ARTICLE

THE CARCERAL HOME

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ABSTRACT

In virtually all areas of law, the home is the ultimate constitutionally protected area, at least in theory. In practice, a range of modern institutions that target private life—from public housing to child welfare—have turned the home into a routinely surveilled space. Indeed, for the 4.5 million people on criminal court supervision, their home is their prison, or what I call a "carceral home." Often in the name of decarceration, prison walls are replaced with restrictive rules that govern every aspect of private life and invasive surveillance technology that continuously records intimate information. While prisons have always been treated in the law as sites of punishment and diminished privacy, homes have not. Yet in the carceral home people have little privacy in the place where they presumptively should have the most. If progressive state interventions are to continue, some amount of home surveillance is surely inevitable. But these trends raise a critical, underexplored question: When the home is carceral, what is, or should be, left of the home as a protected area?

This Article addresses that question. Descriptively, it draws on a fifty-state analysis of court supervision rules to reveal the extent of targeted invasions of intimate life in the name of rehabilitation or an alternative to prison, rendering the home a highly surveilled space. Normatively, it argues that allowing this state of affairs with no corresponding adaptations in legal doctrine is untenable.

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With the home no longer sacred and no limiting principle to take its place, millions of people are left with no meaningful protection from government surveillance, even (or especially) in their home. Left unchecked, the carceral home further entrenches the precise racial, economic, disability, and gender inequities that often inspire reform efforts. Instead, as this Article recommends, privacy and security must be recognized as positive entitlements separate from physical homes.

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INTRODUCTION

In criminal procedure jurisprudence, "the home is first among equals."[1] The Supreme Court often invokes the need to protect the "sanctity of a man's home and the privacies of life."[2] As Justice Antonin Scalia colorfully put it, the State must be prevented from knowing "at what hour each night the lady of the house takes her daily sauna and bath."[3] From the Castle Doctrine to curtilage, "the Fourth Amendment has drawn a firm line at the entrance to the house."[4] The home, and intimate life, is protected—at least in theory.

In practice, that "firm line" does not exist for millions of housed people. Even in a house with four walls and a door, a range of modern social welfare institutions—public housing, the child welfare system, and social services, to name just a few—deploy various methods of control and surveillance that all but eliminate the "sanctity" of the home and the "privacies of life."[5] This is especially true for the 4.5 million people subject to criminal court supervision whose homes are transformed into carceral spaces, or what I call "carceral homes."

Drawing on a collection of criminal court supervision rules from all fifty states, this Article shows how walls and doors often offer no real security or privacy for the millions of people subject to various methods of carceral surveillance.[6] Often in the name of decarceration, judges now routinely subject people to restrictive rules that govern every aspect of intimate life and invasive surveillance technology that continuously records intimate information.[7] In contrast to the theoretical sacred home, people on criminal court supervision are subject to searches of their homes and phones without suspicion, 24/7 geolocation tracking, ankle monitors equipped with two-way microphones, and warrantless collection of genetic material (such as DNA samples and regular drug and alcohol tests).[8] Rules governing people on court supervision dictate where they live and with whom, when people may leave their home, how they parent, and the physical and mental health treatment they receive.[9] Intimate

[1] Florida v. Jardines, 569 U.S. 1, 6 (2013).

[2] Payton v. New York, 445 U.S. 573, 585 (1980) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[3] Kyllo v. United States, 533 U.S. 27, 38 (2001).

[4] *Payton*, 445 U.S. at 590.

[5] *See infra* Part II.B.

[6] While focus of this Article is on adult court, the carceral home also occurs in juvenile court. *See generally* KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021); Jyoti Nanda, *Set Up To Fail: Youth Probation Conditions as a Driver of Incarceration*, 26 LEWIS & CLARK L. REV. 677 (2022); Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399 (2018); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297 (2015).

[7] *See infra* Part II.A.

[8] *Id.*

[9] *Id.*

information—such as health records, as well as biometric, biological, and geolocation data—is routinely shared between government agencies, private companies, and law enforcement.[10]

While prison has always treated as a site of punishment and diminished privacy by the law, the home has not. Yet in the carceral home, people have little privacy in the place where law and social norms expect them to have the most. Contrary to COVID-19 quarantines or unrepresentative depictions of celebrities on house arrest, the carceral home is pervasive, invasive, and unequal: every aspect of home and private life is controlled and surveilled.

At first glance, this state of affairs may seem inevitable: if the home is an alternative to prison, then it follows that the carceral home must operate in some ways like a prison with limited privacy and autonomy. But as the experience of incarceration increasingly exists in people's homes, an unresolved question emerges: When the home is carceral, what is left of the doctrines reflecting that "the home is first among equals"[11] and the need to protect "the privacies of life"?[12] This Article attempts to provide an answer.

This Article focuses on the carceral home in the context of criminal court supervision, but it is illustrative of a larger phenomenon of both the over- and underprotection of the home. Throughout the law there is, on one hand, a commitment to the home as a private space that protects intimate activities and choices. This is true both normatively (the role we desire homes to play) and descriptively (the way the home is, in fact, protected). Accordingly, in both criminal and civil contexts, the home holds a special protected legal status.[13] Under the Fourth Amendment, the home cannot be searched without a warrant, people cannot be arrested in their homes without a warrant, and the curtilage doctrine protects "intimate" areas directly adjacent to the home.[14] In constitutional law, courts invoke the "marital bedroom" and the home more generally to protect what are viewed as private activities and choices, including marriage, parenting, sex, using contraception, viewing pornography, and owning a gun.[15] In terms of privacy and the ability to exclude others, the home is the ultimate "constitutionally protected area."[16]

On the other hand, advances in surveillance technology have led to less privacy in our homes and personal life; a reality for almost everyone, but especially true for people involved in the criminal legal system. Because of who is arrested, charged, and convicted of crimes, the carceral home—and the corresponding loss of privacy—reflects the larger critique that Fourth

[10] *Id.*

[11] Florida v. Jardines, 569 U.S. 1, 6 (2013).

[12] Payton v. New York, 445 U.S. 573, 585 (1980) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[13] *See infra* Part I.

[14] *Id.*

[15] *See* Part I.B.

[16] Katz v. United States, 389 U.S. 347, 349 (1967).

Amendment "has been era[s]ed"[17] for people of color and other marginalized groups.[18]

Herein lies a contradiction: the carceral home is the opposite of a "constitutionally protected" space. While a prison cell is undoubtedly a type of carceral home, years of prison litigation helped establish a complex—albeit inadequate and often critiqued—set of legal standards, including Eighth Amendment protections, that govern the deprivation of rights for people in prison.[19] No such legal framework governs the millions of carceral homes that are located outside of prisons. Instead, the carceral home exists in a legal gray zone: it has neither the protections generally afforded to the home, nor any obvious mechanism limiting government intrusion into otherwise private spaces.

Certainly, part of the explanation is that the carceral home is often viewed as "better" than prison—and in some situations that may be true. Yet the analysis often stops there. Left unresolved is what happens to the legal protections generally afforded to the home and private life. Moreover, better-than-prison is a low threshold and mistakenly assumes that everyone living in a carceral home would otherwise be incarcerated, an unproven empirical claim. While some people might in fact be incarcerated were it not for carceral surveillance technology, many people would not otherwise be in prison, certainly not all four million people on various forms of supervised release. The better-than-prison explanation also assumes a false binary, comparing the home to prison, but of course there is a third comparison point: freedom.

To be sure, Fourth Amendment scholars have long debated the role of the home, and whether the legal definition of "home" protects certain groups, such as people experiencing housing insecurity, parents suspected of abuse or neglect, poor people, and survivors of domestic violence, among others.[20] Other scholars

[17] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 969 (2002).

[18] *See* Jamelia N. Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 516 (2022); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 958 (2023); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245, 246-47 (2010); I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654 (2018) [hereinafter Capers, *Good Citizen*]; Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1550 (2019); I. Bennett Capers, *Unsexing the Fourth Amendment*, 48 U.C. DAVIS L. REV. 855, 875 (2015) [hereinafter Capers, *Unsexing*]; Victoria Schwartz, *Leveling Up to a Reasonable Woman's Expectation of Privacy*, 93 U. COLO. L. REV. 115, 184-85 (2022); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485, 491 (2009) [hereinafter Suk, *Is Privacy a Woman?*].

[19] *See* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 311 (2022); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 570 (2021); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 380-81 (2018).

[20] *See* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 400 (2003); Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1290 (2014) [hereinafter Ferguson, *Personal Curtilage*]; Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the*

have explored how advances in technology subject most of us to unprecedented levels of surveillance.[21] But these critiques do not question whether the home can, or should, remain the benchmark for determining privacy given that large numbers of people are subject to social control and surveillance, even when fully ensconced inside a home.[22]

This Article offers a new claim: so long as reform efforts and modern welfare regimes continue to deploy social control and surveillance methods targeted at private life, the home as a "constitutionally protected area" becomes an empty promise. Indeed, the law's continued focus on the physical home as the legal "firm line" between protected and unprotected spaces risks legitimating a hierarchy of privacy protections,[23] reinforcing racialized surveillance,[24] and

Fourth Amendment, 95 CORNELL L. REV. 905, 906-08 (2010); Ric Simmons, Lange*,* Caniglia*, and the Myth of Home Exceptionalism*, 54 ARIZ. ST. L.J. 145, 147 (2022); JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 9 (2009); I. Bennett Capers, *Home Is Where the Crime Is*, 109 MICH. L. REV. 979, 981-83 (2011); Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 249-50 (2014); Lindsay J. Gus, *The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless*, 2016 U. CHI. LEGAL F. 769, 791 (2016); Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 357 (2010); Thomas P. Crocker, *The Fourth Amendment at Home*, 96 IND. L.J. 167, 172 (2020).

[21] DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY 1 (2022); Barry Friedman, *Lawless Surveillance*, 97 N.Y.U. L. Rev. 1143, 1145 (2022); Andrew Guthrie Ferguson, *Persistent Surveillance*, 74 ALA. L. REV. 1, 3 (2022); NEIL RICHARDS, WHY PRIVACY MATTERS 4 (2021); I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 40 (2019); Andrew Guthrie Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 557 (2017).

[22] Several scholars, myself included, have explored the invasiveness of criminal court supervision, though not with a focus on the legal significance of the home. *See* Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 177 (2022) [hereinafter Weisburd, *Punitive Surveillance*]; Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 650, 650 (2022); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 675 (2019); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 294, 301 (2016).

[23] *See* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 92 (2017); I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1285 (2017); SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 16 (2021).

[24] *See* JAMES KILGORE, E-CARCERATION 89-90 (2022); RUHA BENJAMIN, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE 55-56 (2019); Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data Protection Reform*, 131 YALE L.J.F. 907, 920-21 (2022); Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html; Alvaro M. Bedoya, *The Color of Surveillance*, SLATE (Jan. 18, 2016, 5:55 AM), https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html [https://perma.cc/X9XY-LBAN] (describing history of racialized surveillance in United States).

further entrenching the racial, economic, disability, and gender inequities that often inspire reform efforts to begin with.[25]

At the same time, the privacy traditionally afforded to the physical home sometimes fails to provide a refuge for victims of intimate violence or police violence that occurs within homes. The Supreme Court has also made clear that people on court supervision have a lower expectation of privacy.[26] In this respect, the line between public and private space is never absolute. But if the physical home offers no meaningful refuge from state invasions of intimate life, what could or should?

To be sure, even though physical places (like homes) still matter in Fourth Amendment law, they arguably matter less. The "reasonable expectation of privacy" test, after all, is meant to protect "people, not places."[27] Likewise, the trio of *Carpenter v. United States*,[28] *United States v. Jones*,[29] and *Riley v. California*[30] opinions recognize privacy interests in intimate data that exist outside of homes. Although scholars debate the significance of these cases, they undoubtedly signal a new chapter in Fourth Amendment law that adjusts privacy protections to the "modern-day equivalent of a physical invasion into persons, houses, papers, or effects."[31]

Yet this new chapter in Fourth Amendment law is unlikely to impact the surveillance and control associated with the carceral home. While some aspects of the carceral home involve intimate data—like geolocation tracking and cellphone searches—other aspects—such as movement restrictions, behavior requirements, and mandated treatment—do not take the form of the data at issue in *Carpenter*, *Jones*, and *Riley*.

Moreover, even if homes now carry less significance for Fourth Amendment purposes, that is not the case with respect to carceral homes. Surveillance of the home and private life is integral to criminal court supervision and serves—at least in theory—its rehabilitative mission. Because people on court supervision are deemed to have a lower expectation of privacy, courts generally find that *Carpenter*, *Jones*, and *Riley* do not apply to the privacy intrusions associated with court supervision.[32] Instead, most of these otherwise unconstitutional restrictions are upheld because they "reasonably relate" to rehabilitation and (or) because the person consented to the restriction. Neither justification offers any

[25] *See* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME 30 (2020).

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

[27] Katz v. United States, 389 U.S. 347, 351 (1967).

[28] 138 S. Ct. 2206 (2018).

[29] 565 U.S. 400 (2012).

[30] 573 U.S. 373 (2014).

[31] Orin S. Kerr, Katz *As Originalism*, 71 DUKE L.J. 1047, 1050 (2022) [hereinafter Kerr, Katz *As Originalism*]; *see also* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 482 (2011).

[32] *See* Weisburd, *Punitive Surveillance*, *supra* note 22, at 176 (collecting cases).

meaningful limit on the intrusions. When it comes to carceral homes, the Fourth Amendment protects neither people nor places.

Before proceeding further, it is important to clearly define the carceral home. As explored more fully in Part II, this Article defines the carceral home loosely to include all the ways that criminal court supervision polices the home, body, and mind—spheres of privacy that are difficult to separate and that often implicate more than the physical boundaries of a home. The carceral home refers to restraints on rights that are imposed explicitly as punishment, a topic explored more fully in related work,[33] as well as other forms of control imposed either for purported rehabilitative purposes or as an explicit alternative to prison.

This Article does not conclude with perfectly packaged interventions but does address the policy and legal implications of the carceral home. Perhaps most fundamentally, the carceral home suggests the need to reckon with the reality that social control and surveillance measures are intrinsic features of institutions considered reformist.[34] This includes not just criminal court institutions, like court supervision, treatment programs, and problem-solving courts, but also other social welfare institutions—such as social services, public housing, education, and child welfare—that are often heralded as beneficial, protective, and integral to ending mass incarceration.[35] Surveillance of the home and intimate life are intrinsic features, not bugs,[36] of all these institutions and signals the need to reconceptualize privacy, security, and autonomy as positive entitlements decoupled from physical homes.[37]

This inquiry is especially timely given that the future of intimate privacy and bodily autonomy is uncertain in light of *Dobbs v. Jackson Women's Health Organization*.[38] Although the decision opens the door to greater surveillance of

[33] *See* Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 101-63) [hereinafter Weisburd, *Rights Violations*].

[34] *See* SCHENWAR & LAW, *supra* note 25, at 30; Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 109) (discussing how noncarceral punishments are framed as efforts of decarceration); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385 (2022); Monica C. Bell, Katherine Beckett & Forrest Stuart, *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1301 (2021) [hereinafter Bell et al., *Investing in Alternatives*].

[35] *See* Bell et al., *Investing in Alternatives*, *supra* note 34, at 1301-02.

