Samson v. California: Tearing Down a Pillar of Fourth Amendment Protections

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I. Introduction

Few would claim that the Fourth Amendment's protection against unreasonable government search and seizure is the most determinate of Supreme Court doctrines. It is grounded in lofty historical principles of individual liberty and government restraint but routinely challenged by the exigencies that arise from being invoked everyday in a society appropriately concerned with safety and security.[1] The doctrine's hallmark balancing test seems to be a compromise between those two values, leaving courts to calibrate the degree of personal liberty that is consonant with public safety. In *Samson v. California*,[2] the Court upheld a statute that dispensed with the requirement that a police officer must have individualized suspicion before searching a parolee; at any time, a parolee's person and home can be searched without suspicion.[3] This requirement was long considered a foundational element of the Court's analysis of Fourth Amendment questions. Abandoning it in the name of crime prevention represents an unprecedented blow to individual liberties. The decision increases the opportunity for police investigators to ignore individual rights and may threaten to take those liberties that it has stripped from parolees away from law-abiding citizens as well.

The Court in *Samson* used the wrong analysis to come to a questionable conclusion. In the absence of some suspicion by investigators, courts have traditionally found only a narrow range of searches to be consistent with Fourth Amendment protections. These valid suspicionless searches must be motivated by needs outside law enforcement aims, and thus include procedural requirements that minimize government overreach. The *Samson* Court did not turn to this special needs doctrine, as it should have;

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[1] *See generally* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 487–526 (1995) (describing the historical context of the amendment and debates over its interpretation).

[2] 126 S. Ct. 2193 (2006).

[3] *Id.* at 2196.

instead it looked at a suspicionless police search and asked if its crime-prevention aims outweighed a parolee's interest in being free from unwarranted police investigation. The Court reduced the parolee's interest in freedom so as to make its weight in the balance almost insignificant. Without being anchored by a right to undergo only searches accompanied by individualized suspicion, this individual-interest side of the balance stood little chance against the government interest in preventing parolee recidivism. In blurring the lines between two jurisprudential approaches to search and seizure issues—the balancing test and the special needs test—*Samson* undermined some seminal protections against government overreaching and gave courts an analytical framework for applying either test to suspicionless searches.

II. Facts and Procedural History

On a September afternoon in 2002, Donald Samson, Deborah Watson, and Watson's three-year-old son were walking down a street in San Bruno, California, en route to a friend's house.[4] The trio was stopped by Officer Alex Rohleder of the San Bruno Police Department. Officer Rohleder, relying on "prior contact" with Samson to identify him as a parolee, stopped him with the intention of confirming a belief among officers that Samson had a warrant out for his arrest.[5] Samson informed the officer that there was no at-large warrant for his arrest, and the officer verified this information with his department. Officer Rohleder's safety was never in question and Samson's conduct created no suspicion of illegal activity,[6] but Samson nevertheless was forced to submit to a search. Believing that "[i]t's a privilege for [Samson] to be out here," Officer Rohleder searched Samson while Watson and her son watched.[7] The search turned up methamphetamines inside a cigarette box in Samson's possession. The sole justification for the search, as supported by a California statute,[8] was that Samson was a parolee at the time and had consented to suspicionless searches as a condition of his release from prison.[9]

At trial, Samson moved to suppress the evidence as the product of an illegal search; his motion was denied.[10] After being found guilty for possession of methamphetamines and receiving a seven-year sentence, Samson

[4] People v. Samson, No. A102394, 2004 WL 2307111, at *1 (Cal. Ct. App. Oct. 14, 2004).

[5] *Id.*

[6] *Id.* at *3 n.4.

[7] *Id.* at *1.

[8] *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.").

[9] *See Samson*, 126 S. Ct. 2193, 2196 (2006).

