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# The Supreme Court Opens the Door to a Probationer's Home: Griffin v. Wisconsin

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# THE SUPREME COURT OPENS THE DOOR TO A PROBATIONER'S HOME: *GRIFFIN v. WISCONSIN*

## INTRODUCTION

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[1] Until recently, a person's right to be free from unreasonable governmental intrusion into the home was unquestioned.[2] In the context of the home, a bright line rule appeared to separate a reasonable intrusion from an unreasonable one. As the United States Supreme Court stated: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[3] In *Griffin v. Wisconsin*,[4] the Court reconsidered that line and redefined the core of the fourth amendment by holding constitutional the search of a probationer's home conducted without a warrant and without probable

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1. Silverman v. United States, 365 U.S. 505, 511 (1961) (citation omitted). The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

2. *See, e.g.*, Payton v. New York, 445 U.S. 573, 585 (1980) (prohibiting the warrantless entry into a home by police when making a felony arrest); *Silverman*, 365 U.S. at 511 (finding eavesdropping by means of a listening device placed in the heat ducts of a suspect's home to be a violation of the fourth amendment); Johnson v. United States, 333 U.S. 10, 14 (1948) (holding that a search conducted by officers who smelled opium and subsequently searched a hotel room without a warrant was unconstitutional); Agnello v. United States, 269 U.S. 20, 32 (1925) (establishing that a search incidental to arrest does not extend to a suspect's dwelling when that dwelling is several blocks away from point of arrest, the offense has been committed, and the suspect is in custody elsewhere).

3. *Payton*, 445 U.S. at 590.

4. 107 S. Ct. 3164 (1987).

cause.[5]

The *Griffin* Court's approval of an intrusion into a home absent a search warrant raises grave concerns regarding the scope of the fourth amendment's protections. This Comment will explore the substance of the decision and the implications it holds for future decisions regarding searches of homes. Section I provides a review of the protections that the fourth amendment historically has afforded persons in their homes, particularly examining the protection given to probationers.[6] Section II analyzes the Supreme Court's reasoning in the *Griffin* decision and presents the main issues in dispute between the majority and the dissenters. Section III addresses some ramifications of the decision's departure from the long-held notion that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[7]

## I. HISTORICAL BACKGROUND

The words of the fourth amendment clearly reflect the Framers' desire to protect the sanctity of the home against unreasonable governmental intrusions: "The right of the people to be secure in their persons, *houses*, papers and effects, against unreasonable searches and seizures, shall not be violated."[8] The zealous protection of the home was part of an effort to protect citizens from the general warrants once employed by the British government.[9] A general warrant authorized an unlimited search; government officials acting pursuant to this type of warrant were free to look anywhere for anything.[10] Although the British legislature and courts had declared such warrants unlawful by the time the United States Constitution was written,[11] the Framers believed that these war-

5. Griffin v. Wisconsin, 107 S. Ct. at 3171.

6. This Comment will use the term "probationer" to refer to both probationers and parolees. The *Griffin* decision is relevant to both because courts generally have treated parolees and probationers alike in the fourth amendment context. *See, e.g.*, United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975); People v. Jackson, 46 N.Y.2d 171, 175, 385 N.E.2d 621, 623 (1978).

7. United States v. United States District Court, 407 U.S. 297, 313 (1972). After weighing the government's interest in protecting domestic security against an individual's right to be secure in his home, the court held that the fourth amendment requires a warrant prior to surveillance of speech in a home. *Id.* at 321.

8. U.S. CONST. amend. IV (emphasis added).

9. *See* Boyd v. United States, 116 U.S. 616, 624—27 (1886) (reviewing the general history of the development of the fourth amendment).

10. *See id.* at 641 (Miller, J., concurring).

11. *See id.* at 627—29.

rants, still fresh in the minds of many, should be prohibited specifically.

The fourth amendment does not expressly provide that the reasonableness of a search is determined by the presence of a warrant based on probable cause. However, the Supreme Court, in *Agnello v. United States*,[12] made this definitive statement regarding the warrantless search of a home:

> While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. The protection of the Fourth Amendment extends to all equally, — to those justly suspected or accused, as well as to the innocent. *The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws* . . . . Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.[13]

This view of the fourth amendment has been reaffirmed by the Court many times.[14] Historically, the Court seemed unwavering in its conviction that the fourth amendment was designed specifically to guard against governmental intrusion into a home.[15] The Court drew a "firm line" at the threshold of the home; without an emergency, it was unreasonable to cross that line without a warrant based on probable cause.[16]

As with any firm line or general rule, exceptions exist to the requirements of a warrant and probable cause for the search of a home. For example, in the search of a probationer's home, an exception exists allowing "reasonable suspicion" to satisfy the probable cause requirement.[17] In addition, a search of a home may be

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12. 269 U.S. 20 (1925).

13. Agnello v. United States, 269 U.S. at 32—33 (citations omitted) (emphasis added).

14. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 211—12 (1981); Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 474—75, *reh'g denied*, 404 U.S. 874 (1971); Johnson v. United States, 333 U.S. 10, 13—15 (1948).

15. *See, e.g.*, United States v. United States District Court, 407 U.S. 297 (1972); *Coolidge*, 403 U.S. 443 (1971); Silverman v. United States, 365 U.S. 505 (1961); *Johnson*, 333 U.S. 10 (1948); *Agnello*, 269 U.S. 20 (1925).

16. *See Payton*, 445 U.S. at 590.

17. United States v. Scott, 678 F.2d 32, 35 (5th Cir. 1982) (court held that parole officer was authorized to collect samples of the parolee's handwriting and from his

constitutional even without a warrant when certain circumstances exist.[18] This Comment addresses only the exceptions relevant to probationers' rights.

### *A. Exception to the Requirement of Probable Cause*

The fourth amendment requires warrants based on probable cause.[19] Although the language defining probable cause varies, the basic concept was summarized by the Supreme Court in *Texas v. Brown*:[20]

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.[21]

Despite the probable cause requirement of the fourth amendment, some courts have held that the status of a probationer justifies reducing the level of suspicion necessary for the issuance of a warrant.[22] These courts required a lower threshold of probable cause to obtain a warrant for the search of a probationer's home because, unlike other citizens, a probationer is subject to govern-

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typewriter even though the samples were gathered on the basis of reasonable suspicion instead of probable cause).

