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Samson v. California: "Evil" Suspicionless Searches Become a Part of Everyday Life for Parolees

John Lassetter*

Introduction

On September 6, 2002, Officer Alex Rohleder of the San Bruno Police Department arrested Donald Samson for drug possession.[1] Officer Rohleder had searched Donald Samson without any suspicion of wrongdoing because he knew that Samson was on parole, with parole conditions requiring submission to suspicionless searches by police officers.[2] During the search, Officer Rohleder found Samson in possession of methamphetamines.[3] The United States Supreme Court applied the Fourth Amendment reasonableness balancing test and upheld the search.[4] The Court held that suspicionless searches of parolees permitted by state statute are constitutionally reasonable under the Fourth Amendment and that California's ban of "arbitrary, capricious or harassing"[5] suspicionless searches provided sufficient protection of a parolee's diminished expectation of privacy.[6]

In a significant footnote, the Court indicated that it was not deciding Samson's case under the "special needs" doctrine.[7] An

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1. *See* Samson v. California, 126 S. Ct. 2193, 2196 (2006) [hereinafter *Samson I*]; People v. Samson, No. A102394, 2004 WL 2307111, at *1 (Cal. Ct. App. Oct. 14, 2004) [hereinafter *Samson II*].

2. *Samson I*, *supra* note 1, at 2196. *See* CAL. PENAL CODE § 3067(a) (West 2000) ("Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.").

3. *Samson II*, *supra* note 1, at *1.

4. *Samson I*, *supra* note 1, at 2202.

5. *Samson II*, *supra* note 1, at *2 (citing California v. Reyes, 968 P.2d 445, 449 (Cal. 1998)).

6. *Samson I*, *supra* note 1, at 2202.

7. *Id.* at 2199 n.3.

application of the special needs doctrine more than likely would have changed the outcome of *Samson*.[8] In order to engage in a reasonableness balancing analysis, this doctrine would have required the Court to find that the regime of suspicionless searches upheld in *Samson* satisfied a special government need beyond the regular need for law enforcement.[9]

This Article first argues that the Court should have applied the special needs doctrine when deciding Donald Samson's case. This Article proposes that a suspicionless search of a parolee by a police officer does not qualify as a special need under this doctrine. This Article then argues that even if the Court had found a special need for police officers to search parolees without individualized suspicion, the search should have failed under the Court's reasonableness balancing calculus. The Court should have found that parolees are reasonably protected from suspicionless searches. Finally, this Article concludes with several alternatives the Court could have considered that better satisfy the special needs doctrine and the reasonableness balancing calculus.

I. The Special Needs Exception and Reasonableness Balancing

A. General Fourth Amendment Principles

In order to find that a person's Fourth Amendment privacy rights have been violated, a court first must determine that a search has occurred.[10] The party claiming that an unconstitutional search has occurred must then show that the search intruded upon a reasonable expectation of privacy.[11] Justice Harlan articulated the test for determining a reasonable expectation of privacy in his concurring opinion in *Katz v. United States*.[12] He stated that first, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the

8. *See id.* at 2204 (Stevens, J., dissenting).

9. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (indicating that the Court should not engage in reasonableness balancing until it has found a special need).

10. *See* U.S. CONST. amend. IV:

> 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.

11. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

12. *See id.*

expectation be one that society is prepared to recognize as 'reasonable.'"[13]

Once a person has established a reasonable expectation of privacy, the Fourth Amendment normally protects that expectation from intrusion by requiring that authorities show "probable cause" in order to perform a search or seizure.[14] The Court defines "probable cause" as a showing that "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[15] Authorities usually show probable cause by obtaining a warrant before conducting a search.[16] The probable cause and warrant requirements are "subject only to a few specifically established and well-delineated exceptions."[17] These exceptions are "jealously and carefully drawn,"[18] and the party seeking an exception must show that "the exigencies of the situation [have] made that course imperative."[19]

B. The Special Needs Doctrine: Warrantless Searches Justified By Legitimate Needs Beyond Law Enforcement

The special needs doctrine provides an exception to the warrant and probable cause requirements of the Fourth Amendment.[20] The Court has employed the special needs doctrine to justify suspicionless searches[21] and searches performed on

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13. *Id.*

14. *See* U.S. CONST. amend. IV.

15. Illinois v. Gates, 462 U.S. 213, 238 (1983).

16. *See* U.S. CONST. amend. IV.

17. Katz v. United States, 389 U.S. 347, 357 (1967).

18. Jones v. United States, 357 U.S. 493, 499 (1958).

19. McDonald v. United States, 335 U.S. 451, 456 (1948). The Court stated the following concerning the history and exceptions of the warrant requirement:

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

Id. at 455-56.

20. Ferguson v. Charleston, 532 U.S. 67, 79 n.15 (2001).

21. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding the random drug testing of high school student athletes based on the school's special needs of maintaining order and preventing drug addiction among student athletes); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (allowing for suspicionless drug testing of certain U.S. Customs Service employees because these searches fulfilled a special government need of ensuring that these employees, who often had contact with illegal drugs, were not using illegal drugs).

reasonable grounds.[22] In order to use the special needs doctrine to bypass the warrant requirement, the government must show "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable."[23] Only in these "exceptional circumstances . . . is a court entitled to substitute its balancing of interests for that of the Framers."[24] In other words, if a court determines that a special need beyond law enforcement is not present to justify a warrantless search, it should hold the search unconstitutional.[25]

The Court does not "simply accept the State's invocation of a 'special need.'"[26] When analyzing a government assertion of a special need, the Court should perform a "close review" of the purported need.[27] For example, in *Ferguson v. Charleston*, the plaintiffs claimed that the city police had unreasonably searched them without suspicion of any wrongdoing. The police were following a search policy that they had implemented in cooperation with the local hospital.[28] Concerned about an increase in cocaine use among pregnant women, members of the hospital staff agreed to cooperate with the local police force in testing pregnant women for illegal drug use and prosecuting pregnant women if they tested positive.[29] The search policy set forth procedures for identifying and testing pregnant women for suspected drug use, contained police procedures and criteria for arresting patients who tested positive, and prescribed prosecution for drug offenses or child neglect.[30] In its analysis of the case, the Court focused on the search policy's incorporation of police operational guidelines and attention to chain of custody, possible

22. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868 (1987) (upholding the search of a probationer's home based on reasonable grounds for suspicion because the state had a special need to monitor probationers).

23. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

24. *Id.*; *see also* Chandler v. Miller, 520 U.S. 305, 309 (1997) (recognizing that the category of constitutionally permissible suspicionless searches is "closely guarded").

25. *See T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); *see also Ferguson*, 532 U.S. at 81-85 (2001) (striking down the drug testing of pregnant women at a public hospital because the primary purpose of the testing was to gather evidence for police investigations); Indianapolis v. Edmond, 531 U.S. 32, 38, 40 (2000) (finding a suspicionless search roadblock system unconstitutional because the state could show no legitimate special need for the roadblock beyond law enforcement).

26. *Ferguson*, 532 U.S. at 81 (quoting *Chandler*, 520 U.S. at 318).

27. *Id.* (quoting *Chandler*, 520 U.S. at 321).

28. *Id.* at 71-74.

29. *Id.* at 70-74.