[36] Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

[37] *See* Monica C. Bell, *Safety*, *Friendship*, *and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 719 (2019); Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 710 (2022); Fanna Gamal, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CALIF. L. REV. 979, 1006 (2016).

[38] 142 S. Ct. 2228, 2235 (2022); *see also* Danielle Keats Citron, *Intimate Privacy in a Post-*Roe *World*, FLA. L. REV. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4387341 [https://perma.cc/WEV2-V5VW]; Kenji Yoshino, *After the Supreme Court's Abortion Ruling, What Could Happen to Other Unwritten Rights?*, WASH. POST (Nov. 30, 2022, 5:34 PM), https://www.washingtonpost.com/magazine/interactive/2022/substantive-due-process-dobbs/.

private and intimate life for people who can be pregnant,[39] individuals subject to criminal court control are especially vulnerable.[40] Warrantless geolocation tracking, electronic searches of cell phones, and requirements to obtain permission to leave the house, city, or state—all standard features of criminal court supervision—can be deployed not just to detect court supervision violations, but also to surveil people's reproductive health and investigate illegal abortions.[41]

This Article proceeds in three parts. Part I describes the law's treatment of the home as sacred, both in the Fourth Amendment and beyond. Part II contrasts the sacred home doctrines with the targeted invasions of intimate life that constitute the carceral home. Part II also situates the carceral home within the larger ecosystem of other institutions and criminal procedure doctrines that further strip the home of privacy protections. Part III considers the path forward and why doing nothing or expanding *what* is protected will do little to resolve the conflict between carceral and sacred homes. Instead, policy and legal interventions are needed, as well as a recognition of security and privacy as positive entitlements.

I. LAW'S TREATMENT OF THE HOME AS SANCTUARY

Although the Fourth Amendment lists "houses" along with "persons, . . . papers and effects," it is the house that has been deemed the "first among equals."[42] The Supreme Court has made clear that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[43] The home's special status appears not just in criminal law; the "sanctity of the sanctuary of the home"[44] is also a foundational normative and descriptive feature of family law, property law, and constitutional law more broadly. When it comes to personhood and property, the "home is a moral nexus between liberty, privacy, and freedom of association."[45]

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[39] *See generally* Aziz Z. Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post*-Roe *Era*, 97 N.Y.U. L. REV. (forthcoming 2023); Elizabeth Joh, *Dobbs Online: Digital Rights as Abortion Rights*, *in* FEMINIST CYBERLAW (forthcoming 2023) (on file with author).

[40] Kate Weisburd, Opinion, *Women in Prison and Under Court Surveillance Will Suffer Under New Abortion Bans*, L.A. TIMES (July 5, 2022), https://www.latimes.com/opinion/story/2022-07-05/op-ed-women-in-prison-and-under-court-surveillance-will-suffer-under-new-abortion-bans.

[41] *Id.*

[42] Collins v. Virginia, 138 S. Ct. 1663, 1669-70 (2018) (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).

[43] United States v. U.S. Dist. Ct. for the E. Dist. of Mich. (*Keith*), 407 U.S. 297, 313 (1972).

[44] Wyman v. James, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting) (emphasis omitted).

[45] Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982).

A. *First Among Equals in the Fourth Amendment*

Much of Fourth Amendment jurisprudence recognizes the "unique importance of the home" as "the most essential bastion of privacy recognized by the law."[46] While some scholars reasonably critique the centrality of the home as "outdated,"[47] people's relationship to houses continues to undergird Fourth Amendment doctrine.[48]

Supreme Court cases addressing curtilage offer some of the most obvious examples of home-centric Fourth Amendment doctrine. For example, the Court defines curtilage as areas like porches and backyards that are "intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[49] The Court's rationale is likewise focused on the home: the "protection afforded [to] the curtilage is essentially a protection of families and personal privacy."[50] This is in contrast to the lack of protection in common or public areas considered "open fields," that "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[51] These cases reflect how Fourth Amendment protection is relational—the closer to the home, the greater the "invasions of the privacy of the home."[52]

The home-as-sanctuary approach is also reflected in the general prohibition against warrantless arrests in the home.[53] In justifying this rule in *Payton v. New York*, Justice John Paul Stevens explained that nowhere "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."[54] The Supreme Court often invokes the sanctity of the house to limit both arrests and searches.[55]

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[46] Minnesota v. Carter, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting).

[47] Ferguson, *Personal Curtilage*, *supra* note 20, at 1290.

[48] *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 536 (2005) ("[T]he search of a home remains the canonical fact pattern of a Fourth Amendment search and seizure case.").

[49] California v. Ciraolo, 476 U.S. 207, 213 (1986).

[50] *Id.*

[51] Oliver v. United States, 466 U.S. 170, 179 (1984) (holding police walking through landowner's field was not Fourth Amendment search because landowner lacked reasonable expectation of privacy over open field).

[52] Payton v. New York, 445 U.S. 573, 573 (1980).

[53] *See id.* at 589 (holding officers with arrest warrant could not enter suspect's home to arrest them without warrant to enter home); Lange v. California, 141 S. Ct. 2011, 2015 (2021) (finding misdemeanant's flight from police into their home insufficient to "trigger a categorical rule allowing warrantless home entry").

[54] *Payton*, 445 U.S. at 589.

[55] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001); Minnesota v. Carter, 525 U.S. 83, 88 (1998); Kentucky v. King, 563 U.S. 452, 477 (2011) (Ginsburg, J., dissenting); Caniglia v. Storm, 141 S. Ct. 1596, 1599 (2021).

The decision in *Kyllo v. United States*[56] is perhaps the paradigmatic example of the Court's reliance on the home-as-sanctuary to limit warrantless home searches.[57] It was in that opinion Justice Scalia invoked the lady and the sauna to suggest the need to protect the home—the "realm of guaranteed privacy"—from the State's prying eye.[58] While his reference to the bathing "lady" is roundly critiqued as both problematic and antiquated,[59] lower courts continue to invoke the lady and bath language in upholding various Fourth Amendment protections afforded to the home.[60] Even though the search in *Kyllo* was conducted with a heat-detecting device outside the home, both the dissent and majority were primarily concerned with how to best protect the home in particular—be it a physical intrusion or a technological invasion. Although courts often cite to *Kyllo* for rejecting a "mechanical interpretation"[61] of the Fourth Amendment, the decision also reflects a doubling down on the traditional protection afforded to homes.

Even when the search in question does not occur in the home, or even near a home, courts still invoke the home and its key features as the appropriate metric to determine the amount of privacy due. In *Katz*, for example, Justice John Marshall Harlan reasoned that an enclosed phonebooth is more like a home, and "unlike a field," because the occupant "shuts the door behind him," reflecting the expectation of "freedom from intrusion[s]."[62] Similarly, in upholding the collection of DNA samples from arrestees, the majority in *Maryland v. King* justified the search because it was not as invasive or intrusive as a home search.[63] Justice Neil Gorsuch's dissent in *Carpenter* likewise took the position that because location data is not in fact *in* a home, it is not subject to Fourth Amendment protection.[64] Conversely, in *Smith v. Maryland*,[65] holding phone numbers are not protected by the Fourth Amendment, the dissent disagreed on the basis that phone numbers are information that "emanates from private conduct within a person's home."[66]

Despite the Court's proclamation in *Katz* that the Fourth Amendment protects "people not places," these cases demonstrate that a "reasonable expectation of

[56] *Kyllo*, 533 U.S. at 27.

[57] *Id.* at 28.

[58] *Id.* at 34.

[59] *See id.* at 38; Suk, *Is Privacy a Woman?*, *supra* note 18, at 488; Capers, *Unsexing*, *supra* note 18, at 879-80; Crocker, *supra* note 20, at 185.

[60] *See* United States v. Shuck, 713 F.3d 563, 569 (10th Cir. 2013); United States v. Brock, 417 F.3d 692, 696 (7th Cir. 2005); United States v. Miller, 982 F.3d 412, 427 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2797 (2021); United States v. Cotterman, 709 F.3d 952, 965 (9th Cir. 2013).

[61] *Kyllo*, 533 U.S. at 35.

[62] Katz v. United States, 389 U.S. 347, 352, 360-61 (1967).

[63] Maryland v. King, 569 U.S. 435, 466 (2013).

[64] Carpenter v. United States, 138 S. Ct. 2206, 2266-71 (2018) (Gorsuch, J., dissenting).

[65] 442 U.S. 735 (1979).

[66] *Id.* at 747 (Stewart, J. dissenting).

privacy" continues to turn on physical places and how much those places resemble a home.[67] To be sure, the majority opinion in *Carpenter* and the concurrence in *Jones* could be read as the Supreme Court finally making good on the *Katz* promise. In both opinions, the justices did *not* invoke the home in their concern that location data reflects the "privacies of life."[68] Yet, as explored in greater depth in Parts II-III, *Carpenter*'s impact on carceral homes is limited at best.

B. *Elevated Status Beyond the Fourth Amendment*

The home as a constitutionally protected space is not unique to criminal procedure. Its elite status in Fourth Amendment jurisprudence is explained, at least to some degree, by the reverence for the home, as well as private life, in other areas of the law.[69] Take, for instance, the origin of the Castle Doctrine. Historically, the home was viewed as a fortress against hostile invasions and the recognition that "a man may forcefully defend himself, his family, and his property against harm by others."[70] Under current doctrine, a resident can use deadly force to repel an intruder without having to retreat.[71] It is the home—and the home alone—that makes this defense viable.

A strong allegiance to the sanctity of the home also permeates Second Amendment jurisprudence. For example, the question before the Supreme Court in *District of Columbia v. Heller* was whether a prohibition on the possession of handguns *in the home* violates the Second Amendment.[72] Writing for the majority, Justice Scalia drew a connection between the right to bear arms and the right to defend one's home.[73] Scalia was concerned the prohibition in *Heller* "extend[ed] to the home, where the need for defense of self, family and property is most acute."[74] Although the right to carry a handgun for self-defense now extends beyond the home, the home continues to animate Second Amendment jurisprudence.[75]

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[67] *See* David A. Sklansky, Katz v. United States*: The Limits of Aphorism*, *in* CRIMINAL PROCEDURE STORIES: AN IN-DEPTH LOOK AT LEADING CRIMINAL PROCEDURE CASES 223, 260 (2006).

[68] *Carpenter*, 138 S. Ct. at 2214; *Katz*, 389 U.S. at 360.

[69] *See* Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099, 1106 (2019).

[70] SUK, *supra* note 20, at 56.

[71] *See, e.g.*, State v. Harden, 679 S.E.2d 628, 631 (W. Va. 2009); State v. Glowacki, 630 N.W.2d 392, 402 (Minn. 2001); United States v. Peterson, 483 F.2d 1222, 1237 (D.C. Cir. 1973); Kilgore v. State, 643 So. 2d 1015, 1018 (Ala. Crim. App. 1993).

[72] 554 U.S. 570, 635-36 (2008).

[73] *Id.* at 649.

[74] *Id.* at 628.

[75] *See* N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2122 (2022); United States v. Rahimi, No. 21-11001, 2023 WL 1459240, at *521 (5th Cir. Feb. 2, 2023), *withdrawn and superseded by* United States v. Rahimi, 61 F.4th 443 (5th Cir.), *cert. granted*, 143 S. Ct. 2688 (2023).

The substantive due process and equal protection cases upholding the right to marry, same-sex marriage, the right to contraception and parenthood, interracial marriage, and same-sex consensual sex, are also rooted in social conceptions of the home.[76] The opening line of Justice Anthony Kennedy's opinion in *Lawrence v. Texas*,[77] for example, focused on the home in particular: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."[78] Perhaps in recognition of the Court's allegiance to homes, the plaintiffs' lawyers in *Lawrence* intentionally framed the two plaintiffs as lovers with enduring personal bonds, even though that was not an accurate description of their relationship.[79]

In protecting intimate activities that occur in the home, many of these cases focus not only on the intimate activity itself, but also the actual physical attributes of the home. For example, Laurence Tribe famously observed of *Bowers v. Hardwick* that the question "was not what Michael Hardwick was doing in his bedroom, but rather what the State of Georgia was doing there."[80] In *Griswold*, the Court likewise rhetorically asked: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[81] This focus on walls, doors, and rooms makes sense as it tracks the difference between inside and outside and public and private spaces.[82] In *Lawrence*, for example, the Court was concerned with protecting the "most private human conduct, sexual behavior, and in the most private of places, the home."[83] While the Court was primarily focused on the activity in question, the home played a critical role in shielding "private erotic acts from public view."[84]

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[76] *See* Griswold v. Connecticut, 381 U.S. 479, 479 (1965) (affirming right to privacy in marital home); Lawrence v. Texas, 539 U.S. 558, 562 (2003) (declaring same-sex intimate conduct in one's home free from unwarranted government intrusion); Loving v. Virginia, 388 U.S. 1, 12 (1967) (prohibiting states from infringing upon freedom to marry and establish marital abode with persons of other races); Obergefell v. Hodges, 576 U.S. 644, 646 (2015) (asserting right to same-sex marriage falls within right to intimate association); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (reaffirming right to marry, establish home, and rear children as fundamental to right of privacy).

[77] *Lawrence*, 539 U.S. at 562.

[78] *Id.*

[79] DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 90 (2012).

[80] Thomas B. Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987).

[81] *Griswold*, 381 U.S. at 485-86. Whether the *Dobbs* decision changes this analysis remains to be seen. *See* Melissa Murray, Opinion, *How the Right to Birth Control Could Be Undone*, N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/opinion/birth-control-abortion-roe-v-wade.html.

[82] SUK, *supra* note 20, at 111.

[83] *Lawrence*, 539 U.S. at 567.

[84] Suk, *Is Privacy a Woman?*, *supra* note 18, at 511.

II. THE HOME'S STATUS AS CARCERAL

The surveillance and social control measures that constitute the carceral home stand in stark contrast to the home-as-sanctuary. Drawing on an extensive collection of criminal court supervision rules from fifty states, this Part provides a descriptive account of how little privacy people have in the place the law expects them to have the most: the home. After defining and describing the carceral home, this Part explores how the carceral home is not an isolated phenomenon, but rather part of a constellation of social welfare institutions that are often viewed as decarcerative or progressive.

A. *Targeted Surveillance of the Home*

Nowhere is the State more "omnipresent in the home"[85] than in the context of criminal court supervision.[86] Although probation and parole are established institutions, several recent developments—including the COVID-19 pandemic, bipartisan interest in alleviating mass incarceration, and private surveillance companies' growing influence—have created a new landscape of criminal court control of the home.[87] Often in the name of criminal justice reform, prison walls are increasingly replaced by half-way homes, court-ordered treatment programs, house arrest, drug and mental health courts, and 24/7 electronic surveillance that tracks, records, and analyzes a range of private information.[88]

A close examination of the rules governing criminal court supervision reveals the extent to which home and private life are surveilled and controlled. Over the past year, I gathered and analyzed almost 200 standard rules and regulations governing probation, parole, electronic surveillance, and other forms of court

[85] *Lawrence*, 539 U.S. at 562.

[86] For in-depth critiques of criminal court supervision, including electronic monitoring, see Weisburd, *Punitive Surveillance*, *supra* note 22, at 149-59; Karteron, *supra* note 22, at 649; Arnett, *supra* note 22, at 399; Doherty, *supra* note 22, at 316-17; KILGORE, *supra* note 24, at 8; SCHENWAR & LAW, *supra* note 25, at 2; Priscilla A. Ocen, *Awakening to a Mass Supervision Crisis*, ATLANTIC (Dec. 26, 2019), https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108/; Kathryne M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1323-26 (2016) (reviewing CHARLES EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014)); Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 887 (2014); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 51 (2013); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1015-16 (2013).

