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# PAROLEES AND THE EROSION OF THE FOURTH AMENDMENT: A CONSTITUTIONAL ANALYSIS OF CALIFORNIA PENAL CODE SECTION 3067 AND THE SUSPICIONLESS SEARCH REGIME IT AUTHORIZES

*Shaun H. Crosner\**

## I. INTRODUCTION

Outraged over a string of high-profile criminal cases involving parolees, the people of California in 1996 proposed a bill that ultimately would become the subject of considerable controversy.<sup>1</sup> The words of the bill's author express the state's concerns: "Prison inmates are released early from prison regardless of the threat they pose to our communities. We must give our local law enforcement officers the tools they need to adequately supervise these parolees."<sup>2</sup> Seemingly in agreement with this assessment, the state legislature responded with section 3067 of the California Penal Code.<sup>3</sup>

Section 3067 requires every prisoner eligible for parole to agree in writing "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and *with or without cause*."<sup>4</sup> Though California has

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1. The bill was introduced in the wake of the uproar following the kidnapping and murder of 12-year-old Polly Klass by Richard Allen Davis, a convicted felon out on parole. AB NO. 2284 BILL ANALYSIS (1996), available at [http://info.sen.ca.gov/pub/95-96/bill/asm/ab\\_2251-2300/ab\\_2284\\_cfa\\_960830\\_031055\\_asm\\_floor.html](http://info.sen.ca.gov/pub/95-96/bill/asm/ab_2251-2300/ab_2284_cfa_960830_031055_asm_floor.html) [hereinafter AB NO. 2284 ANALYSIS].

2. *Id.*

3. Assemb. B. 2284, 1995–1996 S. Assemb., Reg. Sess. (Cal. 1996) (codified at CAL. PENAL CODE § 3067 (Deering Supp. 2007)).

4. CAL. PENAL CODE § 3067(a) (emphasis added).

never applied traditional warrant requirements<sup>5</sup> to searches of its parolees,<sup>6</sup> section 3067 is constitutionally remarkable in one material respect. Prior to section 3067, every parole or probation search condition—in California or any other state—required at least reasonable suspicion.<sup>7</sup> Section 3067 is thus the nation's first codification of a *suspicionless* search condition for parolees,<sup>8</sup> making it arguably the most severe legislative intrusion on parolees' Fourth Amendment<sup>9</sup> rights in United States legal history.

In a 6–3 vote, the United States Supreme Court recently validated a parole search conducted in the absence of suspicion under the authority of section 3067.<sup>10</sup> The Court's decision is not too surprising given that it has been watering down the Fourth Amendment for decades. For instance, recent Supreme Court decisions have relaxed warrant and probable cause requirements in

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5. As a general rule, warrants are required to make a search or seizure reasonable under the Fourth Amendment. U.S. CONST. amend. IV.

6. *See, e.g., In re Tyrell J.*, 876 P.2d 519, 535 (Cal. 1994) (Kennard, J., dissenting) (noting that in California “every grant of parole included an implied [warrantless] search condition” even before it became common to codify such conditions). Probationers, like parolees, have long been subject to warrantless searches as well. *See, e.g., United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that a law enforcement officer needs only reasonable suspicion, and not a warrant supported by probable cause, to conduct a search of a probationer's home). *Knights* is discussed in depth *infra* Part II.A.

7. *See, e.g., United States v. Williams*, 417 F.3d 373, 376 n.2 (3d Cir. 2005) (finding Pennsylvania's parole search condition to include “an implicit requirement that any search be based on reasonable suspicion”); *People v. Woods*, 535 N.W.2d 259, 261–62 (Mich. Ct. App. 1995); *State ex rel. Corgan v. King*, 868 P.2d 743, 746 (Okla. Crim. App. 1994) (holding that Oklahoma's parole search condition requires reasonable suspicion); *People v. Slusher*, 844 P.2d 1222, 1225 (Colo. Ct. App. 1992) (stating that a parole search must be predicated on “reasonable grounds to believe that a parole violation has occurred”).

8. No other state has codified a suspicionless parolee search condition. Reply Brief for the Petitioner at 8–9, *Samson v. California*, 126 S. Ct. 2193 (2006) (No. 04-9728). However, the courts of one state have expressed judicial approval of probation searches conducted in the absence of particularized suspicion. In a 1999 decision, the North Dakota Supreme Court held suspicionless searches to be theoretically permissible under the Fourth Amendment. *See State v. Smith*, 589 N.W.2d 546, 550 (N.D. 1999) (holding that reasonable suspicion is not necessary for probation searches, but finding that the search in question was supported by reasonable suspicion). Still, it is worth noting that North Dakota courts have yet to apply the *Smith* holding to a suspicionless search. *See, e.g., State v. Maurstad*, 647 N.W.2d 688, 695 (N.D. 2002) (finding no reason to “apply our prior case law holding reasonable suspicion” as unnecessary because, as in *Smith*, the search in question was supported by reasonable suspicion).

9. The Fourth Amendment to the United States Constitution, in pertinent part, reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” U.S. CONST. amend. IV.

10. *Samson v. California*, 126 S. Ct. 2193 (2006). Justice Stevens wrote a dissenting opinion to the case that was joined by Justices Souter and Breyer. *Id.* at 2202 (Stevens, J., dissenting). For a full discussion of the Court's opinion in *Samson*, see *infra* Part II.A.

airports.<sup>11</sup> Moreover, the Court has essentially suspended warrant requirements for automobile searches.<sup>12</sup> The Court has even applied the so-called automobile exception to motor homes.<sup>13</sup>

Still, despite the recent trend in Fourth Amendment jurisprudence, section 3067—with its allowances for suspicionless searches of parolees—takes privacy intrusions to a higher level. This note questions the body of case law validating the constitutionality of section 3067. Part II summarizes existing section 3067 case law by looking at landmark state and federal court decisions. Part III criticizes the decisions of these courts and argues that section 3067 does not pass constitutional muster. Finally, Part IV suggests changes to section 3067 that, while keeping in mind government interests, would improve the statute from a constitutional standpoint.

## II. EXISTING CASE LAW

Both state and federal courts have weighed in on the constitutionality of section 3067 and warrantless searches. While some of the cases have dealt with the statute as applied to parolees, others have addressed section 3067 and its application to non-parolee third parties.

### *A. Section 3067 as Applied to Parolees*

In *People v. Reyes*,<sup>14</sup> the California Supreme Court reviewed the case of Rudolfo Reyes and established the state's stance on parolees' Fourth Amendment rights. A police officer arrested Reyes after receiving an anonymous tip that he was under the influence of drugs.<sup>15</sup> After searching Reyes' shed, the officer found a small amount of methamphetamine.<sup>16</sup> Reyes pled guilty to a drug

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11. See, e.g., *United States v. Place*, 462 U.S. 696, 707 (1983). The Court in *Place* refused to apply traditional Fourth Amendment requirements to dog sniffs performed by trained canines in airports because it did not view them as "searches" for Fourth Amendment purposes. *Id.*

12. See *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (holding that a warrantless search of an automobile is permissible so long as there is probable cause to believe that the vehicle is carrying contraband or fruits of a crime).

13. See *California v. Carney*, 471 U.S. 386, 393 (1985) (extending the automobile exception because motor homes, like more traditional automobiles, can be moved quickly by an individual seeking to avoid a search).

14. 968 P.2d 445 (Cal. 1998).

15. *Id.* at 446. The Court of Appeal found that this anonymous tip did not amount to reasonable suspicion. *Id.*

16. *Id.*

possession charge after a trial court ruled that this evidence—despite its having been obtained pursuant to a suspicionless parole search—was admissible against him.<sup>17</sup>

The California Supreme Court granted certiorari to determine whether reasonable suspicion was necessary for a parole search<sup>18</sup> and held that the Fourth Amendment imposed no such requirement.<sup>19</sup> The court found that search conditions designed to “deter the commission of crimes” were more effective if “enhanced by the potential for random searches.”<sup>20</sup> Still, while the court validated the search of Reyes, it was quick to point out that a parolee retains some constitutional protections.<sup>21</sup> The court noted that a parole search conducted arbitrarily or capriciously would be unreasonable under the Fourth Amendment.<sup>22</sup>

The United States Supreme Court has also tackled the issue of search conditions. In *United States v. Knights*,<sup>23</sup> the Court reviewed the case of Mark James Knights, a probationer<sup>24</sup> who had signed a probation order containing language similar to section 3067.<sup>25</sup> Knights, who was on probation<sup>26</sup> for an unrelated drug offense, had been a primary suspect in a string of over thirty acts of vandalism

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17. *Id.*

18. *Id.*

19. *Id.* at 451.

20. *Id.*

21. *Id.*

22. *Id.*

23. 534 U.S. 112 (2001).