30. *Id.* at 71-73.

criminal charges, and logistics of arrest.[31] The *Ferguson* Court also noted that the policy did not discuss the "special need" of "protecting the health of both mother and child," as purported by the government.[32] The extensive involvement of local police in the implementation of the suspicionless searches also factored into the *Ferguson* Court's analysis.[33] Based on these factors, the Court held:

> [T]he threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of [the hospital's] policy was to ensure the use of those means . . . . Because law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.[34]

In *City of Indianapolis v. Edmond*,[35] decided the same term as *Ferguson*, the Court struck down a roadblock program designed to discover and interdict illegal narcotics.[36] The program instructed police officers to stop and search a predetermined number of vehicles on certain roads throughout the city.[37] In an opinion by Justice O'Connor, the Court held that the general crime-control purpose of the search regime did not qualify as a special need.[38] The *Edmond* majority distinguished this roadblocking scheme from others that it had upheld in the past,[39] stating that the past roadblocks had been implemented for special needs purposes such as immediate protection of public safety from drunk drivers.[40] In contrast, the Court indicated that the "primary purpose" of the search at issue in *Edmond* "was to detect evidence of ordinary criminal wrongdoing."[41] Ultimately the Court held that because of this "general interest in crime control," the City did not establish a special need to perform searches without individualized suspicion. Therefore, the roadblock program

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31. *See id.* at 82.
32. *Id.*
33. *See id.*
34. *Id.* at 83-84 (footnote omitted).
35. 531 U.S. 32 (2000).
36. *Id.* at 47-48.
37. *Id.* at 35.
38. *Id.* at 41-44, 48.
39. *See, e.g.*, Michigan v. Sitz, 496 U.S. 444 (1990) (upholding the state's use of a sobriety checkpoint).
40. *Edmond*, 531 U.S. at 39.
41. *Id.* at 38, 41-42.

contravened the Fourth Amendment.[42]

C. Reasonableness Balancing: Balancing the Special Need Against the Individual's Expectation of Privacy

Once the Supreme Court has identified a special need beyond general law enforcement, it engages in a reasonableness balancing inquiry to determine whether the government's method of satisfying its special need is "reasonable" within the dictates of the Fourth Amendment.[43] The Court has identified reasonableness as the "touchstone" of the Fourth Amendment.[44] The Court determines the reasonableness of a government search or seizure "by balancing [the government practice's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[45] The "legitimate governmental interests" are the special needs identified by the first step of the analysis.[46] This reasonableness balancing inquiry implies that the more a government practice intrudes on a person's reasonable expectation of privacy, the stronger the government's special needs interest must be.

The Court has identified two levels of suspicion below the normal probable cause standard that pass constitutional muster in different circumstances.[47] The lowest level of suspicion recognized is essentially a suspicionless standard.[48] The Court has recognized that suspicionless searches intrude to an extreme on an individual's privacy and are "the very evil the *Fourth Amendment* was intended to stamp out."[49] Therefore, the Court closely guards the category of constitutional suspicionless searches, allowing such searches only in the most demanding circumstances.[50]

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42. *Id.* at 41-42.

43. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995).

44. United States v. Knights, 534 U.S. 112, 119 (2001).

45. *Vernonia*, 515 U.S. at 652-53 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979))).

46. *Id.* at 653.

47. *See* Matthew S. Roberson, *"Don't Bother Knockin'... Come On In!": The Constitutionality of Warrantless Searches As Condition of Probation*, 25 CAMPBELL L. REV. 181, 189 (2003).

48. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding the random drug testing of high school student athletes based on the school's special needs of maintaining order and preventing drug addiction among student athletes).

49. *Samson I*, *supra* note 1, at 2203 (Steven, J., dissenting) (citing Boyd v. United States, 116 U.S. 616, 625-30 (1886)).

50. *See* Ferguson v. Charleston, 532 U.S. 67, 77 (2001) (citing Chandler v.

The Court has identified the second level of suspicion as the "reasonable suspicion" standard.[51] This level of suspicion does not require a warrant, but it does require the searching officer to articulate reasonable grounds in order to justify a search.[52] Often the Court will allow the person administering the search to incorporate her own experiences on the job when determining whether reasonable grounds for a search exist.[53]

When the reasonable balancing calculus tips in favor of a government agency applying either a suspicionless standard or a reasonable suspicion standard, the Court normally requires other procedural safeguards to protect those intruded upon from a government agent's discretionary use of authority. Recognizing that there are situations "in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,'" the Court stated "other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field[.]'"[54]

The Court has applied the special needs doctrine and the accompanying reasonableness balancing to a wide variety of contexts including situations involving students,[55] government workers,[56] involuntary participants in roadblocks,[57] and public

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Miller, 520 U.S. 305, 309 (1997)) (recognizing that the category of constitutionally permissible suspicionless searches is "closely guarded").

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

52. *See id.* at 878; *see also* Terry v. Ohio, 392 U.S. 1, 27 (1967) ("[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.") (citations and footnotes omitted). *But see Griffin*, 438 U.S. at 883-87 (Blackmun, J., dissenting) (arguing that even with a "reasonable suspicion" standard, a search warrant should still be required).

53. *See Terry*, 392 U.S. at 27 ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

54. *See* Delaware v. Prouse, 440 U.S. 648, 654-55 (1979) (quoting Camara v. Mun. Court of City and County of San Franscisco, 387 U.S. 523, 532 (1967)).(citations omitted); *see also* United States v. Brignoni-Ponce, 422 US. 873, 882 (1975) ("The reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.").

55. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341-47 (1985) (upholding a school official's search of a minor student's purse for cigarettes and the admission of marijuana discovered inside based on the school's special need to establish discipline and maintain order and the official's reasonable suspicion that the student had been smoking in the lavatory).

56. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620-33 (1989) (upholding blood, breath, and urine testing of railroad employees based on the

hospital patients.[58] The Court has recognized special needs such as a high school's need to establish discipline and maintain order,[59] and the government's special need to regulate the conduct of railroad employees in order to ensure public safety.[60] Nevertheless, as noted in the discussion of the *Ferguson* and *Edmond* cases above, the Court has also *rejected* government claims of special needs when it has found that the searches are performed for the purpose of general crime control.[61] The Court normally is reluctant to expand the special needs category, defining it as "closely guarded."[62]

D. The Court's Application of the Special Needs Doctrine and Reasonableness Balancing Test to the Context of Probationers and Parolees

In *Griffin v. Wisconsin*, the Court first recognized a state's special need to closely supervise probationers and parolees.[63] Joseph Griffin moved to suppress evidence found during a warrantless search conducted by probation officers.[64] The officers searched Griffin's house because they had received a tip from a police detective that the probationer may have had an illegal weapon in his home.[65] The probation officers found a gun, which later served as the basis of Griffin's conviction for a state-law weapons offense.[66]

The *Griffin* Court upheld the Wisconsin regulation allowing a probation officer to search a probationer's home based on a reasonable suspicion that the probationer is in possession of contraband.[67] The *Griffin* Court specifically held that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, presents 'special needs' beyond normal law enforcement

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government's special need to regulate the conduct or railroad employees in order to ensure public safety); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

