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HUDSON v. PALMER—"BRIGHT LINES" BUT DARK DIRECTIONS FOR PRISONER PRIVACY RIGHTS

MARTIN R. GARDNER*

I. INTRODUCTION

Privacy¹ is a luxury virtually unknown in the daily lives of incarcerated offenders.² While the United States Supreme Court has recognized privacy as a protected interest under several constitutional doctrines³ and has granted that prison inmates do not forfeit all civil rights upon entering penal institutions,⁴ the exigencies of confine-

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¹ A leading authority has defined privacy as "the claim of individuals . . . to determine for themselves when, how, and to what extent information about themselves is communicated to others." A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967). See also Gerety, *Redefining Privacy*, 12 HARV. C. R.-C.L. L. REV. 233, 268 (1977); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974); Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323, 331 (1975); van den Haag, *On Privacy* in *PRIVACY* 149 (J. Pennock & J. Chapman eds. 1971), which conceptualize privacy as the ability to control to whom one shares personal intimacies. Social conventions dictate the content of "intimacy." See, e.g., C. FRIED, *AN ANATOMY OF VALUES* 145 (1970); Benn, *Privacy, Freedom and Respect for Persons* in *PRIVACY AND FREEDOM* 1, 3-4; Gross, *Privacy and Autonomy* in *PHILOSOPHY OF LAW* 191 (J. Fienberg & H. Gross eds. 1975).

² Imprisonment entails radical denials of privacy:

A prisoner is mortified and vulgarized not only by having to continually expose himself as he is moved and stored in the company of others; he is also defiled by being subject to *their* exposure. . . . The custody orientation negates privacy in innumerable other ways. These include such purposive intrusions as periodic headcounts, nightly checks, inspections or shakedowns of prisoners' living areas and belongings. Whatever tends to disturb visibility is forbidden.

Schwartz, *Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison*, 63 J. CRIM. L. & CRIMINOLOGY 229, 232-34 (1972) (emphasis in original). A prison "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Lanza v. New York*, 370 U.S. 139, 143 (1962).

³ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (decision to have an abortion is privacy right protected by due process "liberty"); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (possession of obscene material protected privacy interest under the first amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital privacy protected under the "penumbra" of various bill of rights provisions); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (fourth amendment and fifth amendment self-incrimination clause protect against governmental intrusions into the "privacies of life").

⁴ See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (prisoners protected from cruel and

ment require prison officials to extensively intrude into the intimacies of inmates' lives.⁵ Yet, until the Supreme Court's recent decision in *Hudson v. Palmer*,⁶ some courts appeared willing to afford prisoners that modicum of constitutionally protected privacy consistent with the weighty governmental interest in maintaining law and order within penal institutions.⁷ *Palmer*, however, signals the end of

unusual punishments by the eighth amendment); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (prisoners retain free speech rights not inconsistent with their prisoner status); *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (procedural due process afforded prison inmates); *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam) (free exercise of religion protected in prison).

⁵ The necessity of maintaining internal security within prison facilities requires curtailing certain inmate rights. *Pell v. Procunier*, 417 U.S. at 823. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 550-51 (1979) (no first amendment right to receive publications not mailed directly from publishers, book clubs, or book stores because contraband might otherwise be introduced into the institution); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (first amendment associational rights curtailed as a risk to prison order and stability); *Walker v. Blackwell*, 411 F.2d 23, 26 (5th Cir. 1969) (security demands justified refusal to accommodate inmates' religious practice of eating meals after sunset).

⁶ 104 S. Ct. 3194 (1984).

⁷ Some courts have held that fourth amendment privacy protection is not available to prison inmates. See, e.g., *Robinson v. State*, 312 So. 2d 15, 18 (Miss. 1975) (prisoners lose their "constitutional protection against invasion of . . . privacy and h[ave] no standing to object to a search"); *People v. Chandler*, 262 Cal. App. 2d 350, 356, 68 Cal. Rptr. 645, 648 (1968), cert. denied, 393 U.S. 1043 (1969) ("prison authorities may subject inmates to intense surveillance and search unimpeded by Fourth Amendment barriers"). Other courts, however, recognize that prisoners retain minimal rights to be free from unreasonable searches and seizures. These courts grant that institutional exigencies result in "decreased expectation[s] of privacy" by inmates; such expectations, however, are sufficient to trigger "at least some degree" of fourth amendment protection. *United States v. York*, 578 F.2d 1036, 1041 (5th Cir.), cert. denied, 439 U.S. 1005 (1978). See also *United States v. Savage*, 482 F.2d 1371 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974) (inmate letter protected from unreasonable seizure); *Burns v. Wilkinson*, 333 F. Supp. 94, 96 (W.D. Mo. 1971) (prisoners entitled to the protection of the fourth amendment); *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1971) ("the right to be free from unreasonable searches and seizures is one of the rights retained by prisoners subject, of course, to such curtailment as may be made necessary by the purposes of confinement and the requirements of security").

The Supreme Court has articulated similar views. In *Bell v. Wolfish*, 441 U.S. 520, 557 (1979), discussed in detail in text and notes 159-65 *infra*, the Court assumed *arguendo* that incarcerated individuals possess "diminished expectations of privacy." While *Wolfish* dealt with pretrial detainees, the Court recognized that its assessment of inmate rights "applies equally to pretrial detainees and convicted prisoners." *Id.* at 545-46. Moreover, in another decision, a plurality of the Court in an opinion by Chief Justice Burger rejected the first amendment challenge by news media to policies restricting their access to a local prison, and specifically recognized prisoners' privacy rights as "fundamental":

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

the judicial attempt to accommodate federal constitutional privacy rights relating to searches of prisoners' cells and personal effects.

The *Palmer* Court held, in an opinion by Chief Justice Burger, over the dissent of four Justices⁸ and contrary to a substantial body of lower court case law, that prison inmates possess no recognizable privacy expectations in their prison cells.⁹ Prisoners are therefore without fourth amendment protection against governmental confiscation and destruction of their personal property, even if the sole purpose of the intrusion is to harass the inmate.¹⁰ Unlike persons in the free world, prisoners enjoy no right "to be secure in their . . . papers and effects against unreasonable searches and seizures."¹¹

The *Palmer* Court specifically excluded from fourth amendment scope the confiscation of an inmate's letters and legal materials obtained by prison guards during unannounced cell "shakedowns." The Court, therefore, explicitly spoke to privacy issues relating to possession of personal property. If the Chief Justice's opinion were limited to such "property" issues the opinion would, as illustrated

Houchins v. KQED, Inc., 438 U.S. 1, 5 n.2 (1978) (emphasis added).

⁸ Justices Stevens, Brennan, Marshall, and Blackmun dissented in *Palmer*. 104 S. Ct. at 3207-17. For a discussion of their dissent, see *infra* notes 48-67 and accompanying text.

⁹ Before *Palmer*, a majority of the federal courts of appeals deciding the issue held that prisoners retain at least limited fourth amendment privacy protection in their cells. *Id.* at 3198 n.5. See *United States v. Chamorro*, 687 F.2d 1, 4 (1st Cir.), *cert. denied*, 459 U.S. 1043 (1982); *United States v. Hinckley*, 672 F.2d 115, 129-32 (D.C. Cir. 1982); *United States v. Stumes*, 549 F.2d 831, 832 (8th Cir. 1977); *Bonner v. Coughlin*, 517 F.2d 1311, 1317 (7th Cir. 1975) *aff'd on rehearing*, 545 F.2d 565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978). A minority of federal courts have held the fourth amendment inapplicable to prison cells. See *Christman v. Skinner*, 468 F.2d 723, 726 (2d Cir. 1972).

Despite these developments in the federal courts, the majority of cases hold that prisoners forfeit fourth amendment rights upon incarceration. See S. KRANTZ, *CORRECTIONS AND PRISONER'S RIGHTS* 155 (2d ed. 1983); Gianelli & Gilligan, *Prison Searches and Seizures: 'Locking' the Fourth Amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045, 1046-47 (1976); Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFFALO L. REV. 669, 672 (1972).

¹⁰ *Palmer*, 104 S. Ct. at 3202. The *Palmer* Court recognized the reality of occasional harassment of inmates, but suggested that the eighth amendment prohibition against cruel and unusual punishments provides the constitutional remedy. *Id.* As for redressing property rights infringed through malicious destruction of inmate personality, the Court viewed state remedies as sufficient. *Id.*

¹¹ The fourth amendment provides:

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

by the *Palmer* dissent, be controversial enough.¹² *Palmer's* significance is magnified, however, because the opinion provides the theoretical basis for the total demise of constitutional rights of inmate privacy by implying that personal privacy, as well as privacy rights regarding one's papers and effects, also is unprotected.¹³

This Article assesses the merits of the *Palmer* opinion and its implications for the continued vitality of constitutionally protected privacy in penal institutions. The critique reveals deficiencies in the Court's analysis of the scope of fourth amendment safeguards and argues (the Court's allusions to the contrary notwithstanding) that a doctrine of privacy protection is essential to safeguard inmates' basic human rights.

II. THE *PALMER* CASE

A. THE FACTS

Palmer was an inmate at a Virginia Correctional Center¹⁴ serving sentences for several theft offenses. Hudson, an officer at the Center, in an alleged effort to discover contraband, conducted a shakedown search of Palmer's cell and locker. The search uncovered a ripped pillowcase which was used to trigger a disciplinary action against Palmer for destroying state property. Pursuant to prison procedures, Palmer was found guilty and ordered to reimburse the state for the cost of the pillowcase; additionally, prison authorities entered a reprimand on Palmer's prison record.

Palmer subsequently brought a civil rights action in United States District Court contending, among other things,¹⁵ that Hudson had violated his fourth amendment rights by conducting the shakedown solely for harassment purposes and by destroying certain of Palmer's noncontraband property, including legal materials and letters.¹⁶ Hudson denied the allegations and received a sum-

¹² See *infra* notes 48-67 and accompanying text.

¹³ See *infra* notes 155-226 and accompanying text.

¹⁴ Neither the Supreme Court nor the lower courts discuss the degree of security manifested by the correctional center.

¹⁵ Palmer brought his action under the Federal Civil Rights Act, 42 U.S.C. § 1983 (1981). He raised a due process argument, not discussed in this Article, alleging that his property had been improperly taken and destroyed. Both the Fourth Circuit and the Supreme Court rejected the due process claim on the theory that the state provided Palmer adequate postdeprivation remedies. See *Palmer v. Hudson*, 697 F.2d 1220, 1222-23 (4th Cir. 1983); *Hudson v. Palmer*, 104 S.Ct. at 3203-05. Palmer also introduced additional due process claims and an eighth amendment argument, all of which were summarily dismissed by the district court and the Fourth Circuit, 697 F.2d at 1221 n.1, and not raised in the Supreme Court.

¹⁶ 104 S. Ct. at 3208 (Stevens, J., dissenting).

mary judgment. The district court accepted Palmer's allegations as true, but held that they were constitutionally insignificant.¹⁷

The Court of Appeals for the Fourth Circuit reversed, finding the summary judgment premature because Hudson may have violated Palmer's "limited privacy right" against searches conducted solely for harassment.¹⁸ The court of appeals found that unannounced shakedown searches of an inmate's property are necessary security protections, but determined that shakedowns of individual inmates are permissible only if "pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband"¹⁹ or upon proof "that some reasonable basis exist[s] for the belief that the prisoner possesse[s] contraband."²⁰

The United States Supreme Court granted certiorari²¹ to consider, among other things,²² "whether a prison inmate has a reasonable expectation of privacy in his prison cell" entitling him to fourth amendment protection.²³

B. THE SUPREME COURT RESOLUTION

The Supreme Court reversed the fourth circuit, holding that although inmates enjoy those constitutional rights "not fundamentally inconsistent with . . . the objectives of incarceration,"²⁴ fourth amendment protection of prison cells, even to the "limited" extent recognized by the court of appeals, was unavailable to Palmer.²⁵ The Court grounded its decision on Palmer's inability to establish a privacy interest sufficient to trigger the fourth amendment.

The Court determined the issue to be whether Palmer could satisfy the "justifiable expectation of privacy" test of *Katz v. United States*.²⁶ The applicability of the fourth amendment, according to the *Palmer* Court, turns on whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy,' that has been invaded by government action."²⁷

¹⁷ 697 F.2d at 1222.

¹⁸ *Id.* at 1223-25.

¹⁹ *Id.* at 1224.

²⁰ *Id.* at 1225.

²¹ 103 S. Ct. 3535 (1983).

²² For a discussion of the due process issue raised in *Palmer*, see *supra*, note 15.

²³ 104 S. Ct. at 3196.

²⁴ *Id.* at 3198.

²⁵ *Id.* at 3197-202.

²⁶ 389 U.S. 347 (1967). For a discussion of the *Katz* decision, see *infra* notes 71-87 and accompanying text.

²⁷ 104 S. Ct. at 3199.

