LOST IN PROBATION: CONTRASTING THE TREATMENT OF PROBATIONARY SEARCH AGREEMENTS IN CALIFORNIA AND FEDERAL COURTS

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In the administration of a state or federal probation system, a criminal defendant who is placed on probation often signs a "consent-to-search" agreement. This agreement contains a clause in which the probationer consents to suspicionless, warrantless searches of his person and residence for the duration of his probationary term. Searches pursuant to these agreements have generated a number of cases challenging their constitutionality. Specifically, several defendants who have been searched pursuant to their probation agreement and later prosecuted have invoked the Fourth Amendment, arguing that the exclusionary rule demands that such evidence be deemed inadmissible in a subsequent criminal trial.

But federal and state courts have failed to provide a consistent legal analysis in deciding such cases. On one hand, California courts hold that consent-to-search agreements eliminate a probationer's privacy protection, and the exclusionary rule challenge typically fails. On the other hand, federal courts reason that such agreements constitute only one factor in the expectation of privacy balancing test, and thus hold that searches pursuant to these agreements must meet some reduced level of constitutional scrutiny. In this Comment, the author explores this level of scrutiny in the wake of the Supreme Court's decision in United States v. Knights, *and argues that federal courts should adopt the more logical and straightforward California approach.*

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Probationers . . . walk an interesting line. They dwell among the public with whom they share many of the guarantees of the Bill of Rights, but they remain subject to the strictures of the criminal justice system."[1]

—Stacey L. Arthur

1. Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1, 60 (1992).

INTRODUCTION

In 1998, Mark Knights was convicted of a drug offense, and the court placed him on summary probation.[2] To receive probation in lieu of a prison sentence, Knights agreed to "submit his person, property, place of residence, or vehicle, to search at anytime, with or without a search warrant, warrant of arrest, or reasonable cause by any probation officer or law enforcement officer." In the presence of his attorney and a neutral judicial official, Knights then signed a probation order containing the suspicionless search condition representing that: "I have received a copy, read and understand the above conditions of probation and agree to abide by same." Less than a week later, a sheriff's deputy searched Knights' residence while investigating $1.5 million in vandalism Knights was suspected of committing. The deputy, knowing that Knights was on probation and that he had agreed to warrantless, suspicionless searches, believed a warrant was unnecessary. While searching, the deputy found evidence implicating Knights, and Knights was arrested and indicted. At trial, Knights moved to suppress the evidence on the grounds that the search of his house violated his Fourth Amendment rights.[3]

Should the motion succeed? Has there been a violation of the Fourth Amendment? A straightforward approach would suggest that the answer to both of these questions must be "no." After all, Knights agreed, in the course of a proceeding overseen by a neutral judicial official, that his residence could be searched at any time, without a warrant, and without a showing of reasonable cause by any law enforcement officer. As one might expect, however, the answer is not a simple "no." Rather, the answer is "it depends." More specifically, it depends almost solely upon which court a defendant is charged in.

In California and federal courts, criminal defendants on probation are afforded disparate levels of constitutional protection.[4] California courts have taken a straightforward approach in this context, holding that by entering into a probation agreement of the type described above, a probationer has waived her right to be free from unreasonable searches and seizures. In

2. Under a system of "formal probation," probationers are supervised by individual probation officers, while in a system of "summary probation," no specific officer is assigned.

3. These facts are those of *United States v. Knights*, 534 U.S. 112 (2001). See *infra* Part II.B.4 for a complete discussion of the *Knights* decision.

4. This Comment focuses solely on the disparity between California and federal courts for two reasons. First, the *Knights* decision—the most relevant case on point—arose out of California and applied a California probation condition. Second, California has a rich history of case law interpreting the constitutionality of warrantless search conditions imposed by consent. In Part II.B.3 *infra*, this Comment explores the development of this case law in California.

California, the search of a probationer who has signed such an agreement is permitted so long as the search is not "arbitrary, capricious, or harassing."[5]

In federal courts, however, the analysis is imprecise and complex, and the validity of these probation agreements has proven controversial. Before 2001, the Ninth Circuit Court of Appeals held that "even when a probationer has consented to searches of his home as a condition of his probation, those searches must be conducted for probation purposes and not as a mere subterfuge for the pursuit of criminal investigations."[6] This "mere subterfuge" analysis contradicted U.S. Supreme Court precedent emphasizing the "special needs" of a state's probation system.[7] Thus, in 2001, deciding *United States v. Knights*,[8] the Court rejected the Ninth Circuit's "mere subterfuge" test. But instead of finding, like California courts, that the probationer's express waiver eliminated Fourth Amendment concerns, the Court applied a traditional Fourth Amendment balancing test. Interpreting the probation agreement as a "salient factor" in the "totality of the circumstances" test, the *Knights* court concluded that if officers are searching a probationer, even if that search is for investigative purposes, it may be supported by no more than "reasonable grounds," rather than the more stringent "probable cause" requirement for most searches of nonprobationers.[9] By evading the central issues of consent and waiver, the *Knights* Court made a critical error.

This Comment argues that while *Knights* narrowed the gap between California and federal law by reducing the level of suspicion required to uphold a search in federal court, the decision did not go far enough—the Court should instead adopt a middle ground between the California and federal approaches. Because a probationer's consent to search eliminates the probationer's expectation of privacy, subsequent searches do not need to be justified by *either* probable cause or reasonable suspicion. Part I presents a brief discussion of probation. Part II traces the relevant legal developments regarding the Fourth Amendment and probationers, looking at decisions from California, the Ninth Circuit, and the U.S. Supreme Court. Part III presents the argument for federal courts to begin following the middle ground approach advocated in this Comment. Specifically, Part III.A illustrates that

5. *See, e.g.*, People v. Reyes, 968 P.2d 445, 450 (Cal. 1998) (holding that the search of a probationer "is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious, or harassing"); People v. Bravo, 738 P.2d 336, 340 (Cal. 1987) ("[A] waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons.").

6. United States v. Knights, 219 F.3d 1138, 1145 (9th Cir. 2000), *rev'd*, 534 U.S. 112 (2001).

7. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

8. 534 U.S. 112.

9. *Id.* at 118–19. See *infra* Part II.B.4 for a complete discussion of the *Knights* decision.

the theories of express consent and waiver mandate that suspicionless search conditions be deemed constitutional. Part III.B explains that because searches pursuant to statutory orders are more intrusive than those pursuant to suspicionless search conditions, and because the U.S. Supreme Court deemed searches pursuant to statutory orders constitutional in *Griffin v. Wisconsin*,[10] searches pursuant to suspicionless search conditions are therefore constitutional. In Part III.C, this Comment describes how allowing probationers to agree to suspicionless search conditions furthers the goals of probation. Part III.D explains why suspicionless search conditions should be used for probationers to promote consistency and predictability in the criminal justice system. Finally, Part III.E defends the California approach from a popular counterargument.

I. THE LEGAL SYSTEM OF PROBATION

A. Background

Probation is the most common form of criminal punishment in the United States.[11] At the end of 2002, nearly four million Americans were on probation.[12] Before sentencing, about half had been convicted of a felony, while the other half had been convicted of one or more misdemeanors.[13] Women constitute about one-quarter of the probation population.[14] Just over half of probationers are white, about 30 percent are African American, and about 12 percent are Latino.[15]

The system of probation was inadvertently created in 1841, when Boston bookmaker John Augustus posted bail for a "common drunk," and requested that the judge defer sentencing until Augustus had a chance to rehabilitate him.[16] Augustus continued this practice and had tremendous success with his program, rehabilitating all but a few of his nearly two thousand charges. His work "provided the model for [modern] probation," and states soon began creating probation systems for both juvenile and adult offenders.[17] By the middle of the twentieth century, the idea of using probation as a system of punishment was widely accepted throughout the United States.

10. 483 U.S. 868.
11. *See* Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 149 (1997).
12. U.S. Dep't of Justice, Bureau of Justice Statistics, Probation and Parole Statistics, *at* http://www.ojp.usdoj.gov/bjs/pandp.htm.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* Petersilia, *supra* note 11, at 149.
17. *See id.* at 156.

Congress enacted the Federal Probation Act in 1948,[18] and by 1956 every state had created comprehensive probation systems.[19] Matthew Roberson explains the intent behind imposing a probationary term:

> The efficacy of probation rises from the assurance that criminals can be closely watched even when not jailed. A correctional facility offers a controlled environment, providing uniformity, maintaining authority, and employing a constant system of monitoring. Probation systems implement the same crucial functions through the existence of conditions that limit a criminal's conduct and remove a number of civil rights otherwise available to law-abiding citizens.[20]

B. Purposes and Goals of Probation

Traditionally, the customary rationales for probation fell into three general categories: rehabilitation of the offender, deterrence of future misconduct, and assurance of public safety.[21] This Comment argues that defining "deterrence" as a separate goal of probation makes little sense. If the probationer is deterred from committing further crimes, this would further his rehabilitation *and* help protect society from his future crimes. And the Sentencing Reform Act of 1984[22] called into question the rehabilitative purpose of probation. The Act rejected rehabilitation as a goal of sentencing, but retained probation as a form of punishment,[23] so the Act did not directly

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18. Pub. L. No. 80-772, §§ 3651–3656, 62 Stat. 842 (1948) (repealed 1987). This section read:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Id.; William Carl Brown, *United States v. William Anderson Co.: Monetary Conditions of Probation Under the Federal Probation Act*, 69 IOWA L. REV. 1147, 1147 n.2 (1984).

19. *See* Petersilia, *supra* note 11, at 156. The Federal Probation Act was repealed when Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (effective 1987).

20. Matthew S. Roberson, Note, *"Don't Bother Knockin' . . . Come on In!:" The Constitutionality of Warrantless Searches as a Condition of Probation*, 25 CAMPBELL L. REV. 181, 197 (2003).

21. While these three goals seem to mirror traditional rationales for any criminal penalty, the utility of probation as a penalty can be explained in greater detail.

> Like the traditional penalties . . . [probation] may help to rehabilitate the offender, deter further criminal behavior on the part of the probationer or others, and satisfy the community's desire for retribution. Moreover, probation serves these ends without subjecting the convict to the corrupting and debilitating influences of prison life, and without placing upon the public treasury the burden of his support.

Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 181 (1967) (footnote omitted).

22. 98 Stat. 1987.

23. *See* 18 U.S.C.S. app. ch. 5, pt. b (Law. Co-op. 2004).

answer whether rehabilitation remained a valid purpose of probation. Thus, one could argue that the only valid rationale for probation is assurance of public safety.

But this is not entirely true. While the "deterrence" purpose of probation has not been revived, the "rehabilitative" purpose of probation has. Current state and local "[s]tatutes empowering court to impose probation universally cite rehabilitation of the offender as a goal; today, a large number add protection of the community to this traditional objective."[24] And courts agree with this approach. The *Knights* Court identified "rehabilitation and protecting society from future criminal violations" as "the two primary goals of probation."[25] Furthermore, some commentators also include punishment of the probationer as a goal of the probation system.[26]

Imposition of a probationary term involves both carrots and sticks. A probationer's opportunity "to serve a community based sentence is contingent upon compliance with conditions that frequently impose severe restrictions upon probationers' everyday activities, associations, and behavior. Conditions . . . may also mandate participation in certain rehabilitative activities."[27] To further the effectiveness of probation, the trial judge imposing probation conditions has traditionally been afforded "broad, sometimes unbridled, discretion to fashion conditions which [the judge] believes are appropriate."[28] The Sentencing Reform Act allows a judge to impose any "court-created condition that is reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the goals of sentencing."[29] The standard of review for abuse of discretion in the probation context is whether the probation "conditions are 'reasonably related' to the goals of probation."[30] And because "[m]any probation conditions implicate constitutional rights in their mission to promote the rehabilitation of probationers and protection of the public,"[31] constitutional questions often

24. *Cf.* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1179 (1990).

25. United States v. Knights, 534 U.S. 112, 119 (2001); *see also* Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980) (stating that rehabilitation of the offender and protection of the public are the permissible purposes of probation).

26. *See* Stephen S. Cook, *Selected Constitutional Questions Regarding Federal Offender Supervision*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 1–2 (1997).

27. Rosen, *supra* note 24, at 1178.

28. Note, *supra* note 21, at 181; *see also* Brian G. Bieluch, *Thirty-First Annual Review of Criminal Procedure, IV. Sentencing: Probation*, 90 GEO. L.J. 1813, 1817–18 (2002).

29. *Id.*

30. Shaun B. Spencer, Note, *Does Crime Pay—Can Probation Stop Katherine Ann Power From Selling Her Story?*, 35 B.C. L. REV. 1203, 1219 (1994).

