DISSENTBY:
STEVENS (In Part)

DISSENT:

[*541] JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and
JUSTICE BLACKMUN join, concurring in part and dissenting in part.

This case comes to us on the pleadings. We must take the allegations in Palmer's complaint as true. n1 Liberally construing [**3208] this pro se complaint as we must, n2 it alleges that after examining it, prison guard Hudson maliciously took and destroyed a quantity of Palmer's property, including legal materials and letters, for no reason other than harassment. n3

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n1 See Hughes v. Rowe, 449 U.S. 5, 10 (1980) (per curiam); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515-516 (1972); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-175 (1965); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam). [***45] n2 See Boag v. MacDougall, 454 U.S. 364 (1982) (per curiam); Haines v. Kerner , 404 U.S. 519 (1972) (per curiam). n3 "On 9-16-81 around 5:50 p. m., officer Hudson shook down my locker and destroyed a lot of my property, i. e.: legal materials, letters, and other personal property only as a means of harassment. Officer Hudson has violated my Constitutional rights. The shakedown was no routine shakedown. It was planned and carried out only as harassment. Hudson stated the next time he would really mess my stuff up. I have plenty of witnesses to these facts." App. 7-8.
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For the reasons stated in Part II-B of the opinion of the Court, I agree that Palmer's complaint does not allege a violation of his constitutional right to procedural due process. n4 The reasoning in Part II-A of the Court's opinion, however, [*542] is seriously flawed -- indeed, internally inconsistent. The Court correctly concludes that the imperatives of prison administration require random searches of prison cells, and also correctly states that in the [***46] prison context "[of] course, there is a risk of maliciously motivated searches, and of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society." Ante, at 528. But the Court then 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. Ante, at 525-526.

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n4 I join Part II-B of the opinion of the Court on the understanding that it simply applies the holding of Parratt v. Taylor, 451 U.S. 527 (1981), to the facts of this case. I

do not understand the Court's holding to apply to conduct that violates a substantive constitutional right -- actions governmental officials may not take no matter what procedural protections accompany them, see Parratt, 451 U.S., at 545 (BLACKMUN, J., concurring); see also id., at 552-553 (POWELL, J., concurring in result); or to cases in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property, see id., at 543; see also Block v. Rutherford, post, at 591-592, n. 12; Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-436 (1982).

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[***47]

Measured by the conditions that prevail in a free society, neither the possessions nor the slight residuum of privacy that a prison inmate can retain in his cell, can have more than the most minimal value. From the standpoint of the prisoner, however, that trivial residuum may mark the difference between slavery and humanity. On another occasion, THE CHIEF JUSTICE wrote:

"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." Houchins v. KQED, Inc., 438 U.S. 1, 5, n. 2 (1978) (plurality opinion) (citation omitted).

Personal letters, snapshots of family members, a souvenir, a deck of cards, a hobby kit, perhaps a diary or a training manual for an apprentice in a new trade, or even a Bible -- a variety of inexpensive items may enable a prisoner to maintain contact with some part of his past and an eye to the possibility of a better future. [***48] Are all of these items subject to unrestrained perusal, confiscation, or mutilation at the hands of a possibly hostile guard? Is the Court correct in its [*543] perception that "society" is not prepared to recognize any privacy or possessory interest of the [**3209] prison inmate -- no matter how remote the threat to prison security may be?

I

Even if it is assumed that Palmer had no reasonable expectation of privacy in most of the property at issue in this case because it could be inspected at any time, that does not mean he was without Fourth Amendment protection. n5 For the Fourth Amendment protects Palmer's possessory interests in this property entirely apart from whatever privacy interest he may have in it.

"The first Clause of the Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .' This text protects two kinds of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs

when [***49] there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984) (footnotes omitted). n6

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n5 Though I am willing to assume that for purposes of this case that the Court's holding concerning most of Palmer's privacy interests is correct, that should not be taken as an endorsement of the Court's new "bright line" rule that a prisoner can have no expectation of privacy in his papers or effects, ante, at 523. I cannot see any justification for applying this rule to minimum security facilities in which inmates who pose no realistic threat to security are housed. I also see no justification for reading the mail of a prisoner once it has cleared whatever censorship mechanism is employed by the prison and has beenreceived by the prisoner.

n6 See also United States v. Karo, post, at 712; United States v. Place, 462 U.S. 696, 707 (1983); id., at 716 (BRENNAN, J., concurring in result); Texas v. Brown, 460 U.S. 730, 747-748 (1983) (STEVENS, J., concurring in judgment).