More specifically, the Court invoked Justice Harlan's formulation in his concurring opinion in *Katz*: "We must decide, in Justice Harlan's words, whether a prisoner's expectation of privacy in his prison cell is the kind of expectation that 'society is prepared to recognize as "reasonable".'" ²⁸

The Court concluded that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell. . . ." ²⁹ The Chief Justice found that protecting society's interest in maintaining the security of its penal institutions—volatile places where the threat of violence and the possession of contraband are ubiquitous³⁰—is "impossible . . . if inmates retained a right of privacy in their cells."³¹ The "limited" right articulated by the court of appeals would, in the opinion of the *Palmer* Court, enable inmates to anticipate the occurrence of shake-downs because they would eventually decipher the official scheme of "planned random searches."³² Because their cells are "[v]irtually the only place inmates can conceal weapons, drugs, and other contraband,"³³ the Court found that "wholly random [cell] searches are essential to the effective security of penal institutions."³⁴ Only the "bright line" approach of denying fourth amendment protection altogether³⁵ protects against deterioration of prison security and order. "The 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."³⁶

The *Palmer* Court also recognized the power of prison officials to seize from cells "any articles which, in their view, disserve legitimate institutional interests."³⁷ The redress of inmate losses caused by improper destruction of seized property rests under state rather than federal law.³⁸

The Court recognized the possibility of intrusions conducted solely to harass, and noted that "intentional harassment of even the most hardened criminals cannot be tolerated by a civilized soci-

²⁸ *Id.*

²⁹ *Id.* at 3200.

³⁰ The Court referred to statistics reflecting the incidence of criminal activity within penal institutions. *Id.*

³¹ *Id.*

³² *Id.* at 3201.

³³ *Id.* at 3200.

³⁴ *Id.* at 3201.

³⁵ *Id.*

³⁶ *Id.* at 3200.

³⁷ *Id.* at 3201 n.8.

³⁸ *Id.*

ety.”³⁹ The Court concluded, however, that the eighth amendment prohibition against cruel and unusual punishments constitutes the constitutional remedy for such violations.⁴⁰

C. THE O’CONNOR OPINION

Justice O’Connor joined the Court’s opinion but concurred separately.⁴¹ Justice O’Connor contended that Palmer’s privacy claim was unfounded due to its failure to show “unreasonable” governmental action in light of the government’s compelling interest in prison safety.⁴² Citing *United States v. Robinson*,⁴³ she concluded that no case-by-case assessment of reasonableness in prison cases was necessary because the Court had held in other contexts that certain

³⁹ *Id.* at 3201. The Court noted that “the way a society treats those who have transgressed against it is evidence of the essential character of that society.” *Id.* at 3199.

⁴⁰ The eighth amendment provides in full: “Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The *Palmer* Court stated:

Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates’ property rights with impunity. The Eighth Amendment always stands as a protection against ‘cruel and unusual punishments.’ By the same token, there are adequate state tort and common-law remedies available to respondent to redress the alleged destruction of his personal property.

104 S. Ct. at 3202. The *Palmer* Court did not recognize an alternative remedy for violation of privacy under a substantive due process theory. For a discussion of due process privacy, see *infra* notes 169-77 and accompanying text. Instead, the Court implied that a fourteenth amendment due process remedy was *not* available because it merged with the rejected fourth amendment privacy claim:

Petitioner maintains that the Court of Appeals’ decision rests at least in part upon a finding of an independent right of privacy for prisoners under the Fourteenth Amendment alone. Arguably, it is not entirely clear whether the Court of Appeals believed that the limited privacy right it recognized was guaranteed solely by the Fourth Amendment, and applicable to the States only through the Fourteenth Amendment, or whether the right emanated from the Fourteenth Amendment alone, or both. The court’s opinion, however, explicitly speaks to the ‘primary purpose of the Fourth and Fourteenth Amendments,’ . . . and nowhere does it suggest an intention to draw a distinction between the Fourth and Fourteenth Amendments right of privacy in prison cells. Under the circumstances, we assume, since there is no suggestion to the contrary, that the court did not mean to imply in this context that any right of privacy that might exist under the Fourteenth Amendment alone exceeds that that exists under the Fourth Amendment.

Id. at 3197 n.4.

⁴¹ 104 S. Ct. at 3205 (O’Connor, J., concurring).

⁴² *Id.* at 3206 (O’Connor, J., concurring).

⁴³ 414 U.S. 218 (1973). *Robinson* holds that the fourth amendment permits warrantless searches of the person incident to lawful custodial arrests. The decision in *Robinson* is not concerned with defining “searches and seizures,” but rather with when personal searches and seizures are “reasonable.”

contested practices are categorically permitted.⁴⁴ In light of the interests at stake, prison searches are the categorically reasonable products of necessarily *ad hoc* judgments of prison officials maintaining prison safety.⁴⁵ Moreover, according to Justice O'Connor, the "fact of arrest and incarceration abates all legitimate Fourth Amendment privacy . . . interests in personal effects."⁴⁶ Consequently, "all searches and seizures of the contents of an inmate's cell are reasonable."⁴⁷

D. THE PALMER DISSENT

Justice Stevens, joined by Justices Brennan, Marshall and Blackmun, dissented in *Palmer*,⁴⁸ contending that prisoners are entitled to fourth amendment protection against unreasonable searches of their cells and seizures of their property. Accepting the allegations in the complaint as true,⁴⁹ the dissenters found a clear fourth amendment violation in Hudson's malicious confiscation and destruction of Palmer's property—his possession of which was protected under state law and by several constitutional provisions.⁵⁰ Agreeing with the majority that the imperatives of prison administration require random searches of prison cells,⁵¹ Justice Stevens rejected the view that the legitimacy of such searches negates the possibility of protecting inmate privacy in their cells and possessions. He granted that privacy rights will no doubt be "minimal" compared to conditions in the free world, but prisoners must be afforded a "slight residuum of privacy" in their cells lest they be totally stripped of their dignity.⁵² "From the standpoint of the prisoner . . . that trivial residuum may mark the difference between

⁴⁴ Justice O'Connor lists two contested practices: searches incident to arrest and prison room and body cavity searches. 104 S. Ct. at 3206 (O'Connor, J., concurring).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 104 S. Ct. at 3207-17 (Stevens, J., dissenting).

⁴⁹ The dissenters noted:

This case comes to us on the pleadings. We must take the allegations in Palmer's complaint as true. Liberally construing this pro se complaint as we must, it alleges that after examining it, . . . Hudson maliciously took and destroyed a quantity of Palmer's property, including legal materials and letters, for no reason other than harassment.

Id. at 3207-08 (Stevens, J., dissenting).

⁵⁰ In addition to property rights under state law, the dissenters cited first amendment, eighth amendment, and due process theories as constitutional grounds protecting Palmer's interests in the confiscated materials. *Id.* at 3210-11 (Stevens, J., dissenting).

⁵¹ *Id.* at 3208 (Stevens, J., dissenting).

⁵² *Id.* at 3208, 3215 (Stevens, J., dissenting).

slavery and humanity.”⁵³ Moreover, the dissenters contested the empirical validity of the majority’s conclusion that “society is [un]prepared to recognize [as reasonable] the possessory interests of prisoners”⁵⁴ and chided the majority for disregarding the significance of the fact that “[v]irtually every federal judge to address the question over the past decade has concluded that the Fourth Amendment does apply to a prison cell.”⁵⁵

Apart from privacy considerations, Justice Stevens contended that Palmer’s property rights themselves were sufficient to trigger fourth amendment protection. Hudson’s actions clearly constituted a “seizure” depriving Palmer of his possessory interests in his property.⁵⁶

Having concluded that Palmer’s complaint alleged a “search and seizure,” the dissenters easily found fourth amendment “unreasonableness.” The intrusion alleged by Palmer could not be penologically justified or excused, and therefore was necessarily unreasonable.⁵⁷ To the dissenters, protecting a residuum of inmate privacy and possessory rights to noncontraband property is essential to the government’s goal of maintaining prison security.⁵⁸ Otherwise, prisoners are “deprived of any sense of individuality [and] devalue themselves and others and therefore are more prone to violence toward themselves or others.”⁵⁹ Moreover, the total rejection of inmate privacy rights is inconsistent with the rehabilitative function of correctional institutions.⁶⁰

⁵³ *Id.* at 3208 (Stevens, J., dissenting).

⁵⁴ *Id.* at 3212 (Stevens, J., dissenting). Justice Stevens states:

The Court’s holding is based on its belief that society would not recognize as reasonable the possessory interests of prisoners. Its perception of what society is prepared to recognize as reasonable is not based on any empirical data; rather it merely reflects the perception of the four Justices who have joined the opinion that THE CHIEF JUSTICE has authored.

Id.

⁵⁵ *Id.* at 3212 (Stevens, J., dissenting). See *supra* note 9 and accompanying text.

⁵⁶ *Id.* at 3209 (Stevens, J., dissenting).

⁵⁷ Justice Stevens states:

In the final analysis, however, any deference to institutional needs is totally undermined by the fact that Palmer’s property was not contraband. If Palmer were allowed to possess the property, then there can be no contention that any institutional need or policy justified the seizure and destruction of the property. Once it is agreed that random searches of a prisoner’s cell are reasonable to ensure that the cell contains no contraband, there can be no need for seizure and destruction of noncontraband items found during such searches.

Id. at 3215 (Stevens, J., dissenting).

⁵⁸ “[I]t appears to be the near-universal view of correctional officers that guards should neither seize nor destroy noncontraband property.” *Id.* at 3213 (Stevens, J., dissenting).

⁵⁹ *Id.* at 3214 (Stevens, J., dissenting), citing Schwartz, *supra* note 2.

⁶⁰ 104 S. Ct. at 3214 (Stevens, J., dissenting). ‘It is anomalous to provide a prisoner

Justice Stevens also disputed the Chief Justice's assessment of the dangerousness of prisons, pointing out that the homicide rate in prisons is "significantly lower than . . . in many . . . major cities."⁶¹ Moreover, many inmates, even in maximum security institutions, are not violent people⁶² and most minimum security facilities are populated by inmates who pose no realistic threat to security. . . ."⁶³

These considerations led the dissenters to suspect that the interest in institutional security may be something of a red herring in the majority opinion. To Justice Stevens, the Chief Justice's position might best be explained as an unstated willingness to sacrifice constitutional principle on the altar of expediency. In addition to promoting its view of wise penal administration,⁶⁴ the *Palmer* Court's adoption of a "bright line" rule avoided the possibility of flooding the courts with frivolous lawsuits⁶⁵—a fear, the dissenters pointed out, which posed insufficient justification for modifying pre-*Palmer* case law permitting inmates fourth amendment protection. In fact the "flood" had never materialized under such case law, and the dissenters believed that it could easily be handled if it ever occurred.⁶⁶

Finally, Justice Stevens expressed hope that *Palmer* would not affect inmates' interests in personal privacy. "The Court's [repeal of the fourth amendment] . . . appears to [be], limit[ed] to a prisoner's 'papers and effects' located in his cell. Apparently [the Court] believes that at least a prisoner's 'person' is secure from unreasonable search and seizure."⁶⁷

with rehabilitative programs . . . in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures.' *Id.* (quoting Gianelli & Gilligan, *supra* note 9, at 1069).

⁶¹ 104 S. Ct. at 3214 (Stevens, J., dissenting).

⁶² Justice Stevens notes:

The Court's portrayal of the stereotypical prison inmate entirely overlooks the wide range of individuals who actually have served and do serve time in the prison system. It ignores, for example, the conscientious objectors who refuse to register for the draft, and the corporate executives who have been convicted of violating securities, antitrust or tax laws, union leaders, former White House aides, former governors, judges, and legislators, famous writers and sports heroes, and many thousands who have committed serious offenses but for whom crime is by no means a way of life.

Id. at 3215 n.29 (Stevens, J., dissenting).

⁶³ *Id.* at 3209 n.5 (Stevens, J., dissenting). The majority did not address the security level of the penal institution involved in the case; thus *Palmer* cannot be read as automatically limiting the fourth amendment rights of only those inmates confined in maximum security institutions.

⁶⁴ *Id.* at 3216 (Stevens, J., dissenting).

⁶⁵ *Id.* at 3215 n.30 (Stevens, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.* at 3216 n.31 (Stevens, J., dissenting).

E. THE PALMER OPINIONS: A BRIEF ASSESSMENT

Several of the dissent's criticisms appear particularly telling. The Chief Justice is unconvincing in concluding that prisons are dangerous places and therefore security demands automatically outweigh any privacy interests of inmates.⁶⁸ This position is plausible only upon a showing that prisons are *significantly more dangerous* places than other areas. Moreover, to conclude, as the *Palmer* Court appears to do, that all prisons, maximum or minimum security, are equally dangerous is fatuous. But even if all prison life is *sui generis* in magnifying risks to order and security, the *Palmer* majority never explains why governmental interests are unduly sacrificed by permitting inmates like Palmer to litigate fourth amendment claims of official harassment. The bringing of such actions poses no risk to security—if anything, protecting a residuum of privacy is consistent with security demands⁶⁹—and the concern about a deluge of frivolous lawsuits itself seems frivolous.⁷⁰

While the *Palmer* dissent points out these deficiencies, it fails to explore other fundamental problems with the Chief Justice's opinion. The remainder of this Article will address two such problems—the Court's general analytical approach to defining the scope of the fourth amendment, and the effect of *Palmer* on issues of prisoners' rights to personal privacy.

III. DEFINING FOURTH AMENDMENT SCOPE

The *Palmer* Court continues an analytic tradition begun by *Katz v. United States*.⁷¹ In *Katz*, the Court rejected earlier judicial attempts to define "searches and seizures" in terms of physical intrusions into certain protected areas and adopted an approach extending the fourth amendment to situations where the government invades recognizable privacy.⁷² While the emergence of a privacy oriented test is laudable in principle,⁷³ sound doctrinal advancement has been

⁶⁸ With no disrespect intended toward the Chief Justice, the following observation of Hugo Bedau might be noted: "Along with patriotism, security—national security and prison security—is the last refuge of scoundrels." Bedau, *How to Argue About Prisoners' Rights: Some Simple Ways*, 33 RUTGERS L. REV. 687, 702 (1981).

