

# **They Released Me From My Cage . . . But They Still Keep Me Handcuffed: A Parolee’s Reaction to *Samson v. California***

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*“Yes, 'n' how many years can some people exist,  
before they're allowed to be free?”*

*- Bob Dylan<sup>1</sup>*

*When I went in, I was young and naïve. Prison is a violent place, and the older, stronger men prey on the young and weak. I got physically strong so that I could survive. I saw the inside of what has been called “Hell on Earth.” I got out with no money, no job, and no real friends. I had lived with convicted felons for four years, one month, and six days. I was changed. I came home sixty pounds heavier and eons wiser. I had navigated my way through the treacherous waters of a state prison. When I got outside the walls, I felt like an alien. I felt as if I had never before walked as a free man. It was eerily unfamiliar. Those should have been the happiest days of my life—they were not. I walked as a free soul through a society filled with landmines that target those of us on supervised release. I walked carefully, knowing what I had been through and understanding the consequences of my every step.<sup>2</sup>*

As a parolee, I pay close attention to any court’s decision concerning those of us scrutinized by the watchful eyes of the justice system. I am concerned when courts describe us as combustible, and I am disheartened when courts term us a threat to society. Unfortunately, I *live* supervised. I understand parole because it

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<sup>1</sup> BOB DYLAN, BLOWIN’ IN THE WIND, THE FREEWHEELIN’ BOB DYLAN (Columbia Records, 1963), available at <http://www.bobdylan.com/songs/blowin.html>.

<sup>2</sup> An excerpt from an untitled novel Mr. Binnall is currently writing in which he describes his time in prison and his subsequent release. James Binnall, untitled novel (2005) (unpublished manuscript, on file with author).

is my existence, and I fear that a recent holding by our highest court has mischaracterized my life.

#### I. *SAMSON V. CALIFORNIA*

On September 6, 2002, parolee Ronald Curtis was subjected to a suspicionless search at the hands of a California police officer. Because of previous contact with Curtis, the searching officer was aware that he was on parole. Suspecting he was facing an at-large warrant, the officer stopped Curtis to confirm his suspicion. When questioned, Curtis acknowledged his status as a parolee and assured the officer that he was not facing an outstanding warrant. The officer confirmed Curtis' contentions and searched Curtis "based solely on [his] status as a parolee."<sup>3</sup> During the search, methamphetamine was found. Curtis was arrested and charged with possession of a controlled substance. He was subsequently sentenced to seven years imprisonment. The California Court of Appeal affirmed his conviction, and the United States Supreme Court granted certiorari to decide whether a suspicionless search of a parolee is permissible under the Fourth Amendment.<sup>4</sup>

In *Samson v. California*, the Supreme Court per Justice Clarence Thomas held California's suspicionless parole-search standard reasonable under the Fourth Amendment.<sup>5</sup> Balancing policy concerns against a parolee's expectation of privacy, the Court provided five justifications for its holding: 1) parolees have diminished Fourth Amendment protections because they are the closest to prison on the continuum of punishment; 2) parolees lack adequate adjustment capabilities, as illustrated by recidivism rates, and therefore require intense supervision; 3) the social value of suspicionless searches outweighs the parolee's expectation of privacy, which expectation is reduced in light of the parolee-supervision conditions; 4) a "reasonable suspicion" requirement would undermine the ability of the state to monitor supervised parolees; and 5) a law forbidding harassment of parolees by law enforcement agents will prevent such behavior.<sup>6</sup>

Woven through the Court's theories about parole are subtle characterizations of parolees common in American society. Many see us as broken and incorrigible. We allegedly subsist to abuse the innocents we live among because we once deviated from recognized law. In *Samson*, the Supreme Court used these prejudiced characterizations as fodder in an attack on the Fourth Amendment protections that parolees should enjoy. And, as an incidental but hardly irrelevant matter, the Court's overall reasoning could be extended in the future to justify suspicionless searches in other non-parolee circumstances.

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<sup>3</sup> *Samson v. California*, 126 S. Ct. 2193, 2196 (2006).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2194–95.

