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Hudson v. Palmer: Return to the Hands-Off Approach to Prisoners' Rights?

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Hudson v. Palmer: Return to the "Hands-Off" Approach to Prisoners' Rights?

I. Introduction

In *Hudson v. Palmer*,[1] a divided Supreme Court decided for the first time that the fourth amendment's protection is unavailable to prisoners in their prison cells.[2] The Court held that society is not prepared to recognize that a prisoner has any legitimate expectation of privacy in his prison cell and, accordingly, the constitutional proscription against unreasonable searches and seizures is inapplicable in that context.[3] In so holding, the Court gave great weight to the paramount interest in prison security, maintaining that recognition of privacy rights for prisoners simply cannot be reconciled with the concept of incarceration, and the needs and objectives of penal institutions.[4]

Part II of this Note reviews the development of fourth amendment analysis in the context of prison search and seizure cases. Part III presents the facts, procedural history, and the opinion of the Supreme Court in *Hudson v. Palmer*. Part IV analyzes the majority and dissenting opinions of the Court in *Palmer*, giving particular attention to the divergent views of legitimate prisoner rights and the distinction between privacy and possessory interests protected by the fourth amendment. Part V

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1. 104 S. Ct. 3194 (1984).

2. The circuit courts addressed this issue prior to *Palmer*. Initially, the majority of circuit courts held that prisoners retain at least some remnants of fourth amendment rights consistent with the legitimate demands on prison security. *E.g.*, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982); United States v. Lilly, 576 F.2d 1240 (5th Cir. 1978). In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court held that prisoners retain those constitutional rights not inconsistent with prison security needs. Prior to *Wolff*, the Second and Ninth Circuits held that the fourth amendment has no application in a prison cell. It is now the law in both of these circuits that the fourth amendment protects prisoners against unreasonable searches and seizures. For a more extensive discussion of the lower court decisions, see *infra* notes 26-51 and accompanying text. *See also Palmer*, 104 S. Ct. at 3212 n.19 (Stevens, J., concurring in part and dissenting in part).

3. *Palmer*, 104 S. Ct. at 3200.

4. *Id.*

concludes that the Court's holding is unjustified and unnecessarily broad, placing unfettered discretion in the hands of those whom the fourth amendment was historically meant to restrict.[5]

II. Background

Although few prison search and seizure cases have been decided by the Supreme Court,[6] the nature of the fourth amendment inquiry in that context can be defined by examining the standards enunciated in *Katz v. United States*[7] and in the Court's most recent pronouncement in *United States v. Jacobsen*.[8] *Katz* and its progeny established that the fourth amendment's prohibition against unreasonable searches or seizures[9] applies when the person seeking to invoke its protection has exhibited a subjective expectation of privacy that society is willing to recognize as reasonable.[10] This analysis was expanded in *Jacobsen* with the Court's recognition that the fourth amendment protects two distinct interests — a privacy interest and a possessory interest.[11] A constitutionally prohibited search occurs when an expectation of privacy that society is willing to recognize as reasonable is infringed through government action.[12] A seizure of property occurs when, through official conduct, there is some meaningful interference with an individual's possessory interest in that property.[13] The claims of prison inmates alleging

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5. *See, e.g.*, United States v. Lilly, 576 F.2d at 1244 (maintaining that prisioners may retain some fourth amendment rights without posing a threat to security).

6. These cases are Bell v. Wolfish, 441 U.S. 520 (1979); Lanza v. New York, 370 U.S. 139 (1962); and Stroud v. United States, 251 U.S 15 (1919). For a discussion of *Stroud* and *Lanza*, see *infra* notes 14-22 and accompanying text. For a discussion of *Wolfish*, see *infra* notes 52-56 and accompanying text.

7. 389 U.S. 347 (1967).

8. 104 S. Ct. 1652 (1984).

9. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

10. Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

11. United States v. Jacobsen, 104 S. Ct. at 1656.

12. *Id.*

13. *Id.*

unconstitutional official conduct have prompted a refinement of fourth amendment analysis, focusing the inquiry on the legitimacy of a prisoner's claim of a constitutionally protected interest and on the difference between his separate privacy and possessory interests.

There were only two prison search and seizure cases decided by the Supreme Court prior to *Katz*, *Stroud v. United States*[14] and *Lanza v. New York*.[15] It is significant that neither case squarely confronts the threshold question of whether the fourth amendment applies at all in a jail cell. Together, however, they illustrate the tension in fourth amendment analysis between evaluating each individual case for the existence of a protectable interest and entirely denying fourth amendment protection in a prison context pursuant to a per se rule.

In *Stroud*, certain letters written by a prisoner were intercepted, examined, and turned over to the warden who, in turn, furnished them to the District Attorney. The prisoner sought to suppress the use of the letters when they were later offered as evidence against him in a criminal case.[16] The Court rejected his claim, finding that no constitutional violation had occurred.[17] Assuming that the fourth amendment offered some protection to prisoners, the Court focused on whether the seizure was reasonable. Since the letters came into the possession of the penitentiary officials under established practice, reasonably designed to promote the discipline of the institution, there was no violation of the prisoner's rights.[18]

Lanza involved a defendant who had been convicted of contempt for refusing to answer questions before a legislative committee.[19] The defendant claimed that the questions were based on an in-jail conversation between him and his brother that had been illegally intercepted and recorded by state officials. Although the Court upheld the conviction on grounds that were unrelated to the fourth amendment issue,[20] it stated in dicta:

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14. 251 U.S. 15 (1919).
15. 370 U.S. 139 (1962).
16. Stroud v. United States, 251 U.S. at 21.
17. *Id.* at 21-22.
18. *Id.*
19. Lanza v. New York, 370 U.S. at 140.
20. *Id.* at 145-46. At least two of these questions that the committee asked the de-

> But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument . . . . [W]ithout attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.[21]

This view reflected the notion that the fourth amendment provided constitutional protection for specific places. *Lanza* suggests that a jail, as a place, might have diminished fourth amendment protection. The majority of circuit court decisions in later cases, however, recognized that *Katz* mandated a departure from the constitutionally protected area doctrine and that the dicta in *Lanza* should be ignored.[22]

Although *Katz* was not a prison search and seizure case, it established the fourth amendment analysis used in subsequent cases involving inmate challenges of official misconduct.[23] To invoke the fourth amendment, a prisoner must demonstrate a subjective expectation of privacy that society is willing to recognize as reasonable.[24] *Katz* also established that the fourth amendment protects people not places,[25] shifting the inquiry away from determining whether the challenged conduct occurred in a constitutionally protected place to whether the person's constitutional rights had been violated.

Following *Lanza* and *Katz*, the circuits were called upon more frequently to address the issue of searches and seizures in the prison context. The circuit courts adopted the *Katz* reasonable expectation of privacy test, the majority concluding that, consistent with the security needs of institutions, prisoners re-

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fendant were not related in any way to the intercepted conversation.

