantless, suspicion-less searches of parolees actually *helped* reintegrate parolees into society.⁹² This unsupported claim, perhaps more than any other piece of reasoning in the Court's jurisprudence in this area, characterizes its modern approach to the Fourth Amendment rights of probationers and parolees.

F. A "Short" Criticism of the Griffin Trio

The trio of *Griffin*, *Knights*, and *Samson* has generated controversy among the lower courts. The best example of this is *State v. Short*, a case in which the Iowa

⁸⁴ 547 U.S. 843 (2006).

⁸⁵ *Id.* at 846.

⁸⁶ *Id.*

⁸⁷ *Id.* at 846–47.

⁸⁸ *Id.* at 847.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 853.

⁹² *Id.* at 854 (emphasis added).

Supreme Court emphatically rejected the Supreme Court's approach to probationers' Fourth Amendment rights.⁹³ In a blistering opinion, the Iowa Court refused to go along with what it characterized as an "evisceration" of constitutional protections for probationers, emphasizing the historical basis of search and seizure law, the sanctity of the home, and the importance of warrants.⁹⁴ First, it sharply criticized the Court's use of the reasonableness standard in these cases, asserting that without warrant and probable cause requirements, such a standard can be readily manipulated.⁹⁵ Furthermore, the Iowa court emphasized that the home is the *last* place it would consider waiving the warrant requirement.⁹⁶ The Court found it easy to distinguish searches of probationers' homes from traditional, more accepted examples where searches are authorized without a warrant or with less than probable cause:

The canard that a person's home is their castle has always been subject to some limitations, but the basic principle is a sound one. We are not talking about a routine encounter at airport security where the announced and understood purpose of the examination is safety of passengers unrelated to the goals of general law enforcement, or an investigative stop on the street where a quick pat down is conducted to ensure the safety of police officers, or an exigent circumstance where the acquisition of a warrant was simply not possible. Here, police officers are penetrating a home, the place of final refuge, the focal point of intimate relationships, and what is constitutionally thought of as a place of safety, security, and repose.⁹⁷

The Iowa court went on to reject "eviscerations of constitutional protections . . . based upon claims that a probationer has a lesser expectation of privacy."⁹⁸ Such arguments, the court urged, are generally based upon a misreading of Justice

⁹³ 851 N.W.2d 474 (Iowa 2014).

⁹⁴ *See id.* at 500–04.

⁹⁵ *See id.* at 501–02 (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (arguing that absent warrant and probable cause standards, the concept of reasonableness is "virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term").

⁹⁶ *See id.* at 503 ("Even if we were inclined to fuzzy up the warrant requirement, a home invasion by law enforcement officers is the last place we would begin the process.").

⁹⁷ *Id.*

⁹⁸ *Id.* at 504.

Harlan's "reasonable expectation of privacy test" in *Katz v. United States*.⁹⁹ This test, the court stressed, was designed to expand, not contract, Fourth Amendment protections.¹⁰⁰ Indeed, Justice Harlan himself later bemoaned the use of his test in later opinions slashing constitutional protections.¹⁰¹

Finally, the Iowa court attacked the notion that the warrant requirement imposed an unnecessary burden on probation officers and law enforcement. It stated that, whatever may have been true in the past, obtaining a warrant from a judicial officer is not particularly onerous.¹⁰² Even in the mid-1980s when *Griffin* was decided, warrants were generally readily available 24 hours a day.¹⁰³ The court contended that *Griffin*'s assertion "that it was impracticable . . . to obtain a warrant was wrong then and it is even more wrong today."¹⁰⁴ In the end, the court refused to allow Iowa to go down the same path as *Griffin* and its progeny, holding that the warrant requirement fully applied to home searches of both probationers and parolees by law enforcement.¹⁰⁵

Overall, *Short* provides an enlightening summary of many of the constitutional and policy arguments against the "evisceration" of Fourth Amendment protections carried out by *Griffin*, *Knights*, and *Samson*. As *Short* demonstrates, the reasoning behind these cases is far from settled, and there are compelling counterarguments to be made that the Court has perhaps gone too far in this area.

⁹⁹ 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

¹⁰⁰ *Short*, 851 N.W.2d at 504 (citing *Katz*, 389 U.S. at 361).

¹⁰¹ See *United States v. White*, 401 U.S. 745, 786–87 (1971) (Harlan, J., dissenting) (arguing that intrusions significantly jeopardizing Fourth Amendment liberties should require a warrant).

¹⁰² *Short*, 851 N.W.2d at 505.

¹⁰³ See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1492–93 (1985) (noting that, even in 1985, with only a fraction of the modern technology we enjoy today, magistrates were generally available 24/7 to issue search warrants).

¹⁰⁴ *Short*, 851 N.W.2d at 505.

¹⁰⁵ *Id.* at 506.