31. Shana Weiss, *A Penny for Your Thoughts: Revisiting* Commonwealth v. Power, 17 LOY. L.A. ENT. L.J. 201, 212 (1996).

arise. Reviewing "courts have upheld probation conditions" that impinge on constitutional rights including freedom from warrantless searches.[32] Furthermore, courts have been liberal in upholding probation conditions that restrict even fundamental rights. For example, in *United States v. Terrigno*,[33] the Ninth Circuit upheld a probation condition which restricted the probationer's First Amendment right of expression, by preventing her from profiting from her "crime story."[34] "Other courts have upheld conditions restricting First Amendment activities where the conditions were 'reasonably related' to the purposes of probation."[35]

Under *Terrigno*, we could inquire whether warrantless search provisions in probation agreements are per se invalid as unconstitutional conditions. Because broader search powers will help law enforcement to reduce recidivism, and reducing recidivism furthers both rehabilitation and public safety, warrantless search conditions are nearly certain to bear the requisite "reasonable relationship" to the rehabilitative and public safety purposes of probation. Accordingly, this Comment goes beyond posing the constitutional questions framed by *Terrigno*.

II. LEGAL BACKGROUND: PROBATIONERS AND THE FOURTH AMENDMENT

A. The Exclusionary Rule

To understand whether the fruits of a probation search should be excluded from a subsequent criminal trial, we must briefly review the scope and purposes of the exclusionary rule. For nearly a century, the U.S. Supreme Court has held that illegally obtained evidence cannot be admitted to prove the guilt of a criminal defendant.[36] As an "imperative of judicial integrity," courts have been unwilling to become "accomplices in the willful disobedience of a Constitution," and have excluded such evidence under the so-called exclusionary rule.[37] However, the Supreme Court has held that this exclusionary rule is not an individual constitutional right per se; instead, it operates as a deterrent to bad faith police misconduct.[38]

32. *See* Bieluch, *supra* note 28, at 1819.
33. 838 F.2d 371 (9th Cir. 1988).
34. *Id.* at 374.
35. Weiss, *supra* note 31, at 213.
36. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383, 387 (1914).
37. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 114 (3d ed. 2000) (quoting Elkins v. United States, 364 U.S. 206 (1960)).
38. *See Mapp*, 367 U.S. at 655.

The modern test used to determine whether a search is illegal was articulated in Justice Harlan's concurrence in *Katz v. United States*.[39] According to Justice Harlan, a search violates a defendant's Fourth Amendment rights only when the defendant has an actual, subjective expectation of privacy, and this expectation is objectively reasonable.[40] Thus for a defendant to have *any* privacy protection under the Fourth Amendment, a court must first find that he expected privacy at the time of the search, and that this expectation was objectively reasonable.[41] If a privacy right is found, then a court will exclude the evidence obtained in violation of this right.[42] Searches supported by "probable cause" do not violate a defendant's privacy right; neither do searches conducted pursuant to a warrant or in the context of exigent circumstances that excuse the need to obtain a warrant.[43] In some contexts, warrantless searches can also be supported by "reasonable suspicion," a lower standard of suspicion than "probable cause."[44] In determining whether a warrantless search is justified, a court will look to the totality of the circumstances surrounding the search.[45]

B. The Case Law: Probationers and the Fourth Amendment

More than fifty years ago, before waivers and probationary search conditions gained widespread use in California, the Fourth Circuit Court of Appeals addressed the Fourth Amendment protections afforded probationers. In *Martin v. United States*,[46] the court held that the probationer's "status [was] a circumstance to be taken into consideration" when determining his Fourth Amendment rights.[47] Soon after, the inherent tension between the Fourth Amendment and the probation system became clear, as the *Martin* decision was interpreted to mean one of two things.[48] First, the decision was interpreted to mean that a probationer's status should be *considered* when applying the

39. 389 U.S. 347 (1969).

40. "My understanding of the [exclusionary] rule . . . is that there 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.'" *Id.* at 361 (Harlan, J., concurring).

41. *See* LAFAVE ET AL., *supra* note 37, at 134.

42. *See id.* at 113 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

43. *See id.* at 146–50.

44. *See id.* at 215–16.

45. *See id.*

46. 183 F.2d 436 (4th Cir. 1950).

47. *Id.* at 439.

48. *See* Welsh S. White, *The Fourth Amendment Rights of Parolees and Probationers*, 31 U. PITT. L. REV. 167, 171–72 (1969).

general probable cause test.[49] Under this approach, a court would accept that a probationer has a subjective and objectively reasonable expectation of privacy, and would then assess the probationer's consent agreement as a significant factor in weighing the totality of the circumstances surrounding the search—the "general probable cause" test mentioned above—to determine whether the intrusion on that privacy interest was reasonable. Second, the court's holding in *Martin* could instead "imply that citizens on probation do not have the same rights under the [F]ourth [A]mendment as other citizens."[50] Under this approach, as this Comment advocates, courts would recognize that probationers who sign suspicionless search agreements have neither the subjective nor the objectively reasonable expectation of privacy necessary for Fourth Amendment protection.

Thus, even before a discussion of consent-to-search clauses, it seems logical to apply the Fourth Amendment to probationers in one of two ways. Either a probationer should be treated as a regular citizen, and a court should view her placement on probation as a salient circumstance in a Fourth Amendment balancing test, or a probationer should be placed under separate standards altogether. But in over fifty years of case law, courts have failed to make a clear choice between those analyses.

It is virtually undisputed that if a search turns up evidence of a probation violation, probation can be revoked. Many constitutional protections do not apply in revocation proceedings, including the exclusionary rule and the right to counsel. While the separate proceeding of probation revocation has relevance for the goals of probation,[51] this Comment focuses on the constitutionality of search agreements to support *subsequent criminal charges*. So the essential question is how a search condition in a probation agreement affects the probationer's Fourth Amendment rights when she is charged in a subsequent criminal trial. As we will see below, the answer varies drastically by jurisdiction.

1. California

California courts have consistently interpreted consent-to-search clauses in probation agreements as waiving a probationer's privacy protection. Over

49. *See id.* at 171. This interpretation of *Martin* tracks the U.S. Supreme Court's reasoning in *Knights* that the probation agreement should be considered as a "salient circumstance" in determining the reasonableness of a search under the general Fourth Amendment balancing test. However, the difference between *Martin* and *Knights* is clear: *Martin* did not involve a waiver whereas *Knights* involved an explicit one.

50. *Id.* at 172.

51. *See* discussion *infra* Part I.B.

thirty years ago, the California Supreme Court upheld the validity of a search conducted pursuant to a waiver in a defendant's probation agreement. In *People v. Mason*,[52] the probationer agreed to "submit his person, place of residence, [or] vehicle, to search and seizure at any time of the day or night, with or without a search warrant, whenever requested to do so by the Probation Officer or any law enforcement officer."[53] Officers searched the defendant's home and vehicle without his permission.[54] The court upheld the validity of the search, finding that "the probation condition authorized the search of defendant's residence and car."[55] The court then addressed the conflict between probation agreements and a defendant's Fourth Amendment rights. Although the defendant objected that the search violated his Fourth Amendment rights, the court concluded that his expectation of privacy was reduced.[56] Indeed, the court found that "a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of *traditional* Fourth Amendment protection."[57] The *Mason* court further reasoned that "when the defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car, and house, he voluntarily waived whatever claim of privacy he might otherwise have had."[58] The only exception the *Mason* court recognized was that a warrantless search could still qualify as unreasonable, and hence violate the Fourth Amendment, if the search involved "unlawful harassment."[59]

In 1987, the California Supreme Court decided *People v. Bravo*,[60] a case with facts similar to those of *Mason*. In *Bravo*, the defendant agreed to a

52. 488 P.2d 630, 631 (Cal. 1971).

53. *Id.* at 762. The search provision at issue in *Mason* is nearly identical to those interpreted by later California courts. *See, e.g.*, People v. Bravo, 738 P.2d 336, 336–37 (Cal. 1987) (requiring probationer to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant").

54. *Mason*, 488 P.2d at 631.

55. *Id.* at 631.

56. *Id.* at 633.

57. *Id.* (emphasis added). The *Mason* court did not elaborate on the definition of "traditional" Fourth Amendment protection. This could mean that (1) the defendant has no expectation of privacy and therefore no privacy right, or (2) the defendant has a privacy right but police can constitutionally impinge upon this right with a lower level of suspicion than probable cause.

58. *Id.* at 634.

59. *Id.* at 633 n.3. The court stated:

> We do not intend to suggest that one who has accepted such a condition to the grant of probation is thereafter barred from objecting to the unreasonable manner in which that condition is carried out by police officers. For example, a probationer who claims unlawful harassment by officers in executing a search may seek appropriate relief from the trial court, including an amendment of the order of probation.

Id.

60. 738 P.2d 336 (Cal. 1987).

probation condition like Mason's that authorized a warrantless search at any time.[61] Officers searched the defendant's home without a warrant and arrested him.[62] The court held that "a probationer who has agreed to submit at any time to a warrantless search may have no reasonable expectation of *traditional* Fourth Amendment protection."[63] The court further explained that probation agreements should be analyzed from the perspective of a reasonable person, disregarding any subjective expectations of the probationer.[64] Thus, the *Bravo* court followed *Mason*, finding, without regard to the probationer's subjective expectation of privacy, that a probationer's expectation of privacy may not be objectively reasonable when he has consented to warrantless searches. *Bravo*, however, recognized additional exceptions to the validity of warrantless searches, holding that arbitrary, capricious, as well as harassing searches could be deemed "unreasonable."[65] Accordingly, since *Bravo*, California courts have held searches of probationers reasonable and valid unless the disputed search is "arbitrary, capricious, or harassing."[66]

In California, a probationer may lack an objectively reasonable expectation of privacy even when he has not waived his Fourth Amendment protections in a judicial proceeding. In *In re Tyrell J.*,[67] a minor was released from juvenile detention, thus becoming subject to a California law making submission to warrantless searches a mandatory condition of his release. The minor's probation officer notified him of the condition. The minor was later searched and arrested for marijuana possession.[68] Even though the minor clearly displayed a subjective expectation of privacy by trying to conceal his drugs, the court found that his expectation was objectively unreasonable because of the statutory search condition.[69] Although the minor defendant might have thought that the officer would not search him (therefore manifesting a subjective expectation of privacy), his probation officer had informed him of

61. The defendant agreed to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant." *Id.* at 336–37.

62. *Id.* at 337.

63. *Id.* at 338 (quoting *Mason*, 488 P.2d at 633 (emphasis added)). The word "reasonable" appears in the *Mason* decision, but was omitted from the *Bravo* opinion quote.

64. Warrantless search conditions "must . . . be interpreted on the basis of what a reasonable person would understand from the language of the condition itself, not on the basis of appellant's subjective understanding, or under a strict test in which a presumption against waiver is applied." *Id.* at 340.

65. "A waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons." *Id.* at 342.

66. *See, e.g.*, People v. Reyes, 968 P.2d 445, 450 (Cal. 1998).

67. 876 P.2d 519 (Cal. 1994).

68. *Id.* at 521.

69. *Id.* at 527–28.

knowledge of the statutory search condition. Therefore, although the minor did not *agree* to the consent-to-search clause, the California Supreme Court found that his expectation of privacy was objectively unreasonable because he was aware of the search condition.[70]

Six years later, in *People v. Reyes*,[71] the California Supreme Court extended the *Tyrell* reasoning to adult parolees.[72] In *Tyrell* and *Reyes*, neither defendant signed a traditional probation agreement consenting to a warrantless search, yet both courts found that the probationer's expectation of privacy was reduced by the statutory search condition. The *Reyes* court emphasized that "[i]n both cases the expectation of privacy is already reduced by the absence of the warrant requirement."[73] Thus, California courts have found that a probationer who is subject to a search condition does not have an objectively reasonable expectation of privacy, regardless of whether the condition is imposed by a consent agreement *or* a statutory order.[74]

2. The Ninth Circuit

While California courts have upheld warrantless searches because the probationer's expectation of privacy was unreasonable given the search conditions, the Ninth Circuit has taken a strikingly different approach.

Before *Knights*, the Ninth Circuit consistently rejected warrantless search conditions in probation agreements. In *United States v. Consuelo-Gonzales*,[75] the probationer agreed to a search clause somewhat less explicit than the now-standard California condition.[76] Federal and local agents searched her home without a warrant and obtained evidence for use in a narcotics prosecution.[77] The majority did not analyze whether the defendant had a right of privacy violated by the search, concluding instead that the search was invalid because it was "not in keeping with the purposes intended to be

70. *Tyrell* affirmed an earlier case from the California Court of Appeal where a minor was required by a probation order to submit to warrantless searches, and the court held that this order authorized a warrantless search. *In re* Binh L., 6 Cal. Rptr. 2d 678, 679 (Ct. App. 1992).

71. 968 P.2d 445.

72. *Id.* at 450.

