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### Hudson v. Palmer: Throwing Away the Keys to Prisoners' Privacy and Due Process Rights

Robert M. Hartmann

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# HUDSON v. PALMER: THROWING AWAY THE KEYS TO PRISONERS' PRIVACY AND DUE PROCESS RIGHTS

## I. INTRODUCTION

"There is no iron curtain drawn between the Constitution and the prisons of this country."<sup>1</sup> Nevertheless, prison inmates have long been considered to possess fewer rights than the average citizen. In recent years, the United States Supreme Court has granted prison inmates limited constitutional rights including: (1) the right to be free from racial discrimination;<sup>2</sup> (2) the right to petition the courts for redress of their grievances;<sup>3</sup> (3) the right to freedom of religion;<sup>4</sup> (4) the right to due process;<sup>5</sup> and (5) the right not to be subjected to cruel and unusual punishment.<sup>6</sup>

*Hudson v. Palmer*<sup>7</sup> presented the Court with the opportunity to add the right of privacy to these rights cited by Chief Justice Burger in *Wolff v. McDonnell*.<sup>8</sup> The *Hudson* Court, however, rejected Palmer's claim

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1. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). For a discussion of *Wolff*, see *infra* note 5.

2. *Hudson v. Palmer*, 104 S. Ct. 3194, 3198 (1984) (citing *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam) (Alabama statutes requiring racial segregation in Alabama prisons found unconstitutional)).

3. *Id.* (citing *Johnson v. Avery*, 393 U.S. 483, 489-90 (1969) (Tennessee prison regulation prohibiting prisoners from assisting other inmates in preparation of writs found unconstitutional because it violated inmates' right to petition for federal habeas corpus relief)).

4. *Id.* (citing *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (prison administration's prohibition of Buddhist inmate's use of prison chapel, while not prohibiting other inmates with more conventional religious beliefs from using the chapel, found unconstitutional)).

5. *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974)). In *Wolff*, the prisoner brought a 42 U.S.C. § 1983 action alleging prison disciplinary proceedings violated inmates' due process rights. The Court found that to satisfy due process, prison disciplinary proceedings must provide: (1) advance written notice of the charges against an inmate; (2) a written statement by the factfinders identifying the evidence relied upon to invoke disciplinary action; and (3) the opportunity for an inmate to call witnesses and present evidence in his defense. Because these rights were not granted in *Wolff*, the inmates' right to due process was violated. *Wolff*, 418 U.S. at 558-59.

6. *Hudson v. Palmer*, 104 S. Ct. 3194, 3198 (1984) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (deliberate indifference of prison personnel in treatment of inmate's injury violates eighth amendment protection against cruel and unusual punishment and is actionable under § 1983 (1976))).

7. 104 S. Ct. 3194 (1984).

8. 418 U.S. 539 (1974).

that prisoners are entitled to a right of privacy.<sup>9</sup> Due to the need for institutional security, the Court found that inmates have no fourth amendment right to be free from unreasonable searches.<sup>10</sup> Additionally, the Court held that the intentional deprivation of an inmate's property, where no pre-deprivation hearing took place, did not violate the due process clause of the fourteenth amendment, since the state provided a "meaningful"<sup>11</sup> remedy to the prisoner.<sup>12</sup>

With *Hudson*, the Burger Court has taken another step in narrowing the scope of the fourth and fourteenth amendments' privacy and due process protections.<sup>13</sup> This Note examines the Court's application of a security-privacy balancing test to the circumstances surrounding the search of a prisoner's cell. The security-privacy balancing test used in *Hudson* will result in law enforcement officials interpreting the due process clause of the fourteenth amendment more narrowly.<sup>14</sup> This Note also examines whether *Parratt v. Taylor*,<sup>15</sup> where the Court held that a negligent deprivation of an inmate's property did not violate the due process clause of the fourteenth amendment provided that meaningful state remedies were available to the inmate, is applicable to the intentional deprivation suffered by Palmer.

This Note concludes that the Court erred in finding that inmates are not protected from unreasonable searches and seizures by the fourth and fourteenth amendments.

## II. STATEMENT OF CASE

Russell T. Palmer was incarcerated at the Bland Correctional Center in Bland, Virginia after a conviction of forgery, uttering, grand larceny and bank robbery.<sup>16</sup> On September 16, 1981, petitioner Hudson, along with other prison guards, conducted a "shakedown" search of

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9. *Hudson*, 104 S. Ct. at 3202.

10. *Id.* at 3201.

11. *Id.* at 3204-05. A "meaningful" remedy was defined by the Court as one that provides an inmate with fair opportunity to present his claim of property deprivation before a state tribunal. *Id.* at 3203.

12. *Id.* For a discussion of the adequacy of Virginia remedies, see *infra* notes 75-83 and accompanying text.

13. See *infra* notes 197-99 & 202-29 and accompanying text. For pertinent text of the fourth amendment, see *infra* note 20. For pertinent text of the fourteenth amendment, see *infra* note 21.

14. See *infra* notes 229-32 and accompanying text. For pertinent text of the fourteenth amendment, see *infra* note 21.

15. 451 U.S. 527 (1981). For a full discussion of *Parratt*, see *infra* note 203-06 and accompanying text.

16. *Hudson v. Palmer*, 104 S. Ct. 3194, 3196 (1984).

Palmer's cell.<sup>17</sup> The search was not part of a pre-authorized search program. The officers discovered, seized and destroyed a quantity of Palmer's noncontraband personal property, including legal materials and letters.<sup>18</sup>

Palmer subsequently brought an action against Hudson in the United States District Court for the District of Virginia pursuant to 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .<sup>19</sup>

Palmer asserted two claims. First, he argued that the search by Hudson, conducted solely to harass and humiliate Palmer, violated his fourth amendment right to be free from unreasonable searches and seizures.<sup>20</sup> Additionally, Palmer argued that Hudson's seizure and destruction of his noncontraband personal property, done without the prior approval of the prison administration, constituted a violation of Palmer's fourteenth amendment right not to be deprived of personal property without due process of law.<sup>21</sup>

The district court granted summary judgment in Hudson's favor. Having acknowledged that the search was conducted solely to harass and humiliate Palmer, and that the status of the property destroyed was non-

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17. *Id.* A "shakedown" search involves a thorough, often violent search of an inmate's cell, usually for contraband. Commonly, a prisoner's possessions may be littered on the jail floor, and his mattress may be ripped during the search.

18. *Id.* at 3208. Contraband is an illegal object or substance. Under no authority may it be argued that Palmer's letters and legal materials were contraband. See *infra* notes 130-32 and accompanying text.

19. 42 U.S.C. § 1983 (1976). Palmer argued that the violation of his right to be free from unreasonable searches and seizures pursuant to the fourth amendment and his right not to be deprived of his property without due process of law pursuant to the fourteenth amendment could be remedied by application of § 1983. *Hudson*, 104 S. Ct. at 3197.

20. *Hudson*, 104 S. Ct. at 3198. The fourth amendment provides, in pertinent part, that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . but upon probable cause. . . ." U.S. CONST. amend. IV. Palmer's claim was based on Hudson's motives for the search, which Palmer argued were based not on probable cause, but rather on Hudson's desire to harass and humiliate Palmer. *Hudson*, 104 S. Ct. at 3197.

21. *Hudson*, 104 S. Ct. at 3197. The fifth amendment provides, in pertinent part, that "any State [shall not] deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. Palmer contended that the prison administration should have conducted a pre-deprivation hearing in order to allow him the right to answer allegations concerning contraband in his cell. *Hudson*, 104 S. Ct. at 3204.

contraband,<sup>22</sup> the court nevertheless entered summary judgment against Palmer.<sup>23</sup> Additionally, the court found that the destruction of Palmer's property did not violate the fourteenth amendment due process clause because Virginia provided adequate tort remedies to redress the deprivation.<sup>24</sup>

The Fourth Circuit reversed in part, affirmed in part, and remanded for further proceedings.<sup>25</sup> The Fourth Circuit reversed the district court's finding as to Palmer's fourth amendment claim. Having found that inmates enjoy a "limited privacy right" in their cells against searches conducted solely to harass or humiliate,<sup>26</sup> the court concluded that summary judgment was inappropriate and remanded the case to the district court to determine the cause of the search.<sup>27</sup>

The Fourth Circuit affirmed the district court's finding that Palmer's fourteenth amendment due process right was not violated.<sup>28</sup> The court acknowledged that the logic of *Parratt v. Taylor*<sup>29</sup> applied to intentional as well as negligent deprivations of an inmate's property<sup>30</sup> where adequate post-deprivation remedies were available to the inmate.<sup>31</sup>

The Supreme Court granted Hudson's petition for a writ of certio-

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22. *Hudson*, 104 S. Ct. at 3197.

23. *Id.* As to the fourth amendment claim, Palmer acknowledged that had his case involved contraband rather than legal property, the analysis would have been different. In such a case, a guard would likely have preestablished authority to seize the contraband. Moreover, the prisoner's legitimate expectation of privacy would have been absent whereas the government's interest in immediate seizure might be strong. Brief for Respondent and Cross-Petitioner at 7 n.5, *Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

24. *Hudson*, 104 S. Ct. at 3197. See VA. CODE § 8.01-195.1 et seq. (Supp. 1985) for Virginia remedies.

25. *Hudson*, 104 S. Ct. at 3197 (citing *Palmer v. Hudson*, 697 F.2d 1220, 1220 (4th Cir. 1983)). To date, the Fourth Circuit has not reconsidered the issues remanded to it by the Supreme Court.

26. *Palmer*, 697 F.2d at 1225. The court reasoned that since the primary purpose of the fourth and fourteenth amendments is to provide all citizens, even those in prison, the freedom from unreasonable searches and seizures, Palmer enjoyed a limited privacy right against the type of search conducted by Hudson. *Id.* The court implied that had Hudson's "shakedown" search been conducted pursuant to a legitimate program authorizing random searches of inmates' cells, it may have reached the opposite conclusion. *Id.* at 1224-25.

27. *Palmer*, 697 F.2d at 1225. See also *Hudson*, 104 S. Ct. at 3198.

28. *Palmer*, 697 F.2d at 1223.

29. 451 U.S. at 527 (1981). For a full discussion of *Parratt*, see *infra* notes 203-06 and accompanying text.

30. *Palmer*, 697 F.2d at 1223. "[O]nce it is assumed that a postdeprivation remedy can cure an unintentional but negligent act causing injury, inflicted by a state agent which is unamenable to prior review, then that principle applies as well to random and unauthorized intentional acts." *Id.* The court reasoned that there was no way for a prison administration to predict when its guards might conduct "personal vendettas" against prisoners. Thus, the only practical mechanism to prevent seizures of property was to punish guards after the seizure. *Id.*

31. *Id.* See also *Hudson*, 104 S. Ct. at 3197. The court of appeals did not discuss the

rari and affirmed the district court's finding for Hudson on both the fourth and fourteenth amendment claims.<sup>32</sup>

### III. REASONING OF THE COURT

#### A. *The Plurality Opinion*

##### 1. Fourth amendment claim

In *Hudson v. Palmer*, the Court began its discussion by addressing the issue of constitutional limitations of rights granted to inmates. The Court stated that while prisoners retain "many protections of the Constitution, it is also clear that imprisonment carries with it the circumscription or loss of many significant rights."<sup>33</sup> Two reasons were cited by the Court. First, the curtailment of rights may be necessary to accommodate a myriad of "institutional needs and objectives,"<sup>34</sup> chief among which is internal security.<sup>35</sup> Second, restrictions on an inmate's rights serve "as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction."<sup>36</sup>

The Court then addressed the question of privacy. To determine whether Palmer enjoyed the fourth amendment right to be free from unreasonable searches, Chief Justice Burger stated that Palmer must show that he had "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."<sup>37</sup>

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availability and adequacy of existing Virginia remedies. Rather, it accepted the district court's statement as to the existence of remedies pursuant to Virginia law.

32. *Hudson*, 104 S. Ct. at 3197.

