poses a greater threat to the exclusionary rule than the past decisions that limited its application. First, the Court's two newest Justices joined the majority opinion in full.[79] Second, the majority was willing to bar the application of the exclusionary rule without regard to its deterrent effect.[80] Finally, the majority's emphasis on changed circumstances — the expansion of § 1983 and internal police discipline — could justify overruling *Mapp*.[81] It remains to be seen how far the Court will go, but *Hudson* is a strong signal that the exclusionary rule is in trouble.

6. Fourth Amendment — Suspicionless Search of Parolees. — In 1787, Jeremy Bentham argued that the ideal prison would consist of cellblocks encircling an interior opaque column from which wardens and guards could monitor prisoners without themselves being seen.[1] Because the prisoners would not know when the wardens were watching them from inside the column, Bentham surmised that the prisoners would attempt to conform their behavior to acceptable standards at all times.[2] Although Bentham's Panopticon has met with considerable criticism,[3] his core idea — that supervision, real or imagined, can deter

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[79] In another case from last Term, the new Chief Justice noted that "the exclusionary rule is not a remedy we apply lightly" in view of its social costs and declined to apply the rule to violations of the right of foreign nationals under the Vienna Convention of Consular Relations to consular notification of their arrest or detention. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2680 (2006); *see also infra* pp. 303–12.

[80] *See Hudson*, 126 S. Ct. at 2166 ("[E]ven if this assertion [that without suppression there would be no deterrence] were accurate, it would not necessarily justify suppression."). All the pre-*Hudson* limits on the exclusionary rule apply in situations in which there is little reason to believe that exclusion would have a deterrent effect. *See id.* at 2175–76 (Breyer, J., dissenting). For example, the Court established an exception to the exclusionary rule when police officers rely in good faith on a warrant that turned out to be defective. *See Leon*, 468 U.S. at 919–20. The basis for this exception is that an officer who subjectively believes she is acting lawfully would not be deterred by the threat of exclusion. *See* Michigan v. Tucker, 417 U.S. 433, 447 (1974).

[81] Justice Kennedy's concurrence casts some doubt on whether the Court, at least as it is currently constituted, has five votes to eliminate the exclusionary rule. Justice Kennedy saw the *Hudson* decision as a narrow one, applicable only "in the specific context of the knock and announce requirement," and declared that "the continued operation of the exclusionary rule . . . is not in doubt." *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring in part and concurring in the judgment). His decision not to join the last part of Justice Scalia's opinion, discussing *Segura*, *Harris*, and *Ramirez*, also suggests he took a narrower view of the case.

[1] *See* Jeremy Bentham, *Panopticon; or, the Inspection-House* (1787), *reprinted in* 4 THE WORKS OF JEREMY BENTHAM 37 (John Bowring ed., Russell & Russell, Inc. 1962) (1843).

[2] *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 495 (describing the panoptic "chilling effect [on behavior] when people are generally aware of the *possibility* of surveillance, but are never sure if they are being watched at any particular moment").

[3] *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH 205–06 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (observing that modern-day panopticism creates a "cruel, ingenious cage" that "makes it possible to perfect the exercise of power" by the all-seeing totalitarian state). John Bowring addresses the concerns regarding panopticism in a way that is particularly relevant to the discussion of parolee supervision: "Some individuals . . . have considered the *continual inspection* . . . as objectionable. It has appeared to them as a restraint more terrible than

crime and recidivism — continues to have staying power. Last Term, in *Samson v. California*,[4] the Supreme Court upheld a California statute that requires parolees to agree 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,"[5] ruling that a suspicionless search of a parolee does not offend the Fourth Amendment.[6] Although the Court's widening of the ambit of permissible searches may ease California's immediate parolee management problems, it nonetheless raises significant questions about the status of parolees, the appropriate level of state surveillance, and the right way to implement similar schemes elsewhere. Even if suspicionless searches are in some cases legitimate under the Fourth Amendment, as a matter of policy the Court should have more narrowly tailored the guidelines for state law enforcement to provide more direction to the states and to minimize Fourth Amendment violations that may result from this kind of search.

