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Certain Certiorari: The Digital Privacy Rights of Probationers

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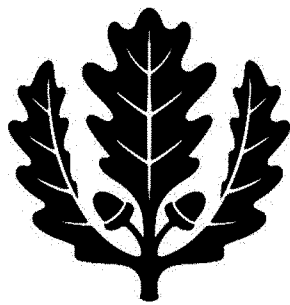
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Essay

Certain Certiorari: The Digital Privacy Rights of Probationers

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In a recent oral argument, a judge on the California Court of Appeal told me they had “at least 50” pending cases on the constitutionality of probation conditions authorizing suspicionless searches of digital devices. As counsel of record in three of those cases, I feel positioned to comment on this hot topic within criminal law. My intention here is less to reconcile California’s cases on suspicionless searches of probationers’ digital devices than to locate them within the precedents of the United States Supreme Court, which is bound before long to pick up a case for the same purpose.



Certain Certiorari:
The Digital Privacy Rights of Probationers

DANIEL YEAGER*

I. INTRODUCTION

Recently I represented a juvenile (I.V.) who trashed his bedroom in a tantrum that was later adjudicated as an act of vandalism.¹ I appealed a probation condition imposed by the trial court as part of his guilty plea, by which he agreed to suspicionless searches of his property. The condition was as run-of-the-mill as they come—of a type imposed over and over by trial courts, invariant to probationers’ crimes of conviction. In my briefs on I.V.’s behalf, I characterized the condition as unconstitutionally vague and overbroad.² Any search relying on the condition, I went on, would violate the Fourth Amendment’s ban on unreasonable searches and seizures.³

At oral argument before the California Court of Appeal for the Fourth District, Justice Judith Haller seemed sympathetic, but her interest was fleeting. After hearing a summary of I.V.’s plight, she asked me to riff on something else altogether. The court, Justice Haller explained, had before it “at least 50” cases involving probation conditions authorizing suspicionless searches not just of property (in a general sense), but of digital devices (in a specific sense). I did have a case of that variety—a so-called explicit electronics condition—then percolating in the state high court on appeal from an adverse ruling by a panel on which Justice Haller sat.⁴ In response to her invitation, I undertook less to reconcile

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¹ In re I.V., 217 Cal. Rptr. 3d 545 (Cal. Ct. App. 2017).

² Appellant’s Opening Brief at 10, *In re I.V.*, 217 Cal. Rptr. 3d 535 (Ct. App. 2017) (No. D070611).

³ *Id.* at 22.

⁴ *People v. Nachbar*, 207 Cal. Rptr. 3d 855, 857, 860 (Cal. Ct. App. 2016), *review granted and briefing deferred*, No. S238210, 384 P.3d 1242 (Cal. Dec. 14, 2016).

California's cases on suspicionless searches of probationers' digital devices and more to locate them within the precedents of the United States Supreme Court, which is bound to pick up a case for the same purpose.

Specifically, the Court is bound to hear whether *Riley v. California*—its 2014 ruling excluding content found on digital devices in warrantless searches of arrestees' grab-area⁵—applies to probationers. David Riley's case arose out of his arrest when police lawfully found firearms under the hood of his car.⁶ Incident to Riley's arrest, police found evidence of his gang membership in a search of his cell phone, which placed itself at an unsolved shooting.⁷ After an unsuccessful motion to suppress the contents of his phone, Riley was convicted of various assaultive offenses, all made worse by having been done for the benefit of a gang.⁸ His state court appeal went nowhere.⁹

That from there the Supreme Court granted Riley review was unsurprising. Four years earlier, the Court predicted its involvement in the Fourth Amendment's regulation of digital privacy.¹⁰ Precisely, *City of Ontario v. Quon* upheld a municipal police department's discovery of extra-professional text messages in an audit of a SWAT officer's department-issue pager.¹¹ Assuming, *arguendo*, the officer's expectation of privacy in the content of the messages, the Court found the warrantless search of the digital device reasonable in a Fourth Amendment sense, given the government's "special need[]" to regulate public employees.¹² Within its narrow ruling, the Court acknowledged that digital devices have profoundly altered human activity,¹³ the legal contours of which remain open despite eighty-two years of electronic surveillance litigation. Because those devices might be "essential means or necessary instruments for self-expression, even self-

⁵ 134 S. Ct. 2473, 2495 (2014).

⁶ *Id.* at 2480.

⁷ *Id.* at 2480–81.

⁸ *Id.* at 2481.

⁹ *People v. Riley*, No. D059840, 2013 WL 475242, at *2-6 (Cal. Ct. App. Feb. 8, 2013), *review denied* May 1, 2013, *cert. granted*, *Riley v. California*, 134 S. Ct. 999 (2014).

¹⁰ *City of Ontario v. Quon*, 560 U.S. 746, 759–60 (2010).

¹¹ *Id.* at 746, 750, 751, 752–53, 765.

¹² *Id.* at 756, 760.

¹³ *Id.* at 760.

identification,”¹⁴ their Fourth Amendment implications would need tending beyond searches of public employees’ department-issue devices. But picking the right case would be delicate:

The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. See, e.g., *Olmstead v. United States*, 277 U.S. 438 (1928), overruled by *Katz v. United States*, 389 U.S. 347, 353 (1967). In *Katz*, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. See *id.*, at 360–361 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises¹⁵

The occasion turned out to be *Riley*, where the court privileged the “privacies of life” over the “often competitive enterprise of ferreting out crime.”¹⁶ But what, exactly, are *Riley*’s implications? Is it just a technical ruling on the privacy interests only of arrestees, with no specific applicability to post-conviction phases of criminal cases? Because the Court’s most on-point precedents—one involving a probationer (*United States v. Knights*),¹⁷ the other a parolee (*Samson v. California*)¹⁸—indicate no stance on *Riley*’s applicability beyond the arrest context, California courts improvidently consider those precedents legal non-events. Ultimately, the Court will settle the matter itself, almost certainly within one of the eleven electronics conditions cases¹⁹ now on review in the California Supreme Court.

¹⁴ *Id.*

¹⁵ *Id.* at 759.

¹⁶ *Riley v. California*, 134 S. Ct. 2473, 2482, 2495 (2014).

¹⁷ 534 U.S. 112, 114–16 (2001).

¹⁸ 547 U.S. 843, 846 (2006).