[10] *People v. Samson*, 2004 WL 2307111, at *1.

appealed his conviction.[11] In relevant part, he argued that the search was invalid because it lacked individualized suspicion and because it was "arbitrary, capricious and harassing."[12] The unanimous court found against Samson and focused its analysis on the rule handed down by the California Supreme Court in *People v. Reyes*.[13] *Reyes* held that a parolee who agreed to a search condition upon release could be searched without individualized suspicion of any wrongdoing.[14] To the court hearing Samson's appeal, this holding meant that "reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property."[15] The only limitation placed upon the state's search authority is that a search is not legal if it is "arbitrary, capricious and harassing."[16] The court reasoned that, because Officer Rohleder identified Samson as a parolee before executing the search and seizure, the search was not arbitrary, capricious, or harassing.[17]

III. The Supreme Court Decision

A. The Majority—Extending the Reach of Police Searches

The Supreme Court affirmed. Writing for the six-Justice majority,[18] Justice Thomas began by observing that this issue was one of first impression, allowing the Court to reach the question of whether the Fourth Amendment permits searches executed without individualized suspicion or probable cause,[19] a question which *United States v. Knights* did not settle.[20] He concluded that a parolee's conditioned release from prison can diminish a reasonable expectation of privacy to a degree that would allow a suspicionless search to comport with the Fourth Amendment.[21]

The majority analyzed the issue by comparing the reasoning in *Knights* to the facts of Samson's case. In *Knights*, the Court faced an issue that

[11] *Samson*, 126 S. Ct. at 2196.

[12] *People v. Samson*, 2004 WL 2307111, at *2.

[13] 968 P.2d 445 (Cal. 1998).

[14] *Id.* at 449 (describing a search condition similar to the one in *Samson*).

[15] *People v. Samson*, 2004 WL 2307111, at *2 (quoting *Reyes*, 968 P.2d at 450).

[16] *Reyes*, 968 P.2d at 450 (interpreting *In re* Tyrell J., 876 P.2d 519 (Cal. 1994)).

[17] *People v. Samson*, 2004 WL 2307111, at *3.

[18] Justice Thomas was joined by Justices Alito, Ginsburg, Kennedy, and Scalia, and Chief Justice Roberts.

[19] *See Samson*, 126 S. Ct. at 2196. *But see infra* text accompanying notes 70–89.

[20] 534 U.S. 112 (2001) (holding that a warrantless search of a probationer's home was constitutional given the search condition agreed to by the probationer and the reasonable suspicion accompanying the search). The Court explicitly left open the question of whether ex-convict status could justify a suspicionless search. *Id.* at 120 n.6 ("[W]e do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.").

[21] *See Samson*, 126 S. Ct. at 2196.

fell more squarely within the bounds of its Fourth Amendment jurisprudence. Knights, a California probationer who had agreed to a search condition similar to Samson's, was subjected to a warrantless search of his home. The search was conducted after police developed reasonable suspicion that Knights had committed arson.[22] This factual posture triggered the traditional balancing test that considers the totality of the circumstances in weighing individual interests against government interests.[23] Examining the circumstances, the Court found that the search was reasonable in balancing government interests in crime prevention and public safety with the individual interest in freedom from overbroad searches. The fact that reasonable suspicion justified the search of Knight was critical for the Court. Based on prior surveillance, police had developed reasons for suspecting that Knights was engaging in illegal activity.[24] The Court found that this suspicion satisfied the Fourth Amendment's Probable Cause requirement given Knights's reduced privacy expectation as a probationer.[25]

In considering Samson's privacy interests, Justice Thomas found "salient" both Samson's status as a parolee and his agreement to be searched at any time.[26] The Court turned to *Knights*, which regarded the defendant's status as a probationer as an important component of the totality of the circumstances. In line with precedent, the *Samson* Court viewed freedom as a continuum: individual rights receive protection in accordance with one's status as determined by one's criminal history.[27] For example, probationers enjoy more liberties than incarcerated felons and parolees, but fewer than law-abiding citizens.[28] Therefore, as a parolee who was released from incarceration, Samson had a reduced liberty interest. Though his liberty interest was somewhat greater than that of an inmate, who may claim only minimal Fourth Amendment protections,[29] it was more modest than Knights's because parolees have been found to occupy a status nearer to that of incarcerated felons.[30] The Court continued to liken Samson's case to *Knights* by noting that both defendants agreed to the suspicionless search condition; this fact, in the Court's judgment, led to the conclusion that

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[22] *Knights*, 534 U.S. at 114–15.

[23] *See id.* at 119–21. This balancing test is invoked to determine the reasonableness of the search; it weighs the intrusion upon individual privacy against the promotion of legitimate government interest. Reasonableness, according to the Court, is the "touchstone of the Fourth Amendment." *Id.* at 118–19.

[24] *See id.* at 114–15 (describing activity of long-time suspect Steven Simoneau and surveillance that linked Knights's home to Simoneau's potentially criminal activities).

[25] *See id.* at 121.

[26] *Samson*, 126 S. Ct. at 2199.

