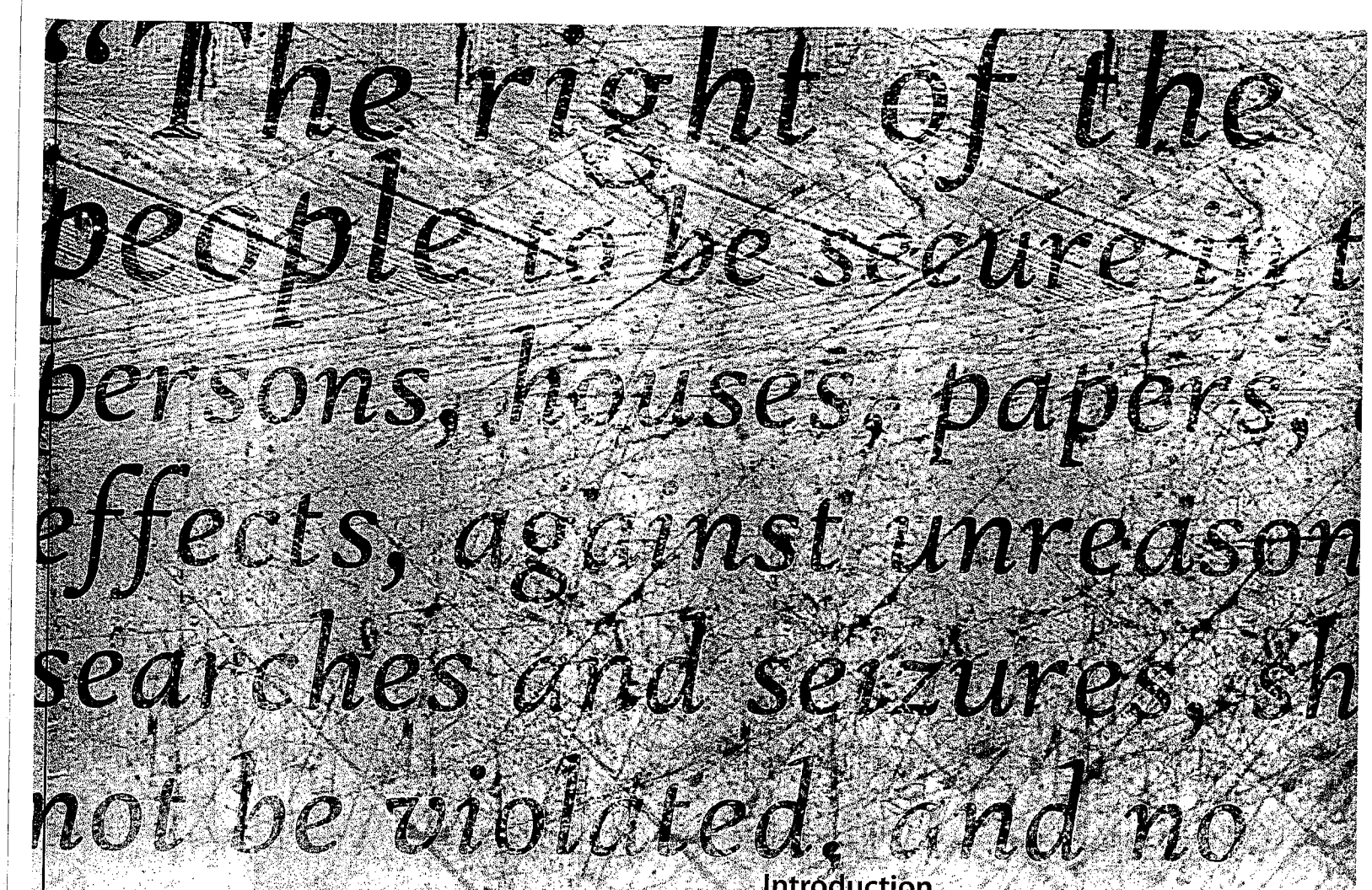

Suspicionless Searches in Probation and Parole in Light of Samson v. California:

The Ruling, its Distinction and its place in Fourth Amendment History

Introduction

The Fourth Amendment's ban on unreasonable searches or seizures goes to the very heart of the ideals and discontent that stirred the American Revolution. Unreasonable searches and seizures caused the type of outrage that had colonists throwing tea in the Boston Harbor.[2] Specifically, the colonists complained about the practice of 'general warrants' also known as 'writs of assistance.' This type of warrant or writ gave the King's agent unfettered authority and discretion to conduct searches or seizures against the Colonial citizenry. This practice led directly to the Fourth Amendment's language demanding that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized."[3]

In his famous 1761 speech James Otis spoke out against general warrants or 'writs of assistance' stating: "A man's house is his castle; and *[whilst] he is quiet*, he is as well guarded as a prince in his castle."[4] Although Otis only mentions the privacy afforded an individual who is in their home or "castle" his speech has been viewed by many as calling for a more general privacy protection

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where "it is the citizen who controls one's own security"[5] and this security should not be violated in the absence of some type of individualized suspicion and particularity.