33. *Hudson v. Palmer*, 104 S. Ct. 3194, 3199 (1984) (citing *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (held that the following correctional center policies did not violate the first, fourth or fifth amendment: (1) housing two inmates in rooms designed for one; (2) prohibiting inmates from receiving certain books not mailed from publishers, book clubs or bookstores; (3) prohibiting inmates' receipt of packages of food and personal items from outside the institution; (4) conducting body-cavity searches of inmates following contact visits with visitors; and (5) requiring pretrial detainees to remain outside their cells during inspections)).

34. *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)). For a discussion of *Wolff*, see *supra* note 5.

35. *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (prison regulation prohibiting inmate interviews with media, enacted due to correctional authorities' belief that such interviews contributed to prison violence, not violative of prisoners' right of free speech)).

36. *Id.*

37. *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740, 745 (1979) (telephone user did not have legitimate expectation of privacy regarding telephone number he dialed)). See also *Katz v. United States*, 389 U.S. 347 (1967). *Katz* was convicted of transmitting wagering information by telephone. The evidence against him included recordings of his telephone conversations. The Court found that since *Katz* intentionally concealed his voice from the public, he had a legitimate expectation of privacy in the spoken words. *Id.* at 352-53. In his concurring opinion, Justice Harlan detailed his understanding of the rule regarding whether an individual has a fourth amendment right of privacy: "there is a twofold requirement, first that a person

For Palmer to succeed, Chief Justice Burger stated that society must be willing to acknowledge that prison inmates have a reasonable expectation of privacy.<sup>38</sup> The Chief Justice found that society was not prepared to recognize even a limited privacy right for inmates.<sup>39</sup> Accordingly, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."<sup>40</sup> Thus, the Chief Justice found that because society was not willing to recognize a privacy right for inmates, Palmer did not have a "reasonable" expectation of privacy.<sup>41</sup>

Additionally, the Chief Justice noted that privacy rights for prisoners are incompatible with security needs of the institution.<sup>42</sup> He argued that "[t]he 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."<sup>43</sup> Because Palmer had no reasonable expectation of privacy, the Court rejected the Fourth Circuit's finding that Palmer enjoyed a limited privacy right.<sup>44</sup>

In reaching his conclusion, Chief Justice Burger explored the nature of prisons and prisoners. He stated:

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for

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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 361 (Harlan, J., concurring).

Justice Harlan stressed the controlling importance of the second requirement in *United States v. White*: "[t]he analysis must . . . transcend the search for subjective expectations. . . . [W]e should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." *United States v. White*, 401 U.S. 745, 786 (Harlan, J., dissenting). Justice Harlan seemed to imply that the function of the Court was to determine objectively the desirability of giving prisoners a right of privacy. In *Hudson*, Chief Justice Burger interpreted Justice Harlan's second requirement to mean that society's wishes should be taken into account before imposing risks upon society. *Hudson*, 104 S. Ct. at 3199 n.7. By looking to society's wishes instead of using an objective standard, Chief Justice Burger's conclusion may be a misapplication of Justice Harlan's analysis in *White*.

38. *Hudson*, 104 S. Ct. at 3199.

39. *Id.* at 3201.

40. *Id.* at 3200.

41. *Id.* at 3201-02.

42. *Id.* at 3200.

43. *Id.*

44. *Id.* at 3201-02.

law or an appreciation of the rights of others.<sup>45</sup>

The Chief Justice further stated that "prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administration personnel, but visitors [as well]. They are under an obligation to . . . guarantee the safety of the inmates . . . ."<sup>46</sup> Chief Justice Burger identified two separate, and in his view mutually exclusive institutional goals. One was to grant inmates rights which did not jeopardize institutional security;<sup>47</sup> the second goal was to allow prison officials the means to guarantee prison security.<sup>48</sup> The result, according to the Chief Justice, was to deny prisoners the right to be free from unreasonable searches and seizures:

it would be literally impossible to accomplish the prison objectives . . . if inmates retained a right of privacy in their cells. Virtually the only place inmates can conceal weapons, drugs, and other contraband is in their cells. Unfettered access to these cells by prison officials, thus, is imperative if drugs and contraband are to be ferreted out and sanitary surroundings are to be maintained.<sup>49</sup>

The Court's conclusion differed from that reached by the Fourth Circuit.<sup>50</sup> The Fourth Circuit was troubled by maliciously motivated searches.<sup>51</sup> Chief Justice Burger took issue with the Fourth Circuit's

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45. *Id.* at 3200. Chief Justice Burger continued:

[d]uring 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 29 riots or similar disturbances were reported in these facilities for the same time frame. . . . [D]uring 1983, there were 11 inmate homicides, 359 inmate assaults on other inmates, 227 inmate assaults on prison staff, and 10 suicides.

*Id.* The amount of violence cited by the Chief Justice was essential to his argument that the security needs of the institution were incompatible with a right of privacy. Chief Justice Burger seemed to imply that because some prisoners were violent, no prisoners could be trusted with even a limited privacy right. See *supra* note 43 and accompanying text.

46. *Hudson*, 104 S. Ct. at 3200.

47. *Id.* Chief Justice Burger stated that "the two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell." *Id.*

48. *Id.* See *supra* note 46 and accompanying text.

49. *Hudson*, 104 S. Ct. at 3200. In balancing the two interests of institutional security and a prisoner's right of privacy, the Chief Justice stated that "[w]e strike the balance in favor of institutional security, which we have noted is 'central to all other corrections goals . . . .'" *Id.* at 3201 (citing *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (prison regulation prohibiting inmate interviews with media, enacted due to correctional authorities' belief that such interviews contributed to prison violence, not violative of prisoners' right of free speech)).

50. For the Fourth Circuit's reasoning in finding that Palmer enjoyed a limited privacy right, see *supra* note 26.

51. *Palmer v. Hudson*, 697 F.2d 1220, 1224 (1983).



conclusion that a limited privacy right would protect against this type of search.<sup>52</sup> The Chief Justice agreed that maliciously motivated searches were a possibility and that searches done purely to harass should not be tolerated.<sup>53</sup> However, he maintained that a limited privacy right was not the solution.<sup>54</sup> Rather, the Chief Justice reasoned that eliminating the privacy right would subject inmates to periodic searches, the timing of which would be unknown to the prisoner, and added that "[t]he uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband."<sup>55</sup>

Palmer admitted that "shakedown" searches are essential to institutional security.<sup>56</sup> However, he argued that since searches motivated by the guard's desire to harass are unreasonable, an inmate has a reasonable expectation of privacy not to have his cell searched for such a purpose.<sup>57</sup> The Court chose not to address this issue. Chief Justice Burger argued that because prisoners have no reasonable expectation of privacy, the reasonableness of this particular search was not at issue.<sup>58</sup>

The Chief Justice did not conclude that "prison attendants can ride roughshod over inmates' property rights with impunity."<sup>59</sup> Even though the fourth amendment did not provide a remedy for Palmer, Chief Justice Burger concluded that the eighth amendment,<sup>60</sup> state tort and common law remedies would be sufficient to redress Palmer's grievances.<sup>61</sup>

## 2. Fourteenth amendment claim

Upon concluding that Hudson's search of Palmer's cell did not violate the fourth amendment, the Court then addressed the question of whether Hudson's intentional deprivation of Palmer's personal property violated the fourteenth amendment due process clause. In deciding this

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52. *Hudson*, 104 S. Ct. at 3201.

53. *Id.*

54. *Id.*

55. *Id.* See also *Marrero v. Commonwealth*, 222 Va. 754, 757, 284 S.E.2d 809, 811 (1981) (random searches of inmates necessary to ensure security of the institution, safety of inmates and all others in the institution).

56. *Hudson*, 104 S. Ct. at 3202. See also Brief for Respondent and Cross-Petitioner at 7 n.5, *Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

57. *Hudson*, 104 S. Ct. at 3202.

58. *Id.*

59. *Id.*

60. For text of eighth amendment, see *infra* note 127.

61. *Hudson*, 104 S. Ct. at 3202. To date, none of the alternative remedies suggested by Chief Justice Burger have compensated Palmer for the loss of his property.

question, the Chief Justice first discussed the Court's holding in *Parratt v. Taylor*.<sup>62</sup> In *Parratt*, the Court found that the negligent deprivation of an inmate's property did not violate the fourteenth amendment due process clause because the state provided a meaningful remedy to redress the prisoner's loss.<sup>63</sup> Since the district court granted summary judgment to Hudson based on *Parratt*, Chief Justice Burger framed the issue to be whether *Parratt* applied to cases of intentional deprivations of an individual's property.<sup>64</sup>

The Chief Justice reasoned that *Parratt* stood for the proposition that where property deprivations were effected through random and unauthorized acts, pre-deprivation hearings were impossible since the state could not know when an act of property deprivation will occur.<sup>65</sup> He concluded that there is "no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees that it can anticipate similar negligent conduct."<sup>66</sup> The Chief Justice argued that intentional acts of property deprivation might be even more difficult to anticipate since the guard could take steps to avoid signalling his intent to deprive an inmate of his property.<sup>67</sup>

Since negligent deprivations of property do not violate the due process clause of the fourteenth amendment because pre-deprivation hearings are impracticable, Chief Justice Burger reasoned that intentional deprivations do not violate the due process clause if a meaningful post-deprivation remedy is available to the individual.<sup>68</sup> Accordingly, the Court held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a

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62. *Id.* (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)). For a full discussion of *Parratt*, see *infra* notes 203-06 and accompanying text.

63. *Hudson*, 104 S. Ct. at 3202-03.

64. *Id.* at 3202. If *Parratt* applied to intentional deprivations of property as well as negligent deprivations, Palmer's fourteenth amendment due process right would not have been violated if Virginia provided a sufficient alternative remedy. *Id.* at 3204.

65. *Id.* at 3203.

66. *Id.* The Court reasoned that if the prison administration does not know that a guard is planning on seizing a prisoner's property, it does not know to hold a hearing. *Id.* Thus, requiring pre-deprivation hearings to satisfy due process is impracticable. *Id.*

67. *Id.* Chief Justice Burger concluded that the better way to protect the prisoner's right to his property was to require the state to provide adequate post-deprivation procedures rather than pre-deprivation procedures. *Id.* at 3203-04.

68. *Id.* at 3204.

meaningful postdeprivation remedy for the loss is available."<sup>69</sup>

Palmer contended that because an agent of the state "*can* provide pre-deprivation process, then as a matter of due process he must do so."<sup>70</sup> Paraphrasing the Court's holding in *Parratt*, Chief Justice Burger responded that:

postdeprivation procedures satisfy due process because the *State* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process.<sup>71</sup>

Due process, according to Chief Justice Burger, did not depend on the availability of pre-deprivation process. He reasoned that Palmer's argument represented a fundamental misunderstanding of *Parratt*; it was not sufficient for a violation of the fourteenth amendment due process clause for Palmer to have shown that the guard could have requested a pre-deprivation hearing.

Citing *Logan v. Zimmerman Brush Co.*,<sup>72</sup> Palmer also contended that Hudson's deliberate destruction of his property constituted a due process violation despite the availability of post-deprivation remedies.<sup>73</sup> Arguing that *Logan* only applied in situations where the property deprivation was pursuant to a state procedure, Chief Justice Burger disagreed. He stated that Palmer failed to allege that the asserted destruction of his property occurred pursuant to an established Virginia procedure.<sup>74</sup>

Having determined that *Parratt* applied to intentional deprivations of property, the Court next addressed the issue of whether Virginia provided Palmer with an adequate post-deprivation remedy for the alleged

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69. *Id.* A violation of due process would occur if the state "refuses to provide a suitable postdeprivation remedy." *Id.* See also *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (corporal punishment inflicted on students by state officials did not violate fourteenth amendment due process clause since sufficient post-deprivation remedies were available to students to redress any liberty interest deprivation).

70. Brief for Respondent and Cross-Petitioner at 8 (emphasis in original), *Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

71. *Hudson*, 104 S. Ct. at 3204 (emphasis in original).

72. 455 U.S. 422 (1982). In *Logan*, the claimant, Logan, brought his claim of wrongful termination to the attention of the requisite commission within the statutorily allotted time. The commission, however, failed to act within its allotted time. The Court found that unlike the situation in *Parratt*, an established state procedure was responsible for Logan's loss, and allowed him to recover despite *Parratt*. For a full discussion of *Logan*, see *infra* note 208 and accompanying text.

