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## If I Had a Hammer . . . I'd Still Need Some Nails: A Fictitious Reconstruction of *Hudson v. Palmer*

Thomas Ford Ascher\*

### Foreword\*\*

The law does not exist in a vacuum. Rules of law are developed through case holdings that necessarily change lives. Although these propositions appear elementary, too often legal decision making overlooks these realities and becomes an intellectual exercise, rather than a means of securing justice. When analyzing a case, few legal scholars attempt to learn more about the personal conflicts involved before considering how a particular decision affects the existing law. In order to illustrate this phenomenon, I have imaginatively reconstructed the circumstances which led to the United States Supreme Court case of *Hudson v. Palmer*.<sup>1</sup> Hopefully, the reader will consider adopting a slightly different perspective from which to analyze case law after reading the fictional recreation of the events leading up to the prisoner's lawsuit in *Hudson v. Palmer*.

*Hudson v. Palmer* involved a prisoner's claims against an officer of his prison. The suit alleged that the officer had conducted an unreasonable search of the prisoner's locker and cell, had brought a false charge of destroying state property against him solely for harassment, and had, in violation of the due process clause, intentionally destroyed noncontraband personal property during the search.<sup>2</sup> The United States Supreme Court ruled that:

society is not prepared to recognize as legitimate any objec-

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\* B.A., Creighton University (1988); J.D., University of Minnesota Law School (1991). The author would like to thank Tricia Baatz, Professor Don Marshall, Eila Savela, Dwight Penas, Kay Pulju and particularly Katharine Brennan for their editorial advice and guidance on this article. The author is, however, entirely responsible for the end product.

\*\* The author advises that this piece contains language and depicts scenes which some may find offensive.

1. 468 U.S. 517 (1984).

2. Much of Palmer's destroyed property was personal, such as legal materials and letters, and of no conceivable threat to prison security. *Id.* at 541, 548 (Stevens, J., dissenting).

tive 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. 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.<sup>3</sup>

The Court went on to say that the same reasons leading to the conclusion that the search was not barred by the fourth amendment apply with equal force to the question of seizures in prison cells. "Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests."<sup>4</sup>

I have extrapolated from the facts, dramatized a possible chain of events, and created characters based upon *Hudson v. Palmer* in an attempt to broaden the parameters of case study. When the individuals in a given case are merely "plaintiff" and "defendant," the temptation to view them as mere pawns in the legal process is powerful. If, however, the individuals' thoughts, emotions, problems, goals and disappointments are acknowledged, we may see case law for what it more accurately represents—a conflict among individuals that will almost certainly leave some people dissatisfied.

Gleaning legal propositions from case law is, of course, a natural and necessary part of legal study. Too often, however, the inquiry ends upon a determination of how a particular holding shapes the law. The additional query—concerning how the decision shapes the world—is generally and unjustifiably neglected. The facts and individuals of a case are viewed only as tools in the construction of a particular rule of law. Logic displaces compassion, and we murder in order to dissect. When this type of analysis becomes the norm, the law ceases to serve the people, and begins to serve only itself.

***Ratio decidendi* cannot escape reality.**

Autumn isn't artistic in prison. No trees. Without color, September is just a cruel prologue to a wimpy Virginia winter. Ret-sabala had forgotten what fall colors—orange, yellow, maroon—really looked like. He knew gray, black, and brown. The walls of

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3. *Id.* at 526.

4. *Id.* at 528 n.8. The Supreme Court was unwilling to even allow the prisoner an opportunity to prove that the search was conducted solely to harass. The Supreme Court overruled the reasoning of the court of appeals that if the search was intended solely as harassment, the prisoner would have a claim. Since the prisoner has absolutely *no* expectation of privacy in his cell, his property can be searched and seized for any reason. *Id.* at 529-30.

the goddamn place were the same faded gray all over. The color was grotesquely indistinct; you couldn't focus on any particular spot. The bland uniformity drank you in, absorbed your gaze. Before you realized what was happening, you were staring at the damn swirling gray without seeing anything. The bars were less subtle. Every damn place a con looked there were bars. Deep, jet-black, slap-you-in-the-face, motherfucking bars. Go to eat, bars on the windows. Go to work, bars on the doors. Want some exercise? Better be ready to wait for three or four barred doors to pinch you through the various sections of the prison halls on the way to the gym with its goddamn black-barred windows. Or you could go out into the yard and sit on the brown ground. Grass doesn't grow in prison. Grass isn't stupid. It grows in the suburbs where accountants and sales managers can water it. About the only thing brown is good for is ants.

The red ants were swirling around Retsabala's feet, swarming over the black ants (even though the red ants were greatly outnumbered), claiming the brown as their own. Retsabala looked up from the rumble long enough to notice Froggy bullshitting over on the east side of the yard. Froggy was headed for a fall. Erion wanted him as a snitch, so he was always hounding Froggy, talking him up. It really didn't matter whether Froggy was listening or not. If the cons saw the two talking together too often, the rumors would start.