¹⁹ *In re Ricardo P.*, 193 Cal. Rptr. 3d 883 (2015), *reh'g denied* (Nov. 24, 2015), *review granted and opinion superseded*, 365 P.3d 343 (Cal. 2016); *In re Patrick F.*, 194 Cal. Rptr. 3d 847 (2015), *reh'g denied* (Dec. 3, 2015), *review granted and opinion superseded*, 365 P.3d 344 (Cal. 2016); *In re*

Here is why and how.

II. *IN RE I.V.*: ARE PHONES “PROPERTY”?

At 9:30 AM on May 24, 2016, Chula Vista, California police were called to a disturbance at the home I.V. shared with his mother, aunt, siblings, and grandparents. After arguing with his mother about money, I.V. threw a fit in his room, damage to which prompted the district attorney to file a delinquency petition alleging one count of felony vandalism. Attributing to I.V. only damage to the door frame in an amount of sixty dollars, the juvenile court found him to have violated the lesser-included, misdemeanor version of the felony allegation. In addition to consigning I.V. to a day reformatory for a year, the court imposed various conditions recommended by court probation officers, including condition number 27 (No. 27), which permitted suspicionless searches of his “person, property, vehicle, and any property under his immediate custody or control.”²⁰

A. THE VAGUENESS OF PROBATION CONDITION NO. 27

Central to I.V.’s appeal was whether condition No. 27 was unconstitutionally vague for insufficiently stating *what* property was subject to search. Relying on the due process right to adequate notice of criminal laws, appellate courts have struck down as vague

Alejandro R., 196 Cal. Rptr. 3d 651 (2015), *review granted and opinion superseded*, 366 P.3d 528 (Cal. 2016); *In re Mark C.*, 197 Cal. Rptr. 3d 865, *review granted and opinion superseded*, 368 P.3d 311 (Cal. 2016); *In re A.S.*, 200 Cal. Rptr. 3d 100, *review granted and opinion superseded*, 370 P.3d 1052 (Cal. 2016); *In re R.F.*, No. A145723, 2016 WL 4039794 (Cal. Ct. App. July 28, 2016), *review granted* (Oct. 12, 2016); *In re J.E.*, 205 Cal. Rptr. 3d 28 (Ct. App. 2016); *People v. Nachbar*, 207 Cal. Rptr. 3d 855 (Ct. App. 2016); *In re George F.*, 203 Cal. Rptr. 3d 607, *reh'g denied* (July 22, 2016), *review dismissed*, 382 P.3d 1136 (Cal. 2016); *In re Q.R.*, 213 Cal. Rptr. 3d 374 (Ct. App. 2017); *In re J.R.*, No. A147835, 2017 WL 396668, at *1 (Cal. Ct. App. Jan. 30, 2017), *review granted* (Apr. 12, 2017); *In re Carlos H.*, No. A148154, 2017 WL 695953, at *1 (Cal. Ct. App. Feb. 22, 2017), *review granted* (May 10, 2017).

²⁰ Appellant’s Opening Brief, *supra* note 2, at 10.

probation conditions that could be inadvertently violated.²¹ Inadequate notice of a law occurs when “persons of common intelligence must . . . guess at its meaning and differ as to its application.”²² To survive a vagueness challenge, a condition must be precise enough for the probationer to know what is required of him and for the court to determine whether the condition has been violated.²³

It was my position that, by extending to I.V.’s “property . . . and any property under his immediate custody or control,” condition No. 27 left open whether a refusal to submit personal information stored on his electronic devices would violate his probation.²⁴ All property is either real (land and that which is affixed or appurtenant thereto), or personal (all property which is not real). Personal property may be either tangible or intangible. Tangible personal property is “seen, weighed, measured, felt, or touched, or . . . in any other manner perceptible to the senses.”²⁵ Intangible property is “personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences.”²⁶

No one would mistake an electronic device for real property. And while a cell phone may seem a clear and high example of tangible personal property, its contents are equally intangible. To the California Supreme Court, classifying property as tangible as opposed to intangible can be a “troublesome” task in some cases.²⁷ And I.V.’s, as I saw it, was such a case. Condition No. 27’s vagueness, I.V.’s argument ran, arose not from whether the device itself is tangible personal property (it is), but from whether, given its intangible *contents*, that tangible-intangible distinction is captured by the unmodified word “property” (it isn’t). Because any determination of

²¹ *E.g.*, *In re H.C.*, 96 Cal. Rptr. 3d 793, 795–96 (Ct. App. 2009); *In re Sheena K.*, 10 Cal. Rptr. 3d 444, 446 (2004), *opinion superseded by In re Sheena K.*, 153 P.3d 282 (Cal. 2007).

²² *People v. Freitas*, 102 Cal. Rptr. 3d 51, 53-54 (2009).

²³ *In re Sheena K.*, 153 P.3d 282, 294 (Cal. 2007) (citing *People v. Reinertson*, 223 Cal. Rptr. 670, 672 (Ct. App. 1986)).

²⁴ Appellant’s Opening Brief, *supra* note 2, at 22.

²⁵ Cal. Rev. & Tax. Code § 6016 (2017).

²⁶ *Navistar Int’l Transp. Corp. v. State Bd. of Equalization*, 884 P.2d 108, 110 (Cal. 1994).

²⁷ *Preston v. State Bd. of Equalization*, 19 P.3d 1148, 1156 (Cal. 2001).

whether a cell phone is property turns on that distinction, the unmodified word “property” is, I concluded, in that context void for vagueness.

The prosecution deemed I.V.’s vagueness challenge “insubstantial.”²⁸ Citing a case from 1987, the prosecution recalled that “probation conditions containing this term have been in use for years.”²⁹ To the prosecution, because everyone knows that “property” means real and personal, tangible and intangible, electronics search conditions need not be explicit to be constitutional.³⁰ But no published opinion has so held.³¹ The one published case featuring a condition allowing suspicionless searches of “property”—not delineating electronics—the prosecution dubbed “inapposite,”³² since that condition not only threatened a search, but produced one too.

