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# Blinding Fundamental Rights with "Bright-Line" Rules: *Hudson v. Palmer*, 104 S.Ct. 3194 (1984)

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Note*

# Blinding Fundamental Rights With "Bright-Line" Rules

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

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## I. INTRODUCTION

In *Hudson v. Palmer*,[1] the United States Supreme Court, by a 5-4 majority, adopted a "bright-line"[2] rule holding that "the fourth amendment proscription agains unreasonable searches does not apply within the confines of the prison cell."[3] Over a vociferous dissent by Justice Stevens,[4] the Court maintained that "recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of

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* I wish to dedicate this Article to my mother Yvonne, and to the found memory of my father William; for their persistent patience and understanding enabled me.

1. 104 S. Ct. 3194 (1984). While this Article will focus only on the fourth amendment issue decided in *Hudson*, another important issue was decided. The Court held that the intentional destruction of an inmate's property by a prison official will not warrant a § 1983 action for violation of the due process clause if the inmate has adequate post-deprivation remedies available. This holding extended the principle enunciated in Parratt v. Taylor, 451 U.S. 527 (1981). In *Parratt*, the Court held that a § 1983 action could not be maintained when adequate post-deprivation state remedies existed to compensate an inmate for prison official's negligent loss of an inmate's property.
2. Hudson v. Palmer, 104 S. Ct. 3194, 3198 (1984).
3. *Id.* at 3200.
4. *Id.* at 3207 (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined the dissent.

penal institutions."[5]

For the substantial number of citizens that are presently or will in the future be incarcerated,[6] this "bright-line" rule will have a significant impact. Protections for an already vulnerable class of citizens will be further limited by the withdrawal of the fourth amendment protections from the prison cell. Prior to *Hudson*, lower courts, both state and federal, had determined that prison inmates retained a minimal degree of fourth amendment privacy interest in their prison cells. These decisions balanced legitimate state interests, primarily the state's security interest, and an inmate's privacy interest. The minimal scope of fourth amendment protections gleaned from these cased did not infringe on or interfere with legitimate state penal objectives. It is the conclusion of this Article that the Supreme Court, in *Hudson v. Palmer*, unnecessarily deprived prison inmates of minimal fourth amendment protections without a concomitant enhancement of the state's asserted interest in penal security. This conclusion will be substantiated in subsequent sections that discuss the pre-*Hudson* case law, exploring its rationales, analysis, and factual settings. In addition, the *Hudson* opinion will be critiqued to demonstrate that the Court needlessly withdrew the fourth amendment's protection of an inmate's privacy in his prison cell.

## II. THE FOURTH AMENDMENT IN THE PRISON SETTING PRIOR TO *HUDSON V. PALMER*

Traditionally, many rights, constitutional or civil, were denied to the inhabitants of correctional facilities.[7] These institutions were administered without review by or interference from the judiciary. This pervasive policy of judicial deference to penal authorities was known as the "hands off" policy.[8] It was utilized by courts, which claimed a lack of expertise in the corrections area, to dismiss inmate suits challenging the conditions imposed or the treatment received in correctional institutions.[9] Recently, however, the pervasive adherence to the "hands off" policy by the judiciary has been mitigated. Though

5. *Id.* at 3200.
6. In 1983 the inmate population for state and federal prisons was 438,830. *Id.* at 3214 n.26 (Stevens, J., dissenting) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE PRISONERS IN 1983 (April 1984)).
7. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871), where the court stated: "He [the convicted felon] has, as a consequence of his crime, not only fofeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." *Id.* at 796. *But see* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (prisoners retain all rights except those necessarily lost.)
8. *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).
9. Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954)

courts still defer to the judgments of corrections administrators,[10] when a fundamental constitutional right is at issue courts will review actions by the penal authorities[11] and, if necessary, order remedial actions.

As was aptly stated by the Supreme Court in *Wolff v. McDonnell*,[12] "there is no iron curtain drawn between the constitution and the prisons of this country."[13] Adhering to the basic premise that "his [i.e. an inmate's] rights may be diminished by the needs and exigencies of the institutional environment,"[14] the Court has, nonetheless, determined that inmates retain first amendment rights of speech[15] and religion,[16] due process rights,[17] the fourteenth amendment protection against racial discrimination via the equal protection clause,[18] and the right of access to the courts.[19] These retained rights, however, are not as fully exercisable as they would be were the inmate not confined. The breadth of these rights is assessed against the background of "the legitimate goals and policies of the penal institution."[20]

Prior to *Hudson*, the Court had not determined definitively

("courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.")

10. In Bell v. Wolfish, 441 U.S. 520 (1979), the Court stated:

> [T]he problems that arise in the day-to-day operation of a correctional facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

*Id.* at 547. Corrections administrators, both federal and state, have the power to promulgate rules and regulations for the operation of their facilities. *See, e.g.*, 18 U.S.C. §§ 4001, 4042 (1982); ALA. CODE § 14-1-8(6) (1982); IND. CODE ANN. § 11-11-5-2 (Burns 1981); MD. ANN. CODE art. 27 § 676 (1982); MISS. CODE ANN. § 47-5-10 (1984).

11. *See* Palmigiano v. Travisono, 317 F. Supp. 776, 785 (D.R.I. 1970) (indiscriminate opening and reading of inmate mail a violation of the fourth amendment; the court must interfere with prison function "by articulating the permissible applicable standards when there has been a deprivation of prisoners' constitutional rights"). *See also* United States v. Lilly, 576 F.2d 1240 (5th Cir. 1978).
12. 418 U.S. 539 (1974).
13. *Id.* at 555-56.
14. *Id.* at 555.
15. Pell v. Procunier, 417 U.S. 817 (1974).
16. Cruz v. Beto, 405 U.S. 319 (1972).
17. Wolff v. McDonnell, 418 U.S. 539 (1974).
18. Lee v. Washington, 390 U.S. 333 (1968).
19. The right of access to the courts encompasses several features: the right to challenge the legality of detention, *Ex parte* Hull, 312 U.S. 546, 549, (1941) ("the state and its officers may not abridge or impair [a prisoner's] right to apply to a federal court for a writ of habeus corpus"); the right to inmate assistance, where necessary and reasonable for preparing legal documents, Johnson v. Avery, 393 U.S. 483 (1969); and the right of access to either adequate law libraries or access to persons adequately trained in law. Bounds v. Smith, 430 U.S. 817 (1977).
20. Wolff v. McDonnell, 441 U.S. 540, 546 (1979). Full exercise of these fundamental

whether fourth amendment protections against unreasonable searchers and seizures extended to an inmate's privacy interest in his prison cell. The Court had, however, addressed the fourth amendment's applicability in other prison contexts.

In *Stroud v. United States*,[21] letters voluntarily written by a prison inmate "came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution."[22] Incriminating evidence contained in the letters was utilized in convicting the inmate for the murder of a prison guard. Since the letters were not seized "without process,"[23] there was no violation of the fourth amendment's proscription against unreasonable searches and seizures.[24]

In *Lanza v. New York*,[25] the petitioner challenged his conviction for refusing to answer the questions of a legislative committee investigating corruption in the New York parole system. The questions were posed from conversations the petitioner had had with his brother, an inmate, in a visiting room at a state prison. Penal authorities had surreptitiously recorded these conversations. Petitioner challenged his conviction on fourth amendment grounds. A plurality of the Court expressed, as dicta, the view that recording the conversations between a prisoner and a visitor did not violate the fourth amendment.[26] The

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constitutional rights is restrained by the exigencies of the prison environment and penal objectives.

21. 251 U.S. 15 (1919) (Stroud was the famous Birdman of Alcatraz).
22. *Id.* at 21.
23. *Id.*
24. *Accord* State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105 (1983) (though inmates retain some fourth amendment rights, no fourth amendment violation when prisoner voluntarily gave note to guard for delivery). *Contra* United States v. Savage, 482 F.2d 1371 (9th Cir. 1973) (interception and photocopying of an inmate's letter violates the fourth amendment absent a showing of a justifiable purpose of imprisonment or security); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970) (indiscriminate opening and reading of inmate mail is a fourth amendment violation).
25. 370 U.S. 139 (1962).
26. The Court stated that:

> [T]o 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 . . . . Yet, without 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.

*Id.* at 143. The plurality used the "constitutionally protected area" test, which premised fourth amendment analysis on whether there was a physical intrusion into a protected area. Property concepts were utilized to determine whether an area was protected or not, thus, whether fourth amendment protections did or did not adhere in a specific situation. For example, in Olmstead v. United States, 277 U.S. 438 (1928), the Court held that wire-tapping did not violate the fourth amendment since there was not physical intrusion into petitioner's home, thus no

actual opinion, however, upheld the conviction on independent state grounds.[27] In a memorandum opinion, Chief Justice Warren took the plurality to task for its "gratuitous exposition"[28] on important constitutional issues not fully before the Court.[29]

As stated, prior to *Hudson* the Court had not specifically determined whether prison inmates retained any fourth amendment privacy rights in their cells.[30] This vacuum, however, was not left

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invasion of a protected area. The "protected areas" test was subsequently ruled not to be "controlling" for determining whether an individual was entitled to fourth amendment protections in certain circumstances. Katz v. United States, 389 U.S. 347, 353 (1967). This Article will further discuss *Katz* and the potentially still existent "protected areas" test. *See infra* notes 127 & 162.

27. Lanza v. New York, 370 U.S. 139, 146 (1962). Two of the questions the petitioner refused to answer, which refusal he was subsequently convicted for, were based on information apart from the recorded conversations.