[27] *Id.* at 2197–98.

[28] *See id.*

[29] *See* Hudson v. Palmer, 468 U.S. 517, 527 (1984).

[30] *See Samson*, 126 S. Ct. at 2198 (explaining that parolees are afforded fewer rights than probationers because parole is part of a prison sentence, whereas probation is a more lenient form of punishment).

"[Samson] did not have an expectation of privacy that society would recognize as legitimate."[31]

Addressing the government side of the balance, Justice Thomas considered the State's interests to be "substantial."[32] Marshaling empirical evidence to support this position, he began by analyzing the government's interest in preventing future crimes committed by recidivist parolees.[33] Since parolees have been found more likely to commit crimes, according to the evidence that the Court found persuasive, the state has a strong interest in targeting them in an effort to reduce recidivism.[34] The attendant benefit to low recidivism rates is more successful reintegration and rehabilitation of released felons.[35] The Court found that the government's interests "warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment."[36]

In response to the argument that the Court's holding granted police too much authority to conduct searches, Justice Thomas returned to the safeguards found in California case law that protect parolees from "arbitrary, capricious and harassing" investigative procedures.[37] In a concluding thought, the Court noted that such a search would be unreasonable unless the officer knew in advance that the subject of the search was a parolee.[38]

B. The Dissent—Unprecedented Authority To Search

Justice Stevens dissented.[39] His chief objection was the "unprecedented curtailment of liberty" sanctioned by the majority in allowing conditional suspicionless searches of unincarcerated citizens.[40] The majority, Justice Stevens continued, was content to "run[ ] roughshod over [Court] precedent" by equating a parolee's privacy expectations with that of inmates.[41] The dissent agreed that a continuum existed for the restriction of liberties but urged that the wholesale removal of Fourth Amendment safeguards for unincarcerated citizens violated the guarantees of the Amendment.[42]

Beginning with a discussion of the Fourth Amendment's historical significance, Justice Stevens argued that searches have always required

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[31] *Id.* at 2199.
[32] *Id.* at 2200.
[33] *See id.* at 2200–01.
[34] *See id.*
[35] *See id.*
[36] *Id.*
[37] *See id.* at 2202 (citing People v. Reyes, 968 P.2d 445, 450–51 (Cal. 1998); People v. Bravo, 738 P.2d 336, 342 (Cal. 1987)).
[38] *See id.* at 2202 n.5.
[39] Justices Breyer and Souter joined the dissent.
[40] *Id.* at 2202 (Stevens, J., dissenting). Justice Stevens also noted that consent is no justification for the majority's restriction on individual liberty. *See id.* at 2206 n.4.
[41] *Id.* at 2203.
[42] *Id.*

cause, however minimal, to comport with the Constitution.[43] He observed that the only exception to the cause requirement is cases of "special needs" searches.[44] These programmatic, comprehensive searches are motivated by a need other than general law enforcement, and so cause can be set aside if the government's non-law-enforcement interest is sufficiently compelling.[45] The proposition that "individualized suspicion 'is not an irreducible component of reasonableness' under the Fourth Amendment" should only be invoked, Justice Stevens argued, upon this narrow ground.[46] Justice Stevens contended that, absent a programmatic need, which the majority did not establish, searches in line with the Constitution have always required some level of individualized suspicion.[47] In his view, *Knights* is best understood as falling in line with the rule that constitutionally permissible searches require suspicion unless they qualify as special needs or administrative searches.[48] *Knights* should not serve as a link in a chain that bars parolees from enjoying the most fundamental procedural protections guaranteed by the Fourth Amendment.[49] Removing the suspicion requirement, Justice Stevens concluded, means removing "the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment."[50]

According to Justice Stevens, the majority's analysis reflects a fundamental misconception of the jurisprudence regarding probationer and parolee freedoms. He characterized the majority's reasoning as a false syllogism: "Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy."[51] The dissent forcefully rejected both the notion that parolees are subject to the same control as prisoners and the assertion that parolees

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[43] *See id.* ("The suspicionless search is the very evil the Fourth Amendment was designed to stamp out.").

[44] *See id.*

[45] *See infra* text accompanying notes 76–93.