On June 19, 2006, the United States Supreme Court handed down its ruling in *Samson v. California,*[6] a case involving a California parole statute that some considered the equivalent of a general warrant against a parolee.

This article is the third publication stemming from my research into the Fourth Amendments boundaries of computer monitoring of probationers with a prior conviction for child sexual exploitation. The first article was a comprehensive examination of the Fourth Amendment jurisprudence related to this type of computer monitoring.[7] The second article[8] (mentioned in Part I(i), *below*) provided an update to this material that included general information about the *Samson v. California* case and an update on the technology related to probationary computer monitoring. This article will review the holding of *Samson* in detail and describe its place in the more general legal framework involving warrantless searches of probationers and parolees. It will further address the Court's most recent discussion of where probation and parole, as distinct entities, fall on the hypothetical continuum of rights afforded to different individuals depending on their status. Finally, it will place this discussion into the historical framework of the Fourth Amendment and conclude that probationer and parolees are not the type of "[whilst] quiet" citizen Mr. Otis envisioned or argued so diligently and eloquently for.

Part I – *Samson v. California*

i. Samson v. California –

Justice Thomas' opinion in *Samson v. California*[9] is unsatisfying for those who have long awaited the decision as the Court's opportunity to answer some of the questions left open in the 2001 *United States v. Knights* decision.[10] Beyond unsatisfying, its value as precedent is somewhat limited.

ii. The Facts

The facts giving rise to the *Samson* case are straightforward. In September 2002, Donald Curtis Samson, a parolee with a prior conviction for being a felon in possession of a firearm, was walking down the street with a woman and a child in San Bruno, California.[11] Police Officer Alex Rohleder observed Samson and, knowing he was on parole, and believing (at the time of the initial stop) that he was "facing an at large warrant"[12] he stopped Samson. Samson denied that there was any at large warrant and Officer Rohleder confirmed this by radio dispatch.[13]

With actual knowledge that there was not an existing parole warrant for Samson, Officer Rohleder decided to search Samson pursuant to California law.[14] Officer Rohleder stated that he had searched Samson pursuant to California statute and "solely on petitioner's status as a parolee."[15] Unlike other related caselaw[16] this case gave the U.S. Supreme Court the opportunity not only to consider a warrantless search in the context of probation or parole, but, a completely suspicionless search where the warrantless search was conducted solely because of the search target's status as a probationer or parolee.[17]

iii. The Court's Ruling

There are three basic approaches the U.S. Supreme Court takes in evaluating a warrantless search of a probationer or parolee: (1) consent; (2) the 'special needs' exception to the Fourth Amendment; and (3) general 'reasonableness' under a totality of the circumstances analysis; (the approach employed by the *Samson* Court.) I will deal with each in turn.

(a) Consent

When I first encountered this area of law, especially as a former police officer, my gut reaction was: probationers waived their Fourth Amendment rights when they accepted probation in lieu of incarceration. In other words, they consented to it. Further, they could be in jail where they could be searched *at any time for any reason or no reason at all.* In this regard I generally followed Justice Scalia's sentiment, if we can do more, we can certainly do less. I find this to be almost intuitive – that someone who is enjoying the privilege of probation or parole should be subject to being searched by law enforcement.

However, the Court has neither accepted or rejected this line of reasoning and, has instead, avoided it (or just failed to reach it) altogether. In *Knights*, the Court expressly avoided the consent analysis. In *Knights*, the Court stated "[w]e need not decide whether Knights' acceptance of the search condition constituted consent...."[18] In the more recent *Samson* case, the Court held "[b]ecause we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether 'acceptance of the search condition constituted consent...'"[19]

Personally, I feel that this is the proper analysis in the context of probation or parole and an analysis that would provide a great deal more precedential value and direct guidance than the more *de facto* reasonableness approach utilized by the Court in *Samson*.

(b) 'Special Needs'

It appeared, at least after *Griffin v. Wisconsin*,[20] that 'special needs' would be the approach that would carry the day with regards to warrantless probation (or parole) searches. The special needs doctrine is an amorphous doctrine that is subject to valid criticism.[21] The special needs doctrine seems, in many ways, to simply be another layer of reasonableness; or, put another way, simply one of the "circumstances" that could adequately be considered by a "totality of circumstances" analysis. What is "special" could be fully and efficiently considered as part of the general "reasonableness" approach (*see* C, *below*) instead of creating a new doctrine (that has not been fully developed) and, instead, appears to be a pragmatic tool of the Court to reach its intended ends in certain types of cases (*i.e.,* drug testing).