There, in *United States v. Lara*, the Ninth Circuit suppressed evidence that probation officers found in a cell-phone search based on an electronics condition imposed on a probationer convicted of drug offenses.³³ In lieu of prison, Paulo Lara had accepted suspicionless searches of his “property,” a designation the Ninth Circuit found precluded electronics.³⁴ As authority, the court looked to *Riley*,³⁵ which declared that an electronic device is not “property” in the same sense as “a cigarette pack, a wallet, or a purse.”³⁶ Calling the condition neither vague nor overbroad, but invalidating the ensuing search as unreasonable in Fourth Amendment terms, the Ninth Circuit acknowledged that “privacy is ‘significantly diminished’ when a defendant’s probation order ‘clearly expressed the search condition’ of which the probationer ‘was unambiguously

²⁸ Respondent’s Brief at 20, *In re I.V.*, 217 Cal. Rptr. 3d 535 (Ct. App. 2017) (No. D070611).

²⁹ *Id.* at 17 (citing *People v. Bravo*, 738 P.2d 336, 342–43 (Cal. 1987)).

³⁰ *Id.* at 19.

³¹ See *People v. Garcia*, No. C082617, 2017 WL 2334413, at *3 (Cal. Ct. App. May 30, 2017), *review denied* (Sept. 20, 2017) (unpublished decision holding defendant’s probation search condition encompassing a search of a cell phone in defendant’s possession objectively reasonable).

³² Respondent’s Brief, *supra* note 28, at 20.

³³ *United States v. Lara*, 815 F.3d 605, 611–12 (9th Cir. 2016).

³⁴ *Id.* at 607.

³⁵ *Id.* at 610–12.

³⁶ *Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014).

informed.”³⁷ But *Lara*, like *I.V.*, had accepted no such explicit condition.

The absence of the word “vague” from the opinion makes *Lara* no less instructive in *I.V.*, where the mischief of the vague condition had yet to produce an illegal search. No doubt a vague condition is unconstitutional whether or not police have found occasion to rely on it. *Lara*’s value thus is in demonstrating that the risk of law enforcement exploiting, even inadvertently, the vagueness of unelaborated references to “property,” is hardly hypothetical. The risk of the intrusion that materialized in *Lara* should have been reason enough to enjoin such an eventuality in *I.V.* rather than force *I.V.* and those similarly situated to await an unconstitutional search before judicial relief is available.

Nor does the fact that the word “property” is in dictionaries tell us anything about its vagueness. *No* word in dictionaries is vague in the abstract, that is, out of context. Any word that is vague in the abstract would not *be* in a dictionary, which displays words whose application is knowable, not just guesswork. While “property” is not vague as an idle entry in a dictionary, it has *become* vague in specific speech-situations due to tensions among technology, privacy, and police practices as regulated by courts.

Accordingly, the prosecution’s observation that suspicionless searches of probationers’ “property” go back thirty years³⁸ says nothing about the term *today*, when suspicionless searches of digital devices must be expressly stated in any probation condition with a hope of surviving constitutional challenge. “It would be foolish,” the Supreme Court noted in 2001, “to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology The question . . . today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”³⁹ Given the flux in which the legal relation of technology and privacy remains in 2017, an “insubstantial” constitutional claim of vagueness *I.V.*’s was not.

³⁷ *Lara*, 815 F.3d at 610 (quoting *United States v. Knights*, 534 U.S. 112, 119–20 (2001)).

³⁸ See Respondent’s Brief, *supra* note 28, at 17 (citing a case from 1987 to illustrate that suspicionless searches have been “in use for years”).

³⁹ *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001).

Because the relation between digital devices and “property” is too open to give the notice needed to survive a vagueness challenge, I.V. asked the Court of Appeal to modify the search condition as follows: “The minor shall submit for suspicionless search his person, vehicle, and the physical aspects of his property and of any property under his immediate custody or control at any time.”⁴⁰ But the court declined.⁴¹ Instead, like the prosecution, the court recorded that “probation conditions authorizing searches of a probationer’s person, property, and vehicle are ‘routinely imposed.’”⁴²

Unlike the prosecution, however, the court found “no indication in this case that in imposing the standard search condition, the juvenile court intended to authorize searches of I.V.’s electronic data.”⁴³ “Reasonably construed,” the court posited, “the search condition applies only to tangible physical property, and not to electronic data.”⁴⁴ Citing as authority both *Lara* and the “sea change” brought about by the “digital revolution,” the court remarked that only “an explicit search condition pertaining to electronic data” could authorize a search of a probationer’s intangible property.⁴⁵

Yet the fact that the prosecution presupposed that “property” subsumes intangible interests, while the court presupposed the opposite, indicates the ambiguity of the word “property” in this context: *both* interpretations are plausible. The court supported its position in a footnote:

This interpretation is consistent with California’s recently enacted Electronic Communications Privacy Act, which limits government entities’ access to “electronic device information.” Although the statute generally requires “specific consent” or a warrant before a government entity may access electronic device information, a government entity may also access such information “if the device is seized from

⁴⁰ *In re I.V.*, 217 Cal. Rptr. 3d at 547.

⁴¹ *Id.*

⁴² *Id.* at 546.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 547.

an authorized possessor of the device *who is subject to an electronic device search as a clear and unambiguous condition of probation*, mandatory supervision, or pretrial release.”⁴⁶

The court’s explication of the recent Act is incomplete. The original Act permitted official access to electronic communications only with specific consent from an owner or rightful possessor of the device, an exigency, or judicial authorization.⁴⁷ But the California Legislature promptly recognized that consent to probation conditions in exchange for a suspended prison term *might* be read to count as the “specific” consent required to override section 1546.1’s ban on official access to electronic communications. An amendment then clarified that such access is allowed when “the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation”⁴⁸ The amendment thus acknowledged two realities: first, “consent” as understood in the original Act was not meant to extend to a search victim’s electronic devices; and second, the original iteration of the Act was susceptible to such a plausible but mistaken reading. Indeed, the Legislature would have had no occasion to amend the Act if *not* for the plausible interpretation that generalized suspicionless search conditions imposed on “property” extend to electronics. Yet without engaging the implications of the amendment, the Court of Appeal rejected I.V.’s vagueness challenge, finding off the mark both his and the prosecution’s readings of condition No. 27.⁴⁹

B. THE OVERBREADTH OF PROBATION CONDITION NO. 27

Because condition No. 27 may be fairly construed to include electronics, I characterized it on appeal as unconstitutionally

⁴⁶ *Id.* at 547 n.16 (quoting CAL. PENAL CODE § 1546.1(c)(10) (2017)).