57. *See, e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).
58. *See* Ferguson v. City of Charleston, 532 U.S. 67, 85-86 (2001).
59. *See T.L.O.*, 469 U.S. at 341-47.
60. *See Skinner*, 489 U.S. at 620-33.
61. *See Ferguson*, 532 U.S. at 81-85; *Edmond*, 531 U.S. at 44.
62. *See Ferguson*, 532 U.S. at 77.
63. *See* Griffin v. Wisconsin, 483 U.S. 868, 874-75 (1987).
64. *Id.* at 871-72.
65. *Id.* at 871.
66. *Id.* at 870.
67. *Id.* at 880.

that may justify departures from the usual warrant and probable-cause requirements."[68] The Court further 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.[69]

The Court recognized the State's special need to closely supervise probationers and parolees based on the its dual legitimate interests in reducing recidivism and in rehabilitating probationers and parolees.[70] First, the Court found that more intensive supervision can reduce recidivism among parolees and protect the public from a predictable danger.[71] Second, the Court agreed with the argument that closer supervision provides further encouragement for a probationer's rehabilitation.[72]

When considering the Fourth Amendment rights of probationers, the Court found that Wisconsin's suspicion standard was reasonable under the circumstances.[73] Probationers and parolees do not enjoy "the absolute liberty to which every citizen is entitled . . . ."[74] Instead, probationers and parolees enjoy only a "conditional liberty properly dependent on observance of special [probation] restrictions."[75] This enabled the Court to hold that a probationer's privacy rights were outweighed by the government's special needs interest.[76]

The *Griffin* Court also concentrated on the fact that a probation officer conducted the search,[77] recognizing that a search conducted by a probation officer based on reasonable grounds differs from a police officer conducting a search on reasonable

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68. *Id.* at 873-74.

69. *Id.* at 876 (citations omitted); *see also id.* at 877-78 (concluding that the warrant requirement is constitutionally inseparable from the probable cause standard, and thus rejecting Justice Blackmun's dissenting argument that the State's reasonable grounds standard should still require a warrant).

70. *Id.* at 873-75.

71. *Id.* at 874.

72. *Id.*

73. *See id.* at 880.

74. *Id.* at 874 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

75. *Id.* (equating parolee status with probationer status) (quoting *Morissey*, 408 at 480 (1972)).

76. *See id.* at 880.

77. *Id.* at 876-77.

grounds.[78] A probation officer not only considers the public safety when conducting her duties, she also is supposed to consider the welfare of her probationer;[79] however, a police officer conducting a search of a probationer will not necessarily have the probationer's welfare in mind.[80] The Court used this distinction to further support its finding that a probation officer can conduct searches of a probationer's home based on a reasonable suspicion.[81]

Later, in *United States v. Knights*,[82] the Court upheld a search of a probationer's home by a police officer based on a reasonable suspicion that the search would yield evidence of a crime.[83] A California district court had sentenced Knights to probation for a drug offense.[84] The probation order contained a condition that he would "[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer."[85] The search at issue occurred when a police officer inspected Knights' home after discovering evidence in his truck possibly connecting him to recent arson attempts.[86]

Upon finding the probation condition "salient" after using the totality of the circumstances analysis,[87] the Court defined the issue as "whether the Fourth Amendment limits searches pursuant to this probation condition to those with a 'probationary' purpose."[88] While acknowledging that the *Griffin* Court had held that a search of a probationer based on a reasonable suspicion satisfied a "special need,"[89] the *Knights* Court chose not to engage in a special needs analysis. Instead, the Court stated that the

78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.* at 879-80.
82. 534 U.S. 112 (2001).
83. *See id.* at 121.
84. *Id.* at 114.
85. *Id.* (quoting the probation order).
86. *See id.* at 115.
87. *See id.* at 118 (stating explicitly that this case did not decide "whether Knights' acceptance of the search condition constituted consent . . ."). *But see* Sean M. Kneafsey, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to Be Free from Unreasonable Searches and Seizures?*, 35 SANTA CLARA L. REV. 1237, 1256-59 (1995) (arguing that a probationer's acceptance of the probation requirements did constitute consent and the government did not need to show a special need to bypass the warrant requirement).
88. United States v. Knights, 534 U.S. 112, 116 (2001).
89. *See id.* at 117.

Griffin holding did not apply to *Knights*[90] and proceeded immediately to apply a reasonableness balancing test.[91] The Court decided the case using a "general Fourth Amendment approach of 'examining the totality of the circumstances.'"[92] Citing *Griffin*, the Court found that Knights, as a probationer, had a limited expectation of privacy.[93] The Court again concluded that the government had valid interests in reducing recidivism among probationers and encouraging their rehabilitation.[94] Finally, it held that after balancing the government's interest against Knights' limited expectation of privacy, a reasonable suspicion requirement satisfied the reasonableness requirement of the Fourth Amendment.[95] The Court declined to address whether a suspicionless search conducted under the same probation requirement would have satisfied the Fourth Amendment reasonableness requirement.[96]

II. *Samson v. California*:[97] The Court Strays From Its Special Needs Precedent.

In *Samson v. California*, the Court held that an application of reasonableness balancing justified a police officer's suspicionless search of a parolee under the Fourth Amendment.[98] Donald Samson was on state parole in California on September 6, 2002, for being a felon in possession of a firearm.[99] That afternoon, Officer Rohleder of the San Bruno Police Department saw Samson on the street.[100] Officer Rohleder, aware of Samson's parolee status and believing that Samson had an at large warrant for his arrest, stopped Samson for questioning.[101] Samson told Rohelder that he did not have an outstanding warrant and that he "was in

90. *Id.* at 117-18.

91. *Id.* at 118-20; *see also* Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Homes Searches in* United States v. Knights, *122 S. Ct. 587 (2001)*, 25 HARV. J.L. & PUB. POL'Y 1201 (2001) (arguing that society's interests have increased in weight in the Court's reasonableness balancing calculus and that the *Knights* Court did not decide its case under the special needs doctrine in order to streamline its Fourth Amendment reasonableness jurisprudence).

92. *Knights*, 534 U.S. at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)).

93. *See id.* at 119.

94. *Id.*

95. *See id.* at 121.

96. *Id.* at 120 n.6.

97. *Samson I*, *supra* note 1; *Samson II*, *supra* note 1.

98. *Samson I*, *supra* note 1, at 2197, 2202.

99. *Id.* at 2196.

100. *Id.*

101. *Id.*

good standing with his parole agent."[102] Rohleder confirmed that Samson did not have an outstanding warrant,[103] but then searched Samson based on his parole condition allowing for suspicionless searches.[104] Officer Rohleder explained why he searched Samson, stating "I believe that being [a] parolee, that [Samson] needs to make sure he's still obeying the laws. It's a privilege for him to be out here."[105] The officer also testified "that he did not search all parolees 'all the time,' but does conduct parole searches 'on a regular basis' unless he has 'other work to do' or already 'dealt with' the parolee."[106] Officer Rohleder further testified that he intended to discharge Samson "if he had nothing on him illegal."[107] The search turned up a plastic baggie containing methamphetamine in a cigarette box inside Samson's breast pocket.[108] Officer Rohelder placed Samson under arrest.[109]

A California trial court denied Samson's motion to suppress the evidence resulting from Officer Rohleder's suspicionless search.[110] On appeal, the First District of the California Court of Appeals affirmed the trial court's decision, holding that "the search was lawful pursuant to a condition of defendant's parole."[111] Quoting controlling California Supreme Court precedent, the appellate court held that society did not recognize that Samson, as a parolee, had a legitimate expectation of privacy.[112] The court ruled that if the state imposed a suspicionless parole condition, such searches were reasonable under the Fourth Amendment as long as they were not "arbitrary, capricious or harassing."[113] The court stated that a search based on this parole condition would not be found arbitrary, capricious or harassing unless "the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a

102. *Id.* (internal quotation omitted).