18. Vale v. Louisiana, 399 U.S. 30 (1979). The *Vale* court, although finding that no exception applied in that particular case, summarized the exceptions as follows:

> [O]ur past decisions make clear that only in "a few specifically established and well-delineated" situations, may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. The burden rests on the State to show the existence of such an exceptional situation. And the record before us discloses none.
>
> There is no suggestion that anyone consented to the search. The officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. The goods ultimately seized were not in the process of destruction. Nor were they about to be removed from the jurisdiction.

*Id.* at 34—35 (citations omitted).

19. U.S. CONST. amend. IV ("no Warrants shall issue, but upon probable cause").

20. 460 U.S. 730 (1983).

21. Texas v. Brown, 460 U.S. at 742 (citations omitted).

22. *See, e.g.*, United States v. Scott, 678 F.2d 32 (5th Cir. 1982); United States v. Workman, 585 F.2d 1205 (4th Cir. 1978); United States v. Bradley, 571 F.2d 787 (4th Cir. 1978).

mental supervision.[23]

For example, in *United States v. Scott*,[24] the Fifth Circuit advocated the use of a "reasonable suspicion" test. The court stated:

> Less stringent a standard than probable cause, reasonable suspicion requires no more than that the authority acting be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant a belief in the conclusion mooted — in this instance, that a condition of parole has been or is being violated.[25]

Furthermore, the Fourth Circuit, although unyielding in its requirement of a warrant in such cases, noted: "[W]e do not imply that the probable cause for a warrant to search a parolee's person or home is as demanding as the probable cause for a warrant to search a suspect's person or home in an ordinary criminal investigation."[26] In another case, the Fourth Circuit held that the special relationship between the parolee and the parole officer, combined with the community's interest in the supervision of the parolee, justified reducing the standard for assessing probable cause.[27]

Even though a reduced level of suspicion is generally accepted in cases involving the search of a probationer's home, the appropriate degree of reduction is less settled. Although the lesser standard may be justified by the individual's status, that standard should not be reduced to nonexistence.[28] Such a standard effectively would exclude probationers from any fourth amendment protection and certainly would be unconstitutional.[29]

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23. *See supra* note 22.

24. 678 F.2d 32 (5th Cir. 1982).

25. *Scott*, 678 F.2d at 35.

26. *Bradley*, 571 F.2d at 788 n.1.

27. United States v. Workman, 585 F.2d 1205, 1207. One might argue that the Fourth Circuit's less demanding probable cause standard is merely semantically distinct but not different from the Fifth Circuit's reasonable suspicion standard.

28. The problem in *Griffin* came not with recognizing the validity of a reduced level of suspicion but in questioning whether even this reduced standard was met. The majority accepted the trial court's finding that the tip was given by an officer of the Beloit Police Department. Griffin v. Wisconsin, 107 S. Ct. 3164, 3171 n.7 (1987). The dissent questioned this acceptance, however, as the record evidenced that no one was quite sure who placed the call, and there was no attempt to verify the tip or to follow any of the other regulations relating to the establishment of probable cause. *Id.* at 3175—76. Although some dissenters agreed that the lesser standard was acceptable, they did not want that standard to become a nonexistent one satisfied by any "feeble justification for [a] search." *Id.* at 3176.

29. Although some courts have held that probationers are entitled to less protection under the fourth amendment than are average citizens, no court has suggested that probationers are entitled to no protection under the amendment. *See, e.g., Scott*, 678

### *B. Exceptions to the Requirement of a Warrant*

Several exceptions have been made to the warrant requirement.[30] However, this Comment will analyze only the two exceptions found relevant in *Griffin*: searches of probationers' homes and administrative inspections. The first exception is directly applicable; the second exception involving administrative inspections is included in this discussion because the Court in *Griffin* analogized that search to such inspections.

#### *1. Probation Searches*

Until *Griffin*, the Supreme Court did not consider a person's status as a probationer an exception to the requirement that a warrant be obtained for the search of a person's home. However, that exception has long been the source of controversy among the circuits, particularly the fourth and ninth.

The Ninth Circuit asserted its position in *Latta v. Fitzharris*.[31] Holding that the fourth amendment does not require a warrant for the search of a parolee's residence by his parole officer when such a search is otherwise reasonable, the court stated:

> There appear to be several justifications for not requiring a warrant in the foregoing cases. One is the pervasiveness of the regulation to which the person or premises to be searched is subject. As we have seen, the authority of the parole officer is pervasive indeed. Another is the presence of express statutory

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F.2d at 34 ("The parolee occupies a position intermediate between that of an ordinary citizen, entitled to be free of intrusion not based on probable cause at least, and that of an incarcerated convictee, liable to searches at any time for well-nigh any reason."); Latta v. Fitzharris, 521 F.2d 246, 252 (9th Cir.) ("This is not to say that we will uphold every search by a parole officer. In a given case, what is done may be so unreasonable as to require that the search be held to violate the Fourth Amendment."), *cert. denied*, 423 U.S. 897 (1975).

30. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (allowing warrantless search of an automobile and its contents); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (permitting searches without a warrant when consent is given); Chimel v. California, 395 U.S. 752 (1969) (making exception to the warrant requirement when searches are incident to arrest and the place to be searched is within the immediate control of the defendant); Warden v. Hayden, 387 U.S. 294 (1967) (upholding the warrantless search of a home when police are in hot pursuit of an armed robber who has just entered the home); United States v. Jeffers, 342 U.S. 48, 52 (1951) (noting that "imminent destruction, removal, or concealment of the property intended to be seized" justifies a warrantless entry into a home); United States v. Tabor, 722 F.2d 596, 598 (10th Cir. 1983) (commenting that a warrantless "sweep search" of a home may be justified if the lives of an officer or those around him are threatened).

31. 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975).