73. Brief for Respondent and Cross-Petitioner at 8, *Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

74. *Hudson*, 104 S. Ct. at 3204.

destruction of his property. Chief Justice Burger accepted the district court and Fourth Circuit's findings that "several common-law remedies available to [Palmer] would provide adequate compensation for his property loss."<sup>75</sup> Palmer, however, argued that relief in a Virginia court "is far from certain and complete" because the state court might hold that Hudson, a state employee, was entitled to sovereign immunity.<sup>76</sup> For support, Palmer relied on *Elder v. Holland*,<sup>77</sup> where the court found that "a State employee *may* be held liable for intentional torts."<sup>78</sup> The Chief Justice rejected Palmer's claim as unpersuasive "speculation,"<sup>79</sup> finding that *Elder* was unambiguous since Virginia employees did not enjoy immunity for their intentional torts.<sup>80</sup> He argued that Virginia "has provided an adequate post-deprivation remedy for the alleged destruction of property."<sup>81</sup> Thus, the Court found neither a violation of Palmer's fourth amendment right to be free from unreasonable searches<sup>82</sup> nor a violation of his fourteenth amendment due process right.<sup>83</sup>

### B. The Concurring Opinion

In concurring, Justice O'Connor did not address the issue of "whether a prisoner may recover damages for a malicious deprivation of property,"<sup>84</sup> but rather of *what* was the appropriate source of the constitutional right protected and the remedy that corresponds to that right.<sup>85</sup>

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75. *Id.* The Court did not discuss the sufficiency of Virginia remedies. *Id.*

76. *Id.* at 3205 (citing Brief for Respondent and Cross-Petitioner at 11, *Hudson v. Palmer*, 104 S. Ct. 3194 (1984)).

77. 208 Va. 15, 155 S.E.2d 369 (1967); see also *Short v. Griffiths*, 220 Va. 53, 255 S.E.2d 479 (1979) (school board, athletic director, and baseball coach/buildings and grounds supervisor of high school not entitled to sovereign immunity in tort action).

78. *Elder*, 208 Va. at 19, 155 S.E.2d at 372 (emphasis added).

79. *Hudson*, 104 S. Ct. at 3205.

80. *Id.*

81. *Id.* For an analysis of the adequacy of Virginia remedies, see *infra* notes 221-26 and accompanying text.

82. *Id.* The Chief Justice did not dispute Justice Stevens' argument that Hudson's actions, while not violative of the fourth amendment's search clause, did violate the seizure clause.

83. *Id.*

84. *Hudson v. Palmer*, 104 S. Ct. 3194, 3205 (1984) (O'Connor, J., concurring) (emphasis in original).

85. The Chief Justice argued that the issues facing the Court were: (1) [w]hether the fourth amendment protected Palmer from searches conducted solely to harass or humiliate, *id.* at 3198, see *supra* note 37 and accompanying text, and (2) whether *Parratt v. Taylor*, 451 U.S. 527 (1981), applied to cases involving intentional property deprivation, *Hudson*, 104 S. Ct. at 3202, see *supra* note 64 and accompanying text. Thus, Justice O'Connor argued that "[t]he issue in this case . . . does not concern *whether* a prisoner may recover damages for a malicious deprivation of property. Rather, this case decides only *what* is the appropriate source of the constitutional right and the remedy that corresponds with it." *Hudson*, 104 S. Ct. at 3205 (O'Connor, J., concurring) (emphasis in original).

Unlike Chief Justice Burger, Justice O'Connor summarily disposed of the question of the reasonableness of Hudson's search of Palmer's cell. She focused on whether Palmer's fourteenth amendment argument stated a "ripe"<sup>86</sup> constitutional claim.<sup>87</sup>

Justice O'Connor argued that "all searches and seizures of the contents of an inmate's cell are reasonable."<sup>88</sup> She identified two lines of cases emphasizing different methods of fourth amendment analysis. First, Justice O'Connor identified cases which interpreted the fourth amendment in a case-by-case manner.<sup>89</sup> In these cases, the court weighed the government's interest in the search against the particular invasion of privacy and possessory interests in the case to determine the reasonableness of the search.<sup>90</sup> Next, Justice O'Connor noted that the Court sometimes rejected this balancing test in favor of an approach "that determines the reasonableness of contested practices in a categorical fashion."<sup>91</sup> According to Justice O'Connor, prison cell searches and

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86. *Id.* at 3205-06 (O'Connor, J., concurring). Justice O'Connor's use of the term "ripe" may be misplaced. *Black's Law Dictionary* states that "a case is ripe for decision by an appellate court if the legal issues involved are clear enough and well enough evolved and presented so that a clear decision can come out of the case." BLACK'S LAW DICTIONARY 1192 (5th ed. 1979). Justice O'Connor reasoned that Palmer would have stated a ripe fourth amendment claim had he shown that the guard acted unreasonably. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring). The showing of a constitutional violation is not a prerequisite to a "ripe" claim. A "ripe" claim need only contain issues sufficiently evolved such that the court determines the controversy worthy of adjudication. BLACK'S LAW DICTIONARY 1192 (5th ed. 1979).

87. *Hudson*, 104 S. Ct. at 3205-06 (O'Connor, J., concurring). Justice O'Connor's approach tested the validity of Palmer's argument that the fourteenth amendment protected his property. Palmer's failure to establish this issue led to Justice O'Connor's conclusion that the complaint did not state a ripe constitutional claim. *Id.* at 3207 (O'Connor, J., concurring). This finding is similar to Chief Justice Burger's framing of the fourteenth amendment issue as whether Palmer's claim was valid under 42 U.S.C. § 1983 or his remedy lay outside the fourteenth amendment due to the Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981). See *supra* note 64. Both Chief Justice Burger and Justice O'Connor examined the nature of the § 1983 remedy.

88. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring) (emphasis added).

89. *Id.* (O'Connor, J., concurring). See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968). For a full discussion of *Terry*, see *infra* note 90.

90. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring) (citing *Terry v. Ohio*, 392 U.S. 1, 17-18 n.15 (1968)). In *Terry*, petitioner Terry was convicted of carrying a concealed weapon. Terry had been observed standing on a street corner, occasionally pacing in front of and looking in a store window. Believing that Terry was preparing to rob the store, the officer identified himself, searched Terry and found a gun. The Court weighed the governmental interest in searching Terry against the invasion which the search entailed. *Terry*, 392 U.S. at 22-26. The Court concluded the search was reasonable under the fourth amendment. *Id.* at 31.

91. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring). See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 555-60 (1979) (cited *supra* note 33); *United States v. Robinson*, 414 U.S. 218 (1973). In *Robinson*, a District of Columbia police officer stopped Robinson's car and arrested him for

seizures are appropriate for categorical treatment because the government has a "compelling interest"<sup>92</sup> in prison safety and prison officials must necessarily rely on ad hoc judgments.<sup>93</sup> Thus, Justice O'Connor concluded that Hudson's search of Palmer's cell was reasonable.<sup>94</sup>

Palmer's allegation that his property was destroyed did not alter Justice O'Connor's fourth amendment analysis. She argued that the reasonableness of the search and seizure was independent of the disposition of the property after it had been seized.<sup>95</sup> Thus, "any losses that occur while the property is in official custody are simply not redressable by Fourth Amendment litigation."<sup>96</sup>

While the fourth amendment did not redress Palmer for the loss of his property, Justice O'Connor conceded that "[t]he Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests. These constitutional protections against the deprivations of private property do not abate at the time of imprison-

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driving without a valid driver's license. Pursuant to police department regulations, Robinson was placed under full custodial arrest. Subsequent to his arrest, Robinson was searched. During the search, the officer discovered capsules filled with heroin in Robinson's jacket. The Supreme Court, in reversing the court of appeals, reinstated the district court's conviction of Robinson. *Id.* at 220-24. The Supreme Court held that:

[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

*Id.* at 235.

92. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring). By using the term "compelling interest," Justice O'Connor has interjected a standard of review more commonly associated with the strict scrutiny tests in cases involving racial discrimination. *See, e.g., Brown v. Board of Educ.*, 347 U.S. 483 (1954) (segregation of white and black children in public schools held a violation of the equal protection clause of the fourteenth amendment). Justice O'Connor did not make clear why she would impose this standard when the rights of prisoners are at stake.

93. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring). *See also* LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141-45.

94. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring).

95. *Id.* (O'Connor, J., concurring). According to Justice O'Connor:

if the act of taking possession and the indefinite retention of the property are themselves reasonable, the handling of the property while in the government's custody is not itself of Fourth Amendment concern. The nonprivacy interests protected by the Fourth Amendment do not extend beyond the right against unreasonable dispossessions.

*Id.* (O'Connor, J., concurring).

96. *Id.* (O'Connor, J., concurring). Unlike Justice O'Connor, Chief Justice Burger did not consider whether the fourth amendment provided a remedy to Palmer for the intentional deprivation of his property.

ment."<sup>97</sup> Essentially she argued that while inmates had no constitutional right to be free from unreasonable searches and seizures, they did have some constitutional protection not to be deprived of their property without due process.<sup>98</sup>

Justice O'Connor concluded that Palmer's fourteenth amendment argument failed to state a ripe constitutional claim.<sup>99</sup> She premised her conclusion on the belief that Palmer was required, in establishing a violation of the fourteenth amendment due process clause, to show that he had availed himself of Virginia remedies or proved them inadequate.<sup>100</sup> His failure to do so resulted in a finding that Palmer's due process rights had not been violated by Hudson's search.<sup>101</sup>

Finally, Justice O'Connor took issue with the dissent's argument that the seizure clause of the fourth amendment provided constitutional protection of Palmer's property. She reiterated that the fourth amendment is independent of the disposition of an inmate's property, assuming it was seized pursuant to the requirements of the fourth amendment.<sup>102</sup> The sources of protection, argued Justice O'Connor, were the fifth and fourteenth amendment due process clauses.<sup>103</sup> Because Palmer failed to avail himself of Virginia remedies, or successfully prove them inadequate,<sup>104</sup> the summary judgments issued by the district court and Fourth Circuit were proper.<sup>105</sup>

### C. *The Dissenting Opinion*

Justice Stevens, joined by Justices Blackmun, Brennan and Mar-

97. *Id.* (O'Connor, J., concurring). The fifth amendment provides, in pertinent part, that "any person [shall not] . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

98. *Hudson*, 104 S. Ct. at 3206 (O'Connor, J., concurring).

99. *Id.* at 3207 (O'Connor, J., concurring). Palmer's alleged failure to avail himself of Virginia remedies, or to prove them inadequate, is unrelated to whether his claim was ripe for judgment. For a discussion of what constitutes a ripe claim, see *supra* note 92. Additionally, ripeness was not an issue discussed by the Fourth Circuit. As an appellate court, the Supreme Court in *Hudson* was limited to issues raised on appeal to the Fourth Circuit. Sup. Ct. R. 15, 414 U.S. 441 (1974).

100. *Hudson*, 104 S. Ct. at 3207 (O'Connor, J., concurring). See *Parratt v. Taylor*, 451 U.S. 527, 537-44 (1981). For a full discussion of *Parratt*, see *infra* note 203-06.

101. *Hudson*, 104 S. Ct. at 3207 (O'Connor, J., concurring). According to Justice O'Connor, "[w]hen adequate remedies are provided and followed, no uncompensated taking or deprivation of property without due process can result." *Id.* (O'Connor, J., concurring).

102. *Id.* at 3206-07 (O'Connor, J., concurring). See *supra* note 95 and accompanying text.

103. *Hudson*, 104 S. Ct. at 3206-07 (O'Connor, J., concurring). See *supra* note 97 and accompanying text.

104. Justice O'Connor did not respond to Palmer's contention that Virginia courts were unlikely to provide him a meaningful remedy.