III. REHABILITATION

A. *Rehabilitation and Probation*

Looking back at this decades-long scaling back of the constitutional rights of probationers and parolees naturally raises the question of how this jurisprudence affects the goals of sentencing criminals in the first place. One of the primary goals of sentencing is rehabilitation, providing a means by which persons convicted of crimes can better themselves and become more productive members of society.¹⁰⁶ Rehabilitation assumes that “[a] crime was committed due to some ethical or moral defect in the offender that can be repaired by enabling him or her to return to their ‘normal’ behavior.”¹⁰⁷ Supporters of the rehabilitative purpose of criminal law do not claim that it is the *only* rationale for punishment; rather, rehabilitation “takes those that are in some sense already deserving of punishment . . . for their crime and seeks to reform them.”¹⁰⁸

Probation is one way to accomplish this, serving as the primary sentencing alternative to incarceration.¹⁰⁹ It may be seen by some as a form of leniency by the justice system, but that is a mischaracterization. Rather, probation is designed to offer “a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court.”¹¹⁰ The sentencing court’s judgment may be seen as a calculated risk based on the court’s belief that this individual is suitable for rehabilitation through return to the community under supervision.¹¹¹ Arguably, any determination that an individual is suitable for probation contains the implicit conclusion that that person is also not a significant threat to public safety. Overall,

¹⁰⁶ See 18 U.S.C.S. § 3553(a)(2)(D); *Williams v. New York*, 337 U.S. 241, 247–48 (1949) (“[Reform] and rehabilitation of offenders [are] important goals of criminal jurisprudence.”).

¹⁰⁷ *United States v. Blake*, 89 F. Supp. 2d 328, 341 (E.D.N.Y. 2000) (citing BLACK’S LAW DICTIONARY (6th ed. 1990) (defining rehabilitation as “restoration of individual to his greatest potential, whether physically, mentally, socially, or vocationally”) and THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2474 (1971) (defining rehabilitate as “to restore to a previous condition; to set again in proper condition”)).

¹⁰⁸ *Blake*, 89 F. Supp. 2d at 341.

¹⁰⁹ Probation is authorized as a form of sentencing under 18 U.S.C.S. § 3551(b)(1) (2012).

¹¹⁰ *Roberts v. United States*, 320 U.S. 264, 272 (1943).

¹¹¹ *United States v. Allen*, 349 F. Supp. 749, 753 (N.D. Cal. 1972).

probation functions as a comprehensive rehabilitative program designed to benefit society by providing probationers with a means to become better members of society.

Probation can come with many strings attached. Probationers are often subjected to numerous conditions at the discretion of the sentencing court that are vigorously enforced by their probation officers.¹¹² Some conditions are directly related to protection of the public.¹¹³ But many of these discretionary conditions serve specific rehabilitative goals, aimed at helping the probationer become a better version of themselves. Some examples include conditions requiring the individual to “support his dependents and meet other family responsibilities;” “work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;” “refrain from excessive use of alcohol, or any use” of narcotic drugs or controlled substances; to “undergo available medical, psychiatric, or psychological treatment;” or “work in community service.”¹¹⁴ The presence of these and other enumerated conditions illustrate the importance of rehabilitation as a goal of federal sentencing laws. It is also worth noting that the statute does not mention subjecting probationers to warrantless or lower-suspicion (or no suspicion) searches.¹¹⁵

With this background in mind, Justice Thomas’s claim in *Samson* that warrantless, suspicion-less searches somehow help reintegrate parolees into society is puzzling.¹¹⁶ Reintegration of probationers and parolees into society is a key function of rehabilitation. It is difficult to see how subjecting someone to police searches without a warrant or even reasonable suspicion (let alone probable cause) serves rehabilitative sentencing goals. Search conditions such as these *might* potentially serve other goals of sentencing (retribution, deterrence, and incapacitation),¹¹⁷ but it is hard to see how they facilitate rehabilitation.¹¹⁸ Justice

¹¹² See 18 U.S.C.S. § 3563(b) (2012) (enumerating authorized discretionary conditions of probation).

¹¹³ See, e.g., 18 U.S.C.S. § 3563(b)(8), (b)(10), (b)(13), (b)(19).

¹¹⁴ 18 U.S.C.S. § 3563(b)(1), (b)(4), (b)(7), (b)(9), (b)(12) (2012).

¹¹⁵ See generally § 3563(b) (2012). Section 3563(b)(22) provides that probationers may be required to “satisfy such other conditions as the court may impose,” which demonstrates that, though still important, the enumerated examples are not exhaustive. Also, § 3563(b)(23) authorizes searches of probationers who have been required to register under the Sex Offender Registration and Notification Act. However, this is a separate, narrower issue that is beyond the scope of this Note.

¹¹⁶ See *Samson v. California*, 547 U.S. 843, 854 (2006).

¹¹⁷ See *infra* Part IV.A.

¹¹⁸ See 18 U.S.C.S. § 3553(a)(2)(A)–(C) (listing the three other enumerated goals of sentencing as “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for

Thomas's apparent conflation of rehabilitation with other sentencing objectives is arguably nothing new, however. Many courts appear to have lost sight of rehabilitation as a key objective of sentencing, or at least confused it with other sentencing goals.