This Commentary explores the rationales and characterizations at work in *Samson v. California*. It deals in a reality to which theory is inapplicable. Focusing not on the hypothetical, but on the concrete, this essay explains how the Court's abstractions cannot support the evisceration of a parolee's Fourth Amendment protections. I examine the five arguments set out above in light of statistical data and common occurrences in the life of a parolee in order to illustrate that the Court's holding is based on generalizations and conjecture.

## II. PROBATIONERS ARE CLOSER THAN PAROLEES TO PRISON ON THE CONTINUUM OF PUNISHMENT

*In 2002, probationers committed 40% of the total new crimes leading to state prison terms in California.<sup>7</sup> Of the 41,295 new prison admissions in California that year, 16,518 were probationers who had committed a new crime.<sup>8</sup> In contrast, only 14,328 parolees were sent to prison for committing a new offense.<sup>9</sup>*

In *Samson*, the first rationale employed by Justice Thomas to justify suspicionless parole searches is that parolees are closer to prison than are probationers because they pose a greater threat to society than probationers.<sup>10</sup> The continuum of punishment constructed by the Supreme Court is an imaginary rainbow chart, pitting solitary confinement on one end against community service on the other, with varying degrees of state-sanctioned punishments filling in the gaps.<sup>11</sup> Justice Thomas situates parole closer to prison on a theoretical continuum of punishment without considering the *actual* number of those in each supervised group who will ultimately harm society. The Court instead relies on a flawed parolee recidivism rate in his analysis of supervised release.<sup>12</sup>

California's parole recidivism rate is a flawed tool for analyzing potential harm to the public because it includes technical violations of parole conditions.<sup>13</sup>

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<sup>7</sup> Mark A.R. Kleiman et al., *Opportunities and Barriers in Probation Reform: A Case Study of Drug Testing and Sanctions*, [2002] 14–4 California Policy Research Center Brief 1, available at <http://www.ucop.edu/cprc/Sanctionsbrf.pdf> (“About 40% of new crimes leading to state prison terms are committed by probationers.”).

<sup>8</sup> CALIFORNIA DEP'T OF CORR. AND REHAB. OFFENDER INFO. SERVS. ESTIMATES AND STATISTICAL ANALYSIS SECTION, DATA ANALYSIS UNIT, *California Prisoners and Parolees 2003: Summary Statistics on Felon Prisoners and Parolees, Civil Narcotic Addicts and Outpatients and Other Populations* 8 (Sacramento, CA 2005), available at <http://www.cdcr.ca.gov/ReportsResearch/OffenderInfoServices/Annual/CalPris/CALPRISd2003.pdf> (last checked March 1, 2007).

<sup>9</sup> *Samson*, 126 S. Ct. at 2200–01.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2197 (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)).

<sup>12</sup> *See id.*

<sup>13</sup> Ryan G. Fischer, *Are California's Recidivism Rates Really the Highest in the Nation: It Depends on What Measure of Recidivism You Use*, in 1 UC IRVINE CENTER FOR EVIDENCE-BASED

According to Justice Thomas, “68 percent of adult parolees are returned to prison, 55 percent for a parole violation, 13 percent for the commission of a new felony offense.”<sup>14</sup> Lacking in this analysis, however, is any examination of the types of violations that *harm* society. Justice Thomas merely concludes that a parolee who returns to prison must have hurt the public while free. This conclusion is inaccurate because technical violations of parole do not harm society and should not factor into the parolee’s place on the continuum of punishment.

The more accurate indicator of a parolee’s potential for harming citizens is the number of new crimes parolees commit while supervised. As noted above, probationers, not parolees, are responsible for a greater number of new crimes each year. If protection of the public is the goal of the Court then the *number of new crimes committed* must be the measure by which the Court determines the probationers’ and parolees’ place on the continuum of punishment. Therefore, the Court improperly describes parole as being “more akin to imprisonment than probation.”<sup>15</sup>

Because my crime involved alcohol, a condition of my parole is that I must abstain from drinking. This behavior is *legal* for citizens over the age of twenty-one in the United States. Yet for me, drinking alcohol *even in private* can constitute a violation of parole and an immediate return to prison. How does such a violation involve harm to society? How does sitting in my recliner drinking beer and watching football harm the public? The act of using alcohol, in and of itself, is a victimless activity and does not hurt the public in a traditional sense.