105. *Hudson v. Palmer*, 104 S. Ct. 3194, 3207 (1984) (O'Connor, J., concurring).

shall, dissented in *Hudson v. Palmer*. Although Justice Stevens agreed with Chief Justice Burger and Justice O'Connor that the destruction of Palmer's property did not violate Palmer's "right to procedural due process,"<sup>106</sup> he charged that "Hudson maliciously took and destroyed a quantity of Palmer's property, including legal materials and letters, for no reason other than harassment."<sup>107</sup>

Unlike the Chief Justice, Justice Stevens argued that inmates retain a "slight residuum of privacy that . . . can have [no] more than the most minimal value."<sup>108</sup> In agreeing that the Court was correct in finding that the imperatives of prison security require random searches,<sup>109</sup> Justice Stevens argued that security needs of the prison do not abate inmates of all rights. Justice Stevens cited Chief Justice Burger, who had in the past stated that "[i]t 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 a zoo . . . ."<sup>110</sup>

After contending that inmates retain a right of privacy, Justice Stevens next considered whether this privacy right protected a prisoner's possessory interest in personal property. Unlike Chief Justice Burger, who argued that the fourth amendment applied strictly to searches,<sup>111</sup> Justice Stevens framed the issue as whether the fourth amendment protected an inmate's possessory interest in the property seized.<sup>112</sup>

According to Justice Stevens, an inmate's privacy interest in his property differed from his possessory interest in the property. Justice Stevens cited the Court's decision in *United States v. Jacobsen*<sup>113</sup> to dis-

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106. *Id.* at 3208 (Stevens, J., dissenting). Justice Stevens agreed with the Court's reasoning on the issue of whether Hudson's destruction of Palmer's property constituted a violation of the fourteenth amendment's due process clause. *Id.* (Stevens, J., dissenting). For a discussion of the Chief Justice's reasoning, see *supra* notes 62-83 and accompanying text.

107. *Hudson*, 104 S. Ct. at 3208 (Stevens, J., dissenting).

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

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

110. *Id.* (Stevens, J., dissenting) (citing *Houchins v. KQED*, 438 U.S. 1, 5 n.2 (1978) (first and fourteenth amendments held not to provide news media with a constitutional right of access to jails superior to that of another person)).

111. For a discussion of Chief Justice Burger's analysis of Palmer's fourth amendment argument, see *supra* notes 33-61 and accompanying text.

112. *Hudson*, 104 S. Ct. at 3209 (Stevens, J., dissenting). For the pertinent text of the fourth amendment, see *supra* note 20. Note that the fourth amendment applies to unreasonable searches and seizures. Justice Stevens argued that the Chief Justice did not analyze whether the seizure clause of the fourth amendment provided a remedy to Palmer for the loss of his property. *Hudson*, 104 S. Ct. at 3209-10 (Stevens, J., dissenting).

113. 104 S. Ct. 1652 (1984) (destruction of property in a field test for cocaine held to be an unconstitutional interference with possessory interests).



tinguish the two interests:

The first clause of the Fourth Amendment provides that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ." This text protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.<sup>114</sup>

Justice Stevens next argued that Palmer's complaint adequately alleged a seizure within the meaning of the fourth amendment: "Palmer was completely deprived of his possessory interests in his property; by taking and destroying it, Hudson was asserting 'dominion and control' over it; hence his conduct 'did constitute a seizure . . . .'"<sup>115</sup> The fact that Palmer's property was destroyed subsequent to the search did not alter Justice Stevens' analysis. He argued that an individual was equally deprived of his possessory interest when his property was destroyed as when it was taken.<sup>116</sup> This differed from the approach taken by Justice O'Connor, who argued that "incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects."<sup>117</sup> The distinction between the two approaches was illustrated by Justice Stevens:

The net result of her position, however, is that harassment by means of temporarily—i.e., for no longer than the duration of the prisoner's incarceration—depriving an inmate of his personal effects raises no Fourth Amendment issue, and no constitutional issue of any kind if the property is ultimately returned.<sup>118</sup>

Justice Stevens rejected the Court's contention that the need for prison security abated an inmate's possessory interests.<sup>119</sup> He contended

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114. *Id.* at 1656, cited in *Hudson*, 104 S. Ct. at 3209 (Stevens, J., dissenting).

115. *Hudson*, 104 S. Ct. at 3209 (Stevens, J., dissenting). See, e.g., *Jacobsen*, 104 S. Ct. at 1660; and *Bell v. Wolfish*, 441 U.S. 520, 574-75 (1979) (Marshall, J., dissenting) (holding discussed *supra* note 33).

116. *Hudson*, 104 S. Ct. at 3209 (Stevens, J., dissenting).

117. *Id.* at 3206 (O'Connor, J., concurring).

118. *Id.* at 3209 n.8 (Stevens, J., dissenting).

119. *Id.* at 3210 (Stevens, J., dissenting). The existence of Virginia remedies, according to Justice Stevens, was irrelevant to the fourth amendment question, because 42 U.S.C. § 1983 provided a remedy for fourth amendment violations supplemental to any Virginia remedy that may have existed. *Hudson*, 104 S. Ct. at 3210 n.9 (Stevens, J., dissenting).

that Palmer's possession of the material was legitimate as a matter of state law, because the material seized passed prison inspection regulations.<sup>120</sup> Not only did Palmer have a legal right under state law to possess the property, according to Justice Stevens, but the due process clause as interpreted by Chief Justice Burger indicated that Palmer had a legitimate right to the property.<sup>121</sup> In responding to Palmer's contention that the destruction of his property violated the fourteenth amendment's due process clause, the Court found that the material seized was "property."<sup>122</sup> According to Justice Stevens, "an interest cannot qualify as 'property' within the meaning of the Due Process Clause unless it amounts to a legitimate claim of entitlement. Thus . . . the Court necessarily indicates that Palmer had a legitimate claim of entitlement to the material at issue."<sup>123</sup> Once a state creates such an interest, Justice Stevens noted that it is forbidden by the Constitution<sup>124</sup> for the state to revoke the interest arbitrarily.<sup>125</sup> "Thus Palmer had a legitimate right under both state law and the Due Process Clause to possess the material at issue."<sup>126</sup>

Palmer's possessory interest, according to Justice Stevens, was also protected by the eighth amendment's proscription against "cruel and unusual punishments."<sup>127</sup> Justice Stevens reasoned that the eighth amendment's proscriptions are measured by society's standard of decency.<sup>128</sup>

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120. *Id.* at 3210 (Stevens, J., dissenting).

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

122. *Id.* (Stevens, J., dissenting) (citing *Hudson*, 104 S. Ct. at 3203-04).

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

124. Justice Stevens did not indicate where the Constitution forbids a state to arbitrarily revoke such an interest.

125. *Id.* (Stevens, J., dissenting) (citing *Hewitt v. Helms*, 459 U.S. 460, 469-72 (1983) (due process required to support prison official's decision to confine inmate to administrative segregation); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 11-12 (1979) (due process required to deny parole release to inmates); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1973) (due process required before prison administration may revoke inmate's goodtime credits)).

126. *Id.* (Stevens, J., dissenting). The Court's own analysis indicated that Palmer had a legitimate fourth amendment possessory interest in the property. *Id.* at 3212-13 (Stevens, J., dissenting).

127. *Id.* at 3211 (Stevens, J., dissenting). The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Justice Stevens claimed that the eighth amendment protected Palmer's possessory interests, "as a matter of substantive constitutional law, entirely apart from the legitimacy of those interests under state law or the Due Process Clause." *Hudson*, 104 S. Ct. at 3211 (Stevens, J., dissenting).

128. *Hudson*, 104 S. Ct. at 3211 (Stevens, J., dissenting) (citing *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (double celling of inmates is not cruel and unusual punishment within the context of the eighth amendment); *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (deliberate indifference to an inmate's serious medical needs constituted a violation of the eighth amendment)). By relying on society's standard of decency, Justice Stevens used an *ad populum* test to

The Chief Justice's finding that Palmer's possession of legal materials and letters was not entitled to constitutional protection would not, in Justice Stevens' judgment, "comport with any civilized standard of decency."<sup>129</sup>

Justice Stevens also argued that the first amendment entitled Palmer to receive mail subject to the prison's right to censor it.<sup>130</sup> He also reasoned that the fourteenth amendment's right to access the courts entitles an inmate to reasonable access to legal materials.<sup>131</sup> With constitutional justification for concluding that Palmer had a legal possessory right in the seized property, Justice Stevens concluded that "[i]t is therefore beyond me how the Court can question the legitimacy of Palmer's possessory interests which were so clearly infringed by Hudson's alleged conduct."<sup>132</sup>

After concluding Palmer adequately alleged a seizure, Justice Stevens next considered whether the seizure was unreasonable in the context of the fourth amendment.<sup>133</sup> Justice Stevens argued that inmates retained those constitutional rights consistent with penological objectives, such as punishment and rehabilitation.<sup>134</sup> Under this standard, Hudson's seizure of Palmer's property was without penological justification. Justice Stevens stressed that there was no evidentiary showing that Palmer's property posed a threat to institutional security. He argued that "[w]hen, as here, the material at issue is not contraband it simply makes no sense to say that its seizure and destruction serves 'legitimate institutional interests. . . .' Such seizures are unreasonable."<sup>135</sup>

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determine the extent of eighth amendment protections. For a discussion of the fallacy of *ad populeum*, see *infra* note 182 and accompanying text.

129. *Hudson*, 104 S. Ct. at 3211 (Stevens, J., dissenting).

130. *Id.* (Stevens, J., dissenting). The first amendment provides that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. See *Procunier v. Martinez*, 416 U.S. 396 (1974) (prison mail censorship deemed unconstitutional under first and fourteenth amendments).

131. *Hudson*, 104 S. Ct. at 3211 (Stevens, J., dissenting). See also *Bounds v. Smith*, 430 U.S. 817 (1977) (constitutional right of access to courts held to require prison authorities to assist inmates in the preparation and filing of legal documents by providing inmates with adequate law libraries or legal assistance).

132. *Hudson*, 104 S. Ct. at 3211 (Stevens, J., dissenting).

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

134. *Id.* (Stevens, J., dissenting). See also *Bell v. Wolfish*, 441 U.S. 520, 545-47 (1979) (holding discussed *supra* note 33).

135. *Hudson*, 104 S. Ct. at 3212 (Stevens, J., dissenting). The seizure was unreasonable, according to Justice Stevens, since the property posed no threat to any penological goal: there is no room for any conclusion but that the alleged seizure was unreasonable. The need for "close and continual surveillance of inmates and their cells" . . . in no

Next, Justice Stevens addressed Chief Justice Burger's argument that society would not recognize as reasonable any possessory interests of prisoners.<sup>136</sup> This argument, according to Justice Stevens, was based on the perception of the four justices who joined the opinion that Chief Justice Burger authored.<sup>137</sup> Justice Stevens also argued that, on the question of what rights society was prepared to accept, the lower courts' consensus that the fourth amendment did apply in prison cells was relevant.<sup>138</sup>

The Court held that security needs of the prison determined whether a search and seizure was reasonable.<sup>139</sup> Deference was given to the view taken by prison administrators toward inmate conduct.<sup>140</sup> Justice Stevens argued that Chief Justice Burger's contention that prison officials need the power to search and seize was inaccurate. "To the contrary, it appears to be the near-universal view of correctional officials that guards should neither seize nor destroy noncontraband property."<sup>141</sup> Virginia law similarly authorizes seizures of contraband material alone.<sup>142</sup>

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way justifies taking and destroying noncontraband property; if material is examined and found not to be contraband, there can be no justification for its seizure.

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

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

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

138. *Id.* at 3212 n.19 (Stevens, J., dissenting). A majority of the circuit courts have held that the fourth amendment applies to prison cells. *See, e.g.,* *United States v. Mills*, 704 F.2d 1553, 1560-61 (11th Cir. 1983) (to satisfy the fourth amendment, prison cell searches must be: motivated by a legitimate penological objective; have no other less intrusive alternatives to the search available; and conducted in a reasonable manner), *cert. denied*, 104 S. Ct. 3517 (1984); *United States v. Hinckley*, 672 F.2d 115, 128-29 (D.C. Cir. 1982) (inmates retain fourth amendment protections consistent with institutional security); *United States v. Chamorro*, 687 F.2d 1, 4 (1st Cir.) (inmates retain residuum of fourth amendment protection), *cert. denied*, 459 U.S. 1043 (1982); *United States v. Lilly*, 576 F.2d 1240, 1244-46 (5th Cir. 1978) (government has burden of proving reasonableness of prison cell search pursuant to fourth amendment); *Bonner v. Coughlin*, 571 F.2d 1311, 1317 (7th Cir. 1975) (prisoners entitled to lesser degree of fourth amendment protection than unincarcerated persons), *cert. denied*, 435 U.S. 932 (1978).

