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# An Unprecedented Curtailment of Liberty: *Samson v. California* and Its Gift of a Limitless Blank Check for “Arbitrary, Capricious, or Harassing” Searches and Seizures

## I. INTRODUCTION

At the end of 2004, nearly five million adults were under Federal, State, or local probation or parole jurisdiction;<sup>1</sup> nearly one quarter of those people were on parole.<sup>2</sup> At some point during their sentence, almost 95% of all state prisoners will be released, and nearly 80% of those released will be placed on parole supervision.<sup>3</sup> In California, in order for an inmate to be released on parole, he must stipulate that the police can search him at any time for any reason, and that any items found on his person can be subsequently seized.<sup>4</sup> However, this policy conflicts with the Fourth Amendment which protects “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”<sup>5</sup> In June 2006, the United States Supreme Court handed down a decision which effectively eradicates this fundamental right for parolees.<sup>6</sup> *Samson v. California*<sup>7</sup> affirmed a California Court of Appeals decision, quoting Cal. Penal. Code § 3067(a), which states that “[e]very prisoner eligible for release on state parole 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

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<sup>1</sup> U. S. Department of Justice, *Probation and Parole Statistics*, <http://www.ojp.gov/bjs/pandp.htm> (September 22, 2006).

<sup>2</sup> U. S. Department of Justice, *Probation and Parole Statistics*, <http://www.ojp.gov/bjs/pandp.htm> (September 22, 2006).

<sup>3</sup> U. S. Department of Justice, *Probation and Parole Statistics*, <http://www.ojp.gov/bjs/pandp.htm> (September 22, 2006).

<sup>4</sup> Cal. Penal Code § 3067(a) (2006).

<sup>5</sup> U.S. Const. amend. IV. The Fourth Amendment of the United States Constitution states “[t]he 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.”

<sup>6</sup> See *Samson v. California*, 126 S. Ct. 2193 (U.S. 2006).

<sup>7</sup> *Samson v. California*, 126 S. Ct. 2193 (U.S. 2006).

with or without cause.”<sup>8</sup> The Supreme Court should have made the standard for parolee searches and seizures one of “reasonable suspicion” which would have lowered the expectation of privacy for parolees to the same level as that of probationers. Instead, by adopting the “any reason” standard promulgated in *Samson*, the Court eliminated all expectations of parolee privacy.

This article explores the dire effects that that this decision will have on every state in the union, but in particular, California. Allowing such unfounded searches will open the doors to limitless police harassment without consequence. If parolees, free from prison and trying to make the transition back into society, cannot depend on the fundamental freedoms given to all citizens through the United States Constitution, then these parolees may be equally well off back behind bars, where they have the same amount of rights that are afforded them on the outside under the Court’s “any reason” search standard.

## II. CALIFORNIA PAROLE REGULATIONS

“[A] period of parole placed on an adult is intended ‘to provide for the supervision of and the surveillance of parolees, . . . and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.’”<sup>9</sup> In California, an inmate may either serve his parole period in prison, or out, but subject to certain conditions.<sup>10</sup> While these conditions may include mandatory drug testing, restrictions on association with others, and

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<sup>8</sup> Cal. Penal Code § 3067(a) (2006).

<sup>9</sup> *People v. Reyes*, 968 P.2d 445, 462 (Cal. 1998) (citing Cal. Penal Code § 3000(a)(1)).

<sup>10</sup> *Samson v. California*, 126 S. Ct. 2193, 2199 (U.S. 2006).

mandatory meetings with a parole officer,<sup>11</sup> the parole conditions must also be reasonable.<sup>12</sup> Parolees must comply with every restriction and condition imposed, including any special conditions deemed necessary by the parole board if unusual circumstances exist.<sup>13</sup> The extent of such impositions, “demonstrate that parolees have severely diminished expectations of privacy by virtue of their status alone.”<sup>14</sup>

In the interest of justice,<sup>15</sup> any inmate who is eligible for parole in California must “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.”<sup>16</sup> In addition to conflicting with the United States Constitution, this penal code section stands in stark contrast to Article I, Section 13 of the California Constitution.<sup>17</sup> The California Constitution provides, in almost identical content and structure to the Fourth Amendment,<sup>18</sup> “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or

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<sup>11</sup> *Samson v. California*, 126 S. Ct. 2193, 2199 (U.S. 2006).

<sup>12</sup> *Terhune v. Superior Court*, 65 Cal. App. 4th 864, 868 (Cal. Ct. App. 1998) (“Conditions imposed on parole must be reasonable, since parolees retain constitutional protection against arbitrary and oppressive official action . . .”).

<sup>13</sup> *Samson v. California*, 126 S. Ct. 2193, 2199 (U.S. 2006).

<sup>14</sup> *Samson v. California*, 126 S. Ct. 2193, 2199 (U.S. 2006).

<sup>15</sup> See Cal. Penal Code §1202.7 (2006) (stating the California legislature’s intent concerning strict parole provisions: “The Legislature finds and declares that the provision of probation services is an essential element in the administration of criminal justice. The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation.”).