### III. A PAROLEE’S ABILITY TO ADJUST CANNOT BE DETERMINED BY EXAMINING THE RECIDIVISM RATE

*I work 11 P.M. to 7 A.M., I have a Code-A-Phone number I need to call Monday through Saturday to see if I need to come in and leave a UA [urinalysis]. So, I’m responsible for makin’ sure I remember to call every day, workin’ a job. I have five children. Then on Thursday, I go for a counselin’ session. . . .*<sup>16</sup>

*I’m not where I’m supposed to be, and it’s all over now. A policeman on the road, if I’m driving, even if I wasn’t speeding or wasn’t sliding*

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CORRECTIONS BULLETIN 1–1 (2005), available at [http://ucicorrections.seweb.uci.edu/pdf/bulletin\\_2005\\_vol-1\\_is-1.pdf](http://ucicorrections.seweb.uci.edu/pdf/bulletin_2005_vol-1_is-1.pdf) (discussing the various factors used to determine parole recidivism rates and how those rates change with further analysis of the data).

<sup>14</sup> *Samson*, 126 S. Ct. at 2200 (citing California Attorney General, CRIME IN CALIFORNIA 37 (Apr. 2001)).

<sup>15</sup> *Id.* at 2198.

<sup>16</sup> PATRICIA O’BRIEN, MAKING IT IN THE “FREE WORLD”: WOMEN IN TRANSITION FROM PRISON 76 (2001) (quoting a woman named Nan, who was on federal supervised release at the time of her interview).

*through a stop sign, there was that, "Where am I supposed to be? Is everything right? Do I have my pass?"*<sup>17</sup>

Justice Thomas reasons that recidivism rates reflect a parolee's adjustment capabilities, and since recidivism rates are high, parolees intrinsically lack the requisite capacity to adjust.<sup>18</sup> Supervision conditions, however, shape readjustment capabilities. Therefore, it is inaccurate to define such capabilities based on *who* ultimately fails, without considering *why* they fail. Intense supervision ultimately retards a parolee's ability to adjust and cannot be justified by the negative results it produces.

The Supreme Court has failed to recognize both of the traditional goals of parole: to protect the public and, lest it be forgotten, to reintegrate the offender in the community as a productive member of society.<sup>19</sup> Justice Thomas addresses the concerns for public safety, but notably neglects to discuss the actual problems of recidivism. *Why* do we go back? *Why* do we commit new offenses or violate supervised release? Ultimately, Justice Thomas concludes, "[a]s the recidivism rate demonstrates, most parolees are ill prepared to handle the pressures of reintegration. Thus, most parolees require intense supervision."<sup>20</sup>

Intense supervision will *not* remedy the astronomical recidivism rate with which California and the rest of the United States is currently struggling.<sup>21</sup> Reintegration is difficult for those of us who have been on the inside of a state prison. We deal with relationship issues, self-esteem problems, and a host of psychological nuances foreign to most people.<sup>22</sup> At the same time, the Supreme Court strips us of our Fourth Amendment protections entirely, disregarding the effect that *this* will have on reintegration. Reintegration is essential because, like it or not, almost all prisoners are released.<sup>23</sup>

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<sup>17</sup> *Id.* at 74 (quoting a woman named Elizabeth, who had been discharged from her state parole at the time of the interview).

<sup>18</sup> *Samson*, 126 S. Ct. at 2200.

<sup>19</sup> DAVID T. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 1–2 (1976) (identifying the two theoretical goals of parole as reintegration and protection of the public).

<sup>20</sup> *Samson*, 126 S. Ct. at 2200.

<sup>21</sup> Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State between Liberty and Recommitment*, in *PRISONER REENTRY AND CRIME IN AMERICA* 50, 77 (Jeremy Travis & Christy Visher eds. 2005) (noting that in recent years "recommitted parolees have become a burgeoning part of the prison population").