21. *Id.* at 143.

22. *See, e.g.*, Lyon v. Farrier, 727 F.2d 766, 769 (8th Cir.), *cert denied*, 105 S. Ct. 140 (1984); United States v. Hinckley, 672 F.2d at 128-32; United States v. Lilly, 576 F.2d at 1245-46; United States v. Ready, 574 F.2d 1009, 1013-14 (10th Cir. 1978).

23. *See, e.g.*, United States v. Hinckley, 672 F.2d at 130-31; Bell v. Wolfish, 441 U.S. at 556-57; United States v. Savage, 482 F.2d 1371, 1372-73 (9th Cir. 1973).

24. *See supra* note 10 and accompanying text.

25. Katz v. United States, 389 U.S. at 351.

tain at least some remnants of fourth amendment protection.[26] The Second and Ninth Circuits in these early cases, however, held that the fourth amendment had no application in a prison cell.[27] After the Supreme Court decided *Wolff v. McDonnell*,[28] the Second and Ninth Circuits reversed their positions and held that prisoners retain fourth amendment protection against searches and seizures that are not justified by the institutional needs of prisons.[29] *Wolff* was a class action brought by an inmate of a Nebraska prison. He alleged that certain disciplinary proceedings offended due process, that the inmate legal assistance program did not meet constitutional standards, and that the mail inspection regulations governing mail between inmates and their attorneys were unduly restrictive.[30] The Supreme Court held that, although a prisoner's rights are diminished by the "needs and exigencies of the institutional environment,"[31] he is not "wholly stripped of constitutional protections when he is imprisoned for crime."[32] The Court maintained that certain minimal due process requirements must be observed in disciplinary proceedings.[33] *Wolff* decided that due process did not require the right to counsel during prison disciplinary hearings,[34] and that certain restrictions on an inmate's incoming mail were legitimate to protect against receipt of contraband.[35] In so holding, the Supreme Court in *Wolff* established a more flexible approach to prisoners' rights and mandated an "accommodation

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26. *See supra* note 2.

27. *See, e.g.*, United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1977), *cert. denied*, 410 U.S. 916 (1978); Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972).

28. 418 U.S. 539 (1974).

29. *See, e.g.*, Hodges v. Stanley, 712 F.2d 34 (2d Cir. 1983); Hansen v. May, 502 F.2d 728 (9th Cir. 1974); United States v. Savage, 482 F.2d 1371 (9th Cir. 1973). *See also* Hudson v. Palmer, 104 S. Ct. 3194, 3212 n.19 (Stevens, J., concurring in part and dissenting in part).

30. Wolff v. McDonnell, 418 U.S. at 543.

31. *Id.* at 555.

32. *Id.*

33. *Id.* at 563-69. The Court held that due process requires that prisoners are entitled to notice, to call witnesses, and to present documentary evidence. Prisoners do not retain the right to confront or to cross-examine witnesses. *Id.*

34. *Id.* at 569-70. The Court opined that allowance of counsel would diminish the utility of prison disciplinary proceedings by, among other things, causing delay. In dictum, the Court suggested that an illiterate inmate, or one facing complex issues, should be able to seek the assistance of a fellow inmate or staff designate in lieu of counsel. *Id.*

35. *Id.* at 576-77.

between institutional needs and objectives and the provisions of the Constitution that are of general application."[36] *Wolff* is universally cited as the Court's repudiation of a "hands-off" approach which had required absolute deference to prison administration. It mandated examination of prisoners' rights on a case by case basis.[37]

Repudiation of the "hands-off" approach allowed the circuits to more fully examine the justifications for application of the fourth amendment in the prison context. Several circuits, considering whether the fourth amendment afforded protection to prisoners, expressly limited the discretion customarily accorded prison officials. Their analysis incorporated a consideration of the history and purpose underlying the fourth amendment, focusing on the recognition of human dignity inherent in its protections. Three important cases are *Bonner v. Coughlin*,[38] *United States v. Lilly*,[39] and *United States v. Hinckley*.[40]

In *Bonner*, an inmate alleged that the loss of his trial transcript during a "shakedown search" violated the fourth amendment.[41] Citing *Wolff*, the Seventh Circuit held that "respect for the dignity of the individual"[42] requires that an inmate retain fourth amendment protection[43] because surrender of privacy in prison is not total. The court held that the inmate had stated a fourth amendment claim that required a trial on the merits.[44] *Lilly* involved two inmates in a federal prison who challenged the reasonableness of a body cavity search to which they were subjected after unsupervised absences from the prison. The court maintained that the history and purpose of the fourth amendment required recognition that prisoners retain at least

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36. *Id.* at 556.

37. *See* J. WESLEY HALL, SEARCH AND SEIZURE § 15:3 n.20 (1982). *See also Palmer*, 104 S. Ct. at 3212 n.19 (Stevens, J., concurring in part and dissenting in part).

38. 517 F.2d 1311 (7th Cir. 1975).

39. 576 F.2d 1240 (5th Cir. 1978).

40. 672 F.2d 115 (D.C. Cir. 1982).

41. Bonner v. Coughlin, 517 F.2d at 1312. The inmate also claimed the loss of the transcript deprived him of his property without due process and that the defendants had interfered with his access to the courts in violation of the sixth and fourteenth amendments. *Id.*

42. *Id.* at 1316.

43. *Id.*

44. *Id.* at 1317.

some degree of fourth amendment protection. The fourth amendment ensured abolition of the general warrants that had given government agents "unfettered discretion" and with which the Framers were so deeply concerned.[45] Because denial of all fourth amendment protection would potentially "subject [a prisoner] to any form of search and seizure, no matter how abusive or intrusive,"[46] the Fifth Circuit required that the government show the searches and seizures to which prisoners were subjected "be reasonable under all the facts and circumstances in which they [were] performed."[47]

In *Hinckley*, the District of Columbia Circuit was called upon to decide whether an inmate's fourth amendment rights were infringed when prison guards seized a handwritten document from his cell.[48] Announcing that the fourth amendment did afford protection in a prison cell, the court emphasized the purpose of the fourth amendment and concluded that "the preeminent value underlying the fourth amendment, the right to freedom from arbitrary interference with privacy,"[49] compelled recognition of a prisoner's right to be free of unreasonable searches and seizures. The court stated that the wide-ranging deference customarily accorded prison officials must "be corralled by the fourth amendment's prohibition of arbitrary invasions of privacy."[50] Accordingly, the court held that a serious invasion of Hinckley's right to privacy occurred when prison officials, unrestrained by prison rules or by instructions from their superiors, seized and read his personal papers.[51]

In 1979, five years after *Wolff*, the Supreme Court decided *Bell v. Wolfish*.[52] *Wolfish* was a class action by pretrial detainees to challenge, inter alia, unannounced searches of inmate living areas and visual body cavity searches.[53] The Court, once again,