24. Section 3067 applies only to parolees, but cases of probationers such as *Knights* remain highly relevant to the discussion at hand. Courts have repeatedly taken the stance that there is no “constitutional difference between probation and parole for purposes of the fourth amendment.” *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991).

25. The probation order, much like section 3067, conditioned Knights’ continued freedom on his willingness to “[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.” *Knights*, 534 U.S. at 114.

26. Though probation and parole operate similarly, the two sanctions also have their notable differences. Probation is a punishment given out in lieu of a prison sentence, and it is typically reserved for those individuals convicted of minor crimes without a required minimum prison sentence. Probation is usually characterized by little or no government supervision. CAL. PENAL CODE § 1203 (West Supp. 2007). Parole, on the other hand, is generally granted at or near the end of a prison sentence. Because parolees have been convicted of crimes serious enough to merit imprisonment, the government monitors parolees much more closely than it does probationers. CAL. PENAL CODE § 3000.

against Pacific Gas & Electric (“PG&E”) facilities.<sup>27</sup> After an act of arson at PG&E, a detective with knowledge of Knights’s probation condition searched his residence and discovered various explosive materials and detonation devices.<sup>28</sup> Knights sought to suppress the evidence obtained during the warrantless search of his residence, arguing that the search was unreasonable under the Fourth Amendment.<sup>29</sup>

The United States Supreme Court found that the police officer’s search of Knights’s residence was “supported by reasonable suspicion and authorized by a condition of probation” and thus reasonable under the Fourth Amendment.<sup>30</sup> In making its decision, the Court applied traditional Fourth Amendment analysis, which determines the reasonableness of a search by examining the totality of the circumstances.<sup>31</sup> The totality of the circumstances approach, as applied in *Knights* and numerous other Fourth Amendment cases, is a two-prong balancing test that looks at (1) the degree to which a search infringes upon an individual’s legitimate expectation of privacy; and (2) the extent to which the search is necessary to promote “legitimate governmental interests.”<sup>32</sup>

The Court balanced the state’s legitimate interest in reducing crime and monitoring parolees against Knights’s reduced expectation of privacy in light of his status as a probationer.<sup>33</sup> The Court found that Knights’s probation search condition was “a salient circumstance” that weighed toward finding the warrantless search reasonable.<sup>34</sup> The Court’s analysis, however, ultimately turned on the fact that the officer had reasonable suspicion that Knights was engaged in criminal activity. The Court found that reasonable suspicion, rather than the usual requirement of probable cause,

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27. PG&E had filed a theft-of-services complaint against Knights, and criminal charges followed. A detective had noticed that the acts of vandalism coincided with Knights’ court appearances in the matter. *Knights*, 534 U.S. at 114–15.

28. *Id.* at 115.

29. *Id.* at 116–17.

30. *Id.* at 122.

31. *Id.*; see *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (noting that the reasonableness of a search “is measured in objective terms by examining the totality of the circumstances”).

32. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The *Knights* Court employed the same balancing test as the one used by the Court in *Houghton*. *Knights*, 534 U.S. at 119.

33. *Knights*, 534 U.S. at 119–21.

34. *Id.* at 118.

satisfied the Fourth Amendment because probationers such as Knights are much more statistically likely to violate the law than are normal citizens.<sup>35</sup>

In applying the two-prong totality of the circumstances balancing test, the *Knights* Court set forth guidelines for Fourth Amendment analysis that subsequent courts would follow.<sup>36</sup> However, because the search in *Knights* was supported by reasonable suspicion, the Court did not feel compelled to address the constitutionality of a search conducted in the absence of individualized suspicion.<sup>37</sup> The Court in *Samson v. California*<sup>38</sup> would later address this unresolved issue.

In *Samson*, the United States Supreme Court reviewed the conviction of Donald Curtis Samson.<sup>39</sup> Samson was a parolee at the time of his arrest.<sup>40</sup> An officer had stopped Samson as he was walking down the street with two companions.<sup>41</sup> The officer recognized Samson from prior contacts and searched him solely based on his status as a parolee.<sup>42</sup> The officer found a plastic baggie containing methamphetamine on Samson's person and arrested him.<sup>43</sup> The trial court convicted Samson of possession of a controlled substance and sentenced him to seven years imprisonment.<sup>44</sup>

After the California Court of Appeal affirmed Samson's conviction,<sup>45</sup> the United States Supreme Court granted certiorari to determine whether a suspicionless parole search could be reasonable under the Fourth Amendment.<sup>46</sup> The Court applied traditional Fourth

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35. *Id.* at 121.

36. *See, e.g.*, *Samson v. California*, 126 S. Ct. 2193, 2197 (2006) (looking to the *Knights* Court's analysis for guidance in analyzing the constitutionality of section 3067).

37. *Knights*, 534 U.S. at 120 n.6 ("We do not decide whether the probation condition so diminished, or completely eliminated, Knights' reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment.")

38. 126 S. Ct. at 2196.

39. *Id.*

40. Samson was on parole following a conviction for being a felon in possession of a firearm. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

Amendment analysis, examining the “totality of the circumstances” in an effort to determine the reasonableness of Samson’s search.<sup>47</sup> The Court,<sup>48</sup> echoing its sentiments in *Knights*, noted that Fourth Amendment totality of the circumstances analysis calls for a balancing of legitimate government interests against an individual’s expectation of privacy.<sup>49</sup>

The *Samson* Court first looked at the expectations of parolees, ultimately finding that their status precluded them from having any reasonable expectation of normal Fourth Amendment protections.<sup>50</sup> Viewing parolees as more akin to prisoners than probationers on the “‘continuum’ of state-imposed punishments,” the Court treated parole as an extension of a prison sentence.<sup>51</sup> Under this interpretation, the “inmate-turned-parolee” remained in the “legal custody of the California Department of Corrections” and was subject to the rules set by that entity.<sup>52</sup> Accordingly, the Court found any expectation of privacy by a parolee to be patently unreasonable, especially considering that parolees such as Samson consent to the section 3067 suspicionless search condition.<sup>53</sup>

Though the Court refused to recognize the parolee’s expectation of privacy as legitimate, the government interests at stake actually drove the *Samson* Court’s holding. California’s high recidivism rates—which measure the number of parolees returned to prison for either a parole violation or the commission of a new felony offense—played an especially important role in the Court’s analysis.<sup>54</sup> In conducting its totality of the circumstances balancing test, the Court gave particular weight to California’s stated goal of reducing its recidivism rate, which at roughly 70 percent was the

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47. *Id.* at 2197.

48. The majority opinion in *Samson* was written by Justice Clarence Thomas. *Id.* at 2196.

49. *Id.* at 2197.

50. *Id.* at 2199.

51. *Id.* at 2198.

52. *Id.* at 2199.

53. *Id.* Though it viewed parolees’ consent to the search condition as a noteworthy factor in its totality of the circumstances analysis, the Court declined to rest its holding on “consent rationale.” *Id.* at 2199–200 n.3. The Court felt it could base its holding on traditional Fourth Amendment totality of the circumstances balancing, and the Court was also not convinced that the State had “properly raised its consent theory” in the lower courts. *Id.*

54. See *id.* at 2200 (noting that a state’s interest in reducing recidivism warrants privacy intrusions not otherwise tolerated under the Fourth Amendment).

highest in the nation.<sup>55</sup> The Court argued that imposing a reasonable suspicion requirement would unduly undermine the state's ability to combat its recidivism problem.<sup>56</sup>

The *Samson* Court also made a point of addressing "[t]he concern that [California's suspicionless search] system gives officers unbridled discretion to conduct searches."<sup>57</sup> The Court found that any such concern was "belied by California's prohibition on 'arbitrary, capricious or harassing' searches."<sup>58</sup> To further bolster this position, the Court pointed to the text of section 3067, which indicates that the Legislature did not intend to authorize harassing searches of parolees.<sup>59</sup> The Court ultimately concluded that these prohibitions were constitutionally sufficient safeguards to protect against the threat of police misconduct.<sup>60</sup>

Justice Stevens, in a dissenting opinion joined by Justices Souter and Breyer, criticized the *Samson* majority's logic.<sup>61</sup> He noted that the majority used circular reasoning when it applied the totality of the circumstances balancing test, thereby tainting its ultimate conclusions regarding the constitutionality of section 3067.<sup>62</sup> Stevens also criticized the majority for placing too much emphasis on California's recidivism problem, noting that high crime rates have never justified Fourth Amendment intrusions as serious as those allowed under the Court's decision.<sup>63</sup> Moreover, Stevens argued that section 3067, in violation of the Fourth Amendment's reasonableness requirement, gives officers in the field largely unrestrained discretion.<sup>64</sup> To Stevens and the other dissenting Justices, the majority's sanction of section 3067 amounted to an "unprecedented curtailment of [Fourth Amendment] liberty."<sup>65</sup>

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55. *Id.*

56. *Id.* at 2200–201.