103. *Id.*

104. *Id.*; *see also* CAL. PENAL CODE § 3067(a) (West 2000) ("Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.").

105. *Samson II*, *supra* note 1, at *1 (internal quotation omitted).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. *Id.*

111. *Id.*

112. *Id.* at *2 (citing People v. Lewis, 74 Cal. App. 4th 662, 667-68 (1999) (citing People v. Reyes, 19 Cal. 4th 743, 753-54 (1998))).

113. *Id.* at *2 (quoting Reyes, 19 Cal. 4th at 752).

legitimate law enforcement purpose."[114] The appellate court determined Officer Rohleder did not violate this standard because he had a "legitimate law enforcement purpose" for this search: ensuring that Samson was "still obeying the laws."[115]

The United States Supreme Court defined the issue presented as "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."[116] For the first time in a probationer/parolee context, the Court upheld a suspicionless search under a reasonableness balancing test.[117] Citing *Knights,* the Court explained it would apply its "general Fourth Amendment approach" by examining the "totality of the circumstances."[118] It further clarified that this meant "assessing, on one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests."[119] In an important footnote in this decision, the Court justified its decision not to address "whether California's parole search condition [was] justified as a special need under *Griffin v. Wisconsin* . . . because our holding under general Fourth Amendment principles renders such an examination unnecessary."[120]

The Court articulated its reasoning concerning Samson's expectations of privacy as a parolee, as well as the legitimate government interests recognized under the reasonableness balancing analysis.[121] Relying on its holdings in *Knights*, the *Samson* Court first recognized that probationers enjoyed a diminished expectation of privacy because of their status.[122] The Court further held that on the continuum of punishment, parolees

114. *Id.* at *3 (quoting People v. Cervantes, 103 Cal. App. 4th 1404, 1408 (Cal. Ct. App. 2002)).

115. *Id.*

116. *Samson I*, *supra* note 1, at 2196.

117. *Id.* at 2202.

118. *Id.* at 2197 (quoting United States v. Knights, 534 U.S. 112, 118 (2001)) (internal quotation omitted).

119. *Id.* (quoting Knights, 534 at 118-19) (internal quotation omitted).

120. *Id.* at 2199 n.3. This footnote also indicated that the Court was not deciding this case under the doctrine of consent. The Court arguably could have based its decision in *Samson* on its doctrine of consent, as defined in Shneckloth v. Bustamonte, 412 U.S. 218 (1973). This Article does not specifically address issues surrounding the consent doctrine.

121. *See id.* at 2197-2202.

122. *Id.* at 2197.

"have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[123] Ultimately, the Supreme Court held that Samson "did not have an expectation of privacy that society would recognize as legitimate."[124] Thus, the scale of reasonableness balancing weighed less in Samson's favor than it had weighed for the probationer in *Knights* or *Griffin*. The conditions placed on a parolee, such as the suspicionless search condition at issue in this case, reflected her diminished expectation of privacy.[125]

The Court continued to recognize the legitimate government interests of parolee recidivism and rehabilitation,[126] deeming these interests "substantial" in contrast to Samson's Fourth Amendment rights.[127] The Court noted that California had a particularly strong interest in the reduction of recidivism considering the empirical evidence that the government presented in the case.[128] Suspicionless searches were an effective way for California to combat its high rate of recidivism and such searches did not hinder "the reintegration of parolees into productive society."[129] A higher standard of suspicion, such as the reasonable suspicion standard upheld in *Knights* and *Griffin* and urged by Samson, "would give parolees greater opportunity to anticipate searches and conceal criminality."[130] Recognizing that the Fourth Amendment "imposes no irreducible requirement of such [individualized] suspicion,"[131] the Court found the fact that other jurisdictions held authorities to an individualized suspicion standard of "little relevance" to California's supervisory system, as long as that system was within the reasonableness limits of the Constitution.[132]

The Court further held that California's prohibition of "arbitrary, capricious or harassing searches" of probationers and parolees provided sufficient protection against unbridled police

123. *Id.* at 2198.

124. *Id.* at 2199; *see also id.* at 2198 n.2 (noting that the Court's holding in this case clearly does not imply that parolees are more akin to prisoners than probationers).

125. *Id.* at 2199.

126. *Samson I*, *supra* note 1, at 2200-02.

127. *Id.* at 2200.

128. *Id.* ("California's parolee population has a 68-to-70 percent recidivism rate.").

129. *Id.*

130. *Id.* at 2201.

131. *Id.* at 2201 n.4 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

132. *Id.*

discretion.[133]

III. The *Samson* Court Incorrectly Departed from Its Special Needs Precedent in Order to Uphold the Suspicionless Search of Parolees

A. California's Challenge of Regulating Its Large Parolee Population

California has over 118,000 parolees[134]—a large population for the state to monitor and control. Nevertheless, the challenge of reducing recidivism and promoting the rehabilitation of parolees does not justify dismissing the principles of the Fourth Amendment and the Court's long-standing precedent of closely scrutinizing suspicionless search standards.[135] If it were a proper justification, the search regime permitting the suspicionless drug testing of pregnant women should have passed muster since it would protect a large population of both women and children.[136] By threatening the privacy rights of a politically weak minority group, such as parolees, the entire population's privacy rights are potentially compromised.[137] Following the reasoning of the *Edmond* Court, unless ordinary crime control is distinguished from special needs searches of parolees, suspicionless searches might become "a routine part of American life."[138] This is particularly true for a parolee.[139]

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133. *Id.* at 2202 (quoting People v. Reyes, 19 Cal. 4th 743, 752 (Cal. 1998).

134. CALIFORNIA DEP'T OF CORR. & REHAB., DATA ANALYSIS UNIT, PAROLE COUNTS – DECEMBER 31, 2006, at 6 (2007).

135. *See* Ferguson v. Charleston, 532 U.S. 67, 81-86 (2001) (holding the suspicionless search regime unconstitutional despite the State's articulated, legitimate interest in the health of the mother and unborn child).

136. *See id.*

137. *See The Supreme Court, 2005 Term – Leading Cases*, 120 HARV. L. REV. 125, 192 (2006) [hereinafter *Leading Cases*] (suggesting that encroachments on the privacy rights of parolees should be of concern to law-abiding citizens). It also is important to note that California parolees do not have the right to vote, therefore they are completely excluded from the political process that defines their rights. *See also* Maya Harris, *Slavery to Imprisonment, Disenfranchisement Plagues America's Ballot Box*, ACLU OF N. CAL, Dec. 1, 2005, at 10 (noting that California is one of four states that disenfranchises parolees).

138. Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

139. *See also Leading Cases*, *supra* note 137, at 192 n.62 ("It is ironic that a state that was the leader in rehabilitative justice, social reform, and restorative community programs now suffers from such a failure of imagination that the only solution to recidivism seems to be the threat of suspicionless searches.").