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[***50]

[*544] There can be no doubt that the complaint adequately alleges a "seizure" within the meaning of the Fourth Amendment. Palmer was completely deprived of his possessory interests in his property; by taking and destroying it, Hudson was asserting "dominion and control" over it; hence his conduct "did constitute a seizure," id., at 120. n7 The fact that the property was destroyed hardly alters the analysis -- the possessory interests the Fourth Amendment protects are those of the citizen. From the citizen's standpoint, it makes no difference what the government does with his property once it takes it from him; he is just as much deprived of his possessory interests when it is destroyed as when it is merely taken. n8 This very Term, in Jacobsen, we squarely held that destruction of property in a field test for cocaine constituted a constitutionally cognizable interference with possessory interests: "[The] field test did affect respondents' possessory interests protected by the [Fourth] Amendment, since by destroying a quantity of the powder it converted what had been only a temporary deprivation [**3210] of possessory interests into a permanent one." Id [***51] ., at 124-125.

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n7 See also Bell v. Wolfish, 441 U.S. 520, 574-575 (1979) (MARSHALL, J., dissenting).

n8 JUSTICE O'CONNOR, like the other Members of the majority, would apparently draw a distinction between the physical destruction of the prisoner's property and its "indefinite retention," see ante, at 538 (concurring opinion), in that the former may be actionable under the Due Process and Taking Clauses. I am not entirely sure whether she

believes that an inmate can be harassed consistently with the Fourth Amendment by temporarily taking custody of his correspondence and family snapshots, for example, because "incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects," ibid., or because "all searches and seizures of the contents of an inmate's cell are reasonable," ibid. The net result of her position, however, is that harassment by means of temporarily -- i. e., for no longer than the duration of the prisoner's incarceration -- depriving an inmate of his personal effects raises no Fourth Amendment issue, and no constitutional issue of any kind if the property is ultimately returned.

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[***52]

The Court suggests that "the interest of society in the security of its penal institutions" precludes prisoners from [*545] having any legitimate possessory interests. Ante, at 527-528, and n. 8. n9 See also ante, at 538 (O'CONNOR, J., concurring). That contention is fundamentally wrong for at least two reasons.

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n9 The existence of state remedies for this seizure, to which the Court adverts, ante, at 528, n. 8, as does JUSTICE O'CONNOR, ante, at 540, is of course irrelevant to the Fourth Amendment question, since 42 U. S. C. @ 1983 provides a remedy for Fourth Amendment violations supplemental to any state remedy that may exist. Monroe v. Pape, 365 U.S. 167, 183 (1961). See Burnett v. Grattan, ante, at 50; Patsy v. Florida Board of Regents, 457 U.S. 496 (1982); Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100, 104 (1981); Allen v. McCurry, 449 U.S. 90, 99 (1980); Paul v. Davis, 424 U.S. 693, 710, n. 5 (1976); Wilwording v. Swenson, 404 U.S. 249, 251 (1971) (per curiam); McNeese v. Board of Education, 373 U.S. 668, 671-674 (1963). See also n. 4, supra.

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First, Palmer's possession of the material was entirely legitimate as a matter of state law. There is no contention that the material seized was contraband or that Palmer's possession of it was in any way inconsistent with applicable prison regulations. Hence, he had a legal right to possess it. In fact, the Court's analysis of Palmer's possessory interests is at odds with its treatment of his due process claim. In Part II-B of its opinion, the Court holds that the material which Hudson took and destroyed was "property" within the meaning of the Due Process Clause. Ante, at 533-534. See also ante, at 539-540 (O'CONNOR, J., concurring). Indeed, this holding is compelled by Parratt v. Taylor, 451 U.S. 527 (1981), in which we held that a $ 23.50 hobby kit which had been mail-ordered but not received by a prisoner was "property" within the meaning of the Due Process Clause. See Id., at 536. n10 However, an interest cannot qualify as "property" within the meaning of the Due Process Clause unless it amounts to a legitimate claim of entitlement. n11 Thus in Part [*546] II-B of its opinion the Court necessarily indicates [***54] that Palmer had a legitimate claim of entitlement to the material at issue. It is well settled that once a State creates such a constitutionally protected interest, the Constitution forbids it

to deprive even a prisoner of such an interest arbitrarily. n12 Thus, Palmer had a legitimate right under both state law and the Due Process Clause to possess the material at issue. That being the case, the Court's own analysis indicates that Palmer had a legitimate possessory interest in the material within the Fourth Amendment's proscription on unreasonable seizures.