⁴⁷ CAL. PENAL CODE § 1546.1 et seq. (2016).

⁴⁸ Electronic Surveillance—Communications—Searches and Seizures, ch. 541, 2016 Cal. Stat. 3878; Law Enforcement Agencies—Electronic Surveillance—Orders, ch. 511, 2016 Cal. Stat. 3777 (codified as CAL. PENAL CODE § 1546.1(c)(10) (2017)).

⁴⁹ *In re I.V.*, 217 Cal. Rptr. 3d at 546–47.

overbroad in the same way that explicit electronics conditions are overbroad.⁵⁰ While the vagueness doctrine enforces the due process requirement of notice, a clear and precise enactment may be overbroad if it prohibits constitutionally protected conduct. When laws threaten to invade protected freedoms, reviewing courts modify them into less drastic means for achieving the same purpose.

Prior to I.V.'s disposition, the California Court of Appeal for the First District had repeatedly found explicit electronics conditions overbroad in appeals brought by juveniles.⁵¹ Finding support in *Riley*, those overbreadth challenges succeeded even though juveniles need more supervision than adults and their constitutional rights are more circumscribed. Representative of those successful overbreadth challenges is *In re Malik J.*⁵² After admitting in 2012 to a robbery, Malik was found to have committed three more robberies on one night in 2014.⁵³ The juvenile court imposed the following condition:

[P]rovide all passwords to any electronic devices including cell phones, computers and notepads within your custody and control, and submit to search of devices at any time to any peace officer. And also provide any passwords to any social media sites . . . and submit those sites to any peace officer with or without a warrant.⁵⁴

On appeal, the prosecution argued that because Malik. J. owned no cell phone but had robbed others of theirs, any device found on him

⁵⁰ *Id.* at 540.

⁵¹ *See, e.g. In re Ricardo P.*, 193 Cal. Rptr. 3d 883, 895 (Ct. App. 2015) (“We agree with Ricardo that the electronics search condition is overbroad because it is not ‘narrowly tailored for the purposes of public safety and rehabilitation’ and ‘is not narrowly tailored to him in particular.’”); *In re J.B.*, 242 195 Cal. Rptr. 3d 589, 756–57 (Ct. App. 2015) (“The requirement that he submit his electronic devices for search and provide his probation officer with his electronic passwords is constitutionally overbroad and must be stricken.”); *In re P.O.*, 200 Cal. Rptr. 3d 841, 848 (Ct. App. 2016) (“The electronics search condition is overbroad because it is not narrowly tailored to further P.O.’s rehabilitation.”).

⁵² 193 Cal. Rptr. 3d 370 (Ct. App. 2015).

⁵³ *Id.* at 372-73.

⁵⁴ *Id.* at 373.

could be lawfully searched, digital content included, to see if the device was stolen.⁵⁵ Relying on *Riley*'s emphasis on "the ubiquitous advent of cell phones and their capacity both to store and to remotely access vast quantities of personal information," the court concluded that "identifying whether an electronic device is stolen has no relationship to accessing the content of [Malik J.'s] social media accounts."⁵⁶ To permit electronics searches "without violating the probationer's diminished privacy interests," the court modified the overbroad condition.⁵⁷

Three months before I.V.'s disposition, the California Court of Appeal for the Sixth District decided *People v. Appleton*, invalidating on overbreadth grounds a probation condition in an adult prosecution stating that Appleton's "computers and electronic devices shall be subject to search for material prohibited by law."⁵⁸ After reaching out to his minor victim on a social-media site, Appleton undertook with him an illegal sexual relation for which he was convicted.⁵⁹ The Court of Appeal held that the condition unconstitutionally risked encroachment on areas of Appleton's life, including "medical records, financial records, personal diaries, and intimate correspondence with family and friends," all unrelated to his criminality.⁶⁰

Citing favorable precedent, *Appleton* distinguished contrary precedent for predating *Riley*, featuring more narrowly drafted conditions, or failing outright to engage the Fourth Amendment.⁶¹ In the Sixth District's view, the electronics condition imposed on Appleton threatened intrusions beyond conventional conditions granting official access to "probationers' persons, vehicles, and homes."⁶² "Even the most basic phones that sell for less than \$20," the court went on, "might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry

⁵⁵ *Id.* at 374.

⁵⁶ *Id.*

⁵⁷ *Id.* at 375, 378.

⁵⁸ *People v. Appleton*, 199 Cal. Rptr. 3d 637, 639 (Ct. App. 2016).

⁵⁹ *Id.* at 640.

⁶⁰ *Id.* at 644.

⁶¹ *Id.* at 645-46.

⁶² *Id.* at 644.

phone book, and so on.”⁶³ Rather than throw out the condition altogether, the court recommended a narrower version obligating Appleton to “provide his social media accounts and passwords to his probation officer for monitoring” and “maintain his browser history” for specified durations for on-demand inspection.⁶⁴ That, the court concluded, would bring the overbroad condition back within the reasonableness limits of the Fourth Amendment.⁶⁵

I.V.’s digital privacy was not the subject of the prosecution’s responsive brief, which sought to dodge the issue on procedural grounds. Precisely, the prosecution claimed that “infringements on federal constitutional rights, outside of the First Amendment context, cannot support an overbreadth challenge.”⁶⁶ Held out as authority for that proposition was a United States Supreme Court footnote, which the prosecution dug up from a California Supreme Court footnote, which stated:

Because we conclude that the Santa Ana ordinance is not overbroad, *we need not decide whether the overbreadth doctrine is applicable outside the area of freedoms protected by the First Amendment.* The Supreme Court has stated that overbreadth challenges will be entertained only if a First Amendment violation is alleged. “[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad.”⁶⁷

The state high court went on in that same footnote to concede:

Other decisions of the United States Supreme Court suggest that this limitation is not invariably observed. *We will assume arguendo that the overbreadth doctrine may be applied outside the First Amendment context.*⁶⁸

⁶³ *Id.*

⁶⁴ *Id.* at 646-47.

⁶⁵ *Id.*

⁶⁶ Respondent’s Brief, *supra* note 28, at 21 n.5.

⁶⁷ See *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1160 n.15 (Cal. 1995) (quoting *Schall v. Martin*, 467 U.S. 253, 268–69 n.18 (1984)) (emphasis added).

