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Sado-Justice in America: The Treatment of High Security Prisoners and the Bill of Rights

The Return of the Oubliette

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Most of us remember reading as children the tales of men in iron masks, dungeons deep or, as in the Prisoner of Chillon, chain'd to a column of stone where all was "blank, and bleak, and grey; and never night, nor ever day." And with a shudder, we would wonder, how any king could do a thing so terrible and cruel. Thank goodness there had been a revolution!

Thank goodness too, the Oubliette, the dungeon's dungeon, the cavernous hole into which men were dropped and forgotten, was mostly a thing of gothic tales meant to instill in us a horror of what we ought not to be. Alas, gothic horrors have become a standard feature in America's criminal justice/national security complex.

For a brief moment, December's WikiLeaks scandal caused us to remember the forgotten Private Bradley Manning who this very day languishes in a perpetually lit white box, forbidden virtually all sentient stimulation or social contact.

Spokesmen for the Marine Base at Quantico, Virginia, where Manning is being held, deny that he is denied reading material and state that he is being treated no differently than other so-called high security prisoners. To those familiar with so-called "supermax" confinements being used in state and federal facilities since the 1990's, the denials smack of officially crafted evasions.

The question in reply becomes: how are those other high security prisoners treated? The answer is that for two decades, extreme isolation and depersonalization have been standard and routine features in the American Gulag. The effects of these regimens both on individuals and on constitutional standards of justice are devastating.

With good reason, most of the Bill of Rights is devoted to criminal justice because the "bottom line" of any civilization is precisely how it treats the least of its members. The Bill imposes standards of decency, fair play and restraint on investigations before trial, on proceedings during trial and on punishment thereafter. Because supermax regimes destroy the human mind they necessarily violate constitutional standards at each stage of the justice system.

The cases of John Walker Lindh and Jose Padilla illustrate the destructive effects of sensory and social deprivation on our Fifth Amendment right against coerced confession, our Sixth Amendment right to a fair jury trial and our Eighth Amendment guarantee against cruel and unusual punishments. Both cases also illustrate the less than heroic response of the judiciary to what has become a system of institutionalized sadism.

Much of the litigation in the Lindh and Padilla cases concerned the Bush Administration's shell game with the defendants' status. Centuries of jurisprudence was premised on a distinction between international war and domestic violence. As a rule, soldiers acting on orders to kill are not criminals whereas a resort to violence by private persons, whether for personal gain or from political motives, is a crime. By invading a sovereign country in order to "smoke out" alleged terrorists and by treating enemy combatants as criminals (as in Lindh's case) or alleged criminals as enemy combatants (as in Padilla's), Bush wreaked havoc on accepted norms of both legal and military procedure. In effect, the Bush Administration played both ends against the middle, using status designations to circumvent legal rights and then bringing criminal sanctions to bear on combatants.

But within the smoke and mirrors concerning status, the hard core constant remained the subjection of human beings to social isolation and sensory deprivation. Lindh's case illustrates how supermax regimens deconstruct the Fifth Amendment and render any confession irremediably involuntary. Padilla's case illustrates how supermax isolation reduces any ensuing trial to a farce and a sham. The acceptance of these "techniques" reflects an unparalleled degradation of American law and is categorically incompatible with the Bill of Rights.

The Fifth Amendment. A Free and Voluntary Confession

We begin our gothic analysis in July 1896 when the 'Herbert Fuller' set sail from Boston. Two weeks out, at midnight, second mate Bram took the deck. Just after 2 a.m., a scream and gurgling sound were heard emanating from the captain's cabin. Now in command, Bram had seaman Brown clapped in irons. Once in port, Brown accused Bram of the murder and Bram was clapped in irons too. Bram was then stripped of his clothes and brought before Chief Inspector Powers. "Bram, we are trying to unravel this horrible mystery," Powers said, "Your position is rather awkward… Brown [says] he saw you do the murder." Bram replied: "He could not have seen me from where he was." And on this fatal admission, Bram was convicted.

On appeal, the Supreme Court held that Bram's confession was involuntary and inadmissible because "it must necessarily have been the result of either hope or fear, or both, operating on the mind." (Bram v. United States (1897) 168 U. S. 532, 563.) The Court relied on English authorities for the rule that "[a] confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure … its effect upon the mind of the prisoner…." (id., at p. 543) and "will not suffer a prisoner to be made the deluded instrument of his own conviction" (id., at p. 547).

