Unreasonable: Judge Easterbrook, the Seventh Circuit, & the Deterioration of Fourth Amendment Protection for Convicted Prisoners

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UNREASONABLE: JUDGE EASTERBROOK, THE SEVENTH CIRCUIT, & THE DETERIORATION OF FOURTH AMENDMENT PROTECTION FOR CONVICTED PRISONERS

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INTRODUCTION

“[T]hose who try to formulate substantive principles of justice should reserve a prominent place for human dignity. If this is not done, the distinctively moral aspects of justice will be absent; and the claims of justice will be at best legalistic and at worst arbitrary.”

In Henry v. Hulett, 2 Delores Henry represented a certified class of approximately 200 convicted women at Lincoln Correctional Facility in Illinois who were strip searched as part of a “training exercise” for cadet guards. 3 The facts of the case were summarized by the district and court of appeals this way:

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1 Michael S. Pritchard, Human Dignity and Justice, 82 ETHICS 299, 300-01 (1972).

2 930 F.3d 836, 837 (7th Cir. 2019).

3 Id. at 841.
[Plaintiffs] were required to stand naked, nearly shoulder to shoulder with 8-10 other inmates in a room where they could be seen by others not conducting the searches, including male officers. Menstruating inmates had to remove their tampons and sanitary pads in front of others, were not given replacements, and many got blood on their bodies and clothing and blood on the floor. The naked inmates had to stand barefoot on a floor dirty with menstrual blood and raise their breasts, lift their hair, turn around, bend over, spread their buttocks and vaginas, and cough.4

Judge Easterbrook, writing for the Seventh Circuit majority, held there was no fourth amendment violation because inmates have no reasonable expectation of privacy against any visual inspection.5 In other words, according to the Seventh Circuit, the fourth amendment can only be violated when prison guards physically penetrate prisoner’s bodies.6

4 Id. at 837.
5 Id.; see id. at 838 (“The Fourth Amendment does not apply to visual inspections of convicted prisoners but does apply to procedures that entail intrusions within prisoners' bodies.”). Judge Manion joined in the majority. Judge Lee issued a dissenting opinion.
6 Plaintiffs brought a section 1983 claim under the eighth and fourth Amendments. Id. at 837. The district court awarded summary judgment to the defendants on the fourth amendment, holding the claim was only proper under the eighth amendment, given Seventh Circuit precedent “that a visual inspection of a convicted prisoner is not subject to analysis under [the fourth amendment].” Id. At trial, a jury returned a verdict for the defendants on eighth amendment grounds, which plaintiffs did not contest in their appeal before the Seventh Circuit. Id. Rather, the plaintiffs solely sought reinstatement of the fourth amendment claim, which was precluded from jury consideration. Id. As such, this paper addresses only the fourth amendment claim.
The *Hulett* majority opinion not only got the law wrong, it also got the policy wrong. Prisoners are particularly vulnerable to sexual violence. Prisons in the United States are run with almost no oversite and transparency. As such, the State of Illinois has no state official outside of the Department of Corrections that acts as an independent ombudsperson to jails and prisons within the state. The only protection against neglect and abuse by the Department of Corrections is through the court. When the Seventh Circuit categorically denied that protection, it denied prisoners their basic human dignity as well.

This paper will argue the Seventh Circuit erred when it upheld the district court decision granting summary judgment for the defendant due to a failure to state a fourth amendment claim. In writing for the majority, Judge Easterbrook relied on flawed reasoning and dubious precedent to conclude the fourth amendment does not protect convicted prisoners from visual inspections, regardless of whether they are overly intrusive or unnecessary, leaving bodily intrusions by prison guards as the only possible claim for fourth amendment protection.

Section I of this paper will briefly discuss the history of the fourth amendment and its protections for prisoners. Section II will review the Seventh Circuit’s previous decisions on the matter, demonstrating the erosion of constitutional protections for the incarcerated. Section III

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7 See Hudson v. Palmer, 468 U.S. 517, 540 (1984) (holding an inmate had no privacy interest in his cell where a prison guard ripped the inmate’s pillowcase during a search and the inmate filed suit).