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n10 On this point, the Court was unanimous, see 451 U.S., at 546-548 (POWELL, J., concurring in result), as it is today.

n11 See, e. g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-1004 (1984); Logan v. Zimmerman Brush Co., 455 U.S., at 430-431; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980); Greenholtz v. Nebraska Penal Inmates , 442 U.S. 1, 7 (1979); Leis v. Flynt, 439 U.S. 438, 441-443 (1979) (per curiam); Bishop v. Wood, 426 U.S. 341, 344, and nn. 6, 7 (1976); Arnett v. Kennedy, 416 U.S. 134, 165-166 (1974) (POWELL, J., concurring in part and concurring in result in part); id., at 185 (WHITE, J., concurring in part and dissenting in part); id., at 207-208 (MARSHALL, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). [***55]

n12 See Hewitt v. Helms, 459 U.S. 460, 469-472 (1983); Greenholtz v. Nebraska Penal Inmates, 442 U.S., at 11-12; Wolff v. McDonnell, 418 U.S. 539, 556-558 (1974).

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[**3211] Second, the most significant of Palmer's possessory interests are protected as a matter of substantive constitutional law, entirely apart from the legitimacy of those interests under state law or the Due Process Clause. The Eighth Amendment forbids "cruel and unusual punishments." Its proscriptions are measured by society's "evolving standards of decency," Rhodes v. Chapman, 452 U.S. 337, 346-347 (1981); Estelle v. Gamble, 429 U.S. 97, 102-103 (1976). The Court's implication that prisoners have no possessory interests that by virtue of the Fourth Amendment are free from state interference cannot, in my view, be squared with the Eighth Amendment. To hold that a prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary or malicious perusal, seizure, or [***56] destruction would not, in my judgment, comport with any civilized standard of decency.

There are other substantive constitutional rights that also shed light on the legitimacy of Palmer's possessory interests. [*547] The complaint alleges that the material at issue includes letters and legal materials. This Court has held that the First Amendment entitles a prisoner to receive and send mail, subject only to the institution's right to censor letters or withhold delivery if necessary to protect institutional security, and if accompanied by appropriate procedural safeguards. n13 We have also held that the Fourteenth Amendment entitles a prisoner to reasonable access to legal materials as a

corollary of the constitutional right of access to the courts. n14 Thus, these substantive constitutional rights affirmatively protect Palmer's right to possess the material in question free from state interference. It is therefore beyond me how the Court can question the legitimacy of Palmer's possessory interests which were so clearly infringed by Hudson's alleged conduct.

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n13 See Procunier v. Martinez, 416 U.S. 396 (1974). A prisoner's possession of other types of personal property relating to religious observance, such as a Bible or a crucifix, is surely protected by the Free Exercise Clause of the First Amendment. See Cruz v. Beto, 405 U.S. 319, 322, n. 2 (1972) (per curiam).
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n14 See Bounds v. Smith, 430 U.S. 817 (1977).

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II

Once it is concluded that Palmer has adequately alleged a "seizure," the question becomes whether the seizure was "unreasonable." Questions of Fourth Amendment reasonableness can be resolved only by balancing the intrusion on constitutionally protected interests against the law enforcement interests justifying the challenged conduct. n15

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n15 See, e. g., United States v. Jacobsen, 466 U.S. 109, 125 (1984); Michigan v. Long, 463 U.S. 1032, 1051 (1983); United States v. Place, 462 U.S., at 703; Bell v. Wolfish, 441 U.S., at 559.
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It is well settled that the discretion accorded prison officials is not absolute. n16 A prisoner retains those constitutional [*548] rights not inconsistent with legitimate penological objectives. n17 There can be no penological [***58] [**3212] justification for the seizure alleged here. There is no contention that Palmer's property posed any threat to institutional security. Hudson had already examined the material before he took and destroyed it. The allegation is that Hudson did this for no reason save spite; there is no contention that under prison regulations the material was contraband, and in any event as I have indicated above the Constitution prohibits a State from treating letters and legal materials as contraband. The Court agrees that intentional harassment of prisoners by [*549] guards is intolerable, ante, at 528. That being the case, there is no room for any conclusion but that the alleged seizure was unreasonable. The need for "close and continual surveillance of inmates and their cells," ante, at 527, in no way justifies taking and destroying noncontraband property; if material is examined and found not to be

contraband, there can be no justification for its seizure. When, as here, the material at issue is not contraband it simply makes no sense to say that its seizure and destruction serve "legitimate institutional interests." Ante, at 528, n. 8. Such seizures [***59] are unreasonable. n18

