Searches Without Suspicion: Avoiding a Four Million Person Underclass

Tonja Jacobi
Addie Maguire

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Law Commons

Recommended Citation
Tonja Jacobi and Addie Maguire, Searches Without Suspicion: Avoiding a Four Million Person Underclass, 48 BYU L. Rev. 1769 (2023).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol48/iss6/7

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
Searches Without Suspicion: Avoiding a Four Million Person Underclass

Tonja Jacobi* & Addie Maguire+

In Samson v. California, the Supreme Court upheld warrantless, suspicionless searches for parolees. That determination was controversial both because suspicionless searches are, by definition, anathema to the Fourth Amendment, and because they arguably undermine parolees’ rehabilitation. Less attention has been given to the fact that the implications of the case were not limited to parolees. The opinion in Samson included half a sentence of dicta that seemingly swept probationers into its analysis, implicating the rights of millions of additional people in the United States. Not only is analogizing parolees and probationers not logically sound because the two groups differ in important respects, but the Court made this proclamation without any briefing on whether it is constitutional or practically advisable to treat probationers’ rights in the same restrictive way as the Court ultimately determined was appropriate for parolees. Such preemptive behavior by the Court is contrary to well-established norms of jurisprudence, and for good reason: the resulting extemporaneous half-sentence addressing the rights of probationers has created considerable uncertainty as to its precedential power, and the circuits have since applied the decree in disparate ways. We argue that the substantial differences between probationers and parolees make the extension to probationers flawed. Permitting warrantless, suspicionless searches of probationers defeats the rehabilitative purpose of probation, risks creating an underclass of millions of people, and is likely to particularly harm already marginalized communities. Finally, there is no limiting principle to the Court’s logic, and so its inclusion of probationers may be a slippery slope to undermining the rights of many others.

*Professor of Law and Sam Nunn Chair in Ethics and Professionalism, Emory Law School; Tonja.Jacobi@Emory.edu.

+Gideon’s Promise Fellow, Orleans Public Defenders; addiemaguire2021@nlaw.northwestern.edu.
INTRODUCTION

In critiquing the Supreme Court’s embrace of one type of suspicionless search, Justice Sotomayor wrote in dissent: “[T]his case tells everyone, white and black, guilty and innocent... that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”

Justice Sotomayor was objecting to the Court permitting searches that followed unconstitutional stops if, during the stop, an officer found an outstanding warrant. She cited statistics of the

1. Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (permitting as constitutional searches that follow an illegal stop if there is attenuation between the unconstitutional police conduct and the evidence found).
2. Id. at 2070–71 (Justice Sotomayor, dissenting).
number of outstanding warrants in Ferguson, Missouri,\(^3\) which, she argues, made it possible for the police to target individuals and groups based on characteristics such as race.\(^4\) Her dissent gained extensive public attention\(^5\) due to heightened concerns about the deaths of minorities during police stops.\(^6\) Yet, a potentially far more pervasive and pernicious form of suspicionless stops has received little attention. In *Samson v. California,*\(^7\) the Supreme Court upheld warrantless, suspicionless searches of parolees.\(^8\) Not content to simply undermine the rights of the almost one million people on parole,\(^9\) the majority opinion included half a sentence of dicta that seemingly swept into its analysis probationers as well,\(^10\) implicating the rights of nearly four million additional people.\(^11\)

Suspicionless searches are, by assumption, anathema to the Fourth Amendment,\(^12\) and *Samson* was criticized for breaching that principle, as well as for the more practical harm it posed to the rehabilitation of parolees.\(^13\) Far less attention has been given to its potential exponential effect if probationers are also excluded.

3. *Id.* at 2068 (referring to the “‘staggering’ numbers of warrants, ‘drawers and drawers’ full”) (quoting Dept. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 47, 55 (2015)).
4. *Id.* at 2071 (“We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’”)
5. See, e.g., Matt Ford, *Justice Sotomayor’s Ringing Dissent,* THE ATLANTIC (June 20, 2016), https://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/ (“in a thundering dissent, Justice Sonia Sotomayor was less forgiving” of the police than the majority opinion); Maya Rhodan, *Sonia Sotomayor Writes Scathing Dissent in Illegal Police Searches Case,* TIME (June 20, 2016), https://time.com/4375339/sonia-sotomayor-traffic-stop-dissent-utah-streiff/ (“the ruling is notable for the scathing, personal dissent of Justice Sonia Sotomayor.”).
8. *Id.* at 857 (“Thus, we conclude that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.”).
10. *Id.* at 854 (“[A] State’s interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.”).
11. See discussion infra Section II.B.1.
12. *McDonald v. United States,* 335 U.S. 451, 456 (1948) (“We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.”).
13. See infra Section I.B.2 and note 32.
from ordinary Fourth Amendment protections.\textsuperscript{14} By making this proclamation in a half-sentence of dicta—lumping probationers and parolees together as though interchangeable—the Court created considerable uncertainty for millions of probationers and for the lower courts, who have interpreted this throwaway decree in disparate ways. At one point, the opinion of the Court acknowledged in passing that there were meaningful differences between parolees and probationers, particularly that parolees have less of an expectation of privacy than probationers—the key determinant making suspicionless searches of parolees permissible.\textsuperscript{15} But later, it addressed the government interest in warrantless searches for probationers and parolees interchangeably, seemingly permitting suspicionless searches of probationers.\textsuperscript{16} This ambiguity has led circuits to split on the issue, and, consequently, the rights of millions are in flux.\textsuperscript{17} There is good reason for some courts to resist applying \textit{Samson}'s rule to probationers: probationers and parolees differ in key ways,\textsuperscript{18} and warrantless, suspicionless searches of probationers defeat the purpose of probation and make it less likely that probationers will be able to successfully rehabilitate from their crimes.\textsuperscript{19} Furthermore, we show that such searches create a slippery slope to undermining the rights of others who resemble probationers and parolees because the Court provided few logical boundaries by which to limit the underclass of people to whom the Fourth Amendment does not apply.\textsuperscript{20} And that underclass is significant in size. The number of probationers in the United States far outnumber parolees or prisoners. In 2020, one in 66 people in the United States were on some sort of supervision, and nearly one in 100 was on probation.\textsuperscript{21} Consequently, the Court's one seemingly

\begin{itemize}
\item \textsuperscript{14} See infra Section I.A.
\item \textsuperscript{15} Samson v. California, 547 U.S. 843, 850 (2006) ("[P]arolees are on the ‘continuum’ of state-imposed punishments. On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.").
\item \textsuperscript{16} Id. at 853 ("[T]his Court has repeatedly acknowledged that a State’s interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.").
\item \textsuperscript{17} See infra Section I.C.
\item \textsuperscript{18} See infra Section II.B.1.
\item \textsuperscript{19} See infra Section II.B.2.
\item \textsuperscript{20} See infra Sections I.B.2 and II.B.
\item \textsuperscript{21} See infra note 232.
\end{itemize}
off-hand remark has the potential to impinge upon millions of Americans’ fundamental Fourth Amendment rights.\(^{22}\)

The Court’s allowance of suspicionless searches of both parolees and probationers is contrary to foundational principles of Fourth Amendment jurisprudence.\(^{23}\) In the probationer and parolee cases—particularly Samson and United States v. Knights,\(^ {24}\) an earlier case in which the Court allowed a search of a probationer based only on reasonable suspicion—the Court developed a new approach inconsistent with any other area of the law. The Court did not assume the necessity of a warrant for a search, as is usual;\(^ {25}\) it ignored the traditional requirement of probable cause; and it declined to analyze the facts under a traditional special needs analysis.\(^ {26}\) Instead, it embarked on a reasonableness balancing test—a test that was not seen before, and has not been seen since, the probationer and parole cases.\(^ {27}\) By failing to follow traditional Fourth Amendment jurisprudence, the Court essentially created a category of second-class citizens to whom Fourth Amendment protections do not apply.\(^ {28}\)

The Court also diverged from its practice of being briefed fully on an issue before making a sweeping decision. Instead of hearing arguments on the implications of warrantless, suspicionless searches of probationers, the Court severely altered probationers’ rights in dicta in a case concerning a parolee, not a probationer. By doing so, the Court did not grant itself the opportunity to analyze the differences between the two groups—besides to acknowledge briefly that differences existed.\(^ {29}\) Nor did it consider whether it is constitutionally sound or practically advisable to treat probationers’ rights in the same restrictive way as the Court ultimately determined

\(^{22}\) See infra Section II.B.2.
\(^{23}\) See infra Section I.A.
\(^{25}\) Johnson v. United States, 333 U.S. 10, 14 (1948) (emphasizing that searches without warrants must be “exceptional”); Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967) (“[O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.”).
\(^{28}\) See infra section I.B.2.
\(^{29}\) See Samson, 547 U.S. at 850.
was appropriate for parolees. Instead, the Court seemingly curtailed probationers’ rights without even being presented the opportunity to do so in a case directly addressing the issue. This flies in the face of Supreme Court practice to only consider issues before it and to decline to make sweeping declarations. Samson was devastating to parolees, but its dicta concerning probationers is even more concerning; it indicates that the Court is so willing to restrict the rights of this group that it did not even need to wait for a case on point.

Many scholars have critiqued Samson’s reasoning as it applies to parolees. Others have criticized Samson’s results, arguing that warrantless, suspicionless searches defeat the rehabilitative and reintegrative goals of probation and parole. However, as of yet,
no authors have seriously discussed the significance of the differences between probationers and parolees in the context of *Samson* and considered whether the two groups can be treated interchangeably, as the Court’s extremely brief consideration suggests they can. We argue that they cannot, and that the way the Court treated them as interchangeable was especially harmful, both to the interests of probationers and to the notion of judicial constraint.\textsuperscript{33}

The differences between probationers and parolees highlight the ways that *Samson’s* reasoning cannot just be applied *pro forma* to probationers.\textsuperscript{34} First, probationers and parolees have meaningfully different expectations of privacy because of their different levels of supervision: probation is given for less serious crimes, and parole is given for more serious crimes. Likewise, the governmental interest balancing the reduction of privacy in preventing parole-eligible crimes, such as murder, is far greater than its interest in preventing probation-eligible crimes, like shoplifting. Second, incarceration itself, which typically applies to parolees but not probationers, impacts expectations of privacy. Third, probation’s primary purpose is to rehabilitate probationers after their crime, whereas parole serves to reintegrate parolees into the community only once they have already been rehabilitated in

\begin{flushright}
\end{flushright}

\textsuperscript{33} It is well understood that addressing issues not briefed is contrary to judicial propriety, and that judges and justices who do so accordingly make efforts to mask such behavior. \textit{See} Lee Epstein, Jeffrey A. Segal, & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POLI. SCI. REV. 845 (1996) (arguing that “issue fluidity,” whereby Justices address legal questions in their opinions that were not presented to them in the legal briefs, is considered inappropriate as violating an important norm); S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, in SUPREME COURT ACTIVISM AND RESTRRAIN (Stephen C. Halpern & Charles M. Lamb eds., 1982) (showing that nonetheless some Justices create issues that were not presented to them, via issue fluidity); Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POLI. SCI. REV. 691 (1995) (same); Vanessa A. Baird & Tonja Jacobi, *How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court*, 59 DUKE L.J. 183 (2009) (showing that because issue fluidity raises problems of judicial legitimacy, Justices will go to the effort of signaling issues not before them that they are interested in and waiting typically five years for a new case that directly raises the issue in order to address it).

\textsuperscript{34} \textit{See infra} Section II.B.1.
prison; these different purposes require different restrictions on movement, employment, and association. Fourth, parolees may need more supervision than probationers because of the more severe nature of their crimes and the more stringent regulations they are subject to.

None of these differences were before the Court in *Samson* because the issue of searches of probationers was never explicitly raised or briefed independent of parolees. If it had been, the Court may have come to appreciate that applying *Samson*’s off-the-shelf logic to probationers is not only inapt but also dangerous: we show that it undermines the rehabilitative and reintegrative goals of probation itself; first, that it is harmful to judicial legitimacy in overreaching beyond a case concerned only with parolees and arguably more legislative in nature due to the breadth of its application; second, that the Court is more likely to make errors in the cost-benefit analysis implicit in the judgment by incorporating six times as many people in the class; and third that is harmful to equity in the criminal justice system generally, creating second-class citizens whose rights are not respected, and also affecting broader communities, particularly communities of color. Furthermore, there is no limiting principle that prevents courts from applying the same logic to other groups beyond probationers. There is nothing to stop the same logic being expanded, for example, to those on release awaiting trial or anyone who is on supervised outpatient drug or alcohol treatment, and then to other marginalized groups.

In Part One, we discuss the background of Fourth Amendment law that sets the stage for the Court’s opinion in *Samson*. We trace the development of the Court’s jurisprudence surrounding probationers and parolees to assess how the Court ended up with such an unusual opinion in *Samson*. Prior cases such as *Griffin v. Wisconsin* and *United States v. Knights* reduced Fourth Amendment rights for probationers and parolees, but we argue that *Samson* went further than any prior case, in a way that deviated from how the Court decides all other cases. Further, we describe how the uncertainty surrounding the dicta in *Samson* has resulted in a circuit split, leaving the constitutional rights of millions of people unclear.

In Part Two, we discuss the implications of the Court’s holding in *Samson* for parolees and then outline the differences between probationers and parolees, arguing that the negative effects of *Samson* for parolees are greatly exacerbated for probationers because of key differences between the two groups. We next show that treating probationers like parolees is not only inapt but dangerous: to judicial legitimacy in overreaching in a case concerned only with parolees; and to equity in the criminal justice system generally, with particular significance for racial equity, as traditionally marginalized minority groups are most likely to be adversely affected. Finally, in the conclusion, we argue that the impact of expanding *Samson*’s reach to probationers may be broader yet: in veering so significantly from traditional Fourth Amendment jurisprudence, the Court has opened the door to do so for any other group it decides does not deserve the traditional protections of the Fourth Amendment.