10 As are the facts of this case.

11 “This mass strip search of female inmates was conducted solely for training purposes, but the training was not strictly necessary, as most cadets graduated without it.” Henry v. Hulett, 930 F.3d 836, 841 (7th Cir. 2019) (Lee, J., dissenting) (internal citations omitted).

12 Judge Easterbrook relies on cases written by Judge Easterbrook: Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995); King v. McCarty, 781 F.3d 889 (7th Cir. 2015).
will discuss the concept of dignity as a guide courts should use to better protect the fourth amendment rights of all people, particularly convicted prisoners.

I. FOURTH AMENDMENT PROTECTIONS FOR PRISONERS

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”13

Generally, the fourth amendment protects the right of the people “against unreasonable searches and seizures.”14 It ordinarily requires the government to obtain a warrant for a search, probable cause for an arrest, and reasonable suspicion for a patdown.15 However, if the target of the search is incarcerated, broad deference is granted to guards and the prison system—and there may be no protection at all.16

Courts justify limiting rights of offenders in two primary ways. First, by recognizing the practical issues inherent in prisons.17 These include danger, order, discipline, efficiency, and complexity.18 Second, where rights may be constitutionally limited by due process of law.19 At the intersection of practical and constitutional considerations is the

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13 U.S. CONST. amend. IV.
14 Id.
15 For example, see Mapp v. Ohio, 367 U.S. 643, 650 (1961) (holding the exclusionary rule applies to bar evidence obtained through searches conducted without probable cause); Draper v. United States, 358 U.S. 307 (1959) (holding arresting officials had probable cause to believe that petitioner was violating federal narcotic laws and their search was incident to a lawful arrest where an informant's tip was independently corroborated); Terry v. Ohio, 392 U.S. 1, (1968) (holding no fourth amendment violation where an officer had reasonable suspicion that defendant was about to commit robbery, and made a "stop and frisk" warrantless intrusion that yielded a weapon).
16 Such was the holding in Henry, 930 F.3d at 838.
18 Id.
19 Id.
unreasonableness standard within the language of the fourth amendment. This paper will look to past decisions, as well as considerations for good policy in trying to determine when a search is—and should be—unreasonable, and why the decision of the Seventh Circuit in Hulett was exactly that, unreasonable.

A. History of the Fourth Amendment in the Supreme Court

Throughout much of United States history, courts generally did not recognize fourth amendment protections for prisoners.20 In the 19th century, convicted prisoners were considered “slaves of the state.”21 Even as courts moved away from the language of slavery, the Supreme Court continued to deny Constitutional rights to prisoners. In 1962, the Court ruled in Lanza v. State of New York that a jail is inherently different from other settings where privacy within the fourth amendment applies, reasoning that “official surveillance has traditionally been the order of the day.”22

Just five years after Lanza, the Court decided the landmark case Katz v. United States.23 Katz gives us the expectation of privacy test, used to determine whether a search has occurred, and whether that search was reasonable.24 Under the Katz test, a fourth amendment “search” has occurred where (1) someone “exhibited an actual (subjective) expectation of privacy,” and (2) “the expectation [is] one

20 See Stroud v. United States, 251 U.S. 15, 22 (1919) (holding no fourth amendment violation occurred where letters by an inmate were intercepted by prison officials and used against him in a criminal case, reasoning that taking the letters was “reasonably designed to promote the discipline of the institution”).
22 Lanza v. State of N.Y., 370 U.S. 139, 143–44 (1962) (“a jail shares none of the attributes of privacy of a home, automobile, an office, or a hotel room.”)
24 Id. But see William J. Stuntz, Privacy's Problem and the Law of Criminal Procedure, 93 Mich. L. Rev. 1016, 1017–18 (1995) (“The idea that the Fourth and Fifth Amendments guarantee broad privacy protection dates back at least to Boyd v. United States, an 1886 Supreme Court decision that laid the foundation for modern search and seizure and self-incrimination doctrine.”)
that society is prepared to recognize as ‘reasonable.'”