<sup>16</sup> Cal. Penal Code § 3067(a) (2006).

<sup>17</sup> Cal. Const. art. I, § 13.

<sup>18</sup> U.S. Const. amend. IV. The Fourth Amendment of the United States Constitution states “[t]he 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.”

affirmation, particularly describing the place to be searched, and the persons and things to be seized."<sup>19</sup>

### III. *SAMSON v. CALIFORNIA*

In June 2006, the United States Supreme Court, in a 6-3 majority, handed down a controversial and unprecedented decision in *Samson v. California*<sup>20</sup> regarding parolee privacy rights in connection with Cal. Penal Code §3067(a).<sup>21</sup>

On September 2, 2002, while Donald Curtis Samson was on parole for possession of a firearm, he was stopped on the street by Officer Alex Rohleder of the San Bruno Police Department.<sup>22</sup> The officer knew that Samson was on parole, and believed he had an outstanding warrant.<sup>23</sup> After Rohleder radioed in Samson's information and was informed that there was no such warrant, Rohleder— being aware of Samson's §3067(a) search condition, and for no reason other than Samson's status as a parolee— searched Samson and found a small bag of methamphetamine in his shirt pocket.<sup>24</sup> Samson was subsequently charged with possession.<sup>25</sup> The trial court denied Samson's request to suppress the evidence, finding that the search was reasonable because it was within the scope of §3067(a) and was not “arbitrary or capricious.”<sup>26</sup> Both the California Court of Appeal and the United States Supreme Court affirmed.<sup>27</sup> Despite Samson's contention

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<sup>19</sup> Cal. Const, Art. I § 13.

<sup>20</sup> *Samson v. California*, 126 S. Ct. 2193 (U.S. 2006).

<sup>21</sup> Cal. Penal Code § 3067(a) (2006).

<sup>22</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

<sup>23</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

<sup>24</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

<sup>25</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

<sup>26</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

<sup>27</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

that he was searched solely based on his parolee status, thereby violating his Fourth Amendment right, the U.S. Supreme Court held that,

[T]he suspicionless search was a reasonable condition of parole which advanced state interests and parole conditions severely diminished the inmate's expectation of privacy while on parole. The State of California had substantial legitimate interests in reducing recidivism and thereby promoting reintegration and positive citizenship, and requiring individualized suspicion to support the search of the inmate would undermine those interests. Further, the constitutional requirement that the search be reasonable did not preclude the suspicionless search, and the inmate's limited privacy rights were protected by the prohibition of searches which were arbitrary, capricious, or harassing.<sup>28</sup>

#### IV. CONTRARY PRECEDENT

##### A. Expectation of Privacy

In 1967, the United States Supreme Court, in *Katz v. United States*, stated that “the Fourth Amendment protects people, not places.”<sup>29</sup> In his concurring opinion, Justice Harlan extends this idea and asks just what that protection is.<sup>30</sup> He sets forth a twofold requirement regarding the relationship between protection and a citizen’s expectation of that protection: 1) A person must have exhibited an actual (subjective) expectation of privacy; and 2) That that expectation must be one that society is prepared to recognize as “reasonable.”<sup>31</sup> For example, a man’s home is, generally, a place where he expects privacy; however, activities or statements that he exposes to the public in “plain view”<sup>32</sup>

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<sup>28</sup> *Samson v. California*, 126 S. Ct. 2193 (U.S. 2006).

<sup>29</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>30</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967).

<sup>31</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967); *see also Bond v. United States*, 529 U.S. 334 (2000) (holding that Defendant did have a reasonable expectation of privacy in the luggage he carried on a bus); *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that Petitioner did have a reasonable expectation of privacy in his home from a sense-enhancing, thermal imaging device, without which the information could not have been obtained without “physical intrusion into a constitutionally protected area.”).

<sup>32</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967).

are not “protected”<sup>33</sup> since he has not exhibited any intention of keeping such activities or statements to himself.<sup>34</sup> Similarly, a conversation that takes place in public would not be protected, since an expectation of privacy in this circumstance would be unreasonable.<sup>35</sup>

In 1979, the Supreme Court further expanded Justice Harlan’s concurrence in *Katz* to its decision in *Smith v. Maryland*.<sup>36</sup> In *Smith*, the Court stated that, “the application of the Fourth Amendment depends on whether the person invoking the protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”<sup>37</sup>

#### B. Standard for Search and Seizure

In addition to the reasonable expectation of privacy promulgated by the United States Supreme Court, the Fourth Amendment expresses the probable cause standard for all searches and seizures.<sup>38</sup>

In spite of the Fourth Amendment probable cause standard, in *Terry v. Ohio*, the Supreme Court created a new, intermediate standard that deemed certain types of searches reasonable, even when there was not “probable cause” for the search.<sup>39</sup>

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<sup>33</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967).