B. Gementera—A Case Study in Judicial Confusion on Rehabilitation

One case that provides a particularly illuminating example of the criminal justice system's confusion in this area is *United States v. Gementera*.¹¹⁹ In *Gementera*, twenty-four-year-old defendant Shawn Gementera pled guilty to mail theft after police caught him opening mailboxes along Fulton Street in San Francisco and stuffing the letters into his jacket.¹²⁰ Though still quite young, Gementera had a relatively lengthy criminal record, with convictions for misdemeanor criminal mischief, driving with a suspended license, failing to provide proof of insurance, and misdemeanor battery.¹²¹ He also had arrests and citations for possession of drug paraphernalia, taking a vehicle without the owner's consent, and other various minor driving offenses.¹²²

The district court sentenced Gementera to two months of incarceration and three years of supervised release, upon which the court imposed multiple conditions.¹²³ Initially, the court imposed a condition requiring the defendant to perform 100 hours of community service that would consist of standing in front of a post office in San Francisco wearing a sandwich board sign declaring: "I stole mail. This is my punishment," in large letters.¹²⁴ Gementera objected to this condition and moved to correct the sentence by removing the signboard requirement.¹²⁵ The court modified his sentence, adding three new conditions proposed jointly by defense

the offense;" "to afford adequate deterrence to criminal conduct;" and "to protect the public from further crimes of the defendant"). These three other sentencing goals are often characterized as retribution, deterrence, and incapacitation, respectively.

¹¹⁹ 379 F.3d 596 (9th Cir. 2004).

¹²⁰ *Id.* at 598.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 598–99 (referring to FED. R. CRIM. P. 35(a)).

counsel and the prosecution: defendant was ordered to observe persons visiting the “lost or missing mail” window at the post office, to write apology letters to the victims of his own mail theft, and to give multiple lectures at a local school.¹²⁶ However, the signboard provision remained, albeit in a scaled-down form—Gementera would still be required to stand outside the post office wearing the signboard for eight hours.¹²⁷

Gementera appealed, arguing that the signboard requirement was imposed for the impermissible purpose of humiliation in violation of the Sentencing Reform Act (and, though not discussed here, the Eighth Amendment’s ban on cruel and unusual punishment).¹²⁸ He specifically pointed to remarks made by the district court at the first sentencing hearing, in which the judge said:

He (Gementera) needs to understand the disapproval that society has for this kind of conduct, and that’s the idea behind the *humiliation*. And it should be *humiliation* of having to stand and be labeled in front of people coming and going from a post office as somebody who has stolen the mail.¹²⁹

The judge backtracked at the second sentencing hearing, however, stating: “Ultimately, the objective here is, one, to deter criminal conduct, and, number two, to rehabilitate the offender so that after he has paid his punishment, he does not reoffend, and a public expiation of having offended is, or at least should be, rehabilitating in its effect.”¹³⁰ The court went on to say that, while criminal punishment should generally be humiliating, “humiliation is not the point,” and that its overall goal was not “to subject defendant to humiliation for humiliation’s sake, but rather to create a situation in which the public exposure of defendant’s crime and the public exposure of defendant to victims of his crime” would serve the purpose of “the rehabilitation of the defendant and the protection of the public.”¹³¹ The court further explained that the humiliation or shame Gementera would experience would have “a specific rehabilitative effect” on him that could not be accomplished by other

¹²⁶ *Id.* at 599.

¹²⁷ *Id.*

¹²⁸ *See id.* at 599–600, 608; 18 U.S.C. § 3583(d) (2012).

¹²⁹ *Gementera*, 379 F.3d at 601 (emphasis added).

¹³⁰ *Id.*

¹³¹ *Id.* at 601–02.

forms of punishment.¹³² The court concluded (and perhaps indicated the actual purpose underlying its reasoning), “it will also have a deterrent effect on both this defendant and others who might not otherwise have been made aware of the real legal consequences of engaging in mail theft.”¹³³

The Ninth Circuit Court of Appeals agreed with the district court’s reasoning, rejecting Gementera’s arguments and upholding the signboard condition as “reasonably related to the legitimate statutory objective of rehabilitation.”¹³⁴ The Court of Appeals appeared to show great deference to the lower court’s rationale, justifying this based on supposed uncertainty as to how rehabilitation is best accomplished.¹³⁵ It defended Gementera’s sentence by stressing that the mere fact of conviction alone is shameful, embarrassing, and stigmatic to offenders.¹³⁶ The appellate court admitted that the signboard requirement was indeed “crude” and “could entail risk of social withdrawal and stigmatization,” but it believed that the presence of the other conditions of Gementera’s supervised release mitigated this risk.¹³⁷

This case provides a useful example of how courts, while still getting certain aspects right, appear to struggle with the concept of rehabilitation. The district court appeared to forget about the rehabilitative aspects of sentencing entirely at first, as only *after* Gementera filed his motion to correct the sentence did the court change its characterization of the signboard punishment to one of “rehabilitation and deterrence” rather than pure humiliation.¹³⁸ This change in terminology appears to be nothing more than the trial judge’s attempt to save face and dress up what was substantially the same punishment in more defensible terms. At best, this sequence of events demonstrated that the district court believed that this shame-based punishment fit comfortably under the umbrella of “rehabilitation,” a proposition that possibly reveals the court’s confusion as to what rehabilitation even means.

¹³² *Id.* at 602.