After a review of American and English precedents dating back to the reign of Elizabeth and the infamous case of Nicholas Throckmorton, the Court concluded that while police interrogations did not render confessions involuntary per se, the coercive threshold was so low that the "slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession." (Id., at p. 552.) Thus, Bram's statements "were not made by one who, in law, could be considered a free agent. … A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived." (Id., at p. 564.)

Unfortunately, the brutality of ensuing cases tended to obscure Bram's legal analysis. In Brown v. Mississippi (1936) 297 U.S. 278, the Court invalidated a confession obtained by whipping a Negro as he was repeatedly hung by his neck. "Further details of the brutal

treatment… need not be pursued. It is sufficient to say that… the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government." (Id., at p. 282.)

Again, in Brooks v. Florida (1967) 389 U.S. 413, the Court struck a confession obtained by confining the defendant in a barren cage for two weeks on a daily ration of thin soup and 8 ounces of water. "Putting to one side quibbles over the dimensions of the windowless sweatbox into which Brooks was thrown naked with two other men, we cannot accept his statement as the voluntary expression of an uncoerced will." (Id., at p. 414.)

By the time Miranda v. Arizona (1966) 384 U.S. 436 was decided the Court had had enough. Speaking for his judicial colleagues, California's Chief Justice Roger Traynor explained, "We just got tired reading about rubber hoses and people falling down stairs."

As everyone now knows, Miranda required the police to advise in-custody suspects of their right to remain silent and to legal assistance prior to any interrogation. What tends to get overlooked, even in legal circles, is the basis for rule. While the majority opinion recited at length the plethora of psychological and physical techniques used by law enforcement to induce or extract confessions, its basic factual finding was that any in-custody situation was "inherently" coercive. (Id. at pp. 458, 467, 468, 478.)

Curiously, the majority opinion ignored Bram's historical analysis. The majority opinion compounded matters by making the astonishingly incorrect assertion that "since" Chambers v. Florida 309 U.S. 227 was decided in 1940 "this Court has recognized that coercion can be mental as well as physical." (Miranda, at p. 448.) Bram had clearly made that point 44 years before.

Bram was a finessed decision. While it refrained from ruling that custodial interrogations were per se coercive it nevertheless concluded that Bram "could [not] be considered a free agent." That was a curious way to put it because, rather than referencing the quality of the statement given, it focused on the defendant's status as a prisoner. That focus coupled with the fact that Inspector Powers had little more than asked a question, resulted in a fact-law holding that for all practical purposes had deemed any in-custody confession to be involuntary.

The underlying logic is impeccable. A person in custody is not free. If you are not free you can't exercise free will; if you don't have free will any confession is ipso facto not voluntary.

Fairly read, Bram, while not strictly precedent for Miranda, was solid support for Miranda's determination that all custodial settings were inherently coercive.

But the Warren Court was mesmerized by the notion that "modern science" (to wit: sociology) had progressed us beyond the quaint confines of Victorian formalism and had given us a whole a bunch of new reasons for knowing better. In truth, sociological jurisprudence merely muddles things beyond recognition. The psychological observations in Bram and the older precedents it cited were not less true because they were stated simply and clearly. By ignoring Bram's precedent, Miranda undercut its own better authority and gave the impression of cutting law from new cloth.

Needless to say, the outcry from the right was a deafening roar to the effect that "liberals"

were “shackling” our police in their “war” against crime. But, as Bram had pointed out, English decisional law had long provided for Miranda-like warnings prior to any criminal deposition or judicial inquiry regarding a case. A statute of Victoria required the defendant to be informed that “whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.”

Contrary to myth, Miranda warnings were not some “modern” criminal-coddling incantation but rather an established English procedure which aimed to allow the use of admissions once the “playing field” was supposedly balanced. If there was a defect in Miranda’s reasoning it was the notion (unsupported by sociological studies!) that an incantation from the same party that was slapping on the cuffs would somehow “un-coerce” the situation.

The results of this so-called “prophylactic” rule have been fairly ludicrous, with conservatives on the court heaving heavily to undermine an incantation that the liberals had intended in order to “save” the confession by supposedly purging admissions of any taint of coercion.