Parolee Donald Samson was walking with a friend and her three-year-old son when he caught the eye of Alex Rohleder, an officer with the San Bruno Police Department.[7] Officer Rohleder, recognizing Samson, asked him if he had an outstanding parole warrant.[8] Samson, who was on state parole following a conviction for being a felon in possession of a firearm, answered truthfully that he did not have an outstanding warrant, which the officer verified by calling the station.[9] Rohleder testified that although he did not fear for his own safety and had no reason to suspect that Samson had violated the law, he searched Samson and found a baggie containing methamphetamine in a cigarette box in his pocket.[10] After arresting Samson, Rohleder asked Samson's companion to empty her pockets, then searched her belongings on the hood of a car.[11] Finding nothing incriminating, Rohleder instructed her to go home.[12]

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any other tyranny . . . . They forget, that under this system of continual inspection, a greater degree of liberty and ease can be allowed — that chains and shackles may be suppressed — that prisoners may be allowed to associate in small companies . . . ." John Bowring, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM, *supra* note 1, at 367, 498.

4 126 S. Ct. 2193 (2006).

5 CAL. PENAL CODE § 3067(a) (West 2000).

6 *See Samson*, 126 S. Ct. at 2202.

7 People v. Samson, No. A102394, 2004 WL 2307111, at *1–2 (Cal. Ct. App. Oct. 14, 2004).

8 *Id.* at *1.

9 *Id.*

10 *Id.*

11 *Id.* at *2. The officer claimed that Samson's companion consented to the search. She testified that the officer did not ask for permission, but simply instructed her to empty her pockets and asked if she had weapons or drugs. *Id.*

12 *Id.*

The trial court denied Samson's motion to suppress the drugs, finding that the search was authorized by California Penal Code section 3067(a),[13] which states that released prisoners must "agree in writing" to suspicionless searches by parole or police officers "at any time of the day or night" as a condition of their release.[14] The court further determined that the search did not violate the State's prohibition on arbitrary or capricious searches.[15] Samson received seven years in prison for drug possession.[16]

Samson appealed, claiming both that the search was unconstitutional under the Fourth Amendment and that it was arbitrary, capricious, and harassing.[17] The California Court of Appeal upheld the admission of the drug evidence and affirmed Samson's conviction, reiterating that under binding California precedent, suspicionless searches are constitutional provided they do not run afoul of the "arbitrary, capricious, or harassing" standard.[18] The court reasoned that the search in Samson's case satisfied those criteria as the "warrantless search was predicated entirely upon defendant's parole status"[19] and there was no evidence that Rohleder had been motivated by "mere whim or caprice," had harassed Samson, or had otherwise behaved unreasonably.[20]

The Supreme Court affirmed, holding that California's statute permitting suspicionless searches of parolees was reasonable under the Fourth Amendment.[21] Writing for the Court, Justice Thomas[22] analyzed the totality of the circumstances, balancing the petitioner's privacy expectations against the State's legitimate interests.[23] The Court

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[13] *Id.* at *1.

[14] CAL. PENAL CODE § 3067(a) (West 2000).

[15] *Samson*, 126 S. Ct. at 2196.

[16] *Id.* The amount of drugs found was so small that had Samson's parole officer discovered the drugs, there would not have been sufficient grounds to revoke Samson's parole. *See id.* at 2204 n.1 (Stevens, J., dissenting).

[17] *Samson*, 2004 WL 2307111, at *2. Samson also made a *Blakely v. Washington*, 124 S. Ct. 2531 (2004), claim, asserting a violation of his Sixth Amendment rights based on the way the trial court calculated his sentence. *Samson*, 2004 WL 2307111, at *3. The appellate court declined to decide whether a Sixth Amendment violation occurred but held that any such error would have been harmless. *Id.* at *7. The court also stated that Samson should receive three additional days of credit on his prison term. *Id.* at *3.