> authorization for a warrantless search. . . . Another is the extent to which a justified expectation of privacy is present. In the case of a parolee, that expectation is severely diminished. Another is the necessity for unannounced and frequent searches, which certainly applies to the parole officer-parolee relationship.[32]

The Fourth Circuit, however, has not shared the Ninth Circuit's approval of warrantless searches of a parolee's or probationer's home. When it addressed the warrantless search of a parolee's home by his parole officer, that court held: "[U]nless an established exception to the warrant requirement is applicable, a parole officer must secure a warrant prior to conducting a search of a parolee's place of residence even where, as a condition of parole, the parolee has consented to periodic and unannounced visits by the parole officer."[33] The Fourth Circuit, in *United States v. Workman*,[34] reaffirmed the requirement of a warrant in these situations and expressly declined to follow *Latta*.[35]

The positions of the other circuits are not so easily defined. For example, the Second Circuit has held that the fourth amendment protects only against unreasonable searches and seizures and that the status of a probationer may change the meaning of reasonableness.[36] However, the Second Circuit recently held that "a probation officer is required to obtain a warrant prior to conducting a search of a probationer's home unless the search falls within a judicially recognized exception to the warrant requirement."[37]

*Griffin* appears to settle the controversy in the circuits regarding the reasonableness of warrantless searches of probationers' and parolees' homes. According to *Griffin*, if a warrantless search is conducted pursuant to reasonable regulations, the search is constitutionally valid.[38] This probation and parole exception to the warrant requirement is apparently based on reasoning that analogizes these searches to administrative inspections.[39]

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32. Latta v. Fitzharris, 521 F.2d at 251.
33. United States v. Bradley, 571 F.2d 787, 789 (4th Cir. 1978).
34. 585 F.2d 1205 (4th Cir. 1978).
35. United States v. Workman, 585 F.2d at 1207 n.2.
36. United States *ex rel.* Santos v. New York State Bd. of Parole, 441 F.2d 1216, 1218 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972).
37. United States v. Rea, 678 F.2d 382, 387—88 (2d Cir. 1982).
38. *Griffin*, 107 S. Ct. at 3171.
39. *Id.* at 3169—70. *See* Lewis, *Searches of Probationers and Parolees After* Griffin v. Wisconsin, 15 SEARCH AND SEIZURE L. REP. 25, 26 (1988), stating:

> The latest theory advanced . . . finds its support in the rationale that a

### 2. *Administrative Inspections*

The Supreme Court has recognized exceptions to the warrant requirement "when special needs, beyond the normal need for law enforcement, make the warrant . . . requirement impracticable."[40] Special needs have been recognized in several contexts including that of administrative searches conducted by government inspectors.[41]

Administrative inspections differ from other searches because the inspections are made to verify compliance with regulations, rather than to gather evidence of criminal activity. Administrative inspections are still considered governmental intrusions and, therefore, require a warrant in most instances.[42] Exceptions to the warrant requirement in administrative inspections have been made when there exists consent, an exigent circumstance, or a heavily regulated industry.[43]

The Supreme Court has come almost full circle in its decisions regarding administrative search warrants. In *Frank v. Maryland*,[44] the Court first held that administrative inspections, even if con-

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parolee-probationer search is similar to an administrative search. Here, the courts view a possible parole or probation statute as yet another excessive regulatory scheme, similar to that governing pervasively regulated industries, and thereby justify at the least an approach utilizing less rigorous scrutiny.

40. *Griffin*, 107 S. Ct. at 3167 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)).

41. *See, e.g.*, New York v. Burger, 107 S. Ct. 2636 (1987) (allowing the warrantless search of a closely regulated business); Donovan v. Dewey, 452 U.S. 594, 602 (1981) (confirming the constitutionality of warrantless inspections of mines under the Federal Mine Safety and Health Act of 1977); United States v. Biswell, 406 U.S. 311, 316 (1972) (allowing the warrantless search of a locked business storeroom as authorized by the Gun Control Act of 1968).

Special needs have also justified other warrantless searches. *See, e.g., T.L.O.*, 469 U.S. 325 (holding that because of peculiar circumstances, the search of a student's purse was not in violation of the fourth amendment, although conducted without a warrant or probable cause); O'Connor v. Ortega, 107 S. Ct. 1492 (1987) (declaring constitutional the warrantless search of an employee's desk by his government employer). For a detailed discussion of administrative searches, see Note, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449 (1988).

42. Kress & Iannelli, *Administrative Search and Seizure: Whither the Warrant?* 31 VILL. L. REV. 705, 713—14 (1986).

43. *Id.* Industries are considered heavily regulated when they "have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." Marshall v. Barlow's, Inc., 436 U.S. 307, 313—14 (1977) (citation omitted).

44. 359 U.S. 360 (1959).

ducted in a home,[45] did not require a warrant because no fourth amendment rights were implicated in these types of searches.[46] The Court reversed itself in *Camara v. Municipal Court*,[47] holding that a warrant was required to search a residence to determine compliance with fire regulations.[48] In a companion case, the Court held that the requirement of a warrant also extended to administrative inspections of commercial premises.[49]

By allowing a warrantless search of a home in *Griffin*, the Court appears to retreat from *Camara* and re-evaluate *Frank*. Although the *Griffin* Court does not sanction all warrantless administrative searches of homes as *Frank* did, the Court's broad extension of an exception to the requirement of an administrative warrant resurrects visions of *Frank*. In *Griffin*, the Court applied the exception made for administrative inspections in heavily regulated industries; the Court reasoned that the supervision required for the operation of a probation system made that system analogous to these industries.[50] The Court did not adopt the opinion of the Fourth Circuit which had expressly refuted this reasoning in an earlier case, stating: "We recognize the similarity between searches by probation officers and administrative searches by officials to enforce civil regulations. But . . . this analogy affords no reason for dispensing with a warrant."[51]

In the context of the search of a probationer's home, the require-

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45. Frank v. Maryland, 359 U.S. at 361. In *Frank*, a Baltimore health inspector found evidence of rat infestation behind Frank's home. The inspector requested permission to inspect the basement. Frank refused and was convicted and fined under a city ordinance requiring citizens to honor such requests. The ordinance was held constitutional despite the lack of a warrant requirement. *Id.* at 361, 373.

46. *Id.* at 373. "In light of the long history of this kind of inspection and of modern needs, we cannot say that the carefully circumscribed demand which Maryland here makes on appellant's freedom has deprived him of due process of law." *Id.*

47. 387 U.S. 523 (1967).

48. Camara v. Municipal Court, 387 U.S. at 534.

> [A]dministrative searches of the kind at issue here [search by housing inspectors to determine compliance with building's occupancy permit limit] are significant intrusions upon the interests protected by the Fourth Amendment . . . [and] such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual.

*Id.*

49. See v. City of Seattle, 387 U.S. 541 (1967). The defendant in *See* refused to allow a fire department representative to inspect his locked warehouse without a warrant based upon probable cause. The Supreme Court held that a warrant was a prerequisite to this kind of search. *Id.* at 545—46.