57. *Id.* at 2202.

58. *Id.* (quoting *People v. Reyes*, 968 P.2d 445, 451 (Cal. 1998)).

59. CAL. PENAL CODE § 3067(d) (West 2000) ("It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment.").

60. *Samson*, 126 S. Ct. at 2202.

61. *Id.* (Stevens, J., dissenting).

62. *Id.*

63. *Id.* at 2207 n.6.

64. *Id.* at 2204.

65. *Id.* at 2202.

The bulk of section 3067 cases, like *Samson*, apply the statute to members of California's parolee population.<sup>66</sup> However, federal and state courts have also reviewed cases in which the statute is applied to non-parolee third parties.

*B. Section 3067 as Applied to Non-Parolee Third Parties*

While relatively few in number, the cases that apply section 3067 to non-parolees are highly relevant to the debate over the statute's constitutionality. To begin, in *Motley v. Parks*,<sup>67</sup> the Ninth Circuit Court of Appeals reviewed the constitutionality of a search of non-parolee Dana Motley's apartment.<sup>68</sup> Motley's apartment was located in a gang-ridden Los Angeles neighborhood.<sup>69</sup> In an effort to "clean up" the neighborhood, local police officers—acting under the authority of section 3067—decided to randomly search the residences of ten parolees with gang ties.<sup>70</sup> At the time, officers believed that one such individual, Janae Jamerson, was residing with Motley at her apartment.<sup>71</sup> However, unbeknownst to these officers, Jamerson had violated his parole a few days before the planned search and was back in custody.<sup>72</sup> When police officers arrived for the search, Motley told them Jamerson was back in custody, but they searched her home anyway.<sup>73</sup> After finding nothing linking Motley or Jamerson to criminal activity, the officers left.<sup>74</sup>

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66. The focus of this Note does not allow for a thorough discussion of every section 3067 case reviewing the statute's application to parolees. Other important section 3067 cases include *People v. Willis*, 46 P.3d 898 (Cal. 2002) (looking at the applicability of exclusionary rules to evidence discovered by a state parole officer and police during a search they conducted without suspicion under the erroneous belief that defendant was on parole), and *United States v. Albert*, No. CR-05-00487-DLJ, 2006 U.S. Dist. LEXIS 54746 (N.D. Cal. July 24, 2006) (applying the "arbitrary, capricious, or harassing" standard discussed in *Samson*).

67. 432 F.3d 1072 (9th Cir. 2005).

68. *Id.*

69. *Id.* at 1076.

70. *Id.*

71. *Id.*

72. *Id.* at 1075.

73. *Id.* at 1076.

74. *Id.* at 1076–77.

Motley filed an action<sup>75</sup> against the officers alleging that they had violated her and her infant son's Fourth Amendment rights.<sup>76</sup> The district court granted summary judgment for the officers.<sup>77</sup> The Ninth Circuit affirmed the district court's decision, holding that "before conducting a warrantless search" under section 3067, "officers must have probable cause to believe that the parolee is a resident of the house to be searched."<sup>78</sup> Applying the facts of the case, the court found that the officers indeed had probable cause to believe that Jamerson lived with Motley at her residence.<sup>79</sup> The officers testified to relying on the information gathered by the Los Angeles Police Department regarding Jamerson's parole status, and the court found that this reliance was objectively reasonable.<sup>80</sup>

An important state court decision involving section 3067's impact on third parties is *People v. Middleton*.<sup>81</sup> In *Middleton*, the California Court of Appeal reviewed the conviction of Michael Middleton.<sup>82</sup> On the night of his arrest, Middleton was staying in room 126 of the Travel Lodge Motel in Fairfield, California.<sup>83</sup> Officers patrolling the motel parking lot<sup>84</sup> were told that individuals were smoking marijuana in room 126.<sup>85</sup> When the officers knocked on the door of room 126 to investigate, they heard the room's occupants run into room 111 through an adjoining door.<sup>86</sup> An officer

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75. Motley's action was filed in federal court under 42 U.S.C. § 1983, which provides a private cause of action against "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [federal] Constitution and laws." 42 U.S.C. § 1983 (2000).

76. *Motley*, 432 F.3d at 1077. Motley also alleged that one of the officers, in training a gun on her infant son for a prolonged period of time, used excessive force during the course of the search. The Ninth Circuit ultimately held that this action was objectively unreasonable and reversed the district court's grant of summary judgment on the excessive force claim. *Id.* at 1088–89.

77. *Id.* at 1077.

78. *Id.* at 1080.

79. *Id.* at 1080–83.

80. *Id.* at 1081–82.

81. 31 Cal. Rptr. 3d 813 (Ct. App. 2005).

82. *Id.* at 814.

83. *See id.* at 815–16.

84. Officers were patrolling the area because the surrounding vicinity was considered to be a high drug area. *Id.* at 815.

85. *Id.*

86. *Id.*

then went to the motel manager's office and determined that room 111 was registered to Maurice Hurth, an active parolee.<sup>87</sup>

Based on this information, the officers decided to conduct a warrantless search of Hurth's room.<sup>88</sup> The officers entered room 111 to find Middleton and four others inside; they also found a handgun, later determined to be Middleton's.<sup>89</sup> Though Hurth was not in the room, the officers detained Middleton and his companions.<sup>90</sup> The officers then decided to look for Hurth in room 126, and the detained Middleton consented to the search.<sup>91</sup> In room 126, officers found weapons, cocaine, marijuana, and drug paraphernalia—all belonging to Middleton.<sup>92</sup>

The trial court admitted the evidence found in both rooms against Middleton, who pled guilty to multiple drug and firearm offenses after losing a motion to suppress the evidence.<sup>93</sup> The California Court of Appeal affirmed Middleton's convictions.<sup>94</sup> In reaching its decision, the court relied principally on the fact that the officers did not enter room 111 until they had determined that the room was registered to Hurth, an active parolee.<sup>95</sup> The court did not expressly examine the constitutionality of the search of room 126, but a fair reading of the opinion indicates that it found Middleton's consent to the search to be valid.<sup>96</sup>

Arguably, state and federal courts have incorrectly validated unconstitutional searches conducted under the authority of section 3067. Accordingly, the next section of this note criticizes existing section 3067 case law and questions the legal reasoning of the courts.

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 816.

92. *Id.*

93. *Id.*

94. *Id.* at 819.

95. *Id.* at 818.

96. Middleton had argued that his consent to the search of room 126 was involuntary because it resulted from an unlawful detention. *Id.* at 817. Once the court held that the search of room 111 was constitutional, it implicitly held that the detention of Middleton was lawful, in effect dismissing Middleton's argument that his consent was involuntary. *Id.* at 818.

### III. CRITIQUE OF EXISTING CASE LAW

In an apparent nod to California's high recidivism rates,<sup>97</sup> courts have consistently validated section 3067 and the suspicionless searches it condones. However, the judicial approval of section 3067 is somewhat baffling, for the statute's constitutionality remains highly dubious. Section 3067 seems to lack any firm constitutional footing, and it impermissibly infringes on the Fourth Amendment rights of both California's parolees and non-parolee third parties. Moreover, the statute fails to adequately protect parolees against harassment by police officers. Even if these deficiencies are not constitutionally dispositive, they certainly lead to the conclusion that section 3067 could benefit from some modification.

#### *A. Applying Traditional Fourth Amendment Analysis to Section 3067*

Fourth Amendment analysis generally turns on whether or not a given search is reasonable.<sup>98</sup> Courts typically determine a search's reasonableness by "examining the totality of the circumstances."<sup>99</sup> This approach assesses (1) how significantly a search intrudes on an individual's reasonable expectation of privacy and (2) the degree to which the search is "needed for the promotion of legitimate governmental interests."<sup>100</sup> Even though in *Samson* the United States Supreme Court upheld section 3067 using the totality of the circumstances approach,<sup>101</sup> the Court's analysis was arguably characterized by "faulty syllogism" and "circular reasoning."<sup>102</sup> While the totality of the circumstances approach is fairly flexible, the Court took far too many liberties in arriving at its suspect conclusion.

#### 1. The Parolee's Reasonable Expectation of Privacy

The *Samson* Court found that California parolees subject to the section 3067 search condition, had no "expectation of privacy that

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97. For a general discussion of recidivism in California, see discussion *infra* Part III.A.2.

98. *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

99. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Exceptions to this general approach include the special needs doctrine and consent rationale, discussed *infra* Part III.B.1–2.

100. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

101. See generally *Samson v. California*, 126 S. Ct. 2193 (2006), discussed *supra* Part II.A.

102. *Id.* at 2202 (Stevens, J., dissenting).

society would recognize as legitimate.”<sup>103</sup> The *Samson* majority classified parole as “an established variation on imprisonment,” which allowed for the conclusion that parolees are more akin to prisoners than probationers.<sup>104</sup> However, even if one ascribed to this viewpoint, there is no logical reason to presume that parolees are the same as prisoners—who have absolutely no legitimate expectation of privacy.<sup>105</sup> For that conclusion to be tenable, a parolee would have to be unequivocally equated with a prisoner for the purposes of Fourth Amendment analysis.<sup>106</sup> Yet, precedent has long distinguished parolees from prisoners,<sup>107</sup> and rightfully so. Unlike prisoners, whose activities and movement are closely followed, parolees’ lives are characterized by “many of the core values of unqualified liberty.”<sup>108</sup> Parolees generally choose where they go and what they do, at least to a substantially greater degree than prisoners.<sup>109</sup> This relative freedom makes it difficult to conclude that a parolee has no legitimate expectation of privacy.

Furthermore, while searches of prisoners do not require individualized suspicion,<sup>110</sup> the rationale for suspending prisoners’ Fourth Amendment rights does not logically extend to parolees. It is necessary to strip prisoners of Fourth Amendment rights to “accommodate a myriad of ‘institutional needs and objectives,’” namely the internal security of the prison facility.<sup>111</sup> If prisoners could not be searched randomly, the safety of both prisoners and guards would be severely jeopardized.<sup>112</sup>

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103. *Id.* at 2199.

104. *Id.* at 2198 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)).

105. *Id.* at 2204–05 (Stevens, J., dissenting) (pointing out the illogic of comparing parolees’ privacy interests to those of prisoners simply because the two groups share some superficial similarities).

106. *Id.* at 2202–03.

107. *See, e.g., Morrissey*, 408 U.S. at 482 (noting that a parolee’s “condition is very different from that of confinement in a prison”).

108. *Id.*

109. The activity of parolees and probationers is, however, often restricted. For instance, in the federal system, probationers can be prohibited from frequenting certain places or associating with certain individuals believed to be associated with crime. 18 U.S.C. § 3563(b)(6) (2000).

110. *Hudson v. Palmer*, 468 U.S. 517, 527 (1984) (holding that prisoners have no reasonable expectation of privacy in their cells).

111. *Id.* at 524.

112. *See id.* at 526–28.

However, as Justice Stevens noted in his dissenting opinion in *Samson*, the concerns necessitating suspicionless searches of prisoners simply do not exist outside the walls of a penitentiary.<sup>113</sup> Prisons—self-contained units housing criminals deemed unfit for society—present unique administrative quandaries that necessitate severe Fourth Amendment intrusions; the same cannot rationally be said, however, of everyday society.

Hence, the *Samson* majority wisely offered another more compelling justification for its failure to recognize parolees' Fourth Amendment rights. The *Samson* Court argued that parolees, because they signed an order submitting to the search condition, were “unambiguously’ aware of it.”<sup>114</sup> According to the majority, awareness of the section 3067 search condition significantly reduced a California parolee’s reasonable expectation of privacy.<sup>115</sup> When closely analyzed, however, this contention crumbles. Under the majority’s logic, any state infringement on its citizens’ constitutional rights would be allowable so long as the citizen was forewarned. As the United States Supreme Court pointed out in *Smith v. Maryland*,<sup>116</sup> this obviously cannot be the case.<sup>117</sup>

The *Smith* Court noted that “if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry,” citizens’ subjective expectations of privacy would become irrelevant to Fourth Amendment analysis.<sup>118</sup> As evidenced by the hypothetical scenario advanced in *Smith*, notice of an unreasonable Fourth Amendment intrusion does not necessarily extinguish otherwise legitimate privacy interests.<sup>119</sup> Thus, while it undoubtedly plays some role in determining the overall reasonableness of a search, mere notice of a potential section 3067 search cannot be determinative of reasonableness. As such, the *Samson* majority’s reliance on the notice argument calls into serious

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113. *Samson v. California*, 126 S. Ct. 2193, 2206 (2006) (Stevens, J., dissenting).

114. *Id.* at 2199 (citing *United States v. Knights*, 534 U.S. 112, 119 (2001)).

115. *Id.*

116. 442 U.S. 735 (1979).

117. *Id.* at 740 n.5.

118. *Id.* (noting that, where a state conditions subjective expectations with “influences alien to well-recognized Fourth Amendment freedoms,” the inquiry into subjective expectations becomes an “inadequate index of Fourth Amendment protection”).

119. *See id.*

question its ultimate conclusions regarding California parolees' expectations of privacy.

## 2. The State's Interests

Although the *Samson* Court may not have adequately disproved the existence of Fourth Amendment rights for California parolees, an overwhelmingly compelling state interest would likely make up for this deficiency. In fairness, the *Samson* majority puts forth a fairly compelling argument regarding California's interest in reducing recidivism and monitoring parolees.<sup>120</sup> As the United States Supreme Court has noted in the past,<sup>121</sup> the problem of recidivism implicates serious safety issues. The situation in California, the *Samson* Court noted, is especially disconcerting.<sup>122</sup> As of late 2005, California's parolee population topped 130,000, and the group had the highest recidivism rate in the nation at nearly 70 percent.<sup>123</sup>

Still, notwithstanding the legitimacy of California's interest in controlling and reducing recidivism, it is probably a stretch to say that the interest justifies suspicionless searches. In his dissenting opinion to *Samson*, Justice Stevens said, "If high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter."<sup>124</sup> Hence, while certainly disconcerting, California's struggles with recidivism do not excuse the severe Fourth Amendment intrusions allowed under section 3067.

Moreover, while the statistics appear to paint an especially dire picture, the *Samson* Court may have paid too much heed to California's seemingly astronomical recidivism rates. For starters, not all states use the same definition of recidivism for statistical purposes, making it difficult to accurately compare statistics of different states.<sup>125</sup> Further, California's hard-line stance on parole

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120. *Samson*, 126 S. Ct. at 2200.

121. *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 26 (2003) (plurality opinion).

122. *See Samson*, 126 S. Ct. at 2200 (using California's high recidivism rates as justification for section 3067's regime of suspicionless searches).

123. *Id.* For the purposes of this statistic, recidivism occurs when a paroled felon is returned to prison within 18 months of release for violating parole. *Id.* (citing Joan Petersilia, *Challenges of Prisoner Reentry and Parole in California*, CPRC BRIEF (Cal. Pol'y Res. Ctr., Berkeley, Cal.), June 2000, available at <http://www.ucop.edu/cprc/documents/parole.pdf>).

124. *Samson*, 126 S. Ct. at 2207 n.6 (Stevens, J., dissenting).

125. *See* Ryan G. Fischer, *Are California's Recidivism Rates Really the Highest in the Nation? It Depends on What Measure of Recidivism You Use*, BULLETIN (UC Irvine Cr. For

violations may partially explain the state's high recidivism rates: over half of California's so-called recidivist parolees return to prison on technical violations.<sup>126</sup> This statistic is not overly surprising given California's practice of placing nearly every released inmate under the intense supervision of a parole officer.<sup>127</sup> In contrast, 40 percent of North Carolina's parolees and 60 percent of Florida's parolees have no supervision whatsoever.<sup>128</sup> Such lax supervisory programs, employed to varying degrees by almost every state, no doubt cause many parole violations to go undetected.<sup>129</sup> This probably leads many states to report artificially low recidivism rates, which makes California's comparatively high numbers somewhat misleading.

Even if the statistics might exaggerate California's woes, however, the state's recidivism rates are hardly all smoke and mirrors.<sup>130</sup> Still, numerous other states have serious recidivism problems as well,<sup>131</sup> but no other state has thus far felt the need to codify suspicionless searches of parolees.<sup>132</sup> While the choices of other states do not necessarily make section 3067 constitutionally deficient, it is interesting that virtually all other jurisdictions have taken less aggressive approaches, while still achieving comparable—or in most cases, lower—recidivism rates to California.<sup>133</sup> In fact, it is highly questionable whether section 3067 is even effective in reducing recidivism, as the percentage of California parolees

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Evidence-Based Corrections, Irvine, Cal.), Sept. 2005, at 1, *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) (pointing out the importance of comparing “apples to apples” when looking at states’ recidivism rates).

126. *Id.* at 3 tbl.1 (noting that the percentage of parolees being returned to prison for technical violations is considerably higher in California than in other states with large prison populations such as New York, Florida, and Texas). *But see* JOAN PETERSILIA, CAL. POLICY RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 73–74 (2006), *available at* [http://ucop.edu/cprc/documents/understand\\_ca\\_corrections.pdf](http://ucop.edu/cprc/documents/understand_ca_corrections.pdf) [hereinafter UNDERSTANDING CALIFORNIA CORRECTIONS] (arguing that, “despite their mild description,” most technical violations in California actually involve allegations of some sort of criminal activity).

127. Fischer, *supra* note 125, at 2.

128. *Id.*

129. *Id.*

130. *Id.* at 2 tbl.1 (showing California's high rates of recidivism).