B. The Samson Court Should Have Applied the Special Needs Doctrine Before Proceeding to the Reasonableness Balancing Inquiry

Prior to the holdings in *Samson* and *Knights*, the special needs doctrine served as an important gateway for the Court's analysis before it engaged in a Fourth Amendment reasonableness balancing.[140] The Court strictly applied the special needs doctrine in order to avoid expanding the application of the Fourth Amendment analysis.[141] The *Samson* Court severely altered the purpose of the special needs doctrine when it stated that it did not need to "address whether California's parole search is justified as a special need under *Griffin v. Wisconsin*, because our holding under general *Fourth Amendment* principles renders such an examination unnecessary."[142] The special needs doctrine should have served as a preliminary test before the *Samson* Court engaged in the reasonableness balancing calculus.[143] The *Samson* decision enlarges the states' ability to circumvent the probable cause and warrant requirements of the Fourth Amendment by not requiring them to assert a special need beyond law enforcement. Now, states simply can assert the reasonableness of a warrantless search.[144] If the Court applied the special needs doctrine, it could have reversed the dangerous modern judicial trends of expanding the application of reasonableness balancing and of creating larger exceptions to the Fourth Amendment's requirements.[145]

The suspicionless search at issue in *Samson* imposed a greater intrusion upon the parolee's privacy than the reasonable

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140. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

141. *See* Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 376-80 (2002) (discussing the application of the special needs doctrine in the *Edmond* and *Ferguson* cases, which seemed to imply that the Court did not want to extend the application of reasonableness balancing beyond its previous limits).

142. *Samson I*, *supra* note 1, at 2199 n.3 (citations omitted).

143. *See id.* at 2202-04 (Stevens, J., dissenting); *Griffin*, 483 U.S. at 873.

144. *See Samson I*, *supra* note 1, at 2202-04; *see also* Jennifer Y. Buffaloe, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, HARV. C.R.-C.L. L. REV. 529, 530 n.10 (1997) (noting that the exceptions to the warrant and probable cause standards are numerous).

145. *See* Buffaloe, *supra* note 144, at 530-31 (arguing that special needs doctrine itself is so far reaching that it could turn the warrant preference rule "on its head").; *see also* Frase, *supra* note 141, at 380 (arguing that the *Edmonds* and *Ferguson* decisions "draw a line in the sand" indicating "this far with balancing, and no farther").

suspicion search in *Knights*.[146] This higher degree of intrusion increased the importance of the Court's application of the special needs doctrine.[147] Prior to *Samson*, the Court had closely scrutinized suspicionless searches because of their intrusive nature and had rejected such regimes in both *Ferguson* and *Edmond*.[148] The gravity of the intrusion presented by the suspicionless search in *Samson* warrants a return to the special needs doctrine analysis in the context of probationers and parolees.[149]

C. Suspicionless Searches of Parolees Conducted by Police Officers are Not Divorced from California's General Interest in Law Enforcement

Cases applying the special needs doctrine have conveyed a clear message: general law enforcement purposes do not satisfy the special needs doctrine.[150] These cases also have provided many examples of searches, such as those at issue in *Ferguson* and *Edmond* discussed in Part II, where the Court has identified a high degree of law enforcement involvement to indicate a general law enforcement purpose.[151] In *Ferguson*, even the peripheral involvement of police in conducting the searches, collecting the evidence, and prosecuting women who tested positive to illegal drug use was enough to indicate that law enforcement constituted the "primary purpose" of the search.[152] As the argument below will illustrate, law enforcement clearly constituted the primary purpose of the search at issue in *Samson*, and the Court's decision should have concluded with the application of the special needs analysis.[153]

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146. *Samson I*, *supra* note 1, at 2197.

147. *See id.* at 2204-06 (Stevens, J., dissenting).

148. *See* Ferguson v. Charleston, 532 U.S. 67, 85-86 (2001); Indianapolis v. Edmond, 531 U.S. 32, 48 (2000). *But see* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (allowing for suspicionless drug testing of certain U.S. Customs Service employees).

149. *See* Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987); *cf.* Jonathan T. Skrmetti, supra note 91, at 1213 (noting that the *Knights* decision reflected "an increased emphasis on the government's interest" in the reasonableness balancing analysis and predicting that the "inviolability of the home" would be reduced by the decision).

150. *See* Buffaloe, *supra* note 145, at 531 ("Although special needs cases cover a broad range of situations, they are linked by virtue of the fact that in each case the government actor is someone other than a police officer searching for evidence to support a criminal prosecution.").

151. *See Ferguson*, 532 U.S. at 85-86; *Edmond*, 531 U.S. at 48.

152. *Ferguson*, 532 U.S. at 81-82.

153. *See id.* at 85-86; *Edmond*, 531 U.S. at 48.

The *Griffin* Court found that law enforcement was not the primary purpose of the search at issue because a probation officer conducted the search with reasonable suspicion and her supervisor's permission.[154] This finding aligned the *Griffin* Court's decision with other special needs cases where the primary purpose of the searches at issue was not law enforcement.[155]

The difference between the role of a probation (or parole) officer and the role of a police officer played an important role in the context of conducting searches.[156] Probation officers have a dual charge—the interests of society, while also considering the interests of a probationer or parolee.[157] A probation officer maintains this delicate balance by developing a close relationship with the probationers and parolees placed in their charge.[158] In contrast, a police officer has one primary purpose: to enforce the law.[159] A police officer's general obligation to protect the interests of society as a whole—and no other obligation—dictates his interactions with a probationer or parolee.[160] Even if a police officer intends to ensure that a parolee was conforming to her parole restrictions, and thereby the law, it would be difficult to distinguish how such intent differs from a general law enforcement purpose. When law enforcement motives appear to mix with other motives, such as enforcing parole restrictions, the *Ferguson* decision indicates that the Court would find that law enforcement was a primary motive.[161]

The facts in *Samson I* clearly indicate that Officer Rohleder searched Samson for law enforcement purposes. Officer Rohleder stated that he needed to make sure Samson was "still obeying the laws."[162] He further stated that he intended to discharge Samson "if he had nothing on him illegal."[163] In other words, Officer Rohleder indicated that he would not have arrested Samson had

154. *Griffin*, 483 U.S. at 879 (dispatching with the warrant requirement for probation officers in certain situations).

155. *Id.*

156. *See Samson I, supra* note 1, at 2204-05 (Stevens, J., dissenting) (arguing that the Court should not distinguish between probation and parole status for the purposes of *Fourth Amendment* analysis). For purposes of this argument, the role of a probation officer and the role of a parole officer are assumed to be analogous.

157. *Griffin*, 483 U.S. at 873-75.

158. *Id.* at 876-77.

159. *See id.*

160. *See id.*

161. Ferguson v. Charleston, 532 U.S. 67, 81-82 (2001).

162. *Samson II, supra* note 1, at *1.