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45. United States v. Lilly, 576 F.2d at 1244.
46. *Id.*
47. *Id.*
48. United States v. Hinckley, 672 F.2d at 126.
49. *Id.* at 129.
50. *Id.*
51. *Id.* at 131-32.
52. 441 U.S. 520 (1979).
53. *Id.* at 527. Visual body cavity examinations were conducted with regard to the pretrial detainees following visits during which the detainees had contact with visitors for the purpose of discovering contraband material (weapons or drugs).

did not expressly decide whether the detainees[54] actually had a reasonable expectation of privacy worthy of fourth amendment protection. *Wolfish*, however, expanded the Court's analysis of the reasonableness of a particular search, identifying the competing interests and factors that must be weighed. The court must balance the need for the particular search against the invasion of personal rights entailed in the search. *Wolfish* requires that a court consider the scope of a particular intrusion, the manner in which it was executed, the justification for initiating it, and the place in which it was conducted.[55] Applying this test of reasonableness, *Wolfish* rejected the detainees' challenge, concluding that the significant security interests of the penal institution outweighed the privacy interests of the inmates. The institutional need to maintain security justified the unannounced searches of living quarters and the body cavity inspections.[56]

In the recent case of *United States v. Jacobsen*,[57] the Supreme Court clearly distinguished two distinct interests protected by the fourth amendment. Constitutional protection is provided against unreasonable infringement of an individual's legitimate privacy and possessory interests.[58] In *Jacobsen*, em-

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54. Because detainees have neither been tried nor convicted, due process issues are raised with regard to whether the practice in question amounts to "punishment." These considerations are, of course, not raised with regard to *convicted* prisoners. For a discussion of judicial review of practices affecting pretrial detainees, see *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 151, 153 n.14 (1984).

55. Bell v. Wolfish, 441 U.S. at 559.

56. *Id.* at 560. Because the Court was considering the rights of pretrial detainees in *Wolfish*, it was required to evaluate whether the search rules constituted punishment in violation of the detainees' due process rights. *Id.* at 560-61. In this context, due process requires that the practices in question be "rationally related to a legitimate nonpunitive governmental purpose" and that they not "appear excessive in relation to that purpose." *Id.* at 561. Because the practices in question were reasonable responses to legitimate security concerns, the Court found no due process violation. *Id.*

57. 104 S. Ct. 1652 (1984).

58. *See supra* notes 11-13 and accompanying text. In several cases prior to *Jacobsen*, the Supreme Court had recognized that "searches" and "seizures" were separable, protected events under the fourth amendment. *See* Texas v. Brown, 103 S. Ct. 1535, 1536 (1983) ("[t]he [Fourth] Amendment protects two different interests of the citizen — the interest in retaining possession of property and the interest in maintaining personal privacy."); United States v. Chadwick, 433 U.S. 1, 13 n.8 (1977) ("Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private."); Hale v. Henkel, 201 U.S. 43, 76 (1906) ("a seizure contemplates a forcible disposition of the owner").

ployees of Federal Express, pursuant to a policy regarding insurance claims, examined a damaged package and found zip-lock bags containing white powder. Federal agents were notified. They removed the bags, opened them, and tested the powder which was later identified as cocaine.[59] Even though the Court found no reasonable expectation of privacy and, thus, no "search" within the meaning of the fourth amendment, it determined that a "seizure" had occurred.[60] *Jacobsen* observed that, while the definition of an unconstitutional seizure of property had not been thoroughly discussed in earlier Supreme Court cases, it follows logically from the Court's view that seizure of a person occurs when there has been meaningful interference with his freedom of movement.[61] Thus, a meaningful interference with an individual's possessory interest in property will also constitute a seizure. On the facts of *Jacobsen*, a seizure of property took place when law enforcement agents took complete dominion and control of the defendant's property.[62]

Having found that a seizure occurred, *Jacobsen* evaluated whether it was reasonable under the fourth amendment. A seizure lawful at its inception can, nevertheless, violate the

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In *Jacobsen*, the Court recognized that, even though its analysis was a new one, the concept flowed from the separable fourth amendment "seizure" of a person — "the meaningful interference, however brief, with an individual's freedom of movement." United States v. Jacobsen, 104 S. Ct. at 1656 n.5. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 696 (1981); Brown v. Texas, 443 U.S. 47, 50 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16, 19 n.16 (1968). In *Palmer*, the Supreme Court impliedly adopted the *Jacobsen* two-prong test by addressing, in a footnote, the seizure of Palmer's property as a distict violation. *Palmer*, 104 S. Ct. at 3201 n.8. Justice Stevens *expressly* adopted the *Jacobsen* test in his part concurrence, part dissent. *Id.* at 3209 (Stevens, J., concurring in part and dissenting in part). In addition, several other cases have adopted the *Jacobsen* rationale. *See, e.g.*, Segura v. United States, 104 S. Ct. 3380 (1984); United States v. Karo, 104 S. Ct. 3296 (1984); United States v. Morgan, 744 F.2d 1215 (6th Cir. 1984); Garmon v. Foust, 741 F.2d 1069 (8th Cir. 1984); United States v. Lewis, 738 F.2d 916 (8th Cir. 1984); United States v. Beale, 736 F.2d 1289 (9th Cir. 1984).

Thus, although *Jacobsen* provides a "new" analysis in the sense that it enunciates previous intimations from the Supreme Court, it should not be read as a complete departure from long-standing fourth amendment analysis. It should be read as requiring additional inquiry when the search is separable from the seizure, but not in an overly technical sense that obscures the inherent protections of the fourth amendment.

59. United States v. Jacobsen, 104 S. Ct. at 1655.

60. *Id.* at 1660.

61. *Id.* at 1656 n.5. *See supra* note 58.

62. United States v. Jacobsen, 104 S. Ct. at 1660.

fourth amendment because it is executed in a manner that unreasonably infringes constitutionally protected possessory interests.[63] A seizure lawful at the outset may become unreasonable because its length "unduly intrude[s] upon constitutionally protected interests."[64] The destruction of defendant's property, because it converts a temporary deprivation of possessory interests into a permanent one, can also transform an initially lawful seizure into one that violates the fourth amendment.[65] In *Jacobsen*, the Court considered all of these factors. The Court balanced the importance of the governmental interest justifying the intrusion against the individual's fourth amendment interests. Because it was apparent that the package contained contraband, the Court concluded that the agents' seizure of the bags was based on probable cause and was, therefore, reasonable.[66] On balance, the further intrusion occasioned by the field test was supported by substantial law enforcement interests which outweighed the *de minimis* impact on a protected property interest.[67]

Katz, *Wolfish*, and *Jacobsen* provide a clear framework for the court in analyzing whether the fourth amendment is applicable in a prison context. If the court finds that a prisoner has a reasonable expectation of privacy, it must then balance the need for the search against the prisoner's privacy interests. If there has been only a search, the inquiry ends. But, if there has also been a *seizure* of property, *Jacobsen* provides the criteria a court must use to determine whether the seizure was reasonable. Additionally, *Lilly* and *Hinckley* provide valuable analysis of the history and purpose of the fourth amendment, recognizing that the competing interests of security and privacy can be accommodated through a case by case evaluation of fourth amendment claims.