73. *Id.*

74. This Comment, however, suggests that the California approach should only be followed when search conditions are imposed by agreement, and the Supreme Court's approach in *Knights* continues to be valid when search conditions are imposed by statutory order.

75. 521 F.2d 259, 261 (9th Cir. 1975).

76. *Id.* The defendant agreed to "submit to search of her person or property at any *time when requested by a law enforcement officer*." *Id.* at 261 n.1.

77. *Id.* at 262.

served by the Federal Probation Act."[78] In other words, the majority held the search illegal because it conflicted with the goals of probation.[79] By contrast, both the concurring and dissenting opinions touched on the constitutional questions posed by the California Supreme Court in *People v. Mason*. The concurrence reasoned that a probationer's "expectations of privacy may be somewhat greater than a parolee's, because the rehabilitative goals of probation are perhaps more pronounced than those of parole, and the societal threat posed by granting a person probation may be less than that posed by paroling a prisoner."[80] The dissent, by contrast, explained why the "reasonable expectation of privacy" approach is the "most appealing" of the applicable analyses.[81] The dissent found that "a probationer would have no reasonable expectation of privacy as to those areas and situations which have been made subject to search at any time by the very terms of his or her probation order."[82] The dissent also found that "[t]he more frequent and detailed the intrusions and the more personal the areas of privacy invaded, the greater must be the reasonableness of the search in its relationship to the original crime and to the purposes of the probation system,"[83] implying that a probationer retains some measure of privacy after agreeing to a consent-to-search clause.

In *United States v. Merchant*,[84] the Ninth Circuit created the "mere subterfuge" test which would frame the court's reasoning in *Knights*. In *Merchant*, the defendant was sentenced to a jail term and probation; he objected to the jail term, and the probation term was later reinstated without his knowledge.[85] The probation order was conditioned on the defendant's consent to warrantless searches.[86] Officers searched the defendant's home and seized evidence.[87] The Ninth Circuit held the search unlawful because the defendant did not know about the probation condition, and because the search was a subterfuge for conducting a criminal investigation.[88] But just like the majority in *Consuelo-Gonzalez*, the *Merchant* majority did not address the

78. *Id.*
79. But this conclusion is illogical; see *infra* Part III.C for an explanation of how warrantless search conditions actually *further* the goals of probation.
80. *Consuelo-Gonzalez*, 521 F.2d at 268 (Hufstedler, J., concurring).
81. *Id.* at 274 (Wright, J., dissenting).
82. *Id.*
83. *Id.*
84. 760 F.2d 963 (9th Cir. 1985).
85. *Id.* at 964–65.
86. *Id.* at 964.
87. *Id.* at 965.
88. *Id.* at 969–70.

defendant's Fourth Amendment interests.[89] However, by emphasizing that the defendant was not "on notice" of his probation status and his consent to searches, the court implicitly analyzed the probationer's expectations of privacy. In other words, if the defendant had expressly consented to the searches and had known he was on probation, the analysis in *Merchant* would have been entirely different. But by holding that the search was unlawful because it was a probationary search as a subterfuge for a criminal investigation, the *Merchant* decision opened the door to the Ninth Circuit's dubious "mere subterfuge" analysis.[90] This was perhaps the most significant consequence of the *Merchant* decision,[91] as it remained the standard within the Ninth Circuit[92] until the Supreme Court overruled the test in *Knights*.[93]

3. Supreme Court Precedent Before *Knights*

Like the Ninth Circuit, the Supreme Court has not applied a consistent Fourth Amendment analysis to warrantless probation searches. In *Griffin v. Wisconsin*,[94] the Court interpreted a Wisconsin statute which lowered the

89. The court declined to address the defendant's alternative argument, "that the consent to search clause of his probation violates the Fourth Amendment." *Id.* at 970 n.11.

90. It is clear, then, that the Ninth Circuit placed tremendous importance on the goals of probation in assessing the constitutionality of Fourth Amendment waiver conditions. But the Ninth Circuit approach is flawed. If the goals of probation are of such tremendous importance, then warrantless search conditions must be enforced because the mere specter of a warrantless search *furthers the goals of probation*. A probationer on notice of the possibility of a warrantless search will likely change his behavior accordingly, and the rehabilitative purposes of probation will be served even though the search itself might be unrelated to the initial grant of probation. Thus, even at its foundation, the Ninth Circuit's "mere subterfuge" analysis is logically flawed.

91. Also problematic is that the pre-*Knights* Ninth Circuit cases do not engage in any meaningful discussion of a probationer's reasonable expectations of privacy. *See, e.g.*, United States v. Ooley, 116 F.3d 370 (9th Cir. 1997); United States v. Merchant, 760 F.2d 963 (9th Cir. 1985); United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975). These cases seem to suggest that no matter how explicit the language in the probation agreement, a probationer *cannot* waive his Fourth Amendment protections. But holding that a probationer has some minimal floor of Fourth Amendment protection that cannot be waived is incorrect, as will be discussed in Part III.A.1 *infra*.

92. Several Ninth Circuit cases after *Merchant* confirmed this "mere subterfuge" test. *See, e.g.*, United States v. Knights, 219 F.3d 1138, 1145 (9th Cir. 2000) (reiterating that "even when a probationer has consented to searches of his home as a condition of his probation, those searches must be conducted for probation purposes and not as a mere subterfuge for the pursuit of criminal investigations"), *rev'd*, 534 U.S. 112 (2001); *Ooley*, 116 F.3d at 372 (confirming that "[w]ith respect to probationers, we have long recognized that the legality of a warrantless search depends upon a showing that the search was a true probation search and not an investigation search," because "[u]nlike an investigation search, a probation search should advance the goals of probation").

93. Both the Supreme Court's and the Ninth Circuit's decisions in *United States v. Knights* will be discussed in Part II.B.4 *infra*.

94. 483 U.S. 868 (1987).

level of suspicion applicable to searches of probationers. The defendant in *Griffin* was convicted and placed on probation. Wisconsin law at the time placed probationers in the legal custody of the state, "subject . . . to . . . conditions set by the court and rules and regulations established by" the State Department of Health and Social Services.[95] One particular regulation allowed "any probation officer to search a probationer's home without a warrant as long as his supervisor approve[d] and as long as there [were] reasonable grounds to believe the presence of contraband—including any item that the probationer cannot possess under the probation conditions."[96] Under the regulations, refusal to consent to a home search was also a probation violation.[97]

While the defendant was on probation, a detective informed a probation officer that there might be guns in the defendant's apartment. A subsequent search revealed a handgun, and the defendant was charged under a felon-in-possession statute.[98] The defendant moved to suppress the evidence, but the trial court denied the motion. The defendant was convicted, and the verdict was upheld by both the Wisconsin Court of Appeals and the Wisconsin Supreme Court.[99] The Wisconsin Supreme Court

> found denial of the suppression motion proper because probation diminishes a probationer's reasonable expectation of privacy—so that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only "reasonable grounds" (not probable cause) to believe that contraband is present. It held that the "reasonable grounds" standard of Wisconsin's search regulation satisfied this "reasonable grounds" standard of the Federal Constitution, and that the detective's tip established "reasonable grounds" within the meaning of the regulation, since it came from someone who had no reason to supply inaccurate information, specifically identified Griffin, and suggested a need to verify Griffin's compliance with state law.[100]

Although the defendant did not sign a waiver like the California probation condition, the Wisconsin Supreme Court found that the search was legal

95. *Id.* at 870 (alteration in original).
96. *Id.* at 870–71 (citing WIS. ADMIN. CODE §§ 328.21(4), 328.16(1) (1981)).
97. *Id.* at 871.
98. *Id.* at 871–72. The felon-in-possession statute was WIS. STAT. § 941.29(2) (1985–1986).
99. *Id.* at 872; *see also* State v. Griffin, 376 N.W.2d 62 (Wis. Ct. App. 1985), *aff'd*, 388 N.W.2d 535 (Wis. 1986).
100. 483 U.S. at 872.

because the statutory condition diminished the probationer's reasonable expectation of privacy.[101]

The U.S. Supreme Court upheld the Wisconsin decision, but refused to "embrace a new principle of law" as the Wisconsin Supreme Court did.[102] Instead, it applied the administrative search doctrine, and used a "special needs" test to uphold the statute authorizing warrantless searches of probationers.[103] The government had special needs in supervising probationers, and the Court upheld the statute because the usual "warrant requirement would interfere to an appreciable degree with the probation system."[104] The Court found three identifiable burdens: the typical warrant and probable cause requirements would (1) employ "a magistrate rather than [a] probation officer as the judge of how close a supervision the probationer requires," (2) "make it more difficult for probation officials to respond quickly to evidence of misconduct," and (3) "reduce the deterrent effect that the possibility of expeditious searches would otherwise create."[105] So, returning to the balancing test under the administrative search doctrine, the Court evaluated policy concerns to decide whether an administrative regulation was reasonable.

Specifically, the Court found that the special needs of the Wisconsin probation system—rehabilitation and public safety—justified the lower threshold of reasonable suspicion instead of probable cause.[106] The Court held that the officers had reasonable suspicion that contraband was present, and that the search was therefore legal.[107] In other words, "the Court felt it was constitutionally acceptable for Wisconsin, by *administrative regulation*, to lower the probable cause standard for probation searches to that of 'reasonable cause.'"[108] Therefore, because searches conducted pursuant to statutory order are more intrusive than searches conducted pursuant to probation agreements, and because *Griffin* established that searches pursuant to statutory orders are constitutional, *Griffin* suggested that the Supreme Court

101. *Id.*
102. *Id.*
103. *Id.* at 876.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 880.
108. Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to be Free From Unreasonable Searches and Seizures?*, 35 SANTA CLARA L. REV. 1237, 1246 (1995) (emphasis added).

might overrule the Ninth Circuit and deem searches pursuant to probation agreements constitutional.[109]

In 1997, the Court moved another step toward overruling the Ninth Circuit's categorization of searches pursuant to probation agreements as unconstitutional. In *Whren v. United States*,[110] the Court hinted that the Ninth Circuit's "mere subterfuge" test would be rejected, as it found unanimously that the constitutionality of warrantless searches does not depend on the actual motivations of the officers involved.[111] The Court found that "only an undiscerning reader would [endorse] the principle that ulterior motives can invalidate police conduct that is justifiable."[112] Because the pre-*Knights* Ninth Circuit "mere subterfuge" test depended so heavily on the subjective intentions of the officers, *Whren*, along with *Griffin*, foreshadowed a rejection of the established Ninth Circuit standard.

4. *United States v. Knights*

In 1996, Napa County Pacific Gas & Electric (PG&E) complained about various acts of vandalism to their property, shortly after PG&E filed a theft-of-services complaint against Mark Knights.[113] Napa County sheriff's deputy Todd Hancock "noticed that the acts of vandalism coincided with Knights's PG&E-related court appearances."[114] Accordingly, suspicion for the repeated vandalism against PG&E had "long focused" on Knights.[115]

In 1998, at sentencing for a drug offense in a California trial court, Knights was sentenced to summary probation. As a part of probation, Knights agreed to submit his "person, property, place of residence, vehicle, personal

109. *Griffin* differs from cases like *Knights* in two ways. First, "consent" is not an issue because the defendant in *Griffin* did not agree to the search condition. Because it was imposed by statute, defendant did not have the opportunity to decline this condition. Second, the probation regulation lowered the Fourth Amendment bar to "reasonable cause" or "reasonable grounds," and the Court affirmed this reduced standard in light of the government's "special needs" in monitoring probationers. *Griffin*, 483 U.S. at 875–76. Because of these salient differences between *Griffin* and consent cases like *Knights*, it might initially seem that *Griffin* is inapplicable to the arguments of this Comment. But *Griffin* remains relevant in this context because it illustrates the Court's desire to create a bright-line, reduced standard of Fourth Amendment protection for probationers as a class, instead of analyzing the actual probation imposed and *how* that probation affects defendants' subjective and objectively reasonable expectations of privacy.

110. 517 U.S. 806 (1996).

111. *Id.* at 813; *see infra* Part III.E for a more thorough analysis of *Whren*.

112. *Id.* at 811.

113. United States v. Knights, 534 U.S. 112, 114–15 (2001).

114. Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in* United States v. Knights, 122 S. Ct. 587 (2001), 25 HARV. J.L. & PUB. POL'Y 1201, 1202 (2002).