50. *Griffin*, 107 S. Ct. at 3168.

51. United States v. Workman, 585 F.2d 1205, 1207 (4th Cir. 1978).

ment of a search warrant is often dependent upon the particular analogy drawn by a court. Some courts view the search of a probationer's home as analogous to the search of any other home, and therefore require a warrant; other courts categorize such searches as analogous to an administrative inspection and therefore do not require a warrant. In considering the search of a probationer's home in *Griffin*, the majority adopted the latter view while some dissenters adhered to the former.

## II. *GRIFFIN v. WISCONSIN*

### A. *Facts*

On September 4, 1980, Joseph Griffin was convicted of disorderly conduct, obstructing an officer, and resisting arrest.[52] He was placed on probation in the legal custody of the Wisconsin State Department of Health and Social Services (HSS).[53]

Griffin was still on probation on April 5, 1983, when Michael Lew, supervisor for the State Bureau of Probation and Parole, received a tip regarding Griffin.[54] The tip came from the Beloit Detective Bureau, and the caller stated that Griffin "may have had guns in his apartment."[55] After receiving the call, Lew waited two or three hours for Griffin's assigned probation officer to return to the office; when the officer failed to return, Lew contacted another probation officer to assist him in the search of Griffin's home. Lew also made arrangements with the Beloit Police Department to have three plainclothes policemen accompany him in order to provide protection for himself and the other probation officer.[56]

The five officers went to Griffin's apartment; when he answered the door, Lew told him who they were and that they were going to search the apartment. Once inside, Lew and the other probation officer searched the premises; the police officers remained in the living room and did not participate in the search. After completing his search, Lew entered the living room where one of the police

52. *Griffin*, 107 S. Ct. at 3166.
53. *Id.* WIS. STAT. ANN. § 973.10(1) (West 1985) provides:
> Imposition of probation shall have the effect of placing the defendant in the custody of the department [of Health and Social Services] and shall subject the defendant to the control of the department under conditions set by the court and rules and regulations established by the department for the supervision of probationers and parolees.
54. *Griffin*, 107 S. Ct. at 3166.
55. State v. Griffin, 131 Wis. 2d 41, 46, 388 N.W.2d 535, 536 (1986).
56. *Id.*

officers directed him toward a table. The table had a broken drawer which allowed Lew to see inside.[57] Lew found a gun in the drawer, turned it over to a police officer, and instructed the police officers to take Griffin into custody for violation of his probation conditions. The other probation officer subsequently entered the room and took possession of a bag apparently containing marijuana.[58] Criminal charges were filed against Griffin, accusing him of possession of a controlled substance and possession of a firearm by a felon.[59]

In searching Griffin's home, the officers were acting under the authority of the rules and regulations of HSS. One such regulation allows for a warrantless search of a probationer's home by any probation officer, providing that the officer has reasonable grounds to believe there is contraband in the home and the officer has obtained approval from his supervisor before commencing the search.[60] Another regulation provides that a probationer's refusal to consent to such a search is a probation violation.[61] A third regu-

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57. *Id.* Assuming that Lew had a right to be in Griffin's home, no warrant was needed to search the drawer and seize the gun because it was in "plain view." *See, e.g.*, Illinois v. Andreas, 463 U.S. 765, 771 (1983) ("The plain-view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item firsthand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy."); Texas v. Brown, 460 U.S. 730, 737—39 (1983) ("[O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."); Harris v. United States, 390 U.S. 234, 236 (1968) ("It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.").

58. *Griffin*, 131 Wis. 2d at 47, 388 N.W.2d at 536.

59. *Id.* at 47—48, 388 N.W.2d at 536—37. The complaint requested that Griffin be given an enhanced penalty for being a habitual offender. The trial court granted Griffin's motions to sever and to dismiss the charge of habitual criminality.

60. *Griffin*, 107 S. Ct. at 3166; WIS. ADMIN. CODE §§ HSS 328.21(4), 328.16(1) (Jan. 1981). Although § 328.21 was repealed and repromulgated effective May 31, 1986, the *Griffin* court cited the prior version because it was in effect when Griffin's home was searched. *Griffin*, 107 S. Ct. at 3166 n.1. Section 328.21(4) stated: "A search of a client's living quarters or property may be conducted by field staff if there are reasonable grounds to believe that the quarters or property contain contraband. Approval of the supervisor shall be obtained unless exigent circumstances require search without approval." For the list of factors to be considered in determining whether reasonable grounds exist to believe a probationer possesses contraband, see *infra* note 102.

Section 328.16(1) defines contraband as an item that the probationer may not possess, either according to the terms of his probation or according to the law.

61. *Griffin*, 107 S. Ct. at 3166; WIS. ADMIN. CODE § HSS 328.04(3)(k) (Jan. 1981). The regulation mandates that the probationer "[m]ake himself or herself available for searches or tests ordered by the agent including but not limited to urinalysis, breathalizer, and blood samples or search of residence or any property under his or her

lation forbids a probationer's possession of a firearm without prior approval from his probation officer.[62]

Griffin moved to suppress the evidence obtained during the search, alleging that his fourth amendment rights were violated because the search was conducted without a warrant and was not based on probable cause. The trial court held that Griffin's fourth amendment rights were not violated by the search; no warrant was necessary because Griffin was on probation and the probation officer acted reasonably. The trial court also found that the police officers present at Griffin's home were there only to protect the probation officers; there was no indication that a police search took place. A jury found Griffin guilty of possession of a firearm by a convicted felon and he was sentenced to two years in a state prison.[63]

The Wisconsin Court of Appeals affirmed, agreeing that no warrant is needed to search the home of a probationer if the search is otherwise reasonable.[64] The court found the search valid even though none of the traditional exceptions to the warrant requirement applied.[65]

Griffin's appeal to the Wisconsin Supreme Court was equally unsuccessful, but for different reasons. The court found that probationers have a diminished expectation of privacy because of their status. This diminution allows a probation officer to search the probationer's home without a warrant, even when the search is based only on "reasonable grounds" to believe contraband is present.[66] The court further held that the tip provided by the Beloit

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control."

62. *Griffin*, 107 S. Ct. at 3166; WIS. ADMIN. CODE § HSS 328.04(3)(j) (Jan. 1981). Because Griffin had a previous felony conviction, his possession of a firearm constituted a felony, as well as a violation of probation. Griffin's previous felony conviction was for possession of heroin with intent to deliver. *Griffin*, 131 Wis. 2d 41, 388 N.W.2d 535 (1986).