<sup>22</sup> LOLA VOLLEN & DAVE EGGERS, *SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED* 42–44, 112–15, 190–98, 368–74 (2005) (detailing the struggles ex-inmates have with romantic relationships post-release, the post-traumatic stress component of reintegration, the psychological effects of solitary confinement, and the difficulty ex-inmates face in re-connecting with their children).

<sup>23</sup> JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* xvii (2005) (noting that 630,000 inmates were released in 2002 (1,700 per day) and that

The use of the word “pressures” in Justice Thomas’s well-crafted opinion is telling. The everyday dilemmas discussed by actual parolees at the start of this section create the *pressures* parolees encounter as obstacles to reintegration. How does restricting logistical freedoms and controlling movements decrease *pressure*? How does showing up on a job site and asking to speak with a parolee in front of clients and customers, many of whom might have previously been unaware of the parolee’s situation, aid in one’s reintegration? How does such a situation decrease *pressure*? In theory, like all of the hypothetical arguments put forth by Justice Thomas, intense supervision will *restrict* free time and help foster a structured environment. Idle hands are the Devil’s workshop, right? In practice though, reintegration rarely flourishes in this type of environment. Essentially, such an environment promotes the continuation of institutionalization.<sup>24</sup>

The schedule kept in prison is rigid, as is the daily life of a parolee on intense supervision. Those parolees subject to severe restrictions, in a sense, do not stop thinking like a prisoner. They carry their routine to the “street.” They institutionalize in a free man’s world, thus curtailing their ability to deal with adversity. They—we—develop feelings of inadequacy due to the lack of control we maintain over our own existence while scrutinized by a parole officer. Couple these feelings with pre-existing psychological problems or substance-abuse issues, and intense supervision can lead to volatile results. For these reasons, parolees need the freedom to cope with their complex lives truly as *ex-offenders*. A middle ground will curb recidivism *and* promote reintegration.

#### IV. THE CONSTITUTION DICTATES PRIVACY EXPECTATIONS

*I realize it is necessary, but I do resent a parole officer telling me what I can do and what I cannot do. I believe that every man is different, every case is different, and there can be no set policy.*

*. . . I believe everything should be weighed and judged on the basis of what a man is capable of. I don’t think employment’s a privilege, I think employment is a right! I believe you have a right to work anywhere you want .*<sup>25</sup>

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“[e]xcept for those few individuals who die in custody, every person we send to prison returns to live with us”).

<sup>24</sup> O’BRIEN, *supra* note 16, at 74 (discussing a woman who carried her feelings of “being institutionalized” out of prison, and her trouble in “regaining autonomy,” and that “[t]he extension of the institutional control is maintained through the system of supervision.”).

<sup>25</sup> ROSEMARY J. ERICKSON ET AL., *PAROLED BUT NOT FREE: EX-OFFENDERS LOOK AT WHAT THEY NEED TO MAKE IT OUTSIDE* 19–20 (1973) (quoting Lloyd Nieman, a parolee at the time of the interview).

. . . . You have to come out and you have to feel wanted. If you feel rejected, you're not going to make it, I don't care who they are. If you feel rejected by society, you're not going to make it. This is my feeling.<sup>26</sup>

In *Samson*, the Supreme Court concluded that as a result of the parolee's conditions of supervision, he lacks a legitimate expectation of privacy and, therefore, falls outside the "search" protections of the Fourth Amendment.<sup>27</sup> Yet, parolees are citizens, and as such, have base-level expectations of privacy. Allowed to live among those who cannot readily identify their supervised status, parolees, once released, reasonably expect to be afforded the protections of any free citizen. Parolees have a subjective expectation of privacy, one that is legitimate despite our status as parolees. A suspicionless search, justified by the Court's misguided analogy to prisoners, ought to violate the Fourth Amendment.<sup>28</sup> To destroy the sacred principle of privacy is to throw aside the Fourth Amendment when it suits the policy the justices seek to forward. The Court's logic is both circular and incorrect.