The treatment of Lindh in 2001 stands in stunning contrast to the treatment of Bram in 1896 and illustrates the degradation of American justice even with the supposed “protections” of Miranda.

Lindh, an American convert to Islam, joined the Taliban in order to fight the Afghan Northern Alliance in Afghanistan’s decade long civil war. Although only three states formally recognized the Taliban as the official government of Afghanistan, the Taliban were at least a cognized belligerent party and its soldiers were thus privileged combatants, not criminals.

When the United States invaded Afghanistan it designated the Northern Alliance as an ally and, as a consequence, Lindh became an “enemy combatant.” He was captured along with other Taliban soldiers and held in a flooded basement with floating feces and corpses and such other appalling conditions that there was an uprising of the POWs during which an American CIA agent was killed.

On December 1, 2001, Lindh was transferred to U.S. military custody where he was held incommunicado and interrogated by military personnel. (Defense Memorandum, 2002, U.S. v Lindh (E.D.,Va 2002)212 F.Supp.2d 541.) On December 9th, he was delivered into civilian custody where he was interrogated by the FBI.

In preparation for his transfer, “Marine guards stripped Mr. Lindh of his clothes, blindfolded him, bound him with duct tape to a stretcher and placed him in a metal shipping container” without insulation or heat. (Def. Memorandum, p. 4.) Lindh was denied medical attention to remove a bullet lodged in his leg since the uprising. After two days in these conditions, Lindh was handed over to the FBI.

Lindh was immediately advised of his Miranda rights. However, when he asked for a lawyer he was untruthfully told that no lawyers were available. He then signed the advisement form and, still bound and wounded, was interrogated further for two more days. (Def. Memorandum, pp. 5-6.)

Lindh was thereafter charged with conspiracy to murder US citizens, carrying firearms during crimes of violence and providing material support to terrorist organizations (i.e. the same Taliban the United States had funded and with whom it had sought to negotiate a

pipeline deal).

At trial, Lindh's attorneys sought to suppress both the military and the civilian interrogations. They argued that Miranda applied to interrogations conducted by military personnel and they cited Government guidelines instructing military interrogators to "limit questions to significant military issues and do not question regarding criminal offenses. Leave all criminal offense questioning to [the] FBI…." If it was absolutely impossible to avoid questions on criminal conduct, the interrogee was to be read his Miranda rights. (Def. Memorandum, p. 3 citing Government documents.)

The trial judge had repeatedly ruled against defense motions and, on the day set for hearing of the Miranda motion, a shouting match was heard emanating from the judges chambers. Contemporaneously, Homeland Security Chief, Michael Chertoff, sought to head off any inconvenient court rulings and instructed prosecutors to make Lindh an offer he couldn't refuse. Lindh avoided a possible three life term and pled guilty to carrying a rifle while serving in the Taliban Army for which he was sentenced to 20 years and which he is currently serving in a "Communications Management Unit."

The talismanic focus on Miranda warnings obscured the real issue in the case. Certainly, no advisement of rights was required for genuine military debriefing of an enemy POW. However, once any questioning veered into matters which exposed him to criminal prosecution, Lindh's Fifth Amendment rights came into play and, once he was transferred, into civilian FBI custody a Miranda advisement was required.

But for what earthly purpose? As a magical incantation to "re-balance" the battlefield? At this point, prophylaxis gives way to unreality. Assuming Miranda warnings can truly "un-coerce" hand-cuffed jailhouse interrogations, only a fool would think they could restore voluntariness to shell-shocked combatants or POWs who had been confined in Lindh's conditions which rivalled those of the "sweatbox" in Brooks v. Florida.

Bram both sets the standard of what can be considered "free and voluntary" and likewise shows that Miranda incantations are pointless as against a coercive tidal wave of prolonged and isolated confinement. But if Miranda warnings cannot restore an aura voluntariness so as to "save the confession" then there is no way to reconcile battlefield interrogations or solitary confinements with the Fifth Amendment. The demands of one or the other must give way.

The Sixth Amendment. A Jury Trial as Envisioned by The Framers

In the same month as the invasion of Afghanistan, Attorney General Ashcroft announced that the Justice Department intended to use the material witness statute for the "aggressive detention of lawbreakers". Thus, no sooner had Lindh been packed away than the FBI arrested José Padilla as a "material witness" to an alleged dirty bomb plot.