[18] *Samson*, 2004 WL 2307111, at *2.

[19] *Id.* at *3.

[20] *Id.* The California Supreme Court denied without prejudice Samson's petition for review because it had not yet determined the effect of *Blakely* on California law. *See* California Appellate Courts Case Information, Docket (Register of Actions) (Jan. 12, 2005), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=347911&doc_no=S129509 (posting that petition for review was denied).

[21] *Samson*, 126 S. Ct. at 2196.

[22] Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Ginsburg, and Alito.

[23] *Samson*, 126 S. Ct. at 2197.

determined that parolees are closer to prisoners than to probationers on the "'continuum' of state-imposed punishments"[24] and may be required to consent to a variety of invasive conditions before reentering society, such as requesting permission to travel more than fifty miles from home or refraining from drinking alcohol.[25] Accordingly, the Court concluded that parolees have "severely diminished" expectations of privacy[26] that do not outweigh California's substantial interests in supervising released prisoners, promoting reintegration, and combating recidivism.[27] Citing empirical evidence of the extensive recidivism problem in California's penal system, the Court noted that "most parolees are ill prepared to handle the pressures of reintegration . . . [and therefore] require intense supervision."[28]

Furthermore, the Court rejected the argument that the Fourth Amendment mandates particularized suspicion as a limit on police powers, pointing to the special-needs doctrine as an example of an accepted justification for suspicionless searches.[29] Yet the Court declined to use special needs as its underlying rationale.[30] Rather, the Court emphasized throughout its opinion that the determination of the search's reasonableness came from balancing Samson's privacy expectations against state interests.[31] The Court observed that California's backstop to seemingly broad and nonindividualized discretion is the State's "arbitrary, capricious, or harassing" standard.[32] The Court did not consider whether the Samson search itself had been arbitrary, capricious, or harassing, and did not suggest other guidelines that the state might employ.[33]

Justice Stevens dissented.[34] Declaring that "[t]he suspicionless search is the very evil the Fourth Amendment was intended to stamp out," Justice Stevens reminded the majority of the Framers' abhorrence of general warrants and writs of assistance that conferred broad

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[24] *Id.* at 2198 (quoting United States v. Knights, 534 U.S. 112, 119 (2001)).

[25] *Id.* at 2199.

[26] *Id.*

[27] *See id.* at 2200–01.

[28] *Id.* at 2200.

[29] The Court noted that the "Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Id.* at 2201 n.4 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)) (internal quotation marks omitted). The special-needs doctrine, for example, authorizes suspicionless searches in non–law enforcement contexts, such as high school locker raids. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment); *see also* Griffin v. Wisconsin, 483 U.S. 868, 875–76 (1987) (upholding a suspicionless search of a probationer's home by a probation officer under the special-needs doctrine).

[30] *Samson*, 126 S. Ct. at 2199 n.3. The Court also did not rely on consent doctrine.

[31] *See, e.g.*, *id.* at 2197.

[32] *Id.* at 2202.

[33] *Id.*

[34] Justice Stevens's opinion was joined by Justices Souter and Breyer.

nonspecific search powers on government officials.[35] According to Justice Stevens, searches are unreasonable unless there is individualized suspicion or a special need, and even suspicionless special-needs searches require procedural safeguards and institutionalized processes to guide and restrict state discretion.[36] While accepting that parolees may have less of an expectation of privacy than ordinary citizens, Justice Stevens argued that California may not impose a blanket search condition on "*all* parolees — whatever the nature of their crimes, whatever their likelihood of recidivism, and whatever their supervisory needs — without any programmatic procedural protections."[37]