If both prongs of *Katz* are met, a warrant is required, “subject only to a few specifically established and well-delineated exceptions.”

Even as *Katz* expanded fourth amendment protections, courts continued to find no expectation of privacy for prisoners. Eventually, cracks in this line of anti-prisoner’s rights jurisprudence started to appear, and the Supreme Court became more willing to hear cases and protect the rights of prisoners. Finally, in 1974, a unanimous Supreme Court proclaimed “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”

By 1979, the Supreme Court was ready to take up the issue of visual body cavity searches in *Bell v. Wolfish*. The court considered


26 *Katz*, 389 U.S. at 357.

27 See State v. Brotherton, 465 P.2d 749, 751 (1970) (holding that a search warrant was not necessary to obtain letters from a prisoner in order to use them as evidence in his criminal trial because “prison authorities may subject inmates to institutional searches unimpeded by Fourth Amendment barriers”) (references omitted). But see Giannelli & Gilligan, *Prison Searches and Seizures: “Locking” the Fourth Amendment Out of Correctional Facilities*, 62 V.A.L.REV. 1045, 1060 (1976) (stating “[t]he flaw in the [Katz] subjective approach is obvious. If a person knows he will be searched, he cannot claim that he expected privacy. By announcing a policy of continuous surveillance, thereby eliminating any subjective expectation of privacy, correctional officials could define the scope of an inmate's fourth amendment rights”).

28 See Lee v. Washington, 390 U.S. 333, 334 (1968) (holding invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to “prison security and discipline”); Johnson v. Avery, 393 U.S. 483, 489 (1969) (holding prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts).

29 Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (“though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.”)

the legitimate interests of both the government and the prisoners.\textsuperscript{31} While this decision ultimately came out against the plaintiff prisoners, the Court explicitly stated searches of this kind that are found to be unreasonable or abusive must not be condoned.\textsuperscript{32} Justice Rehnquist wrote the majority opinion for the court. The following excerpt is particularly enlightening:

We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner. But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.\textsuperscript{33}

The Seventh Circuit majority in \textit{Henry} mentioned \textit{Wolfish} as proof for their assertion that “strip searches often are reasonable and thus permissible.”\textsuperscript{34} They ignored entirely “[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates.”\textsuperscript{35}

\textsuperscript{31} \textit{Id.} at 560.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Henry v. Hulett}, 930 F.3d 836, 838 (7th Cir. 2019).
\textsuperscript{35} \textit{Bell v. Wolfish} at 560.

“We hold that the Fourth Amendment has no applicability to a prison cell.” 36

“The reasoning . . . of the Court’s opinion, however, is seriously flawed—indeed, internally inconsistent.” 37

In 1984, Hudson v. Palmer quoted Bell v. Wolfish, stating “[w]e believe that it is accepted by our society that ‘[l]oss of freedom of choice and privacy are inherent incidents of confinement.’” 38 Hudson was a civil action brought by a prisoner, Russell Palmer, under section 1983 against a prison officer, Ted Hudson. 39 Officer Hudson found a ripped pillowcase in Palmer’s trashcan. 40 Palmer was charged and convicted for destruction of state property regarding the pillowcase. 41 The civil suit alleged Officer Hudson conducted an unreasonable “shakedown” search of Palmer’s cell. 42

The Hudson majority stated, “of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society.” 43 This was just a short distance away from the Court’s claim that “curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of ‘institutional needs and objectives’ of prison facilities.” 44 The Hudson Court applied the Katz test to Officer

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37 Id. at 541–42 (1984) (Stevens, J., concurring in part and dissenting in part).
38 Id., 468 U.S. at 528 (majority opinion).
39 Id. at 520.
40 Id.
41 Id.
42 Id.
43 Id. at 528.
44 Id. at 524.
Hudson’s actions. However, the Court included a balancing of interests analysis within its Katz test consideration, stating “[i]t would be literally impossible to accomplish [institutional security] if inmates retained a right of privacy in their cells.”