<sup>34</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967). *See also California v. Ciraolo*, 476 U.S. 207 (1986) (holding that under the twofold *Katz* test, the petitioner did not have a reasonable expectation of privacy in growing illegal substances in his backyard which were visible from “within public navigable airspace.”).

<sup>35</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967).

<sup>36</sup> *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

<sup>37</sup> *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

<sup>38</sup> The Fourth Amendment of the United States Constitution states “[t]he 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.”

<sup>39</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

However, the Court only lowered the probable cause standard to this new, reasonable suspicion standard for “stop and frisk” situations.<sup>40</sup> The *Terry* Court held,

[t]hat where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.<sup>41</sup>

This language clearly demonstrates that the reasonable suspicion standard is only acceptable when a police officer believes that criminal activity may be afoot *and* that the person with whom the officer is dealing may be presently armed and dangerous.<sup>42</sup> Only after these two elements are satisfied is a police officer allowed to search a suspect.<sup>43</sup> However, even though a “frisk” is the only type of search allowed under the reasonable suspicion standard,<sup>44</sup> a “frisk” is still a far cry from a search allowed under a probable cause standard.

## V. PROBLEMS WITH THE MAJORITY’S LOGIC IN THE *SAMSON* DECISION

The majority’s justifications in *Samson*, which allows police officers to search parolees at any time, strictly contradict the right of privacy and the probable cause requirement, and even contradict the lesser reasonable suspicion standard. However, as

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<sup>40</sup> *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

<sup>41</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>42</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>43</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>44</sup> Bryan A. Garner, *Black’s Law Dictionary*, (Bryan A. Garner ed., 2d ed., West 2001), defines a “frisk” as, “A pat-down search to discover a concealed weapon.”

even the Court itself pointed out in *Griffin v. Wisconsin*,<sup>45</sup> “a reduced need for review does not justify a complete removal of the . . . requirement.”<sup>46</sup>

Throughout the *Samson* opinion, the Court sets forth little more than dubious logic in an attempt to justify the difference between the rights of a parolee and those of a probationer. While the Court concludes that “[p]arolees are on the continuum of state-imposed punishments. . . [and] on this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment,”<sup>47</sup> throughout the twenty-five page opinion, the Court did not once explain why. In fact, the Court ignored clearly relevant precedent. Despite an unfettered statement that parolees can be searched at any time and without reason, an array of case law asserts the exact opposite. For example, in *People v. Reyes*,<sup>48</sup> the Supreme Court of California stated that

[I]n most cases the life of a parolee more nearly resembles that of an ordinary citizen than that of a prisoner. The parolee is not incarcerated; he is not subjected to a prison regime, to the rigors of prison life and the unavoidable company of sociopaths. . . . The parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them.<sup>49</sup>

Five years later in *People v. Sanders*, the Supreme Court of California again supported this position by stating that although “[a] parolee's expectation of privacy certainly is diminished, . . . it is not eliminated.”<sup>50</sup>

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<sup>45</sup> *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

<sup>46</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 886 (1987).

<sup>47</sup> *Samson v. California*, 126 S. Ct. 2193, 2198 (U.S. 2006).

<sup>48</sup> *People v. Reyes*, 968 P.2d 445 (Cal. 1998).

<sup>49</sup> *People v. Reyes*, 968 P.2d 445, 462 (Cal. 1998) (citing *People v. Burgener*, 714 P.2d 1251, 1260 (Cal. 1986), *overruled on other grounds*).

<sup>50</sup> *People v. Sanders*, 31 Cal. 4th 318, 332 (Cal. 2003); *see also United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975) (stating that “[a] probationer, like the parolee, has the right to enjoy a significant degree of privacy.”); *Moreno v. Baca*, 400 F.3d 1152, 1168 (9th Cir.2005) (stating that there is no “constitutional difference between probation and parole for purposes of the fourth amendment.”); *In Re*

In *Samson*, although the majority concludes that a parolee does not have any sort of privacy expectation that society is prepared to recognize as legitimate, the Court clearly contradicts itself. The Court states twelve times that a parolee, like a probationer, does have an expectation of privacy, albeit, a diminished one, when compared to that of any given free citizen.<sup>51</sup> The six-justice majority even goes as far as to state that if *Samson* did not implicate the Fourth Amendment then the case would have been resolved through *Hudson v. Palmer*, which held that the prohibition on unreasonable searches and seizures did not apply to *prison cells*.<sup>52</sup>

In his dissenting opinion, Justice Stevens acknowledges another clear error in the majority's logic: "[t]hat prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy."<sup>53</sup> Because parolees, like probationers, only enjoy "conditional liberty. . . dependent on observance of special. . . restrictions,"<sup>54</sup> the fact still remains that probationers (and parolees) "are not in confinement."<sup>55</sup> As the dissent further points out, the majority, which concludes that parolees have no legitimate expectation of privacy, contradicts itself throughout the opinion by stating that parolees are not in confinement.<sup>56</sup> This begs the question, how can a parolee be granted "conditional liberty" if at the same time he is given no more liberty than a prisoner? Ultimately, the Court's holding will have a substantial effect upon California citizens, parolees and non-parolees alike.