In considering how California might best cabin these broad search powers, Justice Stevens examined related cases involving probationers and parolees and concluded that the Court always required either special needs or reasonable suspicion as a prerequisite for constitutional searches.[38] Justice Stevens also observed that permitting probation or parole officers to conduct suspicionless searches was qualitatively different from giving those same powers to the police because the former have "individual-specific knowledge gained through the supervisory [that is, non–law enforcement] relationship."[39] For Justice Stevens, individualized suspicion is "the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment."[40]

Exactly what the *Samson* Court thought about parolee status and the level of Fourth Amendment protections that parolees deserve is not entirely clear. Near the end of the opinion, the majority casually commented that California has an "arbitrary, capricious, or harassing" standard to prevent any Fourth Amendment violations that might result from the State's suspicionless search statute.[41] Although seemingly nothing more than an afterthought, this observation allowed the Court to sidestep the larger issues of parolee status and privacy rights by handing over essentially all oversight responsibilities for suspicionless parolee searches to the state. But a close examination of California's standard reveals definitional, constitutional, and practical

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[35] *Samson*, 126 S. Ct. at 2203 (Stevens, J., dissenting).

[36] *Id.* at 2203–04.

[37] *Id.* at 2207. Justice Stevens argued that prisoners have a lower expectation of privacy not as part of their punishment but because there is a legitimate need to reduce their privacy in prison. *Id.* at 2206–07. Claiming that parolee status is substantively different from prisoner status, Justice Stevens rejected the majority's logic that the sometimes prison-like restrictions on a parolee's liberty justify prison-style suspicionless searches. *Id.* at 2207 ("That balance [between privacy expectations and state interests] is not the same in prison as it is out.").

[38] *Id.* at 2202 (citing United States v. Knights, 534 U.S. 112, 122 (2001); Griffin v. Wisconsin, 483 U.S. 868, 876 (1987)). Although reasonable suspicion preserves some particularity, it is a considerably lower threshold than probable cause.

[39] *Id.* at 2207.

[40] *Id.*

[41] *Id.* at 2202 (majority opinion).

shortcomings that make it an ineffective restraint on the search powers California grants to its police officers. If the *Samson* Court meant to give California unbridled discretion in parolee searches, then the flimsiness of the California standard is not a problem, but if the Court did not intend to grant this level of discretion, it should have provided more explicit guidance in the opinion.

Legal definitions of the "arbitrary, capricious, or harassing" standard in California's courts are broad and somewhat circular.[42] Courts describe "arbitrary" behavior as having no legitimate purpose, sometimes pairing "arbitrary" with "oppressive";[43] courts refer to "harassing" conduct as that "undertaken for purposes of harassment,"[44] including "[u]nrestricted search[ing] . . . at [the] whim and caprice"[45] of police officers. The term "capricious" does not generally merit its own definition in these cases; when it does show up, it usually appears as part of the definitions of "arbitrary" and "harassing."[46] In practice, California courts determine whether there has been a violation of the standard by examining three elements: first, whether the police officer had a permissible law enforcement purpose; second, whether the officer conducted the search in a reasonable manner; and third, whether the officer was unmotivated by personal animosity.[47] If these three criteria are satisfied, the courts generally defer to the officer's judgment. Conversely, an officer who "decides on a whim to stop the next red car he or she sees" without any other legitimate law enforcement purpose,[48] or who searches the same parolee too often, at an unreasonable hour, or in an unreasonably prolonged manner, violates the standard.[49] Note that the legitimate law enforcement purpose need not be specific or individualized. For example, in *Samson*, Officer Rohleder stated that his purpose for the search was to determine whether Samson was

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[42] In many cases, courts use the terms of the standard without defining them, suggesting that their ordinary definition is clear enough. *See, e.g.*, *In re* Tyrell J., 32 Cal. Rptr. 2d 33, 44 (1994).