63. *Griffin*, 131 Wis. 2d at 48, 388 N.W.2d at 537. The charge of possession of a controlled substance was dismissed. *Id.*

64. State v. Griffin, 126 Wis. 2d 183, 193, 376 N.W.2d 62, 67 (1985).

65. *Id.* The court considered the "reasonable grounds" standard of the HSS regulation sufficient to protect the probationer's fourth amendment rights and found that the police tip constituted adequate "reasonable grounds" to suspect the presence of contraband at Griffin's home. *Id.* at 200—01, 376 N.W.2d at 70—71. The Wisconsin Court of Appeals based its finding on the reasoning found in State v. Tarrell, 74 Wis. 2d 647, 247 N.W.2d 696 (1976) (The exception to the warrant requirement in searches and seizures of probationers is founded on the nature of probation; searches and seizures, however, must still be reasonable.).

66. *Griffin*, 131 Wis. 2d at 45—46, 388 N.W.2d at 536. In addition, the court found the "reasonable grounds" standard of the HSS regulation sufficient to meet the consti-

Police Detective Bureau constituted the "reasonable grounds" necessary for a search.[67]

### *B. United States Supreme Court Opinion*

#### *1. Majority*

The United States Supreme Court granted certiorari to determine whether the search of Griffin's home, conducted pursuant to HSS regulations, violated the fourth amendment.[68] In a close decision,[69] the Court upheld Griffin's conviction, but on different grounds than those relied upon by the Wisconsin Supreme Court.[70] The Court stated:

> [W]e find it unnecessary to embrace a new principle of law, as the Wisconsin court evidently did, that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal "reasonable grounds" standard. As his sentence for the commission of a crime, Griffin was committed to the legal custody of the Wisconsin State Department of Health and Social Services, and thereby made subject to that department's rules and regulations. The search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well established principles.[71]

The majority acknowledged that the search of any home must be "reasonable," according to the fourth amendment.[72] The Court recognized that, although a warrant is usually required to make a search reasonable, exceptions are permitted when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[73] The *Griffin* court reasoned that supervision under a state's probation system

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tutional requirement of reasonableness.

67. *Id.*

68. Griffin v. Wisconsin, 107 S. Ct. 643 (1986).

69. Five justices joined in the majority opinion and four dissented. The majority included Chief Justice Rehnquist and Justices White, Powell, O'Connor, and Scalia, who authored the opinion. Justices Blackmun, Brennan, Marshall, and Stevens dissented.

70. *Griffin*, 107 S. Ct. at 3167.

71. *Id.*

72. *Id.*

73. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). *See supra* notes 41—43 and accompanying text.

involves special needs, and therefore, a regulation that dispenses with the warrant and probable cause requirements for a search may be justified in the search of a probationer's home.[74] The Court noted that the special needs of probation supervision allow for a "degree of impingement upon privacy that would not be constitutional if applied to the public at large."[75] The degree of impingement, however, has limits. Consequently, the next issue addressed was whether Wisconsin's search regulation exceeded the permissible degree of impingement.[76]

Specifically, the Court addressed whether the special needs of the Wisconsin probation system justified a regulation which allowed a search of a probationer's home without the traditional requirements of a warrant and probable cause.[77] In finding that those needs did justify a departure from the requirement of a warrant, the Court stated:

> A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct, and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.[78]

To illustrate the difficulties inherent in requiring a warrant for the search of a probationer's home, the Court analogized the situation to a parental search of a minor's room. According to the Court, it would be impracticable to require judicial approval for a custodial search of a minor's room by his parents. The Court reasoned that because probationers are in the custody of HSS, a similar impracticability existed for the requirement of a warrant to search probationers' homes.[79]

After finding that the warrant requirement would greatly interfere with the probation system, the Court evaluated the effect on

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74. *Griffin*, 107 S. Ct. at 3168. Proper functioning of a probation system is a special need of a state because probation officers must "assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 3168—69.

78. *Id.* at 3169 (citations omitted).

79. *Id.*

the probationer of not requiring a warrant.[80] In determining this effect, the Court noted that, although a probation officer has a duty to protect the public, he also has a duty to help the probationer reintegrate into society.[81] According to the Court, because the probation officer has the interest of the probationer in mind, a search without a warrant does not pose the dangerous situation prohibited by the fourth amendment.[82]

The Court next considered whether the requirement of probable cause could be replaced by the lesser requirement of reasonable grounds in this instance.[83] The Court found the reasonable grounds standard appropriate in the search of a probationer's home for two reasons. First, the Court concluded that a requirement of probable cause would reduce the deterrent effect of probation.[84] Second, the Court reasoned that because the relationship between the probation officer and probationer is not entirely adversarial, the interests of the probationer would not be harmed by allowing the search to be based on reasonable grounds.[85]

Because the regulation under which the search was conducted was itself reasonable, the majority held that the search of Griffin's home, although warrantless and without probable cause, did not violate the fourth amendment.[86] The Court specifically declined to follow the Wisconsin Supreme Court's conclusion that reasonable grounds to suspect the presence of contraband in a probationer's

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 3170.

84. *Id.* The Court found that the deterrent effect of probation would be reduced more by requiring probable cause than it would by requiring a warrant based on reasonable suspicion: "The probationer would be assured that as long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected." *Id.*

85. *Id.* The Court maintained that the special relationship that exists between a probation officer and a probationer makes it possible for the probation officer to assess reasonable grounds fairly and thereby protect probationers' fourth amendment rights. In describing the assessment of reasonable grounds, the Court stated:

> The factors [to be considered] include not only the usual elements that a police officer or magistrate would consider, such as the detail and consistency of the information suggesting the presence of contraband and the reliability and motivation . . . of the informant, but also "[i]nformation provided by the client which is relevant to whether the client possesses contraband," and "[t]he experience of a staff member with that client or in a similar circumstance."

*Id.* (citations omitted).

86. *Id.* at 3171.

home would justify any search of such a home.[87]

### 2. *Dissent*

The dissenters in *Griffin* believed the majority had taken "another step that diminishes the protection given by the Fourth Amendment."[88] The dissenters agreed that supervision of probationers is a special need of the state which justifies a departure from the established rationale that mandates the warrant and probable cause requirements.[89] However, the dissenters expressed disagreement with the majority's assumption that mere balancing of the individual's interest with law enforcement needs made it automatically permissible to dispense with the requirements.