Sometimes a real good rumor, like saying a guy is a snitch, could get a con killed. Once some shit like that gets going, it's just a matter of time before somebody fucked up enough gets hold of it and does the guy. That's where the blacks' solidarity worked against them. The cons banded together for a variety of reasons, but the primary purpose was protection.<sup>5</sup> Most cons allied themselves with others to avoid becoming victims of the constant prison violence. For the most part, solidarity helped the prisoners, but sometimes it made manipulation easier. Disloyalty was the ultimate crime, and the brothers didn't tolerate betrayal from someone within the group. The guards knew how to use this against them.<sup>6</sup>

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5. In the late 1950s black prisoners began to protest prison segregation and discrimination through the Black Muslim movement. James Jacobs, *New Perspectives on Prisons and Imprisonment* 65 (1983). The Black Muslims "catalyzed the frustration and bitterness of black prisoners, and provided organizational and ideological tools for challenging the authority of white prison officials." *Id.*

6. Guards have taken care to create suspicion and keep prisoners as divided as possible:

For many years convicts have been victimized by the serpent strategy, 'divide and conquer.' Whether the division is made by race or religion,

Retsabala didn't take to groups. He had seen how they could be manipulated, and the various groups were extremely suspicious of one another. Retsabala thought this sort of divisive racial suspicion was precisely what the guards wanted to keep the cons down, and he told the brothers so. All he got was some pile-of-shit speech about "loyalty to the cause" and "keeping to the path."<sup>7</sup> Retsabala thought the only "cause" any of the cons should be concerned with was making the shit-hole they called home more bearable. That and getting out. But for most, the outside was too abstract to be a cause.

Retsabala was slapped back to reality as he caught sight of Erion approaching. Erion messed with the cons and thought he got away with it because he was sly—everyone else knew that was ludicrous. He got away with it because he had *carte blanche* to kick in the balls of any con who didn't eat his garbage and graciously ask for more. Retsabala sometimes wasn't subtle when he deflected Erion's shit back at him, and, as a result, the fat-ass was after him of late.

Erion waddled up to Retsabala and smirked. "What's your story, *convict*?" he said, slurring the word as if it was distasteful even to say it.

"No story, Mars Erion. I's jus' sittin' here hopin' y'all'd come by and be my friend," Retsabala said with an exaggerated grin.

"Shouldn't you be at work, boy?"

this tactic has seen success over many centuries. . . . A unified prison population would be infinitely harder to manipulate and exploit than one segmented into races, ethnic groups and cliques.

G. Saladin, *Racism I*, in *Inside Prison American Style* 82 (Robert Minton, Jr. ed. 1971).

A comment by a prisoner at the Correctional Training Facility in Soledad, California, illustrates the prisoners' frustration with the overt control tactics practiced by prison guards and administrators:

[The administrators] continually attempted to channel the natural hostility of the cons toward the inhuman treatment they received at the hands of the bulls into racial confrontations, . . . perpetuated the conditioned racist attitudes of whites by not working to re-educate them properly, and sponsoring and overtly supporting the efforts of the fascist Muslims to polarize the natural rage of the black people at the inhuman treatment they receive . . . and by systematically preventing any meaningful (social and political) educational programs, which would work to define the problem and offer an alternate, rational approach to the social conditions which cause and perpetuate racist attitudes.

Micha Maguire, *Racism II*, in *Inside Prison American Style*, *supra*, at 91.

7. "The Black Muslims actively proselytized black prisoners, preaching a doctrine of black superiority. . . . [T]he Muslims challenged a basic tenet of penal administration—that every prisoner 'must do his own time,'" and sought to establish group identities within the prisons. Jacobs, *supra* note 5, at 65-66.

"I'm workin' right now, judge. This is what's called artistic meditation."

Erion was not amused. "You better watch your nigger ass, Retsabala. You're treadin' near deep water."

Retsabala turned away and his face expressed mock shock at Erion's mangled cliché. Erion's stupidity astonished at times. Retsabala quickly shifted gears, turned back toward Erion with a vacant grin and said, "Shit, man, you know I wouldn't want to get near no deep water. Niggers can't swim!"

Erion ran his tongue across his upper teeth and looked at Retsabala for several seconds. After he was convinced he wasn't going to catch Retsabala laughing in his face, he turned and began to leave. "You're barking up the wrong tree, and I'm gonna be there to chop it down real soon," Erion added over his shoulder, and then spat at the brown ground.

Retsabala briefly considered why chopping down the tree someone was barking up was much of a threat. This gave him a slight headache, however, so he instead returned to cheering the massacre of the black ants.