115. *Knights*, 534 U.S. at 114.

effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."[116] Knights signed the probation order immediately below a line which read "I have received a copy, read and understand the above terms and conditions of probation and agree to abide by same."[117]

Three days after Knights was placed on probation, PG&E experienced increased vandalism, "causing an estimated $1.5 million in damage."[118] A few days later, Hancock set up surveillance of Knights' residence. Hancock observed Steven Simoneau (Knights' suspected accomplice in the PG&E vandalism) "carrying three cylindrical items," which Hancock believed to be pipe bombs.[119] Simoneau allegedly threw the items in the Napa River, left Knights' residence, and parked his truck. Hancock examined the truck and found suspicious objects inside: "a Molotov cocktail and explosive materials, a gasoline can, and two brass padlocks that fit the description of those removed from the PG&E transformer vault."[120] Hancock had noticed the probation agreement when reviewing Knights' criminal file, so he was aware of the probation condition and thus believed that a search warrant was unnecessary.[121] Hancock returned to Knights' residence, searched it, and found "a detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock stamped 'PG&E.'"[122]

Knights was arrested and moved to suppress the evidence seized from his apartment. Although the district court found that Knights had "reasonable suspicion" to conduct the search, it granted Knights' motion to suppress because "the search was for 'investigatory' rather than 'probationary' purposes," and the Ninth Circuit affirmed.[123] Thus, in the Ninth Circuit's *Knights* decision, we see the affirmation of the "mere subterfuge" test that had been articulated in earlier cases such as *Merchant* and *United States v. Ooley*.[124]

But the Supreme Court dismissed the "mere subterfuge" test when it decided *Knights*. Knights argued that warrantless searches can only be justified if they are, like those in *Griffin*, "a 'special needs' search conducted by a

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 115.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 116.
124. *See* United States v. Ooley, 116 F.3d 370, 372 (9th Cir. 1997); United States v. Merchant, 760 F.2d 963, 969 (9th Cir. 1985).

probation officer monitoring whether the probationer is complying with probation restrictions."[125] But the Court disagreed, reasoning that although *Griffin* may have upheld the constitutionality of a particular search, it did not implicitly signify that any search *unlike* it is unconstitutional.[126] And although the search was "investigative" according to the Ninth Circuit,[127] the Supreme Court held that the search was not unconstitutional. The Court found that the search condition did not require that the search be for a probationary purpose, and refused to imply any purpose requirement into the condition,[128] thereby rejecting the "mere subterfuge" test.

By refusing to assess Hancock's subjective intent, the Court in *Knights* seemed to follow the California approach of upholding warrantless searches in light of explicit consent-to-search agreements regardless of the purpose of the search. But the Court did not adopt the California approach entirely; instead, the Court interpreted the Fourth Amendment question in a slightly different manner. Had a California court decided *Knights*, the search would have been permissible because (1) the officer's subjective intentions would have been irrelevant and (2) the defendant would not have had an objectively reasonable expectation of privacy. While the U.S. Supreme Court similarly found that Hancock's subjective intentions were irrelevant, it did not find that the defendant had *no* reasonable right to privacy, which would have been consistent with the California approach. Instead, the Court expressly declined to "decide whether Knights' acceptance of the search condition constituted . . . a complete waiver of his Fourth Amendment rights."[129] However, the Court *did* hold that Knights' reasonable expectation of privacy was reduced, because "[t]he probation order clearly expressed the search condition and Knights was unambiguously informed of it."[130] The Court ultimately found that this diminished expectation of privacy justified a reduced requirement regarding warrantless searches of probationers, and held that "reasonable suspicion" can satisfy constitutional scrutiny when probationers who sign these agreements are searched.[131]

125. *Knights*, 534 U.S. at 117.

126. *Id.*

127. United States v. Knights, 219 F.3d 1138, 1144 (9th Cir. 2000).

128. 534 U.S. at 122.

129. *Id.* at 118. Furthermore, the court also declined to "decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy." *Id.* at 120 n.6. Therefore, by leaving the question of waivability open to lower courts, *Knights* does not render the California approach invalid.

130. *Id.* at 119.

131. *Id.* at 121 ("When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interests is reasonable.").

Thus, in *Knights*, the Court struck a balance between the drastically different approaches taken by the Ninth Circuit and the California courts. On one hand, the Court's new standard aligns with the California approach, in that the subjective intentions of searching officers should not be assessed. On the other hand, the Court's *Knights* test differs from the California approach because it does not recognize that probationers who sign consent agreements have completely waived any reasonable expectation of privacy. In finding that a lower level of suspicion can make a search reasonable, the Court did not decide whether a probationer who signs a consent agreement retains a privacy right which is protected by the Fourth Amendment.

But why did the Court expressly decline to decide the question of waivability and fail to recognize that a probationer who signs a consent agreement has no expectation of privacy? Indeed, this is the most substantial difficulty with the *Knights* decision, and the remainder of this Comment will address why the Court should have recognized that consent conditions in probation agreements must be enforced.

III. DISCUSSION: WHY FEDERAL COURTS SHOULD ADOPT THE CALIFORNIA APPROACH

A. The California Approach is Justified by a Theory of Consent and/or Waiver

This Comment offers several reasons for federal courts to begin recognizing the enforceability of warrantless, suspicionless search conditions in probation agreements. Chief among these reasons is the fact that certain probation agreements (such as those at issue in *Knights*) plainly authorize warrantless, suspicionless searches, and by signing the agreement, a probationer has validly relinquished her Fourth Amendment rights.

1. The Consent and Waiver Exceptions to the Warrant Requirement

The Supreme Court has been clear in holding that "consent" and "waiver" are established exceptions to the Fourth Amendment's warrant requirement.[132] But because the concepts are inexorably linked, courts and commentators have had some difficulty distinguishing consent from waiver. For example, consider the following sentence: "[C]onsent is a voluntary waiver of a person's Fourth Amendment rights."[133] While this is undoubtedly

132. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Zap v. United States, 328 U.S. 624 (1946).

133. Kneafsey, *supra* note 108, at 1245.

true—consent *is* a voluntary waiver of certain protections—using "waiver" to define "consent" reflects the fundamental confusion between the two doctrines.[134] Accordingly, this Comment offers the following definitions for the purposes of search conditions in probation agreements: The language in probation agreements creates a waiver of Fourth Amendment rights whereby a probationer consents to future searches. Therefore, a defendant on probation could challenge any probation condition under the theory of waiver, or the search itself under the theory of consent.

Beginning with waiver, defined in the Supreme Court's decision in *Johnson v. Zerbst*,[135] we see the initial requirement of a "knowing and intelligent waiver" of Fourth Amendment rights.[136] Despite this requirement, the Supreme Court has been increasingly willing to allow criminal defendants to waive their constitutional rights in a number of situations.[137] In *United States v. Mezzanatto*,[138] the Court held that evidentiary rules carry a "presumption of waivability,"[139] because "[a]bsent some 'overriding procedural consideration that prevents enforcement of the contract,' . . . agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections."[140] Courts have "liberally enforced" these agreements to waive various exclusionary rules of evidence.[141]

Turning to consent, the Supreme Court has held that the doctrine of consent carries a lower constitutional bar than does waiver. In *Schneckloth v. Bustamonte*,[142] the Court held that the strict *Johnson* test for waiver does not apply to consent searches. Thus, to pass Fourth Amendment scrutiny after *Schneckloth*, consent to search can be express or implied, but the search must (1) be voluntary, (2) not be the product of duress or coercion, and (3) fall within the scope of the consent.[143] To determine whether consent is voluntary, courts look to the totality of the circumstances surrounding the

134. *See* Jonathan V. Holtzman, *Applicant Testing for Drug Use: A Policy and Legal Inquiry*, 33 WM. & MARY L. REV. 47, 86 (1991).

135. 304 U.S. 458 (1938).

136. *See* Kneafsey, *supra* note 108, at 1244 (citing *Johnson*, 304 U.S. at 464).

137. *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196 (1995); Peretz v. United States, 501 U.S. 923 (1991).

138. 513 U.S. 196.

139. *Id.* at 202.

140. *Id.* (citation omitted).

141. *Id.*

142. 412 U.S. 218 (1973).

143. *Id.* at 248–49; *see also* Washington v. Chrisman, 455 U.S. 1, 9–10 (1982); Kneafsey, *supra* note 108, at 1243–45 & n.64.

consent.[144] Consent is a question of fact; when resolving it, trial courts are given tremendous deference, and "[t]heir findings are not to be overturned unless clearly erroneous."[145] The government must prove that consent was voluntary; if it does, then evidence obtained by an otherwise unlawful search will be deemed admissible.[146]

The Supreme Court has also held that if a defendant consents to a search in order to receive a benefit from the government, this does not necessarily render the consent involuntary. In *Zap v. United States*,[147] petitioner was required to open his "accounts and records" to the government in order to receive a government contract.[148] When law enforcement officers searched the petitioner's records, he objected, but the Court held that the search was lawful. The Court reasoned that because the petitioner "specifically agreed to permit inspection of his accounts and records, he voluntarily waived [his] claim to privacy."[149] *Zap* stands for more than the idea that a benefit sought by a consenting defendant does not necessarily render the consent involuntary; the case also supports the argument that a defendant's consent may be validly granted in advance, and that this consent will be enforced in court.[150]

2. Consent and Waiver as Applied to Probationers

Under the theories of consent and waiver, "federal and state courts have consistently held that the [F]ourth [A]mendment allows probation officers to search probationers without a warrant or probable cause."[151] "Traditionally, courts have afforded probationers . . . little to no [F]ourth [A]mendment protection. Some courts have held that . . . probationers may be searched at

144. In assessing whether consent is voluntary, courts may look at a number of factors, none of which are dispositive:

1. Knowledge of the constitutional right to refuse consent;
2. age, intelligence, education, and language ability;
3. the degree to which the individual cooperates with the police;
4. the individual's attitude about the likelihood of the discovery of contraband; and
5. the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior.

Jeffrey Haningan Kuras et al., *Thirty-first Annual Review of Criminal Procedure, I. Investigation and Police Practices: Warrantless Searches and Seizures*, 90 GEO. L.J. 1130, 1166–68 (2002) (footnotes omitted).

145. Kneafsey, *supra* note 108, at 1244 (citing United States v. Twomey, 844 F.2d 46, 51 (1st Cir. 1989)).

146. *Cf.* Rosen, *supra* note 24, at 1192.

147. 328 U.S. 624 (1947).

148. *Id.* at 627.

149. *Id.* at 628.

150. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

151. Rosen, *supra* note 24, at 1192.

any time . . . ."[152] The reduced level of protection for probationers flows logically from one of three theories first identified by Wayne LaFave: constructive custody, act of grace, and express consent/waiver.[153] These theories will be discussed in turn.

a. Constructive Custody

According to the constructive custody theory, "because offenders serving a community sentence are subject to correctional control, they are in technical custody and are entitled to no more rights than prisoners enjoy."[154] And because "a prisoner has no legitimate expectation of privacy in his prison cell, a probationer . . . has no expectation of privacy in her home."[155]

Legal scholars have thoughtfully criticized the constructive custody argument. Sunny Koshy explains that the deprivation of privacy rights is not merely an incident of custody, but instead "derives from the state's compelling interest in maintaining prison security and discipline."[156] So if we use a Fourth Amendment balancing test, on the government's side of the scale the requisite "interest" is reduced because "[t]he state has no compelling interest in regulating the [probationer's] home environment to prevent escapes and riots."[157] And on the probationer's side of the scale (expectation of privacy), the probationer has some additional interest than a prisoner, because probationers "live in free society and, for the most part, may conduct themselves as do members of the public at large. . . . [T]hey do not expect to be searched whenever they return to their home."[158]

Because both sides of the Fourth Amendment analysis are so drastically altered from prison to probation, the direct "analogy between prisoners . . . and probationers . . . falls apart."[159] Thus, the constructive custody theory seems to provide little justification for reducing the Fourth Amendment protections afforded probationers. We turn next to an alternative theory of reducing a probationer's privacy interest: the act of grace.

152. Sunny A.M. Koshy, Note, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449, 463 (1988).

153. Rosen, *supra* note 24, at 1192–93 (citing WAYNE R. LAFAVE, SEARCH AND SEIZURE §10.10(a)–(c) (2d ed. 1987)).

154. *Id.* at 1193.

155. Koshy, *supra* note 152, at 464 (footnote omitted).

156. *Id.* at 465.