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n16 See Bell v. Wolfish, 441 U.S., at 562; Procunier v. Martinez, 416 U.S., at 405-406; Cruz v. Beto, 405 U.S., at 321-322 (per curiam); Haines v. Kerner, 404 U.S., at 520-521 (per curiam). See also Rhodes v. Chapman, 452 U.S. 337, 352 (1981); id., at 368-369 (BLACKMUN, J., concurring in judgment); Estelle v. Gamble, 429 U.S. 97, 102-105 (1976); Saxbe v. Washington Post Co., 417 U.S. 843, 866-870 (1974) (POWELL, J., dissenting).

n17 See Bell v. Wolfish, 441 U.S., at 545-547; Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125, 129 (1977); Wolff v. McDonnell, 418 U.S., at 555-556; Pell v. Procunier, 417 U.S. 817, 822 (1974); Procunier v. Martinez, 416 U.S., at 412-414. No precedent of this Court indicates that this general principle is inapplicable to the Fourth Amendment. As the Court acknowledges, statements concerning the application of the Fourth Amendment to prisons in Lanza v. New York, 370 U.S. 139, 143-144 (1962), were dicta and were not joined by a majority of the Court. See ante, at 524-525, n. 6. I therefore do not understand why JUSTICE O'CONNOR seems to treat that case as an authoritative precedent, ante, at 538 (concurring opinion). In Bell v. Wolfish, the Court explicitly reserved questions concerning prisoners' expectations of privacy and the seizure and destruction of prisoners' property. See 441 U.S., at 556-557, and n. 38. In United States v. Edwards, 415 U.S. 800 (1974), we approved "no more than taking from [an arrestee] the effects in his immediate possession that constituted evidence of crime," id., at 805, and reserved decision on the question presented here, see id., at 808, n. 9. Conversely, when this Court last confronted the question decided today, it took it as given that the seizure of a prisoner's letters was subject to the Fourth Amendment:

"[The] letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights." Stroud v. United States, 251 U.S. 15, 21-22 (1919). [***60]

n18 It follows that I disagree with the premise on which JUSTICE O'CONNOR decides this case: "[If] the act of taking possession and the indefinite retention of the property are themselves reasonable, the handling of the property while in the government's custody is not itself of Fourth Amendment concern." Ante, at 538-539 (concurring opinion). Hudson's infringement of Palmer's possessory interests was not reasonable. If we accept the allegations in the complaint as true -- as we must -- neither the act of taking possession nor the indefinite retention of these harmless noncontraband items would have

been reasonable or justified by any legitimate institutional interest. Hudson took the property solely to harass Palmer.

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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. On the question [***61] of what seizures society is prepared to consider reasonable, surely the consensus on that issue in the lower courts is of some significance. Virtually every federal judge to address the question over the past decade has concluded that the Fourth Amendment does apply to a prison cell. n19 There is similar unanimity among [**3213] the commentators. n20 [*550] The Court itself acknowledges that "intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society." Ante, at 528. That being the case, I fail to see how a seizure that serves no purpose except harassment does not invade an interest that society considers reasonable, and that is protected by the Fourth Amendment.