I. THE UNCERTAIN AND TREACHEROUS STATUS OF PROBATIONERS

According to the Court’s jurisprudence surrounding probation and parole, the Fourth Amendment simply does not apply to probationers and parolees in the same way that it does to everyone else.\(^37\) In this Part, we introduce the most basic Fourth Amendment principles; later, in section I.B., we show how both the Supreme Court and lower courts have failed to follow these principles in cases dealing with probationers and parolees. We also provide background for our later argument that *Samson* continued the Court’s trend of splitting from traditional Fourth Amendment analysis in numerous ways—from the suspicion, or lack thereof, that searches must be based upon, to the interests required for a special needs search to be deemed necessary. Each of these differences have implications both for the rights of probationers and parolees and the broader constitutional right to privacy.

---

37. *See infra* Section I.B.2.
A. A Dramatic Break from Traditional Fourth Amendment Law

At its most basic level, the Fourth Amendment stands for the principle that a search without a warrant is unreasonable. Yet, this Article shows that the Court has broken from this fundamental tenet with respect to probationers’ and parolees’ rights. The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches.” That right is predicated on the importance of neutrality: to be valid, an independent magistrate must issue the warrant based upon probable cause, a determination that cannot reliably be made by an “officer engaged in the often competitive enterprise of ferreting out crime.”

Despite this grounding axiom, police officers may conduct searches without warrants and do so every day. But a search without a warrant is the exception to the rule, and a warrantless search is presumed to be unconstitutional unless officers can point to a reason that their search fits in an exception—for example, a search for an object that may be destroyed if the search is delayed, or a search of a person who will naturally move, as compared to an immovable object like a house. However, as we show in section I.B.2, the Court has failed to respect the sanctity of that basic principle when it comes to probationers and parolees, effectively creating an enormous category of people for whom the presumption of unconstitutionality of a warrantless search does not apply.

38. Katz v. United States, 389 U.S. 347, 357 (1967) (“Searches conducted without warrants have been held unlawful ’notwithstanding facts unquestionably showing probable cause,’ for the Constitution requires ’that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.’”) (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)); Wong Sun v. United States, 371 U.S. 471, 481–82 (1963)).
39. U.S. CONST. AMEND IV
40. Johnson v. United States, 333 U.S. 10, 14 (1948) (finding a search of a defendant’s home unconstitutional when there are no exceptional circumstances that prevent searching officers from first seeking a warrant from an independent magistrate).
41. See Jacobi, supra note 32.
42. Johnson, 333 U.S., at 15 (“There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate’s warrant for search may be dispensed with.”).
43. For example, in Sausen v. California, the Court declined to analyze whether a warrant would have been practicable in the situation, even though the facts of the case—as discussed infra in section I.B.2.—indicate that such a warrant could reasonably have been obtained; because the Court did not even proceed down this line of inquiry, it sent the message that it was simply not applicable to probationers and parolees. 547 U.S. 843.
This line of cases also broke from the second fundamental principle of the Fourth Amendment—that with or without a warrant, searches must be predicated on probable cause. Probable cause is defined as "'a reasonable ground for belief of guilt,' . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized." Without a requirement for probable cause, police could search anyone at any time without needing to articulate a reason to search this particular person; the Fourth Amendment protects against these sorts of suspicionless searches by requiring a clear articulation of the bases for suspicion of a specific crime having been or being committed by that individual. The high threshold of probable cause protects the right of people to be free from searches while going about their daily lives. But as we show in section I.B., probationer and parolee cases have disregarded the traditional constitutional requirement of probable cause for searches without even acknowledging that the requirement exists, instead upholding searches based not only on a lack of probable cause, but on no suspicion at all. In so doing, these cases are a departure from Fourth Amendment norms.

Despite the importance of the warrant and probable cause requirement, Fourth Amendment jurisprudence contains numerous exceptions to one or both of those elements. However, there are two central limits on these exceptions. The first is the strict curbing of the extent of any exception, creating a stringent proportionality between the nature of the intrusion and the level of suspicion

44. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)); Brinegar v. United States, 338 U.S. 160, 164 n. 4 (1949) (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)) ("The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable . . . . On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause . . . . the search and seizure are valid.").

45. See, e.g., Carroll, 267 U.S. at 154 (1925) (analyzing searches of vehicles: persons "have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise").

46. Exceptions include searches incident to arrest, United States v. Robinson, 414 U.S. 218 (1973) (upholding an officer’s search of a person and packages found on person while conducting an arrest); searches conducted with consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (upholding searches where voluntary and knowing consent is given); searches of automobiles, Carroll, 267 U.S. (upholding probable cause searches of automobiles); and searches in exigent circumstances, Mincey v. Arizona, 437 U.S. 385 (1978) (finding that a homicide alone was not sufficiently exigent to allow for a four-day warrantless search).
required for that intrusion; the second is the careful scrutiny of the steps by which an exception is defined. The Samson Court flouted both of these important limits.

First, the privacy protections that result from the requirement for probable cause are so important that the Court has historically allowed searches predicated on the lesser standard of reasonable suspicion only in extremely limited circumstances, and only for very narrow purposes. For example, the Court in Terry v. Ohio allowed a limited stop and frisk based only on reasonable suspicion, not probable cause. But in so holding, the Court noted that police could stop someone based on reasonable suspicion only for a very brief period of time, and a frisk of them must be limited to only what would be necessary to discover weapons. Despite recognizing that police had an interest in conducting searches because of the dangerous nature of their jobs, the Court limited the scope of the search, both in terms of timing and level of intrusion, because of the privacy interests protected by the Fourth Amendment: “Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security . . . .” In section I.B.2, we show that the Court has disregarded this careful weighing of the intrusion on privacy against a lower level of suspicion in cases concerning probationers and parolees. In these cases, the Court instead permits full searches without any suspicion at all and without cabining either the circumstances or the purpose of the searches.

One of the few areas where suspicionless searches are permitted is the special needs exception. As we show in section I.B.2, the

47. Terry v. Ohio, 392 U.S. 1 (1968), discussed immediately infra.
48. Discussed infra, text starting at note 54.
49. Terry, 392 U.S. at 27.
50. Id. at 31.
51. Id. at 25–26. (“A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation.”).
52. Id. at 24–25.
53. As we argue in section I.B.2., Samson v. California is the key example of the Court distancing itself from the Fourth Amendment in cases concerning probationers and parolees. Although Samson allowed police to search an entire category of people without any suspicion whatsoever, the Court did not counteract this low level of suspicion by severely limiting the extent of the ability to search, in line with the balancing principle forcefully articulated in Terry, Id. at 27. Instead, Samson permitted full searches be undertaken without any suspicion whatsoever. 547 U.S. 843, 856 (2006).
Court’s deviation from careful delineation of the special needs exception illustrates the second failure of the probation and parole cases in defining a Fourth Amendment exception: failing to follow the carefully constrained parameters for special needs searches that precedent dictates. Ordinarily, the Court allows searches without individualized probable cause or suspicion only in constrained categories where “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”

This exception allows for searches of groups of people, rather than suspicious individuals, but since such searches have the potential to drastically limit Fourth Amendment protections, the Court has “closely guarded” this category of searches, only upholding them in extremely limited circumstances where they are absolutely necessary and subjecting them to added protections. To determine whether a search fits into the special needs exception, courts engage in a balancing test, weighing the invasiveness of a search with the existence of an important governmental interest—separate from law enforcement goals—that cannot be fulfilled with an individualized suspicion requirement.

When analyzing a special needs search, the first inquiry must be whether the scheme itself—rather than the specific application of that scheme—passes this balancing test. Courts analyze whether there is a special need that is “substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal protections.”


55. Chandler v. Miller, 520 U.S. 305, 309, 318 (1997) (“Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”); see Ferguson v. City of Charleston, 532 U.S. 67, 83 (2001) (finding urine tests of women giving birth unconstitutional, despite fact that searches could arguably have a non-law enforcement purpose in maintaining the health of both mother and child).

56. Skinner v. Ry. Lab. Exec. Ass’n, 489 U.S. 602, 624 (“In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.”).

requirement of individualized suspicion.” They then weigh that interest against the level of intrusion the search requires, based both on an individual’s subjective level of privacy as well as the intrusiveness of the search itself.

Historically, only two types of categories satisfy the governmental interest requirement: searches undertaken for preventative safety purposes, such as sobriety checkpoints and border patrols, and those in which the searching party has a supervisory relationship over the searched party, such as searches of schoolchildren and employees. For example, the Court has upheld special needs searches for drugs in schools by weighing the privacy interest of students, the intrusion of the search, and the important, non-law enforcement needs for the search.

To illustrate: in *Vernonia School District 47J v. Acton*, the Court upheld mandatory, suspicionless urinalysis drug testing of high school athletes. The Court first recognized the diminished expectations of privacy of schoolchildren because of the power of school administrators: “[T]he nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” The children’s diminished expectation of privacy was coupled with the fact that the search at

---

58. *Chandler*, 520 U.S. at 318 (holding statute requiring elected officials to submit to drug testing unconstitutional as a special needs search because there was not a sufficient special needs interest to outweigh officials’ Fourth Amendment privacy interests).


63. Id. at 665.

64. *Id.* at 654 (“Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, i.e., the right to come and go at will . . . . When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them.”).
issue in the case was not particularly intrusive.\textsuperscript{65} Then, the Court weighed the schoolchildren’s limited expectations of privacy with the substantial interest in the search itself. The Court compared the interests in this case to interests accepted in prior cases, holding that deterring children from using drugs was equally as important as ensuring that drugs did not cross the border or that employees in certain professions were not on drugs—other areas in which the Court had previously upheld special needs searches.\textsuperscript{66} In particular, the Court noted that there was a widespread drug problem within the school and that students on drugs could harm both themselves and other athletes during sporting events.\textsuperscript{67} Finally, the Court analyzed the effectiveness of the regime at achieving that substantial interest.\textsuperscript{68}

In each of these cases, and across special needs jurisprudence, two consistent themes emerge that are highly significant. First, the importance of the search is a necessary factor in the analysis—without a substantial government interest, the search would not have been constitutional, regardless of whether the plaintiffs had diminished expectations of privacy. Second, the Court weighs the intrusion and its impact against that important interest. We show in section I.B that neither of these expectations have been met when it comes to applying special needs to parolees and promotions.

A third theme of significance is what has not emerged in the cases: significantly, the Court has not extended the substantial interest factor to many searches. Instead, throughout special needs cases, the Court has returned repeatedly to the same categories of searches—administrative searches, protective policing, and searches predicated on a supervisory relationship, like those in schools,

\textsuperscript{65} Id. at 658 (noting that the conditions of the search “are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible”).

\textsuperscript{66} Id. at 661 (“That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs . . . or deterring drug use by engineers and trainmen . . . ”).

\textsuperscript{67} Id. at 661–62 (“Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”).

\textsuperscript{68} Id. at 663 (noting that search need not be the least intrusive search practicable, but it must be tailored to protecting the substantial governmental interest).
prisons, and certain workplaces. The narrowness of the categories emphasizes just how important Fourth Amendment protections are by ensuring that those protections are not broadly limited except in the most important of contexts.

As we discuss in sections I.B.1 and I.B.2, the Court has essentially ignored the warrant requirement of the Fourth Amendment as it applies to probationers and parolees. In this way, searches of probationers and parolees are different from searches of anyone else—because probationers and parolees have a diminished expectation of privacy, the Court does not even engage in the question of whether there is a compelling reason to subject them to warrantless and suspicionless searches. The Court has ignored the important interests furthered by those steps of analysis and has opened the door for lowered Fourth Amendment protections. Ultimately we show that this endangers the rights not only of probationers and parolees, but also for people generally.

B. The Court’s Initial Treatment of Parolees and Probationers

In this section, we outline the history of the Court’s analysis of searches of probationers and parolees that led to the dramatic curtailment of rights in Samson. We argue that not only is the reasoning in Samson flawed—both doctrinally and in the real-world consequences that resulted from the decision—but the opinion also left open the boundaries of when those searches are constitutional. We summarize the circuit split that has arisen in the fifteen years since Samson and call for clarification from the Court. We then show that the danger posed by Samson applies not only to parolees and probationers; it has the potential to erode Fourth Amendment rights more generally.

69. See City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (surveying the “limited circumstances” in which the Court has upheld special needs searches and finding a traffic stop scheme unconstitutional where the primary purpose was to detect narcotics).

70. See the discussion in section I.B.2 concerning Samson v. California, in which the Court jumped to a “totality of the circumstances test” instead of first answering the key question of whether a sufficiently important interest apart from law enforcement existed. But a balancing test is only appropriate once the programmatic substantial interest has been satisfied, not before. By applying the totality of the circumstances test without having first conducted the first prong of the analysis, the Court ignored the warrant requirement as it applies to probationers.