139. *Hudson*, 104 S. Ct. at 3201.

140. *Id.* at 3200.

141. *Id.* at 3213 (Stevens, J., dissenting). *See also* UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS § 13.01 (1980). Section 13.01 provides, in pertinent part, "[w]ritten policy and procedure specify the personal property inmates can retain in their possession. . . . It should be made clear to inmates what personal property they may retain, and inmates should be assured both that the facility's policies are applied uniformly and that their property will be stored safely." *Id.*, cited in *Hudson*, 104 S. Ct. at 3213 n.21 (Stevens, J., dissenting).

142. *Hudson*, 104 S. Ct. at 3213-14 (Stevens, J., dissenting) (citing VA. CODE § 53.1-26 (1982)). Section 53.1-26 provides, in pertinent part, "[a]ny item of personal property which a prisoner in any state correctional facility is prohibited from possessing by the Code of Virginia or by the rules of the Director shall, when found in the possession of a prisoner, be confiscated and sold or destroyed . . . ." *Hudson*, 104 S. Ct. at 3214 n.22 (Stevens, J., dissenting).

To justify the Court's security argument, Chief Justice Burger cited the amount of violence in prisons.<sup>143</sup> Justice Stevens argued that the use of statistics to prove the reasonableness of a search and seizure was not persuasive because the prison homicide rate was less than that in many major cities.<sup>144</sup> Also, the Chief Justice failed, in Justice Stevens' view, to illustrate why society should treat all prisoners as violent and undeserving of a right of privacy.<sup>145</sup> Justice Stevens concluded that because random searches of prison cells for contraband were reasonable, there was no need for the seizure and destruction of noncontraband property found during such searches. "To accord prisoners any less protection is to declare that the prisoners are entitled to no measure of human dignity. . . . That is the view the Court takes today. It declares prisoners to be little more than chattels, a view I thought society had outgrown long ago."<sup>146</sup>

Justice Stevens argued that by allowing such seizures of an inmate's property, the Court ignored the applicability of the fourth amendment to prisons. The courts have a special obligation to inmates, according to Justice Stevens, because prisoners are "[d]isenfranchised, scorned and feared . . . [and] shut away from public view . . . ."<sup>147</sup> Under this theory, because Palmer's property was seized, the Court had a duty to determine whether the seizure was justified. By adopting a "bright-line rule" that all searches and seizures in prisons are reasonable because of security needs, according to Justice Stevens, the Court has sacrificed "constitutional principle to the Court's own assessment of administrative expediency."<sup>148</sup>

#### IV. ANALYSIS

##### A. Fourth Amendment Search and Seizure Violation

The language of the fourth amendment expressly protects individuals from unreasonable searches *and* seizures. Prior to 1967, courts

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143. *Hudson*, 104 S. Ct. at 3200. For discussion of the magnitude of violence in prisons, see *supra* note 45 and accompanying text.

144. *Hudson*, 104 S. Ct. at 3214 (Stevens, J., dissenting). Justice Stevens cited Dallas, Miami, New York and Washington, D.C. as examples of cities with greater homicide rates than the annual prison homicide rates. *Id.* (Stevens, J., dissenting).

145. *Id.* at 3215 (Stevens, J., dissenting). Justice Stevens further stated that the view that all prisoners are violent and incorrigible is inconsistent "with an enlightened view of the function of a modern prison system." *Id.* (Stevens, J., dissenting).

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

147. *Id.* at 3216 (Stevens, J., dissenting). Justice Stevens stated that the courts were the last arena of protection for inmates who have nowhere else to look for whatever minimal rights the constitution grants them. *Id.* (Stevens, J., dissenting).

148. *Id.* at 3217 (Stevens, J., dissenting).

viewed the fourth amendment as protecting only private property, homes and the area immediately surrounding the dwelling from unreasonable searches.<sup>149</sup> In 1967, the Court rejected this traditional, limited protection of the fourth amendment in *Katz v. United States*.<sup>150</sup> In *Katz*, Federal Bureau of Investigation (FBI) agents placed electronic eavesdropping equipment on a public telephone booth that Katz, a book-maker, used to conduct illegal transactions. In finding that the fourth amendment was intended to protect people, not places, the Court stated that:

[t]his effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.<sup>151</sup>

Justice Harlan, concurring in *Katz*, outlined a two-prong test to determine whether a person was entitled to fourth amendment protection against unreasonable searches: "[f]irst 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.'"<sup>152</sup>

The Court in the past has found that the fourth amendment is not limited to unreasonable searches. "The Fourth Amendment proscribes, to be sure, unreasonable 'seizures' as well as 'searches.'"<sup>153</sup> Thus, analysis of Hudson's actions vis-a-vis Palmer requires an examination of the

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149. See *United States v. Potts*, 297 F.2d 68 (6th Cir. 1961) (fourth amendment protects homes and the area surrounding the dwelling).

150. 389 U.S. 347 (1967).

151. *Id.* at 351-52. The Court has occasionally described the fourth amendment as creating constitutionally protected "areas." See, e.g., *Berger v. New York*, 388 U.S. 41, 51 (fourth amendment's protections include conversation and use of electronic devices to capture conversation). However, Justice Harlan's concurrence in *Katz* suggested that this concept cannot serve as a solution to every fourth amendment problem. *Katz*, 389 U.S. at 362.

152. *Katz*, 389 U.S. at 361.

153. *Chambers v. Maroney*, 399 U.S. 42, 63 (1970) (Harlan, J., concurring and dissenting). In *Chambers*, the Court sanctioned the search of defendant's car. The Court found that the impoundment of the car at a police station was reasonable pursuant to the fourth amendment even though there were no exigent circumstances giving the police officers probable cause to believe that any evidence in the car would become unavailable. *Id.* at 51-52. Justice Harlan, dissenting in part, argued that the Court erred in lumping together the search and seizure, since the degree of intrusion upon defendant's privacy is greater when a search is followed by a seizure of the car. *Id.* at 63-64 (Harlan, J., dissenting in part).

reasonableness of the search of his cell *and* seizure of his property in the context of the fourth amendment.

While the Court has liberally extended some constitutional rights to inmates,<sup>154</sup> it has been less forthcoming where the fourth amendment was concerned. Prior to *Hudson v. Palmer*, the majority of the twelve courts of appeals had held that inmates retain a minimal degree of fourth amendment protection.<sup>155</sup> Although the *Katz* Court found that the fourth amendment protected "people, not places," the *Hudson* Court was unwilling to extend the same degree of protection to prisoners.

Indeed, with the decision in *Hudson*, the Court has created an exception to the *Katz* rule: where prison cells are concerned the fourth amendment analysis focuses on the place rather than the person. Under the *Hudson* rationale, the fourth amendment was ineffective to protect the rights of inmates in a federal correctional institution. Chief Justice Burger found that the institution's security needs outweighed the inmate's need to be free from unreasonable searches.<sup>156</sup> The Chief Justice's security test was crucial to the outcome of the case, because if Palmer did not threaten prison security, he should have retained a fourth amendment privacy right.<sup>157</sup> For example, in *United States v. Hinckley*,<sup>158</sup> prison guards seized a private note possessed by Hinckley. Hinckley had been subject to massive security protection due to the nature of his alleged crime, an assassination attempt against the President of the United States. In finding the search of Hinckley's cell violative of the fourth amendment, the court held that "the right to freedom from arbitrary interference with privacy, must and can be recognized even in a detention context."<sup>159</sup>

Thus, the key issue in *Hudson* was whether the need for prison se-

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154. See *supra* notes 2-6 and accompanying text.

155. See *supra* note 138. However, the Second and Ninth Circuits have found that the fourth amendment does not apply to inmates in all cases. See *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972) (monitoring inmate's conversations violated no fourth amendment right); *United States v. Hitchcock*, 467 F.2d 1107 (9th Cir. 1972) (prison cell shares none of the attributes of home, automobile, office or hotel room; thus, warrantless search of cell reasonable), *cert. denied*, 410 U.S. 916 (1973).

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

157. Chief Justice Burger maintained that searches conducted in the name of institutional security are legitimate. *Id.* Because *Hudson*'s search was carried out not to improve security but rather to harass Palmer, Chief Justice Burger's conclusion that *Hudson*'s search of Palmer's prisoner cell was not violative of the fourth amendment was incorrect.

158. 672 F.2d 115 (D.C. Cir. 1982).

159. *Id.* at 129. The First Circuit reached a similar conclusion in *Chamorro*, holding that inmates were protected by the fourth amendment from unreasonable searches and seizures. *United States v. Chamorro*, 687 F.2d 1, 4 (1st Cir. 1982). But cf. *Lanza v. New York*, 370 U.S. 139 (1962) (prisoners not entitled to the same privacy rights as non-inmates).

curity outweighed Palmer's right to be free from unreasonable searches. In balancing these goals, Chief Justice Burger entrusted the determination of the nature of the security threat solely to prison administrators.<sup>160</sup> By so doing, however, he failed to deal with the problem of an overzealous guard. In a dispute over the need for a search, prison officials are more likely to believe the statement of a guard that the search was justified.<sup>161</sup> The effect of the Chief Justice's finding is to allow prison guards, who are not likely to be knowledgeable in fourth amendment law, to control the amount of privacy given to inmates. This discretion places the "liberty of every man in the hands of every petty officer."<sup>162</sup> To remedy this situation, the *Hudson* Court should have relied on the *Hinckley* court's reasoning that the prison administrator's "discretion should and must be corralled by the fourth amendment's prohibition of arbitrary invasions of privacy."<sup>163</sup>

In *Hudson*, the Court upheld a search that was not necessary for institutional security, but was conducted solely to harass Palmer.<sup>164</sup> Justice Stevens argued that since Palmer presented no security threat,<sup>165</sup> the decision against Palmer was a misapplication of the Court's security threat test. Justice Stevens correctly stated that rather than presenting a security threat, Palmer was the victim of a search conducted only to harass.<sup>166</sup> Since there was no security threat, the Supreme Court should have reached the same conclusion as the court in *Hinckley*—the absence of a security threat is an exception to the general rule that prisoners have

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160. *Hudson*, 104 S. Ct. at 3200. See also *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). In *Bell*, the respondent inmates challenged confinement conditions at a New York City jail, alleging violations of the first, fourth and fifth amendments. In finding against respondents, Justice Rehnquist reasoned that:

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

*Id.*

161. Guards are also well situated individually or in collusion to destroy and/or cover-up evidence relating to the validity of a search.

162. *Hinckley*, 672 F.2d at 129 (citing *United States v. Lilly*, 576 F.2d 1240, 1244 (5th Cir. 1978) (fourth amendment adopted in reaction to issuance of general warrants that gave government officials broad discretion to conduct searches) (quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886) (statute requiring defendants and claimants to produce their private books held unconstitutional violation of fourth and fifth amendments))).

163. *Hinckley*, 672 F.2d at 129.

164. *Hudson*, 104 S. Ct. at 3197, 3205.

165. *Id.* at 3212 (Stevens, J., dissenting).

166. *Id.* at 3210 (Stevens, J., dissenting).



no privacy right. Indeed, Chief Justice Burger established a security threat test in *Hudson*:

[t]he two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances. . . . We strike the balance in favor of institutional security . . . ."<sup>167</sup>

Instead of analyzing the nature of Palmer's threat to institutional security, the Chief Justice skirted the issue by arguing that since inmates enjoy no privacy right, he need not address the merits of Palmer's contention.<sup>168</sup> Thus, in *Hudson*, the Chief Justice concluded that the two goals necessarily conflict.<sup>169</sup>

Contrary to the Chief Justice's conclusion, institutional security and an inmate's right to be free from unreasonable searches conflict only when one goal threatens the existence of the other goal.<sup>170</sup> The *Hinckley* court found that:

[t]here is, therefore, no inherent conflict between the fourth amendment's requirements and the realities of institutional confinement. . . .