[46] *Samson*, 126 S. Ct. at 2203 (Stevens, J., dissenting) (quoting Indianapolis v. Edmond, 531 U.S. 32, 37 (2000)) (internal quotation omitted). Justice Thomas uses this language to defend the position that the Fourth Amendment's "touchstone . . . is reasonableness, not individualized suspicion." Under this reasoning, suspicionless searches may be reasonable if the magnitude of the government interest sufficiently outweighs any harm to individual rights. *Id.* at 2201 n.4 (majority opinion).

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> Although the Court has in the past relied on special needs to uphold warrantless searches of probationers, it has never gone so far as to hold that a probationer or parolee may be subjected to full search at the whim of any law enforcement officer he happens to encounter, whether or not the officer has reason to suspect him of wrongdoing.

See id. at 2203 (Stevens, J., dissenting).

[48] *See id.* at 2204.

[49] *See id.* at 2207.

[50] *Id.*

[51] *Id.* at 2204–05.

have a reduced expectation of privacy compared to probationers.[52] In Justice Stevens's judgment, the Court had not in the past allowed parolees to be deprived of basic liberties to the extent to which they were deprived while incarcerated.[53] Rather, its opinions recognized that incarcerated felons are denied Fourth Amendment protections because of pressing institutional concerns over safety and security.[54] These concerns, he continued, are not as exigent once a parolee has been released from incarceration. This distinction is significant and ought to prevent the majority from "map[ping] blindly" the privacy expectations of prisoners onto those of parolees.[55]

IV. Analysis

A. *Choose Your Doctrine: Special Needs vs. Individualized Suspicion*

The Court should not have interpreted *Knights* as an invitation to extend the Fourth Amendment balancing test to suspicionless searches; proper application of the case law demonstrates that the Court should have used the special needs test. The decision handed down in *Samson* sanctions a dangerous conflation of the special needs and balancing test approaches to Fourth Amendment questions. The decision is historically unsupported and misconstrues the crux of the Court's precedent in this area.[56] The Court's holdings indicate that the balancing test is quite distinct from the special needs test and that the former's individualized suspicion requirement is a vital element for ensuring personal liberty.[57] The majority in *Samson*, which frankly acknowledged the suspicionless nature of the search,[58] decided to dispense with the requirement. In doing so, the majority may have set a precedent for balancing away constitutional rights without allowing the hefty historical and precedential weight of the Fourth Amendment to anchor the individual's side of the scale. The issue is timely, since the Court may soon face a challenge to a statute that requires blanket DNA searches of probationers as a condition of their probation.[59]

The balancing test grew out of a need to maintain the Fourth Amendment's probable-cause protections while allowing law enforcement

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[52] *See id.* at 2205.

[53] *See id.* at 2205–06; *see also* Hudson v. Palmer, 468 U.S. 517, 524 (1984) (discussing the practical necessities that motivate sharp curtailment of inmates' rights); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (noting that the parolee's release from incarceration reflects society's judgment that she is a "responsible, self-reliant person" and makes her condition . . . very different from that of confinement in a prison").

[54] *See Samson*, 126 S. Ct. at 2205 (Stevens, J., dissenting); *see also Hudson*, 468 U.S. at 524, 527.

[55] *See Samson*, 126 S. Ct. at 2206 (Stevens, J., dissenting).

[56] *See infra* note 89 and accompanying text (discussing the line of special needs cases).

[57] *See id.*

[58] *See Samson*, 126 S. Ct. at 2196.

[59] *See infra* Part V (discussing suspicionless searches of probationers required by statute).

to adapt to exigent circumstances arising in the field.[60] Indeed, since *Terry v. Ohio* there has been a marked departure from the more rigorous probable-cause requirement.[61] Despite the reduced procedural protections sanctioned by the Court in *Terry*, suspicion has always been a necessary criterion for making police searches constitutional.[62] As the *Samson* dissent suggested, this is the critical lesson from *Knights*: its precedential value flows from that Court's unwillingness to depart from a suspicion requirement in sanctioning investigative searches.[63] The *Samson* Court instead treated *Knights*'s agnosticism about the permissibility of suspicionless searches as a building block to support its holding. This is a curious step for the Court to take, given that it has only recognized a "closely guarded category of constitutionally permissible suspicionless searches."[64] Without any restraints, the government seems free to follow the lead of *Samson* and analogize away an individual's reasonable expectations of privacy.[65]

In allowing suspicionless searches of an individual's person and home, the government license permitted in *Samson* erodes the fundamental purpose and procedural safeguards of the Fourth Amendment. The Constitution checks the arbitrary exercise of government power by specifying warrant and cause requirements. This concern about arbitrary government overreach motivated the drafting of the Amendment and has been a hallmark of its enforcement.[66] The warrant requirement ensured that a neutral magistrate would make the decision to compromise individual liberty via a search, thus insulating the public from capricious judgments "by the

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[60] *See* Clancy, *supra* note 1, at 531–32 (describing how the application of the Fourth Amendment to the states via the Fourteenth Amendment increased confrontations between liberty and security).