131. *See id.* at 3 tbl.2 (comparing California's recidivism rates with those of Florida, Illinois, New York, North Carolina, and Texas).

132. Reply Brief for the Petitioner, *supra* note 8, at 8–9.

133. The nationwide recidivism rate was only half as great as California's during the 1990s. TIMOTHY A. HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990–2000, at 11 (2001), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf> [hereinafter TRENDS IN STATE PAROLE].

successfully completing parole went virtually unchanged following the adoption of the statute in 1996.<sup>134</sup>

Section 3067's apparent failure to effectively reduce recidivism makes the statute somewhat difficult to justify under the totality of the circumstances approach. Because neither prong of the totality of the circumstances balancing test strongly compels the conclusion that the statute is reasonable under the Fourth Amendment, section 3067 cannot be upheld under traditional totality of the circumstances analysis. Nonetheless, before the statute can be dismissed as constitutionally deficient, two other exceptions to general Fourth Amendment rules must be addressed.

*B. The Inapplicability of Either the Consent Rationale  
or the Special Needs Doctrine to Section 3067*

Even if section 3067 is unjustifiable under the totality of the circumstances balancing approach, the statute is not necessarily unconstitutional. Although the United States Supreme Court was hesitant to do so in *Samson*,<sup>135</sup> courts have routinely validated suspicionless searches under two exceptions to traditional Fourth Amendment principles: (1) a consent rationale and (2) the special needs doctrine. However, given their respective rationales, it is highly arguable whether either exception even applies to section 3067 Fourth Amendment analysis.

1. Consent Rationale

Consent rationale provides a well-established exception to traditional Fourth Amendment prohibitions on suspicionless searches.<sup>136</sup> The doctrine recognizes a person's ability to waive their Fourth Amendment rights and consent to an otherwise unreasonable

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134. *Id.* (noting that 20.9 percent were successfully discharged from parole in 1995, while the discharge rate only increased to 21.3 percent in 1999).

135. *See Samson v. California*, 126 S. Ct. 2193, 2199 n.3 (2006) (majority declining to rest its holding validating section 3067 on either consent rationale or the special needs exception because (1) California did not clearly raise the consent argument in the lower courts; and (2) the holding can be based entirely on totality of the circumstances analysis, making special needs examination unnecessary).

136. *See, e.g., Zap v. United States*, 328 U.S. 624, 628 (1946) (recognizing a voluntary waiver to privacy claims under the Fourth Amendment); *see also Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) (noting that a search conducted pursuant to a valid consent meets Fourth Amendment reasonableness requirements).

search or seizure.<sup>137</sup> To be valid, the consent must be entirely voluntary and not the product of duress or coercion of any sort.<sup>138</sup> A search conducted pursuant to valid consent does not run afoul of the Fourth Amendment so long as the search does not exceed the scope of the consent.<sup>139</sup>

California has sought to justify section 3067 on consent grounds,<sup>140</sup> but the argument fails for a number of reasons. First and foremost, most felonies in California carry a determinate sentence “consisting of a specific number of months or years in prison.”<sup>141</sup> Upon completion of this sentence, the inmate is released on parole<sup>142</sup> and must accept the parole conditions provided by the Board of Prison Terms.<sup>143</sup> Thus, consent rationale is inapplicable because a California parolee has no real choice but to accept the search condition.<sup>144</sup>

Even if, for the sake of argument, a prisoner could opt for a longer sentence in lieu of accepting a section 3067 search condition, consent rationale would still not apply. First, it is probably a stretch to call a parolee’s assent to a section 3067 search condition purely “voluntary.” The promise of relative freedom, especially to an individual who has had no such freedom for some time, is arguably an irresistible inducement.<sup>145</sup> Thus, a parolee’s acceptance of a section 3067 search condition might best be viewed as the product of coercion, not voluntary consent.

Moreover, prisoners up for parole cannot logically “consent” to suspicionless searches, for they have no true alternative option.

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137. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citing *Davis v. United States*, 328 U.S. 582, 593–94 (1946); *Zap v. United States*, 328 U.S. 624, 630 (1946)).

138. *Id.* at 248–49. The Court seems to guard other constitutional rights, namely those playing a role in criminal trials, more closely. For instance, while voluntary consent waives Fourth Amendment rights under *Schneckloth*, valid waiver of the Sixth Amendment right to counsel must also be knowing and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

139. See *Washington v. Chrisman*, 455 U.S. 1, 9–10 (1982) (upholding seizure of contraband during a search conducted pursuant to a valid consent).

140. Respondent’s Brief on the Merits at 33–37, *Samson v. California*, 126 S. Ct. 2193 (2006) (No. 04-9728).

141. *People v. Jefferson*, 980 P.2d 441, 445 (Cal. 1999).

142. CAL. PENAL CODE § 3000(b)(1) (West 2007) (“At the expiration of a term . . . of imprisonment imposed pursuant to Section 1170 . . . the inmate shall be released on parole . . .”).

143. *People v. Reyes*, 968 P.2d 445, 448 (Cal. 1998).

144. See *Samson*, 126 S. Ct. at 2206 n.4 (Stevens, J., dissenting).

145. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10(b) (4th ed. 2007).

Would-be parolees only have the nominal choice of either (1) remaining in prison and being subjected to suspicionless searches under *Hudson*<sup>146</sup> or (2) leaving prison and being subjected to suspicionless searches under section 3067.<sup>147</sup> Clearly, these supposed alternatives present no real choice at all, other than perhaps one of venue. A prisoner faced with this decision only chooses where—not whether—he wishes to be subjected to suspicionless searches. Absent a distinct alternative, a prisoner cannot logically be said to “consent” to a suspicionless search.<sup>148</sup> Thus, consent rationale makes little sense in the context of section 3067 searches. A much stronger argument, however, can be made for the special needs exception.

## 2. The Special Needs Doctrine

Under the special needs doctrine, the United States Supreme Court has recognized another limited exception to Fourth Amendment requirements. The exception recognizes that, in certain instances, states have an important interest that makes “the warrant and probable-cause requirement impracticable.”<sup>149</sup> The special needs exception has been recognized in several areas. For one, government employers are allowed to conduct work-related searches of employees’ desks and offices without obtaining a warrant.<sup>150</sup> The exception also permits public school officials to conduct warrantless searches of student property absent probable cause to do so.<sup>151</sup> The special needs exception has even been used to justify probationer searches. In *Griffin v. Wisconsin*,<sup>152</sup> the United States Supreme Court recognized the supervision of probationers as a “‘special need’ of the State,” allowing probation officers to conduct searches of probationers without requiring individualized suspicion.<sup>153</sup>

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146. Under *Hudson v. Palmer*, wardens and prison guards can search prisoners’ cells at random without offending the Fourth Amendment. 468 U.S. 517, 527 (1984).

147. See *Samson*, 126 S. Ct. at 2206 n.4 (Stevens, J., dissenting) (pointing out that prisoners facing parole have no real “‘choice’ concerning the search condition”).

148. *Id.*

149. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

150. *O’Connor v. Ortega*, 480 U.S. 709, 720–21 (1987) (citing *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973); *United States v. Collins*, 349 F.2d 863, 868 (2d Cir. 1965)).

151. *T.L.O.*, 469 U.S. at 332 n.2.

152. 483 U.S. 868 (1987).

153. *Id.* at 875–76.

According to California, the special needs exception justifies section 3067 searches based on the state's interest in monitoring and supervising its rather sizable parolee population.<sup>154</sup> In fairness, parolees' relative likelihood to commit future crimes—at least when compared to regular citizens—does present a judicially recognized threat to public safety.<sup>155</sup> Since safety concerns typically motivate the special needs exception,<sup>156</sup> California's argument is not entirely baseless. Also, as has been discussed, the *Griffin* Court recognized the state interest in supervising probationers,<sup>157</sup> a group similarly situated to parolees for the purposes of Fourth Amendment analysis.<sup>158</sup> The state supervisory interest is arguably even stronger for parolees than probationers, for parolees have generally committed more egregious crimes—"ones warranting a prior term of imprisonment"—than probationers.<sup>159</sup>

Still, although it may seem logical to apply *Griffin* by analogy to section 3067 suspicionless searches, there is one subtle but important difference. In *Griffin*, and in all other cases validating a suspicionless search under the special needs doctrine, the search in question was conducted for purposes completely "divorced from the State's general interest in law enforcement."<sup>160</sup> Therefore, the exception simply cannot justify section 3067 searches, for suspicionless searches of parolees are inherently related to law enforcement. If a section 3067 search could be upheld under the special needs doctrine merely to make crime-fighting simpler for California's police officers, the special needs exception would be made "so broad as to swallow the rule of Fourth Amendment

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154. Respondent's Brief on the Merits, *supra* note 140, at 22, 27.