¹³³ *Id.*

¹³⁴ *Id.* at 607.

¹³⁵ *Id.* at 604.

¹³⁶ *Id.* at 605.

¹³⁷ *See id.* at 606.

¹³⁸ *See Gementera*, 379 F.3d at 611 (Hawkins, J., dissenting).

The dissent sharply criticized the majority's decision to uphold Gementera's sentence, asserting that the true intention in this case, as perhaps revealed by the district judge, was to humiliate the defendant, not to rehabilitate him.¹³⁹ It considered the majority's downplaying of the negative impact of the signboard requirement (even after acknowledging it as "crude" and carrying the "risk of social withdrawal and stigmatization") based on its coupling with other "more socially useful provisions" illogical.¹⁴⁰ As the dissent pointed out, nothing in the Sentencing Reform Act nor case law indicated that conditions on supervised release should be reviewed as a set and not individually, or that humiliation ceases to be humiliation when combined with other types of punishment.¹⁴¹ Furthermore, the majority appeared to gloss over the fact that the terms of the sentence itself acknowledged the possibility that the signboard requirement could prove dangerous to Gementera: The sentence expressly stated that the condition could be withdrawn or modified if the defendant showed it would cause him psychological harm or create an unwarranted risk of harm to himself or others.¹⁴²

The majority's reasoning in *Gementera* appears to be based upon a highly questionable approach to the rehabilitative goals of sentencing. The *Gementera* court's embrace of overt public humiliation as a legitimate form of punishment is distressing on its own, let alone when it is justified under the guise of rehabilitating the defendant. Opponents of shaming in sentencing argue that it cannot be rehabilitative because shaming conditions cause the offender to withdraw from society or otherwise inflict psychological damage.¹⁴³ First, psychological research

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 611–12.

¹⁴¹ *Id.* at 612.

¹⁴² *Gementera*, 379 F.3d at 599.

¹⁴³ *Id.* at 604–05 (the majority cited multiple psychological studies such as June Price Tagney et al., *Relation of Shame and Guilt to Constructive Versus Destructive Responses to Anger Across the Lifespan*, 70 J. PSYCH. & SOC. PSYCH. 797–98 (1996); and June Price Tagney et al., *Shamed into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 J. PSYCH. & SOC. PSYCH. 669–75 (1992)). It contrasted these studies with others such as Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 371 (1999); and Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996), arguing that the debate is not one-sided against shaming punishments. Without going into detail, this Note proposes that the latter studies, along with others justifying shaming in punishment, can be better viewed as advocating for shaming as a form of deterrence rather than a means of rehabilitation. It arguably does not follow that because such punishments may discourage the offender from reoffending, they also help reintegrate him into society.

on shame suggests that shaming accomplishes little, if anything, in the way of deterrence or rehabilitation.¹⁴⁴ On the contrary, publicly humiliating individuals may actually make them *more* likely to reoffend by reducing inhibitions that tend to restrain criminal instincts.¹⁴⁵ Public shaming can operate as a downward change in social status, accompanied by symbolic and actual shunning of the offender by others.¹⁴⁶ A major problem with this functioning as a rehabilitative tool is that there is generally no corresponding public procedure *reestablishing* that individual's lost social status.¹⁴⁷ The offender is therefore never truly reintegrated into society, which is the whole point of rehabilitation.¹⁴⁸ Stigmatized and marked as an outsider, the offender is vulnerable to drifting toward subcultures that are more accepting of his particular norm violations.¹⁴⁹ This can end up facilitating future crime by pushing such individuals away from regular, law-abiding society and toward criminal subcultures.¹⁵⁰

Overall, there is a strong case to be made that shaming punishments, which may often serve to ostracize offenders and further isolate them from others, do not belong under the umbrella of rehabilitative sentencing. Arguably, nor should any policy that serves to single out individuals and label them as an "other," undeserving of the most important rights that regular citizens enjoy. Even if the analogy is imperfect, it can certainly be argued that stripping probationers and parolees of their core Fourth Amendment rights is an inappropriate and unnecessary course of action that will likely not help reintegrate them into society in any meaningful way. Anything that ultimately pushes offenders away from other law-abiding citizens cannot truly be "rehabilitative."

¹⁴⁴ See Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1918–19 (1991).

¹⁴⁵ See *id.* at 1919.

¹⁴⁶ *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.* ("Modern shaming, like modern punishment in general, is not 'reintegrative.'").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

IV. A PRAYER FOR RELIEF

A. *Increasingly Depriving Probationers and Parolees of Fourth Amendment Protections Is Not a Legitimate Means of Rehabilitation in Sentencing*

The Supreme Court has described probation as “the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence.”¹⁵¹ Although also designed with protection of the public in mind, a primary objective of probation is rehabilitating the offender and facilitating their reintegration into law-abiding society.¹⁵² This is reflected in numerous provisions of the United States Code concerning probation aimed at incentivizing probationers to better themselves and become morally upright, productive citizens once more.¹⁵³ Even Justice Scalia’s opinion in *Griffin* recognized that a probation officer, unlike ordinary law enforcement, is supposed to act with the probationer’s welfare in mind.¹⁵⁴

Probation is not a form of mercy, though, and it often comes with numerous conditions attached.¹⁵⁵ Again, however, while Congress enumerated a list of 23 examples, none of the discretionary probation conditions listed include blanket authorizations to search probationers’ homes without a warrant.¹⁵⁶ Nor are such conditions mentioned in the Model Penal Code (MPC), which has served as a model for numerous state criminal codes; instead, the MPC provides that a court may require a probationer to “satisfy any . . . conditions *reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty* or incompatible with his freedom of conscience.”¹⁵⁷ While the absence of blanket

¹⁵¹ United States v. Murray, 275 U.S. 347, 358 (1928).