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> [I]f this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case. . . . Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Terry v. Ohio, 392 U.S. 1, 20 (1968).

[62] *See Samson*, 126 S. Ct. at 2204 (Stevens, J., dissenting); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (checking the discretion granted to border patrol officers by requiring reasonable suspicion).

[63] *See* United States v. Knights, 534 U.S. 112, 121 (2001) (holding that "the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer's house").

[64] Chandler v. Miller, 520 U.S. 305, 310 (1997).

[65] The dissent presents a strong rebuttal to the logical turns that Justice Thomas employed in establishing that parolees do not enjoy more Fourth Amendment protections than inmates with respect to these searches. *See Samson*, 126 S. Ct. at 2202–05 (Stevens, J., dissenting) (characterizing the majority's analysis as the product of "faulty syllogism" and "circular reasoning").

[66] *See, e.g.*, Stanford v. Texas, 379 U.S. 476, 481–82 (1965) (reviewing the history of the amendment's adoption).

officer engaged in the often competitive enterprise of ferreting out crime."[67] Even in the *Terry* context, the Court recognized that in the absence of neutral magistrates, "specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence."[68] The Court in the past has used the reasonableness standard as a sort of objective test in lieu of a magistrate, protecting the public from intrusions based on "inarticulate hunches."[69]

Given the lack of suspicion in this case, the majority should have turned to the special needs or administrative search exceptions that the Court has carved out to allow programmatic searches unaccompanied by particularized suspicion. Based on *City of Indianapolis v. Edmond*,[70] the direction on this issue is clear: there are three "limited circumstances in which the usual rule [of requiring individualized suspicion] does not apply."[71] Those limited circumstances, as enumerated in *Edmond*, are in cases of special needs,[72] administrative searches,[73] and border searches.[74] All share a focus outside general law enforcement,[75] and all are executed with procedural safeguards designed to preserve individual liberty.

The Court applies this test when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[76] This exception grew out of the need to conduct programmatic investigations of areas when individualized suspicion was precluded by the circumstances. The test proceeds by first determining whether the search furthers a special need outside of general law enforcement purposes. It then weighs the government interest in the search against the individual interest in not being searched.[77] The threshold question of whether a special need has been shown is a "critical" one.[78] The need must be narrowly construed to correspond to the "immediate" purposes of the search.[79] If the special need is not immediate, "any nonconsensual suspicionless search could be immunized under the special needs doctrine

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[67] Johnson v. United States, 333 U.S. 10, 13 (1948).

[68] Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968).

[69] *Id.* at 22.

[70] 531 U.S. 32 (2000).

[71] *Id.* at 37.

[72] *See infra* note 75.

[73] *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–04 (1987) (permitting warrantless administrative inspection of business in a "closely regulated" industry).

[74] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (permitting border checkpoints in order to police illegal immigration).

[75] *See, e.g.*, Illinois v. Lidster, 540 U.S. 419, 428 (2004) (holding search to be constitutional when roadblock is set up to question passing motorists about a crime that recently had occurred on that road because purpose of search was not general crime prevention but gathering of information).

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

[77] Ferguson v. City of Charleston, 532 U.S. 67, 82–83 (2001).

[78] *Id.* at 79.

[79] *Id.* at 83.

by defining the search solely in terms of its ultimate, rather than immediate, purpose."[80]

For instance, in *Edmond*, the Court struck down a police program that stopped motorists and checked them for possession of narcotics.[81] The seizures aimed to curb drug trafficking in the area. A secondary goal was the promotion of traffic safety.[82] The Court found the program unconstitutional because it did not promote any special needs; rather, its "primary purpose was to detect evidence of ordinary criminal wrongdoing."[83] Where, as in *Illinois v. Lidster*,[84] a roadblock's purpose is to gather information about a specific crime that has already occurred on that road in the recent past, the Court has upheld this information-gathering motive as a special need.[85]

A suspicionless search has been found constitutional only in the limited scenarios noted above.[86] It is illuminating at this point to turn back to Justice Thomas's comment in the majority opinion, where he notes that particularized suspicion is not an "irreducible requirement" of constitutional searches.[87] As the case law reveals, this oft-cited point from *United States v. Martinez-Fuerte*—that "the Fourth Amendment imposes no irreducible requirement of such suspicion"[88]—refers only to special needs cases.[89] The conclusion to be drawn is that individualized suspicion was considered an "irreducible" component of *Terry* stops and other non-special-needs searches. Justice Thomas invoked *Martinez-Fuerte*'s language without

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[80] *Id.* at 84.