Yet again, the Administration signalled its willingness to twist accepted distinctions. An alleged "lawbreaker" is a suspect; and, once a suspect is arrested, he is entitled to Miranda warnings. In contrast, under the material witness statute, any person can be locked up and interrogated as a potential witness if there is probable cause to believe he cannot be questioned by other less drastic means. Although the witness can challenge his detention, he is not entitled to any Miranda advisement. Thus, the nation's chief law officer had, in fact,

announced that the administration would circumvent the Fifth Amendment by intentionally mischaracterizing suspects as “witnesses.”

After one month of being held incommunicado as a material witness, President Bush sought to preclude any challenge to his detention by designating Padilla an “enemy combatant” and transferring him to a Navy brig.

There, Padilla was subjected to an improved and cleaned up version of Lindh’s detention. His cell measured nine feet by seven feet. There was a toilet and sink. The steel bunk was missing its mattress. He had no pillow, no sheet, clock, calendar, radio, television, telephone calls or visitors. The windows were covered over and meals were slid through a slot in his door.

Padilla was subject to ongoing sleep deprivation. For most of his captivity, he was unaware whether it was day or night, or what time of year or day it was. When he was brought outside for exercise, it was done at night. His disorientation from not seeing the sun was exacerbated by his captors’ practice of turning on extremely bright lights in his cell or imposing complete darkness for durations of twenty-four hours or more.

Padilla was routinely put in shackled stress positions for hours at a time. Noxious fumes were introduced to his room causing his eyes and nose to run. The temperature of his cell was manipulated, making his cell extremely cold for long stretches of time.

Padilla was denied even shreds of human dignity by being deprived of showers for weeks at a time yet having to endure forced grooming at the whim of his captors. He was given drugs against his will, believed to be some form of LSD or PCP. He was subjected to exceedingly long interrogation sessions and would be confronted with false information, scenarios, and documents to further disorient him. Often he had to endure multiple interrogators who would scream, shake, and otherwise assault him.

Padilla was treated like a thing. When taken out of his cell he was subjected to a ritualized routine of impersonal shackling and sensory deprivation by three or more handlers. Without embarrassment the Government allowed a reporter from the New York Times to witness the handling. Deborah Sontag reported:

“Briefly, his expressionless eyes met the camera before he lowered his head submissively in expectation of what came next: noise-blocking headphones over his ears and blacked-out goggles over his eyes. Then the guards, whose faces were hidden behind plastic visors, marched their masked, clanking prisoner down the hall.”

It was later revealed that Padilla’s depersonalizing was so total that he was required to sign his name as ‘John Doe.’ Members of the brig staff told Padilla’s lawyers that he became so docile and inactive that his behavior was like that of “a piece of furniture.”

After four years as an enemy piece of furniture, the Bush administration changed Padilla’s status to that of a mere criminal and filed charges. His court appointed attorneys soon discovered that it was impossible to coordinate a defense with the wreckage of a human being.

Dr. Angela Hegarty examined Padilla and concluded that “What happened at the brig was essentially the destruction of a human being’s mind.” Padilla was incapable of recalling precise personal details about the interrogations or the experiences or particular incidents.

He wouldn't know when they happened or how long they lasted.

According to Hegarty, Padilla toggled between a state of absolute terror and total numbness. "For him, the government was all-powerful. The government knew everything.... His interrogators would find out every little detail that he revealed. And he would be punished for it." At the same time, in a classic "Stockholm Syndrome," he was distrustful of his attorneys and identified with the Government. When his lawyers had done a good job of cross-examining an FBI agent, Padilla got angry and said that the proceedings had been "unfair to the commander-in-chief." Padilla, Hegarty concluded, had been "deconstructed and reformed."

Speaking for the military, Lt. Col. Todd Vician averred that "Padilla's conditions of confinement were humane and designed to ensure his safety and security." With brutish cynicism he added, "While in the brig, Padilla never reported any abusive treatment to the staff or medical personnel."

Speaking of Padilla's interrogations, Captain Lefever said it was unfair to compare US anti-terror interrogations with Soviet interrogation techniques. "Their abuse was a systematic practice to conceal the truth," he says. "If Padilla was abused, then it was for a righteous purpose – to reveal the truth."

What is astonishing is that anyone would take this verbal garbage seriously. Given his "deconstruction" anything Padilla emitted was so unreliable that one might as well pull "the truth" from fortune cookies.