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63. *Id.* at 1662.

64. *Id.* at 1662 n.5 (quoting United States v. Place, 103 S. Ct. 2637 (1983)).

65. *Id.* at 1662.

66. *Id.*

67. *Id* at 1663.

III. The Decision: *Hudson v. Palmer*

A. *Facts and Procedural History*

On September 16, 1981, defendant Ted S. Hudson, an officer at Bland Correctional Center, conducted a "shakedown" search of inmate Russel T. Palmer's locker. During the search, Hudson discovered a ripped pillowcase in a trashcan in plaintiff's cell. Charges were filed against Palmer under the prison disciplinary procedures for destroying state property. After a hearing, Palmer was found guilty and ordered to make restitution for the cost of the pillowcase. In addition, a written reprimand was entered on his prison record.[68] Palmer subsequently brought a pro se action against Hudson under 42 U.S.C. Section 1983.[69] Palmer alleged that Hudson conducted the shakedown of his cell, that Hudson brought a false charge against him solely to harass him, and that Hudson intentionally destroyed Palmer's non-contraband property[70] in violation of the fourteenth amendment.[71]

B. *The Lower Court Opinions*

The district court granted summary judgment in defendant's favor for failure to state a cognizable claim under section 1983. According to the district court, the alleged destruction of property for purposes of harassment, even if intentional, was not a constitutional violation. Palmer's property had not been taken without due process of law in violation of the fourteenth amendment because he had adequate state tort remedies and the har-

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68. Palmer v. Hudson, No. 81-0290-A (W.D. Va. Nov. 17, 1981), *reproduced in* Joint Appendix to Petition for Certiorari to the Fourth Circuit at 27, Hudson v. Palmer, 104 S. Ct. 3194 (1984) (No. 82-6695).

69. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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 Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

70. The property consisted of legal materials, letters, and other personalty. Hudson v. Palmer, 104 S. Ct. 3194, 3208 n.3 (1984).

71. *Palmer*, 104 S. Ct. at 3197.

assment itself was not sufficient to constitute a constitutional deprivation.[72] The district court considered itself powerless to review the merits of the false charge claim.[73]

The Fourth Circuit agreed that due process was not violated under the facts of the case, but concluded that it was premature to grant summary judgment for defendant on the claim that the shakedown search was unreasonable.[74] Although *Bell v. Wolfish*[75] authorized irregular, unannounced shakedown searches of prison cells, the court held that individual prisoners have a limited privacy right in their cells, protecting them from searches conducted solely to harass or humiliate.[76] The court of appeals announced that shakedown searches were reasonable only if conducted according to an established program reasonably designed to deter or discover contraband, or if some reasonable basis existed for a belief that the prisoner possessed contraband. Because the record reflected a factual dispute about the purpose of the search, summary judgment was considered inappropriate and the case was reversed in part and remanded for this determination.[77]

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72. Palmer v. Hudson, No. 81-0290-A (W.D. Va. Nov. 17, 1981), *reproduced in* Joint Appendix to Petition for Certiorari to the Fourth Circuit, *Palmer* (No. 82-6695).

73. Palmer's second claim was that Hudson had brought a false charge against him before the institution's disciplinary committee. The district court maintained that federal courts do not provide a further avenue of appeal on the merits of a prison disciplinary hearing. The role of the court is to ensure that procedural due process requirements are met. Noting that Palmer was provided with notice and opportunity to be heard and to present witnesses and evidence on his behalf at the proceeding, in deference to the procedures of the state, the court maintained that it was powerless to review the merits of the disciplinary hearing.

With regard to Palmer's claim of harrassment, the district court accorded great deference to prison management because the courts "possess no expertise in the conduct and management of correction institutions." *Id.* (quoting Finney v. Arkansas Board of Corrections, 505 F.2d 194, 200 (8th Cir. 1974)). Maintaining that, in extreme cases of harassment and improper treatment, a claim of cruel and unusual punishment under the sixth [sic] amendment may be stated, the court held that Palmer's claims did not rise to such a level and, therefore, were of no constitutional significance. In this regard the court failed to recognize a cognizable § 1983 claim.

74. Palmer v. Hudson, 697 F.2d 1220, 1223 (1983).

75. 441 U.S. 920 (1979).

76. Palmer v. Hudson, 697 F.2d at 1225.

77. The Fourth Circuit recognized that Palmer had a limited privacy right under the fourth amendment. Therefore, in order for the prison search to be valid, it had to serve a legitimate security purpose. Because the district court did not determine whether the search was motivated by the impermissible motive to harass Palmer, the Fourth Circuit

The Supreme Court granted certiorari to determine whether a prisoner has a reasonable expectation of privacy in his cell entitling him to fourth amendment protection against unreasonable searches and seizures.[78]

C. *The Supreme Court Opinions*

1. *The Majority*

Chief Justice Burger, writing for the majority in this five to four decision,[79] framed the inquiry whether the fourth amendment applies in a prison cell in terms of the two prong test enunciated in *Katz*.[80] Concluding that a prisoner's expectation of privacy in his prison cell is not one that society is willing to recognize as reasonable, the Court held that the fourth amendment's proscription against unreasonable searches is not applicable within a prison cell.[81]

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remanded for evidentiary determination. Palmer v. Hudson, 697 F.2d at 1224-25.

78. In addition to the fourth amendment issue, the Supreme Court considered whether the rationale of Parratt v. Taylor, 451 U.S. 527 (1976), should extend to intentional deprivations of property by state employees acting under color of state law. The Court held that it did. *Palmer*, 104 S. Ct. at 3204. The implications of this decision are just as disturbing as the Court's treatment of the fourth amendment issue.

In *Parratt*, an inmate of a Nebraska prison ordered a hobby kit valued at $23.50. The hobby kit arrived at the prison but was never delivered to the inmate, Taylor. Taylor brought an action under 42 U.S.C. § 1983 (1976). He alleged that the hobby kit was lost as a result of negligence by the prison's officials and claimed that their negligence deprived him of property without due process of law. The Supreme Court held that Taylor did not state a claim for relief under § 1983. Parrat v. Taylor, 451 U.S. at 543. The Court concluded that § 1983 actions could not be brought against prison officials for unintentional deprivations of property because there was an adequate remedy at state law. *Id.*

Palmer extends the holding of *Parratt* to intentional deprivations of property by prison officials. The case effectively removes the federal courts as a protector against inhumane conditions of incarceration. After *Palmer*, the state courts are the prisoner's only effective avenue of appeal when the prisoner is deprived of his property. The court has once again endorsed the "hands-off" attitude toward prisoners rights that prevailed before Wolff v. McDonnell, 418 U.S. 539 (1974).