[81] City of Indianapolis v. Edmond, 531 U.S. 32, 35–36 (2000).

[82] *Id.* at 43.

[83] *Id.* at 41.

[84] 540 U.S. 419 (2004).

[85] *See id.* at 427 ("[T]he stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort."); *see also infra* text accompanying note 115.

[86] *See supra* notes 72–74.

[87] Samson v. California, 126 S. Ct. 2193, 2201 n.4 (2006) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

[88] 428 U.S. at 561.

[89] Indeed, in *Martinez-Fuerte*, the language directly preceding the statement quoted here relies on *Terry* in announcing the conventional rule that individualized suspicion is required. In making its claim that suspicion is not an irreducible requirement, the *Martinez-Fuerte* Court cited to a string of cases that most appropriately fall under the limited circumstances announced in *Edmond*. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (citing concurring and dissenting opinions to a decision that held a search of an individual invalid as an administrative search); United States v. Biswell, 406 U.S. 311 (1972) (administrative search of gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (administrative search of liquor store); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative search); Carroll v. United States, 267 U.S. 132 (1925) (warrantless border searches accompanied by reasonable suspicion). The language in *Martinez-Fuerte* is best understood as preserving a distinction between the two doctrines, one that the *Samson* Court has blurred beyond recognition. *See Martinez-Fuerte*, 428 U.S. at 560–61; *see also* Clancy, *supra* note 1, at 488 ("[G]iven the historical context surrounding the framing of the Fourth Amendment and the need for a principled analysis for assessing reasonableness, individualized suspicion should be considered an inherent quality of reasonableness.").

giving a fair account of its context, and in doing so extended the reasonableness test far past its boundaries.

B. Applying the Special Needs Test

Instead of "running roughshod" over this precedent, the *Samson* Court should have applied the special needs test. The nature of the search in *Samson*, as well as the cases upon which Justice Thomas relied,[90] place it more in line with this exception to the Fourth Amendment's general requirement of individualized suspicion. Without any individualized suspicion supporting the search, and given that the statute had a programmatic quality in its application to a specific population, the special needs test was more appropriate.[91] The Court erred in construing the reasonableness test to penetrate a previously sacred area of Fourth Amendment jurisprudence.

However, applying the special needs test does not make the search in *Samson* consistent with the Constitution. As a threshold matter, the search fails to stem from any special need. Its purpose is not at all distinct from the general purposes of law enforcement. As the majority argued, the government interest was in preventing recidivism; that is, preventing crimes committed by a segment of the population statistically more likely to commit them.[92] In *Edmond*, neither the pressing nature of the crime of drug trafficking nor its likelihood of occurring along one of the roadblocked routes permitted the police to dispense with the suspicion requirement.[93] The Court in *Samson* indicated that the reduction in recidivism was likely to "promot[e]" the ancillary goals of reintegration and positive citizenship.[94] As the Court made clear in *Ferguson v. City of Charleston*,[95] the potential goals of the search cannot be used to establish a special need; the special need must be the "immediate objective" of the proposed search.[96] The primary objective of the *Ferguson* search was to gather evidence about drug use in a certain population and turn that information over to the po-

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[90] *See Samson*, 126 S. Ct. at 2203, 2206 n.4 (Stevens, J., dissenting) (noting that *Griffin* and *Hudson* might best be categorized as special needs cases).

[91] *See id.* at 2203 ("[T]he requirement has been dispensed with only when programmatic searches were required to meet a 'special need . . . divorced from the State's general interest in law enforcement.'") (quoting Ferguson v. City of Charleston, 532 U.S. 67, 79 (2001)) (internal quotation marks omitted).

[92] *See id.* at 2200 (majority opinion) ("The State's interests, by contrast, are substantial. This Court has repeatedly acknowledged that a State has an 'overwhelming interest' in supervising parolees because 'parolees . . . are more likely to commit future *criminal offenses*.'" (emphasis added) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 (1998))).