Certainly the government pulled no truth that resulted in a confession it sought to use at trial. As a result there was no Miranda violation to contest in court. In the alternative, Padilla's defense attorneys sought dismissal of the charges on the grounds of "outrageous government conduct." The motion was denied.

The difficulty with the defense motion was that it failed to connect the Government's outrageous conduct with the deprivation of any right connected to Padilla's trial. Basically, the defense argued, tit for tat, that the Government's wrong entitled Padilla to go free. The judge's response was that Padilla could sue the Government if he wished for whatever, but that his case was proceeding to trial.

On the claims raised, the judge's ruling was legally correct. What the defense overlooked was that by "deconstructing" Padilla, the Government had denied him his Sixth Amendment right to a jury trial. It is axiomatic that the right to a jury trial guarantees more than a stage setting, but envisions a particular kind of trial including a variety of features not specifically mentioned in the Constitution. (See e.g. United States v. Cronic (1984) 466 U. S. 648, 656.)

The Sixth Amendment says nothing about the presumption of innocence or proof beyond a reasonable doubt, but there is no doubt that the kind of trial "envisioned" in the Constitution includes those requirements. (In re Winship (1970) 397 U.S. 358.) A "jury trial" also entails the defendant's right to a jury from which minorities have not been excluded. It includes the right to the assistance of counsel and conversely the opportunity to assist counsel. (Gideon v. Wainwright (1963) 372 U.S. 335, 344.) The right to counsel also "envisions" the absolute right to act as one's own counsel should one choose to do so. (Faretta v. California (1975) 422 U.S. 806.)

Viewing the matter in this light, it is beyond dispute that what the Government had violated was Padilla's core right to that kind of jury trial that is contemplated in the Constitution. The absence of grounds for a Miranda motion did not leave the defense without a "trial right" nexus to connect to. For example, how could Padilla exercise his Faretta right to self-representation if he had been turned into a "piece of furniture?"

Trial proceeded on an indictment that charged Padilla with: conspiracy to kidnap or murder people in a foreign country; conspiracy to provide material support to terrorists; and providing material support for terrorists. The indictment alleged that various co-defendants operated a "North American support cell" that engaged in "propaganda, fundraising, recruiting… and providing other physical assets necessary to wage violent Jihad" in various foreign countries. Padilla's alleged involvement in this conspiracy consisted in being willingly recruited to go fight in Egypt or Afghanistan. Padilla was convicted on all charges and sentenced to 17 years prison.

But Captain Lefever's gambit needs to be clearly understood. The implication of his remark was that Padilla needed to be tortured in order to protect untold millions from the effects of a possible dirty bomb attack. If he was destroyed, the cost-benefit was worth it. Of course, because the information so acquired was so very, very, ultra sensitive, the details cannot be disclosed and the country will have to take it on faith.

That only leaves the problem of what to do with the human wreckage. The Bush-Obama answer is to find some out of the way place to forget them. In the case of "enemy combatants" the answer is supermax Guantanamo or whatever other oubliette can be found in some willing third country.

In the case of American citizens, we have to have a trial beforehand since we don't lock up our own without a right proper jury verdict. But since the "enemy-citizen combatant-criminal" can't be tried on the ultra secret information obtained, he has to be brought up on some flimsy "stand-in" charges which he can't defend against in any case because he has been turned into a walking cabbage.

Never mind, once he has been convicted he can be returned to the white box from which he was dragged and once again forgotten in confidence that Security & Justice for All has been served.

If Lefever's paradigm is accepted, American courts will become wretched theaters of the absurd and the rest of us can live in perpetual insecurity that some false accusation or unwary act will ensnare us into a hell-hole against which there is no recourse and from which there is no likely return.

The Eighth Amendment. The Guarantee of Human Decency in Punishment

As illustrated by the Padilla case, the cruelest part of this sadistic farce is that the defendant is inevitably returned to his i-box for the remainder of his destroyed life. In other words, what begins as a violation of the Fifth and Sixth Amendments ends in rape of the Eighth. The circle is complete.

Conditions of extreme isolation and depersonalization are pandemic throughout the American Gulag. An estimated 20,000 U.S. inmates subsist in Padilla-like isolation in state or federal facilities.