157. *Id.* at 466. Koshy further explains that "[a]lthough the state does possess an interest in preventing an unauthorized departure from the jurisdiction, this type of an escape does not entail the physical danger present in a prison break-out." *Id.*

158. *Id.*

159. *Id.* at 465.

b. Act of Grace/Implied Consent

Under the act of grace theory, "because a probationer has no right to release, the court is free to condition an offender's freedom in whatever way it deems appropriate, subject only to the requirement that the condition be reasonably related to the objectives of probation."[160] Because "the state need not grant . . . probation, the state may attach whatever conditions it desires to the privilege."[161] The act of grace theory rests on the fundamental premise that probationers impliedly consent to the terms of probation as part of the probation grant.[162]

Both courts and commentators have "cast doubt upon the view of probation as an 'act of grace.'"[163] In *Gagnon v. Scarpelli*,[164] the Supreme Court held that "a probationer can no longer be denied due process, in reliance on the [theory] . . . that probation is an 'act of grace.'"[165] Furthermore, "the act of grace theory erroneously assumes that the . . . probation system exist[s] merely for the benefit of the convict," and ignores the government's interest in cost-effective and efficient rehabilitation of prisoners.[166] In other words, probation can be seen as an "implementation of correctional policy" which is "no more a matter of grace than the decision to rehabilitate a slum or locate a highway."[167]

Thus it is clear that neither the constructive custody nor the act of grace theory retains much persuasive force for justifying a reduced level of suspicion for probationers. Although each theory may initially seem convincing, both of them unravel under closer analysis. But these theories are only tangentially relevant to cases like *Knights*, for two reasons. First, both the constructive custody and act of grace theories come from older scholarship, and are now largely irrelevant because they have been rejected by courts.[168] But more importantly, it cannot be denied that the probation agreement in *Knights* at least created some sort of express agreement between the probationer and the government, even if the consent itself is disputed. Therefore the third mode of analysis must be appropriate, and the only applicable theory is that of express consent or waiver.

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160. Rosen, *supra* note 24, at 1194.
161. Koshy, *supra* note 152, at 466.
162. *Id.*; Rosen, *supra* note 24, at 1194; *see also* United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10, 15 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969).
163. Rosen, *supra* note 24, at 1194.
164. 411 U.S. 778 (1973).
165. *Id.* at 783 n.4.
166. Koshy, *supra* note 152, at 467.
167. Comment, *The Parole System*, 120 U. PA. L. REV. 282, 294 (1971).
168. *See generally* Koshy, *supra* note 152; Rosen, *supra* note 24.

c. Express Consent/Waiver

The express consent/waiver theory posits that "the document informing a probationer of the conditions of his release [is] a contract in which the offender accepts the government's offer to serve a community based sentence in return for the offender's agreement to comply with the conditions imposed upon his liberty."[169] Fundamental to this theory is the assumption "that an individual may waive his constitutional rights."[170] If a defendant does so and "agrees to a search condition, he enters into the equivalent of a . . . probation 'contract' and effectively gives up his [F]ourth [A]mendment rights."[171]

Like the two theories articulated above, the express consent/waiver theory has not been immune to scholarly criticism. The most popular counterargument contends that the consent and/or waiver is involuntary and therefore invalid. Using "waiver" language, critics claim that because "[t]he convict is faced with prison on the one hand and relative freedom on the other, the threat of incarceration casts serious doubts on the 'voluntariness' of the waiver."[172] Using "consent" language yields similar reasoning:

> Courts often incorrectly hold that consent to a search and seizure condition is voluntary, basing their decisions on the dubious reasoning that because there is no constitutional right to probation . . . convicts are entirely free to choose between accepting the condition and being released or rejecting the condition and going to prison. Obviously, it is pure fiction to conclude that agreement to abide by a search and seizure condition is not coerced when a defendant is confronted with a choice between the freedom of serving a community-based sentence and incarceration.[173]

Another variation on this argument is that the probation agreement is a contract of adhesion, because the defendant is not afforded the opportunity to negotiate the terms of the agreement. In any case, critics of the California approach claim that because the defendant must choose between two considerably unattractive alternatives (prison versus probation under a suspicionless search condition), the probationer's consent cannot be deemed voluntary.

Rebutting this counterargument is an essential purpose of this Comment. Below, we will see why a probation agreement with a consent-to-search condition *does* create a valid waiver of a probationer's Fourth

169. Rosen, *supra* note 24, at 1194.
170. Koshy, *supra* note 152, at 467.
171. *Id.*
172. *Id.* at 468.
173. Rosen, *supra* note 24, at 1195 (footnotes omitted).

Amendment protections, and why the "involuntary" counterargument identified above is not persuasive.

3. Search Conditions Such as the One in *Knights* Constitute a Probationer's Waiver of His Fourth Amendment Protections and His Consent to Warrantless, Suspicionless Searches

The plain language of probation agreements like those used in *Knights* clearly supports the argument that the probationer has consented to warrantless, suspicionless searches and has therefore waived his Fourth Amendment protections. The language of the search condition in *Knights* is boilerplate for many California probationers.[174] The probationer agrees to "submit his person, property, place of residence, or vehicle, to search at anytime, with or without a search warrant, warrant of arrest, or reasonable cause by any probation officer or law enforcement officer," and signs the agreement which also indicates that: "I have received a copy, read and understand the above terms and conditions of probation and agree to abide by same."[175] A plain language reading of this search condition reveals that:

1. *The probationer has agreed to a warrantless search.* The condition specifies that the search may be "with or without a search warrant, [or] warrant of arrest."
2. *The probationer has agreed to a suspicionless search.* The condition specifies that the searching officer need not have any "reasonable cause" to search. This suggests that the Supreme Court's holding in *Knights* (finding that an officer must still have reasonable suspicion to search a probationer without a warrant)[176] is in tension with the plain language of these probation agreements.
3. *A search can be conducted by any law enforcement officer.* The search condition expressly includes "any probationer or law enforcement officer" in the agreement.
4. *There is no distinction between probation and investigative searches.* Because a search can be conducted by any probation officer or law enforcement officer, and probation officers conduct probation searches while other law enforcement officers conduct investigation searches, the inclusion of any law

174. *Cf.* Brief for the United States at 10, United States v. Knights, 534 U.S. 112 (2001) (No. 00-1260), *available at* 2000 U.S. Briefs 1260 (LEXIS).

175. *Knights*, 534 U.S. at 114.

176. *Id.*

enforcement officer in the condition strongly suggests that any type of search can be conducted.[177]

5. *The probationer is aware of, and agrees to, the terms of the agreement.* The signature block confirms that the probationer has read the agreement, understands it, and "agrees to abide by" its terms.

The language included in these probation agreements could not be any more explicit in creating an express waiver, and thus a plain language reading of the probation agreement clearly supports a finding that a probationer has waived the usual Fourth Amendment protections afforded everyday citizens, and thereby consents to warrantless searches during his probationary period. "Given [that] the consent-to-search terms agreed to by Knights are similar to those included in most California probation agreements, a reasonable person could construe them to permit warrantless searches for purposes [that] the California Supreme Court has deemed valid."[178]

But the counterargument of "involuntary waiver" or "involuntary consent" still lurks. This Comment next establishes how this hypothesis proves too much, and illustrates how, despite the fact that a defendant must choose between prison and probation subject to suspicionless searches, she retains a legitimate choice. Therefore, accepting probation cannot be deemed involuntary.

When probation agreements are imposed, the defendant may accept the probation term or serve time in prison. Indeed, some defendants choose prison instead of probation; although this may seem illogical, it is a legitimate choice nonetheless.[179] If a defendant's decision is always involuntary whenever she makes a decision against her interest to get a benefit from the government, almost any agreement made by a defendant in a criminal proceeding would be invalid. For example, the government may attempt, through negotiation, to persuade a criminal defendant to plead guilty.[180] Indeed, "consent to a search condition [is] 'no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain.'"[181] Courts enforce these guilty pleas even though there is a tremendous disparity in bargaining power (which also exists in the probation context), and the defendant is making the plea in

177. The California Supreme Court has agreed with this interpretation, finding that the probation/investigation distinction is irrelevant when assessing the validity of probationary consent conditions. *See supra* Part II.B.1. This is of course in direct conflict with the Ninth Circuit's "mere subterfuge" test.

178. Roberson, *supra* note 20, at 192.

179. *See id.* at 194 ("Defendants are not compelled to accept probation, and the fact that incarceration or other punishment are the only alternatives does not render the choice involuntary.").

180. In fact, an offer of probation is often part of an attempt to get a defendant to plead guilty.

181. Kneafsey, *supra* note 108, at 1250 (quoting People v. Bravo, 738 P.2d 336, 341 (Cal. 1987)).

order to get a benefit from the government (prosecution under a lesser charge).[182] "The idea that an individual may enter into agreements with the government forgoing certain constitutional rights in return for favorable treatment reflects the general principle that an individual may voluntarily consent to a search that might otherwise be prohibited by the Fourth Amendment."[183] Therefore, a probationer's consent should be deemed voluntary.[184]

A probationer's advance waiver of Fourth Amendment protection is more likely to be knowing and intelligent than a criminal suspect's consent to search, especially a search in the field, outside of court. When a probationer waives her Fourth Amendment rights, defense counsel is present to provide advice, and the proceeding itself is conducted by a neutral judicial official. The procedural protections inherent in the courtroom setting ensure that the waiver was voluntary and was not a product of coercion or duress. On the other hand, many typical "consent" cases involve a criminal suspect who gives consent, in the field, to a searching officer, where such procedural protections are absent.

Of course, a court might find that voluntary consent *could* exist in a limited context: when the circumstances surrounding the actual imposition of the probation condition more clearly illustrate the probationer's consent. For example, if the language used in the probation agreement were more explicit (which seems difficult, given the already explicit nature of the agreement), or the condition required the probationer to orally acknowledge to the court his consent to a waiver of his Fourth Amendment rights, this could perhaps suffice in convincing a court that his consent was legitimate.[185] But this approach has not been followed. Instead, courts invalidating a probationer's consent to search have done so only under the theory that a probationer can *never fully waive* his Fourth Amendment protections, regardless of any individual circumstances which might more clearly suggest consent or waiver.[186]

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182. *See* Bordenkircher v. Hayes, 434 U.S. 357, 360–65 (1978) (upholding a defendant's waiver of his right to trial despite a guilty plea to obtain a reduced sentence).

183. Roberson, *supra* note 20, at 193.

184. Koshy also claims that the probationer will always choose the "relative freedom" of probation instead of incarceration. Koshy, *supra* note 152, at 468. Koshy's choice of words reflects a popular misconception regarding probation; a probationer who agrees to such a search term will not enjoy "relative freedom," especially if the search condition to which he has agreed will actually be enforced.

185. But this alternative approach should not result in finding that the typical California probation consent agreement would be invalid, because it seems that the common search condition in California probation agreements could not be any more explicit than it already is.

186. *Cf.* United States v. Knights, 219 F.3d 1138, 1142 (9th Cir. 2000), *rev'd*, 534 U.S. 112 (2001) ("[W]e have made it clear that his consent must be seen as limited to probation searches, and must stop short of investigation searches.").

But there is little support for the argument that some minimal amount of Fourth Amendment protection exists that cannot be waived. First, as noted above, the Supreme Court has held that like other constitutional rights, Fourth Amendment rights can be completely waived.[187] Second, imposing a consent condition is part of a judge's discretion at sentencing; thus courts that do not recognize these conditions as enforceable also directly conflict with a rich history of Supreme Court precedent vesting tremendous discretion with the sentencing judge.[188]

From a common sense perspective, it seems that a probationer who expressly consents to any suspicionless search of his home or person does not have an actual, subjective expectation of privacy. When a probationer signs a contract like the one at issue in *Knights*, he will likely think that a police or probation officer can search his person or property at any time, and therefore will not have any expectation of privacy. The agreement is explicit and comes in a courtroom setting, so the probationer is clearly "on notice" of the probation condition.[189] To find otherwise, that a consent agreement such as this has absolutely *no effect* on a probationer's subjective expectation of privacy, nearly requires a leap of faith.

Waivers authorized by agreement differ considerably from waivers authorized by statute. When search conditions are imposed by statute, courts should recognize that a probationer might retain some subjective expectation of privacy, and proceed to assess the objective reasonableness of his privacy expectation in light of his status as a probationer. Here, the *Knights* Court erred: It failed to recognize that the reasonable expectation of privacy analysis must be substantially different when the search condition is imposed by agreement and not by statute. If the subjective intent of two contracting parties is expressed in the contract itself, courts should look to the contract between the probationer and the government to determine the probationer's subjective intent when assessing his expectation of privacy. California courts have also erred slightly; while they have found that probationers have waived their Fourth Amendment rights (either because they do not have a subjective expectation of privacy or because their expectation is objectively unreasonable), they have yet to consistently hold that *the contract* between the two

187. *See supra* Part III.A.1.

188. *See, e.g.*, Williams v. New York, 337 U.S. 241 (1949); *see also supra* notes 27–34 and accompanying text.