[43] People v. Reyes, 80 Cal. Rptr. 2d 734, 740 (1998); People v. Lewis, 88 Cal. Rptr. 2d 231, 237 (Ct. App. 1999) (refusing to find police officer's behavior arbitrary, capricious, or harassing because the officer had the legitimate purpose of wanting to make an arrest).

[44] People v. Reed, 28 Cal. Rptr. 2d 509, 512 (Ct. App. 1994).

[45] People v. Bremmer, 106 Cal. Rptr. 797, 800–01 (Ct. App. 1973).

[46] *See, e.g.*, cases cited *supra* notes 42–44.

[47] *See, e.g.*, People v. Cervantes, 127 Cal. Rptr. 2d 468, 471 (Ct. App. 2002); People v. Velasquez, 26 Cal. Rptr. 2d 320, 322 (Ct. App. 1993).

[48] People v. Samson, No. A102394, 2004 WL 2307111, at *3 (Cal. Ct. App. Oct. 14, 2004) (quoting *Cervantes*, 127 Cal. Rptr. 2d at 471).

[49] *Id.* (citing People v. Zichwic, 114 Cal. Rptr. 2d 733, 739 (Ct. App. 2001)). Moreover, Judge Trott of the Ninth Circuit has pointed out that the Due Process Clause of the Fourteenth Amendment reinforces the "arbitrary, capricious, or harassing" standard by forbidding searches that shock the conscience, offend community sensibilities, or are brutal and offensive. United States v. Crawford, 372 F.3d 1048, 1072 (9th Cir. 2004) (Trott, J., concurring) (citing Rochin v. California, 342 U.S. 165, 172, 174 (1952)).

"obeying the laws."[50] A survey of California case law reveals no instances of the courts finding that the police violated the standard; indeed, in his brief and at oral argument before the Supreme Court, Samson argued that not once have California courts used the standard to invalidate a search.[51]

Actually, it would be quite surprising if the "arbitrary, capricious, or harassing" standard ever managed to disqualify a search. First, in the context of suspicionless searches of parolees, it is difficult to see how the "arbitrary" and "capricious" elements of the standard would ever be violated in a particular search scenario, so long as the officer knows that the person is a parolee. Because the decision to conduct a suspicionless search is based on a binary, knowable fact — the person either is or is not a parolee — and because the State has already said that officers can search parolees without cause, demonstrating that a single search was arbitrary or capricious seems impossible.[52] How could it be arbitrary, when the decision to search is based not on an officer's judgment but instead on the indisputable fact of parolee status? Reformulating the "arbitrary" and "capricious" prongs as requiring "a permissible law enforcement purpose" has not made these directives any more enforceable, since the State already accepts highly general law enforcement purposes (for example, to ensure that someone is obeying the laws) in the context of suspicionless searches of parolees. Accordingly, it seems unlikely that courts would look any further than the officer's knowledge of the person's parolee status to determine whether the search was indeed arbitrary or capricious.[53]

A second troubling aspect of the standard is that it requires courts, in practice, to uncover any personal animosity the officer might harbor toward the parolee. Fourth Amendment inquiries typically do not examine the subjective motivations of police officers but instead examine the objective reasonableness of the officers' actions.[54] Yet in the case

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[50] *Samson*, 2004 WL 2307111, at *1.

[51] *See* Brief for Petitioner at 20, *Samson*, 126 S. Ct. 2193 (No. 04-9728); *see also* Transcript of Oral Argument at 24, *Samson*, 126 S. Ct. 2193 (No. 04-9728). When this issue arose during the oral argument, Chief Justice Roberts pointed out that the fact that the courts had never invalidated a search under the "arbitrary, capricious, or harassing" standard could mean there had never been an unreasonable search of a parolee in California. *Id.*

[52] The defendant could demonstrate a pattern of arbitrary behavior, but this would involve considerable evidentiary difficulties. These difficulties are exacerbated by the fact that the inquiry focuses on the *decision* to search, not on the manner of the search itself.