¹⁵² See *supra* Part III.A.; United States v. Consuelo-Gonzalez, 521 F.2d 259, 263 (9th Cir. 1975) (“[R]ehabilitation has [not] ceased to be the central objective of the probation process . . .”).

¹⁵³ See *supra* Part III.A. (listing provisions of 18 U.S.C. § 3563(b) (2012) aimed at rehabilitative goals).

¹⁵⁴ See *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

¹⁵⁵ See *supra* Part III.A.

¹⁵⁶ See generally 18 U.S.C.S. § 3563(b) (2012). Again, as described above, 18 U.S.C.S. § 3563(b)(22) provides that probationers may be required to “satisfy such other conditions as the court may impose,” which demonstrates that, though still important, the enumerated examples are not exhaustive. See *supra* note 115. Also, 18 U.S.C.S. § 3563(b)(23) authorizes searches of probationers who have been required to register under the Sex Offender Registration and Notification Act. However, this is a narrower issue that is beyond the scope of this Note.

¹⁵⁷ MODEL PENAL CODE § 301.1(2)(l) (emphasis added).

search conditions from the United States Code is certainly telling, the MPC, criminal law's most prominent model statute, appears to expressly reject such conditions via this language.¹⁵⁸

Again, Justice Thomas's claim in *Samson* that warrantless, suspicion-less searches somehow contribute to rehabilitation¹⁵⁹ is dubious, and may reflect potentially widespread confusion by courts about the rehabilitative goals of sentencing. It also appears incompatible with many other reintegrative methods, such as promoting healthy family relationships, facilitating education and career training, encouraging medical, psychological, and psychiatric treatment, and requiring community service.¹⁶⁰

Furthermore, even putting aside rehabilitation, subjecting probationers to such overbroad search conditions arguably does not effectively serve any of the other goals of sentencing either. First, it can be argued that stripping away one's Fourth Amendment protections is not an efficient means of punishment for past crimes. Retribution is supposed to be about imposing upon criminal offenders the punishment they "deserve."¹⁶¹ It is borne out of mankind's natural instinct to punish for perceived wrongs and is generally seen as a core component of criminal justice.¹⁶² However, a critical component of retribution is proportionality: the punishment should fit the crime.¹⁶³ Retribution is interested in seeing that the offender gets his "just desserts;" it is not simply wanton revenge.¹⁶⁴ Therefore, "the severity of the appropriate punishment necessarily depends on the culpability of the offender."¹⁶⁵ Here, however, requiring all probationers and parolees to essentially give up their

¹⁵⁸ See MODEL PENAL CODE § 301.1(2)(I).

¹⁵⁹ See *Samson v. California*, 547 U.S. 843, 854 (2006).

¹⁶⁰ See *supra* Part III.A.

¹⁶¹ See 18 U.S.C.S. § 3553(a)(2)(A) (2012) (provides that one goal of sentencing is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"); *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

¹⁶² See *Furman*, 408 U.S. at 308 ("The instinct for retribution is a part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.").

¹⁶³ See *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (plurality opinion) ("Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law"—referring to the famous phrase, "an eye for an eye.").

¹⁶⁴ See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

¹⁶⁵ *Id.*

privacy rights in their home seems disproportionate. This is especially true considering that the type and severity of the crime committed has not even been factored into the Court's balancing of interests.

As for deterrence, such search conditions may even have the opposite effect. Deterrence seeks to prevent future crime by incentivizing both the individual offender, and society at large, to engage in more lawful behavior.¹⁶⁶ Deterrence theory focuses on the consequences of punishment, proposing that society should only punish offenders "if, and to the extent that, doing so maximizes social welfare."¹⁶⁷ Whether many forms of sentencing actually deter criminal conduct has repeatedly been called in question, however.¹⁶⁸ Arguably, it is especially questionable whether categorically subjecting probationers and parolees to warrantless searches has any real deterrent effect. Singling out individuals as undeserving of crucial constitutional protections and subjecting them to the embarrassment and intrusion of such extensive searches may even have the effect of driving them further away from law-abiding society.¹⁶⁹ This could potentially lead probationers and parolees to fall back on old, or even enter new criminal subcultures that are more accepting.¹⁷⁰ Overall, then, even under the lens of "harsher" sentencing goals like retribution and deterrence, the efficacy of categorical search conditions is questionable at best.

However, the greater motivation behind the *Griffin* trio (and the Fifth and Eleventh Circuits' side of the circuit split) may not be a misguided approach to rehabilitation but rather a swing of the pendulum back to the side of law enforcement. That is, rehabilitation should perhaps not be misunderstood as a sentencing goal at all: It is simply being discounted in favor of law enforcement.