71. See the conclusion, infra.
1. The Slide Toward Susicionless Searches of Probationers: Knights and Griffin

Originally, the Supreme Court’s approach to the question of probationer searches was more protective than its ultimate position in Samson. The Court first considered searches of probationers in detail in Griffin v. Wisconsin, where it upheld warrantless searches of probationers’ homes based on reasonable suspicion instead of the standard probable cause requirement.72 Joseph Griffin was on probation for resisting arrest, disorderly conduct, and obstructing an officer. His probation officer’s supervisor received information from a source who purported to be an officer in the local police department. The tipster claimed that there were guns in Griffin’s apartment, a violation of his probation conditions.73 The tip from police was at issue in the case—the dissent notes that it was “an unverified tip from an unknown source.”74 Instead of confirming the tip’s validity, Griffin’s probation supervisor searched his apartment while accompanied by police and found a gun.75 Wisconsin Department of Health and Social Services regulations allowed probation officers to search a probationer’s home so long as the probation officer’s supervisor approved of the search and there were reasonable grounds to believe that there was contraband in the probationer’s home.76

The Court upheld the constitutionality of both the Wisconsin probation regulation and the specific search.77 The Court found that the warrantless search regulation furthered the special need of ensuring that probationers were meeting the terms of their probation.78 In particular, the Court expressed concern that without a provision allowing for warrantless searches, probationers would

72. Griffin v. Wisconsin, 483 U.S. 868, 875–76 (1987) (“We think it clear that the special needs of Wisconsin’s probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by ‘reasonable grounds,’ as defined by the Wisconsin Supreme Court.”).
73. Id. at 871; id. at 885 (Blackmun, J., dissenting).
74. Id. at 887–88 (Blackmun, J., dissenting) (“Even assuming that a police officer spoke to Mr. Lew, there was little to demonstrate the reliability of the information he received from that unknown officer.”).
75. Id. at 871 (majority opinion).
76. Id. at 870–71.
77. Id. at 868.
78. Id. at 875.
come to learn that so long as their conduct was not suspicious enough to give rise to probable cause, they were safe from searches.\textsuperscript{79} Yet importantly, the Court placed limits on the searches, relying on the existence of safeguards to maintain Griffin’s expectation of privacy, including the fact that his probation officer was an employee of the State Department of Health and Social Services, not a police officer.\textsuperscript{80} The Court reasoned that a probation officer, unlike a police officer, would have a probationer’s wellbeing in mind, not only the public’s welfare.\textsuperscript{81} Because the relationship was not entirely adversarial, a probationer would not entirely lose their expectation of privacy as a result of the warrantless search powers.\textsuperscript{82}

The potentially harsh impact of the ruling was further constrained because the Wisconsin provision only allowed for warrantless searches based on reasonable suspicion of a probation violation, not reasonable suspicion that a crime had been committed.\textsuperscript{83} The Court’s choice of analogies shows the importance of the limited rationales for searches of probationers; by comparing these searches to “warrantless, work-related searches of employees’ desks” and “school officials[’] . . . warrantless searches of some student property,” the Court emphasized that it was only approving those searches pursuant to a specific regulatory scheme that presented a special need—in this case, ensuring that probationers were not violating the terms of their probation.\textsuperscript{84}

The reasoning behind the holding does not extend to searches for other purposes. If probation officers were granted permission to search based on reasonable suspicion of criminal activity rather

\textsuperscript{79} Id. at 878 (“The probationer would be assured that so long as his illegal (and perhaps socially dangerous) activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected.”).

\textsuperscript{80} Id. at 876.

\textsuperscript{81} Id.

\textsuperscript{82} Id. The Court noted that Griffin’s probation officer was statutorily required to provide him counseling to further his development as well as evaluate his need for continued supervision. Id. at 876–77.

\textsuperscript{83} Id. at 870–71. The Wisconsin provision “permit[ed] probation officers to search a probationer’s home without a warrant as long as his supervisor approve[d] and as long as there [were] ‘reasonable grounds’ to believe the presence of contraband.” Id.

\textsuperscript{84} Id. at 873–74. “These [probation] restrictions are meant to assure that probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer’s being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed.” Id. at 875 (citation omitted).
than reasonable suspicion of a probation violation, the clear special needs interest in ensuring that probationers are adhering to probation conditions no longer exists. Similarly, without reasonable suspicion at all, the narrowly tailored special need vanishes—no special need exists that would allow for such an unusual search of every probationer. In fact, in resting its holding on the fact that if probable cause were required, probationers would come to expect searches, it is clear that the alternative the Court was contemplating was probable cause, not abolishing the need for any suspicion at all.

Furthermore, the logic of Griffin would not hold if the search was conducted by a police officer, because the Court relied on the fact that a probation officer would be searching with a probationer’s wellbeing in mind. If the search was conducted by a police officer, that safeguard would vanish. Fourth Amendment jurisprudence explicitly requires that special needs searches must be “beyond the normal need for law enforcement”; this requirement is necessarily defeated when police officers search probationers to determine if they are breaking the law. Accordingly, unless warrantless searches of probationers are solely for the probationer’s or the public’s wellbeing, those searches cannot be upheld under a special needs scheme on the logic of Griffin.

Yet, ten years later, despite the seemingly deliberate narrowness of Griffin, the Court expanded the holding in United States v. Knights to exactly what it had chosen to avoid in Griffin: allowing for warrantless searches of probationers so long as there was reasonable suspicion. In Knights, the condition under review

85. Id. at 878.
86. Id. at 876–77.
87. Id. at 873. (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). In T.L.O., Justice Brennan discussed the importance of assessing whether a special needs fit into the administrative search exception prior to reaching a balancing test: “forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that would otherwise like to conduct. But this is not an unintended result of the Fourth Amendment’s protection of privacy; rather, it is the very purpose for which the Amendment was thought necessary.” T.L.O., 469 U.S. at 357.
permitted searches undertaken for the purposes either of monitoring the probationer or for law enforcement.\textsuperscript{89}

As a condition of his probation, Mark Knights signed a probation order that mandated that he would “[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer.”\textsuperscript{90} While on probation, Knights came under suspicion for acts of vandalism against his local electric company.\textsuperscript{91} The electric company had been vandalized nearly 30 times after Knights’ service was cut off for theft of electricity.\textsuperscript{92} A detective at the local sheriff’s department, Todd Hancock, noticed that the acts had occurred at roughly the same time as Knights’ court dates concerning that theft, and that Knights had been stopped near electrical lines with gasoline in his truck.\textsuperscript{93} Subsequently, one of the electric company’s vaults was pried open and set on fire, causing nearly $1.5 million in damage.\textsuperscript{94} Suspecting Knights, Hancock set up surveillance on his apartment. The next morning, Knights left his home carrying cylindrical objects and threw them in a nearby river. Hancock also observed suspicious objects in Knights’ yard, including a Molotov cocktail and gasoline.\textsuperscript{95} Hancock did not try to obtain a warrant, instead relying on Knights’ probation condition allowing for warrantless searches, which he learned of after reading Knights’ file while investigating the crime.\textsuperscript{96} Upon searching

\begin{footnotes}
\footnote{89. Id. at 114. In its holding, the Court reversed the Ninth Circuit, which had found that “the search condition in Knights’ probation order must be seen as limited to probation searches, and must stop short of investigation searches.” Id. at 116 (quoting United States v. Knights, 219 F.3d 1138, 1142–43 (9th Cir. 2000)).}
\footnote{90. Id. at 114.}
\footnote{91. Id. at 114–15.}
\footnote{92. Id. at 114.}
\footnote{93. Id. at 115.}
\footnote{94. Id. at 114. Knights had allegedly removed the brass padlocks securing the vault and then used gasoline as an accelerant to start the fire. Id.}
\footnote{95. Id. at 115.}
\footnote{96. Id. at 115 n.1. When the officer had pulled Knights’ file, he had seen the probation order requiring Knights to submit to warrantless searches, and so “believed a warrant was not necessary.” Id. at 115. However, the Court did not provide any indication that there was a reason the officer could not have obtained a warrant.}
\end{footnotes}
Knights’ apartment, Hancock found further evidence of Knights’ involvement with the crime.97

The Court upheld the probation condition, even though it did not include the requirement that the search be only based on suspicion of a probation violation, as it had in Griffin.98 Instead, the Court held that only reasonable suspicion of a crime was required because probationers were more likely than others to break the law—and so there was an important governmental interest—and that Knights did not have a strong privacy interest because he was on probation.99

The manner by which the Knights Court expanded Griffin is telling. The Court declined to accept the Government’s claim of a broad power to search based on consent—that due to the nature of the search condition, Knights had agreed to a warrantless search by agreeing to be on probation100—as it later did in part in Samson.101 Instead, the Court rested its analysis exclusively on the special needs of the search. But simultaneously, it strayed from the usual structure and confines of special needs searches: that the primary purpose for the search was not law enforcement. It thereby implicitly rejected the prior limit from Griffin that a warrantless search was constitutional only where it was undertaken to serve the special needs purpose of ensuring that a probationer was complying with the terms of his probation.102 Despite failing to

97. Id. (“The search revealed a detonation cord, ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock stamped ‘PG&E.’”).
98. Id. at 122.
99. Id. at 121. (“The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual’s privacy interest reasonable.”).
100. Id. at 118 (“We need not decide whether Knights’ acceptance of the search condition constituted consent in the Schneckloth sense of a complete waiver of his Fourth Amendment rights, however, because we conclude that the search of Knights was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances,’ Ohio v. Robinette, 519 U.S. 33, 39 (1996), with the probation search condition being a salient circumstance.”).
101. See infra Section I.B.2.
102. Knights, 534 U.S. at 116. In its holding, the Court noted that the probation condition did not indicate that searches were limited to only those bearing on probationary status. Id. The Court held that the Ninth Circuit’s analysis ran counter to “Griffin’s express statement that its ‘special needs’ holding made it ‘unnecessary to consider whether’ warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.” Id. at 117–118 (quoting Griffin v. Wisconsin, 483 U.S. 868, 880 (1987)).
establish an ordinary basis for the special need, the Court did not establish any other basis. Instead, it simply abandoned assessing whether a special needs warrant exception applied at all, seemingly just presuming the existence of such an exception by moving to the secondary analysis of a totality of the circumstances test, which it promptly found was satisfied.103

In this way, the Court fell into the trap that Justice Blackmun addressed in his dissent in Griffin: of forgetting to first ask the question of whether a specific search fits into the special needs exception before addressing whether the balancing test for a special needs search weighs in favor of the governmental interest in the search.104 That is the ordinary structure of special needs search exceptions to the probable cause and a warrant requirement.105 Justice Blackmun warned that if instead, as it did in Knights, the Court jumps ahead to the balancing test, it skips the crucial step in the analysis of determining whether a search meets the special needs exception to the warrant requirement: assessing whether the traditional warrant or probable cause requirement is impracticable, and whether the search is primarily for law enforcement purposes.106

If the Court had conducted this first analytical inquiry, it would have found that justifying the application of the exception was much harder in Knights than in Griffin. In Griffin, a probation officer

103. Id. at 118.
104. Griffin, 483 U.S. at 881 (Blackmun, J., dissenting) ("The warrant and probable-cause requirements provide the normal standard for ‘reasonable’ searches. ‘Only when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a ‘balancing’ test to formulate a standard of reasonableness for this context.’") (quoting O'Connor v. Ortega, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting)).
105. This process occurs in every other area in which the Court has upheld special needs searches. See, e.g., Chandler v. Miller, 520 U.S. 305 (1997) (striking down statute that allowed for drug testing of state officials even though the search was non-invasive because the state had not made a showing of a sufficiently compelling special need); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665–66 (1989) (holding that where "a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context"); Vernonia School District 47 v. Acton, 515 U.S. 646, 653 (1995) (holding that "[a] search unsupported by probable cause can be constitutional, we have said, ‘when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.’") (quoting Griffin, 483 U.S. at 873). See discussion supra section I.A.
106. Griffin, 483 U.S. at 881 (Blackmun, J., dissenting).
conducted a search to ensure that a probationer was complying with the terms of his probation, creating a non-law enforcement search by a non-police official. In contrast, Knights was searched by a law enforcement agent for a purely law enforcement purpose: to catch him after he committed a crime. Besides briefly discussing concerns with recidivism and probationers’ incentives to destroy evidence, the Court did not address any specific aspects of the situation that made obtaining a warrant impossible. Indeed, the facts of the case demonstrate that the detective could easily have obtained a warrant—he had been investigating Knights for weeks, he had surveillance evidence of Knights’ highly suspicious behavior, and he had personally observed extensive incriminating evidence. The officer did not avoid seeking a warrant because it was impracticable; he chose not to apply for a warrant specifically because he knew Knights was subject to a warrantless search condition. Because the search was conducted for a law enforcement purpose, and a warrant was easily attainable, Knights constitutes a substantial, warned-against expansion of Griffin.

The Court in Knights departed significantly from normal Fourth Amendment jurisprudence by applying a totality of the circumstances test without first establishing a special need exists. In doing so, the Court essentially ignored the warrant requirement of the Fourth Amendment as it applies to probationers. But this departure from Fourth Amendment doctrine was only the beginning—in later cases, the Court went even further.

2. Jettisoning Suspicion Altogether: Samson’s Dangerous Slippery Slope

The Court continued to drift farther from its normal special needs analysis in Samson v. California, when it addressed the related question of how the Fourth Amendment applies to searches of parolees and held that parolees could be searched based only on their status—without probable cause or any suspicion at all.107 The Court analyzed a California law that required that any parolee “shall agree in writing to be subject to search or seizure by a parole or peace officer at any time of the day or night, with or without a search warrant and with or without cause.”108 In order to

108. Id. at 846 (quoting CAL. PENAL CODE § 3067(a) (West 2000)).
be released from prison, Donald Samson had to agree to this condition; he had no choice.

The facts of the case demonstrate how police in California had come to use the search condition as a shortcut to establish a basis to search. While Samson was on parole for a “felon in possession of a firearm” charge, he encountered a police officer who was aware of his parole status. The officer supposedly believed that Samson was under a parole warrant. However, although Samson told the officer that he did not have an outstanding warrant, and the officer confirmed by radio dispatch, he decided to search Samson anyway— even though the original basis for his search had been resolved. Searching within Samson’s pocket, the officer found a cigarette box, and searching within the cigarette box, he found methamphetamine.