[53] The statute permits searches "at any time of the day or night" without suspicion or other justification, which suggests that the "arbitrary, capricious, or harassing" standard's prohibition against searches at an "unreasonable hour" is not meaningful. CAL. PENAL CODE § 3067(a) (West 2000).

[54] *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective

of a suspicionless search of a parolee, without examining the officer's subjective intentions, it is difficult to prove — assuming the absence of an unmistakable pattern of abuse — that the officer used the search to intentionally harass, annoy, or intimidate the parolee. California's standard, in short, requires courts to assess the constitutionality of parolee searches using an analytical tool disfavored by courts themselves. Even if the *Samson* Court permitted looking at an officer's subjective intentions, it is hard to imagine a meaningful evaluation of a police officer's possible hidden agendas when he or she has been granted such broad and general powers to search parolees based on status alone. It is much harder to establish noncompliance by assessing evidence of intent than by using a simple objective criterion.

Third, even if the standard is adequate for individual searches, it still permits wholly unreasonable outcomes, if only because of the broad, decentralized nature of the police's search capabilities under the California statute. During the *Samson* oral argument, Justice Souter explored the effectiveness of the standard when questioning California's advocate, Ronald Niver:

> JUSTICE SOUTER: Okay. The officer says, "I'm searching to see whether the person has any evidence of crime on him." For example, whether he has any drugs on him. Law enforcement purpose: supervisory, I suppose. They want to know whether their — whether their parolees are committing offenses. And yet, that reason would apply to everyone virtually all the time. So, it doesn't seem to be a limitation at all. What — am I — am I missing something?
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> MR. NIVER: It does apply — it is a limitation. It is not a limitation that would protect the expectation of privacy of a nonparole —
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> JUSTICE SOUTER: Well, how does the limitation work? The guy is on 1st Street, and an officer says, you know, "I recognize this person is a parolee, and I have a law enforcement objective. Is the person committing a crime? Is the — is the person a recidivist? Is the person violating parole?" So, he searches him. The person gets to 2nd Street, another officer does the same thing. Three hours later, a third officer does the same thing. In each case, it seems to me, their justification would not fall afoul of the arbitrary, capricious, or harassment standard. It's not coordinated. They have a — both a parole and a law enforcement objective.[55]

One might argue that multiple searches of this sort are unlikely to occur, considering the growing population of released prisoners and the shortage of police and probation personnel; however, Justice Souter's probing of the theoretical framework of California's statute reveals

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standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."); Scott v. United States, 436 U.S. 128, 136 (1978) ("Subjective intent . . . does not make otherwise lawful conduct illegal or unconstitutional.").

[55] Transcript of Oral Argument, *supra* note 51, at 44–45.

flaws in the State's statutory design. Justice Souter's example above, for instance, suggests that California's policy could facilitate unintentional harassment of parolees. In other suspicionless search contexts, such as subway-station bag inspections, there are procedural and programmatic safeguards in place that prevent overly invasive or duplicative searching.[56] However, suspicionless searches of parolees are intended to be random and unexpected; it is not possible (or arguably even desirable) for the police to coordinate these searches.[57] Accordingly, there is always the possibility that a parolee could suffer multiple searches, especially if there is something about the parolee — such as race, indications of gang membership, or notoriety — that tends to attract the attention of police. This behavior does not technically constitute harassment under the standard, but such unchecked police behavior could nonetheless result in unintentional harassment.[58]

The upshot of the standard's shortcomings is that suspicionless searches of parolees may be inherently unreasonable because they have no functional limiting factor, and therefore they may require additional safeguards. Because other states may follow California's lead and adopt similar statutes, the Court should have taken more seriously its role in formulating standards of reasonableness in the Fourth Amendment context of parolee searches. By installing some requirement of individualized suspicion, the Court could have placed acceptable limits on parolee searches while remaining squarely within precedent. Reasonable suspicion, as defined in *United States v. Knights*,[59] preserves particularization without placing an undue burden on the police.[60] A requirement of reasonable suspicion could discourage arbitrary or capricious behavior by forcing the police to think through and articulate their reasons for the search. This threshold requirement would have

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[56] *See, e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 45–46 (2000) (pointing out that "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion").