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n19 The Circuits which have addressed this question are unanimous. See, e. g., Lyon v. Farrier, 727 F.2d 766, 769 (CA8 1984), cert. pending, No. 83-6722; United States v. Mills, 704 F.2d 1553, 1560-1561 (CA11 1983), cert. denied, 467 U.S. 1243 (1984); United States v. Chamorro, 687 F.2d 1, 4-5 (CA1), cert. denied, 459 U.S. 1043 (1982); United States v. Hinckley, 217 U. S. App. D. C. 262, 275-279, 672 F.2d 115, 128-132 (1982); United States v. Lilly, 576 F.2d 1240, 1245-1246 (CA5 1978); United States v. Ready, 574 F.2d 1009, 1013-1014 (CA10 1978); United States v. Stumes, 549 F.2d 831 (CA8 1977) (per curiam); Bonner v. Coughlin, 517 F.2d 1311, 1315-1317 (CA7 1975), modified on other grounds, 545 F.2d 565 (1976) (en banc), cert. denied, 435 U.S. 932 (1978); Daugherty v. Harris, 476 F.2d 292 (CA10), cert. denied, 414 U.S. 872 (1973). The Court claims that the Second and Ninth Circuits have reached a conclusion in accord with its own, see ante, at 522, n. 5, but both of the decisions it cites predated Wolff v. McDonnell. Prior to Wolff many courts thought that no judicial review of prison conditions was possible. See generally Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985 (1962); Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L. J. 506 (1963). It is now the law in both Circuits that the Fourth Amendment protects prisoners against searches and seizures not reasonably related to institutional needs. See Hodges v. Stanley, 712 F.2d 34, 35 (CA2 1983) (per curiam); DiGuiseppe v. Ward, 698 F.2d 602, 605 (CA2 1983); United States v. Vallez, 653 F.2d 403, 406 (CA9), cert. denied, 454 U.S. 904 (1981); Sostre v. Preiser, 519 F.2d 763 (CA2 1975); United States v. Dawson, 516 F.2d 796, 805-806 (CA9), cert. denied, 423 U.S. 855 (1975); Hansen v. May, 502 F.2d 728, 730 (CA9 1974); United States v. Savage, 482 F.2d 1371, 1372-1373 (CA9 1973), cert. denied, 415 U.S. 932 (1974). [***62] n20 See ABA Standards for Criminal Justice 23-6.10 Commentary (2d ed. 1980); Gianelli & Gilligan, Prison Searches and

Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045 (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 (1972); Note, Constitutional Limitations on Body Searches in Prisons, 82 Colum. L. Rev. 1033, 1043-1055 (1982); Comment, Electronic Surveillance in California Prisons after Delancie v. Superior Court: Civil Liberty or Civil Death?, 22 Santa Clara L. Rev. 1109 (1982).
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[*551] The Court rests its view of "reasonableness" almost entirely upon its assessment of the security needs of prisons. Ante, at 527-528. Because deference to institutional needs is so critical to the Court's approach, it is worth inquiring as to the view prison administrators take toward conduct of the type at issue here. On that score the Court demonstrates a remarkable [***63] lack of awareness as to what penologists and correctional officials consider "legitimate institutional interests." I am unaware that any responsible prison administrator has ever contended that there is a need to take or destroy noncontraband property of prisoners; the Court certainly provides no evidence to support its conclusion that institutions require this sort of power. To the contrary, it appears to be the near-universal view of correctional officials that guards should neither seize nor destroy noncontraband property. For example, the Federal Bureau of Prisons' regulations state that only items which may not be possessed by a prisoner can be seized by prison officials, see 28 CFR @@ 553.12, 553.13 (1983). They also provide that prisoners can retain property consistent with prison management, specifically including clothing, legal materials, hobbycraft materials, commissary items, radios and watches, correspondence, reading materials, and personal photos. n21 Virginia law and its Department of Corrections' regulations similarly authorize seizure of contraband items alone. n22 I am aware of no [**3214] prison [*552] system with a different practice; n23 the standards [***64] for prison administration which have been promulgated for correctional institutions invariably require prison officials to respect prisoners' possessory rights in noncontraband personal property. n24

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n21 See 28 CFR @@ 553.10, 553.11 (1983). The regulations also state: "Staff conducting the search shall leave the housing or work area as nearly as practicable in its original order." @ 552.13(b). See also U.S. Dept. of Justice, Federal Standards for Prisons and Jails @ 13.01 (1980) ("Written policy and procedure specify the personal property inmates can retain in their possession. . . . It should be made clear to inmates what personal property they may retain, and inmates should be assured both that the facility's policies are applied uniformly and that their property will be stored safely").

n22 See Va. Code @ 53.1-26 (1982) ("Any item of personal property which a prisoner in any state correctional facility is prohibited from possessing by the Code of Virginia or by the rules of the Director shall, when found in the possession of a prisoner, be confiscated and sold or destroyed"); Virginia Department of Corrections, Division of Adult Services, Guideline No. 411 (Sept. 16, 1983). [***65] n23 For example, the

Illinois regulation considered in Bonner v. Coughlin, 517 F.2d, at 1314, n. 6, provided: "It is important and essential that searches be systematic and do not result in damage, loss, or abuse to any inmate's personal property. Deliberately damaging, confiscating, or abusing any inmate's permitted personal property will result in disciplinary action against the offending employee."

n24 See ABA Standards for Criminal Justice 23-6.10 (2d ed. 1980); American Correctional Association, Standards for Adult Correctional Institutions 2-4192 (2d ed. 1981); National Advisory Commission on Criminal Standards and Goals, Corrections 2.7 (1973).