The *Samson* Court expressly avoided any special needs analysis,

holding, "[n]or do we address whether California's parole search condition is justified as a special need under *Griffin v. Wisconsin*... because our holding under general Fourth Amendment principles renders such an examination unnecessary."[22]

(c) Reasonableness

The *Samson* Court applied a general reasonableness analysis to the facts before it and held that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee."[23] Given that the Court held that such a search was reasonable for a police officer whose interest was in procuring evidence to be used in a future prosecution it seems clear that this type of search would be deemed reasonable for a probation or parole officer whose interest is supervisory instead of purely investigative.

The Court reviewed the manner in which it determines reasonableness under the Fourth Amendment:

> *"[U]nder our general Fourth Amendment approach" we "examin[e] the totality of circumstances" to determine whether a search is reasonable within the meaning of the Fourth Amendment. Id., at 118 (internal quotation marks omitted). Whether a search is reasonable "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Id., at 118-119 (internal quotation marks omitted)*[24]

Specifically, in this instance, the Court balanced a parolee's diminished expectation of privacy against the "substantial" interests of the government.[25]

What makes the U.S. Supreme Court's 'balancing' in this case interesting is not the result; *it is that it occurred at all.* The Court seems to put the cart before the horse in this instance. This type of 'totality of circumstances' balancing only occurs where the government intrudes into something that an individual has a "reasonable expectation of privacy" (REP) in. It seems undisputed that a probationer or a parolee has a diminished expectation of privacy than that of an ordinary citizen.

In *Samson*, Justice Thomas seemed to indicate that Mr. Samson had no reasonable expectation of privacy at all stating: "[w]e conclude that [Samson] did not have an expectation of privacy that society would recognize as legitimate."[26] If society would *not* recognize the expectation of privacy as legitimate (the objective prong of the test for REP) this would render any balancing unnecessary as the government's action would not invoke Fourth Amendment protection to begin with.

Part II
Understanding Probation and Parole's Place on the Continuum after *Samson*

i. The Continuum—Generally

The Court has found that the statuses of probation and parole can be placed on a hypothetical continuum. The Court has identified "a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service."[27]

ii. Probation vs. Parole

The status of an individual (*e.g.,* parolee or probationer) will be a highly relevant factor in whether or not a search is reasonable because this balancing *should* only occur where the individual has a reasonable expectation of privacy. Further, the reasonableness will be gauged on the government's interest in conducting the search. Therefore, since the Court, in *Samson*, held that probation and parole are not equal statuses, an examination of these statuses as separate entities becomes necessary.

The Court expressly compares probation to parole and holds that probationers have a greater (albeit still reduced) reasonable expectation of privacy than parolees. Finding that parole is "an established variation on imprisonment"[28] the Court held:

> *"On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."*

The First Circuit Court of Appeals has also directly analyzed the place of probation and parole on the 'continuum' stating:

> *"[O]n the Court's continuum of possible punishments, parole is the stronger medicine; ergo, parolees enjoy less of the average citizen's absolute liberty than do probationers."*[29]

The Court's view of these two statuses may become relevant in instances where a court is attempting to determine whether or not an individual had a reasonable expectation of privacy against which the government's intrusion can be balanced against for purposes of Fourth Amendment analysis. The Court has held that both statuses cause an individual's reasonable expectation of privacy to be diminished, the Court has not, to date, held that either status alone completely eliminates an individual's reasonable expectation of privacy. As the Court has placed probation and parole on different points along the continuum, it is possible that the Court could eliminate reasonable expectation of privacy for parolees without doing so for probationers. Only time will tell.

Part III
Samson v. California in the Historical Context of General Warrants

Are there really any *'Whilst quiet'* Probationers?

Two questions generally come to mind when a U.S. Supreme Court case, especially a highly anticipated case such as *Samson,* is handed down: (1) *What does it say*; and (2) *What will it mean?*

Parts I & II, *above*, detail what I think the case *says*. Now I turn

to a more speculative and predictive examination of what the case *will mean* in the future, given how it fits into the existing jurisprudence and history of the Fourth Amendment.

At first glance, it seemed that this decision would translate, in a practical sense, into an 'open season' on parolees as law enforcement officers would seize on this as a tool to conduct warrantless searches without any level of individualized suspicion (assuming that an state statute exists that allows them to do so). While some have compared this 'open season' to a general warrant, I do not find the outcome or effect of *Samson* to be troubling in this regard.