The Court upheld the constitutionality of the warrantless search based solely on Samson’s parole status even absent reasonable suspicion. Although in practice the Court’s analysis echoed the special needs analysis applied in other Fourth Amendment cases, the Samson Court explicitly declined to analyze the search under the special needs doctrine, saying: “our holding under general Fourth Amendment principles renders [a special needs] examination unnecessary.” Instead, the Court proceeded straight to the totality of circumstances test, weighing the intrusion on the individual’s expectation of privacy against a legitimate governmental interest to search. As discussed, this is not the Court’s normal jurisprudence in considering proposed special

---

109. Id.
110. Id.
111. Id. at 846–47.
112. Id. at 843. “The Court seems to acknowledge that unreasonable searches ‘inflic[t] dignitary harms that arouse strong resentment in parolees and undermine their ability to reintegrate into productive society.’ Id. at 856. It is satisfied, however, that the California courts’ prohibition against ‘arbitrary, capricious or harassing’ searches suffices to avert those harms—which are of course counterproductive to the State’s purported aim of rehabilitating former prisoners and reintegrating them into society.” Id. at 865–66 (Stevens, J., dissenting) (citation omitted).
113. Id. at 852 n.3 (majority opinion). Contra id. at 857 (“Neither Knights nor Griffin supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.”) (Stevens, J., dissenting).
114. Id. at 848 (majority opinion). The dissent criticized this approach: “[i]gnoring just how ‘closely guarded’ is that ‘category of constitutionally permissible suspicionless searches,’ the court for the first time upholds an entirely suspicionless search unsupported by any special need.” Id. (Stevens, J., dissenting) (quoting Chandler v. Miller, 520 U.S. 305, 309 (1997)).
needs exceptions to the warrant and probable cause requirement, and doing so skips an important step of the analysis that potentially provides greater Fourth Amendment protections.\textsuperscript{115}

The Court further abandoned traditional Fourth Amendment doctrine by ruling that not only was probable cause not required for the search, but the reasonable suspicion required in \textit{Knights} was not necessary either.\textsuperscript{116} The Court reasoned that based on the totality of the circumstances, the parolee’s expectation of privacy was so diminished, and the governmental interest was so strong, that the search as a whole was still reasonable, even absent any suspicion at all.

As discussed, suspicionless searches are contrary to foundational principles of Fourth Amendment jurisprudence.\textsuperscript{117} Nonetheless, the Court justified this more permissive standard by emphasizing the strong governmental interest in searching parolees. It relied on the assumption that warrantless searches could deter future crime and combat the high rates of recidivism among parolees to satisfy the necessary governmental interest in allowing such a search.\textsuperscript{118} However, deterrence and prevention of future crime cannot be enough to curtail Fourth Amendment protections because any warrantless search could deter crime. If someone knows they could be searched at any time without a reason, they are certainly less likely to commit a crime. But just as applying the death penalty to deter parking tickets would no doubt be effective but would be inappropriately draconian, general deterrence of crime historically has been rejected as enough to allow for searches otherwise in violation of the Fourth Amendment.\textsuperscript{119} And with good reason: doing so would permit almost any intrusive action by the state, effectively annihilating any expectation of privacy by anyone solely because the intrusive action theoretically could deter some crime.

\textsuperscript{115} See \textit{supra} section I.A.

\textsuperscript{116} \textit{Samson}, 547 U.S. at 854.

\textsuperscript{117} See \textit{supra} section I.A; \textit{supra} note 12.

\textsuperscript{118} \textit{Samson}, 547 U.S. at 854 ("Imposing a reasonable suspicion requirement . . . would give parolees greater opportunity to anticipate searches and conceal criminality.").

\textsuperscript{119} See \textit{Ferguson v. City of Charleston}, 532 U.S. 67, 84 (2001) ("Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.").
This is of particular concern because the Court did not counteract its permissive approach to suspicion with a countervailing limit on the extent of the ability to search, in line with the balancing principle forcefully articulated in *Terry*.\(^{120}\) Remember, *Terry* searches are limited to frisks and *Terry* seizures to brief on-the-spot stops, in explicit recognition of the need to balance a lower level of intrusion with a lower suspicion standard, even though that standard still required reasonable suspicion, contra *Samson*. *Samson* permitted full searches without suspicion—including not simply frisking a person but looking under their clothing and even potentially reaching inside their clothing and touching their most private areas, all without any suspicion whatsoever.\(^{121}\)

The Court also failed to provide a clear reason why the warrant requirement was impracticable or would defeat deterrence principles or be unable to address the problem of recidivism.\(^{122}\) In fact, the circumstances of the case indicate that there was no exigency for not seeking a warrant, as the officer had time to confirm that there was not an open warrant for Samson with police headquarters, and so his initial reason for the stop had been resolved.\(^{123}\)

The Court began by allowing a strict special needs search that could only be conducted for the purpose of detecting probation violations; it ended with one analyzed under a totality of the circumstances test, in which reduced privacy expectations and a legitimate governmental interest could outweigh the requirements of a warrant, probable cause, and even reasonable suspicion. Each step is a major departure from ordinary Fourth Amendment jurisprudence, on little justification. The attack on privacy coupled with the absence of a clear reason for doing so raises serious future implications: by departing from its carefully delineated catalog of warrant exceptions, the Court opened the door to analyzing any search under a simple balancing test. As we explore in the conclusion, *Samson* fails to foreclose on such broad implications. Although the case concerned a parolee, there is no natural limiting

---

120. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (“Our evaluation of the proper balance that has to be struck in this case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons . . . .”).

121. In *Samson*, the officer searched inside Samson’s pockets, going so far as to open a cigarette box found in his pocket. 547 U.S. at 846–47.

122. *Id.* at 858–60 (Stevens, J., dissenting).

123. *Id.* at 846 (majority opinion).
principle restricting the Samson Court’s permissive approach to just parolees or probationers. When searches need not even clear the bar of reasonable suspicion, the police can search and harass anyone at will.\textsuperscript{124}

C. The Need for Court Action: Circuit Splits

In deciding Knights and Samson, the Court suggested that probationers, like parolees, could potentially be subject to suspicionless searches; but it did not address whether there are limits on the type of conditions of release that could empower such searches, or whether such conditions are ever unconstitutional. The Court failed to specify whether, if such state actions can be applied to probationers, the constitutionality of that application hinges on explicit probation conditions allowing for warrantless searches or whether those conditions were merely one factor in assessing the constitutionality of a warrantless search. This striking lack of clarity from the Supreme Court has left the circuits little guidance and considerable discretion. Perhaps unsurprisingly, the circuits are currently split on both issues: the potential application of the parolee search rule to probationers and the test to be applied in any case. The Third, Fifth, Seventh, and Eleventh Circuits have upheld warrantless searches even in the absence of explicit warrantless search provisions, while the Fourth Circuit finds those same searches unconstitutional.

1. Highly Permissive Interpretations of Police Powers to Search

In one of the most permissive approaches, the Fifth Circuit upheld a warrantless search of a probationer absent a warrantless search provision in his probation conditions in United States v. Keith.\textsuperscript{125} Chad Keith pled guilty to possession of a destructive device and was given a sentence which included five years of supervised probation.\textsuperscript{126} As part of his probation, Keith was prohibited from

\textsuperscript{124} See Terry, 392 U.S. at 21–22 (Stops must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction”).

\textsuperscript{125} United States v. Keith, 375 F.3d 346 (5th Cir. 2004).

\textsuperscript{126} Id. at 347.
possessing destructive weapons.\textsuperscript{127} Sheriffs received a tip from a building supply retailer that Keith had purchased materials used to make pipe bombs and passed the information on to Keith’s probation officer. The probation officer searched Keith’s home with other probation officers, Bureau of Alcohol, Tobacco and Firearms agents, and local bomb and hazardous materials agents.\textsuperscript{128}

Keith challenged the constitutionality of the search, arguing that his case differed from \textit{Griffin}, where there was a state regulation allowing for warrantless searches, and from \textit{Knights}, where the probationer had signed a consent form for warrantless searches.\textsuperscript{129} Because neither of these justifications applied, Keith argued that he did not have a reduced expectation of privacy akin to the defendants in \textit{Griffin} and \textit{Knights}.\textsuperscript{130} The Fifth Circuit rejected this argument, holding that because Louisiana had previously allowed searches of probationers and parolees absent warrantless search conditions, Keith should have been on notice that he could be subject to such a search, even without an explicit warrantless search provision in his probation conditions.\textsuperscript{131}

This holding presents a problem when coupled with the logic in \textit{Samson}, which at least partially relies on the fact that the defendant’s expectation of privacy was diminished due to his parole conditions. By expanding the world of possible ways of reducing a probationer’s expectation of privacy, the Fifth Circuit has created the possibility of a never-ending ratcheting down of privacy. As new and more expansive probation conditions are set, those conditions are acknowledged by courts; those conditions can then be enforced against probationers even without the probationer’s consent because the probationer should theoretically be aware of them from case law. Ironically, under this approach, a probationer is likely to become less aware of their reduced expectations of privacy as the requirements for actual notice vanish—the average probationer is likely not keeping up-to-date

\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} at 350.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.} (“Thus, a probationer in Louisiana—where the courts have consistently approved the practice of searching probationers’ homes based on reasonable suspicion—is just as aware of the decreased expectation of privacy that follows from probation as a probationer in a state with a \textit{Griffin}-like regulation in place.”).
on the most recent court decisions. Thus, the court is both making empirical claims of probationer knowledge based on implausible assumptions and is also ratcheting down Fourth Amendment protection by relying on its own prior rulings.

This latter danger runs directly counter to the Supreme Court’s reasoning in Smith v. Maryland, where it held that “where an individual’s subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining . . . the scope of Fourth Amendment protection[].” The Court in Smith expressed concern that a government could reduce an individual’s reasonable expectation of privacy simply by alerting individuals that they should no longer have an expectation of privacy in “well-recognized Fourth Amendment freedoms[].” In determining whether a “legitimate expectation of privacy” existed in such cases, the Supreme Court mandated that “a normative inquiry would be proper” to ensure that the government could not reduce an individual’s normal privacy expectations simply by putting individuals on alert.

Instead of focusing on an expectation of privacy that “society is prepared to recognize as ‘reasonable,’” the Fifth Circuit here made itself the arbiter of societal reasonableness, dependent only on its own prior decisions, with no check on its powers. This falls into the exact pitfall the Court warned against in Smith. The Fifth Circuit reduced individuals’ expectations of privacy beyond established Fourth Amendment freedoms simply by announcing that it did so. Even taking a permissive reading of state power, the Fifth Circuit’s reasoning does not comport with the reasoning in Samson. Although Samson relied on parolees’ reduced expectations of privacy, it did not simply point to precedent that had theoretically given parolees notice of their decreased privacy. Instead, the Court relied on a California statute that allowed for warrantless searches and on the fact that parolees had a decreased expectation of privacy.

133. Id.
134. Id. See the conclusion, infra, for further discussion.
135. Id. at 740 (quoting Katz v. United States, 389 U.S. 347, 361 (1967)).
In many aspects of their lives as a condition of their parole. In contrast, the Fifth Circuit looked not at the circumstances existing on the ground that shape parolees’ expectations—prior to any court decision—rather, it relied on the expectation-lowering effect of the very law it was assessing the constitutionality of to determine whether parolee expectations were low enough to justify the intrusion. It is this kind of circularity that the Supreme Court explicitly prohibited in Smith and attempted to avoid in Samson. Because case law is the only source for a reduced expectation of privacy that the Fifth Circuit is relying on, there is no external check on court power. No other branch of government or administrative body is confirming that the court is in fact reflecting a probationer’s legitimate expectation of privacy, not just what is most convenient for the court to find in a specific case.

Although the Eleventh Circuit appears less permissive than the Fifth Circuit, it imposes a similar Catch-22 for probationers where their expectations of privacy are successively ratcheted down. In United States v. Yuknavich, the Eleventh Circuit found that a probationer’s computer was subject to a warrantless search even without an explicit provision in his probation. Yuknavich was sentenced to probation for exploitation of a minor and distribution of obscene material. Since the charges against Yuknavich had stemmed from downloading child rape pornography, he was not allowed to access the internet except at work as a condition of his probation. During a search of Yuknavich’s home, probation officers became suspicious that he was accessing the internet and required him to log onto his computer. Although Yuknavich did not have a warrantless search provision in his probation conditions, the court held that such a provision was not a necessary condition for a warrantless search. Instead of relying on a categorical approach as the Court had done in Samson, the Eleventh Circuit looked to the defendant’s individual expectations of privacy.

136. Samson v. California, 547 U.S. 843, 851, 852–53 (2006). The Court pointed to the fact that a parolee must comply with restrictions including “mandatory drug tests, restrictions on association with felons or gang members, and mandatory meetings with parole officers,” as well as requirements that parolees inform their parole officer when changing employment or seeking to “travel . . . more than 50 miles from [their] home.” Id. at 851.

137. United States v. Yuknavich, 419 F.3d 1302 (11th Cir. 2005).

138. Id. at 1304.

139. Id.

140. Id. at 1310.
It held that because Yuknavich’s computer use was restricted as part of his probation restrictions, he should have expected not only to be asked about his computer use but also for “officers to conduct their own research to find the answers.” Furthermore, the court found that Yuknavich should have been on heightened notice since he had already violated the terms of his probation.

In one sense, the Eleventh Circuit is conducting an entirely different inquiry than the Fifth Circuit, looking at whether a defendant’s subjective expectation of privacy based on their own personal circumstances is such that they should expect that their privacy conditions will be lessened. On its face, this seems at odds with the Fifth Circuit, which instead suggested that a probationer turn to case law to determine what degree of privacy they will be afforded. However, this approach is only less permissive to the state if it is truly an alternative to the Fifth Circuit approach; if, instead, the two approaches are combined, the Eleventh Circuit’s approach contributes to a further unraveling of the rights of those under supervised release.