189. Again, perhaps a helpful suggestion would be to require sentencing courts to explain the warrantless search condition to the probationer before he signs the agreement, which would virtually ensure that the probationer would be placed on valid notice of the search condition.

parties necessitates that the probationer's subjective expectation of privacy be addressed, a concept central to the basic theory of express consent/waiver.[190]

Considering the consent agreement without any discussion of the "subjective" privacy expectation may be logical in other areas of Fourth Amendment jurisprudence—specifically, when a person's reasonable expectation is *impliedly* diminished and express consent is not an issue. The Supreme Court has held that for high school students,[191] railroad employees,[192] and certain employees of the Customs Service,[193] reasonable expectations of privacy can be impliedly diminished. But these decisions are distinguishable; because they do not involve a preexisting agreement between the government and the person subject to search, the decisions do not apply when a probationer has *explicitly* consented to a suspicionless search. On the other hand, in express consent cases such as *Zap* and *Schneckloth*, the Court correctly looked to the preexisting agreement to find that the defendant had consented to the search.[194] So an impliedly diminished expectation of privacy analysis differs from the express consent cases, and it seems that finding that a probationer retains some subjective expectation of privacy is only logical when the probation is imposed by statute, just as it was in *Griffin*.[195]

A final salient difference between the impliedly diminished expectation of privacy cases and those such as *Knights* is that a probationer is placed on probation in lieu of imprisonment, and the grant of probation affects probationer's subjective privacy expectation. Admittedly, the constructive custody theory might not be relevant, and the government might not retain the same interest in controlling the probationer as it does with a prisoner. But we will see later how the government's separate interests—rehabilitation of the offender and ensuring pubic safety—may equate with the government's interest in maintaining a secure prisons.[196] And furthermore, for the purposes of express consent, it must be relevant that defendant receives probation in lieu of prison. Because the Supreme Court has held that a prisoner has *no*

190. *See supra* notes 169–171 and accompanying text.

191. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

192. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

193. *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

194. Admittedly, the probation agreement in *Knights* may appear less "voluntary" than the petitioner's consent in *Zap*: Zap could have declined the government contract with no consequence, but if Knights had refused the government's offer he would have gone to prison.

195. *Griffin* seems analogous to the line of cases recognizing an impliedly diminished expectation of privacy, because in neither situation do we have a preexisting contract which must necessarily be considered to affect the person's subjective expectation of privacy.

196. *See infra* Part III.C.

subjective expectation of privacy,[197] the probationer should be subject to some reduced subjective expectation at least until the probationary period has expired. If a probationer immediately gains access to the full protections afforded by the Fourth Amendment—despite an agreement quite to the contrary—then it seems purposeless to use warrantless search conditions in probation agreements, which could in turn eliminate the practicality of probation for most defendants.

In *Knights* the Supreme Court should have recognized that a California-type waiver should be analyzed under the doctrine of express consent, not under the theory of an impliedly diminished expectation of privacy. Thus it seems inaccurate and illogical to salute *Knights* for providing a straightforward test. In fact, the *Knights* approach wraps the Fourth Amendment probation riddle into a deeper enigma. In *Knights*, the Court first recognizes that a (questionable) right to privacy exists, and then must look at another factor (the waiver and/or consent) in assessing the reasonableness of the search. Clearly, the most straightforward analysis can be found in California, where the waiver is upheld. The California approach should therefore be adopted in federal courts. Specifically, given (1) that a defendant may consent to searches in advance, (2) that this consent may be deemed voluntary even if it is given in exchange for a benefit from the government, and (3) the strong presumption of waivability even for constitutional rights, it seems clear that search conditions in probation agreements should be fully enforceable on a consent-based theory.

B. The Policies Underlying the *Griffin* "Special Needs" Test Support the Use and Enforceability of Agreed-Upon Search Conditions in Probation

In addition to the theories of constructive custody, act of grace, and express waiver/consent, courts have used an additional device to justify a reduced level of Fourth Amendment protection for probationers: the "administrative search" exception to the usual warrant and probable cause requirements.[198] Courts using the administrative search exception balance "the degree of the intrusion on the probationer's individual right of privacy against the importance of the government's need to perform the search."[199] Rosen claims that the administrative search analysis is preferable to the theories described in Part III.A because the administrative search exception

197. *See* Hudson v. Palmer, 468 U.S. 517, 536 (1984) (holding that "the Fourth Amendment has no applicability to a prison cell").

198. *See* Rosen, *supra* note 24, at 1195.

199. *Id.* at 1195–96.

"forces courts to evaluate the policy implications of their decisions."[200] While the constructive custody, act of grace, and express consent theories allow "courts to deny probationers virtually any right of privacy without confronting the important underlying policy concerns," the administrative search balancing test requires courts to analyze "the reasons why they conclude that probationers' rights must be subordinated to the government's claimed interest in performing particular searches."[201] Thus, because a court will engage in a much different analysis when deciding a case under an administrative search balancing test than it would when applying a theory such as express consent, we must place the administrative search theory into a separate analytical box. The landmark Supreme Court decision applying administrative search regulations to probationers is *Griffin v. Wisconsin*.

1. Interpretation of *Griffin*: A Predictable Circuit Split

In Part II.B.3, we saw how the *Griffin* Court applied the "administrative search" doctrine to uphold searches pursuant to a "statutory condition that reduces a probationer's level of constitutional protection."[202] But courts were not consistent in their interpretation of *Griffin*. Because the statutory condition in *Griffin* contained the "reasonable cause" limitation, some courts "read *Griffin* to require *all* probation search conditions to be supported by reasonable cause."[203] Other courts, meanwhile, only applied *Griffin* when a statutory condition was at issue.[204] These differing theories created a predictable split when courts began assessing probation agreements containing consent-to-search terms. Because some courts found *Griffin* applicable only when warrantless searches were conducted pursuant to a statutory condition, and other courts took *Griffin* to apply to *all* searches of probationers, consent-to-search agreements were analyzed under two separate theories.

The First and Ninth Circuits read *Griffin* broadly, finding that even when a consent-to-search agreement exists, a floor of reasonable suspicion protects all probationers. These courts found that the *Griffin* decision created a threshold of "reasonable suspicion" of criminal activity for probationers, "regardless of the specific language of the 'search condition.'"[205] So, in these

200. *Id.* at 1196.
201. *Id.* at 1195–96.
202. *See supra* Part II.B.3.
203. Kneafsey, *supra* note 108, at 1250–51 (emphasis added).
204. *See, e.g.*, United States v. Schoenrock, 868 F.2d 289 (8th Cir. 1989).
205. Kneafsey, *supra* note 108, at 1251 (citing United States v. Gianetta, 909 F.2d 571, 575–76 (1st Cir. 1990)).

jurisdictions, "the search of a probationer must be supported by a reasonable cause even if that probationer's search condition requires him to submit to searches at any time for any reason."[206]

Meanwhile, the Eighth Circuit read *Griffin* narrowly, applying the holding only to cases where state law, expressed in a statutory probation condition, specifies that probationers will be subject to searches under a reduced level of suspicion. In *United States v. Schoenrock*,[207] the defendant was placed on probation, and agreed "to random searches of [his] premises."[208] Relying only on the probation agreement, and no other "suspicion," officers conducted a warrantless search of defendant's residence and found evidence of probation violations.[209] The defendant cited *Griffin*, claiming the search was unconstitutional. But the court disagreed, finding that *Griffin* did not establish a minimum level of "reasonable suspicion" protection for probationers, but that *Griffin* instead established "that reasonableness for probationary searches may be established by statute rather than by warrant."[210] California has taken a similar approach, reading "*Griffin* on its face and appl[ying] its holding only to situations where searches are conducted pursuant to an administrative regulation."[211] Thus, before *Knights*, a clear division between the First/Ninth Circuits and the Eighth Circuit had developed.

In deciding *Knights*, however, the Supreme Court settled this circuit split. When the Ninth Circuit decided *Knights*, it followed its rationale developed in earlier cases that a warrantless probation search must always be "reasonable" like the one in *Griffin* to pass constitutional muster.[212] But the Supreme Court rejected this notion, specifically disagreeing with the First and Ninth Circuits, which read "*Griffin* to imply a 'reasonable suspicion' limitation on all probation searches," regardless of whether the search condition was imposed by agreement or by statute.[213] The Supreme Court went so far as to call the Ninth Circuit's logic "dubious," and to find "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it" directly conflicts with the *Griffin* Court's express refusal to consider whether "warrantless searches of probationers [are] otherwise reasonable within the meaning of the Fourth

206. *Id.* at 1252.
207. 868 F.2d 289.
208. *Id.* at 290.
209. *Id.* at 291.
210. *Id.* at 292.
211. Kneafsey, *supra* note 108, at 1256.
212. United States v. Knights, 219 F.3d 1138, 1145 (9th Cir. 2000), *rev'd*, 534 U.S. 112 (2001).
213. Kneafsey, *supra* note 108, at 1256.

Amendment."[214] So after *Knights*, *Griffin* cannot be interpreted to require reasonable suspicion for every search of a probationer's home—especially when that probationer has consented to searches of his home as a condition for receiving probation.

2. Applicability of *Griffin* to *Knights*: How the Administrative Search Doctrine and the Policy Needs Articulated in *Griffin* Support Enforcing Warrantless Search Conditions in Probation Agreements

In the preceding part, we saw the advantages of using an express consent/waiver theory to uphold search conditions in probation agreements.[215] This Comment maintains that the express consent/waiver theory remains the most straightforward and accurate means to assess such agreements. However, supposing that a court either (1) rejects the express/consent waiver theory, or (2) requires additional justification for upholding search conditions in probation agreements, a court could alternatively use the administrative search doctrine to reach the same result.[216]

At the core of the administrative search test is a policy examination whereby the court scrutinizes "the reasons why . . . probationers' rights must be subordinated to the government's claimed interest in performing particular searches."[217] Indeed, we saw this in *Griffin*, as the Court identified three policy reasons (described as "special needs" of the government) to justify applying the administrative search exception to the Fourth Amendment. Specifically, the Court found that the typical warrant and probable cause requirements would (1) set up "a magistrate rather than a probation officer as the judge of how close a supervision the probationer requires," (2) "make it more difficult for probation officials to respond to evidence of misconduct," and

214. *Knights*, 534 U.S. at 117–18.

215. *See supra* Part III.A.3.

216. Supporters of consent agreements for probationers have claimed that *Knights* was correctly decided under a special needs analysis because of its factual similarity to *Griffin*. This is plainly incorrect; the cases are critically different because the probationer in *Griffin* was subject to warrantless searches *by statute*, whereas the probationer in *Knights* was subject to warrantless searches *by agreement*. Therefore, one could argue that because of the differences between *Griffin* and *Knights*, it would be incorrect for a court to use a special needs test in cases where a probationer has agreed to a search condition. This argument is valid, but only to a limited extent: While it is inaccurate to claim that *Knights* is factually identical to *Griffin*, it is not true that the broader administrative search doctrine is irrelevant whenever probation is imposed by agreement instead of by statute. *See* Skrmetti, *supra* note 114, at 1210 (finding that *Griffin* was "a case closely analogous to *Knights*").

217. Rosen, *supra* note 24, at 1196.

(3) "reduce the deterrent effect that the possibility of expeditious searches would otherwise create."[218]

Just as the *Griffin* Court found that the warrant and probable cause requirements would place an undue burden on probation systems, failing to recognize the enforceability of suspicionless search conditions in probation agreements has placed a similar burden on probation systems. Each of the three burdens identified by the *Griffin* Court are applicable in cases where consent is imposed by agreement; therefore "reasonable suspicion" should not be required when probation is imposed by agreement because of the burdens this limit places on the probation system. Note that whether these are *good* policies will be taken up in the next part; here we merely observe that the policy concerns are *similar*, if not identical.

First, the *Griffin* Court found that the probation officer, and not a magistrate, should have discretion to supervise the probationer.[219] This concern is unchanged from *Griffin* to *Knights*. A lower level of suspicion for probationers (regardless of whether consent is found in a statute or an agreement) means that probation officers may search more often, meaning that the probation officer has increased discretion to monitor the probationer. Second, the *Griffin* Court sought to make it easier for probation officials to respond to evidence of misconduct.[220] Again, this policy goal also exists when searches are imposed by agreement. No matter how the level of suspicion is reduced, whether it is by statute or agreement, a lower level of protection will make it easier for probation officials to detect misconduct. Third, the *Griffin* Court found that the usual warrant and probable cause requirements would reduce the deterrent effect of unexpected searches.[221] And yet again, this policy does not vary when we discuss consent imposed by agreement. In fact, when consent is imposed by agreement instead of statute, it is more likely that the probationer will have an increased awareness of the search condition, because he reads and signs the agreement in court, with the advice of his attorney, and before of a neutral judicial official. Thus, in the agreement context, we might see a higher deterrent effect. So imposing the usual probable cause requirements in the face of an agreement, instead of a statute, might have even greater policy implications than what the Court referred to in *Griffin*. Nonetheless, in light of these similarities in policy, it is clear that consent agreements are justified by the same policies identified in

218. Griffin v. Wisconsin, 483 U.S. 868, 876 (1987).
219. *Id.*
220. *Id.*
221. *Id.*

Griffin, and should therefore be upheld under the administrative search exception to the Fourth Amendment.