28. This phrase, utilized by Chief Justice Warren in his memorandum opinion, was borrowed from Justice Brennan's concurring opinion. *Id.* at 150 (Brennan, J., concurring).

29.
> [T]he opinion undertakes, as Mr. Justice Brennan characterizes it, a "gratuitous exposition" upon those more difficult constitutional problems. . . . These expressions of dicta are in a form which can only lead to misunderstanding and confusion in future cases. Such dicta, when written into our decisions, have an unfortunate way of turning up in digests and decisions of lower courts; they are often quoted as evidencing the considered opinion of this Court, and this is so even though such intention is denied by the writer.

*Id.* at 148. The concerns of the Chief Justice were well founded. Several subsequent cases relied on *Lanza* as precedent to hold that the fourth amendment did not apply in prison. *See* United States v. Dawson, 516 F.2d 796 (9th Cir. 1975); United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972); State v. Pietraszewski, 285 Minn. 212, 172 N.W.2d 758 (1969); Robinson v. State, 312 So. 2d 15 (Miss. 1975).

30. It is important to recognize that the *Hudson* decision held that prisoners have no fourth amendment rights in their prison *cells*. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984). Many courts have found that prisoners retain fourth amendment rights in other contexts. *See, e.g.*, United States v. Lilly, 576 F.2d 1240 (5th Cir. 1978) (prisoner body searches subject to fourth amendment protections); Hodges v. Klein, 412 F. Supp. 896 (D.N.J. 1976) (fourth amendment protects inmates against unreasonable strip searches); State v. Nason, 433 A.2d 424 (Me. 1981) (inmate retains fourth amendment privacy protections agains unreasonable body searches; analysis is premised on a totality of the circumstances). *See also* Ferguson v. Cardwell, 392 F. Supp. 750 (D. Ariz. 1975) (extracting blood samples for drug test subject to fourth amendment); People v. Gibson, 1 PRISON L. REP. 254 (Cal. Super. Ct. 1972). The *Hudson* decision cannot be seen as affecting fourth amendment protections in these areas for several reasons. The Court itself limited its holding to "the confines of the prison cell," thereby recognizing the limited scope of the issue before it. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984). In addition, it is quite arguable that different interests are weighed in determining whether the fourth amendment protections apply in these situations. Penal authorities might have less of a security interest in an individual's body, whereas an individual would certainly have a greater privacy interest in his or her body. *See* Bell v. Wolfish, 441 U.S. 520, 558-59 (1979) (though body searches do not per se violate the fourth amendment they must be reasonable in scope, justification, and place of search). These factors compel the conclusion that the *Hudson* opinion

unfilled. A majority of the federal courts of appeals,[31] many federal district courts,[32] and several state courts[33] had held that inmates do retain some degree of fourth amendment protections in their prison cells. Analysis of several cases will set forth the degrees of fourth amendment protection and the rationale for these decisions.

An example of the issues and factors weighed in determining whether a cell search violated the fourth amendment can be seen in *United States v. Hinckley*.[34] John Hinckley, unsuccessful assassin of President Reagan, was confined at a federal penal institution for psy-

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cannot automatically be extended to other prison contexts wherein the fourth amendment has previously been held to apply.

31. *See* DiGuiseppe v. Ward, 698 F.2d 602 (2d Cir. 1983) (inmate retains limited fourth amendment protections); United States v. Chamorro, 687 F.2d 1 (1st Cir. 1982) (inmate retains a limited fourth amendment protection in prison cell, scope to be determined on a case by case basis); United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982) (reading and seizure of personal writings violates the fourth amendment); United States v. Stumes, 549 F.2d 831 (8th Cir. 1977) (inmate retains limited privacy interest in cell); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) (inmate retains minimal degree of fourth amendment privacy protections); Hansen v. May, 502 F.2d 728 (9th Cir. 1974) (fourth amendment available for a suit seeking return of inmate property). For a Ninth Circuit case holding no fourth amendment privacy rights in a prison cell, see United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972). In an effort to reconcile this apparent conflict in the Ninth Circuit, it appears that the *Hansen* court relied upon United States v. Savage, 482 F.2d 1371 (9th Cir. 1973) (interception and copying of letter violates the fourth amendment when no showing of legitimate penal justification), for its proposition that the fourth amendment applied in prison. It appears to extend the *Savage* principle to the prison cell. *Hitchcock*, on the other hand, relied on New York v. Lanza, 370 U.S. 139 (1962), to deny an inmate's privacy interest in his cell. Though *Hansen* is later in time, it did not even discuss *Hitchcock*. Arguably, *Hansen* could be taken as not applicable to the prison cell, but its ambiguity leaves room for the assertion that it does, indeed, apply to the prison cell.
32. *See* Cook v. City of New York, 578 F. Supp. 179 (S.D.N.Y. 1984) (cell searches must be reasonable, i.e., related to legitimate governmental objective); O'Connor v. Keller, 510 F. Supp. 1359 (D. Md. 1981) (prisoner has privacy and property interests in items legitimately possessed); Clifton v. Robinson, 500 F. Supp. 30 (E.D. Pa. 1980) (inmate has legitimate expectation of privacy that legitimately possessed items will not be wantonly destroyed or confiscated); Thornton v. Redman, 435 F. Supp. 876 (D. Del. 1977) (inmate retains privacy interest in items of personal property in cell). *Contra* Hoitt v. Vitek, 361 F. Supp. 1238 (D.N.H. 1973) (cell block not a constitutionally protected area), *aff'd*, 497 F.2d 598 (1st Cir. 1974).
33. *See* Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970) (search of cell violates the fourth amendment if done for harassment or in cruel and unusual manner); People v. Elkins, 60 Ill. App. 3d 883, 377 N.E.2d 569 (1978) (limited fourth amendment protections in cells); State v. Wilmot, __ R.I. __, 461 A.2d 401 (1983) (inmate retains limited expecation of privacy in cell; searches must be reasonable). *Contra* Robinson v. State, 312 So. 2d 15 (Miss. 1975) (no reasonable expectation of privacy in a prison cell); Marrero v. Commonwealth, 222 Va. 754, 284 S.E.2d 809 (1981) (fourth amendment protections are inconsistent with constant surveillance of inmates).
34. 672 F.2d 115 (D.C. Cir. 1982).

chiatric evaluation. Hinckley's cell was subject to frequent searchers "primarily for 'items with which he could harm himself.' "[35] During one of these searches, a prison guard, claiming his "eye was caught by certain 'trigger words,' "[36] read some of Hinckley's personal writings. In the course of subsequent searches Hinckley's personal writings were further read.[37] Prison officials, after consultation with the F.B.I., eventually decided to seize Hinckley's personal writings and diary as contraband. Hinckley had attempted to conceal these writings by storing them with correspondence from his attorney.[38] Government officials argued that reading the materials was reasonable in the light of the "trigger words,"[39] and if not reasonable, then justified by concern for internal security.[40] The court rejected these arguments and found that the government had violated Hinckley's fourth amendment right to privacy.[41]

The court's analysis[42] was premised on its assertion that "the preeiminent value underlying the fourth amendment, the right to freedom from arbitrary interference with privacy, must and can be recognized even in a detention context."[43] Three factors played significant roles in the court's holding that the fourth amendment had been violated: Hinckley's subjective expectation of privacy,[44] the guard's unreasonable reliance on the "trigger words" to read the materials,[45] and the guard's unbridled discretion in reading (i.e., searching) the materials.[46]

The court's conclusion that Hinckley had a subjective expectation of privacy was based on several factors. His personal writings were deemed to be his "exclusive outlet for private expression."[47] Hinckley

35. *Id.* at 126.
36. *Id.* at 128.
37. *Id.*
38. *Id.*
39. *Id.* at 130.
40. *Id.* at 126.
41. *Id.* at 131.
42. *Id.* at 126, 131.
43. *Id.* at 129. The Court has determined that "the fourth amendment by its very terms envisions an accomodation between the right to privacy and the circumstances in which that right is asserted: 'analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " Pennsylvania v. Mimms, 434 U.S. 106, 193, (1977) (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)). Reasonableness in turn depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference.' " Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).
44. United States v. Hinckley, 672 F.2d 115, 129 (D.C. Cir. 1982).
45. *Id.* at 130.
46. *Id.* at 131.
47. *Id.* at 127, 131.

attempted to preserve the privacy of the contents of these writings by folding and storing them in an envelope with his legal correspondences.[48] Finally, Hinckley was given no notice by corrections authorities that his personal papers would be read.[49] These factors lead the court to recognize that Hinckley did have an expectation of privacy despite constant surveillance of his cell and his activities.

In analyzing the "trigger words" that the guard relied upon to read and further investigate Hinckley's writings, the court found that these "phrases . . . 'neither suggested a threat of criminal activity' nor implicated 'special considerations peculiar to the penal system.' "[50] Interestingly, the court looked beyond the asserted governmental interest of penal security to determine whether Hinckley's writings actually threatened this interest. Having found no legitimate justification in terms of penal interests for reading these materials, the court held this action by penal officials was unreasonable.