⁶⁸ See *id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 358–59 n.8 (1983))

Apart from specific overbreadth challenges to subpoenas and search warrants, overbreadth challenges are brought on more generalized Fourth Amendment grounds: sometimes successfully,⁶⁹ sometimes not.⁷⁰ When Fourth Amendment overbreadth challenges fail, it is not for having been improvidently brought under the wrong amendment; rather, the adverse rulings are on the merits.⁷¹ The putative bar to I.V.'s claim to which the prosecution pointed, therefore, was, in a word, exaggerated.

But that did not stop the Court of Appeal from avoiding the merits of I.V.'s overbreadth claim. Trial counsel failed to raise it below, and I had characterized the claim in a manner perceived to be too particularized to count as a facial challenge cognizable on appeal.⁷² Not that it matters here, given that the same division within the Fourth District had, by the time of its ruling in *I.V.*, made its position on the merits known in the appeal of an explicit electronics condition brought by another client of mine: adult probationer Steven Nachbar.⁷³

In *Nachbar*, the Fourth District took guidance from *In re J.E.*, where the First District upheld an electronics condition against a juvenile burglar with a drug problem.⁷⁴ Contrary to other cases that upheld electronics conditions by predating, ignoring, or just waving at *Riley*, the First District attempted in earnest to distinguish *Riley* with a line nicked from United States Supreme Court cases detailing the rights of parolees at first,⁷⁵ and later of probationers.⁷⁶ That line posits that adjudicated criminals “do not enjoy ‘the absolute liberty to which every citizen is entitled.’”⁷⁷ No longer needing *In re J.E.* as authority, the Fourth District now relies on its own opinion in

(emphasis added).

⁶⁹ *E.g.*, *Appleton*, 199 Cal. Rptr. 3d at 643.

⁷⁰ *E.g.*, *People v. Nachbar*, 207 Cal. Rptr. 3d 855, 860–61 (Ct. App. 2016), *review granted*, 384 P.3d 1242 (Cal. Dec. 14, 2016) (No. S238210).

⁷¹ *E.g.*, *In re J.E.*, 205 Cal. Rptr. 3d 28, 35–39 (Ct. App. 2016), *review granted*, 381 P.3d 232 (Cal. Oct. 12, 2016) (No. S236628).

⁷² *In re I.V.*, 217 Cal. Rptr. 3d at 544–45.

⁷³ *See Nachbar*, 207 Cal. Rptr. 3d at 860–61 (finding *In re J.E.* “persuasive”).

⁷⁴ *Id.*; *In re J.E.*, 205 Cal. Rptr. 3d at 31.

⁷⁵ *E.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

⁷⁶ *E.g.*, *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrissey*, 408 U.S. at 480).

⁷⁷ *In re J.E.*, 205 Cal. Rptr. at 37 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)).

Nachbar, which it has cited for its potentially persuasive value twenty-four times in the fifteen months since handing it down.⁷⁸ Nor is the Fourth District alone in relying on *Nachbar* to justify electronics conditions by declaring *Riley* inapposite. Accordingly, it may repay the effort to go over what the U.S. Supreme Court sees as the legal distinction not only between adjudicated criminals and suspects, but also between different modes of adjudicated criminals: parolees versus probationers. Only then can we get a sense of the post-*Riley* scope of the digital privacy rights of probationers like I.V. or those subject to explicit electronics conditions.

⁷⁸ *People v. Trujillo*, No. D070215, 2017 WL 410200, at *2 & n.2 (Cal. 4th Ct. App. Div. 1, *review granted* Apr. 12, 2017); *People v. Penn*, No. D070506, 2017 WL 999244, at *3 (Cal. 4th Ct. App. Div. 1, *review granted* May 24, 2017); *People v. Kent*, No. D070971, 2017 WL 1033675, at *2 (Cal. 4th Ct. App. Div. 1 March 17, 2017); *People v. Bessette*, D069633, No. 2017 WL 1399741, at *8 n.3 (Cal. 4th Ct. App. Div. 1 April 19, 2017); *In re Christopher O.*, No. D070476, 2017 WL 1507497, at *4 & n.3 (Cal. 4th Ct. App. Div. 1 April 27, 2017); *In re I.V.*, 217 Cal. Rptr. 3d 535, 544 n.14 (4th Dist. Div. 1 2017); *In re R.S.*, 219 Cal. Rptr. 3d 665, 670 n.3 (4th Dist. Div. 1 2017); *In re Jose A.*, No. D070276, 2017 WL 1533477, at *2 n.5 (Cal. 4th Ct. App. Div. 1, *review granted* July 12, 2017); *People v. Castro*, No. D070716, 2017 WL 2061445, at *2 (Cal. 4th Ct. App. Div. 1 May 15, 2017); *People v. Monroe*, No. D070387, 2017 WL 2180480, at *4 (Cal. 4th Ct. App. Div. 1 May 18, 2017); *People v. Miranda*, No. E065454, 2017 WL 2554450, at *1 (Cal. Ct. App. June 13, 2017); *In re Kyle C.*, No. D071318, 2017 WL 2991246, at *6 (Cal. 4th Ct. App. Div. 1 July 14, 2017); *People v. Trierweiler*, No. D071316, 2017 WL 3033288, at *1 (Cal. Ct. App. July 18, 2017), *review granted* (Sept. 27, 2017); *People v. Santana*, No. D070514, 2017 WL 3082710, at *2 (Cal. Ct. App. July 20, 2017); *People v. Milan*, No. D071026, 2017 WL 3224874, at *1 (Cal. Ct. App. July 31, 2017); *People v. Gorla*, No. D070867, 2017 WL 3573782, at *1 (Cal. Ct. App. Aug. 18, 2017); *People v. Wilkerson*, No. D071504, 2017 WL 3614097, at *1 (Cal. Ct. App. Aug. 23, 2017); *People v. Carter*, No. D071357, 2017 WL 3976836, at *1 (Cal. Ct. App. Sept. 11, 2017), *reh'g granted* (Sept. 19, 2017), *vacated*, No. D071357, 2017 WL 4161133 (Cal. Ct. App. Sept. 20, 2017), *review granted* (Nov. 29, 2017); *People v. Carter*, No. D071357, 2017 WL 4161133, at *1 (Cal. Ct. App. Sept. 20, 2017), *review granted* (Nov. 29, 2017); *People v. Rosette*, No. D071590, 2017 WL 4250085, at *1 (Cal. Ct. App. Sept. 26, 2017), *review denied* (Nov. 29, 2017); *People v. Smith*, No. D071956, 2017 WL 4532632, at *1 (Cal. Ct. App. Oct. 11, 2017), *review filed* (Nov. 15, 2017); *People v. Barnes*, No. D071301, 2017 WL 4639896, at *1 (Cal. Ct. App. Oct. 17, 2017), *review filed* (Nov. 21, 2017); *People v. Lyons*, No. D070976, 2017 WL 4826638, at *1 (Cal. Ct. App. Oct. 26, 2017), *review filed* (Dec. 4, 2017).