The above analysis illuminates the importance of policy arguments when assessing the rights of probationers and the Fourth Amendment. And as we will see below, these policy concerns are not limited to the special needs test, but are also relevant for determining whether such consent-to-search clauses should be used in the probation system.

C. Allowing Warrantless, Suspicionless Searches of Probationers Furthers the Public Safety and Rehabilitative Purposes of Probation

In Part I.A, we saw that the two chief purposes of probation are ensuring public safety and furthering rehabilitation of the probationer.[222] First, we must acknowledge that allowing warrantless searches of probationers will undoubtedly help ensure public safety. Warrantless search conditions afford law enforcement officers greater discretion to monitor probationers, and the "conditions are an effective monitoring technique to assure compliance with [probation] conditions."[223] And because probationers as a class are more likely to commit crimes than ordinary members of society,[224] increased surveillance of probationers should almost certainly lead to at least a minimal reduction in crime.

Second, we turn to the rehabilitative purpose of probation. Early critics noted that because "there is a high probability that [probationers] will return to crime, close surveillance of their conduct is necessary to increase the likelihood that they will be effectively rehabilitated."[225] This makes sense; again because "the probationers [are] more likely than the ordinary citizen to violate the law,"[226] and because law-breaking activity hinders rehabilitation, closer supervision of a probationer and eliminating her law-breaking activity helps to ensure her effective rehabilitation. Therefore, to implement closer surveillance, a suspicionless search condition can be a logical choice for a sentencing judge.

But some dispute does exist regarding the effectiveness of suspicionless search conditions in furthering the rehabilitative purpose of probation. For example, Koshy claims that when a probationer is subject to warrantless, suspicionless searches, he "will feel either harassed by frequent searches or surprised by a rare and infrequent search. This unnecessary intrusion into his

222. *See supra* Part I.A.
223. Roberson, *supra* note 20, at 197.
224. *See* United States v. Knights, 534 U.S. 112, 120 (2001).
225. White, *supra* note 48, at 180–81.
226. *Knights*, 534 U.S. at 120 (quoting *Griffin*, 483 U.S. at 880).

privacy can only serve as a roadblock on the path to rehabilitation."[227] But Koshy's argument fails on several counts.

First, Koshy assumes that law enforcement officers will actually use suspicionless search conditions to conduct frequent searches that amount to harassment. Courts in California allowing warrantless searches will nevertheless invoke the exclusionary rule if the search is "arbitrary, capricious, or harassing."[228] Therefore, even though a probationer might not have the unbridled protection of the exclusionary rule at a subsequent criminal trial, it seems doubtful that a law enforcement officer would use the warrantless search condition to conduct searches amounting to harassment. Not only would a court exclude the evidence if the search was arbitrary, capricious, or harassing, but the probationer could invoke the usual civil remedies against the officer or the state for a pattern of objectionable searches.

Second, Koshy assumes that the probationer will be surprised by a rare and infrequent search. But the precise utility of rare and infrequent searches lies in their element of surprise. For example, I am surprised when I have to pull off the road for a DUI checkpoint, but the surprise element itself does not mean that DUI checkpoints are bad policy.[229] And furthermore, the surprise factor aids rehabilitation: When a probationer knows about an upcoming search, he can conceal evidence of unlawful activity during the search, which allows him to proceed through the probation system without being rehabilitated. Therefore, because warrantless search conditions will help change the probationer's behavior, it is clear that warrantless search conditions will help foster rehabilitation.[230]

Critics also argue that allowing suspicionless searches will undermine a probationer's confidence in the rule of law, thereby hindering rehabilitation.[231] In other words, "[t]eaching a probationer that the law will not respect

227. Koshy, *supra* note 152, at 478.

228. *See* People v. Reyes, 968 P.2d 445, 450 (Cal. 1998).

229. DUI checkpoints and similar "surprise" searches have become common in America. *See* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 956 (2003) (finding that "the reality experienced by American citizens today is that they are searched and seized on a regular basis").

230. *See* Roberson, *supra* note 20, at 198 (establishing that search conditions allow "law enforcement to ensure [that] a probationer is progressing, and providing disincentives to engage in further criminal activity").

231. *See* Koshy, *supra* note 152, at 478–79.

> The probationer who has been excused from jail in the hopes that he will become a law-abiding citizen is thus subject to what he may well perceive as lawless and random searches by the very person who is entrusted with the responsibility of overseeing and guiding his hoped-for rehabilitation. Such seeming lawlessness can hardly inspire the probationer's confidence and trust either in his probation agent or in the rule of law.

Id. (footnotes omitted).

his right to privacy will also teach him not to respect the law."[232] But ignoring the probationer's earlier consent-to-search agreement may similarly undermine a probationer's confidence in the rule of law. Indeed, if a California probationer even glances at his probation agreement, or the judge explains it to him, or his attorney reads it to him, he should *expect* a warrantless search during his probationary period. To use Koshy's language, he should actually be "surprised" only if such a search does *not* occur. In any case, it makes little sense to claim that warrantless search agreements do not foster rehabilitation because when the probationer is deterred from committing crime, this both promotes rehabilitation *and* protects the public—thereby furthering the dual purposes of probation.[233]

We must also look at the current state of the probation system to see why warrantless search conditions help to ensure rehabilitation and public safety. It is well documented that probation departments are inadequately funded, and "probation often means freedom from supervision."[234] According to critics, "probationers typically receive minimal supervision" and "enforcement of probation conditions is spotty."[235] And because "criminals tend to ply their trade in secret . . . considerable resources must often be expended to develop probable cause."[236] Therefore, because of fiscal limitations on obtaining probable cause, the *threat* of a suspicionless search may be even more important than the search itself. Enabling a sentencing judge to contract with a probationer so that the probationer is aware that he may be searched at any time without suspicion helps to implement this threat.

If the most fundamental objective of probation is to reduce crime (either for the rehabilitative benefit to the probationer or the safety benefit to the public), then suspicionless search conditions must be enforced because allowing such searches will reduce crime. Because many crimes are tied to possession of certain items (for example, drugs, and in the case of convicted felons, guns), and an officer could discover these items through a home search, the threat of suspicionless searches should be especially effective in deterring criminal activity, specifically possession of illegal items. For instance, because drugs can be destroyed easily,[237] a law enforcement officer might need to enter the probationer's home without first obtaining a warrant or

232. *Id.* at 479.

233. *See* Roberson, *supra* note 20, at 198 (arguing that "the same reasons for protecting the community apply equally to rehabilitation as well").

234. Petersilia, *supra* note 11, at 149.

235. Joan Petersilia & Susan Turner, *An Evaluation of Intensive Probation in California*, 82 J. CRIM. L. & CRIMINOLOGY 610, 610 (1991).

236. Lerner, *supra* note 229, at 1005.

237. *See* Cook, *supra* note 26, at 5.

otherwise conducting enough surveillance to have a required level of suspicion.[238] And because a more "serious" crime carries with it higher "precaution costs . . . to conceal any evidence,"[239] the threat of suspicionless searches should also deter criminal activity beyond possession of drugs and guns.

Probation might also have another, more practical purpose: providing an adequate alternative to imprisonment.[240] A judge will likely be more willing to impose probation on a defendant who would otherwise go to prison if the judge can be assured that the probationer will be subject to searches that will not be challenged on Fourth Amendment grounds.[241] Thus, if search conditions are consistently enforced, judges may be more willing to place defendants on probation, which will relieve the burdens placed on an already crowded prison system.[242] However, Koshy argues that subjecting probationers to searches at random is overly intrusive because the state may conduct a search whenever and wherever it chooses.[243] But this argument ignores the context in which these types of agreements are imposed; if the probationer does not accept the search clause, he will go to prison. Because prison supervision is the most intrusive form of punishment, the conditions of probation should not be criticized as intrusive, especially considering the alternative.

To address the problem of underfunding in the probation system, some experts have argued that the system should be changed. One suggestion involves intensive supervision probation [ISP], "a type of sanction that is more stringent and punitive than traditional probation but less expensive and coercive than incarceration."[244] Proponents of ISP and other systems argue that increasing the number of probation officers and the amount of supervision will make probationers less likely to engage in criminal activity.[245] While ISP might be an effective alternative to resolve some of the problems

238. Indeed, narcotics arrests are perhaps the best illustration of how warrantless search conditions will deter criminal activity by probationer and further the goals of probation.

239. Lerner, *supra* note 229, at 1005.

240. "Probation may be used as an alternative to incarceration, provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including promoting respect for the law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant." 18 U.S.C.S. app. ch. 5, pt. b (Law. Co-op. 2004).

241. *See* Roberson, *supra* note 20, at 197 (finding that with warrantless search conditions in place "trial judges have assurance that probationers will be closely monitored, and therefore will be more willing to offer probation").

242. *See id.* (finding that "probation remains a keenly attractive means of reducing the prison population"). As of 2002, there were over two million people in America's jails and prisons. U.S. Dep't of Justice, Bureau of Justice Statistics, Prison Statistics, *at* http://www.ojp.usdoj.gov/bjs/prisons.htm.

243. Koshy, *supra* note 152, at 478.

244. Petersilia & Turner, *supra* note 235, at 610–11.

245. *See* Petersilia, *supra* note 11, at 150.

with the probation system, it has one critical flaw which is common to *any* probation system that proposes stricter supervision of probationers: Additional supervision will be expensive. On the other hand, allowing suspicionless searches of probationers should garner at least some of the benefits of ISP and related programs, but *without any additional cost.* By affording both police and probation officers greater authority to search probationers, we will likely see a reduction in the recidivism rates of probationers without the burden of hiring additional officers. Recognizing the enforceability of agreed-upon search conditions therefore serves the purposes of probation at an extremely low cost.

D. Enforcing Suspicionless Search Conditions in Probation Agreements Promotes Clarity, Transparency, and Predictability in the Criminal Justice System

Criminal procedure is complex. Lerner describes the current state of probable cause as "that elusive and perhaps hopelessly indeterminate constitutional standard for the issuance of law enforcement warrants."[246] The warrant requirement itself is riddled with exceptions,[247] up to "two dozen at a most recent count."[248] And this Comment has only opened two of the "menagerie of doctrinal boxes"[249]—express consent and administrative searches—that the Supreme Court has created to analyze searches of probationers under the Fourth Amendment. Therefore, any attempt to promote a clearer and more straightforward analysis in criminal procedure should be met with critical acclaim.

This desire for clarity can be seen through a few initial reactions to the Supreme Court's decision in *Knights*. At least one scholar has hailed *Knights* as articulating a "straightforward" and "streamlined" analysis that clarifies the level of suspicion required for searches of a probationer.[250] Because *Knights* allegedly clarifies that reasonable suspicion protects all probationers

246. Lerner, *supra* note 229, at 953.

247. Author Kimberly Keller lists some of them:

> Consent searches, searches under the plain view doctrine, inventory searches, border searches, searches conducted during exigent circumstances, searches of automobiles and boats, searches of airports, searches incident to arrest, administrative searches of businesses, and the judicially-crafted "special needs" doctrine, which permits a warrantless search for a noninvestigatory purpose when the government has a special need justifying the search.

Kimberly S. Keller, *Privacy Lost: Comparing the Attenuation of Texas's Article I, Section 9 and the Fourth Amendment*, 34 ST. MARY'S L.J. 429, 435 (2003).

248. *See* Lerner, *supra* note 229, at 955.

249. *Id.* at 1008.

250. *See* Skrmetti, *supra* note 114, at 1201 (stating that *Knights* "introduces a new straightforward standard of reasonability for warrantless home searches that reflects an increased consideration of society's interest in aggressive prosecution of criminal activity," and offers "a streamlined Fourth Amendment jurisprudence with a straightforward test to determine whether a search is constitutional").

regardless of the individual probation agreement, this means that *Knights* provides a clearer test than what existed before. But *Knights* is far from straightforward. Lerner correctly identifies that Rehnquist's majority opinion only establishes the "cryptic" proposition that "'reasonable suspicion' is the appropriate standard when it is 'reasonable.'"[251] But regardless of the specific criticism, *Knights* cannot be hailed for providing a clearer analysis, especially when compared with the California approach.

The California approach simply applies the terms of the probation contract, with a bar on arbitrary, capricious, and harassing searches as a limitation. By contrast, the *Knights* analysis first requires the reasonable suspicion test, consisting of a complex balancing of a probationer's subjective and objective expectations of privacy.[252] Then, if reasonable suspicion exists, no specific analysis of the terms of the probation agreement is necessary.[253] But if reasonable suspicion does not exist, the Court offers no guidance as to the constitutionality of a search pursuant to a warrantless search condition in a probation agreement. This might suggest that the Court has left the states to decide whether warrantless searches can be imposed by probation agreement, but this Comment will later illustrate why that argument is problematic in the Fourth Amendment context.[254]

In any case, it is clear that the California approach is considerably more "straightforward" and "streamlined" than the test articulated in *Knights*. Below, we see that bringing this clearer, more predictable test to the probation system will have three specific advantages.