Writing for the four-vote dissent, Justice Stevens held no punches in a sharp criticism of the flawed majority opinion by Chief Justice Warren Burger, even quoting a previous decision by the Chief Justice. “It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights.” Justice Stevens went on to state, “[the majority] holds that no matter how malicious, destructive, or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable.” Justice Stevens believed the majority erred in its failure to recognize the important value of privacy, even in residual amounts that “may mark the difference between slavery and humanity.”

Even with its flawed reasoning, neither the Hudson decision, nor any opinion of the Supreme Court since Hudson, demands the type of categorical denial of rights asserted by Judge Easterbrook in his majority opinion in Henry. In fact, no other circuit has allowed such an outcome. Judge Easterbrook’s majority opinion in Henry does not

45 “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.” Id., at 525 (internal quotations omitted).
46 Id., at 527.
48 Hudson, 468 U.S. at 542.
49 Id.
50 Henry v. Hulett, 930 F.3d 836, 837 (7th Cir. 2019) (“Hudson did not consider whether convicted prisoners have some residual privacy interest in their persons, as opposed to their possessions and surroundings. The Justices have not returned to that subject in later decisions”); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012) (Roberts, C.J., concurring) (“The Court is nonetheless wise to leave open the possibility of exceptions, to ensure that we not 'embarrass the future.'”) (quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944)).
51 Vaughan v. Ricketts, 859 F.2d 736 (9th Cir.1988) (“it was clearly established by 1984 that body cavity searches of inmates must be conducted in a
just depart from other circuits, it departs from decisions in the Seventh Circuit as well.\textsuperscript{52}

At this point one may wonder what in the world happened with the \textit{Henry} decision. Afterall, Judge Easterbrook claimed the majority was only following precedent.\textsuperscript{53} I must now confess I have not yet addressed one particularly important circuit court decision: a case from the Seventh Circuit only one year after its decision in \textit{Canedy v. Boardman}.

II. EROSION IN THE SEVENTH CIRCUIT

"My colleagues say that we must respect ‘the hard choices made by prison administrators.’ I agree. There is no basis in the record, however, for supposing that such a choice was made here."\textsuperscript{54}

How did the Seventh Circuit come to a decision in \textit{Henry v. Hulett} that is so different from how other circuit courts deal with this issue? It started with a clash in \textit{Johnson v. Phelan} between Judge Easterbrook, for the majority, and Judge Posner, concurring in part and dissenting in reasonable manner, and that issues of privacy, hygiene, and the training of those conducting the searches are relevant to determining whether the manner of search was reasonable”); Covino v. Patrissi, 967 F.2d 73 (2d Cir.1992) (notwithstanding \textit{Hudson}, “inmates do retain a limited right to bodily privacy”); Dunn v. White, 880 F.2d 1188 (10th Cir.1989) (after \textit{Hudson}, a “prisoner's privacy interest in the integrity of his own person is still preserved under \textit{Wolfish}”); Spence v. Farrier, 807 F.2d 753 (8th Cir.1986) (traditional \textit{Wolfish} approach used re urinalysis); Leovy v. Mills, 788 F.2d 1437 (10th Cir.1986) (rejecting notion \textit{Hudson} “eviscerates the requirement set forth in \textit{Wolfish} that personal body searches of inmates must be reasonable under the circumstances”); King v. Rubenstein, 825 F.3d 206 (4th Cir.2016) (“under \textit{Wolfish}, prisoners retain an interest in some degree of bodily privacy and integrity after \textit{Hudson}”).

\textsuperscript{52} In 1994, the Seventh Circuit. Decided \textit{Canedy v. Boardman}.\textsuperscript{52}, 16 F.3d 183 (7th Cir.1994) (Hudson's abrogation of fourth amendment protections applies to prisoners' cells, not to prisoners themselves).

\textsuperscript{53} Henry v. Hulett, 930 F.3d 836, 838 (7th Cir. 2019).