[87] *See* Weisburd, *Punitive Surveillance*, *supra* note 22, at 149; Eli Hager, *Where Coronavirus Is Surging—and Electronic Surveillance, Too*, MARSHALL PROJECT (Nov. 22, 2020, 5:00 AM), https://www.themarshallproject.org/2020/11/22/where-coronavirus-is-surging-and-electronic-surveillance-too; Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.-C.L. L. REV. 1, 12-23 (2020).

[88] *See* SCHENWAR & LAW, *supra* note 25, at 5.

supervision from all 50 states. In related work, I describe my methodology and provide a description of all the records.[89] Here, in contrast, I focus on how these rules transform the home and private life into carceral spaces.[90]

As addressed in greater depth by other scholars, judges are afforded wide discretion when imposing rules and conditions of release, and agents have similar discretion in which rules to enforce.[91] As a result, it is impossible to tell from the records alone how often, and for whom, certain rules are imposed or enforced. Yet this limitation highlights a critical point: there may be legitimate, or seemingly unavoidable, rules that either are, or should be, imposed in some subset of cases.[92] The problem, however, is that current doctrine offers no meaningful way to distinguish between reasonable and unreasonable intrusions.

1. Surveillance

Perpetual surveillance is a defining aspect of prison.[93] Until recently, that level of surveillance was impossible to replicate outside of a prison setting. Yet new technology makes 24/7 surveillance outside of prison increasingly viable. In the context of the carceral home, surveillance is manifested in two overlapping ways: technological and physical surveillance.

The use of technological surveillance is widespread. Every state relies on electronic monitoring—either for people on probation or parole, or both.[94] This type of surveillance usually takes the form of GPS-equipped ankle monitors that track someone's location 24/7 or radio frequency technology that issues audio alerts when the wearer leaves a designated area.[95] The geolocation data obtained from the monitors is stored, analyzed, and routinely shared between government

[89] *See generally* Kate Weisburd, *Carceral Control: A Nationwide Survey of Community Supervision Rules*, HARV. C.R.-C.L. L. REV. (forthcoming 2023) (on file with author) [hereinafter Weisburd, *Carceral Control*] (analyzing 187 public records from all fifty states governing those on criminal court supervision).

[90] The records pertain to several distinct types of court supervision, including probation, parole, supervised release, and monitoring. To be sure, there are differences between these categories, see, e.g., Jacob Schuman, *Supervised Release Is Not Parole*, 53 LOY. L.A. L. REV. 587, 601 (2020), but the focus in this Article is on how the rules impact the home, a question that cuts across all settings.

[91] Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 80-81 (2000); Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 728 (2020) [hereinafter Weisburd, *Sentenced to Surveillance*]; Doherty, *supra* note 22, at 316.

[92] *See infra* Part II.C.

[93] MICHEL FOUCAULT, DISCIPLINE AND PUNISH 201 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

[94] *See* Weisburd, *Carceral Control*, *supra* note 89, at 3-4; Kate Weisburd et al., *Electronic Prisons: The Operation of Electronic Monitoring in the Criminal Legal System* 3 (GWU, Legal Stud. Rsch. Paper No. 2021-41, 2021) [hereinafter Weisburd et al., *Electronic Prisons*].

[95] *See* Weisburd, *Punitive Surveillance*, *supra* note 22, at 155-56.

agencies and police (without a warrant).[96] The data is often used in criminal investigations, like crime scene correlation.[97] Most rules and regulations make no mention of privacy protection for the collected data.[98]

Technological surveillance is not limited to electronic ankle monitors. Many jurisdictions now use cellphone tracking applications that can also record people's geographic locations and require various forms of facial recognition-based check-ins.[99] Monitoring and searching people's electronic devices is also common.[100] Of the records collected, almost a quarter allowed for searches of electronic devices, such as cell phones, and some programs also monitor otherwise private social media accounts.[101] These searches, "allow law enforcement to monitor supervisees' e-mail, social media activity, texting, location and cellphone usage, and all other information contained on devices, twenty-four hours a day."[102]

Physical surveillance is also a defining aspect of the carceral home. In the vast majority of U.S. jurisdictions, people on various forms of court supervision are subject to warrantless, and often suspicionless, searches of their body, home, cars, and other property.[103] The rules authorize probation and parole agents, sometimes accompanied by police, to conduct random, unannounced searches at any time.[104]

2. Control of Private Life

Criminal court supervision also limits and circumscribes several key aspects of intimate life that coexist with the privacy generally afforded to homes.

a. *Body & Mind*

A common feature of criminal court supervision is the loss of control over people's bodies and restraints on their ability to make decisions about their own well-being, including their medical and mental health care. For example, in most jurisdictions, people on court supervision are required to submit to warrantless drug and alcohol testing.[105] In some places, people on court supervision are also prohibited from using products that contain any amount of alcohol, regardless

[96] *See* Weisburd et al., *Electronic Prisons*, *supra* note 94, at 10.

[97] *See id.* at 10-11.

[98] *See id.* at 26.

[99] TECH. COMM., AM. PROB. & PAROLE ASS'N, LEVERAGING THE POWER OF SMARTPHONE APPLICATIONS TO ENHANCE COMMUNITY SUPERVISION 3 (2020); Todd Feathers, *'They Track Every Move': How US Parole Apps Created Digital Prisoners*, GUARDIAN (Mar. 4, 2021, 6:00 AM), https://www.theguardian.com/global-development/2021/mar/04/they-track-every-move-how-us-parole-apps-created-digital-prisoners [https://perma.cc/RK59-8VVU].

[100] *See* Weisburd, *Punitive Surveillance*, *supra* note 22, at 156.

[101] *See* Weisburd, *Carceral Control*, *supra* note 89, at 11.

[102] Weisburd, *Sentenced to Surveillance*, *supra* note 91, at 728.

[103] *Id.* at 11; *see infra* notes 104-91 and accompanying text.

[104] Doherty, *supra* note 22, at 320.

[105] *See* Weisburd, *Carceral Control*, *supra* note 89, at 14.

of the product's intended purpose. For example, in Alaska, people subject to EM/GPS "agree not to use any personal hygiene products such as mouthwash, cologne, etc. that contain alcohol," and "not use cleaning products such as Lysol™ that contain alcohol while enrolled in EM."[106]

Providing DNA samples is another common feature of criminal court supervision.[107] Because the collection of DNA samples is often part of routine jail booking processes, it is likely this practice is more common than the records in the study suggest.[108]

Courts also commonly order people on supervision to enroll in various treatment programs, such as mental health treatment and drug and alcohol treatment. This treatment is sometimes mandatory, though most often supervising agents and courts use their discretion to require treatment.[109] Failure to attend or complete a treatment program may be grounds for revocation and reincarceration.[110]

While privacy laws, like the Health Insurance Portability and Accountability Act ("HIPAA"), generally protect health records, people under court supervision do not always benefit from such laws. Many rules governing court supervision require people to share medical and mental health records, as well as their use of medication, with the court, law enforcement, or a supervising agency.[111] For example, in Montgomery County, Pennsylvania, people must notify their supervising agent before "consuming and/or using any prescribed medication or any over the counter medication."[112] In Utah, people on monitors must agree to

[106] *Electronic Monitoring Terms and Conditions*, STATE OF ALASKA DEP'T OFF CORR. (Apr. 18, 2022), https://doc.alaska.gov/pnp/pdf/818.10b.pdf; *see also* Johnson Cnty. Dep't of Corr., Johnson County Department of Corrections Electronic Monitoring (on file with author) (stating people subject to electronic monitoring will not use products containing alcohol such as mouthwash, lotions, body washes, household cleaners, and so on).

[107] *See* Weisburd, *Carceral Control*, *supra* note 89, at 15 (highlighting quarter of court supervision and specialty probation programs require DNA testing, with DNA testing actually being more common than reported).

[108] *See* Maryland v. King, 569 U.S. 435, 463 (2013); Andrea Roth, Maryland v. King *and the Wonderful, Horrible DNA Revolution in Law Enforcement*, 11 OHIO ST. J. CRIM. L. 295, 296 (2013).

[109] *See* Weisburd, *Carceral Control*, *supra* note 89, at 15.

[110] Doherty, *supra* note 22, at 322.

[111] *See generally Community Confinement*, STATE OF R.I. DEP'T OF CORR., https://doc.ri.gov/community-corrections/community-confinement [https://perma.cc/4FPB-XS5K] (last updated Jan. 24, 2023); *Standard Conditions of Adult Probation*, STATE OF S.D., https://ujs.sd.gov/media/seventhcircuit/drugcourt/Standard_Conditions_of_Probation.pdf [https://perma.cc/6KUX-9TFL] (last visited Nov. 14, 2023); *Rules and Conditions Governing Probation/Parole and Intermediate Punishment (IP)*, MONTGOMERY CNTY. ADULT PROB. & PAROLE DEP'T (Jan. 2017), https://www.montgomerycountypa.gov/DocumentCenter/View/721/Rules-and-Conditions-for-General-Supervision; PENNINGTON CNTY. DRUG CT., PENNINGTON COUNTY DRUG COURT PROGRAM MANUAL (2016).

[112] MONTGOMERY CNTY. ADULT PROB. & PAROLE DEP'T, *supra* note 111.

not "take or fill any medication, (prescription or over the counter) before having it approved."[113]

b. *Family, Relationships & Reproduction*

Regulations related to family, parenting, and reproduction are also common. Rules forbidding people from being around those with a criminal record, as well as restrictions that limit parents' abilities to see their children, all impact parenting, and the ability of families to be together.[114] These types of conditions are prevalent throughout the United States.[115] Many rules also limit people's ability to live with or visit children, both their own children and other children. For example, people on electronic monitors in Virginia "may not participate in friendships and/or relationships with other adults who have children."[116] In Alaska, people on EM/GPS cannot be the "sole guardian, babysitter, or custodian/primary caregiver for any person(s), children, or pets without approval from EM officers."[117] And people convicted of certain sex offenses in Gila County, Arizona must obtain approval "before possessing children's clothing, toys, games, videos, etc."[118]

Court supervision rules also impact some of the most intimate parts of life, such as entering into romantic relationships, seeing friends, or getting married.[119] For example, in Johnson County, Kansas, the rules provide that "prior to entering into a marriage, financial, or other contract, [the participant] will discuss the matter with [their House Arrest Officer]."[120] Likewise, people on monitoring in Mississippi may "marry only after approval by [the Mississippi Department of Corrections]."[121]

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[113] *GPS Program Terms and Conditions*, UTAH CNTY. SHERIFF'S OFF. CORR. DIV. 56 (Sept. 7, 2014), https://sheriff.utahcounty.gov/forms/GPSApplication.pdf [https://perma.cc/G2HH-LWZG] (emphasis omitted).

[114] *See* Karteron, *supra* note 22, at 661-68.

[115] *Id.*; *see also* Weisburd, *Carceral Control*, *supra* note 89, at 16.

[116] Va. Dep't of Corr., Offender Electronic Monitoring Program Consent (Dec. 21, 2009) (on file with author).

[117] STATE OF ALASKA DEP'T OF CORR., *supra* note 106.

[118] Super Ct. of Ariz., Gila Cnty. Div, Special Conditions of Probation (Oct. 22, 2018) (on file with author).

[119] *Id.*; Super. Ct. of Ariz., Maricopa Cnty. Div., Special Conditions of Probation (on file with author); Johnson Cnty. Dep't of Corr., *supra* note 106; Miss. Dep't of Corr., Electronic Monitoring of Offenders ISP Enrollment & Conditions (Nov. 1, 2015) (on file with author); N.Y. Dep't of Prob., Additional Conditions of Probation for Sex Offenders (on file with author); *Electronic Monitoring / GPS Tracking Unit Rules*, CUYAHOGA CNTY. CT. COM. PL. PROB. DEP'T, https://cp.cuyahogacounty.us/media/1918/em-gps-rules.pdf [https://perma.cc/8KFG-M2HW] (last visited Nov. 14, 2023); Va. Dep't of Corr., *supra* note 116; Dane Cnty. Sheriff's Off., Jail Diversion Rules and Regulations (Apr. 2020) (on file with author).

[120] Johnson Cnty. Dep't of Corr., *supra* note 106.

[121] Miss. Dep't of Corr., *supra* note 119.

The state's involvement in intimate relationships is striking.[122] People on probation for certain sex offenses in Maricopa County, Arizona must "obtain prior written approval . . . before socializing, dating or entering into a sexual relationship with any person who has children under the age of 18."[123] And in Virginia, people on monitors are required to "inform persons with whom you have a significant relationship of your sexual offending behavior as directed by your supervising officer and/or treatment provider."[124] Conditions that limit a person's ability to have a child, and requirements that people use birth control or be subject to involuntary pregnancy tests, have also been upheld.[125]

The carceral home's impact on parenting responsibilities and parent-child relationships is also significant. Parents and caregivers subject to court supervision are required to balance their caregiving responsibilities with dozens of rules and required treatment programs. Parenting a child who is on juvenile court supervision also involves extensive state interference. Courts routinely require parents of children on probation to be the court's "eyes and ears," to take parenting classes, and to assume responsibility for their child's compliance with the various court-imposed requirements.[126]

c. *Behavior & Appearance*

Regulating behavior and appearance is another example of how criminal court supervision directly interferes with autonomy. Half the rules in the study limit who people can be around.[127] For example, people on monitors in Ohio are not "permitted to have contact with anyone outside your home other than those persons directly related to [their] authorized activity."[128] Likewise, people in the DUI program in Pennington County, South Dakota are instructed to "not associate with non-law-abiding individuals, violence-prone individuals, or anyone actively using drugs or alcohol."[129]

Rules related to behavior are also common. Many of the words used to describe undesired behavior, such as "vicious," "lewd," and "lascivious," are

[122] *See* Weisburd, *Carceral Control*, *supra* note 89, at 16.

[123] Super. Ct. of Ariz., Maricopa Cnty. Div., *supra* note 119.

[124] Va. Dep't of Corr., *supra* note 116.

[125] People v. Ferrell, 659 N.E.2d 992, 995 (Ill. App. Ct. 1995); State v. Talty, 814 N.E.2d 1201, 1205 (Ohio 2004); *see also* Devon A. Corneal, *Limiting the Right To Procreate:* State v. Oakley *and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 470 (2003); Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L.J. 9, 10 (1994).

[126] *See* Barbara Fedders, *The Anti-Parent Juvenile Court*, UCLA L. REV. 746, 752 (2022) (illustrating how juvenile courts mandate parents to assume roles in their child's rehabilitation process, which ultimately frustrate their dignity and caretaking duties).

[127] *See* Weisburd, *Carceral Control*, *supra* note 89, at 13 ("In well over half of the programs, rules regulate who people can be around.").

[128] CUYAHOGA CNTY. CT. COM. PL. PROB. DEP'T, *supra* note 119.