\* \* \*

Erion rocked back on his heels as he watched the cons lifting weights. "Shit," he thought out loud, "some of these scumbags come in here all scrawny and weak, but almost all of the ones that walk outta here leave stronger than shit. They pump iron all day, every day, and then beat the shit outta each other." All of the biceps in the world weren't gonna match a Smith & Wesson anyway, Erion thought, as he patted his "baby." "But Retsabala don't work out. He just sits against the wall and reads his philosophy bullshit."

Erion thought it was more important for a guy to be street-smart than formally educated. He grew up in the streets of D.C. and he learned early how to take care of himself. He had his share of fun as a kid—some boozing, a little vandalism, and some pretty good fights. Erion and his pals had some run ins with the cops in high school, but he knew they had deserved it. They broke the law. Erion stood his ground when people messed with him, but he generally left people alone if they didn't create problems. Not the cons, though. No rules for them.

The neighborhoods were becoming battlefields. Erion didn't want his kids growing up scared and on drugs. The gangs controlled the streets now, and those same gangs were trying to control the prison. Erion and the other guards worked hard to keep

the gangs from organizing inside the prison, but it was pretty hopeless. The cons would annihilate each other if the guards didn't keep the gangs broken up. Retsabala didn't understand that. He was always in the middle of the riot preparations. He would float from group to group arousing the tempers of the cons. He would always go to the leaders of the most militant groups first. Erion knew he would have to find a way to stop Retsabala from building the latest conflict into a full-blown riot. A blood bath couldn't be avoided with Retsabala causing trouble.

Erion skimmed a newspaper story about two kids who had been killed by errant gunfire during a drive-by. He closed his eyes and slowly shook his head. Crime was swallowing up the cities, and Erion felt people needed to fight back.

So Erion had gone to junior college to study criminal justice. He didn't mind his job so much—it paid okay—but he really wanted to be a cop. His cousin was a cop, and he had looked up to him as a kid. Being a guard was just a way to pay the bills while he waited for an opening on the D.C. police force. Not much opportunity for a white guy though, and he didn't want to take a job in a small-time operation. Big cities provide the big action. He figured he could learn a lot about criminals as a guard, and knew this would help him out when he became a cop.

Erion watched Ox do some fifty-pound curls while he plotted Retsabala's demise. He knew Retsabala couldn't be baited, so he would need a structured set-up. He could always throw Retsabala in the hole, but Grayson, the new warden, was clearly opposed to "solitary for the sake of solitary."<sup>8</sup> It would be safer if he could make Retsabala's fall look legitimate. Erion was hoping to hook either Rat or Froggy as a stool soon, but he didn't want to wait much longer. The other guards were starting to ride him about Retsabala. They didn't like it when they thought a con was getting the better of a guard. Especially a nigger.

Erion had tried to find some big con to take Retsabala out, but no one seemed eager. They all told Erion they didn't have nothing against Retsabala; he just did his own time and didn't fuck with anyone. They claimed he tried to keep the peace and didn't double cross anyone. Retsabala may have had the cons fooled, but Erion just knew he was trouble. A couple of the other guards said that a lot of the big, dumb-ass cons were afraid of Retsabala be-

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8. Prison discipline, following the elimination of corporal punishment, is enforced primarily by solitary confinement. Officially, this practice is termed "maximum punitive segregation," but in prison argot it is known as "the hole." Leonard Orland, *Prisons: Houses of Darkness* 71 (1975).

cause he was smart. Erion thought that was a bunch of shit. No big dude is going to be afraid of some goddamn bookworm.

Erion remembered when he was in the seventh grade and some four-eyed dork had called him a waste of protoplasm. Erion knew enough to realize this was no compliment, so he smacked the kid around, breaking his nose. The principal suspended him for the rest of the week and called his father. Dad had told him he was stupid to get caught. "Next time, get the little shit *after* school, you dumb-ass," his father had advised him. "I don't want that faggot principal calling me at work again. Now go tell your ma we're ready for dinner."

Erion would get to Retsabala eventually, and he wouldn't get caught.

\* \* \*

Grayson seemed like a decent guy, but he was so fucking naive about prisons. He was some sociology hotshot or some shit like that, and the state figured he would have some good, fresh ideas about how to improve the prison. That is what the politicians said anyway. Retsabala figured they were just looking to cover their asses. If Grayson worked out, however, they couldn't really lose. If Grayson somehow did manage to improve things, the governor would have something to point to in the unlikely event that he was ever questioned about state prison conditions. Of course, if he didn't improve things, as he almost certainly couldn't, the suits could just shift the blame to Grayson's shoulders.

Retsabala told Grayson that when he met with him. Grayson wasn't stupid. He knew that the prisons were considered a politician's nightmare, and that his hands were substantially tied, but he also believed some significant change could take place within this specific prison. Grayson almost immediately recognized Retsabala as an important ally toward creating a better prison society. Grayson thought Retsabala was one of the few cons who would try to speak for all of the prisoners and not try to push a specific group's interests, or his own, first. Retsabala figured Grayson might possibly back him up in a conflict with Erion, if it was clear that Erion was in the wrong. But right now, Retsabala had a more immediate problem.