#### A. *I Have an Expectation of Privacy*

While prison teaches that cell searches and routine strip searches are the norm, on parole a new life is expected. While supervised, I certainly expected to be protected as an American citizen living under the Constitution. Justice Thomas, however, informs me that such expectations as a parolee are illegitimate.<sup>29</sup>

The *Sampson* Court reaches its conclusion based on the restrictions imposed on parolees.<sup>30</sup> As the two parolees make clear above, however, conditions of release do not form or change our expectations of privacy. While in prison, I expected certain Fourth Amendment protections. For instance, I expected that my legal mail would be free from tampering by prison officials. That subjective expectation would continue even if my prison decided that legal mail was no longer privileged.<sup>31</sup> Similarly, parolees expect that they will be free from unnecessary limitations on their Fourth Amendment protections. The rules of parole do not define established expectations. Base-level expectations of privacy

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<sup>26</sup> *Id.* at 43 (quoting Raymond Hinsel, a parolee at the time of the interview).

<sup>27</sup> *Samson*, 126 S. Ct. at 2199.

<sup>28</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that a Fourth Amendment search occurs when the subject of the search has a subjective expectation of privacy that society recognizes as legitimate).

<sup>29</sup> *Samson*, 126 S. Ct. at 2199.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 2206 (Stevens, J., dissenting) (quoting *Smith v. Maryland*, 442 U.S. 735, 740–41, n.5 (1979)) (noting that notice does not cure the circularity of the majority conclusion that conditions define expectations; for example, "if the government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry").

established by the Constitution and conditions of supervised release are mutually exclusive. Justice Thomas errs in assuming that, as parolees, we view our privacy differently than normal citizens.

True enough, I do not expect to live entirely free from the constraints of my past. I am constantly reminded that I am different when I apply for a student loan, seek federal financial assistance, or register for a driver's license.<sup>32</sup> But, I still expect privacy. I expect to live free from strip searches and shakedowns. I expect that my telephone is free from monitoring, and that I can have an opinion without fear of retribution. In short, I expect that parole is not prison.

### B. *My Privacy Expectations Are Legitimate*

For a subjective expectation of privacy to be termed legitimate, society must recognize that expectation as reasonable.<sup>33</sup> By creating the parole system and differentiating parole from prison, society took steps to create a tiered structure of supervision for the convicted. In *Samson*, Justice Thomas tossed aside this accepted structure in favor of a blanket policy void of protections.<sup>34</sup>

By creating a tiered system of punishment, society has necessarily identified two different levels of threat.<sup>35</sup> A prisoner poses one level of threat; parolees pose a different, indeed lesser, level of threat. Parolees have been allowed to leave the walls and exist among the society they once harmed. This difference is crucial in examining what society should term reasonable. In classifying parolees and prisoners as entities that are essentially identical, the Court ignores the fact that society views parole as a legitimate means of reintegrating individuals into society, and in turn fails to recognize that certain privacy expectations removed from prisoners should be restored once they are released on parole.

As a parolee, I am allowed to walk among the free. I am allowed to attend sporting events, go to a mall, and ride the subway. Society now deems me less threatening than those on the inside. I have made parole. The parole board reviewed my file and allowed me to walk out the gate of a maximum security prison. By instituting parole, society has afforded those on the inside a manner through which we can work our way out. We can behave, do our programs, and then, if we are lucky, make parole. We are then told that we must assimilate into

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<sup>32</sup> See TRAVIS, *supra* note 23, at xix (discussing the increased popularity of “collateral sanctions” consisting of laws enacted by Congress that are often termed “invisible punishments” and serve to preclude ex-offenders from participation in society—some examples are exclusion from the welfare system, student loan services, and public housing).

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

<sup>34</sup> *Samson*, 126 S. Ct. at 2196.

<sup>35</sup> *Id.* at 2201 (quoting *United States v. Crawford*, 372 F.3d 1048, 1077 (9th Cir. 2004) (Kleinfeld, J., concurring)) (explaining that parolees in contrast to probationers, “have been sentenced to prison for felonies and released before the end of their prison terms” and are “deemed to have acted more harmfully than anyone except those felons not released on parole”).

society. We are told we must work and we must live as though we are free. As one parolee notes above, failing to recognize base-level privacy expectations, and then demanding that we “fix” our lives, is to ask us to recreate ourselves as citizens without giving us the protections necessary to accomplish the job.