163. *Id.*

he not been carrying an illegal substance on his person.[164] Thus, in no uncertain terms, Officer Rohleder intended to enforce the law. In fact, the California appellate court specifically held that Officer Rohleder had a "legitimate law enforcement purpose" to perform this search.[165] The special needs doctrine would not have permitted this high level of law enforcement involvement.[166] The Supreme Court may well have recognized this reality and dismissed the doctrine with a footnote in order to allow the search to stand.[167]

Additionally, the proceedings that took place after Samson's arrest indicate that his status as a parolee was secondary to law enforcement considerations. According to the California Penal Code, "[a] parole may not be suspended or revoked for commission of a nonviolent drug possession offense," but, instead, the parolee should participate and complete "an appropriate drug treatment program."[168] In other words, had Samson's compliance with his parole conditions been the main focus of Officer Rohleder's investigation, California would have placed him in a drug rehabilitation program, adding completion of the program as another parole condition.[169] Samson was not placed in a drug rehabilitation program; instead, he was charged with a new offense.[170]

IV. California's "Arbitrary, Capricious, or Harassing,"[171] Standard Does Not Provide a Sufficient Safeguard for Parolees Against a Police Officer's Abuse of Discretion

Even when suspicionless searches have been recognized as a special need, the Court has never recognized the validity of such searches without requiring that these exceptions have a regulatory scheme to ensure fair, non-arbitrary application.[172] Prior to the

164. *See id.*

165. *See id.* at *3.

166. *See* Ferguson v. Charleston, 532 U.S. 67, 85-86 (2001); Indianapolis v. Edmond, 531 U.S. 32, 48 (2000).

167. *See Samson I*, *supra* note 1, at 2204 (2006) (Stevens, J., dissenting) (citing United States v. Knights, 534 U.S. 112, (2001)) ("It is no accident, then, that when we later upheld the search of a probationer *by a law enforcement officer* (again, based on reasonable suspicion) we forewent any reliance on the special needs doctrine.").

168. CAL. PENAL CODE § 3063.1(a) (West 2006).

169. *Id.*; *see* Brief for the Petitioner at 36, *Samson I*, 126 S. Ct. 2193 (Nov. 28, 2005) (No. 04-9728).

170. Brief for the Petitioner, *supra* note 169, at 36.

171. California v. Reyes, 968 P.2d 445, 450 (1998).

172. *See Samson I*, *supra* note 1, at 2207 (Stevens, J., dissenting).

Samson decision the Court had often applied this principle to invalidate suspicionless searches that were not sufficiently curtailed by regulatory procedure.[173] When the Court has upheld suspicionless searches, it has done so with a careful analysis of the searches at issue, guaranteeing that sufficient safeguards were in place to discourage the arbitrary application of the search policy.[174]

In *California v. Reyes*,[175] the California Supreme Court upheld suspicionless searches of parolees as long as the search was not "arbitrary, capricious or harassing."[176] The United States Supreme Court upheld this standard in its analysis of Samson's case.[177]

No party has ever successfully argued that a suspicionless search has violated this standard.[178] This powerful statistic, when considered in light of the results of cases such as *Samson*, indicates that police officers can easily satisfy the standard by arguing the search was conducted for a law enforcement purpose due to the suspect's parolee status.[179] These results place a large amount of discretionary power in the hands of California police officers to search[180] California's large parolee population.[181] Such

173. *See, e.g.*, U. S. v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (finding a roving border patrol scheme unreasonable because of the unlimited discretion placed in the hand of the border patrol officers); *see also* U.S. v. U.S.D.C., 407 U.S. 297, 317 (1972) ("[T]hose charged with . . . investigative . . . duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.").

174. *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) (upholding automatic drug tests because they were performed in a non-arbitrary manner); Griffin v. Wisconsin, 483 U.S. 868, 871-73 (1987) (upholding probationer search standard because the searches were performed by probation officers with a reasonable suspicion and their supervisors' permission).

175. 968 P.2d 445, 450 (Cal. 1998).

176. *Id.*

177. *Samson I*, *supra* note 1, at 2202.

178. *See* Brief for the Petitioner, *supra* note 169, at 20; *see also* Transcript of Oral Argument, at 24, *Samson I*, 126 S. Ct. 2193 (No. 04-9728) (showing that Petitioner claims that between 100 and 200 California cases have upheld this standard, indicating that it is "an empty, vacuous standard"). *But see id.* at 24-25,(suggesting that the possibility that California courts have upheld this standard because there has "never been a case of a harassing search of a parolee").

179. *Samson II*, *supra* note 1, at * 3; *see* Brief for the Petitioner, *supra* note 169, at 20 (arguing that "[s]o long as the officer states that the motivation for the search is related to the 'legitimate law enforcement purpose' of searching for evidence of criminal activity, the search is not arbitrary, capricious, or harassing under California's standard"); *see also Leading Cases*, *supra* note 137, at 189 (arguing that it would be surprising if a California court ever disqualified a search because the standard is incredibly malleable and inquires into the subjective knowledge of the police officer that the suspect is a parolee).

180. *See Leading Cases*, *supra* note 137, at 189.

power should not be placed in the hands of police officers without stronger procedural safeguards than those provided by the "arbitrary, capricious or harassing"[182] standard.

The "arbitrary, capricious or harassing"[183] standard approved by the California courts lacks bite as a sufficient procedural safeguard against the arbitrary use of police power for several reasons. First, it calls upon police officers to apply an entirely different standard for searches with parolees than with other people. While the search may be "suspicionless," it may not be arbitrarily conducted. As Professor Richard Frase explains, "police and trial courts cannot be expected to engage in complex balancing . . . in every case . . . ."[184] The police officers are required to apply yet another standard into their already confusing repertoire of standards, which includes probable cause and reasonable suspicion.[185] The California courts have not helped police by providing broad, circular definitions of this muddy standard.[186] Officer Rohleder's statement that he did "not search all parolees 'all the time,' but does conduct parole searches 'on a regular basis" unless he has 'other work to do' or already 'dealt with' the parolee"[187] exemplifies the arbitrary and discretionary manner in which the ambiguous "arbitrary, capricious or harassing" standard can be used and still pass muster. Police forces, whose resources are already spread thin, cannot be expected to correctly and non-arbitrarily apply this additional and confusing standard.[188]

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181. Respondent's Brief on the Merits at 15, *Samson I*, 126 S. Ct. 2193 (Jan. 13, 2006) (No. 04-9728).

182. California v. Reyes, 968 P.2d 445, 449 (Cal. 1998).

183. *Id.*

184. *See* Frase, *supra* note 141, at 408 (2002). *But cf.* Skrmetti, *supra* note 91, at 1201 (arguing that the *Knights* decision simplified the Court's Fourth Amendment reasonableness balancing. The arbitrary, capricious, or harassing standard would be a simplification along those lines).

185. Brief for the Petitioner, *supra* note 169, at 21 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)).

> The Court has said: "We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal standard in addition to 'reasonable suspicion' and 'probable cause.'" The Court explained that in "dealing with a constitutional requirement of reasonableness . . . subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question."

Id. (internal citations omitted).

186. *See Leading Cases*, *supra* note 137, at 188.

187. *Samson II*, *supra* note 1, at *1.