155. See, e.g., *Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 365 (1998).

156. See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989) (noting that the special needs exception applies to searches designed to "prevent the development of hazardous conditions" that threaten public health and safety).

157. *Griffin*, 483 U.S. at 876.

158. *United States v. Williams*, 417 F.3d 373, 376 n.1 (3d Cir. 2005) (noting that courts have always treated parolees and probationers identically for Fourth Amendment purposes).

159. *Samson v. California*, 126 S. Ct. 2193, 2205 (2006) (Stevens, J., dissenting).

160. *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).

reasonableness.”<sup>161</sup> For this reason, the exception has always been narrowly construed.<sup>162</sup>

Additionally, while section 3067 searches are conducted by police officers, the special needs doctrine has traditionally applied only to searches made by non-law-enforcement.<sup>163</sup> This limitation on the special needs doctrine makes considerable sense from a practical standpoint. Most government officials are ill-equipped to determine whether reasonable suspicion exists.<sup>164</sup> Teachers and school administrators, for example, are not in the business of investigating crimes, and as such they cannot be expected to know of reasonable suspicion’s niceties.<sup>165</sup> However, the same cannot rationally be said of police officers, whose main function in society is to ferret out violations in the law.<sup>166</sup> Officers are well-acquainted with Fourth Amendment constraints, since warrants—which are not issued absent probable cause<sup>167</sup>—are required for virtually all searches related to law enforcement. Accordingly, unlike most government officials, police officers can be expected to competently determine whether a search is justified by their level of suspicion.<sup>168</sup>

Another important distinction between section 3067 suspicionless searches and valid special needs searches involves the nature of the relationship between the government official and the party being searched. Even if it falls short of the traditional definition, a search takes on something close to individualized suspicion when based on a more intimate relationship. For instance, a probation officer searches a probationer with subjective knowledge of his individual situation, including the probationer’s background and character traits.<sup>169</sup> Suspicionless section 3067 searches, on the

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161. Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner at 6, *Samson*, 126 S. Ct. 2193 (2006) (No. 04-9728) [hereinafter Brief for ACLU].

162. *Id.* at 7 (noting that a “long and consistent pedigree attaches to the judicial insistence upon cabinining the special needs doctrine”).

163. See *supra* text accompanying notes 149–53.

164. Brief for ACLU, *supra* note 161, at 9.

165. *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985).

166. Brief for ACLU, *supra* note 161, at 10.

167. U.S. CONST. amend. IV (stating that “no Warrant shall issue, but upon probable cause, supported by Oath or affirmation”).

168. *O’Connor v. Ortega*, 480 U.S. 709, 724 (1987).

169. *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987) (noting that a probation agency can proceed with a search “on the basis of its entire experience with the probationer”).

other hand, are made in an entirely different context. Under the statute, a police officer could theoretically search a parolee based solely on the latter's parolee status without any personal knowledge of his specific circumstances. This type of search falls woefully short of anything resembling individualized suspicion.

Considering all of this, the special needs doctrine does not logically justify section 3067 suspicionless searches. Even if the searches at issue fit neatly under the umbrella of the special needs exception, it is still highly doubtful that the statute would be deemed constitutional. Although the Fourth Amendment does not impose an "irreducible requirement of such [individualized] suspicion,"<sup>170</sup> no court has ever used the special needs exception to validate a search regime without the existence of adequate safeguards being in place to limit the discretion of police officers.<sup>171</sup> On its face, section 3067 contains no such restraint.

### *C. Section 3067's Lack of Effective Procedural Safeguards Against Parolee Harassment*

Even if there were no other rational challenge to section 3067, the statute would arguably fail under constitutional scrutiny because of its "blanket grant of discretion untethered by any procedural safeguards."<sup>172</sup> The nation's early history sheds considerable light on this argument. During the colonial era, the King's officers—authorized by liberally granted writs of assistance—had authority to search whomever and whatever they pleased.<sup>173</sup> Hatred for this practice ultimately played a large role in spurring the American Revolution,<sup>174</sup> and it also led the constitutional framers to draft the Fourth Amendment.<sup>175</sup>

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170. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

171. *See, e.g., United States v. Brignon-Ponce*, 422 U.S. 873, 882 (1975) (finding that the "Fourth Amendment demands something more than the broad and unlimited discretion sought by the government"); *see also United States v. Biswell*, 406 U.S. 311, 315 (1972) (noting that a proper administrative searching scheme must limit the discretion of inspecting officers and be "carefully limited in time, place, and scope").

172. *Samson v. California*, 126 S. Ct. 2193, 2202 (2006) (Stevens, J., dissenting).

173. *See Payton v. New York*, 445 U.S. 573, 583 n.21 (1980) (describing pre-Revolutionary conditions).

174. *Id.*

175. *See Tracey Maclin, The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 247–48 (1993) (arguing that the Fourth Amendment was intended to keep the newly formed government from resurrecting the writs of assistance searching scheme).

Given the nation's deep-rooted detestation of blanket search warrants, it is hard to defend the large amount of relatively unchecked power that section 3067 places in the hands of police officers. After all, the statute seems to permit "the very evil that the Fourth Amendment" was designed to eliminate.<sup>176</sup> California state courts have attempted to address this concern, prohibiting those section 3067 searches deemed "arbitrary, capricious, or harassing."<sup>177</sup> Under a traditional definition, it would be hard to view suspicionless searches as anything other than harassing, for they are based purely on status and without regard to individualized suspicion. However, the California Supreme Court has defined the term differently.

The California Supreme Court has held that a search is harassing whenever the "motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes."<sup>178</sup> Given the narrow construction of this definition, it is not surprising that no state court has ever disqualified a section 3067 suspicionless search for violating California's "arbitrary, capricious, or harassing" standard.<sup>179</sup> Moreover, it is unlikely that a court ever will, since it is highly doubtful that any officer would ever admit to conducting a parole search for the primary purpose of harassment.

Even if, for argument's sake, California police officers never purposefully harass parolees, section 3067 searches could still lead to unintentional harassment. If, for example, five police officers conducted five separate suspicionless searches of the same parolee in the course of an hour, none of the searches taken alone would violate California's "arbitrary, capricious, or harassing" standard—so long as the searches were uncoordinated.<sup>180</sup> Yet, the result is clearly harassing for the parolee, who seemingly cannot move two blocks without being stopped and re-searched by a new officer. With the growing number of parolees and a shortage of police officers in California, one could argue that multiple searches of this nature are

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176. Reply Brief for the Petitioner, *supra* note 8, at 3.

177. *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998).

178. *Id.* at 451.

179. Reply Brief for the Petitioner, *supra* note 8, at 5 (noting the "emptiness" of the limitation).

180. This example is similar to the hypothetical proposed by Justice Souter at oral arguments during *Samson*. For the exact text of Souter's questioning of California's advocate, Ronald Niver, see Transcript of Oral Argument at 44–45, *Samson v. California*, 126 S. Ct. 2193 (2006) (No. 04-9728).

unlikely to occur in practice.<sup>181</sup> However, the physical appearance of many parolees might increase the likelihood of this seeming improbability.

Given the demographics of the California parolee population, section 3067 may actually facilitate the harassment of racial minorities. It has often been argued that police officers disproportionately focus on racial minorities in their law enforcement duties.<sup>182</sup> However, this phenomenon—known as racial profiling—is arguably even more prevalent when it comes to section 3067 suspicionless searches.<sup>183</sup>

Today's parolees are nothing more than yesterday's prisoners, making the racial makeup of recent prison populations particularly instructive. The state's prison population in 2004 was 28.9 percent African-American, though that same group makes up a mere 6.7 percent of California's general populace; Hispanics occupied 37 percent of California's prison population during that same period, despite accounting for only 32.4 percent of the general population.<sup>184</sup> Since the 2004 statistics are fairly representative of recent trends,<sup>185</sup> it seems safe to say that today's parolee population in the state of California is disproportionately composed of racial minorities.

Based on this fact, it is likely that the State's minorities bear the brunt of section 3067's suspicionless search regime. Because Hispanics and African-Americans make up the bulk of the parolee population,<sup>186</sup> section 3067 in a sense justifies police officers who stop minorities to inquire as to their parole status. In fairness, police officers would likely have no other way of determining the appropriateness of a section 3067 search since the usual determinant of individualized suspicion is not required. Still, this line of

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181. Leading Cases, *Samson v. California*, 126 S. Ct. 2193 (2006), 120 HARV. L. REV. 125, 190 (2006).

182. See, e.g., R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005).

183. Leading Cases, *supra* note 181, at 191 (noting that certain characteristics—such as race or indications of gang membership such as tattoos—tend to draw the attention of police and increase the likelihood of multiple section 3067 searches).

184. UNDERSTANDING CALIFORNIA CORRECTIONS, *supra* note 126, at 50 fig.22.

185. *Id.* at 52 fig.24 (tracing the racial composition of the prison population over the past four decades).