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*Stevens*, 119 Cal. App. 4th 1228, 1234 (Cal. Ct. App. 2004) ("The expectation of privacy is the same whether the search is a condition of probation or parole.").

<sup>51</sup> See *Samson v. California*, 126 S. Ct. 2193-2196, 2198-2199, 2201 (U.S. 2006).

<sup>52</sup> *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that defendant had no legitimate expectation of privacy, and that the prohibition on unreasonable searches under the Fourth Amendment of the U.S. Constitution did not apply to prison cells).

<sup>53</sup> *Samson v. California*, 126 S. Ct. 2193, 2204-2205 (U.S. 2006) (Stevens, J., dissenting).

<sup>54</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (quoting *Morrisey v. Brewer*, 40 U.S. 471, 480 (1972)).

<sup>55</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987).

<sup>56</sup> *Samson v. California*, 126 S. Ct. 2193, 2204-2205 (U.S. 2006) (Stevens, J., dissenting).

## VI. EFFECTS ON CALIFORNIA

### A. A Blank Check for Police Misconduct

Writing for the *Samson* majority, Justice Thomas noted that California's suspicionless search system, which gives officers "unbridled discretion to conduct searches, thereby inflicting dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society, is belied by California's prohibition on 'arbitrary, capricious, or harassing' searches."<sup>57</sup> However, the Court should not have relied on California's prohibition against arbitrary searches to substitute for the Fourth amendment requirement of reasonableness. As demonstrated below, this arbitrary search prohibition is an ineffective bulwark against police excesses. As stated in *United States v. Knights*, since a parolee cannot be searched without *some* sort of reasonable suspicion, it logically follows that the parolee cannot also be searched merely because of his status as a parolee.<sup>58</sup>

In 1978, the California Court of Appeals held in *People v. Natale*,<sup>59</sup> that, "where there existed no probable cause for the police officer to search, the police could not circumvent [the Fourth Amendment of the U.S. Constitution] by getting blanket approval for searches by parole officers when those parole officers had no knowledge of the facts. . . ."<sup>60</sup> While this holding is still good law, upon closer inspection, the *Samson* opinion essentially overrules this idea and provides for little more than a blank check for police misconduct.

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<sup>57</sup> *Samson v. California*, 126 S. Ct. 2193, 2202 (U.S. 2006).

<sup>58</sup> *United States v. Knights*, 534 U.S. 112 (U.S. 2001); see also *United States v. Guagliardo*, 278 F.3d 868, 873 (9th Cir. 2002) ("affirmed the validity of a search pursuant to a probation term that authorized a warrantless search at any time by any probation officer or law enforcement officer, as long as the search was supported by *reasonable suspicion*." ) (emphasis added).

<sup>59</sup> *People v. Natale*, 77 Cal. App. 3d 568 (Cal. Ct. App. 1978).

<sup>60</sup> *People v. Natale*, 77 Cal. App. 3d 568 (Cal. Ct. App. 1978).

In attempting to articulate and provide evidence for their conclusion, the majority in *Samson* relied heavily on *U.S. v. Knights*.<sup>61</sup> In *Knights*, the court found that defendant's status as a probationer subjected him to a search condition (similar to §3067(a)) because he had a diminished expectation of privacy.<sup>62</sup> The Court further found that when an officer had reasonable suspicion that a probationer was subject to a search condition, and was engaged in criminal activity, there was enough likelihood that criminal conduct was occurring that an intrusion on the probationer's significantly *diminished* privacy interests was reasonable.<sup>63</sup> Finally, the Court concluded that the warrantless search of defendant, *supported by reasonable suspicion* and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment.<sup>64</sup>

While the *Samson* court tried to synonymize the facts before it with those of *Knights*, the Court made one fatal flaw. In *Knights*, the officer had *reasonable suspicion* to search the defendant's apartment.<sup>65</sup> The officer knew that the defendant had long been the focus of an investigation regarding the vandalism and arson of an electrical plant in Napa County.<sup>66</sup> In *Samson*, however, Officer Rohleder had no reason to suspect Samson of any crime, let alone stop Samson on the street; Samson was simply a parolee.<sup>67</sup> Once Officer Rohleder had been informed that Samson had no outstanding warrant, the officer had no reason to believe that Samson was involved in any crime, or that any incriminating evidence would be found on his person.<sup>68</sup> A pretextual search based simply

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<sup>61</sup> See *Samson v. California*, 126 S. Ct. 2193, 2197 (U.S. 2006).

<sup>62</sup> *United States v. Knights*, 534 U.S. 112 (U.S. 2001).

<sup>63</sup> *United States v. Knights*, 534 U.S. 112 (U.S. 2001) (emphasis added).

<sup>64</sup> *United States v. Knights*, 534 U.S. 112 (U.S. 2001) (emphasis added).

