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Recent Development

*223 SAMSON v. CALIFORNIA: TEARING DOWN A PILLAR OF FOURTH AMENDMENT PROTECTIONS

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IV. ANALYSIS

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

The Court should not have interpreted *Knights* as an invitation to extend the Fourth Amendment balancing test to suspicionless searches; proper application of the case law demonstrates that the Court should have used the special needs test. The decision handed down in *Samson* sanctions a dangerous conflation of the special needs and balancing test approaches to Fourth Amendment questions. The decision is historically unsupported and misconstrues the crux of the Court's precedent in this area. [\[FN56\]](#) The Court's holdings indicate that the balancing test is quite distinct from the special needs test and that the former's individualized suspicion requirement is a vital element for ensuring personal liberty. [\[FN57\]](#) The majority in *Samson*, which frankly acknowledged the suspicionless nature of the search, [\[FN58\]](#) decided to dispense with the requirement. In doing so, the majority may have set a precedent for balancing away constitutional rights without allowing the hefty historical and precedential weight of the Fourth Amendment to anchor the individual's side of the scale. The issue is timely, since the Court may soon face a challenge to a statute that requires blanket DNA searches of probationers as a condition of their probation. [\[FN59\]](#)

The balancing test grew out of a need to maintain the Fourth Amendment's probable-cause protections while allowing law enforcement *230 to adapt to exigent circumstances arising in the field. [\[FN60\]](#) Indeed, since *Terry v. Ohio* there has been a marked departure from the more rigorous probable-cause requirement. [\[FN61\]](#) Despite the reduced procedural protections sanctioned by the Court in *Terry*, suspicion has always been a necessary criterion for making police searches constitutional. [\[FN62\]](#) As the *Samson* dissent suggested, this is the critical lesson from *Knights*: its precedential value flows from that Court's unwillingness to depart from a suspicion requirement in sanctioning investigative searches. [\[FN63\]](#) The *Samson* Court instead treated *Knights*'s agnosticism about the permissibility of suspicionless searches as a building block to support its holding. This is a curious step for the Court to take, given that it has only recognized a "closely guarded category of constitutionally permissible suspicionless searches." [\[FN64\]](#) Without any restraints, the government seems free to follow the lead of *Samson* and analogize away an individual's reasonable expectations of privacy. [\[FN65\]](#)

In allowing suspicionless searches of an individual's person and home, the government license permitted in *Samson* erodes the fundamental purpose and procedural safeguards of the Fourth Amendment. The Constitution checks the arbitrary exercise of government power by specifying warrant and cause requirements. This concern about arbitrary government overreach motivated the drafting of the Amendment and has been a hallmark of its enforcement. [\[FN66\]](#) The warrant requirement ensured that a neutral magistrate would make the decision to compromise individual liberty via a search, thus insulating the public from capricious judgments "by the *231 officer engaged in the often competitive enterprise of ferreting out crime." [\[FN67\]](#) Even in the *Terry* context, the Court recognized that in the absence of neutral magistrates, "specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." [\[FN68\]](#) The Court in the past

has used the reasonableness standard as a sort of objective test in lieu of a magistrate, protecting the public from intrusions based on “inarticulate hunches.” [\[FN69\]](#)

Given the lack of suspicion in this case, the majority should have turned to the special needs or administrative search exceptions that the Court has carved out to allow programmatic searches unaccompanied by particularized suspicion. Based on *City of Indianapolis v. Edmond*, [\[FN70\]](#) the direction on this issue is clear: there are three “limited circumstances in which the usual rule [of requiring individualized suspicion] does not apply.” [\[FN71\]](#) Those limited circumstances, as enumerated in *Edmond*, are in cases of special needs, [\[FN72\]](#) administrative searches, [\[FN73\]](#) and border searches. [\[FN74\]](#) All share a focus outside general law enforcement, [\[FN75\]](#) and all are executed with procedural safeguards designed to preserve individual liberty.