[129] PENNINGTON CNTY. DRUG CT., *supra* note 111, at 12.

vague, value laden, and subject to interpretation.[130] For example, people on probation in Nebraska must refrain "from frequenting unlawful or disreputable places or consorting with disreputable persons."[131]

Community supervision rules sometimes regulate dress and appearance as well.[132] For example, people on probation for certain sex offenses in Maricopa County, Arizona must agree to "be responsible for [their] personal appearance, which includes the wearing of undergarments and clothing."[133] In Harris County, Texas, the rules limit what people can wear to the probation office: no revealing clothing, or clothing in "poor taste," including "halters, short shorts, sagging pants, pajamas, house shoes, swimsuits, low cut revealing shirts/blouses, [and] clothing with vulgar language."[134] And in Utah, people on monitors must "wear modest clothing" to court-ordered classes and cannot wear "shorts, dresses or skirts above the knee, . . . tank tops or sleeveless shirts, drug or gang related labeled clothing" or torn clothing.[135]

3. Physical Isolation, Restraints on Movement & Employment Limitations

Physical restraints and social isolation are hallmark features of the carceral home. Rules forbidding people from leaving their house unless they obtain preapproval are the most common type of physical restraint. These house arrest provisions appear in most of the records I collected.[136] In most jurisdictions, people are also prevented from leaving a geographical area (usually a county or city) or are subject to a curfew.[137]

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[130] *See* Weisburd, *Carceral Control*, *supra* note 89, at 17; *see also* Doherty, *supra* note 22, at 295-96.

[131] NEB. REV. STAT. § 29-2262 (2023); *see also Types of Community Supervision*, DALL. CNTY., https://www.dallascounty.org/departments/cscd/services.php [https://perma.cc/69PB-CDD4] (last visited Nov. 14, 2023); Harris Cnty. Cmty., Conditions of Community Supervision (on file with author).

[132] Super. Ct. of Ariz., Gila Cnty. Div., *supra* note 118; Super. Ct. of Ariz., Maricopa Cnty. Div., *supra* note 119; Orange Cnty. Prob. Dep't, Terms and Conditions for Continuous Electronic Monitoring Supervision Via Global Positioning System (GPS) (on file with author); *Conditions of Probation*, N.Y. DEP'T OF PROB. (Apr. 27, 2022); *Participant Policies*, FRANKLIN CNTY. MUN. CT. CMTY. CLEANUP CREW, https://franklincountymuni court.org/Muni-website/media/Documents/Pretrial%20and%20Probation%20Services/ Cleanup-Crew-Instructions,-Rules-and-Regulations.pdf [https://perma.cc/Q34G-R479] (last visited Nov. 14, 2023); PENNINGTON CNTY. DRUG CT., *supra* note 111, at ; Harris Cnty. Cmty. Supervision & Corr. Dep't, *supra* note 131; UTAH CNTY. SHERIFF'S OFF. CORR. DIV., *supra* note 113; Va. Dep't of Corr., *supra* note 116; *Electronic Monitoring Contract*, WASH. STATE DEP'T OF CORR. (Dec. 3, 2021), https://doc.wa.gov/docs/forms/02-353.pdf [https://perma.cc/EU3Q-BHZH].

[133] Super. Ct. of Ariz., Maricopa Cnty. Div., *supra* note 119.

[134] Harris Cnty. Cmty. Supervision & Corr. Dep't, *supra* note 131.

[135] UTAH CNTY. SHERIFF'S OFF. CORR. DIV., *supra* note 113.

[136] *See* Weisburd, *Carceral Control*, *supra* note 89, at 11.

[137] *Id.* at 12.

Restrictions on where, and with whom, people can live are also common.[138] In most places, people are forbidden from moving without permission or without notice to the supervising agent.[139] In a handful of places, people are forbidden from living in hotels, temporary housing, shelters, or public housing.[140] In many places, people cannot live with other people who have criminal records or who are otherwise deemed unacceptable by the supervising agent. Many rules prohibit people from being in a house with drugs or alcohol.[141]

Limitations on employment are yet another form of restraint.[142] Almost every program in the study had some rule or requirement restricting people's ability to work freely.[143] Most often, people are required to obtain permission before changing jobs or changing their schedule, or must provide their work schedule to the supervising agent.[144] These restrictions impact financial autonomy, as well as people's ability to cover court-imposed fees and restitution.[145]

B. *The Contours of the Carceral Home Beyond Criminal Courts*

The carceral home operates within a larger ecosystem of other social welfare institutions that target the home and private life. State institutions such as schools, family court, welfare agencies, and public housing are often considered decarcerative, progressive, or at least as offering an alternative to something worse (such as prison, homelessness, termination of parental rights, or the loss of public benefits).[146] Yet state interference into otherwise private activities and spaces is a common, and often central, feature of each of these institutions.[147]

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[138] *See id.*

[139] *See id.*

[140] *See id.* at 12-13.

[141] *See id.* at 13.

[142] *See id.* at 19-20.

[143] *Id.* at 19.

[144] *See id.*

[145] For in-depth analysis of court-imposed fees and restitution, see Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1537-46 (2020). *See generally* ARTHUR LIMAN CTR. FOR PUB. INT. L. AT YALE L. SCH. & FINES & FEES JUST. CTR. & POL'Y ADVOC. CLINIC AT U.C. BERKLEY SCH. OF L., MONEY AND PUNISHMENT, CIRCA 2020 (Anna Vancleave, Brian Highsmith, Judith Resnick, Jeff Selbin & Lisa Foster, eds. 2020).

[146] *See* Levin, *supra* note 34, at 1434; Bell et al., *Investing in Alternatives*, *supra* note 34, at 1301; Weisburd, *Punitive Surveillance*, *supra* note 22, at 151. *See generally* MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME (2020).

[147] *See generally* BRIDGES, *supra* note 23; Michelle Y. Ewert, *Their Home Is Not Their Castle: Subsidized Housing's Intrusion into Family Privacy and Decisional Autonomy*, 99 N.C. L. REV. 869 (2021); Alexis Karteron, *When Stop and Frisk Comes Home: Policing Public and Patrolled Housing*, 69 CASE W. RES. L. REV. 669 (2019); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022); Fanna Gamal, *Miseducation of Carceral Reform*, 69 UCLA L. REV. 928 (2022); TOSCA GIUSTINI ET AL., IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 7 (2021).

The intrusions into the home are generally justified as necessary, nonpunitive measures to stabilize the home, detect fraud, protect children, or encourage a different type of behavior.[148]

While it may be tempting to conclude the home intrusions associated with criminal court supervision are justified on different theories (such as punishment, public safety, or rehabilitation) and therefore not comparable to the intrusions associated with other social welfare institutions, it is impossible to fully tease these justifications apart. Moreover, while the stated justifications may be different, the experience of being on the receiving end of the intrusion is strikingly similar across different institutions. As other scholars have exposed, many social welfare institutions reflect varying levels of degradation[149] and carceral logic,[150] and reinforce normative conceptions of homes and family.[151] Systems meant to "serve people's needs . . . have become behavior modification programs that regulate the people who rely on them."[152] These institutions often operate in concert with criminal court supervision, thus extending the reach of the carceral home and further eliminating the home as a sanctuary.[153]

The child welfare system offers a compelling example of state interventions in the home that are at direct odds with the home-as-sanctuary doctrines.[154] In her book *Torn Apart*, Dorothy Roberts explains that "[i]dentifying children as at risk for abuse or neglect gives caseworkers the authority to probe into and regulate every aspect of their family's life."[155] The child welfare system gives the government the authority to gather "substantial information about domestic life . . . ordinarily beyond the gaze of the state."[156] Policing home and family life is a defining characteristic of the child welfare system, and why Roberts and others refer to it as the "family policing" or "family regulation" system.[157]

Poor mothers, especially mothers of color, are frequently subject to extensive privacy invasions because of perceptions and stereotypes of inadequate

[148] *See* DOROTHY ROBERTS, TORN APART 160-64 (2022).

[149] *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 304-30 (2013).

[150] *See* Washington, *supra* note 147, at 1131; MARIAME KABA & TAMARA NOPPER, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 5 (2021).

[151] *See, e.g.*, LaToya Baldwin Clark, *Family | Home | School*, 117 NW. U. L. REV. 1, 19-23 (2022); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1657 (2021).

[152] Dorothy E. Roberts, Book Review, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1700 (2019).

[153] For a vivid description of this practice, see HENNING, *supra* note 6, at 293.

[154] *See* Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1483-91 (2012); Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. (forthcoming 2023) (manuscript at 1069-81) (on file with author).

[155] ROBERTS, *supra* note 148, at 163.

[156] *Id.* at 165.

[157] *See* Washington, *supra* note 147, at 1102-04; Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601, 602-03 (2022).

parenting.[158] Welfare recipients are similarly subject to drug testing and searches of their homes for purposes of detecting fraud or ineligibility and must disclose otherwise personal information.[159] These often dehumanizing and stigmatizing searches are generally upheld as administrative searches, on the logic that "a person's relationship with the state can reduce that person's expectation of privacy even within the sanctity of the home."[160] For people receiving public benefits, "[f]ingerprinting, home invasions, and the like become the cost of doing business."[161]

The policing of public, subsidized, and low-income housing also involves surveillance and control of otherwise private spaces and activities.[162] Pursuant to crime-free ordinances, families face eviction if someone in their household engages in illegal activity, and to avoid eviction families often must abide by detailed rules governing behavior.[163] In some cities, police install surveillance cameras to identify and combat "loiterers" in public housing complexes.[164] Government shelters for unhoused people are likewise subject to near constant surveillance, creating a "privacy-starved environment."[165]

Although a more detailed analysis of noncriminal law surveillance of the home is beyond the scope of this Article, systems such as immigration enforcement, sex offender registries, healthcare, and education also involve

[158] BRIDGES, *supra* note 23, at 8; *see also* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 12 (2020); Citron, *supra* note 21, at 61; Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 340 (2014).

[159] *See* BRIDGES, *supra* note 23, at 174-76; Bach, *supra* note 159, at 341; Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1391-92 (2012); Gustafson, *supra* note 149, at 307.

[160] Sanchez v. Cnty. of San Diego, 464 F.3d 916, 927 (9th Cir. 2006); *see also* Wyman v. James, 400 U.S. 309, 318-19 (1971) (holding mandatory home inspections to continue welfare benefits are reasonable because state has interest in seeing funds used properly).

[161] Hasbrouck, *supra* note 37, at 697.

[162] *See* SKINNER-THOMPSON, *supra* note 23, at 21; Karteron, *supra* note 147, at 691.

[163] *See* SKINNER-THOMPSON, *supra* note 23, at 21-22; Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 186 (2019); Leora Smith, *The Gendered Impact of Illegal Act Eviction Laws*, 52 HARV. C.R.-C.L. L. REV. 537, 538 (2017); Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847, 884-87 (2023).

[164] *See* Justin Wm. Moyer, *Lawsuit Alleges D.C. Housing's Cameras Could 'Capture Intimate Details'*, WASH. POST (Dec. 30, 2022, 7:00 AM), https://www.washingtonpost.com/dc-md-va/2022/12/30/dc-housing-authority-surveillance/; Mark Reutter, *Police Surveillance Camera Costs Rising*, BALTIMOREBREW (Mar. 11, 2014, 8:11 PM), https://www.baltimorebrew.com/2014/03/11/police-surveillance-camera-costs-rising/ [https://perma.cc/RTB8-NGGC].

[165] *See* Matthew R. Taylor & Eileen T. Walsh, *When Corporal Acts Are Labeled Criminal: Lack of Privacy Among the Homeless*, 8 SOCIO. MIND 130, 130-42 (2018); *see also* Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 172-74 (2023).

entry into private domains or the deployment of social control measures.[166] These interwoven institutions further stratify the distribution of privacy and imbed carceral forms of control into purportedly noncarceral systems.[167]

In cases upholding regulatory searches, dissenting judges have raised alarm about regulatory searches constituting an "attack on the poor" who are required to "sacrifice their dignity and their right to privacy" as a condition to obtain a benefit.[168] For example, in *Wyman v. James*,[169] in which the Court upheld the constitutionality of home visits by welfare agents, Justice Marshall, writing for the dissent, noted the contrast in the treatment of the homes between the rich and poor:

> [I]t is argued that the home visit is justified to protect dependent children from "abuse" and "exploitation." These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children?[170]

As pointed out by commentators, even when the police are not directly involved in the searches, the home and private life are still subject to invasions by the state, be it by social workers or probation agents.[171] The various ways the home is policed offer further evidence of the uneasy coexistence between the sanctity-of-home doctrines and the active surveillance of the home for ostensibly progressive ends.

C. *The Inevitability of the Carceral Home*

In many respects, the carceral home is an inevitable outcome of reformist efforts aimed at addressing the root causes of mass incarceration. Targeted

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[166] *See* Ji Seon Song, *Policing the Emergency Room* 134 HARV. L. REV. 2646, 2660-95 (2021); Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants*, 129 YALE L.J.F. 279, 283-89 (2019); Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 20-39 (2022); Sunita Patel, *Embedded Healthcare Policing*, 69 UCLA L. REV. 808, 835-58 (2022); HENNING, *supra* note 6, at 139-40.

[167] *See* BRIDGES, *supra* note 23, at 87-89.

[168] *See* Sanchez v. Cnty. of San Diego, 483 F.3d 965, 969 (2007) (Pregerson, J., dissenting from denial of rehearing en banc) (arguing allowing mandatory searches of private spaces of welfare recipients is unreasonable invasion which will overwhelmingly affect dignity of poor).

[169] 400 U.S. 309, 326 (1971) ("[H]ome visitation as structured by the New York statutes and regulations is a reasonable administrative tool . . . it is not an unwarranted invasion of personal privacy; and . . . it violates no right guaranteed by the Fourth Amendment.").

[170] *Id.* at 341-42 (Marshall, J., dissenting).

[171] *See* Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. 1023, 1053-56 (2023); Alan Dettlaff, *End Carceral Social Work*, INQUEST (June 15, 2022), https://inquest.org/end-carceral-social-work/ [https://perma.cc/YV9M-JJBG].

surveillance of the home and intimate life is a key feature—not bug—of institutions reformers consider alternatives to incarceration, which also provide necessary services, care, or support in the form of education, family stability, public benefits, and housing.[172]

1. Intrusions Intrinsic to Institutional Missions

As a descriptive matter, modern welfare institutions, such as the child welfare system and public housing, affirmatively surveil the home because of the need to regulate or monitor what happens within the home or the family.[173] In the context of criminal court supervision, monitoring the home and private life is the precise purpose of the supervision and reflects "aggregate control and system management."[174] In the words of the Supreme Court, the State's "interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment."[175] In this respect, criminal court supervision is not exceptional, but rather illustrative of "governing through crime"[176] and the "power relations, domination, hierarchy, and deep-seated societal punitiveness" embedded in other public and private institutions that regulate marginalized people.[177]

In all these settings, the intrusions into the home are justified as necessary and legitimate for the institutions to function in providing aid, care, and protection. Whether these institutions *should* enter homes, to the extent they currently do, remains an important question. But setting aside the normative inquiry, if court supervision and other modern regulatory regimes continue to deploy social control and surveillance methods targeted at private life, the home as a "constitutionally protected area" becomes meaningless to millions of people. As Charles Reich observed in 1964, when people are subject to state control, they have "no hiding place."[178]

But to have "no hiding place" is, of course, the stated purpose of criminal court supervision,[179] or for that matter other social welfare institutions. Surveillance and social control are precisely how these institutions

[172] *See* Levin, *supra* note 34, at 1427-30; *Investing in Alternatives*, *supra* note 34, at 1301.