Finally, the court adverted to the unilateral discretionary acts of the searching officers. Acknowledging that the courts owe deference to corrections administrators[51] concerning policies and regulations formulated to maintain prison security, "that discretion," the court asserted, "should and must be corralled by the fourth amendment's prohibition of arbitrary invasions of privacy."[52] These guards had acted in their own discretion; there was no rule, policy, or order from a superior officer to guide their actions.[53] Under these circumstances the search was deemed to be "objectively unreasonable,"[54] and "[t]here was no reasoned, principled decision by the prison administration entitled to deference."[55] It is exactly this type of discretionary govern-

48. *Id.* at 127. *See generally* Note, *Searches of Private Papers: Incorporating First Amendment Principles into the Determination of Objective Reasonableness*, 51 FORD. L. REV. 967 (1983). The author argues that when a place is given a diminished expectation of privacy under the *Katz* test, *see infra* note 129, then the nature of the item to be seized must also play a part in determining whether an individual had a legitimate expecation of privacy. This analysis is necessary to safeguard first amendment principles of free expression that might otherwise be vulnerable when a place is given diminished fourth amendment protections.

49. United States v. Hinckley, 672 F.2d 115, 130 (D.C. Cir. 1982).

50. *Id.* at 131. The trigger words cited were "prison," "life sentence," and "cooperation with the Justice Department." "These words," the court stated, "are hardly of a nature that suggests an imminent or even remote threat to security." *Id.* at 132. *Cf.* DiGuiseppe v. Ward, 698 F.2d 602 (2d Cir. 1983) (reading diary entry that corresponded with riot date found during post-riot search did not violate fourth amendment).

51. United States v. Hinckley, 672 F.2d 115, 130 (D.C. Cir. 1982).

52. *Id.* at 129.

53. *Id.* at 131.

54. *Id.* at 130.

55. *Id.* at 131. *See also* Beckett v. Powers, 494 F. Supp. 364 (W.D. Wis. 1980). In *Beckett*, the court held that deference to prison administrative practices that infringed constitutional rights was based on a three-part test: 1) the practice serve the

mental action that the fourth amendment was designed to prohibit.

The *Hinckley* opinion highlights several factors that were characteristic of pre-*Hudson* analysis of fourth amendment rights in prison cells. There was a general assumption that fourth amendment protections against unreasonable searches and seizures would apply to a limited degree. Court analysis of legitimate prison objectives and needs was undertaken. When the interests were shown to be legitimate, judicial deference to the judgments of prison authorities was the norm.

In *Bonner v. Coughlin*,[56] the Court of Appeals for the Seventh Circuit held that "a prisoner enjoys the protection of the Fourth Amendment against unreasonable searches, at least to some minimal extent."[57] In *Bonner*, the appellant alleged prison guards had violated "his constitutionally protected interest in privacy and property."[58] A shakedown search of the appellant's cell resulted in his cell being left in a shambles and his trial transcript missing.[59] The trial court dismissed the complaint on the grounds that the injury was not compensable and the guards' reliance on a valid prison regulation provided a good faith defense.[60] The Court of Appeals rejected this ruling and rationale.

The *Bonner* court premised its decision on prior cases that had found various constitutional rights applicable in the prison context, albeit only to a limited degree.[61] Dignity of the individual,[62] whatever his status, also played a determinative role in the decision. The decision did not, however, reach the merits of the reasonableness of the search. Nor did it outline the contours or the scope of the fourth amendment's applicability in the prison cell.[63] Since the appellant

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needs of the institution for security, order, and discipline; 2) the practice reflect informed judgment of prison administrators; and 3) the practice not be an exaggerated response to legitimate institutional needs.

56. 517 F.2d 1311 (7th Cir. 1975), *aff'd on reh'g*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978).
57. *Id.* at 1317.
58. *Id.* at 1312.
59. *Id.*
60. *Id.* at 1314. Illinois Department of Corrections Administrative Regulation 401 provided guidelines for shakedown searches. *Id.* at 1313 n.6.
61. *Id.* at 1315.
62. *Id.* at 1316. On this issue the court stated:

> Respect for the dignity of the individual compels a comparable conclusion [i.e., retained constitutional rights] with respect to his interest in privacy. Unquestionably, entry into a controlled environment entails a dramatic loss of privacy. Moreover, the justifiable reasons for invading an inmate's privacy are both obvious and easily established. We are persuaded, however, that the surrender of privacy is not total and that some residuum meriting the protection of the Fourth Amendment survives the transfer into custody.

*Id.*

63. The court left open the issue of whether "mere existence of a prison regulation authorizing random shakedowns" was enough to defend against an alleged fourth

predicated his complaint on the absence of "a warrant, probable cause, or his consent,"[64] the court decided the reasonableness issue on this basis. It held that "whatever the level of the prisoner's Fourth Amendment protection, it does not rise to that possessed by the unincarcerated members of society."[65] A fourth amendment claim was established, however, by the alleged taking of the appellant's trial transcript.[66] If, at trial, the inmate could prove that the guards seized the transcript, "the defendants would then have the burden of establishing the 'reasonableness' of the seizure."[67]

This decision is significant in several respects. It recognizes that "the dignity and intrinsic worth of every individual,"[68] regardless of status, are values that the fourth amendment protects. Privacy and property rights of incarcerated individuals, though not extensive, are protected by the fourth amendment against unreasonable searches and seizures. Warrants, probable cause, or consent, traditional fourth amendment safeguards, were not elements of the reasonableness test to determine whether a prisoner's fourth amendment rights have been violated.

Another interesting case is *United States v. Chamorro*.[69] In *Chamorro*, the appellant, an inmate at Walpole Prison, was suspected of sending a book-bomb through the mail.[70] Pursuant to instructions,[71] guards at the prison conducted a search of appellant's cell. Evidence linking the appellant to the bombing was uncovered and seized.[72] Appellant contested the search as "unreasonable and [violative] of his fourth amendment right to privacy."[73]

The *Chamorro* court held that an inmate does, in fact, retain "some residuum of fourth amendment protection."[74] A more difficult issue was the extent to which fourth amendment protections would apply in an inmate's cell. Rather than adopt a definitive rule the court opted for a "case-by-case determination,"[75] in light of the factual situation.

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amendment violation or whether "additional data" would be needed to assess the reasonableness of the search. *Id.* at 1317.

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1316.
69. 687 F.2d 1 (1st Cir. 1982).
70. *Id.* at 2.
71. *Id.*
72. *Id.* The evidence seized was an electrical dictionary and a return address label that had aroused the searching guards' suspicion. This label later was found to match the nonexistent return address that was on the mailed bomb.
73. *Id.*
74. *Id.* at 4. Before *Chamorro* this question had not been definitively decided by the First Circuit.
75. *Id.*

The court held that the search was reasonable under the facts presented.[76] The search was not intrusive, intended to harass, or "solely for the purpose of gathering evidence of a crime."[77] Seizure of the appellant's property was also analyzed by this reasonableness test and upheld. Thus, the *Chamorro* opinion added two important elements to the mosaic of pre-*Hudson* case law: 1) that the scope of the fourth amendment protections should be decided on a case-by-case basis in light of the factual situation; and 2) that the reasonableness test is a multifactor test that balances the interests of all parties concerned.

*O'Connor v. Keller*,[78] offers another piece in the pattern of how courts, prior to *Hudson*, adjudicated prisoners' fourth amendment rights cases. In *O'Connor*, the plaintiff inmate's cell was searched for contraband, specifically sandpaper.[79] During the search, items legitimately possessed by O'Connor were also confiscated.[80] O'Connor vigorously protested this seizure. The guard, in justification of his actions, merely explained that O'Connor was "over the limit of books."[81] A shoving match ensued and O'Connor was subsequently

76. *Id.* at 5. The *Chamorro* court adopted the reasonableness test set out in Bell v. Wolfish, 441 U.S. 520 (1979), for determining "the validity of body cavity searches." The Court in *Bell* stated:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

*Id.* at 559.

77. United States v. Chamorro, 687 F.2d 1, 5 (1st Cir. 1982). It appears that the court was less than candid in making this statement. Since it was known that the appellant was suspected in bombing, his cell was the only one searched, and the guards were instructed to look specifically for bomb-making material, it can be assumed that the purpose of the search was to obtain evidence of a crime. Whether this would have made a difference on the warrant requirement is uncertain since the court held that no warrant to search was required. Surely prison authorities have an interest in security threatened by an inmate's bomb-making capacity that would render a search reasonable without a warrant. *Cf.* People v. Gibson, 1 PRISON L. REP. 254 (Cal. Super. Ct. 1972) (seizure of an inmate's palmprints and blood-type without a warrant was illegal, no reasonable relation of search to objectives of prison administration). *Accord* State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976). *See also* Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045 (1976) (arguing that when non-institutional motives (i.e., obtaining evidence of crime) prompt a prison search, warrants should be required).

78. 510 F. Supp. 1359 (D. Md. 1981).

79. *Id.* at 1361.

80. *Id.* These items were approved magazines, books, and music cassette tapes. The court concluded that according to prison regulations O'Connor had legitimate possession of these items.

81. *Id.* at 1362.

subdued and placed into isolation.[82] O'Connor brought a section 1983 action for violation of his constitutional rights.

The court found that an inmate did retain some fourth amendment protections, concluding:

> [A] prisoner has protectable privacy and property interests in items of personal property he legitimately possesses, and that these interests are infringed when prisoner officials seize such property in an unreasonable manner or without a legitimate justification. Once a prisoner has proven the confiscation of legitmately possessed property, the burden is on the prison officials to establish the reasonability of the seizure.[83]

Factors utilized in determining the reasonableness of the search was set out.[84] Though the purpose of the search was legitimate, the court held that the seizure was "unreasonable and without justification."[85] For this constitutional violation[86] the court assessed compensatory and punitive damages.[87]

Important aspects of the *O'Connor* decision included the fact that the court looked to existing prison regulations for aid in assessing the inmate's interests and whether the guard's actions were violative of those interests.[88] Discretionary guard actions, beyond those necessary to effect the legitimate purpose of the search, were held in check. In addition, the court adopted a reasonableness test[89] that assessed the type of institution as well as the motivation, scope, and supervision of the search.