The Court applies this test when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” [\[FN76\]](#) This exception grew out of the need to conduct programmatic investigations of areas when individualized suspicion was precluded by the circumstances. The test proceeds by first determining whether the search furthers a special need outside of general law enforcement purposes. It then weighs the government interest in the search against the individual interest in not being searched. [\[FN77\]](#) The threshold question of whether a special need has been shown is a “critical” one. [\[FN78\]](#) The need must be narrowly construed to correspond to the “immediate” purposes of the search. [\[FN79\]](#) If the special need is not immediate, “any nonconsensual suspicionless search could be immunized under the special needs doctrine *232 by defining the search solely in terms of its ultimate, rather than immediate, purpose.” [\[FN80\]](#)

For instance, in *Edmond*, the Court struck down a police program that stopped motorists and checked them for possession of narcotics. [\[FN81\]](#) The seizures aimed to curb drug trafficking in the area. A secondary goal was the promotion of traffic safety. [\[FN82\]](#) The Court found the program unconstitutional because it did not promote any special needs; rather, its “primary purpose was to detect evidence of ordinary criminal wrongdoing.” [\[FN83\]](#) Where, as in *Illinois v. Lidster*, [\[FN84\]](#) a roadblock’s purpose is to gather information about a specific crime that has already occurred on that road in the recent past, the Court has upheld this information-gathering motive as a special need. [\[FN85\]](#)

A suspicionless search has been found constitutional only in the limited scenarios noted above. [\[FN86\]](#) It is illuminating at this point to turn back to Justice Thomas’s comment in the majority opinion, where he notes that particularized suspicion is not an “irreducible requirement” of constitutional searches. [\[FN87\]](#) As the case law reveals, this oft-cited point from *United States v. Martinez-Fuerte*—that “the Fourth Amendment imposes no irreducible requirement of such suspicion” [\[FN88\]](#)—refers only to special needs cases. [\[FN89\]](#) The conclusion to be drawn is that individualized suspicion was considered an “irreducible” component of *Terry* stops and other non-special-needs searches. Justice Thomas invoked *Martinez-Fuerte*’s language without *233 giving a fair account of its context, and in doing so extended the reasonableness test far past its boundaries.

B. Applying the Special Needs Test

Instead of “running roughshod” over this precedent, the *Samson* Court should have applied the special needs test. The nature of the search in *Samson*, as well as the cases upon which Justice Thomas relied, [\[FN90\]](#) place it more in line with this exception to the Fourth Amendment’s general requirement of individualized suspicion. Without any individualized suspicion supporting the search, and given that the statute had a programmatic quality in its application to a specific population, the special needs test was more appropriate. [\[FN91\]](#) The Court erred in construing the reasonableness test to penetrate a previously sacred area of Fourth Amendment jurisprudence.

However, applying the special needs test does not make the search in *Samson* consistent with the Constitution. As a threshold matter, the search fails to stem from any special need. Its purpose is not at all distinct from the general purposes of law enforcement. As the majority argued, the government interest was in preventing recidivism;

that is, preventing crimes committed by a segment of the population statistically more likely to commit them. [FN92] In *Edmond*, neither the pressing nature of the crime of drug trafficking nor its likelihood of occurring along one of the roadblocked routes permitted the police to dispense with the suspicion requirement. [FN93] The Court in *Samson* indicated that the reduction in recidivism was likely to “promot[e]” the ancillary goals of reintegration and positive citizenship. [FN94] As the Court made clear in *Ferguson v. City of Charleston*, [FN95] the potential goals of the search cannot be used to establish a special need; the special need must be the “immediate objective” of the proposed search. [FN96] The primary objective of the *Ferguson* search was to gather evidence about drug use in a certain population and turn that information over to the police.*234[FN97] The *Ferguson* Court reasoned that a program whose far-reaching goal was to reduce drug use among pregnant women could not mandate drug tests for maternity patients. [FN98] This goal was not distinct from a general law enforcement concern with drug use, notwithstanding the distant concern over the social benefits attained from eliminating drug abuse during pregnancy.