#### V. IN THE AGGREGATE, “REASONABLE SUSPICION” PROTECTS

*About three months ago, he [the parole officer] called me and said, “Meet me at your house. We need to talk.” Okay, he comes over here. Now there are several reasons why he wanted to talk. One was that he came by my [house] at 6:30 in the morning and did not see my car and wanted to know where the hell I was. Well, sometimes I leave to go to work early. “Well, you don’t have to be to work until 7:00.” “Well, I get there at 6:20 or 6:30 or 6:40 or 6:55 or 6:59. It just depends on how I feel that morning. I might have left early.” “But, you weren’t here.” “Well, I was at work.”<sup>36</sup>*

*I called his supervisor a couple of days after Christmas to discuss this issue with him, and he said that it’s more of the parole officer’s initiative as to how far they can take it. He didn’t have any guidelines, but he said, “It’s up to your parole officer.”<sup>37</sup>*

Justice Thomas calls into question the state’s ability to monitor parolees effectively under a “reasonable suspicion” search standard. He further argues that such a standard “would give parolees greater opportunity to anticipate searches and conceal criminality.”<sup>38</sup> However, a “reasonable suspicion” requirement would protect parolees from the evils of harassment and targeted hatred by providing them a limited shield against targeted bias. It would also protect society, as explained below.

#### A. “Reasonable Suspicion” Protects Liberties

The Fourth Amendment guards citizens not on supervised release against the terror of suspicionless searches. Historically, case law has established that the home and the person must be free from unsubstantiated attacks on privacy.<sup>39</sup> The Supreme Court has shown a strong preference for warrants to prevent such

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<sup>36</sup> O’BRIEN, *supra* note 16, at 81–82 (quoting a woman named Ashley, who was on federal supervised release at the time of her interview).

<sup>37</sup> *Id.*

<sup>38</sup> *Samson*, 126 S. Ct. at 2201.

<sup>39</sup> See *Payton v. New York*, 445 U.S. 573, 586–87 (1980) (noting that nothing short of probable cause and a warrant will validate an invasion into one’s privacy absent specific exceptions).

attacks.<sup>40</sup> Warrants are a constitutionally mandated precursor, except in special circumstances, to any intrusion into a citizen's private sanctity of self or home, and no warrant shall issue without probable cause.<sup>41</sup>

The Constitution and the courts have also long afforded probationers and parolees some measure of protection against intrusive searches. Traditionally, a "reasonable suspicion" standard has governed parole and probation searches in the majority of jurisdictions.<sup>42</sup> The divergence from the long-recognized warrant requirement in those instances signaled a shift towards diminished Fourth Amendment protections for those of us on supervised release. In *Samson*, however, the Court eradicated this already thin "reasonable suspicion" shield against intrusive searches.<sup>43</sup> Parolees now have no Fourth Amendment recourse in situations such as that described at the beginning of this section. *Samson* takes those of us on supervised parole-release from the purgatory of reasonable suspicion into the hell of suspicionless searches.

#### B. "Reasonable Suspicion" Protects Society

Justice Thomas contends that if a "reasonable suspicion" were to remain the benchmark for parolee searches, criminality by parolees could increase.<sup>44</sup> In support of this proposition, Justice Thomas cites *United States v. Knights*, suggesting that "imposing a reasonable suspicion requirement . . . would give parolees greater opportunity to anticipate searches and conceal criminality."<sup>45</sup> However, the opposite conclusion is far more appropriate.

A suspicionless search standard fails to protect the public from criminal behavior because it promotes concealment. By instituting suspicionless searches, those who choose to violate parole conditions will take measurable precautions to prevent detection. Suspicionless searches will not prevent criminal activity; they will simply amplify the secrecy with which already overburdened parole officers

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<sup>40</sup> See *United States v. Ventresca*, 380 U.S. 102 (1965) (demonstrating a strong preference for searches conducted pursuant to a warrant over those conducted without).