In summary, the touchstone of prisoner fourth amendment rights

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82. *Id.* The events surrounding the confinement in isolation and their legal resolution are not significant for the purpose of this Article.

83. *Id.* at 1368.

84. *Id.* at 1368. Factors deemed relevant for determining reasonableness of a search were adopted from Thornton v. Redman, 435 F. Supp. 876 (D. Del. 1976). These factors were "the nature of the institution, the reason for and the scope of the search, the instructions and supervision given to those who carry out the search [and] the means provided for the return of mistakenly seized property." *Id.* at 881.

85. O'Connor v. Keller, 510 F. Supp. 1359, 1369 (D. Md. 1981). The court gave emphasis to the inmates reliance on prison regulations that legitimized his possession of the seized items. The guard's cursory explanation for the seizure, that the inmate was "over the limit of books," was inadequate to justify the seizure.

86. *Id.* at 1370. The court concluded these actions also violated the inmate's first, sixth, and fourteenth amendment rights.

87. Compsensatory damages of $50 and punitive damages of $250 were set against the defendant-guard for his "seizure . . . [that] was wholly without justification." *Id.* at 1375.

88. Since correction regulations are often promulgated in the discretion of correction administrators, *supra* note 10, it might not be automatically assumed that these regulations are reasonable. But when regulations are in place they provide guidelines for determining whether or not the actions of a particular officer, in reliance on the regulations, are reasonable.

89. O'Connor v. Keller, 510 F. Supp. 1359, 1368 (D. Md. 1981) (citing Thornton v. Redman, 435 F. Supp. 876, 881 (D. Del. 1977)).

cases prior to *Hudson* was the reasonableness of the search. Fourth amendment protection "against unreasonable searches and seizures" reached into the prison cell to prohibit arbitrary governmental invasion of an individual's privacy or property. Though the various courts had held that the fourth amendment applied in prison cells, it must be kept in mind that its degree of application was held to a minimum. Neither warrants nor probable cause, traditional fourth amendment safeguards, were required to search in prison cells.[90] Deference to prison administrators' authority and expertise[91] was maintained when the search was necessary or reasonably related to furthering a legitimate corrections objective.[92] Searches unchecked by legitimate regulations or superior's orders,[93] or for harassment or abuse purposes, were not to be tolerated.[94] Protection for the privacy/dignity[95] and property[96] of the inmates was a prominent concern. This flexible standard adopted by the courts accommodated[97] interest of both par-

90. *See* Bell v. Wolfish, 441 U.S. 520, 557 (1979); United States v. Chamorro, 687 F.2d 1, 4 (1st Cir. 1982); Bonner v. Coughlin, 517 F.2d 1311, 1315 (7th Cir. 1975); Cook v. City of New York, 578 F. Supp. 179, 182 (S.D.N.Y. 1984); Beckett v. Powers, 494 F. Supp. 364, 365 (W.D. Wis. 1980); Moore v. People, 171 Colo. 338, 342, 467 P.2d 50, 52 (1970); People v. Elkins, 60 Ill. App. 3d 883, 885, 377 N.E.2d 569, 571 (1978). *But see* People v. Gibson, 1 PRISON L. REP. 254 (Cal. Super. Ct. 1972) (warrant required for search and seizure unrelated to prison interests). *Accord* People v. Trudeau, 385 Mich. 276, 187 N.W.2d 890 (1971); State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976).

91. Bell v. Wolfish, 441 U.S. 520, 547 (1979).

92. *See* DiGuiseppe v. Ward, 698 F.2d 602 (2d Cir. 1983); United States v. Chamorro, 687 F.2d 1 (1st Cir. 1982); United States v. Vallez, 653 F.2d 403 (9th Cir. 1981); Cook v. City of New York, 578 F. Supp. 179 (S.D.N.Y. 1984); Stringer v. Thompson, 537 F. Supp. 133 (N.D. Ill. 1982); Saunders v. Packel, 436 F. Supp. 618 (E.D. Pa. 1977); Thornton v. Redman, 435 F. Supp. 876 (D. Del. 1977); People v. Gibson, 1 PRISON L. REP. 254 (Cal. Super. Ct. 1972); State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976).

93. *See, e.g.*, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982); O'Connor v. Keller, 510 F. Supp. 1359 (D. Md. 1981).

94. *See, e.g.*, DiGuiseppi v. Ward, 698 F.2d 602 (2nd Cir. 1983); United States v. Chamorro, 687 F.2d 1 (1st Cir. 1982); Moore v. People, 171 Colo. 338, 467 P.2d 50 (1970); State v. Wilmot, __ R.I. __, 461 A.2d 401 (1983).

95. *See, e.g.*, United States v. Chamorro, 687 F.2d 1 (1st Cir. 1982); United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975); Wells v. State, 402 So. 2d 402 (Fla. 1981). In *Wells*, one judge stated that: "fourth amendment protections are minimum standards that define civilized treatment of other human beings. To deny persons in a prison environment all fourth amendment rights is to deny them the quality of humanity." Wells v. State, 402 So. 2d 402, 409 (Fla. 1981) (Sundberg, C.J., concurring).

96. *See, e.g.*, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975); Hansen v. May, 502 F.2d 728 (9th Cir. 1974); Cook v. City of New York, 578 F. Supp. 179 (S.D.N.Y. 1984); O'Connor v. Keller, 510 F. Supp. 1359 (D. Md. 1981); Brown v. Hilton, 492 F. Supp. 771 (D.N.J. 1980); Thornton v. Redman, 435 F. Supp. 876 (D. Del. 1977).

97. The accommodation principle was stated in Wolff v. McDonnell, 418 U.S. 539 (1974), as a need for "mutual accommodation between institutional needs and

ties; prison authorities in maintaining correctional institutions according to legitimate penological goals, and inmates' interest in privacy and property. Overall, this standard, while allowing penal administrators necessary latitude for institutional operation, preserved for inmates the modicum of dignity, respect, and privacy inherent in their status as a human being.

## III. HUDSON: FACTS, RATIONALE, AND CRITIQUE

### A. Facts and Rationale

In *Hudson v. Palmer*,[98] the Supreme Court adopted the "bright-line" rule that an inmate has no reasonable expectation of privacy in his cell[99] or in his personal property[100] contained therein: "[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[101]

In *Hudson*, Palmer, an inmate at a Virginia correctional facility, brought a section 1983 suit[102] against prison guard Hudson. The suit alleged that Hudson had conducted a "shakedown" search of Palmer's cell and locker merely to harass Palmer.[103] It also alleged that in the course of the search Hudson "intentionally destroyed certain noncontraband personal property" belonging to Palmer.[104] Hudson, denying the allegations, moved for and was granted summary judgment.[105] The district court held that the intentional destruction of property claim was controlled by the principle enunciated in *Parratt v. Taylor*.[106] On the harassment issue the district court held "that the al-

objectives and the provisions of the Constitution that are of general application." *Id.* at 556.

98. 104 S. Ct. 3194 (1984).
99. *Id.* at 3200.
100. *Id.* at 3201 n.8.
101. *Id.* at 3200.
102. *Id.* at 3197.
103. *Id.*
104. *Id.* Palmer claimed a violation of his fourteenth amendment due process right by the intentional destruction of his letters, legal materials, and personal property. *Id.* at 3208 n.3.
105. *Id.* at 3197.
106. *Id.* In Parratt v. Taylor, 451 U.S. 527 (1982), the Court held that a § 1983 action for violation of the Due Process Clause could not be maintained against prison officials for the negligent loss or destruction of an inmate's property as long as there were adequate state law remedies to compensate for the deprivation. In *Parratt*, the Court determined that pre-deprivation procedures were impractical when the loss was due to a random, unauthorized act of a state employee. *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (post-deprivation procedures do not satisfy due process when deprivation occurs according to a state plan). *Hudson* extended this principle to deliberate destruction of property. In Virginia, state tort remedies were available to compensate Palmer. Hudson v. Palmer, 104 S. Ct. 3194, 3204 (1984).

leged harassment did not rise to the level of a constitutional deprivation."[107]

On appeal the Court of Appeals for the Fourth Circuit[108] affirmed extension of *Parratt* to the intentional destruction facts.[109] It reversed and remanded, however, on the harassment issue.[110] Since there was a clear factual dispute as to whether the prison had a policy of routine, shakedown searches, summary judgment was unwarranted.[111] In addition, the court concluded "that Palmer had a limited privacy right."[112] The court did acknowledge the necessity and efficacy of individual, random, shakedown searches for controlling inmate possession of contraband.[113] It was disturbed, however, about the individual searches and their potential abuse in the hands of malevolent guards.[114] To safeguard against potential abuse of this search tool the court, on remand, required that such searches be "either . . . done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband . . . or . . . that some reasonable basis existed for the belief that the prisoner possessed contraband."[115]

Central to the Supreme Court's decision reversing the court of appeals was the premise of "the paramount interest in institutional security."[116] Internal security is the foundation upon which the Court constructs its "bright-line" rule that "recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions."[117] Several factors weighed in the construction of this rule.