\textsuperscript{54} Johnson v. Phelan, 69 F.3d 144, 156 (7th Cir. 1995) (Posner, C.J., concurring in part and dissenting in part).
part. As with all of the cases Easterbrook relied on in writing the majority opinion in *Henry*, the facts of *Johnson v. Phelan* were inherently less offensive than the sexual trauma committed in *Henry*. Johnson, imprisoned at Cook County Jail, alleged “cross-sex monitoring in the Jail violated the due process clause.” In other words, Johnson was uncomfortable being monitored by female guards because they could see him naked in his cell, using the toilet, and in the shower.

Judge Easterbrook, writing for the majority, began by looking to whether the monitoring was “unreasonable” under the fourth amendment. Rather than simply applying precedent to the relatively easy facts of the case before the court, Judge Easterbrook vastly overstated Supreme Court precedent, and sets the foundation to ignore all fourth amendment claims by convicted prisoners. Judge Easterbrook’s majority opinion explicitly claimed *Hudson v. Palmer* decided that prisoners retain no fourth amendment privacy rights. It goes on to justify its broad conclusion in a way that makes denial of fourth amendment protection in a case with more difficult facts—as in *Henry v. Hulett*—seem inevitable. “Inter-prisoner violence is endemic, so constant vigilance without regard to the state of the prisoners’ dress is essential. Vigilance over showers, vigilance over cells—vigilance everywhere, which means that guards gaze upon naked inmates.” This justification uses the threat of violence, and the implied need of safety for prisoners (and staff), as a means to categorically deny legal claims against practices that can and do unnecessarily and unreasonably cause harm to prisoners.

55 Id., 69 F.3d at 151.
56 Id. at 145 (majority opinion).
57 Id.
58 Id.
59 Id. at 146.
60 Id.
61 Id.
62 Id.
Judge Easterbrook explicitly asserted prisoners retain no right of privacy under the fourth amendment. Judge Easterbrook used *Hudson*—where the Court “h[e]ld that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell”—to assert the end of all fourth amendment privacy protections for convicted prisoners.63

Ultimately, what Judge Easterbrook did was take a line of cases— with easier facts—to unnecessarily establish a broad rule; then applied it to a case which almost certainly would have come out differently under ordinary Constitutional interpretation. *Hudson* involved a routine “shakedown” of a prison cell where the inmate, Hudson, was disciplined after officers found a damaged pillowcase in the trashcan.64 *Hudson* explicitly used the *Katz* expectation of privacy test and applied it to the specific facts of the case.65

In *Phelan*, convicted prisoner Johnson felt uncomfortable being monitored by female guards as opposed to male guards where he would occasionally be nude in going about his day.66 Judge Easterbrook applied *Hudson* in *Phelan*, but never mentioned *Katz*. In fact, Judge Easterbrook applied no test for reasonableness at all.67 He incorrectly asserted that under *Hudson*, prisoners have no fourth amendment privacy rights, and moved on.68

For his *Phelan* finale, Judge Easterbrook claimed that precedent protecting constitutional privacy of prisoners should be understood “as invocations of the eighth amendment’s ban on cruel and unusual punishments.”69 Then within a few paragraphs, Judge Easterbrook

64 *Id.* at 519.
65 *Id.* at 525.
66 *Johnson*, 69 F.3d at 145.
67 A departure from the actual text of the fourth amendment that is worth noting for an originalist like Judge Easterbrook.
68 *Johnson*, 69 F.3d at 146.
69 *Id.* at 147.
opined about “[h]ow odd it would be to find in the eighth amendment a right” to privacy claimed in the case.  

Odd indeed, but 25 years later Judge Easterbrook believed it is precedent worth holding in Henry v. Hulett.  

At the end of the Henry majority opinion, Judge Easterbrook noted “judges, including those within the Seventh Circuit, have disagreed about whether the fourth amendment ever prevents guards from viewing naked prisoners. Johnson was decided over a dissent.”  

Seventh Circuit Chief Judge Richard Posner is listed in the opinion as concurring and dissenting. Posner makes it immediately clear that his concurrence is in outcome only.  