In *Samson*, the only plausible non-law-enforcement need is reintegration of parolees into society. The Court's language sets up this goal as a secondary effect of reducing recidivism, not as an immediate objective of the statute. The Court states that reducing recidivism will “thereby promot[e]” reintegration. [FN99] The primary aim is to reduce repeat crimes by parolees; the less immediate objective is to promote their integration into society. Policing crimes committed by a certain segment of the population is similar to the invalidated programs in *Ferguson* and *Edmond*. Since the California search policy promotes only a distant special need, the statute should be invalidated on the grounds that its immediate goal is not distinct from general law enforcement aims.

A significant danger implicit in the Court's holding is that either of the two doctrines—reasonableness or special needs—can now be invoked to circumvent historically cherished Fourth Amendment protections. Courts may attempt to carve out a programmatic justification for a suspicionless special needs search, or dispense with that heightened requirement and simply weigh a reduced privacy interest against the government interests. As one commentator notes, the reasonableness test presented problems before the *Samson* rule was announced, at a time when the Constitution's suspicion requirement still anchored the individual's claim to freedom from government intrusion. [FN100] Removing this minimal constitutional requirement allows investigators unprecedented rein and gives courts a significant foundation for permitting invasions into privacy and personal security.

*235 V. SAMSON'S IMPLICATIONS FOR DNA TESTING OF PROBATIONERS

The scenario described above is far from a conjecture. Indeed, lower courts have relied on *Samson*'s analysis when addressing the issue of whether probationers can be required to submit to DNA testing as a condition of their probation. [FN101] Under clear Court precedent, the submission of biological data is a search within the scope of Fourth Amendment protection. [FN102] The DNA Backlog Elimination Act [FN103] and similar state statutes mandate that probationers have DNA samples taken and entered into an FBI database in order to have the information on hand to assist in solving crimes. [FN104] This condition of release parallels the condition in *Samson*, as both require individuals to submit to suspicionless searches. As a preliminary matter, it should be observed that the “spurious syllogism” that produced the *Samson* decision may be extended to these matters; probationers are more similar to parolees than they are to law-abiding citizens, [FN105] so perhaps the suspicionless standard will continue its slide along the continuum.

Circuit courts facing this issue have all found DNA statutes to be constitutional, but there is a significant split in their approaches to the Fourth Amendment analysis. [FN106] Six circuits—the Third, Fourth, Fifth, Eighth, Ninth, and Eleventh—applied a balancing test in holding that DNA statutes represent a reasonable balancing of individual and government interests. [FN107] The Second, Seventh, and Tenth Circuits used the special needs test. [FN108] The Eighth Circuit decision, and another at the federal district level, *236 were decided after *Samson*. These opinions invoked the holding in *Samson* to make the easy case that the reduced privacy interests of lawbreakers can be overcome without suspicion by a government seeking to stop crime. [FN109] *United States v. Kraklio*, in which the Eighth Circuit upheld a DNA statute, made short work of the reasonableness test by citing *Samson* to establish the degree to which individual privacy rights were diminished for probationers. [FN110] The District of South

Carolina engaged in a more rigorous application of the balancing test, tracing the arguments made by circuit courts. [FN111] At the conclusion of its analysis, the court curbed probationer liberty the same way the Supreme Court had curbed parolee liberty, arguing that “*Samson* supports [this] Court’s decision in the instant case as the DNA Act serves the same legitimate governmental interests.” [FN112] In this way, *Samson* is already supplying the rationale for unprecedented curtailments of individual liberties in the name of crime prevention.

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[FN56]. See *infra* note 89 and accompanying text (discussing the line of special needs cases).

[FN57]. See *id.*

[FN58]. See *Samson*, 126 S. Ct. at 2196.

[FN59]. See *infra* Part V (discussing suspicionless searches of probationers required by statute).

[FN60]. See Clancy, *supra* note 1, at 531-32 (describing how the application of the Fourth Amendment to the states via the Fourteenth Amendment increased confrontations between liberty and security).

[FN61].

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

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

[FN62]. See *Samson*, 126 S. Ct. at 2204 (Stevens, J., dissenting); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (checking the discretion granted to border patrol officers by requiring reasonable suspicion).