Initially, the Court noted the violent and "volatile" atmosphere that exists in the nation's prisons.[118] To combat potential violence and

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107. Hudson v. Palmer, 104 S. Ct. 3194, 3197 (1984).
108. Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983).
109. *Id.* at 1223.
110. *Id.* at 1225.
111. *Id.* at 1223.
112. *Id.* at 1225. Though the court of appeals termed this a "Fourteenth Amendment right to privacy," *id.* at 1222, it is assumed that its basis is in the fourth amendment. This assumption is based on the fact that the court of appeals analysis focused on cases that previously recognized a limited fourth amendment right in prison cells. *Id.* at 1224. In addition, the court framed the possible violation as resulting from a "nonroutine" search. *Id.* at 1222.
113. *Id.* at 1224.
114. *Id.*
115. *Id.* (citation omitted).
116. Hudson v. Palmer, 104 S. Ct. 3194, 3201 (1984).
117. *Id.* at 3200.
118. *Id.* In support of its assertion about the violent atmosphere pervading the nation's prisons the Court stated:

> During 1981 and the first half of 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

control possession of drugs and weapons by inmates it was asserted that "[u]nfettered access to these cells by prison officials . . . is imperative."[119] In light of this rationale the Court took issue with the requirements for individual cell searches set out by the court of appeals.[120] The Court rejected any requirement for "planned random searches,"[121] because such a requirement "would seriously undermine the effectiveness of this weapon."[122] Flexibility was deemed essential to enable prison administrators to adequately maintain prison security. Fourth amendment rights of privacy, in a prison cell, to any degree whatsoever, would interfere significantly with this requisite flexibility.

The Court did express concern about the possibility of harassment unrelated to prison needs[123] by "prison attendants."[124] As a remedy to such activity the Court asserted that the "Eighth Amendment always stands as a protection against 'cruel and unusual punishments.' "[125] For wanton destruction of an inmate's personal property there existed "adequate state tort and common law remedies."[126]

In its legal analysis, the Court employed the test set out in *Katz v. United States*.[127] The Court utilized a straight balancing test to determine whether an inmate had a legitimate or reasonable "expectation

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> 29 riots or similar disturbances were reported in these facilities . . . and there were over 125 suicides . . . . [I]nformal statistics of the U.S. Bureau of Prisons show that in the federal system during 1983, there were 11 inmate homicides, 359 inmate assaults on other inmates, 227 inmate assualts on prison staff, and 10 suicides. There were in the same system in 1981 and 1982 over 750 inmate assaults on other inmates and over 570 inmate assaults on prison personnel.

*Id* (citation omitted).

119. *Id.* at 3200.
120. *Id.* at 3201. *See supra* note 120.
121. Hudson v. Palmer, 104 S. Ct. 3194, 3201 (1984).
122. *Id.*
123. *Id.* at 3202.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 3199-200. Katz v. Unites States, 389 U.S. 347 (1967), was a landmark in fourth amendment case law. In *Katz* the Court held that bugging the outside of a public telephone booth had "violated the privacy upon which [the user had] justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353. Intoning the famous phrase "the Fourth Amendment protects people, not places," *id.* at 351, the *Katz* Court reassessed the "constitutionally protected area test," which was the fulcrum upon which fourth amendment protections pivoted prior to *Katz*. In *Katz* the Court declared that the "areas" test was "no longer to be regarded as controlling," *id.* at 353, for the purposes of fourth amendment analysis. The test for fourth amendment analysis ultimately gleaned from the pages of *Katz* comes from the concurring opinion of Justice Harlan. It states that "there is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.* at

of privacy" in his cell.[128] After balancing the penal interests of security and the prisoner's interest in privacy, the Court "[struck] the balance in favor of institutional security."[129] Applying the second prong of the *Katz* test, the Court concluded "[w]e are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security."[130]

### B. Critique

The Court has observed that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[131] That incarceration is a legitimate intrusion on personal privacy and dignity is clear; that this intrusion is totally without any fourth amendment protections is less so.

One of the most disconcerting aspects of the *Hudson* opinion is the paucity of substantive analysis by the Court. As the Court acknowledges, "claims that the Fourth Amendment is inapplicable in a given context"[132] are approached warily. Such prudence should be heightened when the context under consideration is a correctional institution where inmates are rigidly controlled and fundamental constitutional rights are honored or dishonored beyond the scrutiny of the public eye.

Internal security of corrections institutions is the foundation upon which the Court plants its decision.[133] Undoubtedly, this is an issue of great importance to correctional authorities, society, and the inmates themselves: "However, the shibboleth of jail security is not a passport to wholesale abuse of . . . constitutional rights."[134] That inmates' constitutional rights are not withdrawn in the prison context is well established.[135] Moreover, the "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general applicability"[136] has been the applicable standard in prisoners' rights cases. In the instant case there was no

361 (Harlan, J., concurring). It is the second prong of this test that is currently recognized in fourth amendment jurisprudence as the effective *Katz* test.

128. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984).
129. *Id.* at 3201.
130. *Id.*
131. Schmerber v. California, 384 U.S. 757, 767 (1966).
132. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984).
133. *Id.* at 3201.
134. State v. Ellefson, 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976) (search by a detective, unrelated to jail staff, for purposes unrelated to jail security impermissible; for such an exploratory search a warrant or probable cause was necessary).
135. *See supra* notes 12-20 and accompanying text.
136. Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

substantive evidence offered that required the total negation of fourth amendment protections in the prison cell.

The Court asserted that "unfettered access"[137] to inmates' cells was required to insure prison security. Prior to *Hudson*, prison authorities had "unfettered access" to search inmates' cells for contraband or other legitimate penal objectives. Neither warrants, probable cause, nor inmate consent was required before such a search of a cell could be made.[138] Prison interests in "ferretting" out contraband of any type were more than adequately safeguarded by the minimal extent to which courts had extended fourth amendment protections into prison cells. What was prohibited were maliciously motivated searches or those that had no relation to legitimate penal objectives, such as security.[139]

In rejecting the analysis of the court of appeals, the *Hudson* Court stated that "[a] requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon."[140] The Court appears to have misinterpreted what the court of appeals held. Rather than "planned random searches",[141] the court of appeals remanded to determine whether there was "an established program of conducting random searches."[142] This distinction is significant. As the Court points out, "planned random searches" could be subject to decoding and anticipation by inmates, thus depriving prison authorities of an essential element of surprise. The court of appeals, however, also advocated the use of ran-

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

138. *See* Bell v. Wolfish, 441 U.S. 520, 557 (1979); United States v. Chamorro, 687 F.2d 1, 4 (1st Cir. 1982); Bonner v. Coughlin, 517 F.2d 1311, 1315 (7th Cir. 1975); Cook v. City of New York, 578 F. Supp. 179, 182 (S.D.N.Y. 1984); Beckett v. Powers, 494 F. Supp. 364, 365 (W.D. Wis. 1980); Moore v. People, 171 Colo. 338, 342, 467 P.2d 50, 52 (1970); People v. Elkins, 60 Ill. App. 3d 883, 885, 377 N.E.2d 569, 571 (1978). *But see* People v. Gibson, 1 PRISON L. REP. 254 (Cal. Super. Ct. 1972); People v. Trudeau, 385 Mich. 276, 187 N.W.2d 890 (1971); State v. Ellefson, 266 S.C. 494, 224 S.E.2d 666 (1976). Several commentators have advocated standards for prison searches that reflect the motive of the search. Law enforcement searches would require greater fourth amendment protection, whereas administrative searches (i.e., security, contraband) would require less. *See* Giannelli & Gilligan, *supra* note 77, at 1077-81; Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in our Prisons*, 21 BUFFALO L. REV. 669, 701 (1972).

139. *See* DiGuiseppe v. Ward, 698 F.2d 602 (2nd Cir. 1983); United States v. Chamorro, 687 F.2d 1, 5 (1st Cir. 1982); United States v. Vallez, 663 F.2d 403, 406 (9th Cir. 1981); Cook v. City of New York, 578 F. Supp. 179, 182 (S.D.N.Y. 1984); Stringer v. Thompson, 537 F. Supp. 133, 136 (N.D. Ill. 1982); Saunders v. Packel, 436 F. Supp. 618, 626 (E.D. Pa. 1977); Thornton v. Redman, 435 F. Supp. 876, 880 (D. Del. 1977); People v. Gibson, 1 PRISON L. REP. 254 (Cal. Super. Ct. 1972); State v. Ellefson, 266 S.C. 494, 501, 224 S.E.2d 666, 670 (1976).

140. Hudson v. Palmer, 104 S. Ct. 3194, 3201 (1984).

141. *Id.*

142. Palmer v. Hudson, 697 F.2d 1220, 1224 (4th Cir. 1983).

dom searches, even for individual shakedowns,[143] thus retaining the element of surprise. By attempting to ascertain whether there was an "established program" for random searches, the court of appeals was prohibiting discretionary (i.e., arbitrary) searches instituted at a guard's own behest. This interpretation is especially plausible in light of the evil that the court of appeals sought to thwart, namely harassment motivated searches.[144] Protection against arbitrary governmental searches is a fundamental value of fourth amendment jurisprudence.[145] With its decision in *Hudson*, the Supreme Court has left prison inmates without fourth amendment protections against potentially abusive, arbitrary searches initiated at a line guard's own discretion.[146] Despite the Court's assertion to the contrary, the eighth amendment's proscription against "cruel and unusual punishment" will not protect prison inmates against ignominous harassment searches.[147]

As has been its wont in fourth amendment cases recently,[148] the

143. The court stated: "We recognize that allowing the *prison authorities* to adopt a program of random individual searches may provide an increased opportunity for *prison officials* to abuse that power and utilize searches as a means of harassment; however, the device is of such obvious utility in achieving the goal of prison security that we do not think that the risk outweighs the benefit." *Id.* at 1224 (emphasis added).