If the circuits are not at odds, these two assessments present a concerning interplay. Either courts will expect that probationers engage in legal analysis to determine which expectations of privacy from case law should apply to them, or courts will find that specific probationers have lessened expectations of privacy due to their individual conditions, meaning that the probationer loses either way. But furthermore, in the latter case, if the court then acknowledges those individually driven lower expectations in case law, it will put all other probationers on notice that they, too, are now subject to those lessened conditions, even though those conditions were a product of the specific crimes and circumstances of one particular individual. Accordingly, the expectations of all probationers will be lessened because of the exceptionally low expectations of one probationer. Thus, probationers as a group will have artificially imposed on themselves the low expectations of the most restricted probationer. Given that probation covers an enormous range of crimes, as discussed further in section II.B., infra,

141. Id.
142. Id. at 1310 (“By virtue of [his] infractions and inappropriate behavior, the officers were justified in monitoring him more closely and thereby imposing greater infringements on his privacy. Yuknavich was given chance after chance after chance and as a result of all of those chances he should have necessarily expected closer monitoring . . . .”).
this could create a situation where people on probation for very minor crimes are subject to highly stringent probation restrictions that apply to those facing far more serious crimes — for example, a person on probation for a minor drug offense would be subject to the same reduction in privacy as a someone on probation for aggravated battery — and those who require far greater oversight than the average probationer, such as those struggling with drug addiction, will render everyone subject to exceptionally intrusive searches. Without reliance on societal expectations or the reasonableness of search conditions, there is no check on this reduction of privacy for probationers over time.

Despite the possibility that probationers’ expectations of privacy will be gradually reduced over time independent of traditional Fourth Amendment expectations of privacy, other circuits are adopting the combination of the Fifth and Eleventh Circuits’ approaches. Although it has not analyzed the constitutionality of a warrantless search of a probationer without an explicit probation condition absent other conditions, the Third Circuit has held in dicta that, like the Fifth and Eleventh Circuits, it would also uphold such a search. In United States v. Eggleston, the court held that the existence of a warrantless search provision was not a determinative factor but rather one factor to be used in evaluating the constitutionality of a search.143 In United States v. Caya, the Seventh Circuit held similarly, finding that “neither [Knights nor Samson] rested on a consent rationale, either express or implied; indeed, Samson and Knights were crystal clear that consent was not a decisive consideration.”144

By failing to rely explicitly on consent, the Third and Seventh Circuits join the other circuits in the race to the bottom for probationers’ expectations of privacy, allowing anything that may shape an expectation of privacy — probation conditions, court decisions, factors specific to an individual probationer — to build upon one another in gradually decreasing probationers’ expectations of privacy over time. In doing so, they are straying farther from the reasoning in Smith v. Maryland and its basis in a reasonable societal expectation of privacy. When courts switch

143. United States v. Eggleston, 243 Fed. App’x 715, 717 (3d Cir. 2007) ("As an initial matter, we disagree with Eggleston that a warrant or probable cause is necessary when a parolee has not consented to a search."). See also United States v. Hill, 967 F.2d 902 (3d Cir. 1992).
144. United States v. Caya, 956 F.3d 498, 503 (7th Cir. 2020).
their legal analysis to whatever factor works to support a privacy restriction, probationers will necessarily be uncertain where to look to base their expectations of privacy. This nebulous cloud of privacy means that courts are holding probationers to a standard seldom applied to any other citizen.

2. Less Permissive Interpretations of Susicionless Searches

The permissive approach is not the only way that Samson can be read. The Fourth Circuit has opted for a narrower reading of state power over probationers, holding that a search of a probationer without a warrantless search provision would be unconstitutional.145 It found that the warrantless search conditions in Samson were upheld only because of parolees’ reduced expectations of privacy as a result of the California statute, its parole conditions, and the fact of prior incarceration, and concluded that those same expectations were not reduced for probationers who were not subject to a warrantless search condition.146

In United States v. Hill, the defendants were subject to probation conditions that their probation officers could visit them at any time in their “home or elsewhere.”147 However, the conditions did not explicitly allow for searches during those visits.148 Officers obtained an arrest warrant for one of the defendants, arrested him in his home, did a protective sweep, and then walked through his apartment to search for contraband in plain view.149 But an object is only in “plain view” if the state agent has the authority to be in the place where the object is observed,150 and so the question arose as to whether the probation officer’s authority to visit the probationer provided the authority to look through the house.151 The court found the search unconstitutional, holding that “the specific probation condition authorizing warrantless searches was critical

146. Id. at 249.
147. Id. at 247.
148. Id.
149. Id. at 245–46.
150. Coolidge v. New Hampshire, 403 U.S. 443, 513 (1971) (inquiring as to whether the disputed evidence was “found by officers at a place where they are legally entitled to be at the time”).
to the Court’s holding” in *Knights* and *Samson*. In so finding, it held that the warrantless search conditions in *Samson* were upheld only because of the California statute that allowed them, and searches that were not pursuant to a statutory basis or express conditions are inherently unconstitutional.

Although the Fourth Circuit’s approach provides greater privacy protections to probationers, it is not clear that it necessarily follows from the reasoning in *Samson*. The Court in *Samson* does point to the fact that the parolee was aware of the warrantless search provision, but refers to it only as a “salient,” not a necessary, condition. Unlike the Fourth Circuit, the Court in *Samson* does not unequivocally find a notice requirement necessary. As such, it is not clear that the Supreme Court will embrace the Fourth Circuit’s approach over the more permissive approach of the Fifth and Eleventh Circuits if it takes up the issue. The ambiguity left by *Griffin, Knights*, and *Samson* have created competing and contradictory interpretations of those cases, and this demands Supreme Court clarification.

The circuits’ varied approaches to the constitutionality of warrantless searches are because *Samson* and *Knights* leave open what is doing the work in rendering the search constitutional: the notice, the probationer’s reduced expectation of privacy merely because of their status, or the strong interest of the state in warrantless searches. Without a clarification from the Supreme Court, probationers will be in limbo, unsure where they should turn to determine their expectations of privacy: the state’s statutes, case law, probation provisions, or their own unique situation. If one possible test affords them privacy, that is not enough in many circuits—some courts will turn to the next factor to determine the constitutionality of the search, leaving the probationer with only their best guess as to what their reasonable expectation of privacy is. And if the more permissive approaches can be combined, even if the probationer has an expectation of privacy under one test, they may still lose out on another test that justifies state action. This circuit split constitutes the kind of ambiguity that often justifies

152. *Id.* at 249.
153. *Id.*
the Supreme Court granting certiorari on an issue; if the Court does not do so, it will leave millions of Americans understandably uncertain of their constitutional rights.

II. THE HARM OF SUSPICIONLESS SEARCHES OF PROBATIONERS

In this Part, we first demonstrate the harm that *Samson*’s ruling has imposed on parolees by subjecting them to warrantless searches conducted without reasonable suspicion (depending on the specifics of state law). We show that those searches do not accomplish the goals of rehabilitation and prevention of recidivism that *Samson* relied upon and that suspicionless searches have numerous negative impacts on parolees, those with whom they live, and their general communities. Then, we argue that the application of *Samson*’s rule to probationers will be even more harmful.

A. The Adverse Effects of Warrantless Searches of Parolees

Refusing to apply the normal rules of Fourth Amendment jurisprudence to parolees and permitting them to be subject to potentially intrusive searches without any suspicion renders parolees part of a separate and inferior class of citizens, defined entirely by their status rather than their reintegrative needs. While all other groups have the protection of standard constitutional rules requiring probable cause for searches with only specific, narrow exceptions, parolees as a broad class are denied these rights. The Supreme Court has condemned this very kind of status differentiation and discrimination when undertaken by legislatures; see, e.g., H.W. Perry, *Deciding to Decide: Agenda Setting in the U.S. Supreme Court* (1991) (describing the factors going into the cert review process, including the existence of a circuit split).

156. In *Samson*, the Court approved a statute allowing for suspicionless searches but left open whether suspicionless searches are constitutional without an explicit statutory provision. 547 U.S. at 857. Circuits have resolved that question in differing ways: some have limited searches to jurisdictions with explicit statutory provisions; others have allowed suspicionless searches without statutory provisions based solely, for example, on precedent in case law. See Section I.C.1, infra, for further discussion.

157. *Samson*, 547 U.S. at 844 (“[A] State’s interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.”).

158. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (striking down ordinance against vagrancy) (“Of course, vagrancy statutes are useful to the police. Of course,
it is no less harmful when undertaken by courts. In fact, arguably it is worse because there is no neutral arbiter to complain to and seek a remedy from. Not only does this broad discretion to conduct warrantless searches infringe parolees’ rights, it also does not successfully reintegrate parolees into society or prevent recidivism. Rather, these types of status differentiations are associated with negative outcomes for parolees, which can be seen in several ways and arise through numerous mechanisms.

Warrantless search provisions subject parolees to a far greater number of searches than the general public. A major cause of the expansion of the number of searches comes from an expansion of who does the searching. Courts initially allowed parole officers to conduct suspicionless searches of parolees specifically because parole officers were not police officers. However, recent case law has undermined this distinction by “bootstrapping” parole officers’ power to search without suspicion to include police. For instance, in New York, police officers require probable cause or reasonable suspicion to search or frisk a parolee, respectively, although the parolee’s status is relevant to the reasonableness determination. But when working with a parole officer, the more permissive parole officer standard applies as long as the parole officer is investigating a parole violation. Even when the parole officer is not present, a police officer acting under the “fellow officer rule” may frisk a parolee without reasonable suspicion if a parole officer directs the police officer to do so and the purpose of the frisk is “reasonably

they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible.”; Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (“Class legislation, discriminating against some and favoring others, is prohibited . . .”) (quoting Barbier v. Connolly, 113 U.S. 27, 32 (1884); Craig v. Boren, 429 U.S. 190, 208 n.22 (1976) (“The repeal of [alcohol prohibition laws against certain ethnic groups] signals society’s perception of the unfairness and questionable constitutionality of singling out groups to bear the brunt of alcohol regulation.”).

159. N.Y. CRIM. PROC. LAW § 140.50 (McKinney 2022); People v. Caicedo, 893 N.Y.S.2d 609 (N.Y. App. Div. 2010) (To conduct a protective pat frisk, an officer “must have ‘knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety.’”) (citations omitted); People v. Hicks, 500 N.E.2d 861 (N.Y. 1986) (giving authority to briefly detain individuals in order to conduct an investigation).

160. People v. Carrington, 807 N.Y.S.2d 89 (N.Y. App. Div. 2006) (“Although the parole officers were cooperating with the police, who were investigating a homicide, the record fails to support defendant’s assertion that the parole officers were acting solely on behalf of the police.”).
and rationally” related to the parole officer’s duty.161 In some jurisdictions, this has been expanded further, to allow police officers to conduct those searches without these restrictions.162

Permitting police powers akin to those of parole officers not only increases the number of searches, but it also changes the nature of those searches. The very purpose of parole officers, and the justification for giving them greater searching powers, is rehabilitative, not punitive: parole officers typically have knowledge of a person’s parole conditions and have some insight into whether a search is conducive to their reintegration.163 In contrast, in some jurisdictions police may conduct those same suspicionless searches based simply on knowing that a person is a parolee. When police officers are involved in a search, it is inherently to serve a punitive end, as opposed to the arguably rehabilitative purpose of a search conducted by a parole officer. But as police power is bootstrapped to the power courts gave to parole officers, the reality on the ground drifts farther away from what the Court originally intended. And in jurisdictions that go even further, allowing for police to conduct suspicionless searches without even the presence of a parole officer, any lingering shred of the Court’s original purpose disappears. A practice that was arguably initially protective has transformed into one that is necessarily adversarial.

Some jurisdictions have attempted to restrict warrantless searches to those conducted by parole officers to protect parolees from generalized police searches. But even where those protections have been put in place, it is not clear they are doing much to change the on-the-ground reality of police-led warrantless searches. In those jurisdictions that limit warrantless searches to parole officers,

161. People v. Porter, 952 N.Y.S.2d 678 (N.Y. App. Div. 2012) (holding that parole officer directing police to search was reasonable after receiving a confidential informant tip that parolee was carrying a gun and was out past his curfew).

162. See, e.g., Samson v. California, 547 U.S. 843, 846 (2006) (upholding a “California law [that] provide[d] that every 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 . . . .’”) (quoting CAL. PENAL CODE § 3067(a) (West 2000)).