<sup>65</sup> See *United States v. Knights*, 534 U.S. 112, 114 (U.S. 2001).

<sup>66</sup> *United States v. Knights*, 534 U.S. 112, 114 (U.S. 2001).

<sup>67</sup> See *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

<sup>68</sup> See *Samson v. California*, 126 S. Ct. 2193, 2196 (U.S. 2006).

on status, such as the search that occurred in *Samson*, cannot be reconciled with a case in which there was reasonable suspicion to search, as was the case in *Knights*.<sup>69</sup>

B. “Arbitrary, Capricious, or Harassing” Searches

With no discretionary tools put in place, the scope of searches permitted under *Samson* is relentless. In addition to *Samson* giving law enforcement excessive leeway to search, the decision also permits such things as pretextual stops, racial profiling, and violations of the privacy rights of third parties. It’s like Christmas for harassment.

The fact that a parolee no longer has a legitimate expectation of privacy, coupled with the nonexistent reasonable suspicion search standard, ultimately renders the *Samson* decision tantamount to the decision in *Whren v. United States*.<sup>70</sup> In 1996, the Supreme Court in *Whren* held that a law enforcement officer’s subjective intentions play no role in ordinary Fourth Amendment analysis.<sup>71</sup> Because the *Samson* court held that there is no standard needed to search a parolee, as long as the search is not arbitrary, capricious, or harassing, all the officer needs to legitimize the search (to prove that it was not arbitrary, capricious, or harassing) is a fabricated, objective<sup>72</sup> rationale that satisfies the judge.<sup>73</sup>

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<sup>69</sup> See Part VI(B)(i).

<sup>70</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>71</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>72</sup> See *Scott v. United States*, 436 U.S. 128, 138 (1978) (setting forth an objectivity test, stating that, “[t]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action”).

<sup>73</sup> See *U.S. v. Crawford*, 372 F.3d 1048 (9th Cir. 2004). In *Crawford*, the searching officer (Bowdich) testified that it is common practice for law enforcement officers to use “Fourth Waivers” as a “tool to talk” to suspects about crimes. “Because the robbery had occurred more than two years earlier and because Defendant had changed residences, Bowdich did not hope to find evidence of the Ulrich Street robbery during the parole search. Rather, Bowdich intended to use the parole search as a pretext to speak to Defendant about the . . . robbery. At most, Bowdich hoped to find evidence of a new crime or parole violation, which he could use to convince Defendant to confess to the old crime. In Bowdich’s words, ‘we weren’t looking for evidence of a bank robbery, but we were looking at potential of possibly flipping him, if we were able to find evidence of a state case.’ The court made it clear, however, that it was not declaring an unfettered open-season on parolees. In keeping with the principle that permissible degree of impingement on a parolee’s privacy is ‘not unlimited;’” see also *U.S. v. Robinson*, 414 U.S. 218, 248

Now, despite an officer's subjective intent for searching a parolee, a court will uphold such a search, even if it "was conducted in an extraordinary manner, unusually harmful to [the parolee's] privacy or even physical interests."<sup>74</sup> Under *Samson*, an officer is now permitted to subjectively search, objectively lie, and ultimately abuse the parolee search process.

i. An Allowance for Pretextual Stops

In *U.S. v. Cannon*,<sup>75</sup> the Ninth Circuit held that,

[A] pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop.<sup>76</sup>

Under *Cannon*, a pretextual stop (and search) occurs when there is no reasonable suspicion for the stop. The Court's definition of a pretextual stop mirrors the nonexistent reasonable suspicion standard needed under *Samson*; therefore, searches conducted without reasonable suspicion are pretextual.<sup>77</sup> Further, *Cannon's* definition of a pretextual stop not only implies a degree of harassment, but is ultimately tantamount to actual harassment. Therefore, if a standardless search is pretextual, and if a pretextual search is arbitrary, capricious, or harassing, then the only logical conclusion is that standardless searches are inherently arbitrary, capricious or harassing.

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(1973) (Marshall, J., dissenting) (stating that "the powers granted to police are powerful, and subject to potential abuse").

<sup>74</sup> *Whren v. United States*, 517 U.S. 806, 818 (1996).

<sup>75</sup> *U.S. v. Cannon*, 29 F.3d 472 (9th Cir. 1994).

<sup>76</sup> *U.S. v. Cannon*, 29 F.3d 472, 474 (9th Cir. 1994); see also *Delaware v. Prouse*, 440 U.S. 648 (1979) (affirming a motion to suppress marijuana found in defendant's car when the police officer stopped the defendant's vehicle after neither observing any traffic or equipment violations, nor any suspicious activity); *People v. Cervantes*, 103 Cal. App. 4th 1404 (Cal. Ct. App. 2002) (holding that the defendant's stop by the officer was illegal in that there was no reasonable suspicion to support it, and that it constituted an "arbitrary, capricious, or harassing" search).