79. Chief Justice Burger delivered this majority opinion in which Justices White, Powell, Rehnquist, and O'Connor joined. Justice O'Connor filed a separate concurring opinion. Justice Stevens filed an opinion in which he concurred in the holding regarding the fourteenth amendment issue, but dissented on the fourth amendment issue. Justices Brennan, Marshall, and Blackmun joined in Justice Stevens' opinion.

80. *Palmer*, 104 S. Ct. at 3199. For a discussion of the *Katz* two-prong test, see *supra* notes 7-14 and accompanying text.

81. *Palmer*, 104 S. Ct. at 3200.

The Court gave great weight to statistics of violent crime in the nation's prisons, concluding that prisoners have demonstrated an inability to control and conform their behavior to society's standards by normal self-restraint. Prisons must be conducted to assure the safety of prison personnel, of visitors, and of the inmates themselves. A sanitary prison environment must also be maintained.[82] To effectively meet these objectives, the Court concluded that the prison officials must be able to prevent attempts to introduce drugs, weapons, and other contraband into the prison. They must also diligently attempt to detect escape plots, involving drugs or weapons, before the schemes materialize.[83]

Using the balancing approach of *Wolff v. McDonnell*[84] the Court concluded that it would be "literally impossible" to attain these prison objectives if inmates retained a right to privacy in their cells.[85] Society would insist that the balance between the prisoner's interest in privacy and society's interest in security *always* tip in favor of the paramount interest in institutional security.[86] A right to privacy, according to Chief Justice Burger, is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure internal order and security.[87] The majority also decided that it need not address Palmer's claim that he had a constitutional right to be protected from searches conducted solely to harass. The Court

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82. The Chief Justice cited to CORRECTIONS COMPENDIUM, PRISION VIOLENCE (Mar. 1983), for the following statistics: during 1981 and the first half of the 1982, there were over 120 prisoners murdered by fellow inmates in state and federal prisons; a "number of" prison personnel were murdered by prisoners during this period; over 29 riots or "similar disturbances" were reported; there were over 125 suicides in these institutions. *Palmer*, 104 S. Ct. at 3200.

In federal prisons, Chief Justice Burger maintained, "informal statistics" from the U.S. Bureau of Prisons for 1983 reveal that there were 11 inmate homicides, 359 inmate assaults on prison staff, and 10 suicides. In that system, during 1981 and 1982, over 750 inmate assaults on other inmates occurred, along with over 570 inmate assaults on prison personnel. *Id.*

83. *Palmer*, 104 S. Ct. at 3200.

84. 418 U.S. 539 (1974). In *Wolff*, the Court stated: "there must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Id.* at 556.

85. *Palmer*, 104 S. Ct. at 3200.

86. *Id* at 3201.

87. *Id.*

reasoned that asserting a constitutional right against unreasonable searches and seizures in a prison cell assumes an answer to the threshold question — whether there is a legitimate expectation of privacy in a prison cell at all. Since the majority had already determined that the fourth amendment does not apply to prison cells, it did not have to reach a claim alleging an unreasonable search or seizure.[88] In any event, says the Court, the proper remedies for calculated harassment are the eighth amendment proscription against cruel and unusual punishment and state tort and common law redress for the destruction of property.[89]

2. *Concurrence*

In a separate concurrence, Justice O'Connor agreed with the majority that "the Government's compelling interest in prison safety, together with the necessarily *ad hoc* judgments required of prison officials, make prison cell searches and seizures appropriate for categorical treatment."[90] Because Justice O'Connor saw the fact of arrest and incarceration as abating all fourth amendment interests of a prisoner, she considered all cell searches and seizures as per se reasonable.[91] Further, although Justice O'Connor recognized that, under *Jacobsen*, the fourth amendment protects possessory interests in addition to privacy interests, she did not consider the alleged destruction of Palmer's property to be redressable under the fourth amendment. Instead, Justice O'Connor stressed that deprivations of property may be redressed by invoking the protection of the due process and the takings clauses of the fifth and fourteenth amendments. But, because Palmer had not availed himself of state tort and common law remedies nor proven them inadequate, she concluded that his constitutional claims under these clauses were not ripe and that summary judgment for Hudson had been proper.[92]

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88. *Id.* at 3202.
89. *Id.*
90. *Id.* at 3206 (O'Connor, J., concurring).
91. *Id.*
92. *Id.* at 3206-07.

3. *The Dissent*

Justice Stevens, dissenting,[93] agreed that Palmer's complaint did not successfully allege a constitutional violation of his right to procedural due process.[94] Nevertheless, he took issue with the majority view that society is unwilling to recognize even a limited privacy right for prisoners in their prison cells.[95] Justice Stevens opined that society is willing to recognize that a prisoner has at least a limited privacy right in his papers or effects. Although this has little value compared with the privacy right that prevails in a free society, it can have a great impact on the rehabilitation goal of penal institutions.[96] A prisoner's personal possessions that may include photographs, books, training materials and the like, may enable him "to maintain contact with some part of his past and an eye to the possibility of a better future."[97] Protecting these few possessions and the prisoner's slight residuum of privacy against unreasonable invasions by prison guards will further the important goal of rehabilitation.[98]

The dissent flatly rejected the proposition that society denies prisoners all fourth amendment protection in their prison cells.[99] Justice Stevens' constitutional analysis is predicated on a recognition that the fourth amendment, prohibiting unreasonable searches and seizures, protects two distinct interests, a privacy interest and a possessory interest. " 'A *search* occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A *seizure* of property occurs when there is some meaningful interference with an individual's possessory

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93. For purposes of this Note, "dissent" refers to that portion of Justice Stevens' opinion that discusses the fourth amendment issue.

94. *Id.* at 3208 (Stevens, J., concurring in part and dissenting in part). Justice Stevens limited his concurrence to the application of *Parratt* to the facts of the case. He did not read the holding of the case to apply to conduct "that violates a substantive constitutional right" nor to cases where it is alleged that "the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property." *Id.* at 3208 n.4.

95. *Id.* at 3208.

96. *Id.* at 3208, 3214.

97. *Id.* at 3208.

98. *Id.* at 3214.