Instead, the dissenters reasoned that the balancing test was merely the first step in analyzing special needs cases; after the balancing was done, then the practicalities of the requirements of a warrant and probable cause should be examined in light of that balance.[90] Justice Blackmun's application of the balancing test found that the replacement of the probable cause standard with the reasonable grounds standard was constitutionally adequate; the reasonable grounds standard advanced the probation system's goals of protecting the public and rehabilitating the criminal, while the lesser standard also sufficiently protected the probationer from unreasonable invasions of his privacy.[91]

However, the majority's dispensation with the warrant requirement did not meet similar approval.[92] The dissenters deemed the absence of a warrant unjustified for several reasons. Most importantly, the search took place in a home, "the place that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment."[93] Second, the dissenters did

87. *Id.* Because of the particular circumstances in *Griffin*, the search was reasonable and therefore the search of the probationer's home was justified. *Id.*

88. *Id.* at 3172. Justice Blackmun authored the main dissenting opinion which was joined fully by Justice Marshall and in part by Justices Brennan and Stevens. *Id.* at 3171. Justice Stevens, joined by Justice Marshall, also wrote a one paragraph dissent, expressing his personal disbelief that the majority could have reached the decision that it did. *Id.* at 3177.

89. *Id.* at 3172. The segment of Justice Blackmun's dissent concerning the dispensation of probable cause was joined only by Justice Marshall.

90. *Id.*

91. *Id.* at 3173.

92. *Id.*

93. *Id.* (citations omitted).

not agree that the search of Griffin's home fell within a recognized exception to the requirement of an administrative warrant.[94] Third, the dissenters also made special mention of the fact that probationers usually live at home with a family, as did Griffin.[95] Because requiring a warrant would not defeat the purposes of probation, the dissenters found that a warrant should be required to protect both the probationer and his family.[96] Fourth, the dissenters rejected the majority's assumption that a probationer stood to benefit from a warrantless search.[97] Rather, the dissenters believed that the possibility of a search at any time, based solely on the judgment of probation authorities, would only discourage trust between the probationer and probation officers.[98] Finally, the dissenting justices were not persuaded by the majority's analogy of a probation search to the parental search of a minor's room. The dissenters distinguished the parent-child relationship, which is private, from the probation officer-probationer relationship, which is statutorily required and subject to particular standards.[99]

Although the majority appeared satisfied that the search was valid "because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement,"[100] the dissenters were not so persuaded.[101] The dissenting justices disagreed with the majority's primary focus on one of the search regulations which explicitly required reasonable grounds to support a search; the dissenters charged that the majority completely ignored the other regulations outlining the procedure for determining whether reasonable grounds existed.[102] The dissenters

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94. *Id.* at 3173—74 "The reasoning that may justify an administrative inspection without a warrant in the case of a business enterprise simply does not extend to the invasion of the special privacy the Court has recognized for the home." *Id.*

95. *Id.* at 3174.

96. *Id.* According to the dissent, the supervisor, Lew, had time to get a warrant. If not, he may have been able to search validly without one, based on the established exception in exigent circumstances. "The existing exception provides a probation agent with all the flexibility the agent needs." *Id.*

97. *Id.* The majority reasoned that a probationer was likely to benefit from a search by his probation officer because a probation officer is not experienced in conducting searches and is concerned about the welfare of his client; therefore, he is less likely to conduct inappropriate searches. *Id.* at 3169.

98. *Id.* at 3174. "If anything, the power to decide to search will prove a barrier to establishing any degree of trust between agent [probation officer] and 'client' [probationer]." *Id.*

99. *Id.* at 3174—75.

100. *Id.* at 3167.

101. *Id.* at 3175.

102. *Id.* The Wisconsin Supreme court cited WIS. ADMIN. CODE § HSS 328.21(6)

maintained that the validity of the search regulations could only be tested in a particular context, and the majority failed to make this application.[103]

The dissenters next applied the reasonable grounds standard to the facts of *Griffin* and found that even this lesser standard was not met.[104] Several reasons were posited for this finding. First, the dissenters characterized the source of the tip as unknown,[105] noting: 1) Lew could not remember which Beloit officer called him with the information regarding Griffin, although he believed it was Pittner; 2) Pittner said that he did not place the call; and 3) the record was so devoid of any information regarding the identity of the caller that the call could have been placed by anyone, including a person pretending to be a police officer.[106] Next, even if the assumption was made that the call came from a police officer, the

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(May 1986):

> In deciding whether there are reasonable grounds to believe that a client possesses contraband or that a client's living quarters or property contain contraband, a staff member shall consider:
>
> (a) The observations of staff members;
>
> (b) Information provided by informants;
>
> (c) The reliability of the information relied on. In evaluating reliability, attention *shall* be given to whether the information is detailed and consistent and whether it is corroborated;
>
> (d) The reliability of the informant. In evaluating reliability, attention *shall* be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information;
>
> (e) The activity of the client that relates to whether the client might possess contraband;
>
> (f) Information provided by the client that is relevant to whether the client possesses contraband;
>
> (g) The experience of a staff member with that client or in a similar circumstance;
>
> (h) Prior seizures of contraband from the client; and
>
> (i) The need to verify compliance with rules of supervision and state and federal law.

State v. Griffin, 131 Wis. 2d 41, 61—62, 388 N.W.2d 535, 542—43 (1986).

103. *Griffin*, 107 S. Ct. at 3175.

104. *Id.* at 3176.

105. The distinction between tips from unknown sources and those given by identified sources is relevant because tips from anonymous sources are given less weight and must be supported by other independent evidence, according to the prevailing "totality of the circumstances" approach for evaluating probable cause. Illinois v. Gates, 462 U.S. 213, 233—34 (1983).