163. See Griffin v. Wisconsin, 483 U.S. 868, 876–77 (1987) (“Although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen. . . . While assuredly charged with protecting the public interest, [he] is also supposed to have in mind the welfare of the probationer. . . . The applicable regulations require him, for example, to ‘[p]rovid[e] individualized counseling designed to foster growth and development of the client as necessary[,]’”) (fifth and sixth alterations in original) (quoting WIS. ADMIN. CODE H.S.S. § 328.03(5) (1981)).
police and parole officers increasingly work in concert, searching together and taking advantage of the lower standards for parole officers, as in New York. The lower standard for searches of parolees leads to higher rates of arrest and incarceration based only on parolees’ supervisory status. The impact of the low threshold for searching parolees under Samson was explored in an empirical study by Jacobi, Richardson, and Barr. The study investigated the impact of warrantless searches both on parolees themselves and also on their families and communities. The authors found that there are more police stops in areas with a high concentration of parolees, even accounting for factors such as income level, race, and rate of single-parent households. And within those areas that have higher rates of stops, officers frequently exploit the more permissive rules that apply to warrantless searches of parolees, progressing directly to searching parolees instead of frisking them, resulting in significantly more arrests. This suggests that parolees are being targeted for searches—likely because of the lower standard that applies to police searches of this group under Samson; as a result, parolees have higher rates of arrest and incarceration simply by the nature of their status. Furthermore, Jacobi et al. showed that the impact of warrantless searches is felt not only by parolees themselves, but also by those with whom they are living. “Increasing the parolee-per-capita rate by 1% increases stops per capita more than tenfold”—note that is not the number of stops of parolees, but the number of stops of all people in the ZIP Code. As Jacobi et al. note, “[g]iven that even in the most dense

165. Id. at note 32, at 933–34.
166. Id.
167. Id. at 955.
168. Id. at 960. The study found that there was a negative correlation between frisks and areas with a high concentration of parolees, and a positive correlation between stops and arrests in areas with high concentrations of parolees. Id. at 970. This indicates that not only are police more likely to stop a parolee, but when they do, they are less likely to conduct a frisk and instead conduct a full search or make an arrest. Id.
169. Id.
170. Id. at 956.
parolee neighborhood, the vast majority of people are not parolees, this is a massive effect.”\textsuperscript{171} For instance, going from a median value of parolees to a high parolee neighborhood (one standard deviation higher) translates to stops per capita increasing 53%.\textsuperscript{172} The authors conclude that this double-digit increase in the number of stops “shows strong support for the argument that both individual parolees and the community generally are being dramatically affected by the permissive police parolee stop and search jurisprudence.”\textsuperscript{173}

The effect that Jacobi \textit{et al.} identify follows from the interplay between \textit{Samson} and related doctrines that amplified the rights-reducing effect of \textit{Samson}. The Court in \textit{Samson} upheld a state statute that allowed not only for warrantless searches of parolees themselves, but also of their residences. Under the doctrine of common authority, so long as a person has access to shared property, they may consent to a search of the shared parts of that property.\textsuperscript{174} But with a parolee, as long as there is a statute allowing for a warrantless search, consent is implied.\textsuperscript{175} As a result, anyone who lives with a parolee is effectively subject to the lower standard that applies to parolees because of \textit{Samson}. Fourth Amendment law recognizes the home as a protected and inherently private space, but anyone who opens their home to a parolee no longer has that same right to privacy because of the parolee’s warrantless search condition.\textsuperscript{176}

The effect of this diminishment in the privacy rights of the co-residents of parolees is not only problematic in terms of vindicating privacy rights, but it also undermines the rehabilitative purpose of the criminal justice system. These invasions into a parolee’s home, and consequently into the home of any person with whom they are living or staying, can make it even more difficult for parolees to find

\begin{itemize}
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{Id.} at 957.
\item \textsuperscript{173} \textit{Id.}
\item \textsuperscript{174} United States v. Matlock, 415 U.S. 164, 170 (1974) (“[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”).
\item \textsuperscript{175} See discussion in Section I.C.1 \textit{infra}.
\item \textsuperscript{176} Silverman v. United States, 365 U.S. 505, 511 (1961) (“At the very core [of Fourth Amendment protections] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).
\end{itemize}
permanent housing upon release. Parolees who can secure stable housing are less likely to re-offend than those who are not. The more barriers that are put in place to a parolee being able to secure stable housing, the more likely they are to re-offend. This runs directly counter to the purposes set forth permitting suspicionless searches in Samson: rehabilitation and prevention of recidivism.

The same type of problem extends generally to people who associate with parolees. For example, if a non-parolee travels in a car with a parolee, the car may be stopped and searched without suspicion based solely on the parolee’s warrantless search provision. This disincentivizes people from even associating with parolees. Warrantless searches therefore impede the development of pro-social connections, which are also vital for a parolee to successfully reintegrate into society.

There is another way in which warrantless search conditions negatively affect people around parolees: the dubious history of arrest quotas within policing. An arrest quota ties the number of arrests an officer makes to their success on job reviews or opportunities for promotion. Many jurisdictions have outlawed such quotas because they limit officers’ discretion and encourage them to take policing actions for the sake of meeting quotas instead of to promote safety within communities. Quotas can lead to “an increase in misconduct and corruption” and a breakdown in relationships between police officers and the communities in which they are working. Whereas without a quota, officers could

177. Jacobi et al., supra note 32. See also James M. Binnall, Released from Prison . . . But Placed in Solitary Confinement: A Parolee Reveals the Practical Ramifications of Samson v. California, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 73 (2008) (arguing that warrantless searches of residences force parolees “to find housing options that are often prohibitively expensive or socially undesirable”).


179. Binnall, supra note 177, at 71 (“[Warrantless searches] create[] a culture in which parolees find it difficult to associate with those who could, and most certainly do, aid in their readjustment into society.”).

180. Scott-Hayward, supra note 178.

181. Nathaniel Bronstein, Police Management and Quotas: Governance in the Compstat Era, 48 COLUM. J. OF L. & SOC. PROBLEMS 543, 553 (2015) (“However effective quotas might be for managing police officers, they often motivate police officers to take enforcement action primarily for reasons unrelated to the traditional goals of law enforcement.”).

182. Id.
be responsive to community needs and situational cues in determining their responses, officers’ main incentive under a policing quota is to secure as many arrests or tickets as possible.

Despite these significant drawbacks, many jurisdictions still allow policing quotas.\textsuperscript{183} And even in those jurisdictions that have outlawed them, officers still claim that they are subject to illegal quotas,\textsuperscript{184} often in the form of performance goals.\textsuperscript{185} That means that in nearly every jurisdiction, officers are incentivized, either formally or informally, to achieve high arrest numbers.\textsuperscript{186} Realistically, that means that officers are incentivized to focus stops in neighborhoods “where they believe they will achieve the greatest number of arrests at the lowest costs.”\textsuperscript{187} Because of this, officers are incentivized to police more heavily in neighborhoods with a high percentage of parolees, which means that everyone who lives in those neighborhoods are subject to more stops.

Each of these negative consequences of warrantless searches of parolees—difficulties in finding permanent housing and maintaining social networks and harm to the communities in which they leave—defeats the justification set forth in \textit{Samson} for warrantless searches. Any expansion of \textit{Samson}, then, should be treated with great suspicion; the next section shows the effect would be even worse applied to probationers.

\textbf{B. The Impropriety of Treating Probationers Like Parolees}

Although the courts have moved to analyzing warrantless searches of probationers and parolees interchangeably, the two groups are meaningfully distinct. The slide toward treating these different groups as equivalent began in \textit{Samson}: in expanding warrantless searches of parolees, the Court acknowledged that

\begin{itemize}
  \item \textsuperscript{183} Id. at 557.
  \item \textsuperscript{184} See \textit{e.g.}, Birch v. City of New York, 184 F. Supp. 3d 21, 24–25 (E.D.N.Y. 2016) for a case in which officers allege that their police departments had quotas, even where a New York state law prohibited them.
  \item \textsuperscript{185} Bronstein, \textit{supra} note 181, at 562–63.
  \item \textsuperscript{186} In New Jersey, Maryland, California, and Arkansas, statutes have recently passed prohibiting police departments from “using enforcement activity as the sole criterion in an officer’s performance evaluation.” Id. at 559–60. But that does not mean that even those most strict departments cannot use enforcement activity as an indicator, even the predominant one.
  \item \textsuperscript{187} Jacobi, \textit{supra} note 32, at 940.
\end{itemize}
probationers and parolees had differing expectations of privacy, yet it pronounced that the state had the same interest in preventing recidivism and promoting reintegration for both. The next section describes four key differences between parolees and probationers, and argues that, for these reasons, it is imperative that the permissive approach to warrantless searches for parolees must not be expanded to apply to probationers. The following section then argues that treating probationers like parolees is not only inapt but also dangerous.

1. Fundamental Differences Between Parolees and Probationers

Parolees differ from probationers in four fundamental ways that are relevant to whether Samson’s conclusion of the legitimacy of suspicionless searches can be extended from one group to the other: first, probation and parole apply to crimes of different severity; second, probationers and parolees have differing expectations of privacy based on time spent in prison and conditions imposed on them; third, probation and parole serve different purposes; and fourth, treating probation and parole interchangeably undermines the goals of each. Each core prong of analysis is meaningfully different: the individuals affected, the doctrine that applies, the goals of each program, and the government interest.

First, probation and parole deal with different severity of crimes. Probation generally substitutes for time spent in prison and is used for lesser crimes, whereas parole is an optional, post-incarceration part of a sentence for a serious crime. That is, probation typically is the sentence itself, whereas parole is an optional variation on the underlying sentence of incarceration. To treat parolees and probationers alike, then, is to ignore the differences between them that define their status—the type of crime that has brought them into the criminal justice system. Treating meaningfully

---

188. Samson v. California, 547 U.S. 843, 850 (2006) ("[O]n the Court’s continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy even less of the average citizen’s absolute liberty than do probationers[,]") (quoting United States v. Cardona, 903 F.2d 60, 63 (1st Cir. 1990)).

189. Id. at 853 (declining to differentiate between probationers and parolees when discussing the state’s interests).

different groups alike is problematic in the same way that treating like groups differently raises concerns of inequality. And doing so with probationers and parolees, who have been convicted of crimes as disparate as shoplifting and murder, is contrary to fundamental principles of proportionality.

The severity of the crime is also reflected in the process by which a person becomes parole- or probation-eligible. Whereas a sentencing judge may choose to impose probation at the moment someone is convicted or pleads guilty, a parole review board, which is an independent entity, only considers whether someone is eligible for parole after they have already served time in prison. This in and of itself reflects a difference in the way the state treats probationers and parolees: while probationers become eligible at the hands of a judge who has only seen the probationer in the context of the crime and thus is relying on limited information, the decision to parole an inmate is ordinarily more calculated. It necessarily occurs after inmates have been under close supervision to determine whether they are deserving of parole.

This is because “parole is legally considered a privilege rather than a right,” unlike probation, which often occurs automatically for lesser crimes.

Parole determinations are much more in depth than those for probation. In jurisdictions in which granting of parole is not automatic, parole boards weigh “an array of information” about an individual to determine whether they should be parole-eligible, indicating the weight of the decision. For example, in Colorado, a full seven-person board sits on parole determinations in cases in

---

191. See Regents of the Univ. of Cal. v. Bakke, 438 U.S 265, 407 (1978) (Blackmun, J., concurring) (holding that race may be a factor in college admissions) (“[I]n order to treat some persons equally, we must treat them differently.”).

192. Mary West-Smith, Mark R. Pogrebin, & Eric D. Poole, Denial of Parole: An Inmate Perspective, FED. PROB., Dec. 2000 at 3, 3 (“The 1973 Supreme Court decision in Scarpa v. United States Board of Parole established the foundation for parole as an ‘act of grace.’”). This is in direct contrast to probation. Although defendants’ crimes must be minor enough to allow them to be released, the process is not one in which they must prove that they are deserving of a privilege; instead, at sentencing, the trial judge makes a determination that they are not too dangerous to be granted probation. While parole could be considered opt-in—where a parolee must prove his eligibility—probation operates as an opt-out system.

193. Id.

194. Morrissey v. Brewer, 408 U.S. 471, 47–78 (1972) (discussing intricacies of parole in holding that parolees have a right to minimal due process in parole revocation hearings).
which a prisoner has been convicted of a violent crime.195 And that is not even the full extent of the parole determination; prior to the board hearing, a smaller group of parole board members reviews a prisoner’s application, interviews them, and then makes a recommendation as to the prisoner’s release and potential release conditions to the entire board.196 And even in those jurisdictions where granting of parole is automatic, an inmate must still meet a list of criteria to be deemed parole-eligible.197 The severity of the crime for which someone is imprisoned is reflected in the stark differences between the almost automatic granting of probation for certain crimes as compared to the lengthy process for granting of parole.

The considerations that inform those two decisions are also quite different. Parole boards are backward-looking; they consider prisoners’ records to see if they have been rehabilitated during their incarceration. In contrast, probation looks forward, to how a probation term itself might serve to rehabilitate an offender. Parole’s emphasis on whether a prisoner has been rehabilitated centers around two primary considerations: the prisoner’s behavior in prison and their expression of remorse for the crime. In fact, those two considerations go hand in hand, as parole boards consider a prisoner’s admission of guilt evidence that they have been rehabilitated during their time in prison.198 Admission of guilt and remorse at a parole hearing greatly impacts an inmate’s chances of being granted parole, and many parole boards expressly include admission of guilt as one of the determining factors.199 This differs significantly from a probation sentencing hearing, where defendants typically do not speak prior to receiving

195. West-Smith et al., supra note 192, at 3.
196. Id. at 3-4.
197. Id.
198. Daniel S. Medwed, The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings, 93 IOWA L. REV. 491, 514 (2008) (“Moreover, inmate participation in the rehabilitative endeavor (ideally in an active, honest, and palpable manner) has always been a centerpiece of the American conception of parole . . . . [P]arole boards view sincere admissions of guilt at a hearing as evidence of that inmate’s cooperation in his own rehabilitation . . . .”).
199. Id. at 514–15 (“Specifically, empirical findings from Great Britain, as well as anecdotal accounts throughout the United States confirm (1) that parole boards attach great importance to inmates’ statements taking responsibility for the crime underlying their current conviction and (2) that the refusal to admit guilt decreases the likelihood of receiving parole. Parole officials seldom deny that inmate acceptance of responsibility is a critical variable in the release decision and, instead, are often overt in showing their dependence on this factor.”).
their sentences. Although a probationer may plead guilty, individualized remorsefulness does not play as distinct a role in the process, because probation itself is meant to serve as the rehabilitation. Importantly, probation is premised on the assumption that a person granted probation is more likely to be rehabilitated by completely avoiding prison time, rather than by experiencing it. Thus, the difference in the seriousness of the crimes that result in sentences of parole and probation seeps into every aspect of the two schemes, rendering the two categories highly disparate in their definitions, their processes, and their purposes, the last of which we return to in more detail below.