⁶⁹ See *supra* notes 57-60 and accompanying text.

⁷⁰ See *supra* notes 65-66 and accompanying text.

⁷¹ 389 U.S. 347 (1967).

⁷² See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356-409 (1974); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968).

⁷³ Professor Kitch describes the focus on privacy as "more congruent with the Fourth Amendment's central purpose to protect the privacy of the citizen from unreasonable government investigation than the property principle." Kitch, *Katz v. United States*:

frustrated by judicial interpretations of *Katz* which have resulted in an unfortunate restriction of the scope of the fourth amendment. *Palmer* perpetuates this misguided trend.

A. THE KATZ STANDARD

In *Katz*, the Court laid the foundation for defining the scope of the fourth amendment's protection of privacy,⁷⁴ the central value underlying the proscription against unreasonable searches and seizures.⁷⁵ The *Katz* Court held that governmental use of an electronic monitoring device placed on the outside of a public telephone to intercept *Katz*'s phone conversations involving illegal gambling activities constituted an illegal search and seizure. The government had invaded *Katz*'s "justifiable reliance on privacy," therefore a fourth amendment "search and seizure" had occurred that was "unreasonable" for want of a supporting warrant.⁷⁶

The Court in *Katz* perceived the issue of defining fourth amendment "reasonableness" as distinct from the analytically prior issue of determining whether or not a "search or seizure" has occurred.⁷⁷ Moreover, searches and seizures are not limited to specific constitutionally protected areas like the home, but occur whenever the government intrudes on one's legally recognizable privacy.⁷⁸ *Katz* is

The Limits of the Fourth Amendment, 1968 SUP. CT. REV. 133, 134-35. Indeed, under the earlier protected area approach, most electronic surveillance would go unregulated because it entails no physical trespass into a protected area. See *Silverman v. United States*, 365 U.S. 505 (1961); *Goldman v. United States*, 316 U.S. 129 (1942); *Olmstead v. United States*, 277 U.S. 438 (1928).

⁷⁴ See *supra* sources cited at notes 72 and 73; see also 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 220-40 (1978); C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 91-94 (1980).

⁷⁵ "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). See also *Katz v. United States*, 389 U.S. 347, 353 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.").

⁷⁶ 389 U.S. at 354-59.

⁷⁷ The *Katz* Court considered the "reasonableness" of the government's conduct as a "question remaining" after having determined that a "search and seizure" had occurred. 389 U.S. at 354. Professor Whitebread describes the two-step process as follows:

If it is determined that no Fourth Amendment right is involved . . . because the defendant had no reasonable expectation of privacy, then the [intrusion] . . . in question can have no impact on subsequent prosecution. However, if it is determined that a Fourth Amendment right does exist, the second step is to determine whether the governmental conduct was reasonable.

C. WHITEBREAD, *supra* note 74, at 102.

⁷⁸ See *supra* notes 72-74 and accompanying text.

problematic, however, in defining protected privacy, particularly when privacy claims arise from intrusions involving novel means of investigation or surveillance⁷⁹ or occur in seemingly public contexts which nevertheless embody aspects of privacy.⁸⁰

The *Katz* Court took meager steps at clarifying the standard: "[T]he . . . Amendment protects people, not places. What a person knowingly exposes to the public, even in his 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."⁸¹ This suggests a subjective standard; the fourth amendment protects what one seeks to keep private. Yet, the Court's implication that subjective desires for privacy only sometimes trigger the fourth amendment—they "may be constitutionally protected"⁸²—belies an exclusively subjective test. Such a test would permit the government to circumvent the fourth amend-

⁷⁹ See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983) (use of a "beeper," a battery operated monitoring device, attached to a container of chemicals used to manufacture illicit drugs prior to its purchase by suspect not a "search"); but see *United States v. Karo*, 104 S. Ct. 3296 (1984) (use of "beeper" to monitor activities within suspect's house is a "search"); *Smith v. Maryland*, 442 U.S. 735 (1979) (use of "pen registers" to record phone numbers dialed by suspect not a "search") For a discussion of *Smith*, *Knotts*, and *Karo*, see *infra* notes 114-20, 127-30 and accompanying text.

⁸⁰ Legitimate exclusive control of a given area or object generally embodies privacy expectations and thus poses few *Katz* problems. On the other hand, a whole range of places raise difficulties under *Katz*. Restaurants, public parks, lobbies, air, rail and bus terminals reflect no exclusive rights of control, but nevertheless are contexts where many intimate affairs occur. See *Kitch*, *supra* note 73, at 137.

Searches in the public schools have posed a special problem. Some courts have suggested that students possess few privacy expectations while in school. See, e.g., *Doe v. Renfrow*, 475 F. Supp. 1012, 1022 (N.D. Ind. 1979), *modified*, 631 F.2d 91, *reh'g denied*, 635 F.2d 582 (7th Cir. 1980) (en banc), *cert. denied*, 451 U.S. 1022 (1982) (sniffs of students by dogs not a "search"). Other courts hold that the school environment has little effect in diminishing privacy expectations. See, e.g., *Horton v. Goose Creek Independent School Dist.*, 690 F.2d 470, 478-79, *reh'g denied*, 693 F.2d 524 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (sniffs of students by dogs are "searches"). See generally *Gardner, Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 Nw. U.L. REV. 803 (1980). The Supreme Court recently addressed the school search issue, holding that the fourth amendment protects students from searches and seizures by school authorities unless supported by "reasonable suspicion" that the student was violating either the law or a school rule. *New Jersey v. T.L.O.*, 105 S. Ct. 733 (1985).

Equally problematic are the "toilet spy" cases where police conduct clandestine surveillance of public restrooms. Some courts find such intrusions to be within the scope of the fourth amendment, especially if the restroom stalls have doors. See, e.g., *Brown v. State*, 3 Md. App. 90, 238 A.2d 147 (1968); *State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1970). Other courts find no privacy invasion where the stalls have no doors. See, e.g., *People v. Heath*, 266 Cal. App. 2d 754, 72 Cal. Rptr. 457 (1968); *People v. Roberts*, 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967) (observation through peepholes into public area of restroom).

⁸¹ 389 U.S. at 351-52 (citations omitted).

⁸² See *supra* text accompanying note 81.

ment by defeating claims of subjective privacy by simply notifying the public that a given area previously thought to be private would henceforth be systematically invaded.⁸³ On the other hand, the subjective test would trigger fourth amendment protections where claimants assert actual privacy reliances in situations where such claims appear ridiculous.⁸⁴

In an attempt to clarify the scope of the privacy interest protected by the fourth amendment, Justice Harlan articulated his "reasonable expectation of privacy" test embraced in *Palmer*⁸⁵ and previously accepted by the Court.⁸⁶ Justice Harlan added an "objective" prong: "there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁸⁷

B. JUSTICE HARLAN'S TEST: AMBIGUITIES AND INADEQUACIES

While Justice Harlan's test avoids the evils of a totally subjective test, it has substantial flaws.⁸⁸ The requirement that "society . . . recognize [privacy expectations] as 'reasonable'" is ambiguous.⁸⁹ The Harlan test may be interpreted two different ways: one with an

⁸³ Professor Amsterdam summarizes the problems inherent in a subjective test:

An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, *supra* note 72, at 384.

⁸⁴ For example, imagine that a police officer walking his beat at high noon in a public park observes a defendant commit a crime. The defendant argues that the observation constitutes a warrantless search because the defendant actually believed his conduct took place in "private" because he took the precaution of checking for police prior to committing the offense.

⁸⁵ See *supra* text accompanying note 28.

⁸⁶ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

⁸⁷ 389 U.S. at 361 (Harlan, J., concurring).

⁸⁸ Some courts have used the subjective prong of Justice Harlan's test to deny fourth amendment protection in cases where the reasonableness of the intrusion arguably might demand attention. See, e.g., *People v. Califano*, 5 Cal. App. 3d 476, 482, 85 Cal. Rptr. 292, 296 (1970). In *Califano*, the defendant was placed in a police interview room with an accomplice. A hidden microphone recorded incriminating remarks. The defendant's fourth amendment challenge was rejected because, among other things, the court concluded that he entertained no subjective expectations of privacy based upon his remark: "They . . . are probably listening right now [laughter]."

⁸⁹ One commentator has suggested that *Katz* destroyed "whatever clarity" had existed in the law defining fourth amendment scope. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 174.

empirical emphasis aimed at discovering and describing normal privacy expectations—those which people “reasonably” possess in fact—the other directed towards the normative problem of determining rights to possess privacy expectations — those which people “reasonably” deserve to possess.

The “empirical” interpretation assumes an objective ability to determine whether a legally recognizable privacy intrusion has occurred in a given case.⁹⁰ Inferences from established social practices may provide guidance in some cases, but often no objective referent will exist to measure whether society recognizes a given privacy expectation as reasonable.⁹¹ In such cases, courts applying the “empirical” interpretation will likely resort to either of two approaches, both of which have a tendency to constrict the scope of the fourth amendment.

The first approach appeals to assumption of risk analysis in defining “reasonable expectations of privacy.” If a reasonable person would have taken precautions to protect privacy, no fourth amendment intrusion occurs when such precautions are not taken and the government intrudes.⁹² Individuals assume the risk of government intrusion when they fail to take sufficient precautions against intrusion. Thus, the failure to pull the curtains precludes “a reasonable expectation of privacy” in a room whose interior could not be observed from ground level but into which FBI agents peered with binoculars while atop a ladder on railroad tracks thirty-five feet away.⁹³

The second judicial approach in applying the “empirical” inter-

⁹⁰ Professor Yackle describes the “empirical interpretation” of the Harlan test as follows:

In recent cases, the Court has looked not for the individual’s ‘justifiable’ but for his or her ‘reasonable’ or ‘legitimate’ expectation of privacy. The difference is more than semantical. The latter phrases invite reference not to the Constitution itself, to ‘what expectations the Fourth Amendment will protect,’ but rather to what expectations contemporary Americans in fact have. It is as though the fourth amendment only mirrors existing understandings, protecting privacy more or less as expectations that privacy be protected rise and fall.

Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 361 (1978).

⁹¹ See Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1473-74 (1977).

⁹² See Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 168-71 (1977).

⁹³ See *Commonwealth v. Hernley*, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971). See also *United States v. Fisch*, 475 F.2d 1071, 1078 n.15 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973) (quoting *State v. Smith*, 37 N.J. 481, 496, 181 A.2d 761, 769 (1962), *cert. denied*, 374 U.S. 835 (1963)): “[I]t is the duty of the policeman to investigate, and we cannot say that . . . the Fourth Amendment itself draws the blinds the occupant could have drawn but did not.” But see *United States v. Kim*, 415 F. Supp. 1252 (D. Hawaii 1976) (the court found a “search” when FBI agents from a quar-

pretation of Justice Harlan's test is to balance interests in discerning "reasonable expectations of privacy." Given the absence of external standards, courts sometimes weigh alleged privacy interests against other values—most often the need for effective law enforcement—in deciding whether a search or seizure has occurred.⁹⁴ Thus, if an intrusion reflects "normal" police behavior generally conducive to the realization of law enforcement interests, the conduct may be judged "reasonable."⁹⁵ If so, the courts may find claimed privacy expectations to be "unreasonable" or non-existent.⁹⁶ Such an

ter mile away used a telescope to peer into defendant's high-rise apartment to determine what he was reading).

⁹⁴ See Note, *supra* note 91, at 1474-76. The balancing approach is elsewhere described: "[A]n expectation of privacy will be reasonable if in a given context it is one normally shared by people in that setting and at the same time falls within some tolerance level which represents the limit of what society can accept given its interest in law enforcement." Note, *The Supreme Court: 1967 Term*, 82 HARV. L. REV. 63, 192 (1968).

⁹⁵ See, e.g., *United States v. Solis*, 536 F.2d 880, 882-83 (9th Cir. 1976) (use of dogs to sniff semi-trailer for illicit drugs is "reasonable" police conduct); *People v. Cooper*, 17 Cal. App. 3d 1112, 1118, 95 Cal. Rptr. 471, 475 (1971) (police acted "reasonably" in using fire escape to observe suspect in his apartment to determine whether he would offer armed resistance to police entry).

⁹⁶ In both *Cooper* and *Solis*, the courts weighed the reasonableness of the police action against the privacy claims of defendants and held that no search had occurred. In *Cooper*, the court stated: "It follows that the officer's utilization of the fire escape was . . . reasonable. That is to say, in the circumstances . . . the procedure followed by the officers constituted no unreasonable invasion of appellant's right to privacy." *Cooper*, 17 Cal. App. 3d at 1118, 95 Cal. Rptr. at 475. Likewise, in *Solis*, the court stated:

The dogs' intrusion such as it was into the air space open to the public in the vicinity of the trailer appears to us reasonably tolerable in our society. . . . We hold that the use of the dogs was not unreasonable under the circumstances and therefore not a prohibited search under the fourth amendment.

536 F.2d at 882-83. See also *Doe v. Renfrow*, 475 F. Supp. at 1021-22, where the court reasoned that because the use of dogs to sniff students for drugs constituted an acceptable "aid" to school administrators in the reasonable exercise of their educational duties, the sniffs of students by the dogs infringed no justifiable expectations of privacy.