99. *Id.* at 3209.

interests in that property.' "[100] For purposes of this case, says the dissent, even if it is assumed that the prisoner had no expectation of privacy in most of his property in question,[101] he adequately alleged an unreasonable seizure cognizable under the fourth amendment.[102]

According to the dissent, prison security does not preclude prisoners from having constitutionally protected possessory interests. They may, as a matter of state law and prison regulations, have a legal right to possess certain items of property.[103] Furthermore, these possessory interests are recognized by virtue of the constitutional protections afforded under the due process clause,[104] and the first, [105] the eighth[106] and the fourteenth amendments. [107]

Having established that Palmer's complaint adequately alleged a fourth amendment seizure, the dissent balanced his constitutionally protected possessory interest with the penological justification for the challenged conduct determining that the seizure was unreasonable. Justice Stevens argued that the legal possession of non-contraband property which poses no security threat is an interest that society is willing to recognize as reasonable. He found evidence of society's view: 1) in the unanimous decisions of federal court judges who have consistently recognized that the fourth amendment applies in a prison cell and 2)

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100. *Id.* (quoting United States v. Jacobsen, 104 S. Ct. 1652, 1656 (1984) (Stevens, J., dissenting)) (emphasis added).

101. *Id.* The dissent assumed that the majority's holding about most of Palmer's privacy interests is correct but cautions that this is not an endorsement of a bright line test denying prisoners any expectation of privacy in their property. The dissent noted at least two situations in which an expectation of privacy must be recognized: 1) minimum security prisons in which there are no real security threats and 2) a prisoner's mail that has already been cleared through the prison censorship procedures. *Id.* at 3209 n.5.

102. *Id.* at 3209.

103. *Id.* at 3210, 3212.

104. *Id.* at 3211. The dissent argued that the majority impliedly recognized Palmer's legitimate claim of entitlement to the property at issue when it held that it was *property* within the meaning of the due process clause. *Id.* at 3210.

105. *Id.* at 3211. Justice Stevens argued that the first amendment protects an inmate's right to send and receive mail.

106. *Id.* The eighth amendment precludes a view that a prisoner has no protection against arbitrary or malicious seizure and distribution of "a letter from his wife, or a picture of his baby."

107. *Id.* The fourteenth amendment protects a prisoner's right to possess legal materials in order to afford the constitutional right of access to the courts.

in the opinions of commentators who suggest that the objectives of incarceration are furthered by respect for a prisoner's legitimate possessory interest.[108] In the last analysis, however, the dissent concludes that "[o]nce it is agreed that random searches of a prisoner's cell are reasonable to ensure that the cell contains no contraband, there can be no need for seizure and destruction of non-contraband items found during such searches."[109] A per se denial of fourth amendment protection for a prisoner's privacy and possessory interests, under these circumstances, is, according to Justice Stevens, to declare that prisoners are "little more than chattels."[110]

IV. Analysis

In holding that the fourth amendment has no application in a prison cell, the Supreme Court maintained that it would be "literally impossible to accomplish the [security goals of an institution] if inmates retained a right of privacy in their cells."[111] The Court was satisfied that society would be unwilling to recognize *any* expectation of privacy as reasonable because, on balance, a prisoner's interest in privacy must *always* yield to the paramount governmental interest in institutional security.[112]

Although the Court provided ample statistics on violence in prisons[113] that support the need for institutional security, it failed, when it adopted a bright-line rule, [114] to seek expressions

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108. *Id.* at 3212-13.

109. *Id.* at 3215.

110. *Id.*

111. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984).

112. *Id.* at 3201. *See supra* notes 82-89 and accompanying text.

113. For a discussion of statistics on violence, see *supra* note 82.

114. Although the language in *Palmer* is very broad in its disregard of fourth amendment rights in prison, the decision's impact on pretrial detainees and on prisoner's rights regarding body cavity searches is unclear. Each of these categories has, in the past, been treated with somewhat more sensitivity by the Court, and different considerations arise in each situation. In *Wolfish*, the Court took care that the practice in question did not constitute punishment of the detainees, in light of the presumption of innocence of these yet untried detainees. Bell v. Wolfish, 441 U.S. 520, 560-62 (1979). However, the Court held that competing security interests of the "holding" institution outweighed the prisoners' privacy interests. Thus, the Court validated the cell search rule and the body cavity search rule. *Id.* at 556-57, 558-60. Further, although the Court did not "doubt . . . that on occasion a security guard may conduct a [body cavity] search in an obtrusive fashion," it maintained that it would not condone such abuse. *Id.* at 560. Justice Powell

of what *society* considers reasonable. Expressions of a societal opinion supporting a right of privacy for prisoners can be found in the circuit court opinions, in writings of legal commentators and sociologists and in the American Bar Association's Standards Relating to the Legal Status of Prisoners.[115]

Before *Hudson v. Palmer*, the circuit court judges were unanimous in recognizing at least a limited privacy right for prisoners.[116] Although Justice Stevens considers it significant that virtually every federal judge in the past decade concluded that the fourth amendment has application in a prison cell, the majority dismissed these circuit court opinions in a mere footnote.[117] Failing to recognize the import of *Wolff v. McDonnell*,[118] Chief Justice Burger incorrectly viewed the circuits as being in a state of conflict needing resolution by the Supreme Court. Prior to *Wolff*, the courts had maintained a "hands-off" attitude about official conduct involving prison administration. They felt deference to prison officials often precluded an evaluation of prison conditions by the courts.[119] The Supreme Court recognized in *Wolff* that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."[120] It is especially significant that judges in post-*Wolff* cases, having

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concurred in part in the Court's opinion in *Wolfish*, but dissented on the body cavity search issue, arguing that "[i]n view of the serious intrusion . . . occasioned by such a search, . . . at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches . . . ." *Id.* at 563 (Powell, J., concurring in part and dissenting in part). Likewise, in *Palmer*, Justice Stevens opined that the Court's holding did not apply to body cavity searches. *See Palmer*, 104 S. Ct. at 3216 n.31. Thus with regard to pretrial detainees and body cavity searches, balancing the prisoner's interests against the prison security interests creates confusion. It is unclear whether the Court would accord the prisoners' interests in these situations more importance than was given to privacy interests in *Palmer* or whether it would consider security interests as paramount to any other consideration in *all* situations. For a discussion of Justice Stevens' cautions with regard to the brightline rule, see *supra* note 101.

115. ABA STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS § 6.6 (Tent. Draft 1977), *reprinted in* J. WESLEY HALL *supra* note 37, § 15:9 n.20.

116. *See supra* notes 26-51 and accompanying text.

117. *Palmer*, 104 S. Ct. at 3198, n.5. The Chief Justice gives no weight to Wolff v. McDonnell, which marked the beginning of judicial review of institutional decisions. Failing to note the decisions after *Wolff*, he thus considers the Second and Ninth Circuits to hold that the fourth amendment does *not* apply within a prison cell.

118. 418 U.S. 539 (1974). *See supra* notes 26-51 and accompanying text.

119. *See supra* notes 26-51 and accompanying text.