Second, probationers and parolees have differing expectations of privacy. Probationers have partially lowered expectations of privacy due to the conditions imposed on them. For example, probationers may have requirements to check in with their probation officer, have curfew requirements, or even be subject to urine tests.200 But while probationers may have a lesser expectation of privacy than a lay citizen, they still have a much higher expectation of privacy than parolees, who are presumed by the courts to have become accustomed to prison life and the complete loss of privacy that comes along with it. In prison, inmates are subject to unpredictable searches of their cells and their lockers that are constitutional even when guards do not have suspicion that an inmate possesses contraband.201 Inmates are also subject to substantial reductions of privacy even within their own bodies: in federal prisons, pretrial inmates are required “to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.”202 Regardless of offense charged, every inmate,


201. Hudson v. Palmer, 468 U.S. 517, 525–26 (1984) (“Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”).

202. Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (upholding body cavity searches of inmates after every visit, even where prison guards have no reasonable suspicion that inmates are smuggling contraband). Indeed, a recent petition for a writ of certiorari asked whether
even someone detained for a minor offense, can be required to “lift their genitals and cough in a squatting position,” even without established suspicion. Although probationers may be subject to some reduced expectations of privacy, any minor requirements they face pale in comparison to the nonexistent expectation of privacy in their belongings and extremely limited expectations of privacy in their own bodies that parolees have become accustomed to as prisoners.

Even post-release, parolee expectations of privacy are typically lower than those of probationers. Parole generally comes both with stricter conditions and more involvement by a parole officer than probation. For example, parole conditions can include restrictions on consuming alcohol or associating with certain people, and parolees generally must check in with their parole officers before they engage in the most fundamental aspects of life, such as finding a new job, moving residences, marrying, or buying a car. This is a far cry from the more limited restrictions placed on probationers. In fact, some probationers may immediately be on inactive status, meaning that they have no requirement to regularly check in with their probation officers. Given that parolees’ lower expectation of privacy was the linchpin in Samson for justifying suspicionless searches, this stark difference in expectations of privacy of the two groups alone is arguably determinative on the question of whether suspicionless searches should be extended to probationers.

Third, these differences in privacy expectations between probationers and parolees do not arise by chance: they arise by design because the two punitive systems have been crafted to serve fundamentally different purposes. Parole serves the primary

detainees can be forced to endure internal cavity searches without probable cause. Petition for A Writ of Certiorari at I, Brown v. Polk County (No. 20-982), cert denied, 141 S. Ct. 1304 (2021) (presenting the question of “Whether the Fourth Amendment permits jail officials to conduct a physical, penetrative search of the vagina and/or anus of a pretrial detainee without a warrant, probable cause, or exigent circumstances, including in cases of persons detained for minor nonviolent non-drug offenses like shoplifting”).

203. Florence v. Bd. of Chosen Freeholders of Burlington, 566 U.S. 318, 335-36 (2012) (holding that prison officials may strip search pretrial detainees who have been arrested for any crime, even without any suspicion that they possess contraband).


205. Community Corrections, BUREAU JUST. STAT., https://bjs.ojp.gov/topics/corrections/community-corrections (last visited Apr. 6, 2023) (“Some probationers may be placed on inactive status immediately because the severity of the offense was minimal or some may receive a reduction in supervision and therefore may be moved from an active to inactive status.”).
purpose of reintegrating people into society once they have served time in prison. That reintegration is necessary because prison is fundamentally different from living in society—upon arrival, prisoners lose not only the everyday habits of their outside lives, but their constitutional protections are also different. For prisoners, “incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” Prisoners lose the right to association, the right to speak to reporters, the right to immediate legal assistance, and the right to privacy in their belongings. Because their return to society will necessarily be jarring, courts reserve prison sentences for those offenders courts think must necessarily be entirely removed from society in order for their rehabilitation. None of this applies to probationers.

Probation necessarily serves an entirely different purpose, as probationers have generally not served any prison time. Instead, probation serves the primary goal of rehabilitation: “[probation] was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender, to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.”

206. Morrissey, 408 U.S. at 477 (“[Parole’s] purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed.”).
207. Jones v. N.C. Prisoners’ Lab. Union, Inc., 433 U.S. 119, 129, 132 (1977) (upholding prison ban on union activity because prisons are inherently different than society and so prisoners are not entitled to standard constitutional rights, including First Amendment associational rights).
208. Id. at 125 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948) (upholding constitutionality of limits on prison unions, including preventing prisoners from meeting, soliciting other inmates to join the union, and distributing union materials).
209. Id.
210. Pell v. Procunier, 417 U.S. 817, 834 (1974) (upholding restriction that prevented journalists from being able to select prisoners whom they wanted to interview and prevented prisoners from initiating those interviews themselves).
211. Lewis v. Casey, 518 U.S. 343, 362 (1996) (finding a delay of up to 16 days for prisoners in lockdown to receive legal correspondence constitutional, even where the delay resulted in actual injury).
213. Community Corrections, supra note 205 (“Probation refers to adult offenders whom courts place on supervision in the community through a probation agency, generally in lieu of incarceration.”).
Whereas the parolee is deemed too dangerous to enter society at sentencing and must be rehabilitated within prison, courts recognize the harm of imposing prison time on a less serious offender.

One manifestation of those different purposes is the dissimilar rates of reincarceration between the two groups. Although probationers and parolees have approximately the same rate of successful completion of supervision, of those who do violate their supervision terms, the two groups’ violations differ in type: violations by probationers are serious enough to warrant reincarceration in only 12% of cases, compared to 27% for parolees. This reflects, once again, that the nature of the crime is different in each case and also the differences in difficulty of reintegration following incarceration. The purpose of probation is to avoid putting the individual into the vicious cycle of incarceration, which while intended to be remedial can actually be harmful if not necessary for a specific individual.

That delicate balance between harm and remediation ties into the fourth and final major difference between parole and probation: not only are parole and probation different but treating them as the same could actually undermine the goals of each. Probation and parole require different strategies to protect both the community and the probationer or parolee themselves. To prevent recidivism and protect the community from crime, parolees arguably need closer supervision not only because they were convicted of a more severe crime but also to ensure that they are meeting the more stringent conditions of release than probationers.

Probationers also should be subject to less intense supervision than parolees for their own rehabilitation, as enhanced supervision of probationers undermines the goal of rehabilitation. The Court in Burns noted that time in prison might frustrate the rehabilitation opportunities available with a deferred sentence. Similarly, if probationers are subject to a reduced expectation of privacy akin to

216. Id. at 9.
217. Burns, 287 U.S. at 220 (“[The Federal Probation Act] was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.”).
that of a prisoner, any potential for rehabilitation while remaining in society is defeated. In contrast, a parolee needs more intense supervision to enable their reintegration into society: prison is so inherently different from normal life that parolees need additional support to reestablish the various parts of their lives—jobs, family obligations, housing—that were absent or fundamentally different in prison. For a probationer, those aspects of everyday life have not been disrupted, and the more probation itself disrupts them, the less successful a probationer will be. In this way, treating probationers like parolees in terms of suspicionless searches is not only unjustified, it is likely to harm the goal of rehabilitation.

Due to these differences, treating probation and parole interchangeably is at odds with the Fourth Amendment mandate that probable cause exceptions only be made if necessary. Treating the two different groups alike subjects probationers to conditions that not only are onerous but likely to lead to worse outcomes. Any one of those reasons standing alone should compel the Court to provide probationers the protections against searches without cause that are afforded to the rest of the population; taken together, the conclusion is unavoidable.

2. The Danger in Expanding Warrantless Searches to Probationers

As applied to just parolees, we have seen that the suspicionless search condition of Samson is detrimental; as extended to probationers, it is downright dangerous. This section shows this is so for at least three reasons. First, because Samson did not raise the issue of warrantless searches of probationers directly before the Court, extending it to probationers raises concerns not only of standing but of judicial overreach. Second, because there are far more probationers than parolees, courts have restricted the constitutional protections of millions of additional people by expanding the holding of Samson to probationers, making errors exponentially more likely. Finally, warrantless searches of probationers exacerbate existing inequalities, particularly racial disparities, in the criminal justice system.

First, because the defendant in Samson was a parolee, the Court unavoidably made its decision based on the necessity of searches of parolees specifically. By expanding warrantless searches to probationers in dicta, the Court implicated the rights of an entirely separate group, without conducting an analysis of costs and benefits of restrictions of rights for both groups. And indeed the costs for probationers may be far greater than those for parolees—a consideration that was never analyzed in briefs or oral arguments.

The breadth of this type of ruling—where millions of Americans’ Fourth Amendment rights have been curtailed—at least requires a case directly considering the issue, with the development of a full factual record and a case or controversy argued by parties facing a direct harm. There is good reason why rules of standing, ripeness, mootness, and other justiciability doctrines have been developed: these rules are not simply designed to trim the Court’s already well-manicured docket, but to ensure that cases are argued by fully invested parties who put forward the strongest arguments of the merits of each side, and thus ensure due process is met. In fact, this is recognized as so vital that in the rare case where there is no such interested party to make the best case, the Court may appoint an amicus advocate to do so. The idea, then, that an issue as important as whether millions of probationers can be searched without any suspicion whatsoever could be decided in a tangential, several-word addendum by a Court addressing another issue is

220. See supra section II.B.1. for discussion on the differences between probationers and parolees.

221. See supra section II.B.2.


224. See, e.g., Holguin-Hernandez, 140 S. Ct. 762, 765 (2020) (“Because the Government agrees with petitioner that the Fifth Circuit’s approach is inconsistent with the Federal Rules of Criminal Procedure, we appointed K. Winn Allen to defend the judgement below as amicus curiae”); Katherine Shaw, Friends of the Court: Evaluating the Supreme Court’s Amicus Invitations, 101 CORNELL L. REV. 1533, 1565-66 (2016) (“[T]he practice of amicus invitation enables the government to make [the decision to change positions in litigation] without undermining courts’ ability to answer important questions.”).
contrary to well-established precedent and basic norms of fairness and decency.

This raises concerns of overreach beyond traditional judicial powers. Implicating the rights of millions of people based on empirical claims of good policy—such as what will best promote reintegration and avoid recidivism in a group where an injured party has not pressed the claim before the Court—moves the decision from the traditional purview of a court to that of a legislature. Yet, ironically, if Congress attempted to pass a law in line with the holding in Samson, regulating the fundamental rights of millions of probationers, courts could apply precedent requiring extensive study and legislative hearings be undertaken to prove the need for such broad-reaching and impactful legislation.

Furthermore, implicating the rights of millions of people based on dicta also runs directly counter to the Court’s practice of writing a decision on the narrowest grounds possible. When considering constitutional freedoms, judges should “stay close to the record in each case that appears before them, and make their judgements

225. The Court has numerous rules preventing its own overreach, such as the rule against issuing advisory opinions as contrary to the separation of powers. Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113–114 (1948) (“This Court early and wisely determined that it would not give advisory opinions . . . [and] to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.”). Such self-restraints are foundational to the notion of judicial independence, whereby courts act as arbitrators, not policymakers or governmental advisers.

226. For instance, when Congress has attempted to make States liable under its enforcement power of the Fourteenth Amendment, even though States are ordinarily immune to suit by their own citizens under the Eleventh Amendment, Alden v. Maine, 527 U.S. 706 (1999), the Supreme Court first assesses whether Congress has established the need for such remedial action, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that State infringement of patents is not a pattern of constitutional violations by states, only a deprivation of property without due process). The Court then examines the depth and breadth of the congressional record to determine whether Congress has adequately shown “congruence and proportionality” between that need and the remedial response, Kimel v. Fla. Border of Regents, 528 U.S. 62, 63 (2000) (finding the application of the Age Discrimination in Employment Act to the States unconstitutional because it is equivalent to heightened scrutiny); Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans with Disability Act does not apply to the States because Congress failed to prove a pattern of irrational State discrimination in employment against the disabled).

based on that alone.” For the Fourth Amendment, that means the Court must assess the privacy intrusion presented by the specific fact situation in the case. By casually encompassing probationers in with parolees, the Court has relied on dicta to remove Fourth Amendment protections from over one percent of people in the United States. That overbroad application violates traditional norms: “[E]ven though [a] governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”

Second, by arguably extending warrantless searches to probationers in addition to parolees, the Court has done away with nearly five times the number of people’s Fourth Amendment rights against suspicionless searches than if it had not mentioned probationers in Samson. In 2006, when Samson was decided, there were 798,202 Americans on parole. In comparison, the number of people in the U.S. on probation in 2006 was 4.2 million. Although the number has decreased in recent years—in 2020, there were 3,053,700 people on probation—probationers still encompass a huge segment of the American population.


229. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (striking down a requirement that teachers in public schools file affidavits giving names and addresses of all organizations to which they had belonged or contributed within the preceding five years as a prerequisite to employment).


equivalent to the population of the city of Los Angeles\textsuperscript{233} or the country of Uruguay.\textsuperscript{234} As of 2020, nearly one in 100 people in the United States was on probation.\textsuperscript{235}

As discussed above, anytime a court decides an issue affecting the rights of a group that is not represented before it, doing so raises issues of due process and judicial overreach. But the expansion of \textit{Samson} to probationers is particularly concerning because of the enormous disparity in the numbers of the two groups. Parolees made up less than 16\% of the larger group that the Court in 2006 was encompassing by nonchalantly including probationers in with parolees. This has significance in terms of the likely error rate involved in the Court’s analysis. It is inevitable that in any police search, even those searches predicated on probable cause, sometimes police will be wrong; they may have the wrong person, or the person may have been doing nothing wrong, and so the police search will therefore uncover no evidence of wrongdoing. Yet if probable cause is satisfied, the search is legal, even if the police officer’s suspicion was incorrect; this is because, unlike conviction, searches do not need to be certain, only based on reasonable evidence. However, the more the standard for suspicion is lowered, the more likely it is that the number of unsuccessful searches will increase. For this reason, searches requiring only reasonable suspicion must be constrained in duration, location, and other restrictions.\textsuperscript{236}

When courts decrease the permitted suspicion

\textsuperscript{233} In 2020, the population of Los Angeles city was 3,893,986. \textit{City and Town Population Totals: 2020-2021}, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html (last visited Apr. 6, 2023). There were 3,053,700 Americans on probation in 2020 and one in 66 Americans were on supervision. KAEBLE, supra note 232, at 1.