¹⁶⁶ See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 425 (1999). Deterrence is codified as a sentencing goal at 18 U.S.C.S. § 3553(a)(2)(B) (2012) (provides that one goal of sentencing is "to afford adequate deterrence to criminal conduct").

¹⁶⁷ See Kahan, *supra* note 166, at 425.

¹⁶⁸ See, e.g., Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 111 n.160 (2010) (citations omitted) ("Moreover, it is questionable whether would-be offenders are rational decisionmakers in the first place, thus potentially undermining the entire enterprise of deterrence-based criminal legislation.").

¹⁶⁹ See Massaro, *supra* note 144, at 1919.

¹⁷⁰ See *id.*

B. Requiring a Warrant Prior to Searching a Probationer or Parolee's Home Is an Essential Constitutional Protection that Will Not Unduly Obstruct Legitimate Law Enforcement Efforts

Opponents of the warrant requirement underestimate the value of the privacies jeopardized by warrantless searches of the home.¹⁷¹ The saying that “a man’s home is his castle” has acquired over time a powerful and independent significance, justifying a more general assurance of personal security in one’s home that has become part of our constitutional tradition.¹⁷² Indeed, the centrality of the home to Fourth Amendment protections is undeniable, but the Constitution merely codified this ancient and near-sacred principle.¹⁷³ The notion that one’s home should be a sanctuary from unreasonable government searches precedes the founding of this country: For example, in a parliamentary debate on searches incident to the enforcement of an excise on cider, William Pitt, Earl of Chatham,¹⁷⁴ famously said:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!¹⁷⁵

From the beginning, the common law drastically limited the authority of law enforcement to enter a private home.¹⁷⁶ Indeed, the saying, “a man’s home is his castle” was an English common law maxim that inspired centuries of jurisprudence

¹⁷¹ See James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1144 (1992).

¹⁷² *Minnesota v. Carter*, 525 U.S. 83, 94 n.2 (1998) (Scalia, J., concurring).

¹⁷³ See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“[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 unreasonable governmental intrusion.’”) (internal citations omitted).

¹⁷⁴ The city of Pittsburgh, Pennsylvania, and my own alma mater, the University of Pittsburgh, were named after this man. *William Pitt, 1st Earl of Chatham*, WIKIPEDIA, https://en.wikipedia.org/wiki/William_Pitt,_1st_Earl_of_Chatham (last visited Oct. 31, 2017).

¹⁷⁵ *Miller v. United States*, 357 U.S. 301, 306–07 (1958) (internal citations omitted).

¹⁷⁶ *Id.*

on searches and seizures.¹⁷⁷ This long history of protection is compelling evidence that the right of privacy in one's home is not to be taken lightly.

For a long time, one of the key protections of the home from unreasonable government intrusion has been the warrant requirement. The Supreme Court has said that “[i]t is a cardinal rule that . . . law enforcement agents must secure and use search warrants whenever reasonably practicable.”¹⁷⁸ This rule has been justified based upon “the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities.”¹⁷⁹ In *Chimel*, the Court explained that in order to “provide the necessary security against unreasonable intrusions upon the private lives of individual, the framers of the Fourth Amendment required adherence to judicial processes wherever possible,” and that “subsequent history has confirmed the wisdom of that requirement.”¹⁸⁰ Despite its multiple exceptions, the warrant requirement has been a central piece of the Fourth Amendment since ratification, and it should not be so easily discarded.

The warrant requirement's detractors complain that it inconveniences law enforcement officers by requiring additional time and effort preparing affidavits and submitting them for judicial approval.¹⁸¹ Indeed, many of the arguments against requiring warrants are rooted in administrative ease and convenience.¹⁸² Such considerations have often been deemed too insubstantial to count when balanced against constitutional protections, however.¹⁸³

Further, the degree of inconvenience posed by the warrant requirement has been repeatedly called into question throughout the Court's history.¹⁸⁴ One particular

¹⁷⁷ See *Carter*, 525 U.S. at 94 (Scalia, J., concurring) (“The people’s protections against unreasonable search and seizure in their ‘houses’ was drawn from the English common-law maxim, ‘A man’s home is his castle.’”) (emphasis removed).

¹⁷⁸ *Chimel v. California*, 395 U.S. 752, 758 (1969).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 758–59.

¹⁸¹ See Tomkovicz, *supra* note 171, at 1153–54.

¹⁸² *Id.* at 1155.

¹⁸³ See *id.*; *Craig v. Boren*, 429 U.S. 190, 198 (1976) (rejecting “administrative ease and convenience” as sufficiently important objectives to justify, in that case, gender-based classifications).