The judiciary has used similar reasoning in assessing the fourth amendment interests of parolees while on parole. Courts have often concluded that parolees enjoy diminished expectations of privacy solely because law enforcement interests in supervising parole through periodic privacy invasions appear especially strong. See, e.g., *People v. Mason*, 5 Cal. 3d 759, 764, 488 P.2d 630, 633, 97 Cal. Rptr. 302, 305 (1971), *cert. denied*, 405 U.S. 1016 (1972) (parolees have "reduced expectations of privacy, thereby rendering certain intrusions by governmental authorities 'reasonable' which otherwise would be invalid"). See also *People v. Hernandez*, 229 Cal. App. 2d 143, 150, 40 Cal. Rptr. 100, 104 (1964), *cert. denied*, 381 U.S. 953 (1965) (parolee may not assert fourth amendment claims against those who supervise him on parole because he enjoys the same privacy protections—none—enjoyed while in prison).

Finally, the Supreme Court engaged in the balancing approach in holding that bank depositors possess no legitimate expectation of privacy in their bank records because the government has a strong interest in obtaining access to such information:

The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act, the expressed purpose of which is to require records to be maintained because they 'have

approach defines privacy, partly at least, in terms of the nature of the government's conduct, and thus appears at odds with the attempt of the *Katz* Court to analyze the privacy issue separately from the issue of whether the government acted reasonably.⁹⁷

Both varieties of the empirical interpretation of the expectation of privacy test are misguided. The assumption of risk analysis places virtually no *a priori* limits on governmental surveillance. As Professor Amsterdam noted:

[U]nless the fourth amendment controls tom-peeping and subjects it to a requirement of antecedent cause to believe that what is inside any particular window is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out. Should we say that prospect is not alarming because the innocent homeowner need not fear that he will get caught doing anything wrong? The fourth amendment protects not against incrimination, but against invasions of privacy The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.⁹⁸

The balancing approach also is defective. By weighing the reasonableness of the law enforcement action against the privacy claim,⁹⁹ the balancing approach rejects the teaching of *Katz* that searches and seizures occur when privacy is invaded whether or not the government's conduct is "reasonable"¹⁰⁰ and tends to constrict the effectuation of constitutional values.¹⁰¹ To determine the reasonableness of governmental conduct, courts applying the balancing approach often employ non-technical, common-sense concepts of rationality and weigh them against privacy claims.¹⁰² While

a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings.'

United States v. Miller, 425 U.S. 435, 442-43 (1976).

⁹⁷ See *supra* note 77 and accompanying text.

⁹⁸ Amsterdam, *supra* note 72, at 403.

⁹⁹ See *supra* text accompanying note 97.

¹⁰⁰ *Terry v. Ohio*, 392 U.S. 1 (1968), provides a vivid example of the Court's attempts to distinguish the "search" and "reasonableness" issues. The *Terry* Court painstakingly found "stops" and "frisks" to be privacy violations and thus searches and seizures before holding them to be reasonable under certain circumstances. *Id.* at 16-17, 19-31. An advocate of assumption of risk analysis offers this condemnation of the balancing approach: "The 'reasonableness' of privacy expectations must be measured by how the 'average person' shields his private activities from public exposure, not by the 'reasonableness' of restricting a given police stratagem." Comment, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U.L. REV. 831, 838 (1972).

¹⁰¹ See Gianelli & Gilligan, *supra* note 9, at 1064-66.

¹⁰² The concept of rationality expressed in the text is really more of a description of normal and supposedly necessary police practices rather than a rigorous fourth amendment evaluation of such. Therefore, the analysis tends to be empirical rather than normative. The analysis is "non-technical" in the sense that it avoids assessing the police

common sense notions of normal or generally acceptable police conduct might appear relevant in assessing whether or not "society is prepared to recognize a privacy claim as reasonable,"¹⁰³ a court utilizing this form of "rationality" often disposes of the case on the theory that no "search" occurred without ever considering the issue of the *fourth amendment* reasonableness or justification of the intrusion.¹⁰⁴ Police conduct, reasonably acceptable in general terms, effectively balances away the claim that a "search" occurred. Consequently, the balancing approach risks denying fourth amendment consideration entirely in situations where privacy has clearly been invaded but where *ad hoc* judicial comparisons determine that law enforcement concerns outweigh the privacy interest.¹⁰⁵

Such deficiencies in the "empirical interpretation" of the Harlan test have led many commentators to reject that approach in favor of a "normative interpretation" of the test,¹⁰⁶ directing the inquiry away from discovering empirically reasonable expectations towards explicating morally justifiable ones. The normative theorists characteristically scrutinize the type of governmental intrusion at issue and determine whether its systematic use would be intolerable in light of underlying constitutional values. Professor LaFave states:

It must be asked whether permitting the police regularly to engage in that type of practice, limited by nothing 'more than self-restraint by law enforcement officials,' requires the 'people' to which the Fourth Amendment refers to give 'up too much freedom as the cost of privacy.' That is, the fundamental inquiry is whether that practice, if not subjected to Fourth Amendment restraints, would be intolerable be-

conduct in terms of such traditional fourth amendment considerations as the need for particularized suspicion prior to intrusions or of the desirability of appeal to the warrant process. See Note, *supra* note 91, at 1474 n.71.

¹⁰³ Justice Harlan's test requires assessing the situation from society's point of view, a point of view which may or may not embrace the Constitution's protection of individual rights.

¹⁰⁴ Intrusions may be upheld due to an absence of privacy expectations as balanced against law enforcement interests without addressing such fourth amendment issues as the requirement of particularized suspicion prior to the intrusion or of the need for a search or arrest warrant. See *supra* notes 95, 96, 102 & 103.

¹⁰⁵ See Note, *supra* note 91, at 1474. The Supreme Court warned against a similar approach in *Chimel v. California*, 395 U.S. 752, 764-65 (1969):

It is argued in the present case that it is 'reasonable' to search a man's house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection . . . would approach the evaporation point.

Id.

¹⁰⁶ See *infra* notes 107-09 and accompanying text; see also Gianelli & Gilligan, *supra* note 9, at 1067-68; Yackle, *supra* note 90, at 358-63.

cause it would either encroach too much upon the 'sense of security' or impose unreasonable burdens upon those who wished to maintain that security.¹⁰⁷

Professor Amsterdam invokes a similar conception:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the fourth amendment inexorably requires the Court to make.¹⁰⁸

Perhaps the most significant articulation of the normative approach is offered by Justice Harlan himself, who ultimately disavowed the emerging empirical focus on privacy expectations spawned by his *Katz* concurrence.

The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as to mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.¹⁰⁹

Courts making a *Katz* inquiry, therefore, should not decide matters of fact about privacy, either in the sense of how "society" views the matter or whether the claimant actually entertains an expectation. Rather, they should determine the issue in light of underlying constitutional values addressing whether given expectations of privacy *ought to be* recognized.

While the normative approach may be somewhat circular — "the fourth amendment protects those interests that may justifiably claim fourth amendment protection"¹¹⁰ — the analysis is flawed to no greater degree than the views which hold that a person has no privacy expectation in a room with open curtains because someone might use binoculars to snoop inside¹¹¹ or that an individual has no privacy expectations when the police invade a seemingly private

¹⁰⁷ W. LAFAVE, *supra* note 74, at 233.

¹⁰⁸ Amsterdam, *supra* note 72, at 403.

¹⁰⁹ 401 U.S. 745, 786 (Harlan, J., dissenting). Justice Harlan elaborated further: "The question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." *Id.*

¹¹⁰ Amsterdam, *supra* note 72, at 385.

¹¹¹ See *supra* text accompanying note 98.

area, but conduct themselves forthrightly in gathering evidence.¹¹² On the other hand, the normative approach has the distinct advantage over its empirical counterparts of forcing judicial attention to underlying constitutional values in deciding questions of fourth amendment coverage.

C. THE EMPIRICAL INTERPRETATION: THE EMERGING APPROACH

The Supreme Court has embraced the empirical interpretation of the reasonable expectation of privacy standard, despite the normative theorists' admonitions to the contrary. The Court has found the assumption of risk approach particularly attractive.¹¹³

The Court explicitly employed assumption of risk analysis in *Smith v. Maryland*¹¹⁴ to support the conclusion that a police instigated installation of a "pen register"¹¹⁵ to record numbers dialed from a suspect's phone did not constitute a fourth amendment "search." The Court applied Justice Harlan's *Katz* standard,¹¹⁶ doubting that the suspect entertained subjective expectations of privacy regarding the phone numbers he dialed.¹¹⁷ Even if the subjective expectation of privacy prong of the *Katz* test had been satisfied, however, the Court concluded that the suspect's expectation was not "one that society is prepared to recognize as 'reasonable'" under the objective prong.¹¹⁸ Because the suspect voluntarily conveyed information about the dialed numbers to the phone company,¹¹⁹ he "assumed the risk that the company would reveal to police the numbers he dialed."¹²⁰

¹¹² See *supra* notes 99-105 and accompanying text.

¹¹³ See *infra* notes 114, 121 & 127 and accompanying text; see also *United States v. White*, 401 U.S. 745 (1971), where the Court found no violation of privacy expectations. A governmental informer, carrying a concealed radio transmitter, engaged defendant in incriminating conversations in his home which were overheard by the use of the radio equipment. The defendant clearly assumed the risk that any confidant might simply go to the police with the incriminating information, thus the Court held that the defendant assumed the risk that his confidant was wired. *Id.* at 751-53.

Several Justices dissented in *White* including Justice Harlan, the author of the "reasonable expectation of privacy" formula in *Katz*. See *supra* text accompanying note 109. For the dissents of Justices Douglas and Marshall, respectively, see 401 U.S. at 756-68, 795-96.

¹¹⁴ 442 U.S. 735 (1979).

¹¹⁵ A pen register is a mechanical device which records numbers dialed on a telephone without overhearing oral communications or indicating whether the calls were actually completed. *Id.* at 736 n.1.

¹¹⁶ *Id.* at 740.

¹¹⁷ *Id.* at 742-43.

¹¹⁸ *Id.* at 743-46.

¹¹⁹ The Court noted that all telephone users realize that they must convey phone numbers to the phone company. *Id.* at 742.

¹²⁰ *Id.* at 744. The *Smith* dissenters applied normative theory in concluding that the

The Court employed similar reasoning in *Rawlings v. Kentucky*,¹²¹ holding that the petitioner's failure to take "normal precautions to maintain . . . privacy"¹²² when entrusting possession of illegal drugs to an acquaintance who put them in her purse led to a denial of his "standing" to raise fourth amendment objection to a subsequent police search of the purse.¹²³ The *Rawlings* Court found that because petitioner had no right to exclude other persons from access to the purse, he had no claim against the government.¹²⁴ Presumably, the petitioner assumed the same risk of intrusion from the government as was posed by the owner of the purse.¹²⁵ Thus, the absence of privacy expectations against a private third party led the Court to the conclusion that no such expectations existed against the government.¹²⁶

The recent "beeper" cases also reflect the assumption of risk approach. In *United States v. Knotts*,¹²⁷ the Court applied the *Smith* risk analysis,¹²⁸ holding that no search occurred when the government monitored the whereabouts of a suspicious chemical¹²⁹ by hiding a beeper device in the chemical's container prior to the time a suspect possessed it. The beeper permitted surveillance of the chemical as it traveled in the suspect's car. Because the suspect would have no expectation of privacy had his car been visually followed by the police, the Court found that no increased privacy expectation was created by means of the hidden beeper.¹³⁰ The suspect assumed the risk of surveillance either way.

Once inside a private dwelling, however, the risks of surveil-

suspect "should be entitled to assume that the numbers he dials in the privacy of his home will be recorded, if at all, solely for the phone company's business purposes." *Id.* at 752 (Marshall, J., dissenting).

¹²¹ 448 U.S. 98 (1980).

¹²² *Id.* at 105.

¹²³ *Id.* at 104-06. Earlier the Court held that "standing" to raise fourth amendment challenges depended entirely on one's ability to satisfy the *Katz* expectation of privacy test. See generally *Rakas v. Illinois*, 439 U.S. 128 (1978).

¹²⁴ 448 U.S. at 105.

¹²⁵ In a case subsequent to *Rawlings*, the Court stated: "[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of the information." *United States v. Jacobsen*, 104 S. Ct. 1652, 1658 (1984).

¹²⁶ The dissenters in *Rawlings* took the majority to task for its narrow application of the privacy expectations standard. 448 U.S. at 114-21 (Marshall, J., dissenting).

¹²⁷ 460 U.S. 276 (1983).

¹²⁸ *Id.* at 283.

¹²⁹ The chemical, chloroform, is a "precursor chemical" used in manufacturing illicit drugs. *Id.* at 278.

¹³⁰ *Id.* at 281-85.

lance decrease. In *United States v. Karo*,¹³¹ the Court held that the use of a beeper to monitor the whereabouts of suspicious chemicals inside a private residence constituted a violation of a recognizable expectation of privacy.¹³² Unlike the situation in *Knotts*, surveillance from outside the house could not have conveyed the same information ultimately obtained by the beeper.¹³³ Therefore, privacy expectations increased and assumptions of risk diminished as the chemicals entered the dwelling.