<sup>41</sup> *Katz*, 389 U.S. at 357 (noting that nothing short of probable cause and a warrant will validate an invasion into one's privacy absent specific exceptions).

<sup>42</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (finding that a warrantless search was proper if a "special need" existed and such a search is permitted by state statute based on "reasonable legislative or administrative standards").

<sup>43</sup> *Samson*, 126 S. Ct. at 2193.

<sup>44</sup> *Id.* at 2201 (extending the logic in *Hudson v. Palmer*, 468 U.S. 517, 529 (1984), in which the court deemed "planned random searches" inside a prison ineffective as they would allow for a prisoner to "anticipate" searches). Extending *Hudson's* logic to parolees is flawed in that the case dealt with prisoners and noted strong policy considerations concerning prison management.

<sup>45</sup> *Id.* (quoting *Griffin*, 483 U.S. at 875) (explaining that "incentive-to-conceal" justified an "intensive" system for supervising probationers).

must deal.<sup>46</sup> In *Samson*, the Court notes the effect of supervision, stating that “probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal . . . .”<sup>47</sup> As Justice Thomas recognizes, intense supervision builds better criminals.

If parole is “akin” to prison, as Justice Thomas assumes, then he ought to consider the behavior of inmates when considering the likely effects of suspicionless searches on parolee behavior. Having lived in a maximum security state prison among many who dealt in illegal narcotics and weapons, I have seen the creativity of inmates, who lack Fourth Amendment protection, to preserve contraband. Feeling secure in one’s setting often produces a measure of complacency. When the standard is changed and those that are determined to commit crimes are alerted that they are subject to random suspicionless searches, they adapt. This phenomenon is typical in prison. These adaptations lead to undetectable illegal enterprises.

In the parole setting, the initial gains no-suspicion parole searches foster will come in the form of technical violations. As discussed above, those who pose a threat to society do not commit technical violations. New crimes by parolees harm the public and suspicionless parole searches will make those crimes virtually undetectable. As is the case in prison, surprise searches and cell shakedowns often produce the fruits of illegal labor, yet hundreds of weapons and supplies of narcotics are then furtively hidden all over the grounds of most penitentiaries. If we analogize the effects no-suspicion parole searches have on prisons to the effects they are likely to have on parolees, it is clear that suspicionless searches will be unsuccessful in preventing crime. If detection and prevention are the goals of parolee searches, then a “reasonable suspicion” standard will more effectively produce the desired outcome.

#### VI. STATUTORY PROHIBITION CANNOT STOP THE HARASSMENT THAT IS NOW LAWFUL

*Whatever his orientation, the parole officer is frustrated most of the time by the unattainability of his goals and by the conflicts between his policing and helping function . . . . [T]he parole officer seems driven toward shallow, meaningless exchanges with the parolee . . . . [T]he officer moves toward increasingly bureaucratized performance . . . . The relationship is never really developed, communication is on the surface only, and the parolee avoids the parole officer as much as possible.*<sup>48</sup>

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<sup>46</sup> STANLEY, *supra* note 19, at 126 (citing a Federal Judicial Center study that found in 1973 each offender could expect approximately 7.7 hours of supervision per year, thirty-eight minutes per month, or nine minutes per week).

<sup>47</sup> *Samson*, 126 S. Ct. at 2197 (quoting *Knights*, 534 U.S. at 120).

<sup>48</sup> STANLEY, *supra* note 19, at 130–31.

The final point put forth by Justice Thomas in support of suspicionless parole searches is that such a standard will not foster arbitrary, capricious, or harassing searches because statutes designed to stamp out such behavior will prevent such misconduct.<sup>49</sup> However, allowing parole departments and law enforcement agencies the latitude to intrude on a parolee's privacy absent an articulable suspicion essentially justifies the violation of statutes created to prevent such behavior.