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Depriving inmates of any residuum of privacy or possessory rights is in fact plainly contrary to institutional goals. Sociologists recognize that prisoners deprived of any sense of individuality devalue themselves and others and therefore are more prone to violence toward themselves or others. n25 At the same time, such an approach undermines the rehabilitative function of the institution: "Without the privacy and [***66] dignity provided by fourth amendment coverage, an inmate's opportunity to reform, as small as it may be, will further be diminished. It is anomalous to provide a prisoner with rehabilitative programs and services in an effort to build self-respect while simultaneously subjecting him to unjustified and degrading searches and seizures." Gianelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045, 1069 (1976).

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n25 A summary of the literature is found in Schwartz, Deprivation of Privacy as a "Functional Prerequisite": The Case of the Prison, 63 J. Crim. L., C. & P. S. 229 (1972).

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To justify its conclusion, the Court recites statistics concerning the number of crimes that occur within prisons. For example, it notes that over an 18-month period approximately [*553] 120 prisoners were murdered in state and federal facilities. Ante, at 526. At the end of 1983 there were 438,830 inmates in state and federal prisons. n26 The [***67] Court's homicide rate of 80 per year yields an annual prison homicide rate of 18.26 persons per 100,000 inmates. In 1982, the homicide rate in Miami was 51.98 per 100,000; in New York it was 23.50 per 100,000; in Dallas 31.53 per 100,000; and in the District of Columbia 30.70 per 100,000. n27 Thus, the prison homicide rate, it turns out, is significantly lower than that in many of our major cities. I do not suggest this type of analysis provides a standard for measuring the reasonableness of a search or seizure within prisons, but I do suggest that the Court's use of statistics is less than persuasive. n28

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n26 U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 1983 (Apr. 1984).

n27 See U.S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports, Crime in the United States -- 1982, pp. 51, 65, 70, 92 (1983).

n28 The size of the prison population also sheds light on what society may consider reasonable with respect to the property and privacy of prisoners. When one recognizes that the prison population is constantly changing and that most inmates have family or friends who retain an interest in their well-being, one must acknowledge that millions of citizens may well believe that prisoners should retain some residuum of privacy and possessory rights.

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The size of the inmate population also belies the Court's hypothesis that all prisoners fit into a violent, incorrigible stereotype. Many, of course, become recidivists. But literally thousands upon thousands of former prisoners are now leading constructive law-abiding lives. n29 The nihilistic tone [*554] [**3215] of the Court's opinion -- seemingly assuming that all prisoners have demonstrated an inability "to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint," ante, at 526, is consistent with its conception of prisons as sterile warehouses, but not with an enlightened view of the function of a modern prison system. n30

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n29 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. [***69]

n30 I cannot help but think that the Court's holding is influenced by an unstated fear that if it re cognizes that prisoners have any Fourth Amendment protection this will lead to a flood of frivolous lawsuits. Of course, this type of burden is not sufficient to justify a judicial modification of the requirements of law. See Tower v. Glover, 467 U.S. 914, 922-923 (1984); Patsy v. Florida Board of Regents, 457 U.S., at 512, n. 13. "Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect [defendants] from vexatious litigation, then there is something wrong with those procedures, not with the [Fourth Amendment]." Hoover v. Ronwin, 466 U.S. 558, 601 (1984) (STEVENS, J., dissenting) (footnote omitted). In fact, the lower courts have permitted such suits to be brought for some time now, see n. 19, supra, without disastrous results. Moreover, costs can be awarded against the plaintiff when frivolous cases are brought, see 466 U.S., at 601, n. 27. Even modest

assessments against prisoners' accounts could provide an effective weapon for deterring truly groundless litigation.