[173] *See* ROBERTS, *supra* note 148, at 161-62; Arons, *supra* note 154, at 5.

[174] *See* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455 (1992).

[175] Samson v. California, 547 U.S. 843, 853 (2006).

[176] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4-5 (2007).

[177] Levin, *supra* note 34, at 1385; *see also* Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 461 (2020) ("A regulatory regime of coercive prevention would have an equally disparate impact on marginalized groups . . . .").

[178] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 760 (1964).

[179] *See Samson*, 547 U.S. at 854.

operationalize their missions, even at the cost of privacy and dignity.[180] In this regard, the label "noncarceral" is ironic as it fails to account for the myriad of ways that distinctly carceral logic defines purported alternatives to incarceration.[181]

The carceral home's inevitability tracks how criminal procedure has long regulated homes and private life, especially for women, people of color, and other marginalized groups. Although a detailed accounting is beyond the scope of this Article, state invasions into physical homes can be traced back to the institution of slavery and the years directly following emancipation. As detailed in greater depth by other scholars, although some enslaved people were afforded standalone physical homes with four walls and a door, this hardly meant they enjoyed security or privacy.[182] The physical spaces of enslaved people, as well as newly freed people, were often invaded, surveilled and monitored.[183] White southerners' fears of an armed insurrection by recently freed Black people was used as a pretext to break into homes and ransack them.[184] Despite having a home and being free, Black people were left asking, "'[Are] we free[?],'" while "holding broken locks and empty pocket books in their hand."[185]

The inevitability of the carceral home also stems from a continued commitment to what Professor Khiara Bridges describes as the "moral construction of poverty," which assumes that "people are poor because there is something wrong with them."[186] Interconnected databases create "digital poorhouses," which require people seeking social services to be subject to extra scrutiny based "not on their behavior but rather on a personal characteristic:

[180] The same critique has been applied in the context of surveillance and domestic violence. *See* Suk, *Is Privacy a Woman?*, *supra* note 18, at 498-99.

[181] *See* Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 105). For more detailed analysis of purported "alternatives" to incarceration, see Arnett, *supra* note 22, at 663; SCHENWAR & LAW, *supra* note 25, at 30; Erin Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1573 (2021); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012); Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1401 (2016); Jessica M. Eaglin, *Against Neorehabilitation*, 66 S.M.U. L. REV. 189, 222 (2013).

[182] *See* SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 284 (2022) (describing how state punished African Americans for failing to maintain "proper home").

[183] *Id.* at 284-85 (stating how "sanctuary of the private was violated regularly").

[184] David H. Gans, *"We Do Not Want To Be Hunted": The Right To Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 277 (2021); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 338 (1991).

[185] Letter from Freedmen's Bureau Subcommissioner at Columbus, Mississippi, to the Headquarters of the Freedmen's Bureau Acting Assistant Comm'r for the N. Dist. of Miss. (Dec. 30, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SER. 3, VOL. 1: LAND AND LABOR, 1865, at 898 (2009).

[186] BRIDGES, *supra* note 23, at 7.

living in poverty."[187] Many of the social welfare institutions that surveil the home "continue the trend of neoliberal paternalism in welfare provision."[188] So long as the "family is not beyond regulation,"[189] intrusions into family life will persist as legal and legitimate.[190]

2. Criminal Procedure Doctrines That Facilitate the Carceral Home

The inevitability of the carceral home is also explained by several interconnected ways that criminal procedure doctrines further undermine the sanctity of the home and limit what counts as a home to begin with. While on one hand, Fourth Amendment jurisprudence draws a "firm line" at the home, on the other hand, exceptions to the warrant requirement undermine the home-as-sanctuary status. As explained herein, these exceptions help construct the carceral home, both for people on various forms of court supervision, as well as people who have frequent contact with police.

First, the automobile exception allows for greater state intrusion into vehicles in which people live, as the "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[191] Although the automobile exception cases are most often read as being about cars, they are just as much about cars that serve as homes, as the doctrine essentially affords "less Fourth Amendment protection to houses of lower socioeconomic statuses."[192]

Second, public spaces where people live or spend time—such as parks, streets, buses, and other shared or common spaces—are generally afforded less Fourth Amendment protection than the home.[193] Courts have relied on this general rule to uphold searches conducted by pole cameras,[194] aerial surveillance,[195] searches of hallways and other common areas,[196] as well as searches of tents and other forms of shelter erected on public land.[197] The result

[187] VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 12, 158 (2015).

[188] Bell et al., *Investing in Alternatives*, *supra* note 34, at 1297.

[189] Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

[190] BRIDGES, *supra* note 23, at 114.

[191] California v. Carney, 471 U.S. 386, 391 (1985).

[192] Gus, *supra* note 20, at 798.

[193] *See* United States v. Knotts, 460 U.S. 276, 276 (1983); United States v. Karo, 468 U.S. 705, 706 (1984).

[194] United States v. Tuggle, 4 F.4th 505, 505 (7th Cir. 2021); United States v. Houston, 813 F.3d 282, 288 (6th Cir. 2016).

[195] California v. Ciraolo, 476 U.S. 207, 215 (1986); Florida v. Riley, 488 U.S. 455, 455 (1989); Dow Chemical Co. v. United States, 476 U.S. 227, 234 (1986).

[196] *See, e.g.*, United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998); United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977).

[197] *See* Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975); People v. Thomas, 38 Cal. App. 4th 1329, 1335 (1995); State v. Tegland, 344 P.3d 63, 68-69 (Or. App. 2015); People v. Nishi, 143 Cal. Rptr. 3d 882, 890-91 (Cal. Ct. App. 2012) .

is less privacy for those "living in crowded apartment complexes in close proximity to others."[198] As other scholars have noted, people living in these areas have neither the benefit of privacy, nor the full enjoyment of public spaces.[199]

Third, the Supreme Court has also made clear that people on probation and parole have a lowered expectation of privacy, including in their homes.[200] In *Samson v. California*, for example, Justice Clarence Thomas, writing for the majority, explained that the search of parolees was a "reasonable" search under the Fourth Amendment because of the State's interest in reducing recidivism and promoting reintegration outweighed the privacy interests of parolees who have a "severely diminished expectations of privacy by virtue of their status alone."[201] This lower expectation of privacy also helps facilitate the carceral home.

Fourth, entry into the home is also facilitated by exigency and the emergency aid exception to the warrant requirement.[202] With respect to exigency, police are permitted to enter a home if immediate action is needed to prevent the destruction of evidence or to stop a fleeing suspect.[203] This exception, which is critiqued as providing too much discretion to police, remains a common basis for police to enter homes.[204] Similarly, under the emergency aid exception, police may enter homes without a warrant to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[205] The police officer's actual belief is irrelevant, so long as objective facts support the emergency entry.[206] While the Court's recent decision in *Caniglia v. Storm* appears to reject a broad "community caretaking" exception, the decision actually undermines the privacy afforded the home.[207] In both the majority opinion, as well as the concurrences, the justices reiterated that already-existing exigency and emergency aid precedents permit entry into the home.[208] Yet in

[198] Chavis Simmons, *supra* note 20, at 250; *see also* BRIDGES, *supra* note 23, at 92.

[199] *See* Morgan, *supra* note 151, at 1677; L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1160 (2012); Slobogin, *supra* note 20, at 401.

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

[201] *Samson*, 547 U.S. at 852.

[202] *See* Ric Simmons, *supra* note 20, at 174.

[203] *See* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298 (1967) (upholding exigency based on fleeing suspect); Kentucky v. King, 563 U.S. 452, 460 (2011) (upholding exigency based on destruction of evidence).

[204] *See* Ric Simmons, *supra* note 20, at 163.

[205] Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

[206] *Id.* at 404 (emphasis added) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

[207] Ric Simmons, *supra* note 20, at 148.

[208] *See* Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021) ("We have thus recognized a few permissible invasions of the home and its curtilage."); *Id.* at 1601 (Roberts, J., concurring) ("Every State has laws allowing emergency seizures for psychiatric treatment, observation, or stabilization . . . ."); *Id.* at 1603 (Kavanaugh, J., concurring) ("[P]olice officers may enter a home without a warrant in circumstances where they are reasonably trying to prevent a potential suicide or to help an elderly person who has been out of contact and may have fallen and suffered a serious injury.").

doing so, the Justices actually broadened what counts as exigency to include circumstances that do *not* involve imminent danger.[209]

Like the other exceptions, emergency aid operates within a larger context of how police respond to certain types of emergencies, such those involving people experiencing mental illness or a mental health crisis, and the extent to which police treat these situations as more dangerous than they may be.[210] The result is not just entry into the home, but unnecessary, and sometimes deadly, encounters with police. This problem is especially acute for people with disabilities, whose "physical and psychological conditions, abilities, appearances, [and] behaviors . . . do not conform to the dominant norm,"[211] and make them more vulnerable to police interactions inside and outside the home.

The diminishment of privacy afforded to the home is also facilitated by rules governing the execution of warrants. Historically, the "knock-and-announce" rule, which requires police to knock and announce themselves before entering a home, was intended to protect the safety of both police and residents. Yet, in *Hudson v. Michigan*,[212] the Supreme Court held that a violation of the "knock-and-announce" rule does not trigger the exclusionary rule.[213] As the dissent warned, the holding "destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement."[214] The result, according to the dissent, was a serious invasion into the sanctity of the home and the "privacies of life."[215]

The use of no-knock warrants similarly facilitates police entry into the home. Based on exigency principles, police are permitted to enter a home if a magistrate judge authorizes a no-knock warrant or if "circumstances support a reasonable suspicion of exigency when the officers arrive at the door."[216] The killing of Breonna Taylor by police executing a no-knock warrant triggered widespread outrage and some policy reform efforts,[217] but Fourth Amendment

[209] Ric Simmons, *supra* note 20, at 148-49.

[210] Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 975-76 (2020).

[211] Morgan, *supra* note 18, at 495.

[212] 547 U.S. 586 (2006).

[213] *Id.* at 594.

[214] *Id.* at 605 (Breyer, J., dissenting).

[215] *Id.* at 606 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[216] United States v. Banks, 540 U.S. 31, 37 (2003).

[217] *See* Colleen Long & Michael Balsamo, *White House Considers Expanding Limits on 'No-Knock' Warrant*, AP NEWS (Feb. 7, 2022, 5:21 PM), https://apnews.com/article/joe-biden-amir-locke-police-shootings-jen-psaki-a33088e70b82f974c0408a3fdb89438b [https://perma.cc/V7TP-7ECG]; Josiah Bates, *Breonna Taylor's Killing Sparked Restrictions on No-Knock Warrants. But Experts Say Those Rules Don't Actually Change Much*, TIME (Mar. 11, 2022, 1:25 PM), https://time.com/6156590/breonna-taylor-no-knock-warrants/ [https://perma.cc/P92M-9FGJ].

law continues to permit unannounced, and sometimes violent or deadly, entries into people's homes.[218]

These doctrines all demonstrate how the home's special status as a sanctuary is far from absolute. Despite rhetoric of the home as a sanctuary from state violence, it is often the opposite: from no-knock warrants to exigency searches, police routinely invade the home, sometimes with dehumanizing and deadly consequences.[219] Although often studied and discussed individually, these exceptions operate in close concert,[220] and all reflect intersecting and legal ways that state actors enter homes.[221] When these doctrines are considered in the context of who bears the brunt of policing in the United States, it is already-marginalized groups that disproportionally lose privacy in their homes and private life. The "hyper- and over-policing of urban areas results in increased surveillance, [and] police presence," such that the "intersectional axes of class and race" determine who is exposed to police interactions and whose homes have less protection from state intrusion.[222]

To be sure, this Article is not suggesting that because the carceral home is inevitable there is not an alternative path forward. Rather, it asserts that any effort to limit the intrusions associated with the carceral home must reckon with both the reality that physical homes often provide no real refuge from government surveillance, and that homes, and intimate life, are the exact and intended target of progressive institutions.

D. *Law's Failure to Account for the Carceral Home*

As Parts I and II reveal, the prison experience of 24/7 surveillance and control increasingly exists in homes. Yet, the law has not kept pace in regulating the carceral home. The lack of any meaningful limit on when, why, or how the state may surveil private life stems in part from a lack of clarity about the purported purpose and function of the carceral home and what it is best compared to. Is it meant to be a type of punishment? Is the carceral home in fact an alternative to prison? If so, how is that measured as an empirical matter? Or is it better to compare the carceral home to freedom? Finally, are the restraints associated with the carceral home regulatory or punitive? As addressed in related work,[223] these

[218] *See* Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 11-12 (2022).

[219] *See, e.g.*, Nicole Dungca & Jenn Abelson, *No-Knock Raids Led to Fatal Encounters, Small Drug Seizures*, WASH. POST (Apr. 15, 2022), https://www.washingtonpost.com/investigations/interactive/2022/no-knock-warrants-judges/.

[220] DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 13-15 (2022).

[221] *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017).

[222] Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J.L. & MED. 279, 293-94 (2017).

[223] *See* Weisburd, *Punitive Surveillance*, *supra* note 22, at 173-74; Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 118-19).

questions do not have easy answers, and, as a result, the law governing the carceral home fails to adequately resolve the tension between the laws protecting the home on one hand, and the current ways that homes have transformed into carceral spaces on the other hand.

Several related legal theories are relied on to uphold the various restraints and intrusions that constitute carceral home. First, people on court supervision are deemed to have a "diminished . . . expectation of privacy."[224] And second, most restrictions are upheld based on some combination of consent, Fourth Amendment reasonableness, or because the rule "reasonably relates" to either rehabilitation or punishment. As explained below, when considered together, these legal doctrines erase the home's sanctuary status and provide no obvious backstop or way to distinguish between reasonable or unreasonable intrusions into the home.

The Supreme Court's holding that people on supervision have a "significantly diminished" expectation of privacy[225] explains why otherwise relevant privacy protections—such as the protection of geolocation and cellphone data—are not extended to people on various forms of community supervision.[226] Yet, this lower expectation of privacy standard has no obvious limit. As others have pointed out, people's expectations of privacy depend on the expectations set, at least to some degree, by the government.[227] So long as the government *tells* people on court supervision that they have diminished privacy, they no longer have a subjective expectation of privacy. Although courts often repeat that people on court supervision have limited privacy, there is no obvious line between limited privacy and no privacy. Moreover, the lower-expectation-of-privacy cases fail to address the home as a uniquely private place, nor do the cases account for other aspects of the carceral home that are unrelated to privacy and searches (like travel restrictions or mandated treatment).[228]

Consent also plays a significant role in justifying otherwise unconstitutional surveillance of the home and intimate life. As addressed in prior work, a person's purported consent to the rules associated with the carceral home is often invoked

[224] United States v. Knights, 534 U.S. 112, 120 (2001).

[225] *Id.*

[226] *See, e.g.*, United States v. Lambus, 897 F.3d 368, 412 (2d Cir. 2018); United States v. Pacheco, 884 F.3d 1031, 1043 (10th Cir. 2018); United States v. Johnson, 875 F.3d 1265, 1275 (9th Cir. 2017); Belleau v. Wall, 811 F.3d 929, 935 (7th Cir. 2016); United States v. Bare, 806 F.3d 1011, 1018 n.4 (9th Cir. 2015); United States v. Jackson, 214 A.3d 464, 478 (D.C. 2019); Commonwealth v. Johnson, 119 N.E.3d 669, 680 (Mass. 2019); State v. Kane, 169 A.3d 762, 774 (Vt. 2017). *But see* United States v. Lara, 815 F.3d 605, 612 (9th Cir. 2016) (invalidating suspicionless search of probationer's cell phone as unreasonable); *In re* Ricardo P., 446 P.3d 747, 754-55 (Cal. 2019) (invoking *Riley* as part of basis to strike down electronic search condition).