III. PROBATIONERS' PRIVACY IN THE SUPREME COURT

A. *KNIGHTS*: A LOW-SUSPICION SEARCH OF A PROBATIONER

On May 29, 1998, Mark Knights was placed on summary probation for a misdemeanor drug offense. Among the terms on his probation form was that Knights "submit his . . . person, property, place of residence, vehicle, [and] personal effects, to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."⁷⁹ That same date, he was sentenced to ninety days in jail, to commence on August 3, 1998.⁸⁰

On June 1, 1998 (three days after the judgment of sentence), "a Pacific Gas & Electric (PG&E) power transformer and adjacent Pacific Bell telecommunications vault near the Napa County Airport were pried open and set on fire with an incendiary device using a gasoline accelerant, causing an estimated \$1.5 million in damage."⁸¹ Knights had been suspected of prior acts of vandalism against PG&E property, based on his two-year grudge over a theft-of-services complaint against him by company investigators, and because they turned off his electricity for failure to pay his bill.⁸² On June 3, 1998, after sheriffs developed cause to suspect Knights as the vandal, a detective, relying on the consent-to-search condition of Knights' probation order, broke into and searched his apartment.⁸³ Found therein were a "detonation cord, ammunition, liquid chemicals, chemistry and electrical manuals, drug paraphernalia, and a brass padlock stamped 'PG&E.'"⁸⁴

Based on the items found in his apartment, sheriffs arrested Knights, who landed in federal court on an indictment for conspiracy to commit arson, possession of an unregistered destructive device, and being a felon in possession of ammunition.⁸⁵ After the district

⁷⁹ Brief of Petitioner at *10, *United States v. Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 799254.

⁸⁰ *Id.* at *2 n.1.

⁸¹ *Id.* at *3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at *3-4.

⁸⁵ *United States v. Knights*, 219 F.3d 1138, 1141 (9th Cir. 2000), *rev'd*, 534

court suppressed the incriminating evidence, the Ninth Circuit affirmed, both courts relying on a legal basis that had by then been repudiated by the United States Supreme Court.⁸⁶

On the government's appeal, the Court reversed,⁸⁷ flicking off the lower courts' defunct basis for suppressing the evidence.⁸⁸ The real issue, Chief Justice Rehnquist reasoned for the unanimous Court, was whether official need for the evidence outweighed the intrusiveness of the apartment search.⁸⁹ In the Court's view, sheriffs had sufficient individualized suspicion of Knights due to his probationary status, thereby rendering the search reasonable in Fourth Amendment terms.⁹⁰

For support, the Court quoted *Morrissey v. Brewer*, its 1972 case that originated the above-quoted line that persons convicted of crimes (there, a parolee) "do not enjoy the absolute liberty to which every citizen is entitled."⁹¹ The Court also emphasized that Knights knew what he was getting into: agreeing to the suspicionless search condition was his only way to avoid prison.⁹² Likewise, because probationers are more likely to re-offend than law-abiding persons (and desperate to conceal evidence to avoid revocation to boot), the Court continued, "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house."⁹³ In light of the district court's finding, which was conceded by Knights, "that the search in this case was supported by reasonable suspicion," the Court reversed the rulings below.⁹⁴

B. *SAMSON*: A NO-SUSPICION SEARCH OF A PAROLEE

Donald Samson was on state parole in California from a

U.S. 112 (2001).

⁸⁶ See *United States v. Knights*, 534 U.S. 112, 116 (2001) (explaining that the district court and the Ninth Circuit relied on the same basis of excluding the evidence, mainly that the search was done for pretextual "investigatory" reasons).

⁸⁷ *Id.* at 122.

⁸⁸ *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

⁸⁹ *Id.* at 118–19.

⁹⁰ *Id.* at 122.

⁹¹ *Id.* at 119 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)) (internal quotation marks omitted).

⁹² *Id.*

⁹³ *Id.* at 121.

⁹⁴ *Id.* at 122; see also Brief of Petitioner, *supra* note 79, at *3 n.3.

conviction for being a felon in possession of a firearm. Section 3067 of the California Penal Code requires that all prisoners eligible for release on parole receive an “advisement that he or she is subject to search or seizure by a probation or parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.”⁹⁵ In September 2002, a San Bruno police officer ran into Samson, whom he recognized as a parolee, a suspicion confirmed by radio dispatch.⁹⁶ Based on Samson’s parolee status, the officer searched him, discovering a baggie of methamphetamine inside a cigarette box.⁹⁷

Charged by the State with possession, Samson’s motion to suppress was denied because the searching officer acted under the authority of section 3067.⁹⁸ After a jury convicted Samson, the trial court sentenced him to imprisonment for seven years,⁹⁹ six of which owed largely to his prior convictions.¹⁰⁰ In an unpublished opinion, the Court of Appeal affirmed, summarizing that suspicionless searches of parolees are lawful unless “arbitrary, capricious or harassing,” which the search of Samson was not.¹⁰¹

The United States Supreme Court thereafter granted Samson’s petition for certiorari “to answer a variation of the question [the] Court left open in *United States v. Knights*.”¹⁰² Notably, *Knights* had said nothing about the legal distinction between the sort of *low*-suspicion search to which *Knights* was exposed (on the one hand), and a *no*-suspicion search (on the other). The distinction was not lost on the *Knights* Court, which dropped this footnote to that end:

We do not decide whether the probation condition so diminished, or completely eliminated, *Knights*’ reasonable expectation of privacy . . . that a search by

⁹⁵ CAL. PENAL CODE §§ 3067(a)–(b)(3) (2012).