<sup>77</sup> This is true even despite the fact that there is an underlying public policy reason for the Supreme Court in *Samson* holding that a suspicionless search of a parolee is legal. See *Samson v. California*, 126 S. Ct. 2193, 2200 (U.S. 2006). *Blacks Law Dictionary* (Bryan A. Garner ed., 8th ed., West 2004), defines "pretext" as "A false or weak reason or motive advanced to hide the actual or strong reason or motive."

This idea is one of the many fears expressed by the dissent in *Samson*.<sup>78</sup> In his dissent, Justice Stevens, joined by Justices Souter and Breyer, stated that, “if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor’s unfettered discretion.”<sup>79</sup> Not only has the majority rejected the idea of individualized suspicion, but the majority has also failed to replace such suspicion with anything to protect a parolee against an officer’s “unfettered discretion.” As such, we are now living in a world governed by the overreaching holding of *Samson*, which states that searches which are arbitrary, capricious, or harassing, are unlawful, are nothing more than a mere “form of words,”<sup>80</sup> one in which, as explained above, can be easily circumvented.

ii. An Allowance for Racial Profiling

In addition to permitting pretextual stops, *Samson* leaves open the door for racial profiling. Because an officer can stop and search a parolee based on nothing more than his status, an officer can now stop a parolee because he is, for example, a minority, doing so under the guise of hoping to find some incriminating evidence to put the parolee back behind bars.

In California, where nearly 40%<sup>81</sup> of the state’s citizens, and 59%<sup>82</sup> of the state’s parolees are either African American or Hispanic, *Samson* could potentially have devastating effects. For example, in an age where terrorism is a major political and social concern, the chances of a Middle Eastern parolee being searched would seem to be higher

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<sup>78</sup> *Samson v. California*, 126 S. Ct. 2193, 2207 (U.S. 2006).

<sup>79</sup> *Samson v. California*, 126 S. Ct. 2193, 2204 (U.S. 2006).

<sup>80</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>81</sup> U.S. Census Bureau, *Quick Facts*, [http://factfinder.census.gov/servlet/QTTable?\\_bm=y&-geo\\_id=04000US06&-qr\\_name=DEC\\_2000\\_SF1\\_U\\_DP1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-redoLog=false](http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US06&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U&-redoLog=false) (October 25, 2006).

<sup>82</sup> U. S. Department of Justice, *Probation and Parole Statistics*, <http://www.ojp.gov/bjs/pandp.htm> (October 25, 2006).

than the chances of a parolee of a different race being searched (regardless of whether or not that parolee was in prison five years ago during the September 11, 2001 attacks). An officer can now stop a Middle Eastern parolee without any suspicion that the parolee is currently involved in any crime, and search that parolee in the extremely slight hope that the officer could find some evidence on the parolee that could tie the parolee to a possible terrorist attack. Such a search would be completely arbitrary, pretextual, and racist, yet under *Samson* that search would also be completely, and objectively, permissible.

African Americans have the highest recidivism rates once on parole.<sup>83</sup> Does this mean that just because one of the objectives of *Samson* is to cut down on the recidivism rate in California,<sup>84</sup> that every parolee who happens to be African American has drugs on their person, or is hiding a weapon in their house? Absolutely not. However, a police officer can now search an African American parolee from head to toe, and search that parolee's personal belongings inside and out, simply because the searching officer does not like the parolee's ethnicity. The effects of such a coincidence only add to the amount of harassment that is perfectly allowable.

Moreover, when illegal immigration and border patrol are key issues in upcoming elections, a parole officer can easily search a parolee in hopes of finding some secondary information, such as an immigration violation, on a parolee who is not yet an American citizen.<sup>85</sup> A California citizen, who is also a minority, already has significant hardships

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<sup>83</sup> U. S. Department of Justice, *Probation and Parole Statistics*, <http://www.ojp.gov/bjs/pandp.htm> (October 25, 2006).

<sup>84</sup> *Samson v. California*, 126 S. Ct. 2193, 2200 (U.S. 2006); See also *Samson v. California*, 126 S. Ct. 2193, 2207 (U.S. 2006) (Stevens, J., dissenting) (The State's interest in lowering its recidivism rates have "never been held sufficient to justify suspicionless searches. If high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter.").

<sup>85</sup> See *U.S. v. Crawford*, 372 F.3d 1048 (9th Cir. 2004). In *Crawford*, the searching officer (Bowdich) testified that it is common practice for law enforcement officers to use "Fourth Waivers" as a "tool to talk" to suspects about crimes. "Because the robbery had occurred more than two years earlier and because

when it comes to living a normal, everyday life, let alone when that citizen is a parolee, trying to rebuild society's trust. This adversity is infinitely magnified, as an officer can now arbitrarily search a parolee for any reason—or no reason at all. Now, under *Samson*, a parolee, who, despite his ethnicity, has already repaid his debt to society by serving time behind bars, is now faced with a situation in which even outside the prison walls, his constitutional rights, and right to privacy, are virtually nonexistent.<sup>86</sup>

### iii. Privacy Rights of Third Parties

*Samson* also raises the issue of privacy rights of third parties. Although a warrant is generally required to search or arrest an individual either in his own home, or in the home of another, the warrant requirement is not the same for parolees as it is for regular citizens.<sup>87</sup> As a condition of their parole, an officer may search a parolee's home or person at any time, with or without cause.<sup>88</sup> This also applies when the parolee shares a residence with another person, whether a wife, a roommate, or a family member.