D. PALMER AND THE BALANCING APPROACH

Palmer perpetuates the Court's commitment to the empirical interpretation of the *Katz* standard. Rather than employing assumption of risk analysis to prison searches as it might have done,¹³⁴ the Court employs the balancing approach in disposing of *Palmer's* claim. Indeed, *Hudson v. Palmer* may represent the Court's first full scale use of this analysis in assessing the fourth amendment validity of a claimed privacy expectation.¹³⁵

"Determining whether an expectation of privacy is . . . 'reasonable,' " according to the *Palmer* Court, "necessarily entails a balancing of interests," specifically the "interest of society in the security of its penal institutions and the interest of the prisoner in the privacy within his cell."¹³⁶ The Court strikes the balance in favor of the government based upon the perceived weight of empirical data establishing security risks within penal institutions. Simply because the government's interest is judged substantial, the Court concludes that *Palmer* has no reasonable expectation of privacy, thus negating his claim without ever assessing it in terms of the underlying constitutional values. The Court concludes that prisoners have no legiti-

¹³¹ 104 S. Ct. 3296 (1984).

¹³² *Id.* at 3303-04.

¹³³ *Id.*

¹³⁴ The Court could have concluded that *Palmer* assumed the risk of privacy intrusions by committing crimes sufficient to send him to prison where such violations are known to be the "order of the day." Something approaching this reasoning is found in *J.M.A. v. State*, 542 P.2d 170 (Alaska 1975), where the court found no "search" where a foster parent eavesdropped upon telephone conversations of the juvenile in her charge. The court based its reasoning partly on the view that the juvenile had been placed in the foster home as an alternative to placement in a correctional institution where "official surveillance has traditionally been the order of the day." *Id.* at 175 (footnote omitted). Apparently, to the court in *J.M.A.*, risks of such intrusions are assumed by those committing offenses. See also van den Haag, *supra* note 1, at 159: "[T]he criminal foregoes privacy by voluntarily acting against the public interest, of which, therefore he becomes an object."

¹³⁵ Brief allusions to the balancing approach are made in at least one other Supreme Court case. See *supra* note 96 discussing *United States v. Miller*.

¹³⁶ 104 S. Ct. at 3200.

mate expectation of privacy, and thus fails to address the reasonableness of the particular intrusion in Palmer's case.¹³⁷

Justice O'Connor reaches the same result by blurring the "search" and "reasonableness" issues and finding prison searches and seizures categorically "reasonable" because governmental interests outweigh prisoners' privacy claims.¹³⁸ Like the Chief Justice, Justice O'Connor generates her conclusion in light of empirical considerations establishing prison security needs, paying little attention to fourth amendment values.

Even the *Palmer* dissenters seem somewhat beguiled by this empirical approach. While more sensitive to normative considerations than their colleagues in the majority,¹³⁹ the dissenters nevertheless note the absence of empirical data—as if it were crucial—as a flaw in the conclusion that society is not prepared to recognize the reasonableness of Palmer's claim.¹⁴⁰

The *Palmer* Court's reliance on the balancing approach is significant because it signals an increased level of commitment by the Court to empirical assessments of the issue of fourth amendment scope. Although the assumption of risk approach is also essentially empirical,¹⁴¹ it differs from the balancing approach by isolating the privacy claim and analyzing it apart from law enforcement issues. Risk analysis, while controversial,¹⁴² at least possesses the analytic virtue of assessing the privacy issue in the abstract without injecting law enforcement interests into the inquiry.¹⁴³ The fourth amendment supposedly protects personal privacy and not governmental

¹³⁷ *Id.* at 3202.

¹³⁸ See *supra* notes 26-36, 41-47 & 71-77 and accompanying text. Justice O'Connor weighed "the asserted governmental interests against the particular invasion of the individual's privacy . . . established by the facts of the case." 104 S. Ct. at 3206 (O'Connor, J., concurring). She saw a strong governmental interest in maintaining prison security and no privacy interest in the prisoner—"the fact of arrest and incarceration abates all legitimate Fourth Amendment privacy." *Id.* Therefore, "all searches and seizures of the contents of an inmate's cell are reasonable." *Id.*

For authority for her "categorical" approach to prison searches (see *supra* notes 41-45 and accompanying text), Justice O'Connor relied on *United States v. Robinson*, but the value of *Robinson* is questionable in the context of *Palmer* because the issue in *Robinson* was whether intrusions, admittedly "searches and seizures," were "reasonable" in the absence of warrants. See *supra* note 43. *Robinson* may thus support a "balancing" approach on the "reasonableness" issue, but is tenuous authority for a similar approach on the "search and seizure" issue.

¹³⁹ See *supra* notes 51-53 and accompanying text.

¹⁴⁰ See *supra* text accompanying note 54.

¹⁴¹ See *supra* text accompanying notes 91-93.

¹⁴² See *supra* text accompanying notes 98 & 109.

¹⁴³ Assumption of risk theory is thus more consistent with the analytic tradition of separating the "search" and "reasonableness" issues. See *supra* note 77 and accompanying text.

interests in law enforcement.¹⁴⁴ The balancing approach poses substantial risk of "balancing away" privacy in favor of accommodations to law enforcement¹⁴⁵ in a variety of contexts,¹⁴⁶ without ever addressing the fourth amendment reasonableness of the particular intrusion.¹⁴⁷

The *Palmer* decision vividly illustrates the need for a normative approach to fourth amendment issues of scope. The Court never explains why—even granting the full thrust of the government's claims—*Palmer* must be denied that tiny residuum of privacy which would permit him to litigate his claims of guard harassment,¹⁴⁸ a blatant form of unreasonable governmental conduct. When the issue is normatively couched in terms of whether *Palmer's* privacy claims *should* be recognized in light of fourth amendment values, the *Palmer* result appears incorrect.¹⁴⁹ The systematic employment of harassment searches, limited only by the self-restraint of prison functionaries, certainly results in an "amount of privacy remaining to citizens . . . diminished to a compass inconsistent with the aims of a free . . . society."¹⁵⁰ If the *Palmer* Court is serious in claiming

¹⁴⁴ See *supra* note 75.

¹⁴⁵ Apart from the questionable wisdom of negating inmate rights by appeals to security needs (see *supra* notes 57-59 and accompanying text), some commentators argue that the balancing approach is logically incoherent in cases such as *Palmer*. Assuming a "right" in the prison administration to maintain prison security, it hardly follows that *Palmer* has no right to privacy:

If a prisoner's right conflicts with somebody else's right, it does not necessarily follow that it is the prisoner who must tolerate without protest the subordination or repudiation of his right; it may well be the other party whose right should give way. All that follows from a situation in which two rights conflict is that the proper course of conduct cannot be settled without appealing to something apart from the conflicting rights themselves.

Bedau, *supra* note 68, at 698 (footnote omitted).

¹⁴⁶ The *Palmer* analysis may extend beyond the prison context to privacy issues arising in jails. See *infra* notes 177-82 and accompanying text. Moreover, the balancing approach may well result in a denial of fourth amendment coverage in contexts not explored in this Article, such as juvenile detention centers (see *supra* note 134), and mental hospitals (see, e.g., *State v. Pietraszewski*, 283 N.W.2d 887, 891 (Minn. 1979)), where security demands are said to be especially high.

¹⁴⁷ See *supra* notes 102-05 and accompanying text.

¹⁴⁸ See *supra* notes 68-70 and accompanying text.

¹⁴⁹ The language of the *Palmer* Court's test can be read as embracing a normative assessment of the scope issue. In addition to deciding whether privacy expectations are "reasonable," the Court indicates that the inquiry should be directed towards "justifiable" expectations as well. See *supra* text accompanying note 27. The distinction is not merely semantic, given the fact that the latter term invites attention to constitutional values while the former may be simply a matter of discovering factual or "normal" expectations. See Yackle, *supra* note 90, at 361.

¹⁵⁰ The formulation of the test is Professor Amsterdam's. See *supra* text accompanying note 108. The issue in *Palmer* is not whether prison authorities can do shakedown searches, but whether they can conduct harassment searches. See *supra* notes 17, 18 & 49 and accompanying text.

that "intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society,"¹⁵¹ it must recognize the fourth amendment validity of Palmer's claim. Regardless of countervailing interests, Palmer *ought to have* a sufficient privacy interest to enable him to litigate the merits of his case.¹⁵² Such a conclusion does not deny prison authorities the power to conduct random shakedowns. It simply denies them the power to conduct malicious ones.¹⁵³

The Court should remember the admonition of Professor Amsterdam:

The question of what constitutes a covered 'search' or 'seizure' . . . should be viewed with an appreciation that to exclude any particular police activity from coverage is essentially to exclude it from judicial control and from the command of reasonableness, whereas to include it is to do no more than say that it must be conducted in a reasonable manner. With the question put in this fashion, the answer should seldom be delivered against coverage.¹⁵⁴

By excluding harassment searches from fourth amendment scrutiny, the Court ignores privacy claims regarding prison cells. But, as discussed immediately below, *Palmer* may be the harbinger of even more substantial denials of inmate privacy, resulting in a constitutional void that jeopardizes the protection of basic human rights of the incarcerated.

¹⁵¹ See *supra* note 39.

¹⁵² Successful harassment suits would no doubt be very rare due to difficulties for inmates to effectively prove their claims. The infrequency of success should be no reason, however, to deny all inmates the opportunity to prove their cases. See *supra* notes 64-66 and accompanying text. On the other hand, permitting such suits may be vitally significant from the inmate's point of view. See *supra* text accompanying note 53.

For a discussion of theoretical problems in bringing harassment actions once the fourth amendment remedy is removed, see *infra* text and notes 169-77, 182-86, 215-26.

¹⁵³ The doctrine advocated in the text would find "searches and seizures" whenever inmates allege privacy intrusions motivated solely for the purpose of harassment. This Article also suggests that certain other alleged privacy intrusions should fall within the scope of the fourth amendment. See *infra* notes 193-214 and accompanying text.

The proposed approach breaks with traditional scope analysis in its attention to the intent of the searcher as a crucial factor in defining protected privacy. For the view that the privacy issue should be determined without taking the conduct of the governmental intruder into account, see *supra* text accompanying note 77. Thus the proposed approach, like most normative varieties, tends to blur "search" and "reasonableness" issues. See *supra* notes 106-09 and accompanying text. The proposed approach does not, however, beg the "reasonableness" issue by its finding that malicious, harassing intrusions constitute searches and seizures. The approach simply takes the alleged bad faith of the searcher into account by giving the inmate "standing" to litigate the issue of the reasonableness of the intrusion. See *supra* note 123. "Harassment searches" generate standing because they violate the residuum of privacy to which inmates are entitled. See *supra* notes 58, 59 & 149-52 and accompanying text.

¹⁵⁴ Amsterdam, *supra* note 72, at 393.

IV. PALMER AND THE PROTECTION OF PRISONERS' DIGNITY

Despite the dissenters' hopes that an enclave of protected personal privacy will remain intact after *Palmer*,¹⁵⁵ the logic of the majority opinion seriously undercuts all privacy claims by prisoners. If so, the total loss of privacy protection precludes adequate judicial oversight of fundamental rights of human dignity.

A. PALMER AND PERSONAL PRIVACY

While *Palmer* dealt with searches of cells, its rationale equally extends to personal searches of inmates. The threat of secreting contraband or weapons on the person is no less substantial than the risk of such items being kept in prison cells.¹⁵⁶ If interests of prison security outweigh claims of privacy in cells, the same interests negate assertions of rights to privacy of the person, unless of course personal privacy is perceived as constitutionally more substantial than the privacy interest raised in *Palmer*. Although some lower courts have held that intrusions into personal security are "searches" where the same means of intrusion directed to personal property is not within the scope of the fourth amendment,¹⁵⁷ Supreme Court case law suggests little basis for such a distinction in prison contexts.¹⁵⁸

*Bell v. Wolfish*¹⁵⁹ is the Court's only significant examination of inmate privacy before *Palmer*.¹⁶⁰ *Wolfish* upheld, despite fourth amendment objection, jail practices of unannounced cell shake-downs and of visual inspection of inmates' body cavities after

¹⁵⁵ See *supra* text accompanying note 67.

¹⁵⁶ See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), discussed *infra* notes 159-65 and accompanying text. Contraband or weapons can be concealed in pockets or under clothing or in body cavities. *Id.* But see Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1050-51 (1982) (questioning legitimacy of routine body cavity intrusions due to "anatomical considerations" which limit the kinds and amounts of contraband that can be secreted on the body).

¹⁵⁷ See, e.g., *Horton v. Goose Creek School Dist.*, 690 F.2d 470, 477-78, *reh'g denied*, 693 F.2d 524 (5th Cir. 1982) (dog sniffs of school students are "searches," but dog sniffs of their lockers and automobiles are not "searches").

¹⁵⁸ See *infra* notes 159-68 and accompanying text. Outside the prison context, the Court has cautioned that intrusions into the body will be scrutinized more strictly than less intrusive searches of the person. See *United States v. Robinson*, 414 U.S. 218, 236 (1973) (citing *Rochin v. California*, 342 U.S. 165 (1952) (pumping of arrestee's stomach)).

¹⁵⁹ 441 U.S. 520 (1979).