Posner began with a textbook legal pragmatist explanation of the Eighth Amendment and the Bill of Rights, describing it as “a Rorschach test. What the judge sees in it is the reflection of his or her own values, values shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources of moral judgment.”  

Posner went on to compare “privacy” and its different meanings under reproductive autonomy, tort law, right to confidentiality, and fourth amendment search and seizure. “The problem is that the term “right of privacy” bears meanings in law that are remote from its primary ordinary-language meaning, which happens to be the meaning that a suit of this sort invokes.”

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70 Id. at 148.
71 “Plaintiffs ask us to overrule Johnson and King to the extent that they deem the Fourth Amendment inapplicable to visual inspections of convicted prisoners. We decline.” Henry v. Hulett, 930 F.3d 836, 838 (7th Cir. 2019).
72 Id. at 839.
73 “I agree with the district judge and my colleagues that Johnson's equal protection claim has no possible merit, that there is no possible basis for imputing liability to the president of the Cook County Board of Commissioners, and that the claims against the defendants in their official capacities must be dismissed as unauthorized suits against the State of Illinois. That is where my agreement ends.” Johnson, 69 F.3d at 151.
74 Id. at 151. Posner addresses the eighth amendment issue first but goes on to the fourth amendment.
75 Id., at 152 (Posner, C.J., concurring in part and dissenting in part).
It is interesting to note the Seventh Circuit decided *Johnson v. Phelan* only one year after their decision in *Canedy v. Boardman*. In Canedy, the court stated “[i]mates surely do not enjoy the full sweep of constitutional rights afforded other members of society. But even so, those who are convicted of criminal offenses do not surrender all of their constitutional rights.”

Judge Easterbrook responded to the question of *Canedy* by first differentiating cases involving “visual rather than tactile inspections.” Expanding on that, Judge Easterbrook stated “[w]e therefore think it best to understand the references to “privacy” in *Canedy* and similar cases as invocations of the eighth amendment's ban on cruel and unusual punishments.” Judge Easterbrook moved privacy protections from the fourth amendment, which demands a reasonableness standard, to the eighth amendment, which has no such demand. If one wanted to eliminate privacy protections, this is how you would do it. However, it still flies in the face of Supreme Court precedent. “Indeed, we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.”

When it comes to the question of visual verses tactile inspections in *Henry*, there appears to be no way around fourth amendment protections against bodily intrusion. Judge Easterbrook recognized as much in his majority opinion for *Peckham v. Wisconsin Department of*...

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76 16 F.3d 183, 185 (7th Cir. 1994). Notably, Judge Easterbrook was not a participant in this case, which does not categorically deny fourth amendment rights as later decisions written by Easterbrook would do.  
77 Id., at 185.  
78 *Johnson*, 69 F.3d at 145.  
79 Id. at 147.  
81 *Sparks* v. Stutler, 71 F.3d 259, 261 (7th Cir. 1995) (“Certainly *Hudson* does not establish that the interior of one's body is as open to invasion as the interior of one's cell”); *Forbes* v. Trigg, 976 F.2d 308, 312 (7th Cir. 1992) (affirming summary judgment for defendants in case challenging requirement that prisoner produce urine for drug test, but noting that "inmates retain protected privacy rights in their bodies").
Corrections.82 “[O]f course the fourth amendment ‘applies’ inside the nation’s prisons.” Judge Easterbrook reasoned “surgical invasions of a person’s body in search of evidence must be objectively reasonable,” because the “fourth amendment interest in bodily integrity . . . does not vanish with conviction and imprisonment.”83 However, Judge Easterbrook doubles down on the notion that places that can hide weapons (cells, pockets, under clothes) retain no privacy protection in prison.84