However, even when it comes to searching a parolee's residence, especially one that is shared, the reasonable suspicion requirement has always been used.

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Defendant had changed residences, Bowdich did not hope to find evidence of the Ulrich Street robbery during the parole search. Rather, Bowdich intended to use the parole search as a pretext to speak to Defendant about the . . . robbery. At most, Bowdich hoped to find evidence of a new crime or parole violation, which he could use to convince Defendant to confess to the old crime. In Bowdich's words, 'we weren't looking for evidence of a bank robbery, but we were looking at potential of possibly flipping him, if we were able to find evidence of a state case.' The court made it clear, however, that it was not declaring an unfettered open-season on parolees. In keeping with the principle that permissible degree of impingement on a parolee's privacy is 'not unlimited;'" see also *U.S. v. Robinson*, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting) (stating that "the powers granted to police are powerful, and subject to potential abuse).

<sup>86</sup> See *U.S. v. Cannon*, 29 F.3d 472, 475 (9th Cir. 1994) (stating that "who is in fact stopped could depend on arbitrary or discriminatory characteristics. Courts have long recognized that such arbitrariness is unreasonable within the meaning of the Fourth Amendment").

<sup>87</sup> See *Steagald v. U.S.*, 451 U.S. 204 (1981)(holding that the "petitioner's U.S. Const. amend. IV rights were violated when drug enforcement officers, in the absence of consent and exigent circumstances, entered petitioner's home and searched for the subject of an arrest warrant without first obtaining a search warrant."); *Payton v. N.Y.*, 445 U.S. 573 (1980)(holding that "The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.").

<sup>88</sup> Cal. Penal Code § 3067(a)(2006).

In 1987, Justice Blackmun stated in his dissenting opinion in *Griffin v. Wisconsin*, that “[a]t the very core (of the Fourth Amendment) stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>89</sup>

Traditionally, courts have shown the utmost respect for the privacy of a person’s home—even a probationer’s home; thus, the standard for searching a parolee’s residence has always been heightened, at least when compared to the standard for searching a parolee’s person.<sup>90</sup>

Because a person’s home is “the place that traditionally has been regarded as the center of a person’s private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment,”<sup>91</sup> “[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom . . . .”<sup>92</sup> As such, “any search of a probationer’s [or parolee’s] home . . . satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a . . . ‘reasonable grounds’ standard.”<sup>93</sup>

Further,

[t]he parolee and his home must be subject to search by the parole officer when the officer reasonably believes that such search is necessary in the performance of his duties. His decision may be based upon specific facts, though they are less than sufficient to sustain a finding of probable cause. It may even be based on a hunch, arising from what he has learned or observed about the behavior and attitude of the parolee. To grant such

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<sup>89</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

<sup>90</sup> See *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting).

<sup>91</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting).

<sup>92</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948).

<sup>93</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987); see also *U.S. v. Knights*, 534 U.S. 112, 118 (2001) (“Probation diminishes a probationer’s reasonable expectation of privacy - so that a probation officer may, consistent with the Fourth Amendment, search a probationer’s home without a warrant, and with only *reasonable* grounds (not probable cause) to believe that contraband is present.”). (emphasis added).

powers to the parole officer is not unreasonable under U.S. Const. amend. IV.<sup>94</sup>

This is where the problem arises. Although precedent has taught us that a reasonable suspicion standard is necessary to search a parolee's residence, *Samson* obliterates this precedent, leaving some questions regarding third party privacy unanswered. For example, if the parolee lives in a house with others, can the other housemates' rooms be searched? What if the parolee is just stopping by a friend's house for a brief visit? To drop something off? For an afternoon barbeque? Even if these searches are allowed, when would the search become harassment? For example, can a peace officer follow the parolee around and search every building that he goes in to? These are the crucial questions that must be answered in order to decipher the boundaries of the *Samson* holding.

Post *Samson*, not only can an officer search a parolee's house without cause, but parts of the residence that are not within the parolee's exclusive control can also be searched, and as long as the reason for the search is objectively reasonable, any evidence found can be used either against the parolee or against another person in the residence.<sup>95</sup> For instance, if a searching officer has a reasonable ground to search the residence, if the officer finds some incriminating evidence, such as drugs that belong to the parolee's roommate, such evidence can be used against the roommate, even though that is not the reason that officers were searching the residence in the first place.<sup>96</sup> Thus, *Samson* extends the use of pretextual searches to search a parolee's person, to the search of a

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<sup>94</sup> *Latta v. Fitzharris*, 521 F.2d 246 (1975).