⁹⁶ *Samson v. California*, 547 U.S. 843, 846–47 (2006).

⁹⁷ *Id.*

⁹⁸ *Id.* at 847.

⁹⁹ *Id.*

¹⁰⁰ *People v. Samson*, No. A102394, 2004 WL 2307111, at *8 (Cal. Ct. App. Oct. 14, 2004).

¹⁰¹ *Id.* at *2–3.

¹⁰² *Samson*, 547 U.S. at 847.

a law enforcement officer without any individualized suspicion would have satisfied . . . the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.¹⁰³

Samson's "variation" on *Knights* was to extend the same question from the probation context to the parole context. Specifically, *Samson* addressed "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."¹⁰⁴

C. THE "CONTINUUM" OF STATE RESTRICTIONS ON AUTONOMY

To the Supreme Court, that *Knights* was a probationer and *Samson* a parolee was an operative distinction based on their respective positions on a "continuum" of state restrictions on autonomy.¹⁰⁵ Imprisonment, the most restrictive measure on the continuum, is followed by parole, which is less restrictive than prison, but more restrictive than probation, which, in turn, is more restrictive than a state of "absolute liberty."¹⁰⁶ Whereas parole is an executive function by which prisoners are released before their court-imposed terms expire, probation is a judicial function by which convicted persons bypass prison altogether. In other words, one cannot get *sentenced* to parole. Because parolees are by definition felons (most with criminal histories), they get the "stronger medicine" of imprisonment, which would be excessive punishment for probationers, who as misdemeanants or first-time felons, pose lesser social harms.¹⁰⁷

¹⁰³ *Knights*, 534 U.S. at 120 n.6.

¹⁰⁴ *Samson*, 547 U.S. at 847 & n.1 (citing *Knights*, 534 U.S. at 120 n.6).

¹⁰⁵ *Id.* at 850.

¹⁰⁶ See *United States v. Smith*, 526 F.3d 306, 308–09 (6th Cir. 2008) (locating the electronic monitoring of Smith—who could leave his residence only with State permission—closer to prison than parole on the punishment continuum).

¹⁰⁷ *Samson*, 547 U.S. at 850 (quoting *United States v. Cardona*, 903 F.2d 60,

Against that background, the *Samson* Court asserted that “parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment”¹⁰⁸

Akin to imprisonment, yes, but as the Court had elsewhere described, parole is also “very different” from imprisonment.¹⁰⁹ In a different case, the Court also had alluded to “the undoubted *minor* differences between probation and parole”¹¹⁰ In non-trivial ways, parole and probation are not different at all.¹¹¹ To begin with, parolees and probationers both pose sufficiently high risks of re-offending so as to justify keeping quite close tabs on them.¹¹² Both groups are thus “set free in the world subject to restrictions intended to facilitate supervision and guard against antisocial behavior”¹¹³ such as association with gang members, possessing a gun, drug or alcohol use, changing addresses without notice, or contacting victims. Both know it too: parolees and probationers are told up front that they are subject to suspicionless searches.¹¹⁴ And it is not just parolees who are considered in custody, even while at large; probationers also remain in custody, albeit “constructively.”¹¹⁵ Finally, when prosecutors allege disobedience on the part of parolees *or* probationers, the process that is due for revocation is informal, unencumbered by proof beyond a reasonable doubt.¹¹⁶

Given such similarities, lower courts long saw “no constitutional difference between probation and parole for purposes of the Fourth Amendment.”¹¹⁷ *Samson*, however, changed all that. Without saying that parolees and probationers differ in only “minor” ways,¹¹⁸ or instead occupy “near opposite ends of the punishment scale,”¹¹⁹ *Samson* insisted that “parolees have fewer expectations of

63 (1st Cir. 1990)).

¹⁰⁸ *Id.*

¹⁰⁹ *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

¹¹⁰ *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973) (emphasis added).

¹¹¹ *See Samson*, 547 U.S. at 861.

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *See id.* at 852, 863 n.4.

¹¹⁵ *People v. Cisneros*, 224 Cal. Rptr. 452, 453–55 (Ct. App. 1986).

¹¹⁶ *See Samson*, 547 U.S. at 849.

¹¹⁷ *E.g.*, *Motley v. Parks*, 432 F.3d 1072, 1083 n.9 (9th Cir. 2005).

¹¹⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.3 (1973).

¹¹⁹ *United States v. Crawford*, 372 F.3d 1048, 1076–77 (9th Cir. 2004) (Kleinfeld, J., concurring).

privacy than probationers”¹²⁰ Though some were slow to come around to the idea,¹²¹ the lower federal courts, with just one holdout,¹²² accept as the law of the land *Samson*’s conclusion that parole and probation are constitutionally distinct; no state court has held out. The constitutional implications of that distinction, however, remain open.

D. READING *RILEY* RIGHT: NARROW OR BROAD?

Neither *Knights* nor *Samson* presented a suspicionless search of a probationer. The likely occasion to put *Samson*’s parole-probation distinction into action is presented by the digital privacy claims of probationers now litigating in the California Supreme Court,¹²³ whose attempt to absorb *Knight* and *Samson* into *Riley* should land in the United States Supreme Court. Once there, if *Riley* is limited to arrestees, the Court will deem suspicionless searches of probationers’ digital devices constitutional if authorized by narrowly tailored, explicit electronics conditions. If *Riley* regulates police practices apart from arrests, then such searches will be deemed unconstitutional as to probationers, if not as to parolees. Meanwhile, I want here to test the thesis that *Riley*’s role in regulating searches of probationers’ digital devices is a matter of locating probationers in relation to arrestees on the continuum of state restrictions on autonomy.

Recall that the California appellate courts’ basis for finding *Riley* inapplicable to probationers is that unlike *Riley*, who, as an arrestee, remained entitled to the “presumption of innocence” and “the absolute liberty to which every citizen is entitled,” probationers are entitled to neither.¹²⁴ Despite the superficial appeal of that observation, arrestees have nothing like absolute liberty. On probable

¹²⁰ *Samson*, 547 U.S. at 850.

¹²¹ See *United States v. Baker*, 658 F.3d 1050, 1055–56 (9th Cir. 2011), *overruled by* *United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc) (concluding that the Fourth Amendment is not violated by suspicionless searches).