Proceeding on that premise, the district court held that "the residuum of Fourth Amendment protection afforded Hinckley as a pretrial detainee exceeded that recognized by the Butner officers in their search of his cell."<sup>171</sup>

In *Hinckley*, the twin goals were found not to be mutually exclusive. In fact, that court found the search to be so egregious that it violated Hinckley's fourth amendment right to be free from unreasonable searches.<sup>172</sup> The court concluded that:

[b]ecause the guards were not acting in accord with an established institutional practice or policy that such reading was necessary to maintain institutional or inmate security, there

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167. *Id.* at 3200-01. See *supra* notes 33-55 and accompanying text.

168. *Hudson*, 104 S. Ct. at 3202. Chief Justice Burger reasoned that "[b]ecause we conclude that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells, we need not address [Palmer's legitimate expectation of privacy]." *Id.*

169. *Id.* at 3201.

170. If the right to be free from unreasonable searches does not violate prison security, the *Katz* guarantee that the fourth amendment protects people and not places should have protected Palmer.

171. *Hinckley*, 672 F.2d at 129-30 (quoting *United States v. Hinckley*, 525 F. Supp. 1342, 1360 (D.D.C. 1981)).

172. *Id.* at 130-31.

was no reasoned, principled decision by the prison administration entitled to deference. Instead, a serious invasion of Hinckley's right to privacy in his own papers was perpetrated by individual officers unguided by prison rules or even the instructions of their superiors.<sup>173</sup>

Since Palmer similarly presented no security threat, Chief Justice Burger should have followed the *Hinckley* court's conclusion regarding the violation of Palmer's fourth amendment right to be free from unreasonable searches. Thus, by assuming the mutual exclusivity of the competing goals of institutional security and Palmer's right to be free from unreasonable searches, the Court unnecessarily sanctioned an invasion of Palmer's fourth amendment right because the search for noncontraband items did not protect institutional security.<sup>174</sup>

Palmer had a legitimate expectation of privacy because he was not a threat to institutional security. The Supreme Court in *Katz* clearly intended to reject the notion that the fourth amendment protects places instead of people.<sup>175</sup> As long as Palmer identified a subjective expectation of privacy, he met the first prong of Justice Harlan's privacy test established in *Katz*.<sup>176</sup>

Chief Justice Burger addressed the second prong of Justice Harlan's privacy test by arguing that society was not prepared to accept a privacy right for inmates.<sup>177</sup> The Chief Justice's argument ignored the fallacy of ad populum. Succinctly stated, popular opinion is not the correct source of constitutional law. Rather, the constitution was designed to protect the interests of minority viewpoints and rights against the "tyranny of the majority." Accordingly, Harry Wellington, a constitutional law scholar, has stated that "[t]he Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law."<sup>178</sup> Thus, the function of the Court is to merge constitutional law and the entirety of public opinion into the rules of law that society lives by.

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173. *Id.*

174. *Hudson*, 104 S. Ct. at 3202; *id.* at 3206 (O'Connor, J., concurring). Chief Justice Burger assumed Palmer did not threaten institutional security, *id.* at 3197, while Justice O'Connor did not comment on that issue. Thus, using the analysis of the *Hinckley* court, there was no need to restrict Palmer's fourth amendment right to be free from the unreasonable search; these two goals were compatible.

175. *See supra* note 151 and accompanying text.

176. *See supra* note 152 and accompanying text.

177. *Hudson*, 104 S. Ct. at 3201.

178. H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973).

In *Hudson*, the Chief Justice created fourth amendment law based on his perceptions of society's belief about prisoner's rights, despite the fact that the Court "certainly has no machinery with which to take a Gallup Poll."<sup>179</sup> Simply because society fails to believe prisoners have a fourth amendment privacy right does not mean that inmates are not constitutionally entitled to such a right. By creating law based on their own perception of what society considered to be the rights of prisoners, the plurality violated the due process rights of prisoners as a class. In *Breithaupt v. Abram*,<sup>180</sup> the Court found that "due process is not measured by the yardstick of personal reaction . . . but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process."<sup>181</sup>

By not providing proof that society would deny a right of privacy to inmates, especially to those who do not threaten prison security, the Chief Justice created the illusion of consensus. His reasoning illustrates the inherent danger of adopting an ad populum standard—the views of the minority can be suppressed by those of the majority. Constitutional law scholar John Hart Ely commented that "by viewing society's values through one's own spectacles—resolving apparent inconsistencies in popular thinking in the 'appropriate' direction by favoring the [views of the majority] . . . one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported."<sup>182</sup> Ely provided insight into Chief Justice Burger's reasoning process. The Chief Justice created a societal consensus where none may have existed. In creating that consensus, the Court limited fourth amendment protection to prisoners, an example of Ely's contention that the views of the majority may, where no real consensus exists, limit constitutional rights entitled to the minority. Thus, while Palmer's claim may not have met the second prong of Justice Harlan's *Katz* test for a right of privacy, in light of the inherent undesirability of an ad populum standard, the Court should have reconsidered Justice Harlan's requirement that society must be prepared to accept an inmate's right to privacy.

The Chief Justice offered proof for his argument that violent crime

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179. *Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Black, J., dissenting) (Connecticut statute forbidding the use of contraceptives violated right of marital privacy contained within the penumbra of the Bill of Rights).

180. 352 U.S. 432 (1957).

181. *Id.* at 436.

182. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 67 (1980).

occurs in prison.<sup>183</sup> He concluded that the prison crime rate was a reason that inmates could not be trusted with a legitimate expectation of privacy.<sup>184</sup> However, Chief Justice Burger failed to justify why an "innocent" prisoner, one who is not guilty of an additional crime after entering prison, should pay for his fellow inmate's violent acts with the loss of his own privacy right. His failure to individualize Palmer's loss of privacy violated the Court's holding in *Ybarra v. Illinois*.<sup>185</sup> In *Ybarra*, the Court refused to sanction the search of a patron of a bar which was legitimately targeted for search by a warrant.<sup>186</sup> The Court reasoned that the search of a person incidentally on the premises was beyond the scope of the warrant.<sup>187</sup> The failure of the warrant to specify Ybarra, a patron of the bar, made the search illegal.<sup>188</sup> In *Hudson*, the Court strayed from its holding in *Ybarra*. The *Hudson* Court sanctioned a search relying on Palmer's incidental presence in prison. As the *sole* justification for the search, Palmer's presence in prison did not justify his loss of the right to be free from unreasonable searches.

Additionally, refusing to grant Palmer a right of privacy due to the actions of other prisoners may have been an imposition of cruel and unusual punishment against Palmer.<sup>189</sup> In *Coker v. Georgia*,<sup>190</sup> Justice White, writing for the Court, found that the execution sentence of a convicted rapist was excessive and violated the eighth amendment restriction against cruel and unusual punishment.<sup>191</sup> He reasoned that the sentence made no contribution to accepted theories of punishment and was nothing more than the needless imposition of pain and suffering.<sup>192</sup>

Denying Palmer's right to be free from unreasonable searches did not further any rational theory of punishment. Rather, by allowing Hudson to seize Palmer's noncontraband personal property, Chief Justice Burger ignored the rule of *Coker* and condoned the needless imposition

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183. For the magnitude of violent crime in prisons cited by the Chief Justice, see *supra* note 45 and accompanying text.

184. *Hudson*, 104 S. Ct. at 3200. Chief Justice Burger may have thought that a right of privacy and of freedom from unreasonable "shakedown" searches contributed to the prison crime rate by allowing inmates the opportunity to conceal weapons in their cells from prison authorities.

185. 444 U.S. 85 (1979).

186. *Id.* at 96.

187. *Id.* at 92-93.

188. *Id.* at 96.

189. For text of the eighth amendment, see *supra* note 127.

190. 433 U.S. 584 (1977). In *Coker*, the defendant, an escapee from a Georgia prison, raped a woman in the course of committing an armed robbery. *Id.* at 587. He was convicted and sentenced to death on the rape charge. *Id.* at 591.

191. *Id.* at 592. For text of the eighth amendment, see *supra* note 112.

192. *Coker*, 433 U.S. at 599.

of pain and suffering on Palmer in violation of the eighth amendment.<sup>193</sup>

By analogy, Justice Stevens faulted Chief Justice Burger's reliance on the prison crime rate to deny inmates a right of privacy. Justice Stevens argued that citizens of Miami, New York and Dallas, all cities with higher crime rates than the prison crime rate cited by the Chief Justice, have a legitimate expectation of privacy.<sup>194</sup> Accordingly, Justice Stevens concluded that the prison crime rate was insufficient to deny inmates fourth amendment protections against unreasonable searches.<sup>195</sup> His analogy, however, failed to refute Chief Justice Burger's reasoning. Inmates are closely monitored and they live in conditions that many times contain explosive combinations of overcrowding and unsanitary conditions. While similar conditions may exist in some cities, they do not rival the persistently overcrowded and unsanitary conditions of many prisons in the United States.<sup>196</sup> In this respect, Justice Stevens' analogy fails to illustrate why an inmate has a legitimate expectation of privacy similar to that granted ordinary citizens in any of the four cities he cited.

Seen in the light of recent Supreme Court cases,<sup>197</sup> *Hudson* is an example of the Court's limitation on the fourth amendment's prohibition

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193. The Court found that "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering. . . ." *Id.* at 592. Further "punishing" Palmer by not allowing him to be free of unreasonable searches and seizures makes no measurable contribution to the goals of punishment which were satisfied when Palmer was sentenced.

194. *Hudson*, 104 S. Ct. at 3214 (Stevens, J., dissenting).

195. *Id.* (Stevens, J., dissenting). See *supra* notes 144-45 and accompanying text.

196. Correctional facilities have been neglected:

[t]he most tangible evidence of this neglect is in the nation's prisons, which can be characterized as physically inadequate, unsafe institutions. Overcrowded living conditions and inadequate health care are two frequently cited areas of deficiency that indicate states have not fulfilled their custodial obligations. An equally salient custodial failure is the inability of correctional administrations to protect inmates from the predatory violence of other prisoners. Today's prisons are bleak and dangerous places.

S. ZIMMERMAN & H. MILLER, CORRECTIONS AT THE CROSSROADS: DESIGNING POLICY 9 (1981).

197. The Court's decision in *Hudson* is an example of the Court's determined effort to cut back on the scope of fourth amendment protection against unreasonable searches. The seminal case dealing with the right to be free from unreasonable searches, *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the fourth amendment's search clause to the states. In *Mapp*, police officers arrived at Mrs. Mapp's residence in Cleveland pursuant to information that an individual wanted for questioning in connection with a bombing was hiding in the home. Mrs. Mapp refused to admit the officers without a warrant. *Id.* at 644. Subsequently, officers returned to her residence and gained admittance by forcing open the door. When Mrs. Mapp again demanded to see a warrant, one of the officers showed her a piece of paper purported to be the warrant. Mrs. Mapp grabbed the paper and placed it in her bosom. She was arrested for resisting the officers' rescue of the paper from her person. During the search of her home,

of unreasonable searches. In denying inmates any right of privacy, the

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various obscene materials were discovered, resulting in her conviction. No search warrant was produced at Mrs. Mapp's trial. *Id.* at 644-45.

The Court reversed Mrs. Mapp's conviction. *Id.* at 656. The Court stated that "[o]nly last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " *Mapp*, 367 U.S. at 656 (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960) (evidence illegally seized by state officers inadmissible in federal criminal trial)). The *Mapp* Court, again citing *Elkins*, also concluded that:

there is another consideration—the imperative of judicial integrity . . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

*Mapp*, 367 U.S. at 659 (citing *Elkins*, 364 U.S. at 222). Additionally, *Mapp* provided that evidence seized during illegal searches should be excluded for reasons of deterrence and judicial integrity. *Mapp*, 367 U.S. at 656, 659.