\textsuperscript{236} See Terry v. Ohio, 392 U.S. 1, 25-26 (1968) (upholding a search predicated on reasonable suspicion where an officer only patted down the outer clothing of defendants).
level to zero, we can expect the number of bad or unsuccessful searches to skyrocket. Accordingly, we need to be very restrictive, and allow this to happen only in exceptional circumstances.

In Samson, the Court deemed that the rehabilitative goals of highly-structured reintegration of parolees back into the community combined with the very high risk of recidivism and public safety concerns justified the highly unusual setting of the standard of suspicion at zero. In doing so, the Court implicitly deemed that the number of unsuccessful searches is likely to be low and the benefits of successful searches high enough that they outweigh the harm of searches that should not have been undertaken—an approach the Court is explicitly embracing in other areas. But the same implicit calculation does not apply to probationers. As discussed supra, the exceptional circumstances that justified suspicionless searches for parolees do not apply to probationers, and so the benefits of successful searches are far lower. In addition, the massively higher numbers of probationers than parolees means that a minor miscalculation in the Court’s implicit cost-benefit analysis could result in a hugely disproportionate number of bad searches of probationers. Quite simply, allowing suspicionless searches of millions of people is likely to result in hundreds of thousands of unsuccessful searches. The Court cannot simply apply its implicit cost-benefit analysis of parolees to probationers, the impact upon whom suspicionless searches it has not even addressed indirectly.

Third and finally, because there are far more probationers than parolees, warrantless searches can greatly transform communities, which exacerbates existing inequalities. As discussed above, police presence increases—and even non-parolees experience negative effects—when there is a higher presence of parolees in an area. Allowing warrantless searches of probationers exacerbates those effects. Expanding the group of people who are subject to warrantless searches six-fold would give police even more incentive

(“A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation.”); United States v. Ramsey, 431 U.S. 606, 622 (1977) (upholding search based on probable cause for mailed envelopes, but only at the border).

237. See, e.g., Herring v. United States, 555 U.S. 135, 144 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningful deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”).

238. See supra section II.A.
to target areas with high probationers, which would likely result in even greater harm to those communities.

Broader systemic-level harm is also exacerbated by the expansion of warrantless searches to probationers. It is widely documented that the criminal justice system disparately impacts Black Americans, and that disparity is even worse when considering rates of probation revocation between racial groups. For example, a study conducted by the Urban Institute found that probation rates were higher for Black Americans in every one of four study sites, ranging from “55 percent higher than that of white probationers in Dallas County to over 100 percent higher in Multnomah County.” Even after controlling for disparities between risk scores and criminal histories, Black probationers had much higher revocation rates than either White or Hispanic probationers, indicating racial bias in probation revocation. By expanding warrantless searches to probationers, the Court is allowing any bias already furthered by warrantless searches to multiply.

In summary, by incorporating more than five times as many people into the embrace of its ruling by casually including probationers, without having directly addressed the issue at all, the Supreme Court was acting contrary to fundamental jurisprudential restrictions on judicial power, arguably overreaching into the legislative dominion, and risking an enormous error rate, which could translate into hundreds of thousands of unconstitutional searches and exacerbate given inequalities within the probation system.

**CONCLUSION: BEYOND PAROLEES AND PROBATIONERS**

This Article has shown that by severely curtailing the rights of probationers in dicta, the Court took a significant step towards normalizing restrictions on Fourth Amendment rights of an already marginalized group. But the danger goes beyond the concerns and uncertainty raised for the literally millions of probationers whom the opinion of the Court flippantly lumped in with parolees — while also recognizing their differences in other parts of the opinion.

---


240. *Id.* at 4.
Here we show that this is a problem that goes beyond the more than 1% of the population made up of probationers: the rights-reducing logic of Samson has no natural limiting principle and has the potential to normalize restrictions of rights generally.

We showed in Part I that the Court departed dramatically from traditional Fourth Amendment analysis. Instead of stringently assessing whether a special needs exception applies to parolees or probationers, the Court applied a totality of the circumstances test, in which reduced privacy expectations and a legitimate government interest could outweigh the requirements of a warrant, probable cause, or even reasonable suspicion. But relying on lower expectations of privacy that the government itself has lowered has the potential to ratchet down Fourth Amendment protections more generally. Katz set forth a two-prong test to determine whether a search falls under the Fourth Amendment: whether a person has a subjective expectation of privacy, and whether that expectation of privacy is reasonable. As discussed briefly, the Court in Smith v. Maryland recognized an inherent logical problem with the Katz test—if a person’s subjective expectation of privacy has been lowered due to external factors, constitutional protections could correspondingly be lessened in a way that departs from traditional Fourth Amendment norms. As has been acknowledged by numerous judges and justices, this renders the Katz test circular, because as people become conditioned to expect less privacy, their lowered expectations are reflected in Fourth Amendment jurisprudence, and so individuals will effectively lose existing Fourth Amendment protections they once had. Because of this danger,

242. See supra Section 1.C.1.
243. Smith v. Maryland, 442 U.S. 735, 741, n.5 (1979) ("Situations can be imagined, of course, in which Katz' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection.").
244. See, e.g., Jones v. United States, 565 U.S. 400, 427 (2012) (Alito, J., concurring) ("The Katz expectation-of-privacy test . . . involves a degree of circularity, and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the Katz test looks."); see also, e.g., Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 384 (1974) ("[T]he government could diminish each person’s subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance."). For more detail, see Tonja Jacobi and Christopher Jaeger, Katz’s Imperfect Circle (2021) (working paper) (on file with authors) (summarizing the literature, cataloguing the various aspects of the circularity problem, and proposing solutions).
the Court in Smith emphasized the importance of guarding against such harm by mandating that courts not give constitutional significance to these lowered expectations, saying:

In such circumstances, where an individual’s subjective expectations had been “conditioned” by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was.245

The Court in Samson did not heed Smith’s warning. In fact, it justified permitting the search on the basis that parolees have lowered expectations of privacy first because they were conditioned to expect less privacy while serving time in prison, and second because of the restrictive conditions of their parole, such as constraints on their movement and employment status.246 That is, the Court relied on the fact that state treatment of parolees is so intrusive that it lowers their expectations of privacy, which then in turn justifies further intrusion, the very logic that Smith warned about.

When this critique is combined with the aforementioned problem of the Court jumping straight to a balancing test, the attrition of rights of parolees becomes even more stark. Because the Court upheld the search of Samson based solely on his decreased expectation of privacy, it declined to address whether in fact he had consented to the warrantless search provision. However, arguably, Samson and other parolees and probationers like him cannot consent to lowered privacy expectations, since they are coerced by the fact that those conditions are a necessary step to be released.247 That means that instead of reasonable expectations of privacy reflecting changing societal norms—or at least those norms that

245. Smith, 442 U.S. 741, n.5.
247. See, e.g., id. (noting that California law mandated that “every prisoner eligible for release on state parole” agree, in writing, to a warrantless search condition) (emphasis added). If every person is required to agree to this restriction, it is not a decision that the parolee consents to. As the Court noted:

[I]nmates who are otherwise eligible for parole yet refuse to agree to the mandatory search condition will remain imprisoned . . . until either (1) the inmate agrees to the search condition and is otherwise eligible for parole or (2) has lost all worktime credits and is eligible for release after having served the balance of his/her sentence.

Id. at 846 n.3 (quoting People v. Middleton, 131 Cal. App. 4th 732, 730-40 (Cal. App. Ct. 2005)).
people have consented to—people need only be on notice of their reduced expectations of privacy for reduced Fourth Amendment protections to attach. By defining reasonableness only based on notice and government interest, the government could constitutionally conduct any search so long as it alerted citizens that the search could happen. In fact, under the Court’s reasoning, any governmental search that deterred crime could be justified, a far leap from the text of the Fourth Amendment that protects against any search without a warrant or probable cause.

Currently, this poses the greatest concern to probationers and parolees. The Court found that parolees generally have naturally lower expectations of privacy than average citizens because of the many restrictions of their parole. But by failing to tie this analysis back to a special needs search, this logic can be extended to a dangerous extent. Under this analysis, any person who has lowered expectations of privacy then has lowered Fourth Amendment protections. For example, people released pre-trial have lowered expectations of privacy in many of the same ways that the Court discusses for probationers and parolees, such as conditions imposed on their movement and activities. Similarly, anyone who is on supervised outpatient drug or alcohol treatment would also suffer from lesser Fourth Amendment protections due to the restrictions of those programs. For example, some halfway houses require that participants not leave the house and be subject to random breath and urine testing.248 As the Court held in *Reno v. Koray*, court-ordered time served in a halfway house does not count toward credit for penal time served because a halfway house is not equivalent to jail, despite having many of the same restrictions.249 But this means a defendant gets the short end of the stick in two ways: they do not get credit for time served, but can be subject to

248. See *Reno v. Koray*, 515 U.S. 50, 66 (1995) (Stevens, J., dissenting) (quoting *Koray v. Sizer*, 21 F.3d 558, 566 (Cal. Ct. App. 1994)) (“[R]espondent ’had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility.’”).

249. Id. at 62-63 (“It is quite true that under the Government’s theory a defendant ‘released’ to a community treatment center could be subject to restraints which do not materially differ from those imposed on a ‘detained’ defendant committed to the custody of the Attorney General, and thence assigned to a treatment center. Unlike defendants ‘released’ on bail, defendants who are ‘detained’ or ‘sentenced’ always remain subject to the control of the Bureau.”).
significant impingements on their Fourth Amendment rights in exactly the same way as those serving time in prison.

The Court’s claim in Samson that it was adhering to traditional Fourth Amendment principles while abandoning applying the usual standard of probable cause is not sustainable. Taking its reasoning to its logical conclusion, government officials could justify nearly any search by putting an individual on alert that the search might happen and that there was a governmental interest in the search. For example, the government could lower citizens’ expectations of privacy by issuing warnings regarding warrantless searches. If the government also put forth a reasonable interest, such as a concern that citizens within a certain geographic region were more likely to commit certain offenses, a search based on no cause would be constitutional under the Court’s analysis in Samson. This would lead to absurd results, in which individuals were subject to searches based on their age, their geographic location, or other non-criminal characteristics. This would be contrary to the rule that searches should be based on individual characteristics, not stereotypes or generalizations.

In extending warrantless, suspicionless searches from parolees to probationers, the Court took another step toward retracting traditional Fourth Amendment protections more broadly. Just as the Court expanded its logic from parolees to probationers in dicta and from special needs searches to those based on the totality of the circumstances, it could disregard its traditional categories of warrant and probable cause exceptions more generally. In future cases, the Court could use this same logic to uphold these types of searches beyond various existing penal categories, for example to include any person who had lessened expectations of privacy due to their time previously spent incarcerated. As such, application of Samson to probationers heralds a danger to many beyond the four million casually swept into the Court’s analysis.

This cumulative narrowing of Fourth Amendment rights puts the Supreme Court at odds with public opinion, which is moving away from support for mass incarceration and toward

250. Samson, 547 U.S. at 848 (“[U]nder our general Fourth Amendment approach’ we ‘examin[e] the totality of the circumstances’ to determine whether [this] search [i]s reasonable.”).

251. Terry v. Ohio, 392 U.S. 1, 22 (1968) (holding that “inarticulate hunches” were not enough for the reasonable articulable suspicion necessary for an investigatory search).
rehabilitation. It is also contrary to legislative trends: in recent years, there has been bipartisan support for criminal justice reform, particularly addressing the problem of mass incarceration. And perhaps hardest to reconcile, this curtailment of Fourth Amendment rights is in direct contrast to the Court’s expansion of constitutional rights in many other areas of the law, such as First and Second Amendment rights. In First Amendment jurisprudence, the Court has, for example, expanded free speech protections to videos of small animals being crushed to death for the sake of cruelty-driven sexual arousal, anti-gay protests at military funerals of fallen soldiers uninvolved in any political advocacy, and false claims of receiving military honors.

The differences in the Court’s jurisprudential trends over the various constitutional protections reflects normative values within the Court, even if those same normative values may not be reflected in the general public’s opinion. By expanding the right to free speech while simultaneously curtailing the right to be free from unreasonable search and seizure, the Court has sent the message that the former is more of a fundamental right than the latter; or alternatively, that rights depend on one’s status, and probationers and parolees are simply not deserving of the same rights as the general public.


255. United States v. Stevens, 559 U.S. 460, 482 (2010) (striking down a federal statute criminalizing the commercial production, sale, or possession of depictions of cruelty to animals as an unconstitutional abridgment of the First Amendment right to freedom of speech due to overbreadth).

256. Snyder v. Phelps, 562 U.S. 443, 458 (2011) (shielding picketers of military funerals from tort liability for intentional infliction of emotional distress due to reading of the First Amendment as giving the right to choose “how and where” to convey its message however “outrageous” the content of that message).

The Court needs to clarify the status of probationers by taking a case that directly addresses their Fourth Amendment rights. If the Court intends to reduce probationers’ rights, it must do so with a case directly on point such that the Court is able to come to the decision fully informed by a complete briefing and supported by a full opinion. As it stands, the Court has curtailed probationers’ Fourth Amendment rights with a wave of its hand. This is untenable, both for probationers themselves and for everyone else. The Court should not reduce fundamental Fourth Amendment rights, but if it does so, it must do it in a way that comports with the rest of constitutional law, instead of creating a class of people for whom parts of the Constitution seem to not apply.