[FN63]. See *United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that “the balance of these considerations requires no more than reasonable suspicion to conduct a search of this probationer’s house”).

[FN64]. *Chandler v. Miller*, 520 U.S. 305, 310 (1997).

[FN65]. The dissent presents a strong rebuttal to the logical turns that Justice Thomas employed in establishing that parolees do not enjoy more Fourth Amendment protections than inmates with respect to these searches. See *Samson*, 126 S. Ct. at 2202-05 (Stevens, J., dissenting) (characterizing the majority’s analysis as the product of “faulty syllogism” and “circular reasoning”).

[FN66]. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965) (reviewing the history of the amendment’s adoption).

[FN67]. *Johnson v. United States*, 333 U.S. 10, 13 (1948).

[FN68]. *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968).

[FN69]. *Id.* at 22.

[FN70]. [531 U.S. 32 \(2000\)](#).

[FN71]. *Id.* at 37.

[FN72]. *See infra* note 75.

[FN73]. *See, e.g.,* [New York v. Burger, 482 U.S. 691, 702-04 \(1987\)](#) (permitting warrantless administrative inspection of business in a “closely regulated” industry).

[FN74]. *See, e.g.,* [United States v. Martinez-Fuerte, 428 U.S. 543, 562 \(1976\)](#) (permitting border checkpoints in order to police illegal immigration).

[FN75]. *See, e.g.,* [Illinois v. Lidster, 540 U.S. 419, 428 \(2004\)](#) (holding search to be constitutional when roadblock is set up to question passing motorists about a crime that recently had occurred on that road because purpose of search was not general crime prevention but gathering of information).

[FN76]. [New Jersey v. T.L.O., 469 U.S. 325, 351 \(1985\)](#) (Blackmun, J., concurring).

[FN77]. [Ferguson v. City of Charleston, 532 U.S. 67, 82-83 \(2001\)](#).

[FN78]. *Id.* at 79.

[FN79]. *Id.* at 83.

[FN80]. *Id.* at 84.

[FN81]. [City of Indianapolis v. Edmond, 531 U.S. 32, 35-36 \(2000\)](#).

[FN82]. *Id.* at 43.

[FN83]. *Id.* at 41.

[FN84]. [540 U.S. 419 \(2004\)](#).

[FN85]. *See id.* at 427 (“[T]he stop’s objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort.”); *see also infra* text accompanying note 115.

[FN86]. *See supra* notes 72-74.

[FN87]. [Samson v. California, 126 S. Ct. 2193, 2201 n.4 \(2006\)](#) (quoting [United States v. Martinez-Fuerte, 428 U.S. 543, 561 \(1976\)](#)).

[FN88]. [428 U.S. at 561](#).

[FN89]. Indeed, in *Martinez-Fuerte*, the language directly preceding the statement quoted here relies on *Terry* in announcing the conventional rule that individualized suspicion is required. In making its claim that suspicion is not

an irreducible requirement, the *Martinez-Fuerte* Court cited to a string of cases that most appropriately fall under the limited circumstances announced in *Edmond*. See [Almeida-Sanchez v. United States, 413 U.S. 266 \(1973\)](#) (citing concurring and dissenting opinions to a decision that held a search of an individual invalid as an administrative search); [United States v. Biswell, 406 U.S. 311 \(1972\)](#) (administrative search of gun dealer); [Colonnade Catering Corp. v. United States, 397 U.S. 72 \(1970\)](#) (administrative search of liquor store); [Camara v. Municipal Court, 387 U.S. 523 \(1967\)](#) (administrative search); [Carroll v. United States, 267 U.S. 132 \(1925\)](#) (warrantless border searches accompanied by reasonable suspicion). The language in *Martinez-Fuerte* is best understood as preserving a distinction between the two doctrines, one that the *Samson* Court has blurred beyond recognition. See [Martinez-Fuerte, 428 U.S. at 560-61](#); see also Clancy, *supra* note 1, at 488 (“[G]iven the historical context surrounding the framing of the Fourth Amendment and the need for a principled analysis for assessing reasonableness, individualized suspicion should be considered an inherent quality of reasonableness.”).