120. *Palmer*, 104 S. Ct. at 3212.

been given the freedom to examine a prisoner's constitutional protections, unanimously recognized that prisoners have at least a diminished expectation of privacy.[121]

The existence of a prisoner's diminished expectation of privacy is affirmed in the American Bar Association Standards Relating to the Legal Status of Prisoners.[122] They provide only for routine *visual* inspections by prison staff who do not have prior authorization from a superior. Under these standards, the chief executive officer is required to authorize an *intrusive* search of a prisoner's living quarters or belongings. Any *unauthorized* intrusive searches of a prisoner's living quarters must be based on a reasonable belief that the prisoner has contraband and that he will dispose of the contraband in the interval necessary to obtain written permission for a search. Such precautions are clearly provided by the American Bar Association to protect a prisoner's privacy interests in his cell.

Concerned that deprivation of privacy has a very adverse impact on prisoners, sociologists and legal commentators alike have argued for the protection of a privacy right for prisoners. According to one sociologist,[123] the security goals of an institution are actually undermined by depriving prisoners of privacy.[124] Studies have shown that because "social distance is instrumental to as well as affirmative of personal honor,"[125] prisoners who are deprived of privacy tend to isolate themselves from those with whom they are forced into contact. This ultimately leads to a repression of hostility and a disposition towards the violent behavior[126] that Chief Justice Burger finds so disconcerting. Thus a denial of privacy rights contributes to, rather than alleviates, security problems. Similarly, legal commentators have maintained that an inmate's ability to reform, a concern unaddressed by the Court, is significantly diminished without the "dignity" inherent in the privacy right accorded by

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121. *See Palmer*, 104 S. Ct. at 3212 n.19.

122. *See supra* note 115.

123. Schwartz, *Deprivation of Privacy as a "Functional Pre-Requisite": The Case of the Prison*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 229 (1972) (recognizing the degradation of lack of privacy and arguing for such a right for prisoners).

124. *See generally id.*

125. *Id.* at 231.

126. *See generally id.*

the fourth amendment.[127] For "[i]t is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures."[128]

Aware of the anomaly created by allowing *all* searches and seizures of a prisoner's living quarters, and concerned about dimunition of a prisoner's chance to rehabilitate, Justice Stevens recognized "at least a residuum of privacy"[129] for prisoners in their cells. For "that trivial residuum may mark the difference between slavery and humanity"[130] insofar as it limits the "unrestrained perusal" by prison staff of prisoners' "[p]ersonal letters, snapshots of family members, a souvenir."[131] Justice Stevens poses the threshold question — "[i]s the Court correct in its perception that 'society' is not prepared to recognize *any* privacy or possessory interest of a prison inmate — no matter how remote the threat to prison security may be?"[132] The majority's answer is based solely on prison crime statistics. Inferences drawn from this information, itself subject to conflicting interpretations, can hardly be said to represent society's view of prisoners' rights in all circumstances.

Aside from determining the existence of a protected privacy interest, *United States v. Jacobsen*[133] requires an assessment of an individual's possessory interests to complete a fourth amendment analysis where "search" and "seizure" are separable events.[134] Although the majority in *Palmer* impliedly recognized the *Jacobsen* analysis,[135] it nevertheless maintained that: "the same [security] reasons that [led it] to conclude that the Fourth Amendment's proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to

127. Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1067-69 (1976).

128. *Id.* at 1069. *See Palmer*, 104 S. Ct. at 3214 (Stevens, J., concurring in part and dissenting in part).

129. *Palmer*, 104 S. Ct. at 3208 (Stevens, J., concurring in part and dissenting in part).

130. *Id.*

131. *Id.*

132. *Id.* at 3208 (emphasis in original).

133. 104 S. Ct. 1652 (1984).

134. *See supra* notes 11-13, 58-67 and accompanying text.

135. *Palmer*, 104 S. Ct. at 3201 n.8.

seizures. Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests."[136] But, the Court ignored the fact that the material at issue — letters and legal materials[137] — did not threaten any legitimate institutional interests. As Justice Stevens points out, Palmer's possession of these items was entirely legitimate under both the Federal Bureau of Prisons' regulations[138] and under Virginia law[139] and its Department of Corrections' regulations.[140] These laws and regulations allow for the seizure of only legitimate contraband property. In fact, they affirmatively mandate that prison officials respect prisoners' possessory rights in *non-contraband* personal property.[141] Thus, once a search establishes that an item is not contraband, its seizure and destruction cannot be justified as reasonable under the fourth amendment on security grounds. The fourth amendment's protections should not be defaced by "a balancing process that overwhelms the individual's protection against *unwarranted* official intrusion by a governmental interest said to justify the search and seizure." [142]

The Court's holding in *Palmer* is overly broad. The bright line rule it adopts in this case is neither warranted by the circumstances of incarceration nor justified by the Court's analysis. Case by case adjudication has been the traditional treatment in fourth amendment cases.[143] Categorical treatment an is exception warranted in only a few instances.[144] In light of the fact that

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136. *Id.*

137. *Id.* at 3208 n.3 (Stevens, J., concurring in part and dissenting in part).

138. 28 C.F.R. §§ 553.12, 553.13 (1983).

139. VA. CODE § 53.1-26 (1982).

140. Virginia Department of Corrections, Division of Adult Services, Guideline No. 411 (Sept. 16, 1983).

141. *See Palmer*, 104 S. Ct. at 3213-14. *See also* American Correctional Association, Standards for Adult Correctional Institutions 2-4192 (2d ed. 1981); ABA Standards for Criminal Justice 23-6.10 (2d ed. 1980); National Advisory Commission on Criminal Standards and Goals, Corrections 2.7 (1973).

142. United States v. Martinez-Fuerte, 428 U.S. 543, 570 (1976) (Brennan, J., dissenting) (emphasis added).

143. *See Palmer*, 104 S. Ct. at 3206 (O'Connor, J., concurring); Terry v. Ohio, 392 U.S. 1, 17 n.15 (1968).

144. *See, e.g,* United States v. Ross, 456 U.S. 798, 823 (1982) (warrantless search of an automobile authorized where police have probable cause to believe contraband is hidden; scope of the search is as broad as a magistrate could authorize by warrant); New York v. Belton, 453 U.S. 454, 460-61 (1981) (a policeman may search the passenger compartment of an automobile where he has made a lawful custodial arrest of its occupants);

the circuit courts found case by case adjudication workable for the sixty-five year span between *Stroud* and *Palmer* and, that the Court offers little justification for leaving prisoners wholly stripped of fourth amendment protections,[145] the Court should have recognized at least a diminished expectation of protection under the fourth amendment.

Echoed in the circuit court cases are the concerns inherent in the fourth amendment's protections: limiting the discretion of individual government agents; according dignity to prisoners; recognizing the history and purpose underlying the amendment. In *United States v. Lilly*,[146] the court maintained that "[t]he history and purpose underlying the fourth amendment . . . require that prisoners retain at least some degree of their fourth amendment protection."[147] The fourth amendment was adopted in reaction to general warrants "that gave government agents unfettered discretion to conduct searches and to seize property."[148] Any wholesale denial of the amendment's protections to persons who are incarcerated subjects them to the threat of abuse at the hands of government agents. *Palmer* permits the very evil that the Framers intended to eradicate when they drafted the fourth amendment.