First, no search of a probationer or parolee is completely without individualized suspicion. The suspicion is grounded in the fact that the individual is on probation or parole. That is why the terms of probation and parole are fixed and, at some point, expire. A much better argument for a general warrant could be made if law enforcement was attempting this type of search on every individual who had a felony conviction. While the terms of probation or parole are in effect, no search can be deemed completely suspicionless. Courts have noted both the high recidivism rates of probationers and parolees and their interest in avoiding detection.[30]

Next, it is not clear, given the willingness of the Court to distinguish between probation and parole, that the Court would reach the same decision if a similar statute—as applied to a probationer—were tested under the Court's general reasonableness analysis. Until this determination is specifically made, claims of a 'general warrant' seem especially premature in the context of probation.

In its historical context, I also do not find *Samson* troubling. Individuals who could (and in many cases should) be incarcerated are simply not the type of "quiet" individuals James Otis had in mind.[31] If laws that prohibit felons from voting or possessing firearms for the rest of their terms of probation or parole (or, in many cases, much longer) can pass Constitutional muster, it does not seem unreasonable, in any sense, to diminish the Fourth Amendment rights of probationers and parolees for a fixed term when they could, in fact, instead be incarcerated.

Endnotes

[1] Senior Counsel, National Center for Justice and the Rule of Law (NCJRL) and Visiting Professor of Law, University of Mississippi School of Law. Views expressed are solely those of the author and do not necessarily represent the views of the National Center for Justice and the Rule of Law (NCJRL) or any other party. As always, thanks go to Dr. James Tanner for his insight and advice.

[2] Generally referring to the incident in Boston, Massachusetts in 1773 where approximately 200 men, dressed as Indians, marched two-by-two to the wharf and threw tea into the harbor in protest of excessive Colonial taxation by Great Britain.

[3] U.S. Const. Amend. IV.

[4] James Otis, *Against the Writs of Assistance* (1761), reprinted in M.H. SMITH, THE WRITS OF ASSISTANCE CASE 548-55 (1978) (emphasis added).

[5] Scott Sundby, *Protecting the Citizen "Whilst He Is Quiet": Susicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501 (2004).

[6] 547 U.S. __ (2006).

[7] *Diminished Privacies, 'Special Needs' & "'Whilst Quiet' Pedophiles"—Plugging the Fourth Amendment into the 'Virtual Home Visit,'* 75 Miss. L.J. 1, 273 (2005).

[8] *Update on Computer Monitoring of Probationers & The Fourth Amendment, (placed in)* SEX OFFENDER LAW REPORT (winter 2006; upcoming publication)

[9] *Samson v. California*, 547 U.S. __ (2006).

[10] 534 U.S. 112, 118 (2001).

[11] *Samson*, 547 U.S. at __.

[12] *Samson*, 547 U.S. at __.

[13] *Samson*, 547 U.S. at __.

[14] *See* Cal. Penal Code Ann. §3067(a) (West 2000).

[15] *Samson*, 547 U.S. at __.

[16] *See e.g., United States v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

[17] *Samson*, 547 U.S. at __.

[18] *United States v. Knights*, 534 U.S. 112, 118 (2001).

[19] *Samson*, 547 U.S. at __ n.3.

[20] 483 U.S. 868 (1987).

[21] Tracey Maclin has stated, correctly in my view, that "[w]hile the Court has issued several rulings under its 'special needs' analysis, these cases do not form a coherent doctrine." *See* Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS 102, 107 (2005); *see also* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 597 (1994) (indicating some confusion in the name and actual application of the [special needs] doctrine.)

The Supreme Court has also not required individualized suspicion when a "special need" of the government is present. The term "special need," however, is misleading. The Court is not referring to any "need" in the sense of necessity; rather it speaks of a special *interest*. Also, although the initial cases adopting the concept involved governmental regulatory interests unrelated to criminal penalties, the Court has now excised from the definition of a special need the requirement that the interest must be unrelated to criminal law enforcement. What is considered a special need has evolved to include some very mundane criminal law enforcement concerns.

Id. (emphasis added).

[22] *Samson*, 547 U.S. at __ n. 3.

[23] *Samson*, 547 U.S. at __.

[24] *Samson*, 547 U.S. at __.

[25] *Samson*, 547 U.S. at __.

[26] Samson, 547 U.S. at __.

[27] *Samson*, 547 U.S. at __ (additional internal citations omitted) Note: It seems that capital punishment would be the furthest reach of the continuum, not solitary confinement in a maximum-security facility; the death penalty is not mentioned. *Id.*

[28] *Samson*, 547 U.S. at __.

[29] *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990) (internal quotation marks and citation omitted).

[30] *See generally, Samson*, 547 U.S. at __; *Pennsylvania Bd. of Probation and Parole*, 524 U.S. 357, 365 (1998).

[31] Further, Otis seemed to only be speaking of the privacy an individual has in his home, not in his person that would affect the street-search at issue in *Samson*.

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