[227] *See* Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 650 (2007) ("[Under *Katz*, the] government seemingly can deny privacy just by letting people know in advance not to expect any."); *see also* SKLANSKY, *supra* note 67, at 254.

[228] *See, e.g.*, Samson v. California, 547 U.S. 843 (2006); *Knights*, 534 U.S. at 112; Griffin v. Wisconsin, 483 U.S. 868 (1987).

as the justification for invasions of the home and family.[229] Because people elect the carceral home over incarceration, the argument goes, consent nullifies any potential constitutional violation.[230] In many respects, consent makes thorny constitutional questions—such as how to reconcile the sacred and carceral home—obsolete. There is no need for courts to resolve difficult legal questions if someone simply consents to the invasive condition. Whether the consent occurs through the plea-bargaining process or at sentencing, people simply agree to whatever terms are presented to them,[231] and as a result, give up privacy they may have had in their home or intimate life. Yet, there are a host of reasons to be skeptical of consent as a check on government power, including coercion, the unconstitutional conditions doctrine, and the assumption that the carceral home is always a substitution for incarceration.[232]

When consent is not invoked, courts most often uphold intrusions into the home based on a general Fourth Amendment "reasonableness" standard. This standard, which balances "individual[] privacy" against "legitimate governmental interests"[233] is often relied on to justify physical searches, electronic ankle monitoring, and the collection of DNA samples for people on court supervision.[234] Although a small number of courts have struck down electronic ankle monitoring as unreasonable, they are the exception, not the norm.[235] When courts find that ankle monitoring or DNA collection is *unreasonable*, it is often in cases where the person has completed their sentence, suggesting that the court is less concerned with the deprivation of privacy for people still on court supervision.[236]

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[229] *See* Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 148).

[230] *See Id.*

[231] *See* Doherty, *supra* note 22, at 342; *see also* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1969 (2019); Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 525-26 (2015); Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 776 (2005).

[232] *See* Weisburd, *Sentenced to Surveillance*, *supra* note 91, at 739.

[233] *Knights*, 534 U.S. at 113.

[234] *Id.*; Samson v. California, 547 U.S. 843, 844 (2006) (searches); Maryland v. King, 569 U.S. 435, 446 (2013) (DNA collection); United States v. Kincade, 379 F.3d 813, 816-17 (9th Cir. 2004) (same); Banks v. United States, 490 F.3d 1178, 1185 (10th Cir. 2007) (same).

[235] *See* Commonwealth v. Norman, 142 N.E.3d 1, 10 (Mass. 2020); Commonwealth v. Feliz, 119 N.E.3d 700, 717 (Mass. 2019); State v. Grady, 831 S.E.2d 542, 571 (N.C. 2019); State v. Gordon, 820 S.E.2d 339, 347 (N.C. Ct. App. 2018). *But see* Belleau v. Wall, 811 F.3d 929, 932 (7th Cir. 2016) (finding condition requiring plaintiff to wear GPS anklet monitor was constitutional where Fourth Amendment does not create any right of privacy and only requires searches be reasonable).

[236] *See, e.g.*, *Grady*, 831 S.E.2d at 559-60 (noting Fourth Amendment concerns are heightened with "respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the 'continuum of possible [criminal] punishments'"); Friedman v. Boucher, 580 F.3d 847, 858 (9th Cir. 2009) (finding nonconsensual DNA collection

The special government needs exception to the warrant requirement is likewise permissive of invasive searches of the home. Traditionally, this exception permits home searches on the basis that probation agencies' rehabilitative function is a special government need that does not require a warrant.[237] Although the searches of people on court supervision are increasingly governed by the general "reasonableness" standard,[238] courts continue to invoke special needs as the basis to uphold practices such as electronic ankle monitoring.[239]

The diminishment of other constitutional rights—beyond the Fourth Amendment—also explains the carceral home. In general, people subject to criminal court control lose constitutional rights so long as the loss "reasonably relates" to rehabilitation or public safety.[240] These rules—such as restrictions on the rights to travel or bear children, or rules requiring participation in religious drug-treatment programs—escape traditional levels of constitutional scrutiny that would ordinarily apply outside the context of criminal court supervision.[241] Rules limiting the right to parent or visit with children, for example, are generally upheld, despite raising substantive due process concerns.[242]

While courts have struck down some particularly intrusive rules and conditions, such as pornography bans,[243] church attendance requirements,[244] penile plethysmography testing,[245] antiprocreation requirements,[246] and full

unreasonable because "Friedman was not on parole. He had completed his term of supervised release successfully and was no longer [under] the supervision of any authority").

[237] *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873-75 (1987).

[238] Weisburd, *Sentenced to Surveillance*, *supra* note 91, at 748.

[239] *See* United States v. Jackson, 214 A.3d 464, 467 (D.C. 2019).

[240] *See, e.g.*, United States v. Schave, 186 F.3d 839, 843 (7th Cir. 1999) ("[A] court will not strike down conditions of [supervised] release, even if they implicate fundamental rights, if such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism."); *see also* Weisburd, *Punitive Surveillance*, *supra* note 22, at 186 (collecting cases).

[241] Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 141).

[242] *Id.*; Karteron, *supra* note 22, at 679-80.

[243] Laura A. Napoli, *Demystifying "Pornography": Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression*, 11 U.N.H. L. REV. 69, 81-84 (2013).

[244] *See, e.g.*, State v. Evans, 796 P.2d 178, 179-80 (Kan. Ct. App. 1990) (striking down parole condition requiring church attendance at specific church where mandatory attendance was violative of defendant's free exercise of religion).

[245] *See, e.g.*, United States v. McLaurin, 731 F.3d 258, 260-62 (2d Cir. 2013).

[246] *See, e.g.*, Trammell v. State, 751 N.E.2d 283, 290-91 (Ind. Ct. App. 2001) ("[O]rdering [the defendant] not to become pregnant while on probation excessively impinges on her privacy right of procreation and serves no discernable rehabilitative purpose."); United States v. Harris, 794 F.3d 885, 889-90 (8th Cir. 2015) (deleting supervised release condition requiring defendant to "not participate in any unprotected sex activities without approval of the Probation Office").

internet bans,[247] those cases are the exception and not the norm. "Constraints as extreme as these, as well as more 'garden variety' [rules] are most often upheld."[248] Courts have upheld as reasonable rules that forbid someone from having children unless they demonstrate the financial means to support children,[249] or complete drug counseling.[250] Restrictions minimizing First Amendment rights—such as participation in AA or restrictions on movement that implicate the ability to protest or practice religion—are also routinely upheld under a "reasonably related" justification.[251] When the Supreme Court invoked the First Amendment to strike down an internet ban for someone convicted of a sex offense, the decision hinged on the fact that the affected people had "already . . . served their sentence and are no longer subject to the supervision of the criminal justice system."[252]

In short, constitutional protections that would otherwise limit intrusions into the home and family life disappear for people on court supervision. This type of legal subordination of the home reflects "informal disenfranchisement," which occurs when a "group that has been formally bestowed with a right is stripped of that very right by techniques that the Court has held to be consistent with the Constitution."[253]

As demonstrated by carceral homes, to be physically housed does not mean to have privacy, security, or autonomy. The contradiction—between the carceral home on one hand, and the home-as-sanctuary doctrines on the other—calls into question the law's continued fidelity to the home as "first among equals."[254] To be sure, this question is not limited to the Fourth Amendment. As other scholars have observed, there are similarly stark contrasts between the sacred status of the home and, for example, the seizure of homes under the Takings Clause of the Fifth Amendment,[255] home searches of welfare recipients,[256] and reform measures meant to protect victims of domestic violence.[257]

The various permutations of this dichotomy all lead to two interrelated conclusions. First, literal walls and doors do not provide the protection for intimate activities and information that the home-as-sanctuary approach would seem to suggest. Instead, in the context of current criminal procedure policies

[247] *See, e.g.*, United States v. Ellis, 984 F.3d 1092, 1095 (4th Cir. 2021).

[248] Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 116).

[249] State v. Oakley, 629 N.W.2d 200, 214 (2001).

[250] State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998).

[251] *See, e.g.*, United States v. Romig, 933 F.3d 1004, 1006-07 (8th Cir. 2019); United States v. Pacheco-Donelson, 893 F.3d 757, 761-63 (10th Cir. 2018); United States v. Evans, 883 F.3d 1154, 1160-61 (9th Cir. 2018); People v. Lopez, 78 Cal. Rptr. 2d 66, 632 (Cal. Ct. App. 1998).

[252] *See* Packingham v. North Carolina, 582 U.S. 98, 107 (2017).

[253] BRIDGES, *supra* note 23, at 13.

[254] Florida v. Jardines, 569 U.S. 1, 6 (2013).

[255] Dickinson, *supra* note 69, at 1100.

[256] Budd, *supra* note 20, at 357.

[257] SUK, *supra* note 20, at 7.

and laws, the home is merely a metaphor to protect intimacy. Second, targeted surveillance of intimacy and the home is a core feature, not bug, of court supervision and social welfare institutions. These conclusions raise another question: If the home, as a legal concept, offers no limiting principle on government surveillance, what can?

III. PATHS FORWARD

As is now clear, the home-as-sanctuary doctrines contradict the various ways homes are now routinely, and inevitably, targeted and surveilled in the service of modern institutions and reform efforts. The failure of current legal doctrine to resolve this contradiction has left the home exposed to limitless surveillance. This Part considers possible paths forward through these doctrinal contradictions.

A. *The Problem with Doing Nothing*

The first possible path is to stay the course and maintain the paradoxical status quo, allowing homes to remain a guiding doctrinal principle, despite the existence of the carceral home. The word "houses" is in the Fourth Amendment,[258] after all, and the various articulations of a "reasonable expectation of privacy" and reasonableness may be sufficiently flexible, at least in theory, to rein in unreasonable surveillance of the home. Physical features of a home—walls, doors, bedrooms—are also easy to identify and imbue with meaning, making it efficient for courts to determine how much privacy is due and to whom. This use-what-we-have approach may be intuitively appealing, if only because it is pragmatic and perhaps the most realistic option.

Doing nothing, however, cannot be the answer to the contradictions identified in this Article. As explained below, maintaining the carceral home is untenable because it leaves millions of people with no actual refuge, even if they are technically housed.

1. Lack of Limiting Principles

The most obvious concern with doing nothing is that there is no effective line to distinguish between reasonable and unreasonable surveillance of the home. If we accept as true that surveillance is an intrinsic part of many public welfare institutions, as well as criminal court supervision, then identifying limiting principles is critical. As described previously, the home provides no such limit. Not only are the sacred home doctrines inapplicable to the carceral home, but many of the activities protected by the "home" are not necessarily intrinsic to the home. For example, the home as the "firm line" to protect against state surveillance does nothing to limit restrictions related to travel, speech, or

[258] U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses . . . shall not be violated . . . .").

parenting, nor does it apply to requirements related to medical or mental health treatment or employment. In these respects, the home is not a helpful metric.

Consent also offers no limit. Consent assumes an actual choice between prison and the carceral home, yet it is never that simple.[259] For example, it is impossible to know if everyone on an ankle monitor today would, in a world without monitors, otherwise be incarcerated, or incarcerated for the same amount of time they are on a monitor. More often, people spend months cycling through prison, court supervision, and other types of state-run programs.[260] It is rarely a question of one day on a monitor or one day in prison—it is often both, just at different times.[261] In this respect, carceral homes do not offer a "discount" on a prison sentence; rather they raise unconstitutional conditions problems, a concern that applies in the context of privacy invasion associated public benefits as well.[262]

Courts' practices of justifying privacy intrusions so long as they are "primarily designed to affect the rehabilitation of the probationer or insure the protection of the public,"[263] are likewise a limitless limit.[264] This standard is not arbitrary, and migrated from prison jurisprudence with little adaptation for the differences between prison and criminal court supervision.[265] In prison, privacy invasions are justified so long as they are "necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, . . . chief among which is internal security."[266] These administrative concerns, however, do not easily map onto the surveillance at issue in carceral homes.

Furthermore, as other scholars have explored, both the general Fourth Amendment reasonableness standard and the special government needs doctrine are so deferential to government interests that privacy concerns almost never prevail.[267] A contributing complication is the extent to which evaluating reasonableness has been "measured in physical terms,"[268] an approach ill-suited for the nonphysical restraints associated with the carceral home. As a result,

[259] Weisburd, *Sentenced to Surveillance*, *supra* note 91, at 739.

[260] *See id.* at 741.

[261] *Id.*

[262] BRIDGES, *supra* note 23, at 66.

[263] United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975).

[264] Weisburd, *Sentenced to Surveillance*, *supra* note 91, at 750.

[265] Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 134).

[266] Hudson v. Palmer, 468 U.S. 517, 524 (1984).

[267] *See* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 289-97 (2011); Cynthia Lee, *Reasonableness With Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1152 (2012); Barry Friedman & Cynthia Benin Stein, *Redefining What's "Reasonable": The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 297 (2016); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994).

[268] Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1364 (2008); *see also* SKLANSKY, *supra* note 67, at 255.

huge numbers of people living in homes are relegated to a "sub-constitutional status"[269] that shrinks the privacy afforded to marginalized people such that "they do not have any claim to privacy."[270] In his dissent in *Samson,* Justice Stevens cautioned that allowing suspicionless searches of parolees set a dangerous precedent, as the Court had never "sanctioned the use of any search as a punitive measure."[271] The carceral home reflects his concern.

2. Failure to Account for Inequity

Maintaining the status quo also fails to address the many permutations of inequity that are reproduced through the carceral home. While there is no question that most homes and intimate life are subject to unprecedented levels of surveillance,[272] "equal observation" does not "result in equal exposure."[273] As Professor Bridges has argued in the context of privacy, "reducing the privacy that the poor enjoy vis-à-vis the state actually purchases an increase in the privacy that the wealthy enjoy vis-à-vis the state."[274] This equity argument applies equally in the context of the carceral home: the more the state intervenes in the homes and private lives of poor people and people of color, the more protection those with both class and race privilege gain. The result is the devaluation of homes as refuges for large numbers of people, primarily those that are already marginalized and subordinated.[275] Although everyone "deserves intimate privacy to create a life of meaning, respect, and love,"[276] the carceral home reflects a form of race and class-based surveillance that directly undermines this type of privacy.[277]

In many respects, the home's legal status as "sacred" rests on assumptions and ideologies that tend to overlook decades of structural inequity and institutional discrimination that have dictated who is afforded the privacy offered by a house. As other scholars have explored, many of the doctrines that address homes, families, and Fourth Amendment case law rely on particular assumptions about social values, vice, and morals, all of which raise equity considerations.[278] The house inhabited by the "lady" who saunas and baths daily, for example, reflects the conception of home as feminine, intimate, clean, and

[269] Budd, *supra* note 20, at 359.

[270] BRIDGES, *supra* note 23, at 89.