¹⁶⁰ Two early cases, *Lanza v. New York*, 370 U.S. 139 (1962) and *Stroud v. United States*, 251 U.S. 15 (1919), *reh'g denied*, 251 U.S. 380 (1920) held, respectively, that the fourth amendment permitted use in evidence of conversations monitored while an inmate was in jail and of letters obtained in an inmate's cell. As both *Lanza* and *Stroud* pre-date *Katz*, their current validity is doubtful. See *Singer, supra* note 9, at 674.

contact visits with persons from outside the institution. The Court admitted that the issue of body-cavity searches "instinctively gives us the most pause"¹⁶¹ and that "abusive" searches of the person "cannot be condoned,"¹⁶² but applied exactly the same reasoning process in upholding both the shakedown and body inspection intrusions. Assuming *arguendo* that inmates retain some fourth amendment rights, the Court weighed the privacy interest against the state interest in maintaining institutional security.¹⁶³ The Court held that both the cell shakedowns and the body-cavity intrusions were reasonable as necessary security measures.¹⁶⁴ Moreover, the *Wolfish* Court intimated that its analysis would apply in both prison and jail contexts.¹⁶⁵

Palmer rejects the *Wolfish* view that prisoners might retain privacy in their cells. Rather than assess the reasonableness of shakedowns on a case-by-case basis, the *Palmer* Court opts for a bright line rule denying privacy protection altogether. The virtues of a similar bright line rule for personal searches are equally persuasive. Assuming that balancing is now the order of the day, the government's interest in routinely searching the persons of inmates may be more "reasonable," in general, than their claims that such action constitutes invasions of privacy. If so, the same logic which led to rejecting *Wolfish's* position regarding the nature of privacy in cells may also lead to rejecting its notion that personal privacy might be protected.

The *Wolfish* Court was concerned that personal searches not be "abusive."¹⁶⁶ This concern is no guarantee, however, that the fourth amendment is available to remedy abuses when they occur. The *Palmer* Court also warned against the evils of harassment searches,¹⁶⁷ yet it denied privacy protection to prisoners' papers and effects. The Supreme Court thus may view abusive searches of the person as it does non-personal harassment searches: not as violations of protected privacy, but rather as matters governed by the cruel and unusual punishments clause of the eighth amendment.¹⁶⁸

¹⁶¹ 441 U.S. at 558.

¹⁶² *Id.* at 560.

¹⁶³ *Id.* at 557-58.

¹⁶⁴ *Id.* at 557-60.

¹⁶⁵ *Id.* at 558. For the sake of argument, the Court assumed that "both convicted prisoners and pretrial detainees retain some Fourth Amendment rights upon commitment to a corrections facility."

¹⁶⁶ See *supra* text accompanying note 162.

¹⁶⁷ See *supra* text accompanying note 39.

¹⁶⁸ See *supra* text accompanying notes 39 & 40. The *Wolfish* Court does cite a fourth amendment case, *Schmerber v. California*, 384 U.S. 757, 771-72 (1966), for the proposition that abusive searches of the person are forbidden. 441 U.S. at 560. *Schmerber*,

B. PRIVACY AND SUBSTANTIVE DUE PROCESS

Although *Palmer* seems to undercut the fourth amendment basis for rights to privacy in either the shakedown or personal search contexts, inmates arguably might retain privacy protection under substantive due process doctrine.¹⁶⁹ *Palmer* does not specifically address the issue,¹⁷⁰ but the Court would probably reject due process privacy claims for the same reasons it dismissed the fourth amendment privacy argument.

If society is unwilling to recognize the reasonableness of inmate claims to protected privacy as a fourth amendment matter, these claims would not suddenly become tenable under a due process doctrine that requires that a personal right be deemed "fundamental" or "implicit in the concept of ordered liberty" before qualifying as protected privacy.¹⁷¹ In light of *Palmer*, inmates appear to lack such "fundamental" interests. Moreover, they may be unable to show a sufficient "liberty" interest as the necessary due process predicate for the right to privacy.¹⁷² The Court has held in procedural due process contexts that prisoners possess no constitutionally based liberty interest once convicted and sentenced to prison.¹⁷³ Therefore, prisoners' claims of a substantive right to

however, is not a prison case—it dealt with the taking of a blood sample from a suspect while in a hospital. This citation in *Wolfish* is made in the context of a discussion which merely assumes for the sake of argument that the fourth amendment applies to personal searches, the same tenuous ground granted cell searches by *Wolfish*. As *Palmer* rejects the *arguendo* premise for cell searches, it seemingly entails a rejection of *Wolfish's* similar premise that personal searches are *arguendo* within fourth amendment purview.

¹⁶⁹ "The doctrine that governmental deprivations of life, liberty, or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process." *Developments: The Family*, 93 HARV. L. REV. 1156, 1166 (1980) (footnote omitted). See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (abortion as right to privacy under due process clause of the fourteenth amendment); *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring); *id.* at 500 (Harlan, J., concurring in the judgment); *id.* at 503 (White, J., concurring in the judgment) (right to marital privacy under fourteenth amendment due process clause).

¹⁷⁰ But see *infra* text accompanying notes 175-77.

¹⁷¹ See, e.g., *Roe v. Wade*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

¹⁷² See *supra* note 169.

¹⁷³ See, e.g., *Meachum v. Fano*, 427 U.S. 215, 224 (1976) ("[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.") The *Meachum* Court used this reasoning to reject a prisoner's claim that transfer from one prison to another constituted a denial of liberty triggering procedural due process requirements. The Court found that "[t]he conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons." *Id.* (emphasis in original). See also *Hewitt v. Helms*, 459 U.S. 460, 462 (1983) (Stevens, J., dissenting) ("[T]he Court seems to assume that after his conviction a prisoner has, in essence, no

privacy grounded in due process likely would be rejected by the Court.¹⁷⁴

Palmer itself implicitly denies the viability of due process privacy. The Court intimated that any such claim merged with the fourth amendment issue.¹⁷⁵ Moreover, in arguing against fourth amendment applicability, Hudson maintained that either the due process clause or the eighth amendment was the appropriate constitutional doctrine to attack harassment searches.¹⁷⁶ The *Palmer* Court does not mention due process as a possible remedy for such searches, but does explicitly note the eighth amendment alternative.¹⁷⁷ Thus, the Court appears to disfavor the due process privacy theory and view the cruel and unusual punishments clause as the sole constitutional remedy for abusive searches of either persons or effects.

C. PRIVACY PROTECTION IN JAILS

Thus far this Article's discussion of *Palmer* and *Wolfish* has centered on the Court's abandonment of privacy protection for convicts sentenced to prison. The same result would seem to obtain, however, in assessing the rights of pretrial detainees held in jail.

The *Wolfish* opinion suggests that privacy issues in jails and prisons are analytically identical. Although many jail inmates are not yet

liberty save that created, in writing, by the State which imprisons him."); *Vitek v. Jones*, 445 U.S. 480 (1980) (state statutes may create prisoner liberty interests under the due process clause of the fourteenth amendment).

¹⁷⁴ Various commentators apparently agree that a prisoner privacy right is tenuous under the *Griswold* line, perhaps favoring such a right under the fourth amendment. See *supra* note 169. Fourth amendment privacy is understood as the right to withhold information or experience of oneself from others. See D. RICHARDS, *MORAL CRITICISM OF LAW* 93 (1977). In contrast, the sexual privacy aspects of cases like *Griswold* and *Roe v. Wade* turn on the quite different interest in "act[ing] in certain ways without threat of governmental sanction or interference or penalty." *Id.* Thus, substantive due process privacy creates a "zone of autonomy," a "right to freedom from official regulation" rather than the traditional fourth amendment "freedom from official intrusion." Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424-25 (1974). See also *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1977) (fourth amendment violations are by nature "intrusions into individual privacy").

For prisoners, the "zone of autonomy"—to the extent it may meaningfully be discussed at all—seemingly exists through such doctrines as the first amendment or the eighth amendment, rather than through substantive due process rights to privacy. See *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (prisoners retain free speech rights not inconsistent with their prisoner status); *Cruz v. Beto*, 405 U.S. 319 (1972) (per curiam) (free exercise of religion protected in prison); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (prisoners protected against physical abuse under cruel and unusual punishments clause).

¹⁷⁵ 104 S. Ct. at 3197 n.4. See *supra* note 40.

¹⁷⁶ Reply Brief for Petitioner at 16 n.15, *Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

¹⁷⁷ See *supra* text accompanying note 40.

convicted, they enjoy no enhanced privacy protection through the presumption of innocence, a principle having "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."¹⁷⁸ The privacy interests of detainees in jails, whether convicted or not, appear no different than those of convicted prisoners. Moreover, security needs are at least as substantial in jails as in prisons.¹⁷⁹ Thus, *Palmer* implies a denial of fourth amendment protection to jail detainees because their privacy claims are outweighed by the governmental interest in maintaining security.

Like their convicted and imprisoned counterparts, jail inmates are unlikely to prevail with due process privacy claims. The *Wolfish* Court rejected the notion that the desire of detainees "to be free from discomfort" rises to the level of a "fundamental liberty interest"—a necessary predicate to trigger the due process right to privacy.¹⁸⁰ While due process privacy protection was unavailable, *Wolfish* did recognize a liberty interest of a different nature in unconvicted detainees to be free from "punishment" while incarcerated in jail.¹⁸¹ Convicted inmates serving jail sentences can be punished as long as eighth amendment requirements are satisfied.¹⁸²

¹⁷⁸ 441 U.S. at 533. The lower courts in *Wolfish* had strictly scrutinized practices and conditions of confinement with respect to pretrial detainees and required the government to justify its action by a showing of "compelling necessity." *Id.* at 528. The Supreme Court found no constitutional basis for the compelling necessity doctrine even as applied to unconvicted detainees. *Id.* at 527-31.

¹⁷⁹ *Id.* at 547 n.28.

¹⁸⁰ *Id.* at 534. The *Wolfish* Court found the right to privacy as expressed in such cases as *Roe v. Wade* and *Griswold v. Connecticut*, see *supra* note 169, to be inapposite in the jail context. 441 U.S. at 534-35.

¹⁸¹ The Court stated: "In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee." 441 U.S. at 535 (footnote omitted).

Notwithstanding *Wolfish*, lower courts continue to recognize a substantive due process right to privacy for jail inmates. See, e.g., *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984) (detainee retains a liberty interest derived from the Constitution in avoiding unwanted medication with antipsychotic drugs—inmate "grounds his asserted liberty interest in the right to privacy").

¹⁸² See *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977):

Eighth Amendment scrutiny [under the cruel and unusual punishments clause] is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with the process of law.

Id.

D. THE ABSENCE OF PRIVACY PROTECTION: INADEQUACY OF
ALTERNATIVE REMEDIES

The upshot of *Palmer* and *Wolfish* appears to be that abusive searches and seizures will be checked, if at all, by the prohibitions against cruel and unusual punishments (for convicted prisoners) and the due process rule against punishment without conviction (for pretrial detainees). Both doctrines (hereinafter collectively referred to as the "unjustified punishment doctrines") require a finding of "punishment" as a prerequisite to their application.¹⁸³ "Punishment" entails the purposeful inducement of suffering upon offenders as a response to their violation of a norm.¹⁸⁴ The Supreme Court consistently has required a showing of punitive intent by the punisher as a necessary condition for punishment, either in the due process or eighth amendment contexts.¹⁸⁵ Where the punisher's actual intent is unclear, the Court permits inferences of punitive intent if restrictions appear to be "punishment on [their] face" and non-punitive purposes of the restrictions are unreasonable.¹⁸⁶

In applying the unjustified punishment doctrines, a distinction should be drawn between the role played by the concept of punishment under the respective theories. Suppose that Inmate A is detained awaiting trial and alleges that a guard is punishing him. *Wolfish* clearly teaches that the inmate will be granted due process relief only upon a showing that the particular conduct of the guard amounts to punishment.¹⁸⁷ On the other hand, suppose Inmate B is a convicted offender sent to prison as punishment. If he alleges that

¹⁸³ A finding of "punishment" is necessary to trigger the cruel and unusual punishments clause. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958), where four Justices in the plurality and four in dissent suggested that the definition of punishment should be analyzed separate from and prior to the "cruel and unusual" issue under the eighth amendment. *Id.* at 94-100 (plurality); *id.* at 124-26 (dissent). Likewise, the due process doctrine requires that "punishment" not be imposed upon the unconvicted. See, e.g., *Bell v. Wolfish*, 441 U.S. at 534-41.

¹⁸⁴ The legal and philosophical literature on the meaning of the concept of punishment is extensive. The author has traced some of it elsewhere and therefrom derived the meaning expressed in the text. See Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 795-822 (1982).

¹⁸⁵ See, e.g., *Bell v. Wolfish*, 441 U.S. at 538-40 (due process); *Trop v. Dulles*, 356 U.S. at 96-97 (eighth amendment); see Gardner, *supra* note 184, at 797-818.

¹⁸⁶ *Bell v. Wolfish*, 441 U.S. at 539 n.20. For a discussion of the problem of circular reasoning embodied in the "punishment on its face" doctrine, see Gardner, *supra* note 184, at 810-14.

¹⁸⁷ The inmates in *Wolfish* were unable to terminate the visual body cavity searches because the Court found the intrusions to be non-punitive in nature. 441 U.S. at 558-61. See also *id.* at 535-43 ("double bunking" not "punishment" and therefore permissible).

the same guard conduct alleged by A amounts to cruel and unusual punishment, Inmate B may not be required to show that the *particular* conduct amounted to punishment, but only that it was cruel and unusual.¹⁸⁸ Because the conduct occurs within an institution whose general purpose is to punish, the punitive nature of the guard's action in the particular case may simply be assumed by the court. The matter is uncertain, however.¹⁸⁹ If one distinguishes, as many experts advocate, between being sent to prison as punishment and being sent to prison *for* punishment,¹⁹⁰ then little basis exists for inferring that the guard's particular acts occurring *within* the institution are necessarily themselves "punishment."¹⁹¹

¹⁸⁸ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) where the Court assessed the eighth amendment quality of medical treatment provided to inmates, concluding that the government was "punishing by incarceration." The Court rejected the prisoner's argument that inadequate medical care constituted cruel and unusual punishment, holding that cruelty would be manifested only if "deliberate indifference to serious medical needs of prisoners" were shown. *Id.* at 104-05. The Court did not address the issue of whether the alleged inadequate medical care itself could be, or must be shown to be, "punishment."