106. *Griffin*, 107 S. Ct. at 3175. The majority adopted the trial court's finding, which was affirmed by the Wisconsin Supreme Court, that the tip came from a police officer. Neither Griffin nor the dissenters claimed that the finding was clearly erroneous. *Id.* at 3171 n.7.

dissenters were troubled by the fact that the tip provided no information as to its reliability.[107] There was no evidence in the record to indicate the precise content of the tip nor was there any information indicating the original source of the tip. The fact that there was no attempt to verify the tip also contributed to the dissenters' opposition. In addition, there was no effort made to evaluate the tip in accordance with the regulations because Lew did not consult with Griffin's assigned officer, did not attempt to evaluate the reliability of the information and informant, and did not make an effort to talk to Griffin before the search.[108] The dissenters asserted that government officials must at least adhere to the regulations for establishing reasonable grounds when the lesser standard is substituted for probable cause, or the substitute standard is really not a standard at all.[109]

In summary, the dissenters were not unanimous in their reasons for opposing the opinion of the majority, disagreeing whether a warrant was required[110] and whether reasonable grounds was a constitutionally adequate substitute for probable cause in certain instances. However, the dissenters were in full agreement that even the most minimal requirement, no warrant but reasonable grounds, was not met in this instance. Thus, they found the search violated the fourth amendment.

## III. IMPLICATIONS OF *GRIFFIN*

Because *Griffin* allows a warrantless search of a home, which is contrary to previous Supreme Court decisions, the ramifications of this decision are troubling. Will the decision create situations in which probation officers become an arm of the police, thereby allowing general warrantless searches by police? Will the decision be extended in a manner that will seriously threaten fourth amend-

107. *Id.* at 3175.

108. *Id.* at 3175—76.

109. *Id.* at 3176. Justice Stevens filed a separate dissent in which Justice Marshall joined, stating that the tip received in *Griffin* was constitutionally insufficient to form the basis for a warrantless search of a home absent consent. *Id.* at 3177.

110. Justices Brennan, Marshall, and Blackmun agreed that a warrant was required for the search of Griffin's home. *Id.* at 3173—74. Justices Blackmun and Marshall believed that, while a reduced level of suspicion may substitute for probable cause, a warrant is still required for a search. *Id.* at 3172—75. The majority took particular issue with this finding by Blackmun and Marshall. Although the majority conceded that there were situations in which probable cause was required but a warrant was not, it maintained that "the reverse runs up against the constitutional provision that 'no Warrants shall issue, but upon probable cause.'" *Id.* at 3169.

ment protections? Will the *Griffin* decision signal an era in which the special needs exception to the warrant requirement overcomes the general rule that warrantless searches of homes are per se unreasonable? Will the *Griffin* decision preclude further analysis of the fourth amendment rights of persons who live with probationers?

The *Griffin* decision raises serious concerns that the authority of the probation officer to conduct warrantless searches will be extended to the police when the two branches of law enforcement decide to work together. The probation supervisor in *Griffin* received a tip from the police, was accompanied to Griffin's home by police, and discovered evidence of a crime with the assistance of a hint from one of the police officers.[111] The problem of police involvement tainting an otherwise valid warrantless search by a probation officer has been addressed by the Ninth Circuit which stated:

> Warrantless searches conducted by parole officers in the performance of their duties are subject to modified Fourth Amendment restrictions. . . . Excepted from the parole standard, however, are those cases in which the parole officer acts as a "stalking horse" to facilitate police investigations by circumventing the warrant requirement.[112]

In another opinion, the Ninth Circuit warned that the search conditions of probation should not be used as a "broad tool for law enforcement."[113]

*Griffin* illustrates the potential for abuse which exists even though a police officer accompanies the probation officer at the latter's request for protection. The tip that instigated the search of

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111. *Griffin*, 131 Wis. 2d at 46—47, 388 N.W.2d at 536.

112. United States v. Jarrad, 754 F.2d 1451, 1453 (9th Cir.) (citations omitted), *cert. denied*, 474 U.S. 830 (1985). In *Jarrad*, the defendant was a parolee charged with a series of bank robberies. He moved to suppress evidence involving a shotgun removed from the trunk of the car he was driving when arrested. The trunk was searched by police officers at the request of a parole officer. The parole officer ordering the search was not Jarrad's parole officer, and the two had never met. However, the parole officer had worked on Jarrad's case previously. This officer ordered the search, but it was conducted entirely by police officers. The shotgun eventually was identified as the weapon from one of the robberies, and Jarrad was convicted. The court held that there was no fourth amendment violation because it found that the parole officer had acted independently of the police. *Id.* at 1453—54.

113. United States v. Merchant, 760 F.2d 963, 969 (9th Cir. 1985), *cert. dismissed*, 480 U.S. 615 (1987). Although *Merchant* provides a good discussion of the implications of probation searches, the search in that case was held unreasonable because Merchant technically was not on probation when it took place.

Griffin's home came from the police department, and the probation officer was accompanied by police officers, supposedly because of the probation officer's request for protection.[114] Furthermore, one of the police officers who accompanied the probation officers to Griffin's house pointed the probation officer to the table in which the gun was stored.[115] The sanctioning of the police officers' conduct by the Court raises the specter that the probation officer will act "not as the supervising guardian, so to speak, of the parolee [probationer], but as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed."[116]

There is also a fear that *Griffin*'s reasoning will be extended in a manner inconsistent with the protections offered by the fourth amendment. Unfortunately, that fear has already been realized; *Griffin* has been cited in two cases with facts vastly different from those in the principal case. In *United States v. Duff*,[117] the Ninth Circuit relied in part on *Griffin* to hold that drug testing employed by a probation officer was constitutionally valid although there was no warrant, probable cause, or notice to the probationer.[118] In *United States v. Jackson*,[119] a recent border search case, the concurring justices found that the same needs that justify dispensing with a warrant and probable cause in the probation search apply with equal force to a border search.[120] While it is true that these are but two cases, the fact that they exist is proof that *Griffin* has gone neither unnoticed nor unextended. Extending *Griffin*'s holding to apply in such cases signals a dangerous trend toward using a probationer's status to justify any warrantless search, even the highly intrusive *Duff* search.

A third concern with the *Griffin* decision also involves the possibility of extension of the special needs exception. The majority held that the special needs of supervision in the probation system justified disposing with the warrant and probable cause requirement.[121] The concept of a special needs exception was advanced by Justice Blackmun in his concurring opinion in *New Jersey v.*

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114. *Griffin*, 131 Wis. 2d at 46—47, 388 N.W.2d at 536.
115. *Id.*
116. Smith v. Rhay, 419 F.2d 160, 162—63 (9th Cir. 1969).
117. 831 F.2d 176 (9th Cir. 1987).
118. United States v. Duff, 831 F.2d at 179—80.
119. 825 F.2d 853 (5th Cir. 1987).
120. United States v. Jackson, 825 F.2d at 871—72.
121. *Griffin*, 107 S. Ct. at 3167—71.