Retsabala knew the brothers were talking riot. He wasn't tight with the ringleaders, but they were acting unusually secretive. The main brother, Cobra, didn't trust Retsabala completely. He generally avoided conflicts with Retsabala because he knew Retsabala could deal with the white cons pretty well. This suited

Retsabala since Cobra could have just about anyone done whenever he wanted.

When Cobra was keeping a low profile, something was going down. Retsabala had plenty of avenues to information, and rumors spread very quickly. The other cons would want information.

He was sitting with his back pressed tight against the huge restraining wall, watching some cons playing a rare, racially mixed basketball game, when a white con, who went by the name of Rat, approached him.

"Who's gonna get it next, man?" Rat asked.

Retsabala thought briefly about playing dumb, acting as if he had no idea what Rat was talking about, but he figured the truth was hardly anything to hide. Besides, Rat obviously already knew what was up anyway.

"I don't know who, and I don't know when," Retsabala said, looking blankly into Rat's eyes.

Rat paused for a few seconds, glaring at Retsabala, not sure how to react to this claim of ignorance. Finally, he crouched down so that he was at eye level with Retsabala and asked with a crude smile, "So the brothers aren't planning on *filling you in*?"

Retsabala chose to ignore Rat's lewd reference to a rumor started by some guards, and snapped back, "Why should they? They know I would try to talk them out of any damn riot. Besides, they don't trust me because I sometimes talk to white trash."

After an uncomfortable pause, Rat said, "Yeah, I s'pose you do," with a slight smirk, easing the tension just a bit. Retsabala and Rat weren't actually enemies. Retsabala almost smiled as he asked, "Why ain't you runnin' with the fellahs?"

Rat shrugged. "I don't know, man." He paused shortly and then cut loose. "The brothers are pretty fucked up when it comes to playing ball. It's like, if ya white, they think ya prob'ly a shitty player. You gotta go out and play great for awhile to beat the rap. If you fuck up once in awhile, they say, 'Aw, man, get the whitey off the court. He's some sorry shit!' It's like you gotta prove yourself again and again. And you make one mistake, it's like ya right back to bein' a worthless white boy. But when a brother wants to play, they take him right away. They say, 'Ho, let the fresh legs in the game.' And if the nig, I mean, the brother messes up, nobody cares. They laugh it off and say, 'Ya'll looked pretty pale on that one.' The brother has to keep messin' shit up over and over before they say *he* can't play for shit. And then they just grab another nig- . . . brother and have him fill in. Us white boys don't get a

chance. Those guys playing now only got in 'cause there weren't enough brothers around."

Retsabala didn't know how to react. Several possible responses ran through his head, most of which would have certainly caused a brawl. Finally, after a pause and a scratch behind his ear, Retsabala said sarcastically, "Ain't really fair, is it?"

"No, it ain't. But ya'll wouldn't understand." Rat turned and left, as Retsabala shook his head.

\* \* \*

Grab a tray. Keep moving. Mashed potatoes. Corn. Something . . . maybe meatloaf . . . under gravy. Keep moving. Eat what you take. Bread is safe. Lots of water. Milk is shitty, pass it up. Erion. Erion. He isn't going to move.

He'll talk shit. Don't respond. Teeth on tongue. Teeth on fucking tongue.

*"What's sa mattah, convict?"*

Eye contact. Don't blink. No goddamn smirk. Let him play.

*"What's sa mattah, convict?!"*

He'll bait you. Don't fucking lose it. Think about something else. Eyes wandering. No problem, just don't say it. He'll get tired of it. Just be cool.

*"WHAT'S THE FUCKING MATTAH, CONVICT?!!"*

Ears ringing. Count to four. Count to ten.

*"You lose something?"*

Shake head. Focus on corn. Why do we eat corn? Where the hell do they grow corn? Kansas, probably . . . I don't know.

*"Why you moving so damn slow, boy?"*

Last con smacked him. Three weeks in the hole. Not me, asshole! He's going for the food. Damn. Damn!

*"Can you eat all this?"*

Sonuvabitch. Mashed on the shirt. Losing control. Where the fuck is Grayson?! Don't do it! He wants a reason. Smith & Wesson. Hold on.

*"Ain't you got anything to say, convict?"*

He's getting bored. Hang on. There's Grayson! He doesn't see him. Spill a little gravy on his shoes. Beauty.

*"What the . . . goddamnit, asshole, I'm gonna fuck your world!"*

Cocked fist. Grayson's voice. Fist lowered. Grayson's question. Little smirk is okay now.