¹⁸⁹ *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Rhodes v. Chapman*, 452 U.S. 337 (1981) are the only two Supreme Court cases remotely on point. In *Gamble*, the Court denied the eighth amendment claim on the absence of "cruelty" without specifically finding that the prisoner had satisfied the "punishment" prong. See *supra* note 188. Similarly, in *Chapman* the Court held that "double celling" (housing two inmates in a cell designed for one) did not constitute "unnecessary and wanton infliction of pain" so as to constitute cruel and unusual punishment. *Id.* at 346-52. The Court assumed that "the conditions of confinement compose[d] the punishment at issue," *id.* at 347, apparently granting that double celling was punishment. The Court noted, however, that not all "deprivations" occurring within the prison constitute "punishment." Diminished job and educational opportunities resulting through double celling "simply are not punishments." *Id.* at 348. The Court offered no basis for distinguishing "conditions of confinement" which constitute punishment from "deprivations" of interests while confined which do not.

¹⁹⁰ See, e.g., Singer, *Prison Conditions: An Unconstitutional Roadblock to Rehabilitation*, 20 CATH. U.L. REV. 365, 388 (1971). The distinction noted in the text is meant to clarify the theory that punishment consists solely in the loss of liberty inherent in being incarcerated and not in the infliction of additional suffering once confined within the institution. In the words of one federal court: "It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State . . . to do nothing meaningful for his safety, well being, and possible rehabilitation." *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

¹⁹¹ Case law clearly establishes that a given restraint upon a prisoner within a prison may or may not constitute "punishment" depending upon the purpose for the restraint. See *Sostre v. McGinnis*, 442 F.2d 178, 190-94 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (solitary confinement assumed to be punitive); *Daughterty v. Carlson*, 372 F. Supp. 1320, 1321-22 (E.D. Ill. 1974) (solitary confinement not "punishment" under cruel and unusual punishments clause where imposed to protect inmate from physical harm); *Krist v. Smith*, 309 F. Supp. 497, 500 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971) (solitary confinement not "punishment" if utilized as means of preventing escape-prone inmate from fleeing); *Graham v. Willingham*, 265 F. Supp. 763, 765 (D. Kan.), *aff'd*, 384 F.2d 367 (4th Cir. 1967) (solitary confinement not "punishment" where

The unjustified punishment doctrines may be of only limited utility because they leave constitutionally unchecked many indignities and indecencies endured by inmates which do not amount to "punishment" or do not amount to "cruelty" under established doctrine. The following hypothetical examples of undeniable affronts to privacy¹⁹² and dignity illustrate some such seemingly unprotected invasions of fundamental rights.

1. Voyeurism

Suppose male guards working in women's jails and prisons secretly photograph female inmates as they shower, use toilet facilities, and engage in other intimate activities.¹⁹³ While trying not to alert the inmates to their actions, the guards distribute the photographs to other guards and to people outside the institution. Nevertheless, the inmates discover that the guards are photographing them and bring actions alleging violation of their civil rights.

Pre-*Palmer* caselaw recognizes violations of constitutional rights to privacy in such situations. Several cases find violations of inmate privacy rights where guards of the opposite sex are merely present in situations where they can view inmates in the nude.¹⁹⁴ According

imposed for inmate's protection and the protection of others); *United States v. Hopkins*, 187 F. Supp. 165, 167 (D. Md. 1960) (solitary confinement not punishment if imposed for inmate's "own protection"). Moreover, while systematic corporal punishment in prisons is cruel and unusual punishment, *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), "isolated assaults" on inmates by prison guards are generally unactionable under the Federal Civil Rights Act. S. KRANTZ, *supra* note 9, at 182.

¹⁹² The concept of privacy is notoriously difficult to define. Some definition is essential lest privacy be condemned by the notion that "[a] concept in danger of embracing everything is a concept in danger of conveying nothing." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 888-89 (1978). Whatever its general definition, *see supra* note 1, privacy surely encompasses uninvited entry into areas of bodily intimacy. *See, e.g., A. WESTIN, supra* note 1, at 14; Gerety, *supra* note 1, at 266. This is the subject of two of the three examples to follow in the text. *See infra* text accompanying notes 193-214. The third example, *infra* text accompanying notes 215-23, the unauthorized reading of a person's diary, also clearly is a situation raising substantial privacy issues. *Cf. Fisher v. United States*, 425 U.S. 391, 433 (1976) (Marshall, J., concurring).

¹⁹³ For a non-prison case involving facts similar to the hypothetical in the text, *see York v. Story*, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). The analysis in the text would also apply if a female guard made similar observations of a male inmate.

¹⁹⁴ *See Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982) (male inmate's allegation that female guards engage in a "certain amount of viewing" of prisoners' intimacies may state a valid right to privacy claim); *Bowling v. Enomoto*, 514 F. Supp. 201, 204 (N.D. Cal. 1981) (male prisoners have "limited right to privacy which includes a right to be free from the unrestricted observation of their genitals and bodily functions by prison officials of the opposite sex under normal prison conditions"); *Hudson v. Goodlander*, 494 F. Supp. 890, 893 (D. Md. 1980) (male inmate's privacy rights violated by the assignment of female guards to posts where they could view him in the nude); *Forts v.*

to these courts, the taking of the photographs likely constitutes "unreasonable searches" under the fourth amendment,¹⁹⁵ while the distribution of the photos violates due process privacy.¹⁹⁶ In the words of one court: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."¹⁹⁷

Palmer, however, seriously exacerbates the plight of the photographed inmates. Assuming that the inmates in either the jail or prison context must establish that the particular action of the guards constitutes unjustified punishment,¹⁹⁸ substantial problems arise. The conduct of the voyeur guards hardly appears to be "punitive." They intend to inflict no unpleasantness upon the subjects of their cameras' eyes, indeed they do all they can to assure that the inmates never discover the intrusions into their intimacy.¹⁹⁹ In fact, the photographed subjects may never become aware of their alleged unjustified "punishment" until after release from custody. While the inmates' discovery of the guards' activities will likely result in mental anguish even if it occurs after release, the resulting suffering of the former inmates is unlike that generally connected with the concept of punishment. Punished persons characteristically are aware of their suffering at the time the actions inducing the unpleasant feel-

Ward, 471 F. Supp. 1095, 1099-1100 (S.D.N.Y. 1979), *vacated in part*, 621 F.2d 1210 (2d Cir. 1980) (female inmate's privacy rights violated by the risk of being viewed by a male guard while in the nude or using the toilet). *But see* Grummett v. Rushen, 587 F. Supp. 913, 915-16 (N.D. Cal. 1984) (male inmates' rights to privacy not violated by distant and casual viewing of them in the nude by female guards); Avery v. Perrin, 473 F. Supp. 90, 92 (D.N.H. 1979) (male inmate's right to privacy not violated even though a female guard might observe him in the nude while she delivers the mail).

¹⁹⁵ Pre-*Palmer* courts considering the hypothetical case in the text would likely analogize to the non-prison case of *York v. Story*, 324 F.2d 450, 454 (9th Cir. 1963), *cert. denied*, 376 U.S. 989 (1964), where the court suggested that the taking of nude photographs by the police of a female victim of an assault might constitute an unreasonable search under the fourth amendment. *But see* *Travers v. Paton*, 261 F. Supp. 110 (D. Conn. 1966) (no invasion of privacy through a secret filming of a prisoner's appearance before a parole board).

¹⁹⁶ See *York*, 324 F.2d at 454-56.

¹⁹⁷ *Id.* at 455.

¹⁹⁸ Unconvicted detainees would surely be required to show that the particular guard behavior was punitive. See *supra* notes 186 & 187 and accompanying text. Convicted inmates may face a similar requirement. See *supra* notes 187-91 and accompanying text. For the sake of discussion, the text assumes that convicted inmates will be required to show "punishment" in particular cases of alleged abuse by prison officials. Without such a requirement, convicted prisoners may anomalously be afforded greater protections than their unconvicted counterparts. See *infra* text accompanying notes 199-203 and note 203.

¹⁹⁹ See *supra* notes 184-86 and accompanying text.

ings occur.²⁰⁰ Moreover, punishment entails the purposeful infliction of suffering.²⁰¹ The voyeur guards have no such purpose, nor are their actions sufficiently "punitive on their face" to cause courts to infer punitive intent.²⁰² Therefore, neither convicted prisoners nor unconvicted detainees appear able to make the necessary showing of "punishment" to trigger their respective unjustified punishment doctrines.²⁰³

²⁰⁰ *Id.* In discussing the possibility of governing prison searches under the cruel and unusual punishment clause, a leading article maintains that "[o]nly searches involving physical abuse and purposeful harassment would be proscribed." Giannelli & Gilligan, *supra* note 9, at 1051.

²⁰¹ See *supra* notes 184-86 and accompanying text. None of the difficulties with doctrines grounded in the concept of punishment discussed in that text are encountered under a right to privacy theory. While one seemingly cannot be "punished" without knowing it, privacy invasions do not depend upon the victim's awareness of their occurrences and thus may actually be unknown to the intruder. See Benn, *supra* note 1, at 10-11; Gross, *supra* note 1, at 193; Parker, *supra* note 1, at 278. The gist of the wrong inherent in privacy violations is not in the mental distress often associated therein, but in the denial of human dignity and the assault on human personality. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973-74 (1964).

Eavesdropping and wiretapping, unwanted entry into another's home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma.

Id.

²⁰² See *supra* note 186 and accompanying text. The conduct of the voyeur guards manifests few of the " earmarks of punishment." See Gardner, *supra* note 184, at 810-14.

²⁰³ Unconvicted detainees would surely be frustrated in their attempts at establishing a due process violation because of their inability to show "punishment." See *supra* notes 180-81, 186-87 and accompanying text. Cf. *Olgin v. Darnell*, 664 F.2d 107, 108-09 (5th Cir. 1981) (not "punishment" for jail officials to remove detainee's clothing except for underwear in response to his assault on another inmate and his threat to set fire to the jail where expressed purpose of clothing removal was to calm the inmate and to avoid the risk of fire). Convicted offenders may fare better if, assuming contrary to the assumption made in the text, they can rely on their incarceration in general as sufficient "punishment" to trigger the eighth amendment inquiry. See *supra* text accompanying notes 187-91. Even so, they might encounter difficulty in establishing that the voyeur guards' conduct was "cruel and unusual" under established doctrine requiring "deliberate indifference" to prisoners' interests in being free from unnecessary pain and suffering. See *supra* note 188; see also *supra* note 200. The voyeur guards do not "deliberately" cause pain and suffering, indeed they attempt to avoid such by concealing their conduct from the inmates. Their conduct might thus be characterized as "reckless" or merely "negligent" and not "deliberate." See *DeJesus v. Coughlin*, No. 83 Civ. 2403, slip op. (S.D.N.Y. Sept. 27, 1984) (in order to state a claim under § 1983 for deprivation of the Eighth Amendment right to be free from cruel and unusual punishment, an unreasonable risk of injury must be accompanied by "circumstances indicating an evil intent, or recklessness, or at least deliberate indifference to the consequences of [prison officials'] conduct for those under [their] control"). If, however, the conduct of the voyeur guards does amount to cruel and unusual punishment so far as the convicted prisoners are concerned, an anomaly is created because the very same conduct of the guards in the unconvicted detainee context would apparently go unprotected under the due process doctrine.

2. *Offensive Body Searches*

Certain morally offensive body searches also appear to be unprotected. Suppose male guards routinely conduct body cavity searches and manual patdowns of the genital areas of female inmates.²⁰⁴ The government argues that such intrusions are necessary for security purposes²⁰⁵ and cannot entirely be done by female guards due to possible employment discrimination problems.²⁰⁶ Inmates object to the intrusions by male guards on two grounds: such intrusions by males are *per se* violative of constitutional rights and the intrusions are often conducted in bad faith either to humiliate the inmate or to sexually gratify the guard.

As with the voyeur hypothetical, caselaw prior to *Palmer* would utilize constitutional rights to privacy to protect the inmates from intrusive body searches by guards of the opposite sex, even in the absence of bad faith by the guards.²⁰⁷ Such searches done to harass or to sexually gratify would *a fortiori* be prohibited as violations of inmate privacy.²⁰⁸

²⁰⁴ Again, the analysis of the hypothetical is the same if female guards make the intrusions described in the text upon male inmates. Moreover, the inmate will presumably encounter essentially the same legal hurdles regardless of whether she is a convicted prisoner or a pretrial detainee. See *supra* notes 187-91, 198 and accompanying text.

²⁰⁵ "Security demands" are frequently offered as justification for administrative behavior in both the jail and prison contexts. See, e.g., *Bell v. Wolfish*, 441 U.S. at 546-47, 558 (jails); *Daugherty v. Harris*, 476 F.2d 292 (10th Cir. 1973), *cert. denied*, 414 U.S. 872 (prisons). In neither *Wolfish* nor *Daugherty* was it alleged that searches were conducted by members of the opposite sex.

²⁰⁶ See, e.g., *Sterling v. Cupp*, 44 Or. App. 755, 607 P.2d 206 (1980), *aff'd*, 290 Or. 611, 625 P.2d 123 (1981) (male inmates seek injunction against assignments of female guards to duties entailing anal-genital frisks while corrections officials argue that they were avoiding employment discrimination).