Supermax confinements began in the 1990's as a means of neutralizing very violent prisoners or gang leaders who were in fact running their operations from within prison. However, within a decade a concededly extreme but supposedly exceptional regimen had become commonplace and routine. A confluence of interests from government operatives to construction companies work to perpetuate what is nothing other than official sado-barbarism.

Surprisingly, although the Eighth Amendment prohibits cruel and unusual punishments, the Supreme Court has yet to hear a challenge to supermax confinements.

There is little doubt that the Eighth Amendment forbids punishments such as burning at the stake, crucifixion, and breaking on the wheel. (See e.g. In re Kemmler, 136 U.S. 436, 446.) However, the Court's jurisprudence has been equivocal when it comes to punishments that don't involve blood, gore and the cracking of bones.

In Haines v. Kerner, (1972) 404 U.S. 519 the Court held that solitary confinement could provide a basis for a civil rights actions but the Court itself has adjudicated little.

Coincidentally, one of the first discussions of solitary confinement came from the same court that had decided Bram. In re Medley (1890)134 U.S. 160. Justice Miller reviewed the "very interesting history" of solitary confinement. In the nascent United States, the "experiment" was first tried at the Walnut-Street Penitentiary, in Philadelphia, in 1787. "The peculiarities of this system were the complete isolation of the prisoner… so arranged that he had no direct intercourse with or sight of any human being…." (Id., at p. 168.) However, it was soon discovered that even after a "short" confinement prisoners fell "into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide…." (Ibid.) Similar experiments were tried in England where persons condemned to hang were kept in solitary confinement. But "public sentiment revolted against this severity" and the additional punishment of solitary confinement was repealed. (Ibid.) The clear implication was that the Court agreed but, unfortunately for the issue, Medley's sentence was reversed on other grounds.

The question of cruel punishments arose again in Weems v. United States (1910) 217 U.S. 349, where it was held violative of the Eighth Amendment to sentence a defendant to "confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council." (Id., at p. 366.) Unfortunately, Weems pointed in several directions which did not make for clear law. Was it the chains, the painful labor or the civil disabilities?

In Trop v. Dulles (1958) 356 U.S. 8, the Court focused on the disabilities. Six justices agreed that "use of denationalization as a punishment is barred by the Eighth Amendment… [because]… the total destruction of the individual's status in organized society… is a form of punishment more primitive than torture…." (Id., at p. 101.)

But when it came to "chains," the Court tacked the other way. In Turner v. Safley (1987) 482 U.S. 78, the Court ruled that restrictive procedures within prison were permissible if they were "reasonably related to legitimate penological interests." (Id., at p. 89.) This constituted a highly flexible standard that deferred to prison authorities provided they could come up with some reasonable sounding excuse that was not bat-wise crazy.

In Overton v. Bazetta (2003) 539 U.S. 126, the Court followed up on Turner by cautioning that the very purpose of prison was to impose civil disabilities on persons convicted of crime, so that curtailment of an inmate's visitation privileges was not ipso facto unconstitutional; although the Court observed that a two year abrogation of all visitation would probably be too severe.

The Turner court's liberal minority salvaged a thread of justiciability with the caveat that "the restraints … 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."

When it came to solitary confinement, however, the clouds over our ethical traditions were ominous. In Beards v. Banks (2006) 548 U.S. 521, the Court upheld supermax confinements in principle on the ground that "rehabilitation is a valid penological interest, and deprivation is undoubtedly one valid tool in promoting rehabilitation." (Id., at p. 548, Stevens, J. diss.; & p. 531, Maj. Opn.)

In Banks, Pennsylvania prison authorities had established a system of gradient and increasingly severe forms of restrictive confinement for prisoners who were disruptive, violent, incorrigible or a threat to prison order. At all levels of restriction, inmates were confined to cells for 23 hours a day without television or radio. At the highest level (LTSU-2) inmates were allowed one non-contact visit a month but otherwise no phone calls and no reading materials or personal photographs.

Prisoner Banks, filed suit claiming that his First Amendment rights were infringed. Applying the Turner-Overton standard, the Court conceded that the deprivations at issue had an "important constitutional dimension." It ruled, nevertheless, that relying on their professional judgment prison officials had "reached an experience-based conclusion that the policies help[ed] to further legitimate prison objectives." (Banks, at p. 533.)