[271] Samson v. California, 547 U.S. 843, 864 (2006) (Stevens, J., dissenting).

[272] *See* Ferguson, *Persistent*, *supra* note 21, at 3.

[273] BRIDGES, *supra* note 23, at 143.

[274] *Id.* at 95.

[275] *See* CARBADO, *supra* note 220, at 20.

[276] CITRON, *supra* note 21, at 105-06.

[277] *See* sources cited *supra* note 24.

[278] Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 273 (2021). *See generally* Anna Lvovsky, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189 (2018).

ordered.[279] The focus of some decisions on the "sacred" "marital bedroom" likewise suggests the importance of marriage.[280] In this way, the legal conception of the home endorses a value set focused on personal responsibility, traditional gender roles, moral behavior, and financial independence.[281] Moreover, what counts as an "ordered" home, as well as a "proper" mother or father, is often rooted in "racist, gendered, and ableist norms."[282] Maintenance of the carceral home fails to reckon with, much less address, these equity considerations.

3. Privacy and Dignity Harms

The carceral home is often viewed as a benevolent alternative to prison, thereby obscuring and normalizing the privacy and dignity harms flowing from surveillance of the home.[283] With respect to privacy, the range of surveillance measures may not seem significant on their own, but these surveillance harms add up.[284] The various methods of data collection and surveillance of intimate life are themselves privacy harms,[285] as is the sharing of medical, mental health, and other private records between agencies and government officials.[286] Physical searches, including of the home, cellphone and body, are also dehumanizing and subordinating.[287]

The accumulation, storage, and analysis of intimate information—such as geolocation data—is a separate but related privacy harm. As the concurrence in *Jones* cautioned with respect to GPS data: "Awareness that the government may be watching chills associational and expressive freedoms. And the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse."[288] This concern is warranted as privacy is a "condition in which there remain important and durable gaps in the information about oneself

[279] *See* Morgan, *supra* note 151, at 1660.

[280] Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977); *In re* Marriage of Tigges, 758 N.W.2d 824, 826 (Iowa 2008); Rimert v. Meriwether & Tharp, LLC, 865 S.E.2d 199, 200-01 (2021).

[281] Capers, *Good Citizen*, *supra* note 18, at 655; Melissa Murray, *Marriage As Punishment*, 112 COLUM. L. REV. 1, 7 (2012).

[282] *See* Morgan, *supra* note 151, at 1657; *see also* Washington, *supra* note 147, at 1121.

[283] For a detailed description of how electronic monitoring furthers social marginalization and entrenches inequity, see Arnett, *supra* note 22, at 675-80; Weisburd, *Punitive Surveillance*, *supra* note 22, at 149.

[284] *See* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 816 (2022).

[285] *See* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 723 (1999).

[286] *See, e.g.*, ROBERTS, *supra* note 148, at 166; Fanna Gamal, *The Private Life of Education*, 75 STAN. L. REV. 1315, 1317 (2023).

[287] *See* Solove & Citron, *supra* note 284, at 827.

[288] United States v. Jones, 565 U.S. 400, 416 (2012).

that is accessible to others."[289] But these "gaps" are not afforded to the people in carceral homes.[290]

The dignity harms are also significant. The carceral home's control of the body and mind runs counter to the "core idea that an individual's body is not public property, that the individual should control access to his or her body."[291] As Professor Danielle Citron explains of intimate privacy, we "are free only insofar as we can manage the boundaries around our bodies and intimate activities."[292] Accordingly, restrictions related to behavior, dress, required treatment, and personal relationships, in addition to pervasive surveillance, all raise dignity concerns.

In a comprehensive study on the social costs of electronic monitoring in San Francisco, Professor Sandra Smith documented the indignity of wearing a monitoring device.[293] As one study participant described, getting a job while on a monitor was next to impossible:

> Sometimes perception is worse than the actual facts. So, they see the ankle monitor and they perceive that you're not a good person—without knowing the true facts. So, you're very limited and you're very handicapped when it comes to jobs.[294]

Other first-person accounts reflect these dignity harms.[295] People describe how probation stripped them of "their independen[ce] and the ability to make autonomous choices about their lives,"[296] and treated them like "cattle" and with little respect.[297] One person described having to wait for two hours for a probation officer, only to be questioned "up and down . . . in front of everyone."[298] These harms will remain undisturbed if the contradiction between the carceral and sacred home is not addressed.

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[289] Julie E. Cohen, *Irrational Privacy?*, 10 J. TELECOMM. & HIGH TECH. L. 241, 244 (2012).

[290] BRIDGES, *supra* note 23, at 155.

[291] David Alan Sklansky, *Too Much Information: How Not To Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1109 (2014).

[292] Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874 (2019).

[293] Sandra Susan Smith & Cierra Robson, *Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco*, HARV. KENNEDY SCH. MALCOLM WIENER CTR. FOR SOC. POL'Y, Sept. 2022, at 1, 2.

[294] *Id.* at 36.

[295] For detailed first-person accounts of life on a monitor, see *The Voice of the Monitored-Ankle Monitors Aren't Humane. They're Another Kind of Jail*, CHALLENGING E-CARCERATION, https://www.challengingecarceration.org [https://perma.cc/5DDL-KXGU] (last visited Nov. 14, 2023) .

[296] James Kilgore (@Lonnieb451), *Challenging E-Carceration*, YOUTUBE, https://www.youtube.com/playlist?list=PLPy3RTCUSJRNah0D8Ugq6QdcZ3p7POgiV (last visited Nov. 14, 2023).

[297] *Id.*

[298] *Id.*

B. *The Problem with Merely Expanding* What *Is Protected*

Broadening the legal definitions of "houses" and "security"—both terms that appear in the Fourth Amendment—is also an instinctively appealing path forward that could better address the equity, dignity, and privacy harms identified in the prior Section. Expanding the scope of "constitutionally protected areas" could extend protection to other forms of refuge, such as temporary shelters, some cars, and tents. Likewise, recognizing privacy interests disconnected from the home could better protect intimacy regardless of where someone physically resides. A greater recognition of personal security decoupled from a home is also consistent with the Supreme Court's declaration that the Fourth Amendment protects "people, not places."[299]

The problem, however, is that current doctrine, such as the reasonable expectation of privacy standard, already allows for broader definitions disconnected from homes and yet the contradiction between carceral and sacred home persists. As explained below, expanding protection of the home is necessary, but not sufficient, in providing a more robust limit on the privacy intrusions associated with the carceral home.

1. Expanding the Definition of the "Home"

In many respects, expanding the scope and substance of protection afforded to the home makes intuitive sense. As a doctrinal matter, a broader definition of the home is consistent with a broader definition of what counts as a "reasonable expectation of privacy." Starting with *Katz*—where Justice Harlan analogized a phonebooth to a home—courts increasingly recognize home-like features in physical areas that have not traditionally been recognized as homes.[300] For example, the Ninth Circuit invalidated the seizure of personal property, including shelter material, from a group of people living on the streets in Los Angeles.[301] The court noted the importance of recognizing privacy in "unabandoned shelters and effects."[302] Other courts have concluded that places not traditionally considered homes, like hotel and dorm rooms, are most often treated as analogous to a home.[303] Justice Stevens, for example, urged in a dissent for "plac[ing] a higher value on the sanctity of the ordinary citizen's home . . . whether the home be a humble cottage, a secondhand trailer, or a

[299] Katz v. United States, 389 U.S. 347, 351 (1967).

[300] *See* Kerr, Katz *As Originalism*, *supra* note 31, at 1054.

[301] Lavan v. City of Los Angeles, 693 F.3d 1022, 1031 (9th Cir. 2012); *see also* State v. Pippin, 403 P.3d 907, 909 (Wash. App. Div. 2017); Kelley v. State, 245 S.E.2d 872, 872 (Ga. Ct. App. 1978).

[302] *Lavan*, 693 F.3d. at 1028 n.6.

[303] Stoner v. California, 376 U.S. 483, 483 (1964); Finsel v. Cruppenink, 326 F.3d 903, 908 (7th Cir. 2003); United States v. Peoples, 854 F.3d 993, 997 (8th Cir. 2017).

stately mansion."[304] Other judges have similarly called for a broader definition of curtilage.[305]

Scholars have likewise argued that the special status of homes and "residential interests" could be deployed to better protect privacy rights of those with less financial means.[306] Although the term "house" is not easy to define, this is all the more reason for courts to "interpret [the] phrase broadly to give effect to Fourth Amendment protections in the context of extreme abundance and deprivation."[307]

It is reasonable to think that if the "special sanctity of a private residence"[308] were expanded, more protection would follow. However broadly or narrowly defined, the home is, after all, "a literal boundary between private and public space" and a "metaphorical boundary between private and public spheres."[309] Expanding the definition of the home is also consistent with the Court's general belief that a "sane, decent, civilized society must provide some . . . oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place."[310] Some scholars expand on this view, taking the position that the home is "affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference."[311] As a normative matter, this position makes sense. As Reich explains, we should all have a "zone of privacy . . . beyond which neither government nor private power can push—a hiding place from the all-pervasive system of regulation and control."[312]

Of course, Reich is correct: homes should be protected spaces and it follows that expanding the definition of the home, and protection of the home, could, and should, result in greater privacy. Yet there are two reasons this path will not solve the contradictions identified in this Article. First, regardless of how broadly the home is defined, it is the *home* that remains—and will remain—the inevitable focus of criminal court supervision, as well as other social welfare institutions. The doctrines that facilitate the carceral home—such as consent, the "reasonably related" standard, and special government needs—are tied to the *purpose* of the surveillance, not the definition of the home. So long as the state

[304] Illinois v. McArthur, 531 U.S. 326, 340 (2001) (Stevens, J., dissenting); *see also* California v. Carney, 471 U.S. 386, 408 (1985) (Stevens, J., dissenting).

[305] United States v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, J., dissenting).

[306] Gus, *supra* note 20, at 798; David Reinbach, *The Home Not the Homeless: What the Fourth Amendment Has Historically Protected and Where the Law Is Going After* Jones, 47 U.S.F. L. REV. 377, 381-85 (2012).

[307] Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 961 (2023).

[308] Maryland v. Buie, 494 U.S. 325, 343 (1990) (Brennan, J., dissenting).

[309] SUK, *supra* note 20, at 2-3; *see also* Crocker, *supra* note 20, at 176.

[310] Silverman v. United States, 365 U.S. 505, 511, 512 n.4 (1961) (Frank, J., dissenting).

[311] Radin, *supra* note 45, at 992.

[312] Reich, *supra* note 178, at 785.

is permitted to surveil the home for purposes of criminal court supervision, or other social-welfarist ends, this surveillance will persist regardless of how the home is defined. Stated differently, the lack of any limiting principle stems not from how homes are defined, but because these doctrines are expansive, invasive, and unlimited. Whether a tent or a palace, once the state has a legal basis to enter, the size or nature of the home becomes less important. In short, a broader definition of the home will do little to rein in unnecessary and overly invasive intrusions.

Second, expanding the definition of the home fails to account for harms that will inevitably continue to occur within homes. The privacy afforded to the home (however broadly or narrowly defined) has, at least traditionally, failed to provide a meaningful refuge to some victims of intimate violence,[313] or other forms of "intimate privacy violations."[314] Relatedly, expanding the definition of the home does little to limit police violence that occurs within homes.[315] In this respect, the boundary between public and private spaces will never be absolute and air tight, regardless of how broadly homes are defined.[316] While expanding the legal definition of homes may limit intrusions in some instances, it fails to offer any new meaningful limit on other intrusions associated with the carceral home.

2. Expanding Privacy

An expanded definition of the home also does little to curtail surveillance of intimate information and activities not intrinsically connected to the home, such as rules related to forced mental health treatment, drug testing, DNA collection, or private data sharing, such as geolocation data and medical records. It makes sense, therefore, to consider doubling down on the privacy afforded to this information and these activities. As this Part makes clear, however, expanding privacy protections may be necessary but it is not sufficient.

The decisions in *Carpenter*, *Jones*, and *Riley* offer the most obvious doctrinal support for increasing privacy protections for intimate information and activities disconnected from the home.[317] In those cases, the Supreme Court recognized that the definition of a "reasonable expectation of privacy" must reflect the "seismic shifts in digital technology"[318] that now allow for "near perfect surveillance"[319] of digital records—records that "hold for many Americans the

[313] SUK, *supra* note 20, at 4-8, 125-27; Sklansky, *supra* note 291, at 1110.

[314] CITRON, *supra* note 21, at 94-104.

[315] Bell, *supra* note 37, at 717.

[316] Sklansky, *supra* note 291, at 1109.

[317] *See* Orin S. Kerr, *Implementing* Carpenter, *in* THE DIGITAL FOURTH AMENDMENT (forthcoming) ("*Carpenter* signals a new kind of expectation of privacy test, one that focuses on how much the government can learn about a person regardless of the place or thing from which the information came.").

[318] Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018).

[319] *Id.* at 2210.

'privacies of life."[320] Writing for the majority in *Riley,* Justice Roberts explicitly noted the limited utility of the home as the benchmark for privacy:

> [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.[321]

In all three cases, the *place* of the search mattered much less than the Court's concern with the data revealing "a wealth of detail about . . . familial, political, professional, religious, and sexual associations."[322]

The Court's concern with protecting intimate data decoupled from homes is arguably applicable to other forms of intimate information and activities, even if they do not take the form of data. For example, rules related to drug testing, sharing mental health records, or limitations on travel and personal relationships, all implicate intimate information. In this respect, a broader definition of privacy could occur through a version of what Orin Kerr terms "equilibrium-adjustment," in which Fourth Amendment law responds to the "digital age" as well as other ways that personal life is surveilled to "restore the earlier balance of government power."[323]

Although this argument is appealing and doctrinally sound, there are two reasons it may not provide effective limits on the intimacy invasions associated with carceral homes. First, and perhaps most obvious, the *Carpenter* majority intended the ruling to be narrow,[324] and how *Carpenter* applies to private information and activities unrelated to location tracking or data is very much an open question.[325]

Second, intimate activities and information are precisely what criminal court supervision institutions seek to surveil and control. People on court supervision have a lower expectation of privacy precisely because surveillance is a central function of court supervision. Invoking this rationale, courts routinely reject extending *Carpenter*, *Jones*, and *Riley* to people on court supervision.[326] So long as intimate life continues to be the targeted focus of criminal court supervision, increasing privacy protections for intimate information and activities will have little effect.

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[320] Riley v. California, 573 U.S. 373, 403 (2014).

[321] *Id.* at 396-97.

[322] United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

[323] Kerr, *supra* note 317 (manuscript at 8).

[324] *Carpenter*, 138 S. Ct. at 2220.

[325] *See* Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1793 (2022).

[326] Weisburd, *Punitive Surveillance*, *supra* note 22, at 176 n.182 (collecting cases).

C. *The Future of the Carceral Home*

If the carceral home is in fact an inevitable aspect of current criminal procedure jurisprudence, reform efforts, and other social welfare programs, it raises a final question: How should law and policy respond? On a basic level, continued adherence to the home as a legal concept—even if broadly defined—offers little in terms of limiting principles. Instead, there is a need to consider immediate policy and legal implications as well as contemplate a broader conception of security and privacy as entitlements disconnected from homes.