144. *Id.*

145. *Id. See also* Schmerber v. California, 384 U.S. 757, 767 (1966).

146. That a prison guard would have too much discretionary latitude for searching is a serious problem. General warrants and their indiscriminate nature were one of the evils against which the fourth amendment was directed. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974). Removal of the fourth amendment from the prison context shields a significant amount of government activity from judicial review: "The question of what constitutes a covered 'search' or 'seizure' would and should be viewed with an appreciation that to exclude any particular police activity from coverage is essentially to exclude if from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner." *Id.* at 393. Tensions inherent in guard-inmate relations in the prison atmosphere could lead to misuse by a guard of his power of discretionary search. This authority should not be left unchecked by judicial review.

147. 104 S. Ct. 3194, 3202 (1984). It appears that the Court is less than candid in making this assertion, especially in light of the fact that the district court had previously found, and was upheld by the court of appeals, that the actions alleged in the instant case did "not constitute cruel and unusual punishment." *See* Palmer v. Hudson, 697 F.2d 1220, 1221 n.1 (4th Cir. 1983). Comment has also been made on the eighth amendment's variability of meaning, making it unreliable as a vindicator of prisoner liberty or privacy rights. *See* Giannelli & Gilligan, *supra* note 77 at 1052. The authors state that "[a]pparently few, if any, courts have actually invalidated a prison search as a violation of the cruel and unusual punishment clause." *Id.* at 1069 n.160.

148. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (lawful stop of vehicle justified by probable cause sanctions search of entire vehicle and containers therein that might harbor the item sought); New York v. Belton, 453 U.S. 454 (1981) (lawful custodial arrest of automobile occupant justifies search of passenger compart-

Court in *Hudson* pronounced a bright-line rule.[149] Such rules, while providing a clearer guide to law enforcement officials, often result in unfair treatment for cases that fall within the periphery of the rule.[150] One commentator has asserted that the traditional case-by-case adjudication communicates sufficiently the standards, values, and guides to be used in search and seizure situations.[151]

Professor LaFave, an advocate of the clarity and guidance for law enforcement officials that "bright-line" rules instill, proposed a formula for determining whether a "bright-line" rule should be implemented.[152] By the criteria set out in Professor LaFave's formula it appears that the Court was overreaching in enunciating a "bright-line" rule in *Hudson*. Arguably, answers to three out of the four questions posed by the formula would have counseled against creation of a

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ment of automobile and all containers therein); Dunaway v. New York, 442 U.S. 200 (1979) ("detention for custodial interrogation" requires probable cause under the fourth amendment); United States v. Robinson, 414 U.S. 218 (1973) (full search incident to custodial arrest is an exception to the fourth amendment warrant requirement and is reasonable). *See also* Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982).

149. 104 S. Ct. 3194, 3198 (1984). This "bright-line" rule, "that prisoners have no legitimate expectations of privacy in their individual cells . . . [entitling] them to Fourth Amendment protection," was advocated by the Petitioner.

150. *See* Alschuler, *supra* note 148, at 231. The author rejects the use of "bright-line" rules in the fourth amendment area; injustice is too frequent and the boundaries of even a "bright-line" rule can be difficult to apply. The author sets out two types of bright-line rules: 1) where the search and seizure will be unconstitutional, though, if viewed in isolation it would be reasonable (i.e., where an entire class of police actions are deemed unfair; and 2) upholding police acts that might be unconstitutional if viewed in isolation. This type of rule expands police discretion (*Hudson* employs this type of rule). Interestingly it is noted that bright-line rules are employed more often in expanding search powers of police rather than in curtailing these powers; witness *Ross, Belton*, and now *Hudson*.

151. *See* Alschuler, *supra* note 148, at 236. This author asserts also that courts should not be involved in developing "bright-lines" for the sake of administrative convenience. The judicial function of deciding the particular case at hand is not well suited for creation of prospective, prophylactic "bright-line" rules. Legislatures are the more appropriate forum for such endeavors. Concomitantly, the notion that an individual should suffer an injustice for the sake of judicial administrative convenience is one difficult to reconcile with the precept of fairness.

152. *See* LaFave, *supra* note 148. This formula is composed of four questions:

> 1) Does the rule have clear and certain boundaries; so that it in fact makes case-by-case evaluation and adjudication unnecessary?
>
> 2) Does it produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle were practical?
>
> 3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable?
>
> 4) Is it not readily subject to manipulation and abuse?

*Id.* at 325-26.

"bright-line" rule by the *Hudson* Court. Results from the *Hudson* "bright-line" rule are not likely to approximate "those which would be obtained if accurate case-by-case application of the underlying principle were practical."[153] Though prior to *Hudson* the success rate of such suits was arguably not high, total negation of fourth amendment protections in this area transforms once potentially successful suits into unmitigated failures. Such failure does not approximate potential success even if such success came at a minimal rate.

No evidence has been presented to date demonstrating that fourth amendment prisoner rights cases had proved meddlesome for lower courts to adjudicate. Deference to penological authorities was a guide to court decisons; abdication of judicial review of fundamental constitutional rights was not. Case-by-case adjudication proved "workable" and a "bright-line" rule seemed unnecessary. Finally, it appears that such a "bright-line" rule is "subject to manipulation and abuse."[154] Without judicial review of search procedures within corrections institutions the likelihood for harassment searches is potentially increased. *Hudson* itself is a case in point where an inmate alleged that a search was motivated solely to harass. As an admonishment Professor LaFave wrote: "In particular, it is necessary for courts to resist the temptation to draw new, supposedly 'bright,' lines when in fact existing doctrine is not causing serious problems in day-to-day practice."[155] In *Hudson v. Palmer*, the Supreme Court neglected to heed this admonition.

As was stated previously, the cavalier manner in which the Court resolved the *Katz* balancing test against the privacy interests of prison inmates is troubling. The doctrine, "that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell,"[156] while plausible, is not substantiated by any objective criteria. Mechanics of prison security and reasons why a limited fourth amendment right of privacy in a prison cell would be "incompatible" therewith were never broached by the Court.[157] The objective prong of the *Katz* test, as applied by the *Hud-*

153. *Id.*
154. *Id.*
155. *Id.* at 333. *See also* New York v. Belton, 453 U.S. 454, 469 (1981) (Brennan, J., dissenting) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.") (citing Mincey v. Arizona, 437 U.S. 385, 393 (1978)).
156. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984).
157. *See* Giannelli & Gilligan, *supra* note 77, at 1066-1070. These commentators proposed a fourth amendment model for application in prisons. Traditional fourth amendment values, such as dignity, privacy, personal security, and property would still be retained as if the individual were free. The state interest, however, would change. A balancing process would determine the scope of fourth amendment protection retained by the inmate. The objective (i.e., societal) prong of the balancing test would require principled analysis, not mere uttering of shib-

*son* Court, displays few characteristics of objectivity at all.[158] Factors that might objectively indicate that inmates do not retain privacy interest are noticeably absent.[159] Merely citing statistical data concerning violence in prison or the disreputable character of prison inhabitants[160] is an insufficient basis for the total withdrawal of a fun-

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bolethic incantations. As premised in Coffin v. Reichard, 143 F.2d 443, 445 (6th cir. 1944), inmates would retain all rights except those expressly or necessarily lost as a result of confinement. In Price v. Johnson, 334 U.S. 266, 285 (1948), the Court maintained that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Though retraction, withdrawal, and limitation of rights due to incarceration are well-nigh inevitable, the basis for such actions should be actual, rather than fanciful, especially in the case of fundamental constitutional rights that demark the minimum standard of treatment that must be accorded to individuals by the states.

158. Justice Stevens makes this point in his dissenting opinion in *Hudson*: "Its perception of what society is prepared to recognize as reasonable is not based on any empirical data; rather it merely reflects the perception of the four Justices who have joined the opinion that THE CHIEF JUSTICE has authored." Hudson v. Palmer, 104 S. Ct. 3194, 3212 (1984) (Stevens, J., dissenting). Some commentators have expressed similar views. *See, e.g.*, Amsterdam, *supra* note 146, at 403 (interests deserving of fourth amendment protections are value judgments determined by the Court); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 983 (1977) (balancing tests are influenced by who decides the interests and factors to be weighted; selecting the interests can predetermine the result).

159. In Rakas v. Illinois, 439 U.S. 128 (1978) the Court stated:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. . . . Expectations of privacy protected by Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or the invasion of such interest. These ideas were rejected both in *Jones*, and *Katz*. But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.

*Id.* at 144 n.12. In *Rakas*, the Court held that since the petitioner asserted no possessory interest in items seized during an illegal search, he lacked the requisite standing to claim a violation of his fourth amendment right. *See also* Smith v. Maryland, 442 U.S. 735, 740-41 n.5 (1979) ("In determining whether a 'legitimate expecation of privacy' existed in such cases, a normative inquiry would be proper."). *See generally* Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L.L. REV. 1 (1981). These commentators argue that state and federal law should be the outside sources utilized for determining legitimate expectations of privacy, thus allowing state flexibility in expanding the scope of fourth amendment protection.

160. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984). From the tone of its opinion the Court seems to advocate a retributive view of penology rather than a rehabilitative view. Many states, however, have expressed rehabilitation and resocialization as goals of their correctional institutions. *See, e.g.*, ILL. CONST. art. 8, § 14; IND. CONST. art. 1, § 18; MONT. CONST. art II, § 28; N.H. CONST. pt. 1, art. 1; N.C. CONST. art. XI, § 2; ORE. CONST. art. 1, § 15; WYO. CONST. art. 1, § 15.

damental constitutional right. Vacuous balancing tests offer little in the way of principled guidance for fourth amendment jurisprudence.[161]

In *Hudson*, the Court also determined that any item an inmate might possess is also bereft of fourth amendment protections.[162] The fourth amendment by definition protects possessory as well as privacy interests.[163] That the Court would deprive an inmate of any fourth amendment interest in items legitimately possessed is puzzling.[164]

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161. *See generally* Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335 (1978). This commentator propounds the general thesis that the Burger Court has eradicated the prexisting fourth amendment structure, having instead moved toward a standard of "fundamental fairness," a due process standard by which the states have always been bound for adjudicating fourth amendment issues. Using such a standard, analysis for arriving at fourth amendment privacy principles is vague or non-existent; emphasis is placed on the government reason for an invasion rather than on the fact of the invasion itself. This approach results in less concern for the individual liberties, a dramatic switch from the Warren Court era. The *Katz* decision, once deemed a vehicle for expanding fourth amendment protections, is instead used to curtail fourth amendment protections. Three basic reasons are advanced for the Burger Court's approach: 1) less concern with the Court's function as a protector of fundamental liberties; 2) rising crime rates prompted the Court to distinguish between constitutional guarantees necessary for accurate fact-finding and those not so required (the fourth amendment fits the latter category); and 3) an increased emphasis on the federalism concept. *See also* Lewis, *Hail The State*, N.Y. Times, July 9, 1984, at A19, col. 5. Interestingly, the Court's decision in *Hudson* substantiates much of the thesis advocated by Professor Yackle. In *Hudson*, the Court engages a vague balancing test that places emphasis on the reason for the search, i.e., prison security, rather than the individual liberties, i.e., personal privacy, that are being invaded. Only searches constituting violations of the eighth amendment, i.e., a violation of fundamental fairness, would be deemed unconstitutional and actionable.

162. Hudson v. Palmer, 104 S. Ct. 3194, 3201 n.8 (1984) ("Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests.")

163. Katz v. United States, 389 U.S. 437, 353 (1967), held that the "constitutionally protected area" test was no longer "controlling" for the purposes of determining whether the fourth amendment applied to a given situation. That the "legitimate expectations of privacy" test has totally displaced the "areas" test (based on property concepts) has not been accepted. *See* Rakas v. Illinois, 439 U.S. 128, 143-44, n.12 (1978). In fact, some courts have used the "areas test" to deny inmate claims to fourth amendment protections. *See* United States v. Kelly, 393 F. Supp. 755 (W.D. Okla. 1975); Hoitt v. Vitek, 361 F. Supp. 1238 (D.N.H. 1973); Commonwealth v. DiMarzo, 364 Mass. 669, 308 N.E.2d 538 (1974). Many commentators have asserted that the *Katz* privacy test and the property concepts of the "areas" test are supplementary and expand fourth amendment protections. *See* Amsterdam, *supra* note 146, at 385; Yackle, *supra* note 161, at 369-72; Note, *supra* note 158, at 970; Note, *A Reconsideration of Katz Expectation of Privacy Test*, 76 MICH. L.REV. 154, 181 (1977) [hereinafter cited as Note, *A Reconsideration*].

164. Justice Stevens, in dissent, is equally incredulous that the majority's opinion goes so far. Justice Stevens stated that Palmer legitimately possessed the items seized as a matter of state law (penal regulations sanction this possession), that no "penological justification" could legitimize the seizure in this case, and viewed such

Though the Court has previously acknowledged a distinction for purposes of fourth amendment analysis when the item seized implicates first amendment interests,[165] that distinction is lost in *Hudson*. The Court is mollified by the fact that Palmer has a state tort remedy to compensate for the destroyed property.[166] But can mere monetary compensation adequately replace "personal letters, snapshots of a family, . . . a diary, . . . or even a Bible . . . ?"[167] Clearly not.

Incarceration is a degrading and depersonalizing process.[168] Prisons are rigidly structured for maximum efficiency in sustaining and maintaining their human wares. Privacy is reduced dramatically by the necessity of this process. What limited degree of privacy does remain should be protected for the inmate's physical and psychological well-being.[169] The *Hudson* Court failed, however, to take account of this issue.

The *Hudson* Court approached the concept of privacy in a stinted fashion. Privacy was defined as a visual, physical concept.[170] But it entails much more than that.[171] Privacy encompasses thoughts, feel-

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arbitrary seizures as violative of the eighth amendment. Hudson v. Palmer, 104 S. Ct. 3194, 3208-11 (1984) (Stevens, J., dissenting).

165. *See* Rhoden v. Kentucky, 413 U.S. 496, 504 (1973) (film seized incident to arrest violated the fourth amendment; when first amendment interests are implicated a higher standard, of reasonableness is required for seizures.); United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982) (through the court premised its ruling on the fourth amendment, first amendment interests were involved). *See generally* Note, *Searches of Private Papers: Incorporating First Amendment Principles Into the Determination of Objective Reasonableness*, 51 FORD. L.REV. 967 (1983). In *Hudson*, the items allegedly destroyed included letters and legal documents. Hudson v. Palmer, 104 S. Ct. 3194, 3209 (1984).

166. Hudson v. Palmer, 104 S. Ct. 3194, 3201, n.8 (1984).

167. *Id.* at 3208 (Stevens, J., dissenting).

168. *See generally* E. GOFFMAN, ASYLUMS 1-124 (1961); Schwartz, *Deprivation of Privacy As A "Functional Prerequisite": The Case of the Prison*, 63 J. OF CRIM. L. AND CRIMINOLOGY 229 (1972) (prison structure and program designed toward depersonalization of inmates to enhance efficient management of prison population); Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U. L.REV. 365 (1971) (prison conditions, from structure to personnel, impede rehabilitative goal of incarceration).

169. This point is well made by Justice Stevens in his dissenting opinion when he states: "[m]easured by the conditions that prevail in a free society, neither the possessions nor the slight residuum of privacy that a prison inmate can retain in his cell, can have more than a minimal value. From the standpoint of the prisoner, however, that trivial residuum may mark the difference between slavery and humanity." Hudson v. Palmer, 104 S. Ct. 3194, 3208 (1984) (Stevens, J., dissenting).

170. The Court states: "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to insure institutional security and internal order." *Id.* at 3201.

171. Curiously, the Chief Justice recognized this fact in Houchins v. KQED, 438 U.S. 1 (1978), where he wrote:

ings, and ideas, all of which are capable of being collected into journals or diaries. Sustaining contact with the outside world also implicates the concept of privacy.[172] Many commentators have linked privacy with concepts of inherent individual dignity.[173] Privacy has been conceptualized as control of information about oneself,[174] control over who can sense us,[175] and as "the rational context for a number of our most significant ends such as love, trust and friendship, respect and self-respect."[176] Whatever its definitional contours may be, privacy, and its alter ego, dignity, are crucial elements for personal growth and self-respect. This applies to incarcerated individuals as well as the free.

Though the Supreme Court does not often incorporate sociological or empirical data when formulating its opinions,[177] it does so on occasion.[178] The privacy issue in *Hudson v. Palmer* was one occasion in which evaluation of sociological and psychological data could have performed a significant and useful function. Former Chief Justice Charles E. Hughes recognized the usefulness of such information long

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> It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights. . . . Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in zoo to be filmed and photographed at will by the public or media reporters, however "educational" the process may be for others.

*Id.* at 5 n.2 (plurality opinion) (citation omitted). It was not merely the physical privacy that Chief Justice Burger sought to protect; such institutions are operated as to make physical privacy non-existent. It was the dignity of the individual that the Chief Justice sought to protect. That is why it is doubly curious that in *Hudson* he has ceased his efforts to protect the privacy and dignity of prison inmates.

172. *See* Homer, *Inmate-Family Ties: Desirable but Difficult*, 43 FED. PROBATION 47 (1979) (studies show better success rate on probation for those who maintained strong family ties during incarceration). Knowledge by an inmate that any correspondence with the outside world is subject to arbitrary searches instigated at the discretion of a guard could chill the desire to correspond. This lack of correspondence in turn might stymie effective re-entry into society.

173. *See, e.g.*, Beaney, *The Right To Privacy and American Law*, 31 LAW AND CONTEMP. PROBS. 253 (1966); Laufe & Wolfe, *Privacy as a Concept and a Social Issue: A Multidimensional Development Theory*, 33 J. OF SOCIAL ISSUES 22 (1977).

174. Levin & Askin, *Privacy in the Courts: Law and Social Reality*, 32 J. OF SOCIAL ISSUES 138 (1977).

175. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

176. *Id.* at 385-86 (quoting FRIED, AN ANATOMY OF VALUES 137-38 (1970)).

177. *See, e.g.*, Haney, *Psychology and Legal Change*, 4 LAW AND HUMAN BEHAVIOR 147 (1980); Melton, *Minors and Privacy, Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455 (1983).

178. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978) (studies used for determining that five member juries were unconstitutional); Terry v. Ohio, 392 U.S. 1 (1963) (Court took cognizance of the potential impact the "stop and frisk" rule would have on communities with tense relations with the police); Brown v. Board of Education, 347 U.S. 483 (1954) (Court relied on sociological data to support its decision that school segregation was unconstitutional).

ago.[179]

In *Hudson*, the Court rested its decision on the security interests of the correctional authorities. Various studies have shown that increases in prison crowding have deleterious effects on prisoners' physical and psychological well-being.[180] Overcrowding can also lead to increased aggression and assaults within the prison community.[181] An analogy can be drawn from these studies to the situation the Court dealt with in *Hudson*. In each case there is a loss of control over privacy and personal space. Inmates are helpless to prevent these intrusions. Vulnerability to indiscriminate invasion is increased. This loss is more pronounced in *Hudson* in that without any fourth amendment right of privacy, any aspect of an inmate's life, from memory-filled possessions to intimate writings, is subject to indiscriminate searches and seizures by penal authorities. There is no recourse from such invasions when there is no right upon which to base a claim. State tort remedies,[182] aimed at compensating an inmate for the market value or replacement cost of destroyed property, are clearly inadequate to compensate for the emotional value often attached to property or for the perceived privacy invasion itself. These values are especially important for inmates subject to the rigors and starkness of institutional life.

The decision in *Hudson* neglects to recognize these needs of inmates. It is arguable that the *Hudson* decision, rather than enhancing prison security, may actually increase aggression and violence within the prison environment.[183] Psychologist Philip Zimbardo has theorized that:

> When a dehumanized person has become an object, then it may be that the only means he can use to get anyone to take him seriously and respond to him

179. Haney, *Psychology and Legal Change*, 4 LAW AND HUMAN BEHAVIOR 149 (1980) (quoting C. HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION METHODS AND ACHIEVEMENTS: AN INTERPRETATION 165-66 (1928) ("Protection both of the rights of the individual and those of society rest not so often on formulas . . . but on correct appreciation of social conditions and a true appraisal of the actual effect of the conduct.")

180. Altman, *Privacy: A Conceptual Analysis*, 8 ENVIRON. & BEHAVIOR 7 (1976) (violations of personal space against the desire of the individual leads to tension, conflict, or discomfort); D'Atri, *Psychophysiological Responses to Crowding*, 8 ENVIRON. & BEHAVIOR 237 (1976); Comment, *Crowded Prisons: A Review of Psychological and Environmental Effects*, 3 LAW AND HUMAN BEHAVIOR 217 (1979) (when physical density and spatial configurations prevent privacy or adequate personal space males are particularly stressed; this stress often translates into increased aggression).

181. *See* Nacci, Teitelbaum, & Prather, *Population Density and Inmate Misconduct Rates in Federal Prisons*, 41 FED. PROBATION 26 (1977) (increased crowding has a correspondent increase in prison misconduct); Comment, *supra* note 180, at 220.

182. Hudson v. Palmer, 104 S. Ct. 3194, 3201 n.8 (1984).

183. An example of the potential disruption is illustrated in O'Connor v. Keller, 510 F. Supp. 1359 (D. Md. 1981).

> in an individuated way is through violence. . . . In one sense, violence and destruction transform a passive, controlled object into an active, controlling person. When driven to the wall by forces of deindividuation, the individual must assert his own force or become indistinguishable from the wall. Conditions which foster deindividuation make each of us a potential assassin.[184]

The prison environment is geared toward creating human objects rather than human individuals. This has been the topic of discussion of many authors.[185] It would be ironic indeed if the *Hudson* decision exacerbated, rather than improved, prison conditions and their concomitant security difficulties.[186]

Another issue for consideration is the basic human dignity that inheres in every individual. Powerful arguments can be made for the right of each individual, whether an inmate or a free citizen, to be treated with basic dignity and respect.[187] Commentators have advocated the necessity of affording to every individual a sanctuary of privacy that would protect the uniqueness of each personality from arbitrary intrusion by the State. These commentators have argued that the fourth amendment fulfills such a role.[188] Many organiza-

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184. Zimbardo, *The Human Choice: Individuation, Reason and Order versus Deindividuation Impulse and Chaos* 1969 NEBRASKA SYMPOSIUM ON MOTIVATION 204. Zimbardo defines the term "deindividuation" as:

> a complex, hypothesized process in which a series of antecedent social conditions lead to changes in perception of self and others, and thereby to a lowered threshold of normally restrained behavior. Under appropriate conditions what results is the "release" of behavior in violation of established norms of appropriateness. Such conditions permit overt expression of antisocial behavior, characterized as selfish, greedy, power-seeking hostile, lustful, and destructive."

*Id.* at 251. Zimbardo also spoke to the issue of dehumanization. This phenomenon occurs when people view others as less than human and treat them accordingly. He states that "[d]ehumanization is more probable whenever a numerically large, continuous flow of people has to be managed efficiently and 'processed'." *Id.* at 296. That prisoners are processed in such a manner is well documented. *See infra* note 168. The removal of fundamental rights from prisoners reinforces the view some guards possess, that an inmate is an inferior type of being. *See* Jacobs & Retsky, *Prison Guard*, 4 URBAN LIFE 5 (1975). Abuse of inmates can only increase without substantive rights for them, and as the rash of prison riots have pointed out, abusive behavior will not be tolerated without tragic reprisals.

185. *See* E. GOFFMAN, *supra* note 168, at 1-124 (1961); Schwartz, *supra* note 168, at 229; Singer, *supra* note 168, at 365.

186. *See* Schwartz, *supra* note 168 at 239. Schwartz theorizes that increased respect for the dignity and privacy of inmates will result in increased trust between inmates and prison authorities. Hostility will potentially abate thereby enhancing the overall security of the institution.

187. *See generally* Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOWARD L.J. 145 (1984). Paust argues that the concept of human dignity has been used by the Supreme Court with the explicit or implied expectation that it is a fundamental constitutional right.

188. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974)

tions[189] and at least one state[190] have recognized an inmate's right to such treatment and have sought to protect this right. The Supreme Court, however, as evidenced by its *Hudson* decision, is retreating from its traditional station as the protector of human liberty and dignity, especially of the politically vulnerable and impotent classes.

It is not to be gainsaid that devising fourth amendment standards for application by law enforcement officials is an arduous endeavor. This task is even more difficult in the area of corrections institutions. The state's interest in maintaining security is substantial. But inmates' interests in personal privacy and property are also substantial and should be accounted for; after all, inmates are human beings and possess as much an affinity for privacy and property as any free citizen. Unjustified invasions of privacy or deprivations of property are bound to anger inmates as well as free citizens.

On this basis, the *Hudson* Court's holding that the fourth amendment does not apply in the prison cell appears to be unwise. A better rule for this difficult area was advocated by the various courts of appeal and lower federal and state courts. The basic premise of this rule was that the challenged search be reasonable in light of all of the circumstances, (i.e., that the search be related in some way to a legitimate penological goal). This requirement of reasonableness balanced the various interests concerned. On the one hand, penal authorities had wide latitude to search the cells and possessions of inmates. Neither warrants nor probable cause were required to conduct such searches. The only requirement was that the search be related to a legitimate penal interest, such as security or contraband control. In order to determine whether a search was related to a legitimate penal interest the courts would weigh various factors such as the motive for the search, the manner and scope of the search, the institution in which the search took place (i.e., whether the prison was maximum or minimum security and the concomitant fluctuating state interest), and whether the search was guided by prison regulations or orders from a

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(Weinreb asserts that the fourth amendment protects a privacy of presence that is designed to protect personal autonomy); Note, *supra* note 158, at 987. *See generally* Note, *A Reconsideration*, *supra* note 163.

189. A.B.A. Joint Committee on the Legal Status of Prisoners, *Tentative Draft of Standards Relating To the Legal Status of Prisoners, Section 6.6., Rights of Privacy*, 14 AM. CRIM. L. RPTR. No. 3 (1977) (*as printed* in J. GOBERT & COHN, RIGHTS OF PRISONERS 441 (1981)); International Covenant of Civil and Political Rights, Part III, art. 7 & 10, *cited in* Sterling v. Cupp, 290 Or. 611, 622 n.21, 625 P.2d 123, 131 n.21 (1981).

190. IND. CODE ANN. § 11-11-2-3 (Burns 1981). In light of the *Hudson* opinion state courts will be increasingly looked upon for protection of constitutional rights based on state constitutions. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (advocating increased reliance on state courts and constitutions as bulwarks against unconstitutional deprivations).

superior officer. These standards appear to have been measures to proscribe arbitrary and abusive searches instituted at the caprice of any corrections officer.

On the other hand, inmates' interests in privacy and personal property, though minimal, were protected against arbitrary and unreasonable searches. Basic elements of dignity and privacy were constitutionally maintained for the inmate. Inmate interests did not interfere with legitimate penal objectives.

In addition, it appears that the benefits of the *Hudson* rule allowing arbitrary searches of prison cells are tangential in comparison with the potential negative implications. Tensions between corrections officials and inmates can arguably increase thus imperiling rather than enhancing security.

## IV. CONCLUSION

The Supreme Court in *Hudson v. Palmer* held that the fourth amendment's protection of individual privacy and property does not apply to prison inmates. While the Court premised its decision on the exigencies of prison security, it is arguable that the rule will exacerbate rather than enhance this security interest. By needlessly establishing this "bright-line" rule the Court rejected near unanimous approval by lower courts of a limited fourth amendment right for inmates. The Court is further retreating from its honored position as the ultimate protector of the rights and dignity of society's vulnerable, down-trodden classes. Arguably, even for prisoners, "[t]here's something sad about being a man, but it is a proud thing too."[191] In its rush to create "bright-line" rules for administration of fourth amendment jurisprudence, the Court, regretfully, has blinded itself to the sadness and pride of being human.

*Christopher McVeigh, '85*

191. S. BENET, *The Devil and Daniel Webster*, in BEST SELECTED WORKS OF STEPHEN VINCENT BENET 42 (1942).