First, the California approach provides for consistency in punishments for defendants who agree to search conditions. The ongoing disparity between state and federal courts in California has created a procedural difficulty: If a probationer is subsequently charged in a California court, a search underlying the criminal charges will virtually never violate the Fourth Amendment. By contrast, probationers subsequently charged in California federal courts enjoy substantially more Fourth Amendment protections even though many of them have signed *the identical waiver*.[255] Therefore, the mere chance that a probationer will be subsequently charged in federal court instead of state court will largely determine the admissibility of evidence at

251. Lerner, *supra* note 229, at 1005.

252. United States v. Knights, 534 U.S. 112, 119–20 (2001).

253. *Id.* at 120 n.6.

254. *See infra* notes 256–260 and accompanying text.

255. Mark Knights—tried in federal court—signed a California probation agreement. Knights agreed to "submit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." *Knights*, 534 U.S. at 114.

trial. This is illogical; the same Fourth Amendment protects all defendants, so the same evidentiary standard should apply in both jurisdictions. A probationer should not enjoy increased federal constitutional protection solely because he violates a federal law instead of a state law. Unless the discrepancy is reconciled, California probationers who have signed consent-to-search agreements and subsequently violate federal law will continue to have a lower chance of being convicted than their counterparts who violate state law because prosecutors in state court will have more evidence available to them.

Second, under the current split between California and federal courts, it will be extremely difficult for federal and state law enforcement officers to conform their investigations to disparate requirements. This problem was apparent in *Knights*: The investigating officer (an employee of the Napa County Sheriff's Department) knew that Knights was on probation and therefore thought that a warrant was unnecessary—an incorrect assumption in federal court. On the other hand, federal agents might not know that California courts authorize suspicionless searches of a probationer's home, and might not use this tool during their investigations, although evidence seized could be used to support state charges. If courts at both levels begin to recognize the validity of a probationer's consent to suspicionless searches, both police and probation officers will be able to plan their investigations much more efficiently. Under the current framework, a police officer probably knows that state law authorizes warrantless searches without suspicion, but federal law requires reasonable suspicion—or something more. Therefore this officer will have to plan her investigation differently depending on whether she thinks the probationer is violating a federal or state law. Forcing an officer to take this additional factor into consideration handicaps her ability to execute a search quickly, thereby frustrating the primary purpose of the suspicionless search condition.

Third, consistent enforcement of probationary consent agreements will allow probationers to better plan their behavior. As noted above, the threat of a random search should itself be effective in changing the behavior of the probationer.[256] Under the current federal approach, however, a probationer might think that courts will "wink" at these consent agreements and invalidate them, thus negating any threat. But if this probationer is charged with a state violation, the condition will be enforced. Thus, either consent agreements should be uniformly enforced so probationers will know that they will indeed be subject to the threat of suspicionless searches, or consent

256. *See supra* Part III.C.

agreements should be consistently invalidated so probationers know they are entitled to some minimal degree of Fourth Amendment protection, regardless of any probation agreement they might have signed and in which court they are prosecuted. It simply does not make sense to base this distinction on whether a probationer has subsequently been charged in a state versus a federal court.

Despite these justifications for a uniform approach between California and federal courts, one could argue that differing constitutional standards might be appropriate. After all, if the states are indeed "laboratories of experiment,"[257] it is appropriate for states to take individual approaches which might differ from other states or the federal government. But this argument ignores the specifics of the Fourth Amendment.

Professors often use a so-called "building analogy" in describing "state and federal constitutional guarantees against unreasonable search and seizure."[258] In this "metaphorical building . . . federal protection under the Fourth Amendment establishes the floor of protection while the state constitution sets the ceiling."[259] Therefore, looking at the current disparity created by *Knights*, it seems as though the ceiling is paradoxically below the floor; probationers are afforded fewer rights when charged in state court as opposed to when they are charged in federal court. Applying this line of reasoning, one might argue that California must adopt the federal approach, in order to bring the ceiling back up, at least to the height of the floor. Initially, the Supremacy Clause seems to mandate such an approach.[260]

But this is not a case of the California Constitution providing fewer protections than the Federal Constitution. After Proposition 8, the California Constitution cannot exclude relevant evidence, leaving only exclusion pursuant to the Federal Constitution.[261] Thus, in California, because of the Supremacy Clause, the floor and the ceiling theoretically coexist. One could still argue, however, that California has misapplied the federal law incorporated into state law by Proposition 8. But this is not necessarily a case of California courts interpreting the Federal Constitution differently than their federal counterparts. Instead, California courts simply read the *probation agreement* differently than federal courts do, an action that neither capsizes the "building metaphor" nor violates the Supremacy Clause. And for the previous reasons identified in this Comment, the California reading

257. *See, e.g.*, New State Ice Co. v. Leibanuan, 285 U.S. 262, 302–03 (1932) (Brandeis, J., dissenting).
258. Keller, *supra* note 247, at 430.
259. *Id.*
260. *See id.* at 450.
261. *See In re* Tyrell J., 876 P.2d 519 (Cal. 1994).

of the probation agreement is much more logical and persuasive than the federal interpretation. But before concluding, this Comment must examine a final counterargument against the California approach.

E. The California Approach is Not Merely *Whren* Revisited

Those who disagree with the California approach and the position advocated in this Comment might echo the critics of *Whren v. United States* and argue that allowing a police or probation officer to search any probationer without suspicion opens the door to racial profiling. In *Whren*, police were patrolling a high drug area and stopped a motorist for a traffic violation.[262] Police noticed that the defendant had "two large plastic bags" of cocaine in his hands.[263] The defendant was arrested; at trial he argued that the stop was not for a traffic violation, but was a pretext for a drug investigation.[264] The Court disregarded the possible ulterior motives of the police, and found instead that just because an "officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action."[265]

Whren v. United States was widely criticized for eliminating the consideration of an officer's subjective intent from Fourth Amendment analysis. Because courts cannot weed out any "unconstitutional motives" of officers without looking at their subjective motivations, critics claimed *Whren* would allow officers to conduct searches as a "pretext to subvert the Fourth Amendment."[266] Similarly, one could argue that under the California approach, police will use their authority to search probationers without warrant or suspicion to subvert the Fourth Amendment. Indeed, this seems to be the logical genesis behind the Ninth Circuit's former "mere subterfuge" test.

Before we distinguish searches under the California approach from cases like *Whren*, we must note that the *Whren* decision seems to validate the California approach, because "[a]pplying the *Whren* analysis would justify [warrantless] searches unrelated to probation."[267] We need look no further than the facts in *Knights* to see that this is true. To get probation, Knights

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262. Whren v. United States, 517 U.S. 806, 808 (1996).
263. *Id.* at 809.
264. *Id.*
265. *Id.* at 813 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).
266. *See* David O. Markus, Whren v. United States: *A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91 (1998); *see also* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).
267. Roberson, *supra* note 20, at 196.

agreed to obey all laws.[268] Deputy Hancock had evidence implicating Knights in the vandalism against PG&E, "criminal activity in direct violation of his probation agreement."[269] Therefore, even if Hancock was searching for investigatory purposes instead of probationary purposes, the objective facts surrounding the search justify Hancock's action.[270]

But even though the search in *Knights* can be justified by the reasoning identified in *Whren*, warrantless searches of probationers should not give rise to the same widespread fear of racial profiling sparked by the *Whren* decision. The numbers speak for themselves. There are approximately 34 million African Americans in the United States.[271] About 30 percent of probationers—1.2 million—are African American.[272] This tells us that approximately 3.4 percent of African Americans are on probation.[273] Therefore, if an officer searches an African American suspect without anything more than suspicion based on race, there is only a 3 percent chance that the suspect will be on probation, and an even a smaller chance that the suspect will be on probation subject to a warrantless search condition. So the narrow approach advocated by this Comment—that the search condition should be enforced regardless of the officer's subjective intent—seems largely immune from the broader critique of *Whren*.

One could still argue that the danger in the California approach emerges when an officer knows that certain suspects are on probation and subject to warrantless search conditions. Then, an officer might racially profile those individuals who are on probation; that is, an officer would be able to single out minority probationers and monitor them more closely than the remainder of probationers being supervised. But this simply returns us to the larger concern of racial profiling, which is beyond the scope of this Comment. This Comment merely argues that all probationers, *including over two million white probationers*, should be subject to reduced protection under the Fourth Amendment when they agree to suspicionless search conditions.

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268. *See* United States v. Knights, 219 F.3d 1138, 1144 (9th Cir. 2000).

269. Roberson, *supra* note 20, at 196.

270. *Id.* at 197 ("Hancock, from an objective standpoint, exercised the search condition based on reasonable suspicion of criminal behavior on the part of Knights. Hancock believed that Knights was involved in criminal activity in direct violation of his probation agreement. Therefore the search advanced both investigative and probationary purposes as well.").

271. U.S. Census Bureau, Highlights from Census 2000 Demographic Profiles, *at* http://factfinder.census.gov/.

272. U.S. Dep't of Justice, Bureau of Justice Statistics, Probation and Parole Statistics, *at* http://www.ojp.usdoj.gov/bjs/pandp.htm.

273. 1.2 million African American probationers divided by 34 million African Americans.

And finally, accepting the theory that law enforcement officers could use probation conditions to violate the Fourth Amendment rights of a probationer begs the question; this notion requires one to first find that a probationer who has consented to searches in advance *actually has* Fourth Amendment protection. In other words, if the defendant's consent to suspicionless searches in a probation agreement constitutes a Fourth Amendment waiver, then an officer searching pursuant to a probation condition could not "subvert" the Fourth Amendment at all. Furthermore, although the search condition affords additional discretion to law enforcement officers, it seems likely that law enforcement officers *should* be granted greater discretion to search probationers. A traditional justification for probation searches is that probationers are more likely to commit crimes,[274] so officers acting in the public good should be able to search probationers without suspicion, especially when the probationer has agreed to subject himself to such searches as a condition of probation. In addition, as we have noted before, California recognizes an exception that can help combat the concern with police misconduct. California only allows suspicionless searches of probationers that are not "arbitrary, capricious, or harassing."[275] So reviewing courts *can* look to the subjective intent of officers who search probationers, but only to ensure that there was not severe misconduct of this type. Finally, it is important to note that the exclusionary rule is a judicially created remedy to protect the public from unreasonable searches and seizures, and that allowing suspicionless searches of probationers has an extremely limited effect on this protection. Barring a clerical error where the police mistakenly think that a person is on probation, searches will only affect probationers, not the general public. Therefore, California courts should not be criticized for excluding an officer's subjective intent from consideration when assessing the Fourth Amendment protections of probationers.

CONCLUSION

In California, courts have chosen to include warrantless, suspicionless search conditions in certain probation agreements. These conditions make sense: A "probationer . . . is more likely than the ordinary citizen to violate the law,"[276] and the conditions help officers ensure that probationers comply with the law. When probationers challenge these agreements, California

274. *See* Griffin v. Wisconsin, 483 U.S. 868, 880 (1987).
275. *See supra* note 5.
276. *Griffin*, 483 U.S. at 880.

courts find that the probationer has waived any protected privacy interest. Federal courts, on the other hand, fail to recognize that a probationer has waived any privacy interest and therefore ignore the plain language of the agreement to impose a requirement of "reasonable suspicion." But this approach is incorrect; the Supreme Court has held that Fourth Amendment and other constitutional rights can be waived, and this is simply another instance of such a voluntary waiver.

First, as California courts have recognized, this approach is doctrinally consistent with the purposes and scope of the Fourth Amendment—a defendant who consents to suspicionless searches of his home or person without reasonable cause does not have either a subjective or an objectively reasonable expectation of privacy, the first requirement for Fourth Amendment protection. And any concern that a probationer's consent-to-search agreement is involuntary is mitigated by the circumstances in which the consent is ordinarily obtained: an adversarial proceeding in which the defendant is represented by counsel before a neutral judicial official. Second, recognizing the validity of a probationer's consent is consistent with the Supreme Court's "special needs" approach discussed in *Griffin v. Wisconsin*. Third, enforcing suspicionless search agreements will further the goals of probation. Fourth, federal courts should uphold these search conditions to promote consistency and predictability in the criminal justice system. And finally, the California approach does not create the type of widespread policy concerns sparked by *United States v. Whren*. These arguments suggest that federal courts should take *Knights* a step further, and recognize that probationers waive their Fourth Amendment rights when they agree to warrantless, suspicionless search conditions in probation agreements. Therefore, federal courts should find that searches pursuant to these conditions are constitutional even in the absence of reasonable suspicion.