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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. To accord prisoners any less protection is to declare that the prisoners are entitled to no measure of human dignity or individuality -- not a photo, a letter, nor anything except standard-issue prison clothing would be free from arbitrary seizure and destruction. Yet that is the view the [*555] Court takes today. It declares prisoners to be little more than chattels, a view I thought society had outgrown long ago.

III

By adopting its "bright line" rule, the Court takes the "hands off" approach to prison administration that I thought it had abandoned forever when it wrote in Wolff v. McDonnell, 418 U.S. 539 (1974): [***71]

"[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. There is no iron curtain drawn between the Constitution and the prisons of this country." Id., at 555-556.

The first Clause of the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ." Today's holding means that the Fourth Amendment has no application at all to a prisoner's "papers and effects." This rather astonishing repeal of the Constitution is unprecedented; n31 since Wolff we have consistently followed its command that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that [**3216] are of general application." Id., at 556. n32

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n31 The Court's repeal does appear to extend to less than the entire Amendment. It appears to limit its holding to a prisoner's "papers and effects" located in his cell. Apparently it believes that at least a prisoner's "person" is secure from unreasonable search and seizure. See Bell v. Wolfish, 441 U.S., at 563 (POWELL, J., concurring in part and dissenting in part). [***72]

n32 See cases cited, nn. 16, 17, supra.

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Today's holding cannot be squared with the text of the Constitution, nor with common sense. The Fourth Amendment is of "general application," and its text requires that [*556] every search or seizure of "papers and effects" be evaluated for its reasonableness. The Court's refusal to inquire into the reasonableness of official conduct whenever a prisoner is involved – its conclusive presumption that all searches and seizures of prisoners' property are reasonable -- can be squared neither with the constitutional text, nor with the reality, acknowledged by the Court, that our prison system is less than ideal; unfortunately abusive conduct sometimes does occur in our prisons.

More fundamentally, in its eagerness to adopt a rule consistent with what it believes to be wise penal administration, the Court overlooks the purpose of a written Constitution and its Bill of Rights. That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental [***73] officials or legislative majorities. n33 The Fourth Amendment is part of that fundamental law; it represents a value judgment that unjustified search and seizure so greatly threatens individual liberty that it must be forever condemned as a matter of constitutional principle. n34 [*557] The courts, of course, have a special obligation to protect the rights of prisoners. n35 Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a "discrete and insular minority." n36 In this case, the destruction of Palmer's property was a seizure; the Judiciary has a constitutional duty to determine whether it was justified. The Court's conclusive presumption that all conduct by prison guards is reasonable is supported by nothing more [**3217] than its idiosyncratic view of the imperatives of prison administration -- a view not shared by prison administrators themselves. Such a justification is nothing less than a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency.

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n33 "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). [***74]

n34 "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as

against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, by whatever the means employed, must be deemed a violation of the Fourth Amendment." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

n35 See Rhodes v. Chapman, 452 U.S. 337, 358-361 (1981) (BRENNAN, J., concurring in judgment); id., at 369 (BLACKMUN, J., concurring in judgment); United States v. Bailey, 444 U.S. 394, 423-424 (1980) (BLACKMUN, J., dissenting).

n36 See Bernal v. Fainter, 467 U.S. 216, 222, n. 7 (1984); Toll v. Moreno, 458 U.S. 1, 23 (1982) (BLACKMUN, J., concurring); O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 800, n. 8 (1980) (BLACKMUN, J., concurring in judgment); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam); Hampton v. Mow Sun Wong, 426 U.S. 88, 102, and n. 22 (1976); Graham v. Richardson, 403 U.S. 365, 372 (1971); Oregon v. Mitchell, 400 U.S. 112, 295, n. 14 (1970) (Stewart, J., concurring in part and dissenting in part); United States v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938).

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More than a decade ago I wrote:

"[The] view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. [*558] 'Liberty' and 'custody' are not mutually exclusive concepts." United States ex rel. Miller v. Twomey, 479 F.2d 701, 712 (CA7 1973) (footnotes omitted), cert. denied sub nom. Gutierrez v. Department of Public Safety of Illinois, 414 U.S. 1146 (1974).

By telling prisoners that no aspect of their individuality, from a photo of a child to a letter from a wife, is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever in our jurisprudence.

Accordingly, I respectfully dissent from the Court's judgment in No. 82-1630 and from Part II-A of its opinion.