Earlier circuit court cases provide a more thorough and balanced appraisal of the significance of fourth amendment protections in the prison context. They emphasize that appropriate deference to the security needs of penal institutions is protected by testing the reasonableness of official conduct. *Lilly* held that a categorical denial of fourth amendment protection for prison inmates is completely untenable. The Constitution, according to *Lilly*, requires an evaluation of reasonableness based on the *particular* facts of *each case*.[149] In *United States v. Hinckley*,[150] the District of Columbia Circuit held that "the preeminent value underlying the fourth amendment, the right to freedom from ar-

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United States v. Robinson, 414 U.S. 218, 235 (1973) (search incident to lawful custodial arrest).

145. *See supra* note 114.

146. 576 F.2d 1240 (5th Cir. 1978). *See supra* notes 39-47 and accompanying text.

147. *Id.* at 1244.

148. *Id.*

149. *Id.* at 1245.

150. 672 F.2d 115 (D.C. Cir. 1982).

bitrary interference with privacy, must . . . be recognized . . . in a detention context."[151] A like concern with the "dignity and intrinsic worth of every individual" was evident in *Bonner v. Coughlin*[152] which required the government to show the reasonableness of the seizure in that case.

In *Bell v. Wolfish*[153] the Supreme Court maintained that, "in *each* case," the test of reasonableness under the fourth amendment "requires a balancing of the need for the *particular* search against the invasion of personal rights that the search entails."[154] Conversely, categorical treatment under the fourth amendment is generally appropriate only when "those forms of police action which involve relatively minor intrusions into privacy, occur with great frequency, and virtually defy on-the-spot rationalization on the basis of the unique facts of the individual case."[155] Applying this test, prison searches are inappropriate for the categorical treatment Justice O'Connor suggests or the bright line rule that the *Palmer* majority creates. Although most *searches* can be justified based on legitimate security concerns, searches that are solely to harass or that are conducted in an abusive manner do not constitute *minor* intrusions into privacy. Nor does the seizure of property, possessed by an inmate in accordance with state law and prison regulations, constitute a minor intrusion. Additionally, prison guidelines eliminate the ne-

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151. *Id.* at 129.

152. 517 F.2d 1311, 1316 (7th Cir. 1975) (quoting Morales v. Schmidt, 489 F.2d 1335, 1338 (7th Cir. 1973)).

153. 441 U.S. 520 (1979).

154. *Id.* at 559 (emphasis added). The *Wolfish* Court did not reach the issue of whether the detainees had an expectation of privacy, but merely assumed that they did for purposes of their analysis in holding the room-search rule to be valid under the fourth amendment. "The room-search rule simply facilitates the safe effective performance of the search which all concede may be conducted. The rule itself, then, does not render the searches 'unreasonable' within the meaning of the Fourth Amendment." Bell v. Wolfish, 441 U.S. at 557. The Court then went on to acknowledge, in a footnote, that this challenge was not a particular instance of abuse by an individual prison guard, which may be rendered unreasonable under the fourth amendment. *Id.* at 557 n.38. Because this action was a challenge to the search rule "in its entirety," in this context, the Court accorded deference to the prison officials to "make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees." *Id.* The Court thus left an avenue open to prisoners to challenge individual instances of abuse.

155. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142-43 (1974).

cessity for ad hoc searches or seizures while ensuring that security considerations are not jeopardized.

Categorical treatment under the fourth amendment is usually reserved to restrict the discretion of the officer in the field to conduct minimal intrusions on an individual's privacy and possessory interests in circumstances that do not permit time to balance competing interests of privacy and security.[156] *Palmer's* bright-line rule gives virtually unlimited discretion to officials in a uniquely controlled situation. The facts of *Palmer* illustrate that its per se rule is an unreasonable departure from traditional fourth amendment analysis. While a search of the inmate's cell may have been justified for security reasons, prison officials did not present any cogent reason for destroying the non-contraband personal property.

"Prisoners are truly the outcasts of society."[157] As such, the judiciary has a constitutional duty to ensure that certain fundamental rights are not "sacrificed to expediency."[158] The fourth amendment is such a fundamental right for it "rests on the principle that a true balance between the individual and society depends on the recognition of 'the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.' "[159] Only the fourth amendment can adequately protect the right to be let alone; state tort actions are no substitute since they provide compensation only *after* the right has been infringed. Likewise, the eighth amendment's proscription against cruel and unusual punishment is effective only when an abusive search and seizure rises to an extreme level. The Supreme Court in *Palmer* therefore, unjustifiably eradicates a fundamental constitutional protection in prisons and takes a giant step backward to the archaic view of the prisoner as a slave of the state.[160] The Court should have adopted a rule that prison-

156. Dunaway v. New York, 442 U.S. 200 (1979). "A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 213-14.

157. *Palmer*, 104 S. Ct. at 3216 (Stevens, J., concurring in part and dissenting in part).

158. *Id.*

159. New Jersey v. T.L.O., 105 S. Ct. 733, 754 (1985) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

160. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (prison inmate

ers have a diminished expectation of privacy. Such a rule would accommodate the legitimate security needs of penal institutions while ensuring that the inherent dignity accorded by the fourth amendment is not unduly and unnecessarily restricted. A diminished expectation rule would support the rehabilitation goals of the institution by preserving the dignity that a prisoner retains if he is allowed to possess personal items that connect him with "some part of his past [with] an eye to the possibility of a better future." [161] The bright-line rule only serves to undermine any possibility for rehabilitation.

V. Conclusion

In *Hudson v. Palmer*,[162] the Supreme Court determined that society is unwilling to recognize as reasonable any expectation of privacy that a prisoner may subjectively exhibit in his cell. This dramatic refusal to afford prisoners any fourth amendment protection is based solely on prison crime statistics and on the conjecture of five Justices. Although statistics provide ample basis for a conclusion that prison is a volatile community mandating substantial security measures, it does not necessarily follow that these interests must be *always* paramount to a prisoner's privacy interest. Under the very facts of this case, there was no legitimate security interest for destruction of Palmer's non contraband property; it was neither a drug nor a weapon, nor material of the kind to pose a security risk.

The holding in *Palmer*, is therefore, unnecessarily broad. Fourth amendment violations are traditionally assessed on a case by case basis. It is neither impractical nor burdensome to allow prisoners a limited expectation of privacy, and to determine the reasonableness of each intrusion by utilizing the *Wolfish* balancing approach. However, under this Court's holding, *all* cell searches and seizures are per se reasonable, leaving the prisoner to the unfettered discretion of the prison staff, with no

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characterized as "a slave of the state").

161. *Palmer*, 104 S. Ct. at 3208.

162. 104 S. Ct. 3194 (1984).

practical redress for the indignity of an unjustified intrusion that infringes his legitimate privacy or possessory interests.

Patricia Yak