188. *See* Frase, *supra* note 141, at 333; *see also* Brief for the Petitioner, *supra* note 169, at 21-22, (arguing that the reasonable suspicion standard is preferable to the subjective arbitrary standard because it is easier for police officers to apply and

Another reason the "arbitrary, capricious or harassing" standard upheld by the *Samson* Court should fail is that it calls upon police officers to distinguish between parolees and probationers in order to perform these suspicionless searches.[189] This is a difficult and improbable task for police officers to engage in daily.[190] While there is a distinction between parole and probation,[191] that distinction does not call for an entirely different level of suspicion for searching parolees.[192] While alternatives to this search regime will be discussed later in this Article, it currently is enough to say that the same level of suspicion should be required to search both probationers and parolees.[193] Officers should be allowed to distinguish between individuals based on rational conclusions deduced from their past criminal records. However, the bright line distinction that is appropriate in this area of jurisprudence should not be drawn from the subtle differences between probationers and parolees.[194]

Finally, the "arbitrary, capricious or harassing" standard may act as a catalyst for increased racial profiling and harassment by police.[195] Racial minorities are over-represented among California's parole population. For example, while African-Americans comprised only 6.7% of California's population in 2000,[196] they comprised 25.5% of the male parolee population and 29% of the female parolee population in 2004.[197] Similar discrepancies exist for other racial minorities.[198] Allowing for

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it better protects parolees' rights).

189. *See Samson I*, *supra* note 1, at 2198.

190. *See* Frase, *supra* note 141, at 333, 407 (suggesting that complex standards are difficult for police personnel to apply in everyday situations and that simple, bright-line rules are preferable).

191. *See Samson I*, *supra* note 1, at 2197-98 (comparing probation status to parole status).

192. *See id.* at 2205 (Stevens, J., dissenting).

193. *See id.*

194. *See id.*

195. *See* Frase, *supra* note 141, at 333; Edward J. Loya, Jr., *Probationers, Parolees, and the Fourth Amendment: Addressing Unanswered Questions*, 35 CUMB. L. REV. 101, 144 (2004) (suggesting that a suspicionless traffic stop standard for probationers would be a method by which police officers might be able to further police harassment and racial profiling).

196. U.S. CENSUS BUREAU, CALIFORNIA 2000: CENSUS 2000 PROFILE 2 (2002), *available at* http://www.census.gov/prod/2002pubs/c2kprof00-ca.pdf.

197. CALIFORNIA DEP'T OF CORR. & REHAB., *supra* note 134, at 82.

198. For example, Hispanic felon parolees in California statistically were overrepresented in 2005. Hispanic or Latino people comprised 32.4% of the state's population in the 2000 census, but 39.9% of the felon parolees in 2005 were Hispanic males. *Compare* U.S. CENSUS BUREAU, *supra* note 196, at 2 *with* CALIFORNIA DEP'T OF CORR. & REHAB., *supra* note 134, at 82.

suspicionless searches likely will increase both unintentional[199] and intentional harassment of parolees who are also members of a racial minority. Because of the enormous costs involved, police will certainly not search every parolee with whom they come into contact .[200] Instead, it seems likely that police officers will use this broad discretionary power in a "highly selective manner."[201] Allowing broad discretion ensures more frequent complaints of racial profiling and police harassment.[202]

V. The California Probation Regulation That Allows Suspicionless Searches of Probationers by Police Officers Should Fail the Court's Fourth Amendment Reasonableness Balancing Test

Even if the Court had concluded that a police officer's search satisfied a special need, such searches would still be unreasonable under a Fourth Amendment reasonableness balancing test.[203] Under the test, the state's interest in performing the search are weighed against the individual's reasonable expectation of privacy.[204]

In *Samson I,* California argued that it had two primary interests in allowing its police officers to conduct suspicionless searches of parolees: 1) reducing recidivism and 2) promoting parolee rehabilitation.[205] While the Court has recognized both of these interests as legitimate, they already are sufficiently promoted and supported by the Court's decisions in both *Knights*[206] and *Griffin.*[207]

The reasonable suspicion requirement recognized in both

199. *See Leading Cases*, *supra* note 137, at 190-91 (suggesting that California's policy could facilitate the unintentional harassment of parolees, especially if there is something about the parolee (i.e. race or gang membership) that tends to attract the attention of the police).

200. *See* Frase, *supra* note 141, at 333.

201. *Id.; see also Samson II*, *supra* note 1, at *1 (indicating that Officer Rohleder did "not search all parolees 'all the time'").

202. *See* Frase, *supra* note 141, at 333.

203. *See* Griffin v. Wisconsin, 483 U.S. 868, 881 (1987) (Blackmun, J., dissenting) (noting that after finding a special need the Court should "turn to a 'balancing' test to formulate a standard of reasonableness for this context") (quoting O'Connor v. Ortega, 480 U.S. 709, 741 (Blackmun, J., dissenting)).

204. United States v. Knights, 534 U.S. 112, 119 (2001) ("[T]he reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.").

205. *See Samson I*, *supra* note 1, at 2200.

206. *See Knights*, 534 U.S. at 119.

207. *See Griffin*, 483 U.S. at 873-75.

Knights and *Griffin* provides law enforcement and parole officers with enough discretion to combat recidivism, allowing parolees to be searched much more easily than the population at large.[208] By eliminating the warrant and probable cause requirements for parolees and probationers, law enforcement should be able to combat the concern that parolees will be able to quickly dispose of the evidence of their crimes and avoid detection.[209] The reasonable suspicion standard also provides a minimal objective guideline for law enforcement officials to follow when performing a search.[210] The reasonable suspicion standard provides the government with sufficient flexibility to combat recidivsm. A suspicionless search standard will only increase the arbitrary use of discretionary law enforcement power.[211]

The suspicionless search standard will also undermine the rehabilitation of parolees.[212] The *Griffin* Court rightly placed a strong emphasis on the importance of a parolee's or probationer's relationship with her parole or probation officer.[213] Parole officers are charged with protecting the parolee's interests and promoting her rehabilitation into society.[214] Given the importance of this relationship, the *Griffin* Court was hesitant to disrupt the trust relationships that the parole officer has developed with her parolees.[215] The *Samson* Court failed to give these considerations sufficient weight in its analysis.[216] Permitting suspicionless searches of parolees will foster an inherent distrust between parolees and law enforcement.[217] This distrust likely will affect parolees' relationships with their parole officers. Disturbing this relationship, as the *Griffin* Court implied, will further hinder parolees' reintegration into society.[218]

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208. *See Knights*, 534 U.S. at 119; *Griffin*, 483 U.S. at 873-75.

209. *See* Brief for Petitioner, *supra* note 169, at 25.

210. *See id.* at 25-26.

211. *See id.*; Frase, *supra* note 141, at 333 (increasing flexibility or reasonableness may lead to increased police abuse of discretionary power); Loya, *supra* note 195, at 144 (suggesting that a suspicionless traffic stop standard for probationers would be a method by which police officers might be able to further police harassment and racial profiling).

212. *See* Brief for the Petitioner, *supra* note 169, at 23.

213. *See* Griffin, 483 U.S. at 876-77.

214. *See id.*

215. *See id.*

216. *See Samson I*, *supra* note 1, at 2303-04 (Stevens, J., dissenting) (discussing *Griffin*'s emphasis on the probationer officer's relationship with her clients and criticizing the *Samson* Court's subsequent avoidance of the special needs doctrine).

217. *See* Brief for the Petitioner, *supra* note 169, at 23.

218. *See id.* at 23-24.