[FN90]. See [Samson, 126 S. Ct. at 2203, 2206 n.4](#) (Stevens, J., dissenting) (noting that *Griffin* and *Hudson* might best be categorized as special needs cases).

[FN91]. See [id. at 2203](#) (“[T]he requirement has been dispensed with only when programmatic searches were required to meet a ‘special need ... divorced from the State’s general interest in law enforcement.’”) (quoting [Ferguson v. City of Charleston, 532 U.S. 67, 79 \(2001\)](#)) (internal quotation marks omitted).

[FN92]. See [id. at 2200](#) (majority opinion) (“The State’s interests, by contrast, are substantial. This Court has repeatedly acknowledged that a State has an ‘overwhelming interest’ in supervising parolees because ‘parolees ... are more likely to commit future *criminal offenses*.’” (emphasis added) (quoting [Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 365 \(1998\)](#))).

[FN93]. See [City of Indianapolis v. Edmond, 531 U.S. 32, 42 \(2000\)](#) (noting that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose”).

[FN94]. [126 S. Ct. at 2200](#).

[FN95]. [532 U.S. 67](#).

[FN96]. [Id. at 83](#).

[FN97]. [Id.](#)

[FN98]. See [id. at 69-70, 82-83](#) (“[W]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.”).

[FN99]. [Samson, 126 S. Ct. at 2200](#).

[FN100].

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

Clancy, *supra* note 1, at 584-85.

[FN101]. See *infra* notes 109-112 and accompanying text.

[FN102]. See, e.g., [Skinner v. Ry. Labor Executives' Ass'n](#), 489 U.S. 602, 616 (1989) (“[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.”).

[FN103]. See [42 U.S.C. § 14135a\(d\) \(2000\)](#) (enumerating the offenses that require individuals to submit to testing, including any felony or crime of violence).

[FN104]. See FBI, U.S. DEPT OF JUSTICE, THE FBI'S COMBINED DNA INDEX SYSTEM PROGRAM: CODIS 2 (2000), available at <http://www.fbi.gov/hq/lab/codis/brochures.htm> (“CODIS [Combined DNA Index System] enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders.”).

[FN105]. See [Samson v. California](#), 126 S. Ct. 2193, 2198 (2006).

[FN106]. This varied approach reflects the lack of clarity surrounding the two tests and suggests a need for analytical refinement of the Court's approach to Fourth Amendment questions. Cf. [Nicholas v. Goord](#), 430 F.3d 652, 664 n.22 (2d Cir. 2005) (“[W]e find puzzling the Third Circuit's comment in *Sczubelek* that the special-needs inquiry is *less* rigorous than the general balancing test.”).

[FN107]. See [United States v. Kraklio](#), 451 F.3d 922, 924 (8th Cir. 2006); [United States v. Sczubelek](#), 402 F.3d 175, 184 (3d Cir. 2005); [Padgett v. Donald](#), 401 F.3d 1273, 1280 (11th Cir. 2005); [United States v. Kincade](#), 379 F.3d 813, 832 (9th Cir. 2004); [Groceman v. U.S. Dep't of Justice](#), 354 F.3d 411, 413 (5th Cir. 2004); [Jones v. Murray](#), 962 F.2d 302, 307 (4th Cir. 1992).

[FN108]. See [Nicholas](#), 430 F.3d at 667; [Green v. Berge](#), 354 F.3d 675, 677-78 (7th Cir. 2004); [United States v. Kimler](#), 335 F.3d 1132, 1146 (10th Cir. 2003).

[FN109]. See [Kraklio](#), 451 F.3d at 924; [Word v. U.S. Prob. Dep't](#), 439 F. Supp. 2d 497, 504 (D.S.C. 2006).

[FN110]. See [Kraklio](#), 451 F.3d at 924 (citing [Samson](#), 126 S. Ct. at 2201) (noting that probationers had “diminished privacy rights”).

[FN111]. See [Word](#), 439 F. Supp. 2d at 504 (discussing the *Samson* decision in light of the Third Circuit's analysis of the DNA Act).

[FN112]. *Id.*