The deprivation technique of rehabilitation came up again in Wilkinson v. Austin (2005) 545 U.S. 209 wherein it was argued that Ohio prison authorities were committing inmates to supermax segregation without a sufficient due process hearing.

For the Court, Justice Kennedy summarized supermax conditions as follows: "Incarceration at OSP is synonymous with extreme isolation. … It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact. (Id., at p. 214.)

After noting that any claim of cruel and unusual punishment was not before it (id., at p. 218) the Court went on to hold that "courts must give substantial deference to prison management" and Ohio's hearing procedures were "adequate to safeguard an inmate's [due process] interests" (id., at p. 229).

The spectacle thus presented was one of lawyers and robed judges on their knees, very precisely examining the mouse of procedure while ignoring the gorilla of substance hovering over them. To say that Jesus received an adequate due process hearing before being crucified rather misses the point.

In a society that is increasingly mired in unceasing blabber, it requires an even greater volume of scientific, psychiatric and statistical mumbo jumbo to prove what is otherwise self-evident. But Justice Kennedy, in fact, put the issue quite sufficiently when he observed

that supermax inmates “are deprived of almost any environmental or sensory stimuli and of almost all human contact.” (Id., at p. 214.)

That merits a pause for actual thought. At least since the days of Aristotle, it has been recognized that Man is both a social and a sentient animal. (Politics, Bk I; De Anima, Bk II; De Sensu, Bk. I.) The essential importance of sense perception was summarized by the scholastic philosophers as, nihil in mente nisi prius in sensu (there nothing in the mind that was not first in the senses). If there are no sensory stimuli, there can be nothing in the mind. Thus, the mind of a person confined to a box will “self-stimulate” with what is already lodged in his brain, reacting to and within itself alone — which is precisely what constitutes being crazy.

Similarly, just as the mind requires sensory stimulation, the human heart requires affection. Again Aristotle had it right when he said that all society was comprised of levels of friendship. A smile, a hand-shake, a pat on the back, an embrace are what anchor us to the reality of secure places within the common good. Without that external anchoring we are left to drift on a sea of doubts, fears, angers and paranoias. Without the love of a parent, wife, child, friend or faithful doggie, the human heart simply atrophies into a piece of furniture.

Speaking of “rehabilitation” through isolation, Alexis de Tocqueville wrote that uninterrupted solitary confinement “devours the victim incessantly and unmercifully; it does not reform, it kills.” (Du Systeme Penitentiaire Aux Etats-Unis Et De Son Application En France (1833).) Observing New York’s Cherry Hill prison in 1842, Charles Dickens wrote of the “immense torture” of solitary confinement “which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature.” (American Notes (1842) pp. 118-121.)

If Justice Kennedy actually contemplates what he himself wrote he would know that solitary confinement is simply a living death, which is a more vile, more vicious, infinitely more cruel punishment than a death which puts an end to suffering once and for all.

As stated by Justice Brennan, “The true significance of [cruel and unusual] punishments is that they treat members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.” (Furman v. Georgia (1972)408 U.S. 238, 272-273.)

However, as Brennan also often pointed out, our constitutional safeguards are cut from a single cloth. The Fourth, Fifth, Sixth and Eighth Amendments are each and all discrete manifestations of the singular core premise that even the vilest criminal is to be treated by the State with dignity and respect at all stages of the proceedings against him.

Hard core cynics will laugh at these “pretensions” as the pretty fantasies of old ladies, bleeding heart wussies and silly ninnies. The short answer is that life is not nasty, brutish and short unless we make it so.

By whatever name, supermax regimens are nothing less than judicially sanctioned state sadism. Sadism after punishment violates the Eighth Amendment; sadism during interrogation violates the Fifth, and sadism as a prelude to trial violates the Sixth.

The broader lesson of the Lindh and Padilla cases is that the converse consequence of turning military campaigns into pseudo police actions is the militarization of domestic policing. The so-called war on terrorism, with its sado-brutal adjuncts, is fundamentally incompatible with rule of constitutional law.

As a civilization we stand at a cross-roads. Once again, it falls to the Supreme Court to define the contours of civility in America. Were the matter to come before the Bram-Medley or Weems court there could be little doubt of the outcome. Unfortunately, the modern Court has shown itself disposed to defer to the assertedly "reasonable" demands of prison safety and national security. God help us.

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