*Wong Sun v. United States*, 371 U.S. 471 (1963), expanded the exclusionary rule, allowing evidence seized as an indirect result of an illegal search to be excluded. In *Wong Sun*, federal narcotics agents illegally broke into Toy's apartment and handcuffed him. Immediately after the entry, Toy made a statement implicating Yee as the individual who sold him the heroin in question. The agents went immediately to Yee, who surrendered heroin to them, and who then made a statement implicating Toy and Wong Sun as the individuals who sold him the heroin. Wong Sun was subsequently arrested without probable cause. Both Wong Sun and Toy were arraigned and released on their own recognizance. A few days later, Wong Sun gave a voluntary confession. *Id.* at 472-76, 491. The Court held that Toy's statement could not be used against him because it was a "fruit" of the illegal invasion of his privacy. *Id.* at 485-86. Also inadmissible against Toy was the heroin seized from Yee. *Id.* at 488. The Court ruled that the seizure of the heroin was a direct result of Toy's statement, itself an inadmissible fruit of the illegal invasion. *Id.* at 487-88. The drugs, however, were admissible against Wong Sun since "[t]he seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." *Id.* at 492. Additionally, even though the Court conceded that his arrest was illegal, Wong Sun's own confession was ruled admissible against him since Wong Sun had confessed voluntarily a few days after the arrest. Thus, "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.' " *Id.* at 491 (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939) (evidence obtained by illegal wiretapping inadmissible)).

The broad interpretation of the search clause reached a zenith in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where the Court excluded incriminating evidence in a murder case since warrantless searches are per se invalid, and this case did not fit into a judicially recognized exception. *Id.* at 453-82.

Since *Coolidge*, the Court has narrowed its interpretation of the scope of the fourth amendment's search clause. For example, in *United States v. Place*, 462 U.S. 696 (1983), the Court held that a "canine sniff" by a trained drug detecting dog of the defendant's luggage did not amount to a "search" within the meaning of the fourth amendment. *Id.* at 707. The sniff technique, reasoned the Court, was "much less intrusive than a typical search," and does not tell the officials anything about noncontraband items in the luggage. *Id.*

The Court again refused to find a "search" in *United States v. Jacobsen*, 104 S. Ct. 1652 (1984). In *Jacobsen*, federal Drug Enforcement Administration (DEA) officers intercepted plastic bags containing a white powdery substance. Before permitting the delivery of the bags to Jacobsen, the DEA agents conducted field tests on the powder to determine whether the substance was cocaine. Prior to the DEA officials' search, the box containing the substance was opened by Federal Express agents who then proceeded to examine the contents of the box.

Court has expressly created an exception to the *Katz* principle that the fourth amendment should protect individuals, not places.<sup>198</sup> Additionally, the Court's use of an ad populum test leaves in doubt the protections of the fourth amendment for the next group "society" deems not worthy of the right to be free from unreasonable searches.<sup>199</sup> The *Hudson* Court's decision likely will have two results: (1) the elimination of any right of privacy allowed inmates and (2) the establishment of an ad populum test that can be used in subsequent cases by the Court to deny fourth amendment privacy rights to a particular class.

To protect institutional security, the Court need not have taken the extreme step of eliminating an inmate's right to privacy. For example, the *Hudson* Court could have found the search unreasonable because it was conducted solely to harass and humiliate Palmer. Such a finding would not have decreased prison security, since the Court could have still found that searches conducted to find contraband or for any other valid purpose, such as evidence of conspiracy or escape plans, would not be unreasonable. Under such a rationale, Palmer's fourth amendment right to be free from unreasonable searches would have been preserved.

Justice Stevens' dissent also provided insight into a solution which

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The test involved opening the bags and placing the powder in tubes; if the liquid inside the tubes turned a certain color, the substance was cocaine. The Court found this not to be a "search" since Jacobsen had "no legitimate privacy interest." *Id.* at 1662. Additionally, Jacobsen had no legitimate expectation of privacy because Federal Express employees had already examined the contents of the box. *Id.* at 1660-61.

Finally, in *United States v. Leon*, 104 S. Ct. 3405 (1984), the Court found that a police search did not violate the fourth amendment since the officers conducted the search in a good-faith belief that the search was constitutional. In *Leon*, the police, relying on a facially valid search warrant, illegally searched several premises. *Id.* at 3409-11. Admitting that the warrant did not contain sufficient probable cause, the Supreme Court found that the search did not violate the fourth amendment's search clause since the police officers searched the premises in "good faith," believing the warrant to be adequate. *Id.* at 3423. Thus, the fourth amendment privacy right upheld in *Mapp*, *Wong Sun* and *Coolidge* has been narrowed considerably in recent years.

198. *Hudson* represents the Court's finding that the fourth amendment applies to persons only in the context of their location. Thus, instead of the privacy right being independent of the place searched as in *Katz*, where prisoners are concerned the privacy right is now a function of where the search occurs.

199. Chief Justice Burger relied on what he considered to be the views of the majority of society. In *Hudson*, the fourth amendment claim of Palmer, a member of a minority class (i.e., prison inmates), was in effect defeated by the wishes of the majority, acting through the perceptions of Chief Justice Burger. Carried to the extreme, this would seem to have established a dangerous trend: whenever the majority chooses to supersede the rights of a minority class, it would be able to do so. There is an irony in the Court's becoming the tool of the majority of society. The Supreme Court is the final arbitrator of constitutional issues. Yet, the Constitution and the Bill of Rights were designed to protect the interests of all citizens of the United States. The Court, in adopting an ad populum decision-making model, stands in a position to do great damage to minority interests.

would preserve both institutional security and an inmate's privacy right. If Hudson's seizure was found to be unreasonable, "shakedown" searches would still be authorized in the name of institutional security. However, the fourth amendment's restriction against unreasonable seizures would provide Palmer with a meaningful remedy under 42 U.S.C. § 1983.<sup>200</sup>

These alternative solutions indicate that the Court need not have denied Palmer his fourth amendment right of privacy in order to better guarantee prison security. The twin goals of institutional security and inmate privacy pursuant to *Katz* are not mutually exclusive.

*B. Deprivation of Palmer's property without due process*

1. Fourteenth amendment

The fourteenth amendment protects an individual from deprivations of property without due process of law.<sup>201</sup> What constitutes an unconstitutional deprivation has been the subject of much debate in the courts. Prior to *Hudson v. Palmer*, courts had generally found that the negligent deprivation of an inmate's property, where no pre-deprivation hearing occurred, did not violate the fourteenth amendment's due process clause.<sup>202</sup>

In *Parratt v. Taylor*,<sup>203</sup> the Court held that the fourteenth amendment's due process guarantee did not require the state to hold a pre-deprivation hearing where meaningful state remedies would suffice for any subsequent claim brought by the inmate.<sup>204</sup> In *Parratt*, a Nebraska

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200. For text of 42 U.S.C. § 1983, see *supra* text accompanying note 19.

201. For the pertinent text of the fourteenth amendment, see *supra* note 21. Courts have held that 42 U.S.C. § 1983 applies to takings of property in violation of the fourteenth amendment's due process clause. See, e.g., *Hofferber v. First Nat'l Bank*, 437 F. Supp. 788 (W.D. Okla. 1977) (court found it beyond doubt that property rights were protected by the fourteenth amendment and violations thereof could be redressed pursuant to § 1983); *Suarez v. Administrator Del Deporte Hipico de Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972) (no distinction between property rights and other human rights in actions pursuant to § 1983).

202. See *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975) (negligence of prison guards in facilitating the taking of inmate's trial transcript by third person did not constitute state deprivation of property without due process of law pursuant to § 1983), *cert. denied*, 435 U.S. 932 (1978).

203. 451 U.S. 527 (1981).

204. *Id.* at 543-44. See also *Juncker v. Tinney*, 549 F. Supp. 574 (D. Md. 1982) (plaintiff alleging deprivation of liberty interest without due process not permitted to bring § 1983 action in federal court since plaintiff had adequate post-deprivation remedy in state court). In some cases, where the state provides an adequate post-deprivation hearing, in order to obtain dismissal of a due process claim of intentional deprivation of property the defendant has the burden of establishing that the pre-deprivation hearing is impractical. See e.g., *Keniston v. Roberts*, 717 F.2d 1295, 1301-02 (9th Cir. 1983) (claim that electric company cut off electric



prison inmate ordered a hobby kit by mail, which was negligently lost after its receipt by prison authorities. The inmate brought an action pursuant to 42 U.S.C. § 1983 to recover the value of the hobby kit.<sup>205</sup> Reasoning that pre-deprivation procedures were impractical to prevent the negligent act of a prison official, the Court rejected the prisoner's claim, because it found that Nebraska provided a meaningful remedy to the inmate.<sup>206</sup> Thus, where the deprivation of an inmate's property is due to the negligence of the prison staff, courts are unlikely to allow a successful action against a state pursuant to section 1983.<sup>207</sup>

The Court again dealt with the negligent deprivation of an individual's property in *Logan v. Zimmerman Brush Co.*<sup>208</sup> In *Logan*, an Illinois statute protected handicapped employees from discrimination which was unrelated to work ability. Logan brought his allegedly wrongful termination to the attention of the requisite Illinois commission within the statutorily required time, but the commission failed to take timely action.<sup>209</sup> Logan's former employer defended by arguing that Logan was claiming the same type of negligent deprivation of property as that complained of in *Parratt*, and that consequently the case should be remitted to the tort remedies prescribed by the Illinois Court of Claims Act.<sup>210</sup> The Court disagreed, and created an exception to the *Parratt* rule that negligent deprivations are not per se violative of due process. The Court found that since Logan was challenging an "established state procedure" that destroyed his entitlement, due process required that a hearing be held in order to give Logan the "proper procedural safeguards" required by the fourteenth amendment.<sup>211</sup>

Not only was section 1983 found to protect individuals from "estab-

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power to plaintiff's home without notice or hearing did not violate due process). In *Bynum v. Kidd*, 570 F. Supp. 696 (W.D.N.C. 1983), the district court dismissed an inmate's action seeking compensation for the loss of his personal property during his confinement in a county jail, because North Carolina provided a sufficient statutory remedy by which the inmate would receive redress for his loss. *Id.*

205. *Parratt*, 451 U.S. at 529. The Eighth Circuit affirmed the district court's summary judgment for the prisoner.

206. *Id.* at 543. The Court reasoned that because the act of deprivation occurred as the result of a random act of a state official, it was impossible to predict when such acts would occur. *Id.* Thus, the Court concluded that in most cases it would be impossible to provide a meaningful hearing before the deprivation. *Id.* Because the *Parratt* Court found that Nebraska provided the prisoner with a meaningful tort remedy for his alleged property deprivation, the due process requirements of the fourteenth amendment were satisfied. *Id.* at 543.

207. See *supra* notes 202-04.

208. 455 U.S. 422 (1982).

209. *Id.* at 424, 426.

210. *Id.* at 436.

211. *Id.* at 436-37.

lished state procedures" violative of due process, it was also found to protect individuals from intentional deprivations violative of due process. The Fifth Circuit held in *McCoy v. Gordon*<sup>212</sup> that while a claim of negligent deprivation of property was not sufficient to state a cause of action pursuant to section 1983 if meaningful state remedies existed, a charge that a state official intentionally deprived an individual of property was sufficient to state a claim under section 1983.<sup>213</sup> Additionally, in *Wolff v. McDonnell*,<sup>214</sup> the Court found that in cases of impending state action against an inmate, written notice of the impending action was required in order "to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact."<sup>215</sup> Thus, in contrast to the unwillingness of courts to allow individuals a remedy pursuant to section 1983 for negligent deprivations of property, prior to *Hudson*, courts were willing to grant relief when the claim involved an "established state procedure" or an intentional deprivation of property.<sup>216</sup>

*Hudson* seemingly contradicts the Court's holding in *Wolff* that an inmate is protected by minimal constitutional rights. Hudson's actions were intentional; he intended to harass and humiliate Palmer by searching, seizing and destroying his personal property.<sup>217</sup> Yet, the Court relied on *Parratt* to find that Hudson's actions did not violate Palmer's fourteenth amendment due process right, even though *Parratt* was limited to *negligent* deprivations of an inmate's property. In *Hudson*, Palmer's loss was due to the *intentional* acts of Hudson. Culpability is more pronounced in *Hudson* due to the lack of necessity for the deprivation of Palmer's property. The Court should have followed its decision in *Logan*, where the Court disallowed an "established state procedure"

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212. 709 F.2d 1060 (5th Cir. 1983).