*"Nothing, sir. Nothing. Yessir."*

Erion's glare. Smirk growing larger. Grayson leads him out. Cons

laughing. Erion's steamed as hell. Gone too far. Too damn far. Me and the mystery meat have gone too damn far.

\* \* \*

After dinner Retsabala stopped by the prisoners' newspaper office to work on his submission for the next issue. Because he had a college degree, Retsabala had no trouble landing a job on the paper. He worked almost twice as many hours as he got paid for, but he didn't mind. Retsabala would much rather write than push a mop or work laundry or something like that. He didn't have the training for an inside track on a job in the shop or something technical.

Retsabala couldn't concentrate on his poem. He was too pre-occupied with trying to figure out Erion's next move. He had nailed Erion *too* good this time. Now the asshole was stoked real good. He would do anything to get even, and Retsabala knew that even a halfwitted guard can get a con eventually if he's ticked off enough. He might try to land Retsabala in solitary. The motherfucking hole. Retsabala could handle solitary quite a bit better than most prisoners. He could reconstruct books he had memorized, or formulate poetry in his mind. The key to keeping your head in the hole was to divert your attention. The typical prisoner only thought about being alone and about the bastard who landed him there.

The darkness smothers you after a couple of hours in the hole. Everyone is afraid of *complete* darkness. In the beginning the smell is nauseating. Guys puke in there, they can't always find the can, and sometimes all the blood doesn't get cleaned up when the cons try to kill themselves and shit like that. After you've been in the hole for awhile, the stench becomes less bothersome. Without it, the sensory deprivation would be virtually complete. The putrid smell is a gruesome link, but a link nonetheless, to life outside the hole. They clean up the strip cells when they have to, like when a state inspector is due or something, but usually the conditions are completely sick.<sup>9</sup>

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9. Incredible horror stories of "the hole" are far from uncommon. Inmates describe extremely cramped boxes, foul-smelling and unsanitary, with little or no light, that are prisoners' homes for days or even weeks. Orland, *supra* note 8, at 71-74; Robert Minton, Jr., *The Black Hole of Soledad*, in *Inside Prison American Style*, *supra* note 6, at 123-33. Fortunately, the federal courts took action in the 1960s to eradicate such prison atrocities. In *Jordan v. Fitzharris*, the court identified three general approaches to determine what constitutes cruel and unusual punishment. One approach discussed by the court states that if, "under all the circumstances the punishment in question is 'of such character . . . as to shock general conscience or to be intolerable to fundamental fairness'" the punishment violates the eighth

Solitary is actually a simple magnification of prison life in general. A person is tossed into a pen and forgotten. The loneliness suffocates the prisoner, glossing his eyes and dulling his senses. Time seems to stand still, yet the days, weeks, and years swirl into a collage of the past, and the prisoner soon becomes unable to distinguish any given day from another. In the hole this is especially true. Some prisoners almost welcome a little time in solitary just to break up the endless monotony of incarceration.<sup>10</sup>

The hole is a classic example of prison as punishment, not as rehabilitation. Prison as a rehabilitator is a bad joke.<sup>11</sup> Hell, some guys get so damn good at being in prison, they don't really even want to stay out.<sup>12</sup> In the same way, solitary doesn't help a pris-

amendment. *Jordan v. Fitzharris*, 257 F. Supp. 674, 679 (N.D. Cal. 1966) (citation omitted). The court in *Hancock v. Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969), specified some of the unconstitutional conditions of a "dry cell":

Plaintiff has been forced to remain in the dry cell without any means of cleaning his hands, body, or teeth. He is denied the use of soap, towel, toilet paper, and other hygienic materials. . . . [P]laintiff has not been permitted to wear clothing of any kind and is being forced to remain in the cell entirely nude. As a result, he is forced to sleep completely nude on the bare concrete floor.

*Id.* at 789. Similar conditions were also condemned as unconstitutionally harsh in *Wright v. McMann*, 387 F.2d 519, 520 (2d Cir. 1967), *on remand*, 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part & rev'd in part*, 460 F.2d 126 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1972).

In *Brooks v. Florida*, 389 U.S. 413 (1967), the Supreme Court stated, "The record in this case documents a shocking display of barbarism which should not escape the remedial action of this Court." *Id.* at 415. The punishment cell had no external window, no bed or other furnishings or facilities except a hole in the floor which served as a commode. During the first 14 days in the cell, Brooks's only contact with the outside was interviews with the prison's investigating officer. Brooks was fed a "restricted diet" of peas and carrots in a soup form three times a day. Brooks was stripped naked before being thrown into the cell. *Id.* at 413-14.

10. One inevitable product of prison life is the tedium created by the regimentation of virtually the entire prison day. The prisoners become desensitized, reacting to the repetitious stimuli without conscious thought. See Orland, *supra* note 8, at 65-66. One effect of denying the prisoners an opportunity to make decisions or to vary their daily routines is an unintended, but damaging, form of psychological abuse. See Paul Keve, *Prison Life and Human Worth* 13-16 (1974). "Boredom, pettiness, and repetitive meaningless activities are inherent in prison existence, and it should be no surprise that at some point the inmate population has had all it can stand." *Id.* at 15.