With this long history in mind, Judge Easterbrook’s majority opinion in Henry appears inevitable. Judge Easterbrook had been building up to this case for so long, laying the foundation in the easier cases and building up the precedent. Then when the court gets to Henry, Judge Easterbrook throws his hands up and exclaims there is nothing he can do; he is bound by this court. He quoted his own previous cases, stating “we should recognize that the Fourth Amendment’s focus on objective reasonableness may preserve some outer limit on the actions of even well-meaning prison administrators where such bodily searches are involved, while it also requires courts to give substantial—but not complete—deference to the warden’s judgment.”85 Judge Easterbrook then invited us to compare that with his majority opinion in Johnson v. Phelan, and his concurrence in King v. McCarty, “hold[ing] that a visual inspection of a convicted prisoner is not subject to analysis under that amendment.”86

Judge Easterbrook ended the majority opinion in Henry by claiming “[f]or more than 20 years it has been established in this circuit that the Fourth Amendment does not apply to visual inspections

82 141 F.3d 694 (7th Cir. 1998).
83 Id. at 699.
84 Id.
85 Id. See also Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004) (Judge Easterbrook concurring) (prisoners’ privacy interests “are extinguished by judgments placing them in custody”).
86 Henry v. Hulett, 930 F.3d 836, 837 (7th Cir. 2019) quoting King v. McCarty, 781 F.3d 889, 904 (7th Cir. 2015).
87 Id., at 837.
This statement is only partially correct. It has certainly been established in opinions of Judge Easterbrook. But it is far from established in the Seventh Circuit. The back and forth over that time regarding fourth amendment protections for prisoners demonstrates, at best, Judge Easterbrook’s preference, and, at worst, the complete failure to establish the visual inspection rule in the Seventh Circuit. Which is totally aside from the fact that no other Circuit has imposed a similarly harsh rule.

It would be easy at this point to say that Judge Easterbrook simply got the law wrong. But there is something inherently problematic with the fourth amendment precedent. And it has a lot to do with that central unenumerated protection: privacy. It is really with the creative view on privacy in the first case—Phelan—where it all goes awry. In fact, Chief Judge Posner recognized the issue in his dissent.

The parties have confused the first issue by describing it as the extent of a prisoner's “right of privacy.” They cannot be criticized too harshly for this. Countless cases, including our own Canedy v. Boardman, have done the same thing. The problem is that the term “right of privacy” bears meanings in law that are remote from its primary ordinary-language meaning, which happens to be the meaning that a suit of this sort invokes. One thing it means in law is the right to reproductive autonomy; another is a congeries of tort rights only one of which relates to the naked body; still another is the right to maintain the confidentiality of certain documents and conversations. Another and overlapping meaning is the set of interests protected by the Fourth Amendment, which prohibits unreasonable searches and seizures. 89

88 Id. at 839.
It is time to recognize human dignity as a right, guaranteed by the fourth amendment.

III. DIGNITY AND THE FOURTH AMENDMENT

“Although privacy may have been a promising theory of the Fourth Amendment at one time, it has now lost much of its luster and utility. The Court has interpreted privacy to be a question of fact rather than a constitutional value.”

The quote above provides some insight into how the Seventh Circuit got to this point. Judge Easterbrook is a smart and influential jurist; respected and revered in the legal community for decades. I am a second-year law student, writing a paper, calling him out for getting the law wrong. But my claim is not that simple. Judge Easterbrook’s majority opinion in *Henry v. Hulett* stated it was merely following Seventh Circuit precedent. That is true. And while I have called that precedent into question—for exaggerating Supreme Court precedent, making logical leaps, and being written by the same Judge—that does not mean it is not precedent. That is how our system works. Bad precedent begets bad precedent. Categorical denials of constitutionally protected rights become just another day at the office. In that way, injustice becomes collateral damage of a system that lacks foresight but demands adherence.

What I am trying to say is Judge Easterbrook, along with the judges that joined his majority opinions, ruled within the scope of the law as it existed. When few were looking and fewer cared, Judge Easterbrook eliminated fourth amendment protections for convicted prisoners. He was able to do this because he reasoned that convicted prisoners necessarily give up their privacy in the prison setting.