<sup>95</sup> *See People v. Icenogle*, 71 Cal. App. 3d 576 (1977) (upholding a conviction of a parolee's girlfriend when incriminating evidence was found in their joint residence, although the girlfriend was not on parole, no search warrant was used, and the officers were there to only search the parolee's property.).

<sup>96</sup> *See People v. Icenogle*, 71 Cal. App. 3d 576 (1977) (upholding a conviction of a parolee's girlfriend when incriminating evidence was found in their joint residence, although the girlfriend was not on parole, no search warrant was used, and the officers were there to only search the parolee's property.).

parolee's residence. Using an objectively justifiable reason, an officer can enter the private domain of a parolee and use the parolee's status as a pretext to search the home in hopes of finding evidence against another.<sup>97</sup>

The long-prevailing reasonable suspicion standard was thought to safeguard citizens from rash and unreasonable interferences with privacy.<sup>98</sup> Now, however, the search possibilities open to law enforcement are absolutely infinite. *Samson* has opened the floodgates to police misconduct; police are now given broad, sweeping power to conduct parolee searches. It seems as though the Fourth Amendment as well as the California Constitution should be changed to state, "the right of the people [except parolees and their families] to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>99</sup> Because parolees (and now parolees' housemates) do not have a reasonable expectation of privacy that, at least according to the Court, society is prepared to recognize as legitimate, there is no end in sight to the arbitrary, capricious, or harassing searches that have now become a reality.<sup>100</sup>

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<sup>97</sup> See *Motley v. Parks*, 432 F.3d 1072, 1079 (9th Cir. 2005) ("Generally, a condition of parole that permits warrantless searches provides officers with the limited authority to enter and search a house where the parolee resides, even if others also reside there. Nothing in the law justifies the entry into and search of a third person's house to search for the parolee. The Fourth Amendment's protection against unreasonable searches in a person's home is not diminished by the mere presence of a guest in the home. In other words, the parole condition indicates only the parolee's acquiescence to a warrantless search of his own residence. Absent this provision and the existence of exigent circumstances, officers must obtain consent or a warrant to enter a house.").

<sup>98</sup> *Motley v. Parks*, 432 F.3d 1072, 1080 (9th Cir. 2005) (citing *United States v. Gorman*, 314 F.3d 1105, 1111-15 (2002)).

<sup>99</sup> Jessica Natali, CASE NOTE: CRIMINAL PROCEDURE - The Supreme Court Gives Parole Officers Carte Blanche to Invade *Parolees'* Fourth Amendment *Privacy* Rights - [Pennsylvania Board of Probation and Parole v. Scott](#), 524 U.S. 357 (1998), 73 Temp. L. Rev. 451, 484 (2000).

<sup>100</sup> See *People v. Reyes*, 968 P.2d 445, 452 (Cal. 1998) ("Inasmuch as authority to search the residence of a parolee extends to areas which are jointly controlled with other occupants of the residence, the authority to search these premises necessarily portends a massive intrusion on the privacy interests of third persons solely because they reside with a parolee. A parole search must therefore be directly and closely related to parole supervision in order to avoid unreasonable invasion of the privacy interests of the parolee and those

## VII. CONCLUSION

For over forty years, the California Supreme Court has followed the precedent set forth in *People v. Edgar*<sup>101</sup> that,

[b]oth the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in no case shall the right of the people to be secure against unreasonable searches and seizures be violated, the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted. It was rejected when the constitutional provisions were adopted and the choice was made that all the people, guilty and innocent alike, should be secure from unreasonable police intrusions, even though some criminals should escape.<sup>102</sup>

Nevertheless, the Supreme Court in *Samson* disregarded years of precedent to erroneously and unfoundedly conclude that Samson, a parolee, has rights synonymous to those of a prisoner behind bars. Now, parolees have any expectation of privacy that society is, as the Court puts it, prepared to recognize as legitimate. However, if the Court expects parolees to reintegrate themselves into society, they “should not be treated like . . . prisoner[s] . . . ‘It is high time that we recognized that a person must have the freedom to be responsible if he is to become responsibly free.’”<sup>103</sup>

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with whom he resides.’ ‘However, our holding that particularized suspicion is not required in order to conduct a search based on a properly imposed search condition does not mean parolees have no protection. As explained in *People v. Clower*, ‘a parole search could become constitutionally ‘unreasonable’ if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer;’ See also *In re Anthony S.* (holding that a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee); *People v. Bremner* (unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment.)”

<sup>101</sup> *People v. Edgar*, 60 Cal. 2d 171 (Cal. 1963).

<sup>102</sup> *People v. Edgar*, 60 Cal. 2d 171 (Cal. 1963).

<sup>103</sup> Sunny A.M. Koshy, Note: *The Right of [All] the People to Be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*. 39 Hastings L.J. 449, 482 (1988).