¹⁸⁴ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”); *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting) (“Experience proves that it is a counsel

example of this is especially illuminating. In *Arkansas v. Sanders*, Chief Justice Warren Burger himself said that “the warrant requirement is not so onerous” as to impede effective law enforcement.¹⁸⁵ Significantly, Chief Justice Burger’s remark in *Sanders* was in the context of the search of a suitcase in the trunk of a taxicab, a search with much lesser privacy interests at stake than those involved in the search of one’s home.¹⁸⁶ Perhaps just as important as this message is its messenger—Warren Burger could *never* be characterized as “soft on crime.” Appointed by President Richard Nixon, a self-proclaimed champion of “law and order,” the conservative former Chief Justice caught the President’s eye based on a speech in which he decried the shortcomings of the American criminal justice system.¹⁸⁷ In that speech, Chief Justice Burger contended that “delaying criminal trials and giving excessive protection to the rights of the accused undermines public confidence in the law and encourages criminals to think that technical loopholes can always be found by clever defense lawyers.”¹⁸⁸ “It is often very difficult,” he claimed, “to convict even those who are plainly guilty.”¹⁸⁹ The fact that the same Warren Burger would later defend the warrant requirement speaks volumes.

Based on the foregoing, it can be argued that the warrant requirement is not nearly as onerous as it is often portrayed, and that the individual privacy interest in the home has been seriously discounted. The balance the Supreme Court has struck in *Griffin* and its progeny is arguably heavily skewed in the favor of law enforcement

of despair to assume that the police cannot be kept within the bounds of the principles which the Fourth [Amendment embodies] except at the cost of impotence in preventing crime and dealing sternly with its commission.”); *McDonald v. United States*, 335 U.S. 451, 455 (1948) (“inconvenience of the officers and delay in preparing papers and getting before a magistrate” are “no justification for by-passing the constitutional requirement”); *Harris v. United States*, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting) (“[T]he impediments of the Fourth Amendment to effective law enforcement are grossly exaggerated.”).

¹⁸⁵ 442 U.S. 753, 767 (1979) (Burger, C.J., concurring) (stating that the warrant requirement is “not so onerous as to command suspension of Fourth Amendment guarantees once [a] receptacle [in an automobile] . . . is securely in the control of the police”).

¹⁸⁶ See *Sanders*, 442 U.S. at 755; *Rakas v. Illinois*, 439 U.S. 128, 154 (1978) (“We have repeatedly recognized that [one’s expectation of privacy] in an automobile is significantly different from the traditional expectation of privacy and freedom in one’s residence.”) (internal citations omitted).

¹⁸⁷ See Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 344 (2012).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* Warren Burger also believed that the criminal justice system was “tilted toward the criminal and needed to be corrected.” See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 12 (1979).

interests. The unfortunate consequence is the undermining of the privacy of one's home, purportedly "first among equals" under the Fourth Amendment.¹⁹⁰

C. *Answers to Counterarguments, and a Final Question*

One longstanding counterargument to various Fourth Amendment protections is that they impose barriers on law enforcement, allowing evidence and contraband to be hidden or destroyed and crime to go unpunished.¹⁹¹ However, assertions such as these arguably miss the point. The Fourth Amendment's framers were not naïve. The Amendment was adopted with full awareness that it would have "undesirable consequences," but also with a belief that a regime of unregulated searches and seizures would be far more undesirable.¹⁹² Optimal law enforcement efficiency was considered a necessary sacrifice in the interest of individual liberty and privacy; indeed, law enforcement practices of the British Empire were what inspired the Fourth Amendment in the first place.¹⁹³ Refusing to offer up constitutional protections, even those of convicted criminals, is wholly consistent with the purpose of the Fourth Amendment.¹⁹⁴

Another counterargument to this Note's assertions is essentially that we are dealing with convicted criminals. To some, the rights of probationers and parolees may seem inconsequential for the rest of us. However, history teaches us that "the safeguards of liberty have frequently been forged in controversies involving not very nice people."¹⁹⁵ And even if it is true in our society that probationers cannot

¹⁹⁰ See *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

¹⁹¹ See, e.g., *Trupiano v. United States*, 334 U.S. 699, 714–15 (Vinson, C.J., dissenting) (insistence on warrant requirements "serves only to open an avenue of escape for those guilty of crime").

¹⁹² Tomkovicz, *supra* note 171, at 1162.

¹⁹³ See, e.g., *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) ("the Court has recognized the importance of [the Fourth Amendment] as a bulwark against police practices that prevail in totalitarian regimes"); *Florida v. Bostick*, 501 U.S. 429, 440 (Marshall, J., dissenting) ("The general warrant, for example, was certainly an effective means of law enforcement. Yet it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion *notwithstanding* the effectiveness of this method.") (emphasis in original); *Harris v. United States*, 331 U.S. 145, 171 (1947) (Frankfurter, J., dissenting) ("[T]his may mean that it might be more difficult to obtain evidence of an offense . . . It may even mean that some offenses may go unwhipped of the law. If so, that is party of the cost for the greater gains of the Fourth Amendment.").

¹⁹⁴ See Tomkovicz, *supra* note 171, at 1161 ("Our willingness to safeguard the constitutional interest of 'guilty' persons conveys a message of strength, not weakness.").