1. Legal & Policy Implications

The carceral home illuminates weaknesses in two well-settled legal doctrines: consent and strict scrutiny. Despite coercion concerns,[327] courts routinely rely on consent to justify otherwise unconstitutional restraints on liberty and privacy. As noted earlier, not only is consent an ineffective limit on invasive surveillance, but it also offers an easy excuse for courts to avoid challenging constitutional law questions. When a person consents to have their cellphone or internet activity monitored as a condition of court supervision, for example, courts need not consider if such a condition runs afoul of the Fourth Amendment or other constitutional amendments. This concern tracks similar critiques of consent in criminal procedure more broadly and raises the question: Should consent be eliminated as a basis to justify searches and seizures? To be sure, eliminating consent alone might still do little to rein in abusive surveillance. Courts can—and do—impose restrictions on constitutional rights without invoking consent.[328] As explored more fully in related work, the implications of abolishing consent are worthy of close review.[329]

The carceral home also raises a second question with respect to constitutional scrutiny: Why does the "reasonably related" standard govern the restrictions associated with the carceral home instead of traditional levels of constitutional scrutiny? As noted in Part II, most restrictions associated with the carceral home—be them related to speech, privacy, or religion—are upheld so long as they "reasonably relate" to rehabilitation or public safety. Yet this approach marks a significant departure from traditional constitutional scrutiny that applies outside the criminal justice system.[330] Typically, state action that implicates constitutional rights needs to be narrowly tailored to meet a compelling government interest and less restrictive measures would have to be infeasible.[331]

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[327] *See, e.g.*, Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1969 (2019); Kay Levine, Jonathan Nash & Robert Schapiro, *The Unconstitutional Conditions Vacuum in Criminal Procedure*, YALE. L.J. (forthcoming 2023).

[328] Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 138).

[329] *See* Kate Weisburd, *Criminal Procedure Without Consent* (forthcoming) (cataloging how consent has been reformed and implications of eliminating consent).

[330] *See* Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 138).

[331] *See Id.* at 45.

Indeed, there is no "punishment exception" to the Constitution that allows for people's rights to be stripped away simply because they are involved in the criminal justice system.[332] This is precisely the position taken by judges who have struck down restrictions on Second Amendment rights for people with criminal convictions.[333] A court supervision restriction that runs afoul of the First, Second, Fourth, or Fourteenth Amendments could be—and should be—subject to the level of constitutional scrutiny that applies to that right to people outside of the criminal legal system.[334] A more robust standard could better account for the myriad of privacy harms implicated by the carceral home. Rather than focus on the home as the relevant legal benchmark, this approach correctly centers intimacy and personal autonomy as the key interests to be protected.

To be sure, some of the restrictions associated with the carceral home will undoubtedly survive stricter constitutional scrutiny. If the restrictions are "imposed for only a short period, demonstrably effective, and constitute[] the only means of achieving the safety goal, for instance, [they] might nonetheless withstand challenge."[335] Traditional constitutional scrutiny does not operate in a vacuum and the definition of a compelling state interest inevitably accounts for the specific needs and contexts of the institutional setting—whether it be criminal court supervision or a social welfare institution.[336] While some subset of surveillance and control measures will survive traditional constitutional scrutiny, many of the invasions associated with the carceral home could be reined in, if not eliminated altogether.

The carceral home also raises policy questions about how to best regulate various forms of carceral surveillance technology as well as other nontechnology-based restraints and invasions of privacy. Although a detailed analysis of possible policy interventions is beyond the scope of this Article (and has been addressed by others) there are two possible policy responses to the carceral home that bear mentioning. First, legislation could significantly limit the use of the surveillance technology, such as electronic ankle monitors.[337] As jurisdictions continue to contemplate reforms to pretrial release, probation, and parole, greater attention could be paid to when and how surveillance technology is used. Legislation could create important guard rails and make clear that freedom—not incarceration—is the baseline and goal. A group of former probation and parole leaders, for example, co-authored a report calling on policy

[332] *Id.*

[333] *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019), *abrogated by* N.Y. State Rifle & Pistol Ass'n, v. Bruen, 142 S. Ct. 2111 (2022); United States v. Rahimi, 61 F.4th 443, 454 (5th Cir. 2023), *cert. granted* (145 S. Ct. 2688) (2023).

[334] Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 146).

[335] Murphy, *supra* note 268, at 1406.

[336] Weisburd, *Rights Violations*, *supra* note 33 (manuscript at 148).

[337] Three states thus far have passed legislation related to monitoring. *See* N.Y. Crim. Proc. Law § 510.40 (McKinney 2023); Illinois Pretrial Fairness Act, Public Act No. 101-0652 (July 1, 2021); Illinois Follow-Up Act, Public Act No. 102-1104 (Dec. 6, 2022); CAL. PENAL CODE § 13012.4 (West 2023); CAL. WELF. & INST. CODE § 628.2 (West 2023).

makers and judges to limit the number of onerous conditions of court supervision.[338] Certainly more could be done to encourage jurisdictions to limit, if not eliminate, reliance on restrictive rules and technology. Advocates in Chicago, Los Angeles, and elsewhere have done just that, and offer a roadmap for further advocacy work in this area.[339]

Second, intimate data and information collected as part of the carceral home could be significantly limited and protected. Some information, such as medical and mental health records, should not be collected at all, except in unusual situations. To the extent other data is collected, such as historic geolocation data, it should be automatically deleted after a certain period of time. The routine sharing of otherwise private information with police could be prohibited without a warrant. Protecting intimate data is an especially acute concern considering *Dobbs*, and the potential for such data to be used in the investigation of illegal abortions.[340] State and federal legislative efforts to better protect intimate and personal data should avoid carveouts for people with criminal records or people in the criminal legal system.[341]

2. Beyond the Home: Privacy & Security as Positive Entitlements

Thus far, this Section has explored both policy and legal implications of the carceral home. Yet, given that the carceral home is legal, it may seem naïve to think that legal solutions could change this state of affairs.[342] It is therefore equally important to consider what the necessary conditions are to make the carceral home—and for that matter, other forms of home surveillance—

[338] JERRY ADGER ET AL., JOINT STATEMENT ON THE FUTURE OF COMMUNITY CORRECTIONS 1 (Aug. 28, 2017); MICHAEL P. JACOBSON, VINCENT SCHIRALDI, REAGAN DALY & EMILY HOTEZ, HARV. KENNEDY SCH., LESS IS MORE: HOW REDUCING PROBATION POPULATIONS CAN IMPROVE OUTCOMES 6 (2017).

[339] *See Criminal Justice*, CHI. APPLESEED CTR. FOR FAIR CTS., http://www.chicagoappleseed.org/criminal-justice/ [https://perma.cc/PRE7-KGPT] (last visited Nov. 14, 2023); *About Us*, DIGNITY & POWER NOW, https://dignityandpowernow.org/about-us/ [https://perma.cc/RZ8P-N3X4] (last visited Nov. 14, 2023); *Digital Security and Surveillance*, MEDIA JUSTICE, https://mediajustice.org/issue/digitalsecurity/ [https://perma.cc/38VJ-PTRV] (last visited Nov. 14, 2023).

[340] *See* Danielle Keats Citron, *The End of* Roe *Means We Need a New Civil Right to Privacy*, SLATE (June 27, 2022, 11:36 AM), https://slate.com/technology/2022/06/end-roe-civil-right-intimate-privacy-data.html [https://perma.cc/A7JG-D6YN]; Elizabeth Joh, *The Potential Overturn of* Roe *Shows Why We Need More Digital Privacy Protections*, SLATE (May 9, 2022, 2:02 PM), https://slate.com/technology/2022/05/roe-overturn-data-privacy-laws.html [https://perma.cc/4EWP-JFW9].

[341] For example, the California Electronic Communications Privacy Act, heralded as a victory for data privacy, explicitly excludes people under various forms of court supervision. *See* Electronic Communications Privacy Act, 2015 Cal. Stat. Ch. 651 (codified as amended at CAL. PENAL CODE § 1546.1(c)(10) (Supp. 2020)).

[342] *See, e.g.*, Clair & Woog, *supra* note 218, at 7 ("[C]ourts contribute to the present crisis of mass criminalization through legal doctrine, practices of racialized social control and violence, and economic exploitation.").

avoidable or even obsolete. To do so requires recognizing privacy and security as positive entitlements that extend beyond the home.

Abolitionist scholars and activists have long focused on the meaning of security and how it encompasses reinvestments to meet basic needs, as well as the removal of barriers, including those imposed by the criminal legal system.[343] Justice for abolitionists is not only "an integrated endeavor to prevent harm [or] intervene in harm," but also to "obtain reparations, and transform the conditions in which we live."[344] As activists involved in challenging aerial police surveillance in Baltimore explained, we "believe that safety is not simply the absence of violence, but the creation of conditions for human flourishing."[345] These advocates and scholars center race, gender, disability, and economic discrimination in explaining the rise of mass incarceration, including its role in furthering divestment and insecurity in marginalized communities.[346] Reconceptualizing security and privacy as positive entitlements decoupled from homes involves similar considerations.

As addressed earlier in this Article, noncriminal law institutions and actors—from schools to social workers—are often viewed as the solution to overpolicing and mass incarceration.[347] While "reallocating state power and state resources away from criminal law and towards other social services"[348] may be part of making security a positive entitlement, this shift is not without risk. As this Article has explored, surveillance and social control are often intrinsic features of social welfare institutions that, when operating in tandem, reflect a "carceral continuum that diffuse[s] penitentiary techniques into the most innocent disciplines."[349]

In this respect, reconceptualizing security and privacy as positive entitlements requires a reckoning with what abolitionist theorists refer to as "reformist reforms": policy changes or reinvestments that further not just "societal reliance on criminal legal institutions" but reliance on other state institutions that similarly involve surveillance and social control of private life.[350] As other

[343] Hasbrouck, *supra* note 37, at 690; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1171 (2015).

[344] Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019).

[345] Lawrence Grandpre, *Who Speaks for Community? Rejecting a False Choice Between Liberty and Security*, LEADERS OF A BEAUTIFUL STRUGGLE (June 5, 2020), https://lbsbaltimore.com/who-speaks-for-community-rejecting-a-false-choice-between-liberty-and-security/ [https://perma.cc/5M5X-5NS6].

[346] *See* Gamal, *supra* note 147, at 983.

[347] *See* discussion *supra* Part II.C.

[348] Levin, *supra* note 34, at 141.

[349] Foucault, *supra* note 93, at 297.

[350] Levin, *supra* note 34, at 124; *see also* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, AND OPPOSITION IN CALIFORNIA 242 (Suzanne Knott & Peter Dreyer eds.,

scholars have explored, there is a "large body of research cataloguing the perils of the welfare state for poor people and communities of color—surveillance, blame and assessments of desert, humiliation and stigmatization, administrative burden, reinforcement of racial hierarchy, and the welfare state's own carceral and neoliberal logics and justifications."[351] Although beyond the scope of this Article, concerns such as these have prompted larger conversations about the role of the welfare state, the creation of safety from sources other than police (such as mutual aid), wealth creation, community control of resources, and reparations.[352]

Reevaluating baselines is also a necessary precursor to a broader understanding of security as a positive entitlement. Because surveilled homes are almost always compared to an even more restrictive option, the baseline is the normalization of surveillance and state presence in the home. But freedom, or, in the words of Samuel Warren and Louis Brandeis, the "right . . . to be let alone"[353] is an equally justifiable baseline. To be free from state control and surveillance should be the guiding principle in both legal and policy reform. This would require flipping the carceral home on its head so that it is viewed in comparison to freedom, instead of more restrictive alternatives.

Activists, organizers, and advocates, many of whom have experienced policed homes, have detailed and clear visions of what it means to be secure.[354] For example, in a joint report focused on reimagining security, the Center for Popular Democracy, Law for Black Lives, and the Black Youth Project explain that the "choice to resource *punitive* systems instead of stabilizing nourishing ones does not make communities safer."[355] Citing extensive research, these groups discuss how "a living wage, access to holistic health services and treatment, educational opportunity, and stable housing are far more successful in reducing crime than police or prisons."[356] Likewise, Families for Justice as Healing, comprised of formally incarcerated women in Boston, launched a

2007); SCHENWAR & LAW, *supra* note 25; MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 256 (2015).

[351] *See* Bell et al., *Investing in Alternatives*, *supra* note 34, at 1301-02 (citations omitted).

[352] *Id.*; *see also* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 682 (2020); Archer, *supra* note 163, at 368; Christopher Lau, *Interrupting Gun Violence*, 104 B.U. L. REV. (forthcoming Apr. 2024).

[353] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (quoting THOMAS MCINTYRE COOLEY, TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (John Lewis ed., 2d ed., Chicago, Callaghan & Company 1888) (1879)) (advocating for legal right to privacy).

[354] *See* Lauren Johnson et al., *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. 191 (2022); Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 62 (2022).

[355] CTR. FOR POPULAR DEMOCRACY, LAW FOR BLACK LIVES & BLACK YOUTH PROJECT, FREEDOM TO THRIVE 1 (2022), https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf [https://perma.cc/5WCD-A4M9].

[356] *Id.*

campaign for a guaranteed-income initiative that will distribute cash to women from the Boston area for a year after they are released from prison.[357]

These visions and efforts offer blueprints of what security and privacy mean. It is movements like these that have the potential to shift cultural assumptions and why it is macro forces like structural inequity and historic discrimination, and not individual choice, that often dictate who is afforded security and privacy and who is not.[358] In sum, the path forward should include both stronger legal limits on the carceral home (such as less reliance on consent, and subjecting restraints to greater scrutiny), as well as policy solutions that contemplate privacy and security as positive entitlements disconnected from the physical home.

CONCLUSION

Technology is swiftly transforming the privacy afforded to homes and intimate life. From Ring doorbells, Fitbit watches, and Amazon's Alexa, it would be easy to conclude that, when it comes to the home and intimate life, privacy is "dead" for everyone.[359] Of course, using some of these devices is a choice, but even if not, were data from these devices routinely shared, tracked, and analyzed by the police, there would be—and has been—appropriate outcry,[360] if not a "revolt."[361] Indeed, the intimate nature of geolocation data is precisely what prompted Justice Roberts in *Carpenter* to observe that "when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."[362] Yet, this is exactly the type of surveillance experienced by millions of people subject to criminal court supervision. With no limiting principles, the carceral home leaves people exposed and without any part of life fully private or secure. At the same time, in the age of decarceral reform and well-meaning social welfare interventions, home surveillance is unlikely to disappear. To address these realities, the home-as-sanctuary approach must give way to a new approach focused not on walls or doors or saunas, but directly on positive entitlements to privacy and security.

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[357] *See Re-Imagining Communities*, FAMILIES FOR JUST. AS HEALING, https://www.justicehealing.org/re-imagining-communities [https://perma.cc/9GPQ-WSTC] (last visited Nov. 14, 2023).

[358] *See* BRIDGES, *supra* note 23, at 209.

[359] Richards, *supra* note 21, at 1.

[360] *See, e.g.*, Stuart A. Thompson & Charlie Warzel, Opinion, *One Nation, Tracked*, N.Y. TIMES (Dec. 19, 2019), https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html ("Within America's own representative democracy, citizens would surely rise up in outrage if the government attempted to mandate that every person above the age of 12 carry a tracking device that revealed their location 24 hours a day.").

[361] Editorial, *The Spy in Your Pocket*, N.Y. TIMES, Dec. 22, 2019, at 8.

[362] Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018).