²⁰⁷ See, e.g., *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982), *cert. denied*, 461 U.S. 907 (1983) (dicta) (male inmate right to privacy offended by frisks by female guards of genital and anal areas); *Gunther v. Iowa Men's Reformatory*, 612 F.2d 1079, 1086-87 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (dicta) (male inmates' privacy rights might be violated by female guards' strip searches and surveillance of prison showers and toilets); *Iowa Dep't of Social Serv. v. Iowa Merit Employment Dep't*, 261 N.W.2d 161, 164-66 (Iowa 1977) (strip or patdown searches of male inmates by female guards constitute invasions of privacy rights); *Sterling v. Cupp*, 44 Or. App. 755, 607 P.2d 206 (1980), *aff'd* 290 Or. 611, 625 P.2d 123 (1981) (affirmed on state constitutional grounds) (anal-genital frisks of clothed male inmates by female guards violate right to privacy). But see *Bagley v. Watson*, 579 F. Supp. 1099, 1103 (D. Or. 1983) (male prisoners have no federal constitutional rights to freedom from clothed anal-genital "patdowns" or visual observations in states of undress by female guards).

Some pre-*Palmer* cases might preclude the searches described in the text even if the inmate fails to allege that the search is conducted by a member of the opposite sex. See, e.g., *Frazier v. Ward*, 528 F. Supp. 80 (N.D.N.Y. 1981) (fourth, eighth and fourteenth amendments violated by routine body-cavity searches).

²⁰⁸ Pre-*Palmer* courts would surely invalidate such intrusive body searches on fourth amendment grounds, even in the wake of *Wolfish*. As one court described its fourth

If the analysis of this Article is correct, however, inmates now raising constitutional objection to offensive body searches face severe difficulties. In cases where the searching guard of the opposite sex does not act in bad faith, the inmate likely has no remedy. The guard's action simply is not "punishment" under either the eighth amendment or due process doctrines.²⁰⁹ No punitive purpose is present. The guard is not seeking to induce suffering in the inmate but rather to keep the institution free of weapons and contraband. Nor is the conduct "punishment on its face" so as to justify an inference of punitive intent.²¹⁰ Even if it were, the action may nevertheless be "reasonable" in light of the non-punitive interests in maintaining security and promoting equal employment opportunity between the sexes.²¹¹

Inmates alleging illicitly motivated body searches will also encounter problems in establishing the punitive nature of such intrusions. Sexually motivated searches may not, in fact, be "punishment" under established doctrine because they lack the necessary factor of punitive purpose.²¹² Again, because body searches by guards of the opposite sex do not manifest "punishment on its face," courts are unlikely to infer punitive intent.²¹³ Therefore, even harassment searches, which may indeed be motivated by punitive purpose, may escape judicial scrutiny if searchers deny illicit motivation and assert security needs or equal employment arguments as justification for their actions.

3. *Illicit Property Searches*

A return to *Palmer's* cell search context provides a final illustration of the apparent constitutional void created by the Court. Suppose Guard A routinely, but secretly reads an inmate's diary left in his unoccupied cell during the day.²¹⁴ Guard A is not motivated by

amendment effect, "*Wolfish* does not stand for the proposition that strip searches are *per se* constitutional, but rather, that body cavity searches are not *per se* unreasonable under the Fourth Amendment." *Frazier v. Ward*, 528 F. Supp. at 81. Strip searches conducted to harass or to sexually gratify would clearly be "unreasonable" under the fourth amendment.

²⁰⁹ See *supra* notes 184-91, 198 and accompanying text.

²¹⁰ See *supra* note 186 and accompanying text.

²¹¹ See *supra* notes 205-06 and accompanying text; see also *Bagley v. Watson*, 579 F. Supp. 1099 (D. Or. 1983) (female correctional officers' federal rights to equal employment supercede male inmates' privacy rights under state constitution).

²¹² See *supra* notes 184-86 and accompanying text.

²¹³ See *supra* note 186 and accompanying text.

²¹⁴ Arguably, the hypothetical inmate will encounter essentially the same legal hurdles regardless of whether he is a convicted prisoner or a pretrial detainee. See *supra* notes 187-91, 198 and accompanying text.

any legitimate state interest, but is simply interested in prying into the intimacies of the inmate's life. Apart from sharing the details of the diary with fellow guards, Guard A makes every effort to keep this activity secret. Guard B, on the other hand, also reads the diary but humiliates the inmate by publishing its contents to others while in the inmate's presence.²¹⁵ The inmate discovers the clandestine activities of Guard A and brings a civil rights action against both Guards A and B.

In the past when courts honored fourth amendment privacy rights of the incarcerated, the hypothetical inmate may well have recovered against Guard A,²¹⁶ and, as the court of appeals decision in *Palmer* itself reflects, would likely also have prevailed against Guard B.²¹⁷ Such is apparently not the case after *Palmer*.

As in the earlier examples, the actions of Guard A are non-punitive. Like the voyeur guard, Guard A attempts to keep his actions unknown to the inmate. However reprehensible his conduct, it simply does not amount to punishment under either the eighth amendment or due process doctrines.²¹⁸ Therefore, under current doctrine Guard A likely acted within the Constitution.

The inmate might fare better in the action against Guard B whose actions may well be characterized as "punishment" if intended to cause the inmate to suffer.²¹⁹ If, however, Guard B re-

²¹⁵ The hypothetical is not entirely fanciful: "In weekly shakedown of the cells," complains an inmate of a well-known penitentiary, "they [the guards] read the mail and then they make derogatory remarks later about people mentioned in the letters." Schwartz, *supra* note 2 at 230 n.9 (quoting Chicago Tribune, Nov. 16., 1971, §1A, at 4).

²¹⁶ See, e.g., *United States v. Hinckley*, 672 F.2d 115, 126-32 (D.C. Cir. 1982), where the court found an illegal fourth amendment search when correctional officers read a detainee's private papers during a cell search for contraband. The court rejected the government's argument that the reading was justified because the officers, while sorting through the inmate's papers during an authorized search for contraband, saw certain words in the papers which triggered an institutional need for further investigation.

But see *DiGuiseppe v. Ward*, 698 F.2d 602, 605 (2d Cir. 1983) (officer justifiably examined prisoner's diary during general search after riot where diary entry contained riot-related material); *United States v. Vallez*, 653 F.2d 403, 406 (9th Cir.), *cert. denied*, 454 U.S. 904 (1981) (search into sealed letter in cell ordinarily impermissible but justified where search prompted by tip of escape plan and officer suspected that letter contained map for escape); *State v. Manning*, 323 N.W.2d 217, 219 (Iowa 1982), *cert. denied*, 459 U.S. 1111 (1983) (no invasion of privacy where officials read inmate's letters, some "on a table in plain view," others thrown into the wastebasket).

²¹⁷ See *supra* note 18 and accompanying text.

²¹⁸ See *supra* notes 184-86, 198-202 and accompanying text.

²¹⁹ See *supra* notes 184-86 and accompanying text. The matter is not entirely clear, however, because the suffering may lack punishment's characteristic as a sanction imposed as a response to a violation of a norm. See generally Gardner, *supra* note 184, at 798-817. Therefore, while the guard's conduct surely should be morally disparaged, it may not, strictly speaking, be a form of "punishment."

sponds to the inmate's allegations of unjustified punishment by asserting that he meant no harm or embarrassment to the inmate by his remarks, courts might find Guard B's conduct non-punitive. Guard B's actions, while morally objectionable, do not bespeak "punishment on its face" so as to permit inferences of punitive intent.²²⁰ The affront to the inmate's dignity may in fact have been the product of a slip of the tongue, with no animus towards the inmate. If so, Guard B does not act unconstitutionally because he does not "punish," nor perhaps even act "cruelly"²²¹ towards the inmate.²²²

4. *Privacy, Dignity and Unjustifiable Punishment*

The above hypotheticals exemplify the value of the right to privacy as a protection of human dignity. While unjustified punishment always constitutes an affront to dignity, the hypotheticals illustrate that not all affronts to dignity entail unjustified punishment. Many, perhaps all, such affronts do entail violations of privacy.²²³ If all privacy protection is denied and inmates are now required to rely on the unjustified punishment doctrines, the Court would have jeopardized the protection of basic human rights. Without adequate federal constitutional protection, incarcerated persons enduring the kinds of indignities illustrated above would be left to seek uncertain relief under state law²²⁴ or worse, to simply rely on

²²⁰ See *supra* note 186 and accompanying text.

²²¹ See *supra* notes 188, 200 & 203 (discusses the "deliberate indifference" standard required to be satisfied before eighth amendment "cruelty" is established).

²²² The text's assumption that inmates will encounter great difficulty establishing that harassment searches violate the cruel and unusual punishments clause is borne out by the fact that the fourth circuit found Palmer's attempts to conceptualize his claim of harassment under the eighth amendment to be "without merit." *Palmer v. Hudson*, 697 F.2d at 1221 n.1. "The district judge properly reasoned that defendant's actions do not constitute cruel and unusual punishment . . ." *Id.*

²²³ A rich literature links the concepts of dignity and privacy. See, e.g., sources cited *supra* note 201. See also C. FRIED, *supra* note 1, at 145; Chapman, *Personality and Privacy in Privacy* 236, 240 (J. Pennock & J. Chapman eds. 1971); Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 How. L.J. 145, 176-178 (1984); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 987 (1977).

Prior to *Palmer*, the Supreme Court itself had recognized the relationship between privacy and dignity. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (public frisk, an invasion of privacy and thus a fourth amendment search, is also a "serious intrusion upon the sanctity of the person which may inflict a great indignity"); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); *United States v. Carignan*, 342 U.S. 36, 46 (1951) (Douglas, J., concurring) ("[w]e in this country . . . early made the choice — that the dignity and privacy of the individual were worth more to society than an all-powerful police").

²²⁴ While some state courts have been active in protecting inmate rights under state

the mercy of prison functionaries.²²⁵

V. CONCLUSION

Hudson v. Palmer signals an undesirable movement towards a balancing approach in defining fourth amendment scope which seriously jeopardizes the ability of prisoners to protect their right to basic human dignity. But even if prisoners ultimately are able to avoid, one way or another, the potential evil effects of *Palmer*,²²⁶ the Supreme Court has set an unfortunate example by its unjustified

constitutional law, *see, e.g.*, *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), the general trend historically has been for courts to adopt a "hands-off" approach to prisoner complaints. *See* S. KRANTZ, *supra* note 9, at 109-16. To the extent that the judiciary has recently rejected the "hands-off" approach, the rejection has been led generally by federal courts applying the Federal Constitution. *Id.* at 111. Moreover, state legislatures typically have not adequately responded to the human rights needs of inmates, thus leaving appeal to the courts for constitutional relief as their sole avenue of protection. *See* S. RUBIN, *LAW OF CRIMINAL CORRECTION* 445-47 (2d ed. 1973).

Even if adequate state remedies did exist, the kinds of indignities outlined in the hypotheticals in the text offend federal constitutional values and therefore should also be constitutionally prohibited. As Justice White has stated:

The fact that a person may have a state-law cause of action against a public official who tortures him with a thumbscrew for the commission of an antisocial act has nothing to do with the fact that such official conduct is cruel and unusual punishment prohibited by the Eighth Amendment. Indeed, the majority's view was implicitly rejected this Term in *Estelle v. Gamble*, . . . when the Court held that failure to provide for the medical needs of prisoners could constitute cruel and unusual punishment even though a medical malpractice remedy in tort was available to prisoners under state law.

Ingraham v. Wright, 430 U.S. 651, 690-91, (1977) (White, J., dissenting).

²²⁵ For discussions of the need for legal checks on the administration of prisons and jails, *see, e.g.*, Cohen, *The Discovery of Prison Reform*, 21 BUFFALO L. REV. 855 (1972); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoner's Rights Litigation*, 23 STAN. L. REV. 473 (1971); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

²²⁶ In addition to the possibility of state constitutional remedies, *see supra* note 224, there are several legislative models proposed to protect the privacy interests of incarcerated persons. *See, e.g.*, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES, 59-61 (Center for Criminal Justice, Boston University School of Law 1973); Uniform Law Commissioners' Model Sentencing and Correction Act § 4-119 (1978); ABA Criminal Justice Section Project on Standards Relating to the Legal Status of Prisoners, 14 AM. CRIM. L. REV. 377, 526-36 (1977).

Prisoners may also find relief under tort actions for invasion of privacy if such actions exist in the jurisdiction and courts are willing to apply them in the prison context. *See* W. PROSSER & P. KEETON, *LAW OF TORTS* 851-66 (5th ed. 1984).

Finally, a window of federal constitutional relief may still be available under the fourth amendment if courts limit *Palmer* to cell search contexts. At least one lower court has done just that. *See Storms v. Coughlin*, 600 F. Supp. 1214, 1223-24 (S.D.N.Y. 1984). *But see supra* notes 155-68 and accompanying text. Moreover, the evils described in the text may be avoided if courts liberally construe the concept of "punishment" under the eighth amendment and due process unjustified punishment doctrines. *But see supra* notes 169-223 and accompanying text.

failure to assure the fundamental human rights of the incarcerated, a class of persons hidden from public view and susceptible to governmental mistreatment. *Palmer's* failure to embrace the enlightened jurisprudence which granted judicial recognition of a modicum of privacy as a necessary means of assuring inmate dignity constitutes a backward step in the quest for a legal order which respects and protects the personhood of all citizens.