[93] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) (noting that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose").

[94] 126 S. Ct. at 2200.

[95] 532 U.S. 67.

[96] *Id.* at 83.

lice.[97] The *Ferguson* Court reasoned that a program whose far-reaching goal was to reduce drug use among pregnant women could not mandate drug tests for maternity patients.[98] This goal was not distinct from a general law enforcement concern with drug use, notwithstanding the distant concern over the social benefits attained from eliminating drug abuse during pregnancy.

In *Samson*, the only plausible non-law-enforcement need is reintegration of parolees into society. The Court's language sets up this goal as a secondary effect of reducing recidivism, not as an immediate objective of the statute. The Court states that reducing recidivism will "thereby promot[e]" reintegration.[99] The primary aim is to reduce repeat crimes by parolees; the less immediate objective is to promote their integration into society. Policing crimes committed by a certain segment of the population is similar to the invalidated programs in *Ferguson* and *Edmond*. Since the California search policy promotes only a distant special need, the statute should be invalidated on the grounds that its immediate goal is not distinct from general law enforcement aims.

A significant danger implicit in the Court's holding is that either of the two doctrines—reasonableness or special needs—can now be invoked to circumvent historically cherished Fourth Amendment protections. Courts may attempt to carve out a programmatic justification for a suspicionless special needs search, or dispense with that heightened requirement and simply weigh a reduced privacy interest against the government interests. As one commentator notes, the reasonableness test presented problems before the *Samson* rule was announced, at a time when the Constitution's suspicion requirement still anchored the individual's claim to freedom from government intrusion.[100] Removing this minimal constitutional requirement allows investigators unprecedented rein and gives courts a significant foundation for permitting invasions into privacy and personal security.

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[97] *Id.*

[98] *See id.* at 69–70, 82–83 ("[W]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.").

[99] *Samson*, 126 S. Ct. at 2200.

[100]

> Remarkably absent from the Court's analysis, however, has been any significant recognition of the historical importance of individualized suspicion or the role it should play in assessing the reasonableness of an intrusion . . . . The factors in the balancing test have become mere shells, manipulated to justify unguided conclusions as to what the majority in any given case concludes is reasonable.

Clancy, *supra* note 1, at 584–85.

V. *Samson*'s Implications for DNA Testing of Probationers

The scenario described above is far from a conjecture. Indeed, lower courts have relied on *Samson*'s analysis when addressing the issue of whether probationers can be required to submit to DNA testing as a condition of their probation.[101] Under clear Court precedent, the submission of biological data is a search within the scope of Fourth Amendment protection.[102] The DNA Backlog Elimination Act[103] and similar state statutes mandate that probationers have DNA samples taken and entered into an FBI database in order to have the information on hand to assist in solving crimes.[104] This condition of release parallels the condition in *Samson*, as both require individuals to submit to suspicionless searches. As a preliminary matter, it should be observed that the "spurious syllogism" that produced the *Samson* decision may be extended to these matters; probationers are more similar to parolees than they are to law-abiding citizens,[105] so perhaps the suspicionless standard will continue its slide along the continuum.

Circuit courts facing this issue have all found DNA statutes to be constitutional, but there is a significant split in their approaches to the Fourth Amendment analysis.[106] Six circuits—the Third, Fourth, Fifth, Eighth, Ninth, and Eleventh—applied a balancing test in holding that DNA statutes represent a reasonable balancing of individual and government interests.[107] The Second, Seventh, and Tenth Circuits used the special needs test.[108] The Eighth Circuit decision, and another at the federal district level,

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[101] *See infra* notes 109–112 and accompanying text.

[102] *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) ("[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.").

[103] *See* 42 U.S.C. § 14135a(d) (2000) (enumerating the offenses that require individuals to submit to testing, including any felony or crime of violence).

[104] *See* FBI, U.S. Dep't of Justice, The FBI's Combined DNA Index System Program: CODIS 2 (2000), *available at* http://www.fbi.gov/hq/lab/codis/brochures.htm ("CODIS [Combined DNA Index System] enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders.").

[105] *See* Samson v. California, 126 S. Ct. 2193, 2198 (2006).