[57] *See* Hudson v. Palmer, 468 U.S. 517, 529 (1984) (observing that "planned random searches" would allow prisoners to anticipate searches, thus defeating their purpose (internal quotation marks omitted)).

[58] Although the California legislature specifically disavowed the harassment of parolees, *see* CAL. PENAL CODE § 3067(d), it is interesting to consider whether California deliberately designed its suspicionless search regime to be somewhat harassing. Subjecting parolees to the possibility of multiple searches may be part of the State's strategy for combating recidivism and antisocial behavior. In this way, the fact that parolees sign off on suspicionless searches does not ameliorate the harassment, but arguably intensifies it. Like the residents of Bentham's Panopticon, the parolees know that they could be searched at any time; however, parolees are released prisoners who are supposed to reintegrate into society. Continuing to subject them to such widespread and unpredictable surveillance is arguably a form of harassment.

[59] 534 U.S. 112 (2001).

[60] *Id.* at 121 (noting that reasonable suspicion falls below the probable cause threshold but still requires the police to determine that there is "sufficiently high probability that criminal conduct is occurring" before conducting the search).

the additional benefit of allowing California's courts to avoid examining the police's subjective motivations. Requiring articulable, individualized suspicion in these cases can help correct any unintentional, bias-driven decisions on the part of police officers — decisions that, once made, may compromise the ability of newly released prisoners to reintegrate into law-abiding society.

The *Samson* Court's failure to provide additional guidance for suspicionless searches of parolees strongly suggests that the Court does not hold in high regard the status and privacy rights of parolees. Although the Court's position may be constitutionally defensible — perhaps the states' rights to suspicionless searches of parolees are indeed coextensive with the Fourth Amendment — it may not be the best policy approach to assimilating released prisoners into society. Moreover, encroachments on parolee privacy rights in California have already created the concern that for ordinary, law-abiding citizens who are aware of the increasing surveillance capabilities of the State, privacy expectations are eroding and "[t]he fishbowl will [soon] look like home."[61] California may respond to these concerns with a weary shrug: the State must address its spiraling recidivism problem, after all, and random searches may eventually improve the State's overall recidivism rate.[62] But who will watch the watchers? Ultimately the Court is in the position to establish boundaries and guidelines that will maintain the integrity of privacy rights while giving the states room to adopt anti-recidivism strategies. The Court cannot perform this function if it shows too much deference to state-imposed limitations — like the "arbitrary, capricious, or harassing" standard in California — when defining reasonable search parameters.

7. Sixth Amendment — Blakely *Violations — Harmless Error Review*. — When an appellate court finds constitutional error to have been present at a criminal trial, the court must determine whether the error constitutes trial error, which is subject to harmless error review, or structural error, which mandates reversal of the conviction. A court applying harmless error review will uphold a conviction if it finds beyond a reasonable doubt that the error was harmless.[1] Since its 1967 holding that harmless error review can be applied to constitutional er-

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[61] United States v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting).

[62] It is ironic that a state that was the leader in rehabilitative justice, social reform, and restorative community programs now suffers from such a failure of imagination that the only solution to recidivism seems to be the threat of suspicionless searches. *See* John Pomfret, *California's Crisis in Prison Systems a Threat to Public: Longer Sentences and Less Emphasis on Rehabilitation Create Problems*, WASH. POST, June 11, 2006, at A3. The *Samson* Court appeared to accept California's conclusion that supervision and searches are the solution without question or comment. *See Samson*, 126 S. Ct. at 2200.

[1] Chapman v. California, 386 U.S. 18, 24 (1967).