¹²² *Keating v. Pittston City*, 643 F. App’x 219, 223 n.4 (3d Cir. 2016).

¹²³ See *In re Ricardo P.*, 193 Cal. Rptr. 3d 883 (2015), *review granted* February 17, 2016, S230923.

¹²⁴ E.g., *In re J.E.*, 205 Cal. Rptr. 3d 28, 36–37 (2016) (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)).

cause, an arrestee may be handcuffed, transported to the stationhouse, fingerprinted, booked, photographed,¹²⁵ and, unless the recent occupant of a car, thoroughly searched.¹²⁶ All that for even the most minor transgressions, including, to name just one, riding with an unfastened seat belt.¹²⁷ When an arrest is not by warrant, the arrestee may be forced to wait in jail for 48 hours for a judicial determination of probable cause.¹²⁸ On arriving at jail, a strip search may follow regardless of the offense of arrest,¹²⁹ as may countless suspicionless searches thereafter.¹³⁰ Once a judge has found probable cause, the constitutional right to a speedy trial places only weak pressure on the prosecution to charge and try an arrestee, even one who remains in custody.¹³¹ Such (perfectly lawful) pretrial punishment inflicted on arrestees is far from “absolute liberty.”

That the timing of the intrusion—whether against an arrestee or a probationer—is not crucial to *Riley* is indicated in lower-court cases upholding warrantless cell-phone searches of motorists at the Calxico border and of public schoolchildren, both occurring at investigative stages under the “special needs” doctrine.¹³² Like the Court’s rulings in *Katz*, *Dow Chemical*, *Kyllo*, and *Jones* before it, *Riley* is, at the highest level of generality, a meditation on the tensions among privacy, technology, and police practices. But in a much more specific sense, *Riley* is Chief Justice Roberts’s *hommage* to cell phones—life-altering instruments which a “visitor from Mars might conclude . . . were an important feature of human anatomy.”¹³³ *Riley* replaced the halting tone of *Quon* with knowing nods to esoterica such as data encryption, remote wiping, gigabytes,

¹²⁵ *E.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

¹²⁶ *E.g.*, *Arizona v. Gant*, 556 U.S. 332, 363–64 (2009) (Alito, J., dissenting).

¹²⁷ *E.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

¹²⁸ *E.g.*, *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

¹²⁹ *E.g.*, *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 322–23 (2012).

¹³⁰ *Hudson v. Palmer*, 468 U.S. 517, 525–30 (1984).

¹³¹ *E.g.*, *United States v. Loud Hawk*, 474 U.S. 302, 312–17 (1986).

¹³² *See* *United States v. Caballero*, 178 F. Supp. 3d 1008, 1014–20 (S.D. Cal. 2016) (based on special need of protecting the border); *In re Rafael C.*, 200 Cal. Rptr. 3d 305, 314–15 (2016) (based on special need of educating the young), *opinion superseded by In re R.C.*, 372 P.3d 903 (Cal. 2016).

¹³³ *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

cloud computing, geo-fencing, and Faraday bags.¹³⁴ By such technical phenomena, *Riley* posits, we install our entire personhood (from the sublime to the ridiculous) in our phones, whose capacities to reveal dwarf those of the once-exalted repository of intimacy: the diary.¹³⁵

What *Riley* is not is an *hommage* to arrestees. In fact, the 8–0–1 decision’s only reference to the status of convicted persons is in Justice Alito’s concurrence, which traces searches incident to arrest back nearly two centuries to “the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice”¹³⁶ The quoted passage places arrestees (who are believed guilty) on the same privacy plane as adjudicated criminals (who are guilty). Indeed, I have not found a single item of evidence that *Riley* is a narrow ruling elevating the rights of arrestees alone, as opposed to a broad ruling elevating digital privacy across the board. Accordingly, the Ninth Circuit hardly overstated the matter in recording that *Riley* “used sweeping language to describe the importance of cell phone privacy.”¹³⁷ *Riley* not only finds digital devices more private than automobiles,¹³⁸ but remarkably, more private even than homes:

[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.¹³⁹

¹³⁴ *Id.* at 2486–87, 2491.

¹³⁵ *Id.* at 2490.

¹³⁶ *Id.* at 2495 (Alito, J., concurring in part and concurring in the judgment) (quoting *Dillon v. O’Brien* [1887] 16 Cox Crim. Cas. 245, 249–50 (Exch. Div.) (Ir.)).

¹³⁷ *United States v. Lara*, 815 F.3d 605, 611 (9th Cir. 2016).

¹³⁸ *E.g.*, *United States v. Camou*, 773 F.3d 932, 942–43 (9th Cir. 2014) (explaining that the content one might find on a cell phone differs qualitatively from what one might find in an automobile).

¹³⁹ *Riley*, 134 S. Ct. at 2491.

So much for “the ancient adage that a man’s house is his castle.”¹⁴⁰ Justifiably, *Riley*’s “sweeping language”¹⁴¹ has extended beyond searches incident to arrest to invalidate electronics conditions that cut into the lawful spheres of the probationer’s life that are unlikely to peek into criminality.¹⁴² Extending *Riley*’s reach in such a fashion cannot count as a denial of *Samson*’s recognition of a difference in a privacy sense between arrestees and probationers. Rather, it counts as an acknowledgment that *Riley* is unconcerned with that difference.

IV. CONCLUSION

In re I.V. gave me a live opportunity to meditate on constitutional snags in lower court criminal litigation concerning the potential or actual use of suspicionless electronics searches as a way of keeping tabs on probationers. With little help from those lower courts on the implications of Supreme Court precedents—of *Knights*, *Samson*, and *Riley*—I am predicting here that the controversy will find its way to the top for resolution. Whatever happens, I am persuaded that to view *Riley* as a narrow tract on the limits of the arrest power is to cut the case off not from its rule or holding or other stock conventions of opinion writing, but from its feel, its tone—its vibe—which, for those with a knack for decoding cases, is as identifiable a convention as any other.

¹⁴⁰ *Georgia v. Randolph*, 547 U.S. 103, 115 (2006).

¹⁴¹ *Lara*, 815 F.3d at 611.

¹⁴² *See, e.g., id.* (distinguishing cell phone data from types of property appropriately subject to probation searches).