*T.L.O.*[122] He stated that special needs make the requirement of a warrant and probable cause impracticable, leaving a "court entitled to substitute its balancing of interests for that of the Framers."[123]

In *Griffin*, this impracticability is simply not apparent. The probation supervisor in *Griffin* waited two or three hours before commencing the search of Griffin's home. Was a warrant impracticable in this instance? Furthermore, there was a great deal of controversy surrounding the identity of the informant and the reliability of his information. Although it is generally agreed that probable cause is not required in these types of searches, was there even any reasonable suspicion that contraband was present in Griffin's home? These unaddressed questions exemplify the concern that the special needs exception was overextended in *Griffin* and will continue to be overextended.

A final dilemma posed by *Griffin* involves its effect on the fourth amendment rights of persons who live with probationers.[124] This issue has been addressed by some state courts. In *State v. Fogarty*,[125] the Montana Supreme Court recognized the potential for endangering the fourth amendment rights of others when allowing the warrantless search of a probationer's home.

> These people [other residents of the probationer's home] are not stripped of their right of privacy because they may be living with a probationer or he may be living with them. While a probationer's right of privacy may be justifiably diminished while on probation, the rights of these people are not so diminished. We . . . would be derelict in our duties if we failed to consider the rights of these innocent others so that they are not swept away by the probationary process.[126]

Because of the presence of third persons, the *Fogarty* court required a warrant for the search of a probationer's home.[127] The Utah Supreme Court allowed a parole search to be conducted without a warrant in *State v. Velasquez*,[128] but noted that "[c]aution

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122. 469 U.S. 325 (1985) (Blackmun, J., concurring in the judgment).

123. New Jersey v. T.L.O., 469 U.S. at 351.

124. For further discussion of this problem, see Note, *Striking the Balance Between Privacy and Supervision: The Fourth Amendment and Parole and Probation Officer Searches of Parolees and Probationers*, 51 N.Y.U. L. REV. 800, 816—17 (1976) [hereinafter *Striking the Balance*].

125. 187 Mont. 393, 610 P.2d 140 (1980).

126. State v. Fogarty, 187 Mont. at 412, 610 P.2d at 151.

127. *Id.* at 413—14, 610 P.2d at 152.

128. 672 P.2d 1254 (Utah 1983).

would certainly suggest that a warrant be obtained if the rights of non-parolees might be affected."[129]

In *Griffin*, the United States Supreme Court failed even to address the effects of a warrantless search on those who reside with a probationer.[130] The opinions of the Wisconsin Supreme Court and Court of Appeals, however, both contain a discussion of the issue. The court of appeals reasoned that because any search may affect the rights of third persons, whether or not there was a warrant, those living with Griffin needed no special consideration.[131] The Wisconsin Supreme Court agreed, concluding that no consideration need be given to the rights of third persons when allowing probation searches because no such consideration is given in "ordinary" searches conducted under a warrant.[132]

The reasoning of the Wisconsin courts is not sound. Certainly, the rights of third persons are not considered when issuing a warrant for a search. However, in these cases, the requirement of probable cause serves to protect third persons. In probation searches, these innocent third parties are protected only by the probation officer's duty to establish reasonable grounds for the search. Although a reduced level of suspicion arguably may suffice when searching the home of a probationer who lives alone, the reduced standard fails when the probationer lives with others. The other members of the house have done nothing wrong, but they are denied their fourth amendment right to remain secure in their homes.

Subjecting persons who live with probationers to warrantless searches not only denies them their fourth amendment rights, but also may have a negative effect on the probation system; the probationer may be unable to reintegrate into society because family and friends will be unwilling to associate with him.[133] The United States Supreme Court's failure to address this issue in *Griffin* poses a serious threat to the fourth amendment rights of innocent third parties living with the probationer, typically the probationer's family.

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129. State v. Velasquez, 672 P.2d at 1260 n.3.

130. Although Justice Blackmun's dissent mentioned that probationers generally live at home with their families, the discussion following that statement focused on the probationer's right to be secure in his home, rather than the rights of his family. *Griffin*, 107 S. Ct. at 3174.

131. *Griffin*, 126 Wis. 2d at 193, 376 N.W.2d at 67.

132. *Griffin*, 131 Wis. 2d at 57—58, 388 N.W.2d at 541.

133. *Striking the Balance*, *supra* note 124 at 816—17.

The *Griffin* decision is not surprising in light of the trend in fourth amendment decisions to find searches reasonable despite the lack of either a warrant or probable cause.[134] Perhaps this trend is evidence of an attempt to mitigate the evidentiary effects of holding a search unconstitutional; evidence seized during an illegal search is inadmissible.[135] Thus, rather than allowing the exclusion of otherwise pertinent evidence under the exclusionary rule, the Court may be simply choosing to narrow the situations in which the rule applies. Unfortunately, such a solution may be in direct contravention of the commands of the fourth amendment.

## CONCLUSION

The Supreme Court in *Griffin v. Wisconsin* not only moves the firm line that "the Fourth Amendment has drawn . . . at the entrance to the house"[136] and replaces it with uncertainty, but also seems to lay the foundation for making the requirement of a search warrant an exception rather than the rule in many contexts. Although few would dispute that there is great societal interest in the rehabilitation of probationers and the protection of society during this rehabilitative process, disagreement exists as to what extent society's interest outweighs the constitutional rights of probationers during this period.[137] Because crowded conditions in prisons continue to make probation a viable sentencing alternative, the controversy surrounding probation issues promises to grow. Although *Griffin* may be characterized as an attempt to deal with

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134. *See supra* notes 22—51 and accompanying text.

135. The exclusionary rule makes evidence obtained in violation of the fourth amendment inadmissible at criminal trials. The rule was first announced and applied to federal cases in Weeks v. United States, 232 U.S. 383 (1914). The rule was later extended to state cases in Mapp v. Ohio, 367 U.S. 643 (1961).

136. Payton v. New York, 445 U.S. 573, 590 (1980).

137. The Court has considered the various societal and individual interests at stake in the search of private living quarters and stated:

> Crime, even in the privacy of one's quarters is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not a policeman or government enforcement agent.

Johnson v. United States, 333 U.S. 10, 14 (1948).

these issues, the decision signals a dangerous departure from established fourth amendment law that deems warrantless searches of homes per se unreasonable.

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