186. These two groups accounted for roughly 65 percent of the prison population in 2004. *Id.* at 50 fig.22.

questioning is potentially embarrassing and harassing, even if it does not result in a formal detention and search. Thus, the problem of racial profiling in section 3067 searches may extend beyond minority parolees and impact California's general minority population as well.<sup>187</sup>

Essentially, California's prohibition on "arbitrary, capricious, and harassing" section 3067 searches is a limitation in name only, and the statute gives police officers far too much discretion. This lack of a functional limiting factor arguably makes the statute unreasonable under the Fourth Amendment.<sup>188</sup> However, section 3067's questionable constitutionality should concern more than just the state's parolee population. The following section details additional problems with the statute—ones that have the potential to impact non-parolees as well.

#### *D. Section 3067's Infringement on the Rights of Non Parolees*

Even if one is not overly sympathetic to the plight of parolees, section 3067 still merits serious concern because it impacts non-parolees as well. Parole searches can involve "massive intrusion[s] on the privacy interests of [non-parolee] third persons" solely because they associate with a parolee.<sup>189</sup> For example, whenever police officers conduct a warrantless search of a parolee's residence, any individual living with that parolee is effectively subjected to a warrantless search as well.<sup>190</sup>

In such instances, the privacy interests of non-parolees are infringed upon regardless of whether the search is suspicionless or suspicion-based.<sup>191</sup> Either way, the non-parolee is searched without a warrant in violation of general Fourth Amendment rules. However,

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187. The scope of this problem would probably be exceedingly difficult to measure because most of these exchanges are likely to go unreported.

188. See *Samson v. California*, 126 S. Ct. 2193, 2204 (2006) (Stevens, J., dissenting) ("[I]f individualized suspicion is to be jettisoned, it must be replaced with [other] measures to protect against the state actor's unfettered discretion.").

189. *People v. Burgener*, 714 P.2d 1251, 1269 (Cal. 1986).

190. As discussed *supra* notes 2, 4–6, and accompanying text, a search of a residence generally requires a warrant, but this requirement is relaxed for parolees in light of the peculiar supervisory problems they present. Thus, individuals living with parolees must—at a minimum—forfeit their general right to be free of warrantless searches.

191. See *Samson*, 126 S. Ct. at 2202 (noting that both suspicionless searches and suspicion-based searches present the potential for the same constitutional encroachments on third parties' Fourth Amendment rights).

the intrusion is arguably more severe when the search is suspicionless.

A simple hypothetical illustrates this point. In Case One, officers—operating under the reasonable belief that a parolee is selling drugs out of his home—do not obtain a warrant prior to searching the residence, which the parolee shares with his non-parolee wife. In Case Two, officers conduct a suspicionless search of the same couple's residence, this time without any suspicion of illegal activity.<sup>192</sup>

In both instances, the non-parolee wife is subjected to a warrantless search despite technically possessing all protections afforded under the Fourth Amendment. However, in the first case, the intrusion on the wife's Fourth Amendment rights seems far less obscene. Through her free association with a parolee who—at least from an objectively reasonable standpoint—appears to be up to no good, the wife in the first case arguably forfeits some of her Fourth Amendment protections. The same rationale does not logically apply in the second instance to the wife who is subjected to the suspicionless search. Hence, while suspicion-based searches can certainly intrude on the Fourth Amendment rights of non-parolees, section 3067 searches of the suspicionless variety offend more core constitutional values.

The practice of admitting evidence seized during section 3067 searches against non-parolee third parties is likewise problematic. Under *People v. Middleton*,<sup>193</sup> courts can admit evidence seized through the extension of a valid section 3067 search against a non-parolee third party.<sup>194</sup> Of course, the search in *Middleton* was based on reasonable suspicion, or perhaps even probable cause.<sup>195</sup> As such, the court's decision to admit the seized evidence against Middleton—a non-parolee—was hardly remarkable.<sup>196</sup>

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192. The Case Two hypothetical is similar to the facts of *Motley*, discussed *supra* Part II.B. Motley's home was subjected to a suspicionless section 3067 search when officers believed, albeit erroneously, that a parolee lived with her. *Motley v. Parks*, 432 F.3d 1072, 1075–76 (9th Cir. 2005).

193. 31 Cal. Rptr. 3d 813 (Ct. App. 2005). For a more complete treatment of *Middleton*, see *supra* Part II.B.

194. *Id.* at 818.

195. *Id.* at 814–16 (detailing the facts which, taken together, certainly amount to particularized suspicion surrounding the search).

196. See *id.* at 818–19 (detailing the Court's holding). Other courts have reached similar conclusions when a parole search is based on reasonable suspicion. See, e.g., *United States v.*

Nevertheless, *Middleton* clearly leaves certain evidentiary issues unresolved—namely those surrounding suspicionless searches conducted under section 3067. Ultimate resolution of these issues, however, is easy to predict. It is only a matter of time before evidence seized pursuant to a section 3067 suspicionless search is admitted against a non-parolee third party. Because suspicionless section 3067 searches would be constitutionally unreasonable if they were applied directly to non-parolees, one can argue that exclusionary rule principles should apply to evidence seized pursuant to such searches.<sup>197</sup> Using the exclusionary rule in this manner would protect the rights of non-parolees, and it would not hinder the state's ability to monitor parolees effectively.

In all likelihood, however, the exclusionary rule would be of no help to non-parolees. The exclusionary rule only applies to evidence seized during an unreasonable search,<sup>198</sup> and the United States Supreme Court in *Samson* upheld the reasonableness of section 3067.<sup>199</sup> Therefore, unless *Samson* is overruled, a non-parolee will never be able to successfully exclude from trial the fruit of a valid section 3067 search.

This result crystallizes one of section 3067's most alarming inadequacies. Section 3067 is aimed solely at California's parolees, a narrow subset of the population, but the statute is clearly broad enough to catch non-parolees in its net. The statute robs non-parolees of their Fourth Amendment rights without any justification whatsoever. Unlike parolees, who by sole virtue of their status have reduced Fourth Amendment rights,<sup>200</sup> non-parolees should rightfully

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Cannon, No. 93-1377, 1994 U.S. App. LEXIS 31828 (10th Cir. Nov. 14, 1994) (admitting evidence of drug distribution seized pursuant to a valid warrantless parole search against a non-parolee wife where the search was based upon reasonable suspicion of illegal activity on the part of the parolee).

197. The exclusionary rule, which suppresses criminal evidence seized pursuant to an unreasonable search or seizure, was established by *Weeks v. United States*, 232 U.S. 383 (1914). Exclusionary rule principles have been incorporated against the states under the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). Hence, while there is no textual basis in the U.S. Constitution for the exclusionary rule, it has been applied by the United States judicial system for nearly a century.

198. *Weeks*, 232 U.S. at 398–99.

199. *Samson v. California*, 126 S. Ct. 2193, 2202 (2006).

200. See *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (finding that the state's interest in monitoring parolees allows for certain Fourth Amendment infringements "that would not be constitutional if applied to the public at large").

enjoy all the protections normally afforded by the United States Constitution. Section 3067 rides roughshod over this principle.

The questionable application of section 3067 to third parties and parolees indicates that the statute would seriously benefit from some alterations. Section 3067, despite judicial decisions to the contrary, displays numerous characteristics of patent unreasonableness under the Fourth Amendment. Therefore, what follows are proposed changes to section 3067 that would make the statute's constitutionality less debatable.

#### IV. PROPOSED CHANGES

Unless the United States Supreme Court revisits its decision in *Samson*, section 3067 suspicionless searches are in no danger of being ruled unconstitutional. Therefore, despite the arguments made in this note, California has no duty to repeal the statute. Nonetheless, it might be time for legal scholars to educate Californians regarding the constitutional deficiencies that arguably plague section 3067.

If California's voters become aware of the injustices perpetrated by section 3067, they might support an amendment to the statute or a restructuring of the state's parolee supervisory program. However, because many voters probably care little about the constitutional rights of convicted criminals, any proposed changes to section 3067 would face an uphill battle. Thus, for such changes to be accepted by the voting populace, they would need to effectively address the concerns that prompted California voters to pass section 3067 in the first place.<sup>201</sup>

##### A. *What Is Needed?*

First and foremost, any change to section 3067 would need to allow the state to battle recidivism and effectively supervise California's sizeable parolee population. As discussed above, California's recidivism rate is higher than that of any other state in the nation.<sup>202</sup> Still, despite the misleading nature of that statistic,<sup>203</sup>

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201. For a discussion of these concerns, see discussion *supra* text accompanying notes 1–3.

202. *Samson*, 126 S. Ct. at 2200.