213. *Id.* at 1062.

214. 418 U.S. 539 (1974). For a discussion of *Wolff*, see *supra* note 5.

215. *Wolff*, 418 U.S. at 563-64. In *Wolff*, the impending state action concerned the imposition of disciplinary procedures against inmates as authorized by the prison administration. *Id.* It should be noted that the imposition of disciplinary procedures against prisoners is similar to an inmate's loss of privacy since both actions are implemented by the state. Thus, *Wolff* should not be distinguished from *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), on that point. See also *Biagiarelli v. Sielaff*, 483 F.2d 508 (3d Cir. 1973) (due process requires that prisoner be given written notice of basis for removal from general prison population and opportunity to rebut charges in a hearing); *Worley v. Bounds*, 355 F. Supp. 115 (W.D.N.C. 1973) (prisoner sentenced to disciplinary segregation entitled to: (1) written copy of charges against him; (2) confrontation with his accuser; (3) opportunity to explain his actions; and (4) written explanation of the reason for decision of the hearing officers); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973) (practice of subjecting federal prisoners to disciplinary confinement in segregation cells without opportunity for a hearing violated due process).

216. See *supra* note 215.

217. *Hudson*, 104 S. Ct. at 3197.

which violated Logan's property rights. In *Hudson*, the state sanctioned a prison procedure which allowed Hudson to seize and destroy Palmer's property without convening a timely hearing. The Court also ignored its reasoning in *Wolff* that where state action is imminent, to deprive an inmate of a right, due process requires that the prisoner have the opportunity to respond to the charges prior to the deprivation.<sup>218</sup>

The *Hudson* Court ignored another fact distinguishing *Parratt* from *Hudson*—the failure of the inmate in *Parratt* to claim that Nebraska's post-deprivation procedures were inadequate.<sup>219</sup> This was the basis of the *Parratt* Court's finding that the negligent deprivation of the inmate's property was not violative of his due process right; the Court assumed Nebraska provided adequate post-deprivation remedies.<sup>220</sup> In *Hudson*, no such guarantee existed for Palmer. While Virginia had waived sovereign immunity for state officials in certain circumstances by enacting the Virginia Tort Claims Act,<sup>221</sup> Chief Justice Burger argued that this avenue was not open to Palmer.<sup>222</sup> Indeed, Virginia employees have been held immune for their actions occurring under color of title. For example, in *Banks v. Sellers*,<sup>223</sup> the court held that a superintendent of schools and a school principal were entitled to sovereign immunity from a negligence charge.<sup>224</sup> Again, in *Lawhorne v. Harlan*,<sup>225</sup> the court held that state employees exercising supervisory functions and discretionary judgment within the scope of their employment at state hospitals were also immune.<sup>226</sup>

*Hudson* is more analogous to cases such as *Logan* and *Wolff* where the inmates were required to have the opportunity to rebut the damaging charges prior to the deprivation, rather than *Parratt*, which was limited

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218. *Wolff*, 418 U.S. at 564.

219. *Parratt*, 451 U.S. at 543.

220. In *Parratt*, the Court stated:

[t]he Fourteenth Amendment protects only against deprivations "without due process of law" . . . . Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

*Id.* at 537 (citation omitted). Since the prisoner made no claim to the contrary, the Court found no violation of his due process rights. *Id.* at 543.

221. VA. CODE ANN. § 8.01-195.1-.8 (1984).

222. *Hudson*, 104 S. Ct. at 3205 n.15.

223. 224 Va. 168, 294 S.E.2d 862 (1982).

224. *Id.* at 173, 294 S.E.2d at 865.

225. 214 Va. 405, 200 S.E.2d 569 (1973) *rev'd sub nom on other grounds*, First Va. Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983).

226. *Id.* at 407-08, 200 S.E.2d at 572.

to negligent deprivations of property and where meaningful state remedies were found to exist to guarantee the inmate's due process right.

In relying on *Parratt*, the Court has, in effect, sanctioned the destruction of an inmate's property without due process of law. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>227</sup> the Court stated in dictum that:

It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved . . . that he was uninvolved in and unaware of the wrongful activity . . . for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.<sup>228</sup>

Palmer's retention of legal materials and letters was not wrongful. Since there was no institutional security justification for the seizure and forfeiture of Palmer's property, it is difficult to ascertain what legitimate purposes were served by Hudson's actions. By taking away the remedy of section 1983, the Court is forcing prisoners to look to existing state law in order to remedy the deprivation. In effect, it is now up to the state to provide the inmate due process. In states like Virginia, however, remedies are uncertain at best.<sup>229</sup> Even if a state statute authorizes a remedy, the inmate faces the obstacle of trying to persuade a civil court of his claim against the testimony of the prison administration.

Chief Justice Burger relied on society's distrust of prisoners in finding that inmates had no fourth amendment right to be free from unreasonable searches.<sup>230</sup> As a result, in the absence of legislative protection of an inmate's privacy right, only extreme deprivations of a prisoner's right of privacy would be redressed by a court. For example, in *Hodges v. Klein*,<sup>231</sup> the prisoner was subjected to restricted confinement without a hearing. The court, in denying the prisoner's section 1983 claim, found that it would not second-guess the warden's judgment on matters of in-

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227. 416 U.S. 663 (1974). In *Calero-Toledo*, appellee was lessor of a yacht upon which marijuana was found. The yacht was seized by the Superintendent of Police and forfeited to the government. The lessor asserted that the seizure and forfeiture of the yacht violated due process of law because he was not given advance notice of the seizure and because he was unaware of the marijuana on board. *Id.* at 665-68. The Court rejected the argument that due process requires notification prior to the seizure and forfeiture of an individual's property. *Id.* at 677.

228. *Id.* at 689-90 (citations omitted).

229. See *supra* notes 221-26 and accompanying text.

230. *Hudson*, 104 S. Ct. at 3201.

231. 421 F. Supp. 1224 (D.N.J. 1976), *aff'd*, 562 F.2d 276 (3d Cir. 1977).

ternal prison security.<sup>232</sup> In *Hudson*, even assuming that Palmer was not barred by sovereign immunity, a Virginia court would not likely take his word over the word of the prison administration.<sup>233</sup> By denying Palmer's section 1983 claim, the Court has forced Palmer into attempting to redress his grievance in the potentially unfriendly courts of Virginia. As the Court stated in *Logan*, "[s]eeking redress through a tort suit is apt to be a lengthy and speculative process. . . ."<sup>234</sup> If Palmer is barred from an action by sovereign immunity, he will have suffered the destruction of his personal property without a hearing and without a remedy, a violation of the due process clause.<sup>235</sup>

The Court's decision not only affects Palmer. Now that the Court has effectively immunized guards and the state from fourteenth amendment scrutiny, guards will be able to indiscriminately seize and destroy an inmate's personal property. The only limitation on the guard's actions is the possibility of a civil suit in a state court. However, the chances of an inmate's recovery are so slim as to have very little deterrent effect on a guard's conduct.<sup>236</sup> The result is to sanction deprivations of property like that inflicted on Palmer. In effect, the Court has taken away the inmate's right not to be deprived of property without due process of law.

Seemingly, the Court's decision to remove Palmer's due process right was unnecessary. Since property seizures are normally part of an established prison procedure,<sup>237</sup> pre-deprivation hearings could be held between prison guards and administrators. If the guard suspects that an inmate's property threatens institutional security, a request to seize the property could be given to prison administrators. An opportunity should then be given the inmate to rebut the guard's charge. If exigent circumstances warrant, the inmate's property could be seized and a hearing could then be conducted. Prior to the destruction of the property, a hearing could be held which would ensure that the prisoner receives due process. This type of procedure could have prevented Palmer's noncontraband property from being destroyed because Palmer could have explained to the prison administration the contents of the property seized.

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232. *Id.* at 1231.

233. See *infra* note 234 and accompanying text.

234. *Logan*, 455 U.S. at 436-37.

235. See *supra* note 220.

236. Guards are well situated to individually and in collusion destroy and/or cover up evidence relating to the destruction of an inmate's property.

237. *Logan*, 455 U.S. at 436.

## 2. Fourth amendment

Prior to *Hudson v. Palmer*, the Court had identified as independent the two expectations guaranteed by the fourth amendment.<sup>238</sup> Yet, the Court had never used the seizure clause to vindicate an inmate's possessory interest in property. Justice Stevens cited no cases when he stated that "the Fourth Amendment protects Palmer's possessory interests in this property entirely apart from whatever privacy interest he may have in it."<sup>239</sup> While Justice Stevens conceded that the search of Palmer's cell did not violate the fourth amendment,<sup>240</sup> and the seizure did not violate the due process clause of the fourteenth amendment,<sup>241</sup> he found objectionable the fact that Hudson seized and destroyed Palmer's noncontraband personal property.<sup>242</sup>

In dissent, Justice Stevens was correct in finding the seizure and destruction of Palmer's letters and legal materials unconstitutional. They were seized for no reason save to harass Palmer; they were destroyed for the same reason. Since the constitution forbids treating letters and legal materials as contraband,<sup>243</sup> and the Court agreed that Hudson's actions were intolerable, the seizure was unreasonable.<sup>244</sup> Even applying the Court's institutional security test, the seizure was unreasonable. Assuming Palmer's letters and legal materials passed through prison screening procedures and were determined not to be contraband, there was no justification for finding that the seizure of these items served to protect institutional security.<sup>245</sup>

Unfortunately, Justice Stevens' innovative argument may remain confined to dissenting opinions. With the recent trend away from grant-

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238. The fourth amendment protects against unreasonable searches and seizures. For the pertinent text of the fourth amendment, see *supra* note 20.

239. *Hudson v. Palmer*, 104 S. Ct. 3194, 3209 (Stevens, J., dissenting).

240. *Id.* at 3208 (Stevens, J., dissenting). Justice Stevens found that "[t]he Court correctly concludes that the imperatives of prison administration require random searches of prison cells . . . ." *Id.* (Stevens, J., dissenting).

241. *Id.* (Stevens, J., dissenting). Justice Stevens observed that "I agree that Palmer's complaint does not allege a violation of his constitutional right to procedural due process." *Id.* (Stevens, J., dissenting) (footnote omitted).

242. *Id.* (Stevens, J., dissenting). Justice Stevens stated that:

[t]he reasoning in . . . the Court's opinion, [dealing with the fourth amendment's proscriptions] however, is seriously flawed—indeed, internally inconsistent . . . .

[T]he Court . . . holds that no matter how malicious, destructive or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable.

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

243. *Hudson*, 104 S. Ct. at 3212 (Stevens, J., dissenting).

244. *Id.* at 3211-12 (Stevens, J., dissenting).

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

ing inmates fourth amendment protection,<sup>246</sup> his approach is not likely to be adopted in addressing the issue of an inmate's property deprivation. Thus, the Court will likely continue to ignore the fourth amendment's applicability to unreasonable seizures of an inmate's property.

## V. CONCLUSION

*Hudson v. Palmer* is inconsistent with the *Wolff v. McDonnell* Court's finding that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."<sup>247</sup> Regarding the fourth amendment's prohibition of unreasonable searches and seizures, and the fourteenth amendment's guarantee of due process of law for property deprivations, the *Hudson* Court found these protections to be nonexistent for prisoners. The Court's analysis was based on security threats which did not exist, and precedent that should have been distinguished. A correct application of fourth and fourteenth amendment law would have labeled the search of Palmer's cell unreasonable, and the seizure and destruction of Palmer's letters and legal materials as violative of basic constitutional rights available to all citizens.

*Robert M. Hartmann*

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246. See *supra* notes 197-99 and accompanying text.

247. *Wolff v. McDonnell*, 418 U.S. 539, 555-56.