¹⁹⁵ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

realistically expect the same degree of privacy as everyone else, it does not necessarily follow that that is the way it should be. As Justice Harlan, the creator of the “reasonable expectation of privacy” test once said, it is the task of the law not just to “mirror and reflect” how society is, but to “form and project” how it ought to be.¹⁹⁶ He urged that judges should not “merely recite the expectations and risks without examining the desirability of saddling them upon society.”¹⁹⁷

Per Justice Harlan’s view in *White*, the critical question here is, therefore, whether under our system, as reflected in the Constitution, we should impose on millions of our citizens the risk of searches of their home on reasonable suspicion alone, without even the protection of a warrant requirement.¹⁹⁸ Such a question must be answered “by assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of a law enforcement.”¹⁹⁹

CONCLUSION

In answer, this Note proposes a reevaluation of the Court’s current balancing approach in this constitutional area. A man’s home may still be his castle, but for millions of Americans, the walls are being undermined—washed away in a rising tide of law enforcement interests. It seems disingenuous that the Court can use such lofty language to describe the sanctity and sanctuary of the home²⁰⁰ when those rights can be so swiftly taken away. There will always be some pressing law enforcement interests clamoring for relief, urging courts to make exceptions to core constitutional protections. But, these arguments miss the point. The Fourth Amendment certainly erects barriers to optimal law enforcement, but it does so in the service of the most sacred constitutional objectives.²⁰¹ Indeed, it was over-effective (and overreaching)

¹⁹⁶ See *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

¹⁹⁷ *Id.*

¹⁹⁸ See *id.*

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013); *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (“Since we hold to the ‘centuries-old principle of respect for the privacy of the home,’ ‘it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.’ We have, after all, lived our whole national history with an understanding of ‘the ancient adage that a man’s house is his castle to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown.’”) (internal citations omitted).

²⁰¹ See Tomkovicz, *supra* note 171, at 1160.

law enforcement measures that inspired the constitutional prohibition on unreasonable searches and seizures in the first place.²⁰² Efficient and effective policing can coexist with rigorous constitutional protection of individual privacy. We, as a society, do not necessarily have to choose between them. There are well established exceptions to the warrant requirement in certain exigent circumstances anyway, which allow police to overcome the warrant requirement in an emergency, while leaving the general rule intact.²⁰³ Undoubtedly, this will not always be enough. By upholding the warrant requirement for searches of probationers' homes, it is inevitable that some crimes may go unpunished. Although a criminal may go free, if he must, "it is the law that sets him free."²⁰⁴ That is the price of the Fourth Amendment, and it is one worth paying. Especially when it comes to safeguarding the privacy of the home, "first among equals" under the amendment's protections.²⁰⁵

As for rehabilitation in sentencing, it is difficult to say whether it has been misunderstood or simply devalued. Judges are granted broad discretion when it comes to sentencing, and they are certainly entitled to consider other statutory objectives in addition to rehabilitation.²⁰⁶ However, when courts do purport to consider rehabilitative goals, they should do more than just pay them lip service. Rehabilitation is intended to help reintegrate offenders into society and make them into better, more productive citizens.²⁰⁷ But as cases like *Samson* and *Gementera* demonstrate, simply labeling a sentence as "rehabilitative" does not make it so.²⁰⁸

As the case law stands today, it appears that perhaps the Court is primed, at the next opportunity, to make a sweeping decision in this area—that as a rule (regardless of the conditions of their supervision), probationers and parolees have such a diminished expectation of privacy that even their homes can be searched without a

²⁰² See *Chimel v. California*, 395 U.S. 752, 761 ("The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence."); *Terry v. Ohio*, 392 U.S. 1, 37–38 (Douglas, J., dissenting) (also discussing the Fourth Amendment's origins in reaction to the abusive law enforcement practices of the British Crown).

²⁰³ See *Welsh v. Wisconsin*, 466 U.S. 740, 752 (1984).

²⁰⁴ *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

²⁰⁵ See *Jardines*, 133 S. Ct. at 1414.

²⁰⁶ See *United States v. Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in [sentencing].").

²⁰⁷ See *supra* Part III.A.

²⁰⁸ See *supra* Parts II.E.; III.B.

warrant or probable cause. Indeed, if another circuit court rules the same way as the Fourth Circuit, the Supreme Court may feel compelled to take up the issue at last. Looking back at the Court's progression from *Griffin*, to *Knights*, to *Samson*, it seems unlikely that the Fourth Circuit's approach will end up being the law of the land. But given the unpredictable nature of the Court's jurisprudence on criminal procedure, nothing is certain.²⁰⁹

Overall, this Note is somewhat of a dissent against the prevailing trend in this area of constitutional and criminal law. However, times change, and today's dissent might be tomorrow's precedent. After all, that is the point of dissenting opinions. As Chief Justice Charles Evan Hughes once said, "A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."²¹⁰ In the end, hopefully this Note may at least serve to shed some light on this disconcerting trend in Fourth Amendment jurisprudence. As Justice Louis Brandeis once said, it may be true that sunlight is the best disinfectant.²¹¹

²⁰⁹ See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000) (where Chief Justice Rehnquist, a longtime, outspoken critic of *Miranda v. Arizona*, both declined to overrule it *and* solidified its status as a constitutional decision that could not be overturned by statute).

²¹⁰ See CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928).

²¹¹ L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed., 1933)).