[106] This varied approach reflects the lack of clarity surrounding the two tests and suggests a need for analytical refinement of the Court's approach to Fourth Amendment questions. *Cf*. Nicholas v. Goord, 430 F.3d 652, 664 n.22 (2d Cir. 2005) ("[W]e find puzzling the Third Circuit's comment in *Sczubelek* that the special-needs inquiry is *less* rigorous than the general balancing test.").

[107] *See* United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 832 (9th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992).

[108] *See Nicholas*, 430 F.3d at 667; Green v. Berge, 354 F.3d 675, 677–78 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).

were decided after *Samson*. These opinions invoked the holding in *Samson* to make the easy case that the reduced privacy interests of lawbreakers can be overcome without suspicion by a government seeking to stop crime.[109] *United States v. Kraklio*, in which the Eighth Circuit upheld a DNA statute, made short work of the reasonableness test by citing *Samson* to establish the degree to which individual privacy rights were diminished for probationers.[110] The District of South Carolina engaged in a more rigorous application of the balancing test, tracing the arguments made by circuit courts.[111] At the conclusion of its analysis, the court curbed probationer liberty the same way the Supreme Court had curbed parolee liberty, arguing that "*Samson* supports [this] Court's decision in the instant case as the DNA Act serves the same legitimate governmental interests."[112] In this way, *Samson* is already supplying the rationale for unprecedented curtailments of individual liberties in the name of crime prevention.

Swimming against a heavy tide, the District of Massachusetts in *United States v. Weikert*[113] invalidated a DNA act and rejected other courts' analyses of the question.[114] The critical issue to be sorted out in such cases, in addition to determining the constitutionality of the statute, is which test should be applied. As this Recent Development suggests, several circuit courts were incorrect in applying a balancing test in the absence of suspicion. This was a contestable proposition pre-*Samson*, and one that may have forced the Court to approach the matter from the special needs perspective, given the suspicionless and programmatic nature of the sampling.

As *Weikert* points out, however, the special needs approach has its own difficulties, given the search's rather obvious link to promoting general law-enforcement aims.[115] *Weikert* proceeded by dismissing the reasonableness test as inapplicable because of the absence of suspicion in conducting the DNA searches.[116] In applying the special needs test, the court exposed the rather obvious law-enforcement aims of the search: "The government's purpose for taking DNA samples is not to get 'information about a crime in all likelihood committed by others' than those providing the information, as permitted in *Lidster* . . . but instead to determine whether the searched individual has committed a crime."[117]

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[109] *See Kraklio*, 451 F.3d at 924; Word v. U.S. Prob. Dep't, 439 F. Supp. 2d 497, 504 (D.S.C. 2006).

[110] *See Kraklio*, 451 F.3d at 924 (citing *Samson*, 126 S. Ct. at 2201) (noting that probationers had "diminished privacy rights").

[111] *See Word*, 439 F. Supp. 2d at 504 (discussing the *Samson* decision in light of the Third Circuit's analysis of the DNA Act).

[112] *Id.*

[113] 421 F. Supp. 2d 259 (D. Mass. 2006).

[114] *Id.* at 261 ("[A]lthough the government is correct that the circuits that have considered the statute that permits defendant to be required to provide a blood sample have all upheld it, the District of Massachusetts is not in any of these circuits.").

[115] *Id.* at 265.

[116] *See id.* at 264 (applying the special needs test after consideration of case law).

[117] *Id.* at 265 (citation omitted).

VI. Conclusion: The Need for Clarity

After *Samson*, courts need not worry whether a balancing test is inappropriate without suspicion; they are free to assign varying weights to government and individual interests, producing any balance that they wish. The special needs test, presumably, is thus cabined to a narrower area of Fourth Amendment jurisprudence. If suspicion does not need to be present to justify a search, the special needs test's requirement of non-law-enforcement purposes only serves as a distant limitation on the types of suspicionless searches that the Constitution permits. As the DNA cases make clear, courts are eager to extend *Samson*'s logic along the continuum toward law-abiding citizens. Without an individualized suspicion requirement, it is unclear where a principled stopping point exists along this spectrum.

As security concerns heighten and the government's ability to intrude upon privacy increases, clear boundaries around our Fourth Amendment rights are required. The Court must disentangle its doctrine as it applies to these issues to preserve the procedural safeguards that each test at one time represented. If courts continue to conflate the doctrines, little may be left to distinguish programmatic and *Terry*-like law enforcement searches from those that truly demonstrate a special need. A suspicion requirement places a weight on the individual's side of the scale; without this protection, individual rights hang in the balance more precariously than ever before.