203. For a discussion regarding the danger of placing too much emphasis on California's recidivism rate, see discussion *supra* text accompanying notes 125–29.

the number of new parolees released in California is unquestionably high—around 125,000 a year.<sup>204</sup>

Given the nature of California's parole system, change is unlikely. Since 1977, when California passed the Determinate Sentencing Law, the state's parolee population has steadily grown.<sup>205</sup> Under this law, most prisoners receive determinate sentences that indiscriminately qualify them for parole upon completion of their sentence.<sup>206</sup> The growing number of parolees in California, especially when combined with the state's high recidivism rate, presents a legitimate and compelling state supervisory interest.

Section 3067 was designed to address this interest. In eliminating the requirement of reasonable suspicion, section 3067 strove to make the supervision of parolees easier for the state and its agents.<sup>207</sup> However, the statute appears to be ineffective. California's recidivism rate has remained steady since section 3067 was passed in 1996.<sup>208</sup> Arguably, if the statute actually reduced recidivism, the effect would have been realized by now. Even if the statute facilitates the supervision of parolees, section 3067's Fourth Amendment intrusions can hardly be justified if recidivism rates go largely unchanged. Still, it is unquestionable that California has an interest in supervising its large parolee population, and any changes to section 3067 must pay heed to this concern.

There are other interests at stake as well. Though seemingly taking a backseat to the state's concern over the supervision of parolees, California's parole system also seeks to reintegrate parolees back into society.<sup>209</sup> To meet this goal, the state must create an environment that allows the parolee to establish a "pro-social" identity that is committed to the values of good citizenship.<sup>210</sup>

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204. UNDERSTANDING CALIFORNIA CORRECTIONS, *supra* note 126, at 65 fig.32.

205. *Id.* at 64.

206. *Id.* California's most dangerous prisoners—those convicted of particularly heinous crimes such as murder or kidnap for ransom—still receive indiscriminate sentences that subject them to parole board review. *Id.* at 65.

207. AB NO. 2284 ANALYSIS, *supra* note 1.

208. TRENDS IN STATE PAROLE, *supra* note 133, at 10 tbl.15.

209. Brief of Amicus Curiae Citizens United for Rehabilitation of Errants in Support of Petitioner at 2, *Samson v. California*, 126 S. Ct. 2193 (2006) (No. 04-9728) ("The unquestionable goal of parole [is] to serve as a transition for the former offender to a law-abiding life") [hereinafter Brief of C.U.R.E.].

210. See, e.g., Stephen Farrall & Shadd Maruna, *Desistance-Focused Criminal Justice Policy Research: Introduction to a Special Issue on Desistance from Crime and Public Policy*, 43

Arguably, the best way to achieve this desired result is for the state to treat its parolees like regular members of society.<sup>211</sup> In so doing, the state allows its parolees to establish new civic-minded identities characterized by normal relationships and traditional liberties.<sup>212</sup> Of course, leaving parolees entirely to their own devices would be highly imprudent. As evidenced by California's high recidivism rates, the transition away from criminal tendencies is not smooth for many parolees. State supervision is thus an essential component of parolee reintegration into society. However, the development of a new identity distinct from the parolee's deviant past and rooted firmly in social values also aids in reintegration.<sup>213</sup>

Section 3067 suspicionless searches may in fact impede a parolee's ability to successfully reenter society. For one, by subjecting him to a suspicionless search, society is essentially telling a parolee that he is a "pre-designated criminal self-suspected of criminal behavior."<sup>214</sup> This message erodes any positive progress a parolee might be making toward developing a pro-social identity.<sup>215</sup>

Suspicionless searches prevent parolee reintegration into society in other ways as well. As previously discussed, section 3067 potentially subjects a third party who is associated with a parolee to severe privacy intrusions.<sup>216</sup> Because of this, many individuals will likely choose to disassociate themselves from parolees.<sup>217</sup> Without the ability to have normal, supportive relationships, parolees will likely struggle to become functional members of society, leading to a higher probability of recidivism.<sup>218</sup> Thus, section 3067 may frustrate rather than foster the parolee's reintegration into society.

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HOWARD J. CRIM. JUST. 358, 361 (2004), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1468-2311.2004.00336.x>; Judith Rumgay, *Scripts for Safer Survival: Pathways Out of Female Crime*, 43 HOWARD J. CRIM. JUST. 405, 407-08 (2004), available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1468-2311.2004.00338.x>.

211. Brief of C.U.R.E., *supra* note 209, at 4.

212. *Id.*

213. *Id.* at 6.

214. *Id.*

215. *Id.*

216. For a more thorough discussion of this point, see *supra* text accompanying notes 189-92.

217. *People v. Sanders*, 73 P.3d 496, 508 (Cal. 2003) (noting that, because of the potential for privacy intrusions under section 3067, "[m]any law-abiding citizens might choose not to open their homes to probationers [or parolees]" (quoting *People v. Robles*, 97 Cal. Rptr. 2d 914, 921(Ct. App. 2000))).

218. *Id.*

*B. What Can Be Done?*

To begin, section 3067 should be amended so as not to apply to third parties. Granted, searches of non-parolees' homes—as in *Motley*<sup>219</sup>—might be necessary, for a parolee should not be able to avoid state supervision simply because he associates or lives with a non-parolee. However, even if certain third party privacy intrusions are impossible to avoid, any evidence seized pursuant to a suspicionless search should not be admissible against a third party.<sup>220</sup>

Although section 3067 should not apply to non-parolees, the statute as it pertains to parolees is far more logical. If the state's voters and legislators were even to consider an amendment to section 3067, the parole system's dual goals of parolee supervision and parolee reintegration into society must be effectively addressed. Arguably, the easiest way to placate both these interests is to simply add a reasonable suspicion requirement to section 3067. This probably would not detrimentally impact recidivism rates, since all other states conduct only suspicion-based parole searches while still enjoying nominally lower recidivism rates than California. Perhaps even more importantly, the addition of a reasonable suspicion requirement to section 3067 would liberate parolees of the social stigma associated with suspicionless searches. However, while a reasonable suspicion requirement would theoretically satisfy both interests of the state, it is probably an overly idealistic solution given the state's current stance on the issue.

Assuming California remains committed to some form of a suspicionless search regime, one can only propose subtle changes to section 3067. For instance, the state could limit section 3067's suspicionless search regime to only those parolees deemed especially dangerous or likely to commit more crimes.<sup>221</sup> This modification to section 3067 would make the statute far more reasonable under the

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219. *Motley v. Parks*, 432 F.3d 1072, 1076–77 (9th Cir. 2005). For a discussion of the facts surrounding the search of Motley's residence, see discussion *supra* Part II.B.

220. While no court has yet decided whether evidence seized pursuant to a section 3067 suspicionless search can be admitted against non-parolee third parties, the issue will probably be decided at some point. In all likelihood, such evidence will be found to be admissible against non-parolees. For a discussion of this topic, and the reasons behind this prediction, see *supra* text accompanying notes 197–99.

221. *Samson v. California*, 126 S. Ct. 2193, 2207 (Stevens, J., dissenting) (noting that “this might have been a different case had a court or parole board imposed the condition at issue based on specific knowledge of the individual's criminal history and projected likelihood of reoffending”).

Fourth Amendment by effectively introducing a modicum of particularized suspicion.

Limiting section 3067's application to searches conducted by parole officers would likewise improve the statute from a constitutional standpoint.<sup>222</sup> After all, the supervision of parolees is a well-recognized special need of the state, and courts have consistently validated suspicionless searches conducted by parole officers under special needs doctrine.<sup>223</sup> Thus, the state could retain a limited suspicionless search regime while still meeting the constitutional requirements of the Fourth Amendment.

## V. CONCLUSION

As this note illustrates, section 3067's constitutional deficiencies are quite numerous. For one, neither traditional Fourth Amendment analysis nor any established exception to general search-and-seizure rules appears to justify the statute's suspicionless searches. Moreover, while the statute no doubt strives to combat the state's high rate of recidivism, whether it has been even remotely successful is highly questionable. Section 3067 also invites numerous forms of harassment of both parolees and non-parolees.

These problems notwithstanding, slight changes to section 3067 could go a long way towards making it more reasonable under the Fourth Amendment. However, at the core of section 3067's constitutional inadequacy is the statute's lack of an individualized suspicion requirement. As Justice Stevens noted in his dissenting opinion in *Samson*, "[t]he requirement of individualized suspicion . . . is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment."<sup>224</sup> Therefore, to bring the statute into full and indisputable compliance with the Fourth Amendment, some element of individualized suspicion must be introduced. Failing to impose such a requirement merely pays "lip service to the end" and overlooks section 3067's questionable means.<sup>225</sup> The time has come to stop ignoring the constitutional deficiencies of section 3067 simply because it primarily applies to

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222. *Id.*

223. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987).

224. *Samson*, 126 S. Ct. at 2207.

225. *Id.*

the long-marginalized parolee population, for doing so dishonors the Fourth Amendment and deteriorates the protections it affords.