11. The penal system results in "prisonization," which contributes not only to prisoner dissatisfaction but to recidivism as well. William Irwin, a prisoner in the United States Penitentiary in Lewisburg, Pennsylvania, summed up the concept of prisonization when he said, "They had me in prisons for 25 years and all they taught me was how to live in prisons." Ben Bagdikian, *Caged: Eight Prisoners and Their Keepers* vii (1976).

12. The detailed regulation of prison life makes even everyday activities difficult for released prisoners. "All prisoners have some difficulty carrying on ordinary interactions in the first weeks after their release. They have difficulty talking to clerks in stores and to persons of the opposite sex, in making change, crossing the street, or a thousand other actions outsiders perform unthinkingly." John Ir-

oner's discipline, it only reinforces the "you're a pile of shit" message prisons bark at convicts every day. Because Retsabala knew these things, he believed he was largely unaffected by the conditioning tactics. He figured he would be out someday, and he was too smart to be ruined by the great prison mind game.

Retsabala turned back to his poem, "Perseverance Is the Liquid, but Environment Is the Cup":

I pour constantly and carefully,  
 But my cup is much too small.  
 I've filled it long ago. But those with the  
 Larger cups won't let me pour in theirs.  
 They pour recklessly and randomly;  
 Their cups are far from filled.  
 Yet they contain much more, and probably always will.

Retsabala wrote absent-mindedly; his thoughts were on the riot. Cons would die. Guards would watch. Some would take their rifles to the roof and fire at "dark meat."<sup>13</sup> The brothers easily outnumbered the white cons, but the guards were the great equalizer. It used to be quite a bit worse, before the prison hired at least a few black guards.<sup>14</sup> Now the bastards had to be at least a bit subtle, but they would get their kills.

Most of the prisoners thought riots were inevitable. Retsabala wasn't so sure. With the cramped conditions fights were a constant. A fight was usually integrated, and since nobody would stop it, one guy would nearly always get killed. Sometimes that would be the end of it. Other times the guy who wasn't in the hospital would end up there when someone decided to flex their

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win, *Sociological Studies of the Impact of Long-Term Confinement*, in *Confinement in Maximum Custody* 51 (David Ward & Kenneth Schoen eds. 1981).

13. Although black prisoners are more unified than whites, biased attitudes of the predominantly white prison officials can easily counterbalance that solidarity. "It has long been common knowledge among incarcerated blacks that an all-out race war in the yard would be insane. . . . Blacks felt that in the event they clashed with the white convicts, only blacks would be getting shot. Their fears are well founded." G. Saladin, *Racism III, San Quentin: Riot for Graft*, in *Inside Prison American Style*, *supra* note 6, at 106-07.

14. Recruiting more blacks for guard positions, however, has apparently not alleviated the administrative bias toward white prisoners. In a questionnaire administered to one-third of the guards working in Illinois prisons, which have a population that is seventy-five percent black, a majority of both white and black guards disagreed with the statement, "Black guards get along better with inmates than whites do." Lawrence Kraft & James Jacobs, *Race Relations and the Guards' Subculture*, in *New Perspectives on Prisons and Imprisonment*, *supra* note 5, at 167. Yet white guards in the Illinois study demonstrated more stereotyped views of minority convicts than did their black counterparts. *Id.* at 173.

Black guards may well feel reluctant to exert their power because most prison administrators are white. It has also been suggested that prisons might screen out black guards who sympathize with the inmates before they complete their probationary service period. *Id.* at 176.

group's muscles. If the brawls stayed relatively fair, the animosity would eventually die out. But sometimes the retaliation would go too far. When one race got real pissed off about a certain retaliation tactic, the violence snowballed.

The current conflict had been building for about five weeks. The latest incident involved five brothers who were lifting weights and nine white cons with lead pipes. The guards in the shop had not only turned their heads when the cons crotched the pipes, but they had also encouraged the white cons by reminding them that the brothers were "one up" at that point. This one was headed for a major eruption.

Grayson was working to resolve the problem without a war, but he wouldn't succeed. Contrary to what Retsabala might hope, riots were a part of prison life. The guards and administrators used them as a control tactic. If the prisoners could unite, they might be able to put some pressure on the staff for some improvements.<sup>15</sup> But as long as they remained divided along racial lines, the staff could control the cons easily. A nice riot was even considered good public relations by some. The media would concentrate on the violence and cover the event as a "senseless, arbitrary, and animalistic free-for-all." The public's view of the prisoner as a mindless, conscienceless blight on society would be reinforced. No one would take the time to examine the underlying causes of the riot, so the prison system would never be indicted as a possible contributor to the problem. Most people would conclude that the prisons were justified in using whatever means were necessary to control the savage convicts.<sup>16</sup>

The guards were given great latitude to control the cons following a riot. This, of course, they enjoyed. The only ones who lost were the cons. Many of the prisoners knew this, but they didn't seem to care once the time for violence drew near. If nothing else, a good riot alleviated the tedium of prison life. A couple of guys would die, but a con never figured it might be him.