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91 *Johnson*, 69 F.3d at 150 (“The fourth amendment does not protect privacy interests within prisons.”)
92 *Id.*, at 146 (“privacy is the thing most surely extinguished by a judgment committing someone to prison.”)
strip search of convicted prisoners is always reasonable, according to Judge Easterbrook. Injustice is not considered. Humanity is not considered. Dignity is not considered. And therein lies the rub; Judge Easterbrook’s Seventh Circuit precedent demands unjust outcomes. The facts of Henry v. Hulett demonstrate this injustice. In fact, there are more to the facts than mentioned on the first page of this paper. That block quote was generously pulled from the majority opinion and left out additional facts recognized by the dissent. “The female correctional officers and cadets conducting the searches made derogatory comments and gestures about the women’s bodies and odors, telling the women that they were ‘dirty bitches,’ ‘fucking disgusting,’ ‘deserve to be in here,’ and ‘smell like death.’ Male correctional officers watched the women from the gym.”

The dissent did not have access to facts not available to the majority. Judges Easterbrook and Manion read these and all the facts of the case, then they signed their names to the majority opinion. “The most one can say for plaintiffs is that judges, including those within the Seventh Circuit, have disagreed about whether the fourth amendment ever prevents guards from viewing naked prisoners.” If that’s the most one can say, the fourth amendment is not worth the paper it’s written on.

The word “privacy” never appears in the text of the Constitution. Certain privacy rights are recognized by courts as constitutionally guaranteed, particularly within the fourth amendment. But privacy alone cannot protect the necessary entirety of the fourth amendment. “Searches and seizures can and often do cause injuries that are simply not cognizable to a regime predicated solely upon privacy.”

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93 Henry v. Hulett, 930 F.3d 836, 839 (7th Cir. 2019) (“For more than 20 years it has been established in this circuit that the Fourth Amendment does not apply to visual inspections of prisoners. It is best to leave the law of the circuit alone, unless and until the Justices suggest that it needs change.”)

94 Henry v. Hulett 841 (7th Cir. 2019) (Judge Lee dissenting) (internal citation omitted).

95 Id., at 839 (majority opinion).

to human dignity must be recognized alongside the right to privacy. “Even if one has no privacy, liberty, or property, or the legitimate expectation of the same, such as is the case with a prisoner, there remains a core human right to be free of government action that unreasonably or unnecessarily strips one of his dignity or intrinsic humanity.”

fourth amendment dignity protections would trigger when a search or seizure violates individual dignity in a way that is objectively unreasonable. Judge Easterbrook’s majority opinion in Henry v. Hulett demonstrates the inadequacy of privacy as the sole basis for fourth amendment protection. Formal recognition of dignity within the fourth amendment would help to ensure just outcomes.

The concept of dignity is not new to the Constitution. The following quote from Justice Kennedy recognizes the important constitutional role of dignity.

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases;

97 Id., at 675.
98 See Lawrence v. Texas, 539 U.S. 558, 567 (2003) (“It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”); Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man”); Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”); United States v. Balsys, 524 U.S. 666, 713(1998) (Breyer, J., dissenting) (“This Court has often found, for example, that the privilege [against self-incrimination] recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth.”).
99 Here in the context of an Eighth Amendment case.
and broad provisions to secure individual freedom and preserve human dignity.\textsuperscript{100}

The prison setting is particularly susceptible to violations of dignity. If the Supreme Court has already stated “[t]here is no iron curtain drawn between the Constitution and the prisons of this country,” why then would we allow prisons to unreasonably violate the dignity of prisoners?\textsuperscript{101} Maybe if Judge Easterbrook had to answer that question, \textit{Henry v. Hulett} would have come out different.

In the end, some 200 women at Lincoln Correctional Center were victims of sexual trauma. They went to court seeking justice and found none.

“\textit{We must not exaggerate the distance between ‘us, the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.}”\textsuperscript{102}

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\textsuperscript{100} Roper v. Simmons, 543 U.S. 551, 578 (2005) (internal citations omitted).
\textsuperscript{101} Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974) (“though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.”)
\textsuperscript{102} Johnson v. Phelan, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., concurring in part and dissenting in part)
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