Justice Thomas is not on supervised release, and he has never seen the hatred observable in the eyes of a civil servant who loathes the profession and holds the power to destroy a life. While society cannot and should not judge a profession by those who operate outside the bounds of regulatory structures, the simple fact remains that miscreants exist. Justice Stevens, authoring the *Samson* dissent, concludes that probation and parole officers “are required to provide ‘individualized counseling’ and to monitor their charges’ progress,” yet his opinion drips with naïve assumption that the supervisory system functions properly.<sup>50</sup> Unfortunately, overburdened supervising agents are often preoccupied with the paperwork necessary to document a job they rarely undertake.<sup>51</sup> The *Samson* decision has given parole officers and law enforcement officers a simple method to lessen a caseload heavy with parolees.

Parole officers now have the authority to farm out investigative duties to local law enforcement officers. Law enforcement now has blanket authority to infringe upon the privacy of anyone on supervised release, at the request of a parole officer or at their own discretion. Justice Thomas maintains that statutes designed to avoid “arbitrary, capricious, or harassing” searches will prevent such behavior.<sup>52</sup> Yet, suspicionless searches are arbitrary, capricious, and harassing by their very definition. Police now have the ability to identify those on parole, already required to register with local law enforcement upon release, and conduct searches based on nothing more—or even less—than a hunch. Is a hunch not arbitrary, capricious, and harassing?

Under *Griffin*, a warrantless search by a *probation officer* was only proper under specific statutory guidelines given “special needs.”<sup>53</sup> Those required guidelines are “designed to ensure evenhandedness in application” and “to protect against the state actor’s unfettered discretion.”<sup>54</sup> Courts have traditionally characterized “special needs” in the probation and parole context as those “divorced from the State’s general interest in law enforcement.”<sup>55</sup> *Samson* directly

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<sup>49</sup> *Samson*, 126 S. Ct. at 2202.

<sup>50</sup> *Id.* (Stevens, J., dissenting) (quoting *Griffin*, 483 U.S. at 876–77).

<sup>51</sup> STANLEY, *supra* note 19, at 125–26.

<sup>52</sup> *Samson*, 126 S. Ct. at 2202.

<sup>53</sup> *Griffin*, 483 U.S. at 873.

<sup>54</sup> *Samson*, 126 S. Ct. at 2204 (Stevens, J., dissenting).

<sup>55</sup> *Id.* at 2203 (quoting *Ferguson v. Charleston*, 532 U.S. 67, 79 (2001)).

opposes the reasoning in *Griffin* by eliminating “programmatic safeguards,” allowing *law enforcement* to conduct suspicionless searches of those on supervised release, while creating no structure governing those searches.<sup>56</sup> What the majority fails to realize is that they have authorized those who employ profiling tactics to exercise outright bigotry towards ex-offenders. The Supreme Court has empowered those who utilize authority to inflict pain on a forgotten population and “placed ‘the liberty of every man in the hands of every petty officer.’”<sup>57</sup>

## VII. CONCLUSION

The Supreme Court in *Samson* effectively held that, when it comes to searches of the person, the Fourth Amendment, at least as to parolees (but who else in the future?), is but a fallacy. The supposed utopia created by the Fourth Amendment, in which citizens can feel safe from arbitrary governmental intrusions, does not exist for us on parole. Essentially, the Supreme Court has decided that the state can be afforded the utmost power, while ignoring individual liberties and the omnipotent guidance the Constitution provides, at least for now, for the rest of the citizenry.

The overzealous destruction of parolees’ expectations of privacy is but one more “invisible punishment” designed to stigmatize the convicted and prohibit our reintegration, under the guise of curbing recidivism and crime.<sup>58</sup> “[E]nacting laws denying ex-offenders the rights and privileges of citizenship is a virtually cost-free exercise in symbolic politics.”<sup>59</sup> Crime rates and recidivism should not be the catalyst for the destruction of the Fourth Amendment. As Justice Stevens points out, “[i]f high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter.”<sup>60</sup>

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<sup>56</sup> *Griffin*, 483 U.S. at 873.

<sup>57</sup> *Samson*, 126 S. Ct. at 2203 (Stevens, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886)).

<sup>58</sup> TRAVIS, *supra* note 23, at 70.

<sup>59</sup> *Id.*

<sup>60</sup> *Samson*, 126 S. Ct. at 2207 n.6 (Stevens, J., dissenting).