"Maybe I'll be in solitary when it happens," Retsabala said to himself as he headed back toward his cell for the evening head count.

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15. The Black Muslims, for example, were instrumental in challenging many administrative practices that deprived prisoners of constitutional rights. "In hundreds of lawsuits the Muslims protested censorship, disciplinary practices, and, of course, religious discrimination." Jacobs, *supra* note 5, at 66.

16. See Saladin, *supra* note 13, at 96-97.

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Erion was waiting for Retsabala at his cell. He stood against the sink with a poorly disguised smirk on his face.

"Cell shakedown, convict," he said when Retsabala stopped at the cell entrance.

Retsabala quickly scanned the other cons in the cell block. Rat's eyes fell, and Retsabala had the information he was after.

"What the hell for?" Retsabala asked, irritated not only with Erion for this cheap tactic, but also with himself for not anticipating something so obvious. Not that he could have done much about it anyway.

"For about twenty minutes, asshole," Erion said predictably.

"What are we going to find?" Retsabala asked sarcastically but realistically.

"Well, we'll find out soon enough now, won't we?" Erion drawled.

"No, *I'll* find out soon enough, you bastard." Retsabala knew he was screwed; he figured he might as well get in a few licks while Erion was in such a good mood.

Erion reached into the wastebasket and pulled out Retsabala's pillowcase. It had been ripped beyond repair. Erion shook his head slowly, as if he was very disappointed, and looked squarely at Retsabala with his best poker face.

"You're in big fuckin' trouble now, boy."

"Mm-hmm," Retsabala said unemotionally. He knew it would be worthless to protest that the pillowcase had been planted, or to point out that only an idiot would put the evidence in his own cell.

"Now we're gonna have to search the whole damn deal, convict!" Erion said, unable to hide his excitement.

"'We' would have done that anyway," Retsabala thought as he crouched in a corner to watch the pillaging.

Erion first stripped Retsabala's bunk. He then found it necessary to throw Retsabala's personal hygiene equipment all over the cell. He was having some fun, but Erion knew enough to save the best for last.

"Open the locker," he demanded.

Retsabala knew Erion could get the locker opened anyway if he refused, so he opened it.

Erion first took out a box of letters from Retsabala's attorney. He began tearing them in half, three or four at a time.

"Hey, what the hell is this?!" Retsabala shrieked. "That's bullshit! There's nothing wrong with that stuff!"

Erion just gave Retsabala a deranged smile and continued. After he finished with the legal letters, Erion grabbed the notebook Retsabala used for working on his poetry and began flushing the pages two or three at a time.

"You goddamn moth-," Retsabala stopped himself. He realized Erion was trying to get a rise out of him. If he didn't seem to care, maybe Erion would get tired of his sadistic scheme and find a new dog to kick. Retsabala settled back in the corner, sat down, and tried not to think about the carnage.

"Well, what do we have here? Girly pictures? You're a sick sonuvabitch, aren't ya, convict?" Erion was examining Retsabala's pictures of his wife and daughter. "Both of 'em are pretty cute. I'll bet you and all the boys use these to toss off, huh, convict?"

Retsabala almost lost it at that point, but stopped short. If he jumped him, Erion could use the gun his hand had dropped to when Retsabala had started to get up. Retsabala clenched his teeth, saying nothing.

Erion took a lighter from his pocket and burned the pictures one by one. Retsabala couldn't help watching as the only remembrance he had of his family was annihilated. His wife had taken their daughter and left the state after his arrest. Retsabala wasn't sure where they had relocated and he hadn't heard from either since.

Retsabala's hatred of Erion swelled. He suddenly became aware of a latent loathing of all the guards. At that point, Retsabala didn't care how much of his shit Erion destroyed. Only one thought raced through his mind, "Just hurry the fuck up so we can get this riot going, and I can bash some goddamn heads!"

### Afterword

With the *Hudson v. Palmer* decision, the Supreme Court contributes to the dehumanizing of United States prisoners. This would be merely regrettable if precedent compelled such a contribution, but the decision becomes reprehensible when viewed in juxtaposition with the more logical and humane alternative.