The fact that all states (with the possible exception of North Dakota) and the Federal government require a much higher standard than California for searching parolees indicates that the state's statutory blanket suspicionless search regime is unnecessary to pursue its legitimate interests.[219] Although the Court stated that the standards used in *some* other jurisdictions are irrelevant to the reasonableness of California's standard,[220] the suspicionless search standard is impliedly rejected by the vast majority of jurisdictions.[221] Though each jurisdiction should certainly be able to impose its own proprietary standards, such unanimity among jurisdictions should at least weigh into the analysis as a measure of reasonableness.[222]

When weighing a parolee's interests, the Court should also recognize that parolees have a diminished, but not extinguished, expectation of privacy.[223] The Court did not state that parolees do not have any legitimate expectation of privacy. Rather, it simply stated that parolees have fewer expectations than probationers.[224] While prisoners may be subjected to blanket suspicionless search policies in order to ensure order in the prison system, the same need for absolute control does not exist when parolees are allowed to reenter society.[225] Therefore, parolees' and probationers' lower expectation of privacy should still be protected from the intrusion of suspicionless searches.[226] This is especially true if, as argued above, these searches are not found to effectively promote the states' legitimate interests of reducing recidivism and promoting parolee rehabilitation.

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219. *Id.* at 22-31.

220. *See Samson I*, *supra* note 1, at 2201.

221. *Id.*; *see* Brief for the Petitioner, *supra* note 169, at 22-31.

222. Brief for the Petitioner, *supra* note 169, at 22-31.

223. *See Samson I*, *supra* note 1, at 2204-06 (Stevens, J., dissenting) (arguing that parolees have a higher expectation of privacy than prison inmates); *see also* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) ("[P]robation [or parole] is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.").

224. *Samson I*, *supra* note 1, at 2198.

225. *See id.* at 2205 (Stevens, J., dissenting) (citing Hudson v. Palmer, 468 U.S. 517, 527-28 ("These institutional needs" — safety of inmates and guards, "internal order," and sanitation—manifestly do not apply to parolees.")) (internal citation omitted).

226. *See id.*

VI. Alternatives to the Broad Suspicionless Search Allowance in *Samson*

There are several alternatives to the blanket suspicionless search regime available to states which want to impose more strict supervision over their parolee populations. One solution is to require that the police officer articulate a reasonable suspicion in order to search a parolee, but to allow the officer to consider the parole status as *a factor* in articulating her suspicion of criminal wrongdoing.[227] Allowing consideration of this factor may appear prejudicial toward parolees and probationers, but it is no more so than other factors, such as past criminal record, or even past reputation, that courts on a regular basis allow police officers to consider in a reasonable suspicion analysis.[228]

Allowing reasonable suspicion based on probationary status may be less prejudicial than many of the already recognized factors because it is an easier and more concrete determination.[229] Permitting consideration of a person's parole status as well as her criminal record may also let officers "double count" a person's criminal history while articulating reasonable suspicion factors.[230] Nevertheless, in these cases the court may always require a showing of more factors that led to an actionable suspicion if it feels such a showing is necessary.[231] This standard would thus better protect the rights of parolees than the "arbitrary, capricious or harassing" standard.[232] This standard also would cause less confusion among law enforcement officials since it would not require them to learn and follow an entirely new standard.[233]

A second alternative is to allow the courts to make individualized determinations that certain parolees warrant a suspicionless or random search conditions.[234] These searches should be performed by the parolee's probation officer, thus ensuring that the searches are not performed primarily for law

227. *See* Loya, *supra* note 195, at 108; *see also id.* at 108 n.50 (stating "probationer or parolee status ... is probative of a broad variety of criminal offenses."); WAYNE LA FAVE ET AL., CRIMINAL PROCEDURE 221 (3d ed. 2000) ("It is proper to take account of the suspect's past criminal record, though such a record standing alone is never a basis for a stop.").

228. *See* Loya, *supra* note 1955, at 108-09.

229. *See id.*

230. *Id.* at 124.

231. *Id.*

232. California v. Reyes, 968 P.2d 445, 449 (Cal. 1998).

233. *See* Frase, *supra* note 141, at 332-33.

234. *Samson I*, *supra* note 1, at 2207 (Stevens, J., dissenting).

enforcement purposes.[235] Courts would be required to make specific findings concerning the seriousness of the parolee's crimes and the parolee's threat to society.[236] The state would have a more articulable special need to control certain individuals because of the proof of their greater propensity for recidivism.[237] If the individualized suspicionless searches were performed by a parole officer, knowledgeable of the parolee's life, character and circumstances, it would provide necessary safeguards to prohibit law enforcement from abusing a discretionary suspicionless search power.[238] Implementation of these requirements would provide the parolee with two levels of protection from improper searches: 1) the judiciary who made the initial determination based on articulable factors that a suspicionless search was necessary and 2) the parole officer who is supposed to have the parolee's best interest in mind when performing any search.[239]

A third alternative to the blanket suspicionless search is for the state to set up a system for the random search of parolees.[240] For example, officers could conduct a suspicionless search of every tenth parolee with whom they came into contact.[241] States probably would have to implement elaborate tracking systems in order to ensure that officers did not search parolees arbitrarily and simply claim that the search was justified under the random search policy.[242] Such an elaborate system might prove expensive and difficult to maintain; however, if a state were successful in implementing a sufficient tracking system that ensured non-arbitrary application, it arguably could be used for purposes other than law enforcement.[243] When a parolee is searched on a random basis, simply because of his parolee status, the state could make a stronger argument that the searches were performed to ensure parolees were complying with the conditions of parole and not for

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *See id.*

240. *Samson I*, *supra* note 1, at 2207 ("[T]his might have been a different case had a court or parole board imposed the condition at issue [i.e. the suspicionless search condition] based on specific knowledge of the individual's criminal history and projected likelihood of reoffending, or if the State had had in place programmatic safeguards to ensure evenhandedness."); *cf.* Loya, *supra* note 195, at 127-45 (proposing that a regime of suspicionless stops of probationers and parolees by police officers would pass constitutional muster).

241. *See* Loya, *supra note* 195, at 127-28.

242. *See id.* at 143-45.

243. *See id.* at 127-45.

law enforcement purposes.[244] Of course, such arguments would meet with criticism because the system would partially evade the *Griffin* Court's focus on parole officers' special relationship to parolees.[245] Nevertheless, a random system conceivably could satisfy concerns that the searches be performed in a non-arbitrary manner.[246] It also seems plausible that such a system could be implemented. The system would promote the state's interests, while simultaneously satisfying the demands of the special needs doctrine.

Conclusion

The country has yet to see the full effect of *Samson v. California* on subsequent litigation. It is clear that the Court deliberately circumvented the special needs doctrine in order to uphold the suspicionless search at issue. Had it held the suspicionless search unconstitutional, state legislatures would be forced to go back to the drawing board to create laws and policies that better conform with the demands of the Fourth Amendment. While the liberty of the population at large has not been threatened with suspicionless searches, the liberty of parolees in California has been severely diminished and are now a part of their everyday lives.

One can only hope that the Supreme Court eventually will reverse the unprecedented and unjustified holding in *Samson*, thereby forcing states such as California to consider alternatives to a blanket suspicionless search standard to control their parolee and probationer populations.

244. *Id.*

245. Griffin v. Wisconsin, 483 U.S. 868, 876-77 (1987).

246. *See Samson I, supra* note 1, at 2207 (Stevens J., dissenting).