The fundamental flaw in the Court's analysis is its failure to distinguish the two separate acts of which the prisoner complains. The majority's treatment of the search issue is developed and consistent: "The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and

objectives' of prison facilities."<sup>17</sup> Arguably, the Court is correct in concluding that society would not consider a prisoner's expectation of privacy in his cell as "reasonable," and thus the fourth amendment's prohibition against unreasonable searches would not apply to this particular case.<sup>18</sup> The opinion's flaw, however, is exposed inadvertently with the majority's own statement that, "society would insist that the prisoner's *expectation of privacy* always *yield* to what must be considered the *paramount interest* in institutional security."<sup>19</sup>

Not only does the Court admit society's readiness to recognize some expectation of privacy in a prisoner's cell, the majority also uses the term "yield," which indicates that the particular state interest must conflict with that privacy interest at the specific time to outweigh the privacy interest. Therefore, when an officer has identified an item turned up in a search as noncontraband, the societal interest in institutional security should be inapplicable to that item.

As articulated by the *Hudson* dissent, "[t]here can be no penological justification for the seizure alleged here. There is no contention that Palmer's property posed any threat to institutional security."<sup>20</sup> The majority's peculiar contention, that the justification for the search is also the justification for the seizure, is thus refuted.

The majority attempts to circumvent the constitutional issue regarding the seizure of Palmer's property by asserting the availability of adequate postdeprivation remedies.<sup>21</sup> What the Court fails

17. 468 U.S. at 524 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)). The Court concluded that:

prison administrators are to take all necessary steps to ensure the safety of . . . prison staffs . . . [and] visitors . . . [and] reasonable measures to guarantee the safety of the inmates themselves. . . . [I]t would be literally impossible to accomplish the prison objectives identified above if inmates retained a right of privacy in their cells.

*Id.* at 526-27 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

18. *Id.* at 525-26. The majority, however, relied heavily on Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), which focused primarily on whether the petitioner's actions placed him in a position such that society would then be ready to recognize a reasonable expectation of privacy. His inquiry did not focus on the setting of the intrusion. It is not so clear that society would be unwilling to recognize a limited expectation of privacy if informed of the very limited means respondent had to ensure his privacy and of the detailed intrusiveness of the search.

19. 468 U.S. at 528 (emphasis added).

20. *Id.* at 548 (Stevens, J., dissenting).

21. *Id.* at 530-31. The Court relied heavily on its decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled, *Daniels v. Williams*, 474 U.S. 327 (1986), in reaching its conclusion. In *Parratt*, the Court stated, "It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.*

to consider, and what would be determinative of the adequacy of any state remedies, are the significant barriers an inmate encounters when attempting to recover under those remedies. Securing legal aid for a tort action, as distinguished from a constitutional action, is significantly more difficult. Many attorneys who volunteer legal assistance to prisoners are more interested in litigating constitutional cases, and virtually no prisoners have the financial resources to secure a private attorney. Also, proving damages would be difficult, especially where the destroyed property is of sentimental and intangible value.<sup>22</sup>

The *Hudson* dissent touched on the most damaging effect of the Court's decision: "Personal letters, snapshots of family members . . . 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."<sup>23</sup> Prisoners have a real need for tangible reminders of life outside confinement. The Court's ruling scoffs at this need. The Supreme Court's refusal to grant prisoners any sort of personal autonomy could be the final factor in the dehumanizing process for some prisoners. Ironically, the prisoner most adversely affected by this license to invade privacy is the more educated prisoner—who attempts to retain some hope and vision for the future, and who can grasp the insulting implications of the decision.

Justice Stevens, in his dissent, sums up the decision's message succinctly: "By telling prisoners that no aspect of their individuality . . . is entitled to constitutional protection, the Court breaks with the ethical tradition that I had thought was enshrined forever

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at 541. Although *Parratt* dealt with the negligent deprivation of property, the *Hudson* majority contended that this distinction was irrelevant: "We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned." 468 U.S. at 533.

The Court reasoned that the state could no more control the intentional conduct of its employees than it could anticipate similar negligent conduct. *Id.* It is true that a guard acting completely without authorization from his superiors would be difficult to anticipate and control; however, the type of search and seizure involved here occurs too frequently and goes without disciplinary redress too often to be reasonably categorized as completely "unauthorized." See Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified 10* (Oct. 20, 1989) (manuscript on file at University of Minnesota Law Review).

22. These realities were some of the concerns that led the Court to rule in *Mapp v. Ohio*, 367 U.S. 643 (1961), that state remedies were inadequate to safeguard the protection ensured by the fourth amendment. The Court stated that, "the right to be secure against rude invasions of privacy by state officers is . . . constitutional in origin, we can no longer permit that right to remain an empty promise." *Id.* at 660.

23. 468 U.S. at 542 (Stevens, J., dissenting).

in our jurisprudence.”<sup>24</sup> Rather than working to eradicate the dehumanization of American prisoners, and rather than merely ignoring it, the Supreme Court of the United States instead elected to contribute to this dangerous phenomenon.

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24. *Id.* at 558 (Stevens, J., dissenting).