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Due Process and Lethal Confinement

Even when it comes to “being a guerilla,” a label alone does not render a person susceptible to execution or other criminal punishment.

—Justice Anthony Stevens, in response to Justice Clarence Thomas’s dissent in *Hamdan v. Rumsfeld*

How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!

—Chief Justice Earl Warren, *Trop v. Dulles*

New World Security

As the White House of George W. Bush continues to incarcerate the innocent in Guantánamo Bay, to rewrite international law, and to use techniques that are cruel, inhuman, and degrading, we read complaints about an administration outside the law, secret CIA sites that are lawless, and “war prisons” that create a legal vacuum for more than thirty thousand detainees in U.S. military prisons in Iraq, Afghanistan, and Guantánamo Bay. However, being outside legality might not be the point. Before the “global war on terror” and the export of local prison practice to a network of overseas prisons, numerous U.S. Supreme Court decisions in dialogue with prison

correctional policy had already retooled the incidence of civil death for the incarcerated. Not only has the reach of Eighth Amendment jurisprudence been severely limited, but the substance of the due process clause has been redefined.

To the extent that the probable cause and due process protections of the Constitution are ignored and abolished in the wake of the war on terror, the directive achieving such ends is illegal by any post-Magna Carta standard. Legal boundaries are being equated with the legitimacy of the government's goals. The ends are being used to justify the means. The extremism of current practices of punishment in the United States—anomalous in the rest of the so-called civilized world, even before September 11—derives not only from a colonial legal history that disabled the slave while inventing the legal person, but also from the extremely legalistic nature of the American system in general. In this context, the suprallegal negation of civil existence remains to be deciphered.¹

What kind of world would we find ourselves in if too much law were the problem, if legal interpretation not only took place, in Robert Cover's words, "in a field of pain and death," but also supplied the terms for rethinking the meaning of *human*?² The White House lawyers have displayed a preoccupation with legality and a delicacy about legal proprieties, the result of which has been to facilitate a state of official and pragmatic lawlessness. What is remarkable now as we observe the extension of legal reasoning into appreciably unprecedented domains is how historically bound is law's ability to invent persons who yet remain in a negative relation to law.

In the United States, the undoing of personhood has a lengthy history, whether in creating slaves as *persons in law* and criminals as *dead in law*, or the perpetual re-creation of the rightless entity, who has, in Hannah Arendt's inimitable words, lost the "right to have rights."³ What is the wreckage left behind by the machinations of law, the remnants that sustain a purified image of liberty or freedom? Law is my subject, the protagonist of this plot. Instead of atrocities being a departure from legal thinking, I would rather see them as the residue or accretions of past points of law that can absolve and even transcend violations of the rule of law. What is it, then, about these law words that allows for the aberration, the tweaking, the deformation?

In *Democracy in America*, Alexis de Tocqueville tried to explain how oppression could operate in a society of equals. What, he wondered, could be the key to a domination so novel that old words like *despotism* and

tyranny do not fit? The ominous leeway in the interpretation of American legal rules—from slave codes, to prison cases, to the torture memos of George W. Bush’s administration—has led to the redefining of persons in law: the stateless, the civilly dead, and the disposable. The redefinition—the creation of new classes of condemned—sustains a violence that goes beyond the mere logic of punishment.⁴

If This Language Becomes Law

On September 21, 2006, the Bush administration and congressional Republicans (led by the “rebels” John McCain, John Warner, and Lindsey Graham) reached a compromise or accord on the detainee bill. The Military Commissions Act (MCA), passed by Congress on September 28, 2006 (signed into law by President Bush on October 17, 2006), was a direct response to the Supreme Court decision in *Hamdan v. Rumsfeld* (2006). *Hamdan* ruled that the courts retained jurisdiction over pending cases and that the military commissions had been improperly established by the president without congressional authorization. The Court argued that these commissions were unauthorized by federal statute and violated international law. A critical part of the majority opinion by Justice John Paul Stevens with a concurring opinion by Justice Anthony Kennedy focused on Common Article 3 of the Geneva Conventions of August 12, 1949, which the Court held applies to the Guantánamo detainees and is enforceable in federal court. The decision emphasized the Common Article 3 requirement of a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵ Though not explicitly mentioned in *Hamdan*, Article 3 also prohibits “outrages upon personal dignity” and provides for treatment (conditions of detention as well as interrogation procedures) that is not “humiliating and degrading.”⁶

Though Bush had argued in 2002 that Common Article 3 did not apply to al-Qaeda, once the Supreme Court had rejected that argument in *Rasul v. Bush* (2004), Bush’s focus in 2005 was on the article’s “ambiguity.” But what kind of legal clarity can be used to signify license to torture?⁷ What Bush has called “alternative sets of procedures” (and the *New York Times*, “Bush’s shadow penal system”) is not illegal.⁸ The new acceptance of torture is rather a sign of increased social rationalism, a hyperlegality that institutes judicial novelties that the law itself was designed to prohibit.

The MCA not only authorized Bush’s military commissions but also pro-

vided that “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”⁹ Tried before new military tribunals, terrorist suspects will not be told who their accusers are or how they came to make their accusations. Documents containing the accusations can be redacted in order to hide the names of accusers. Incriminating statements can be introduced through hearsay testimony, and the defendants will not be able to confront the witnesses against them. In eliminating the constitutional right of habeas corpus, the act strips all courts of jurisdiction to hear hundreds of cases now challenging the arbitrary detention, torture, and abuse of prisoners detained by the federal government. The jurisdiction-stripping subsection applies to “all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”¹⁰ The MCA also alters the U.S. criminal code to ban “serious and non-transitory mental harm (which need not be prolonged).”¹¹ The act thus guarantees terrorist masterminds charged with war crimes an array of procedural protections but bars hundreds of minor figures and people who say they are innocent bystanders from access to the courts to challenge their potentially lifelong detentions.¹²

On April 19, 2007, the U.S. Department of Justice asked the U.S. District Court for the District of Columbia to dismiss the Guantánamo Bay detainees’ habeas corpus cases pending before it. The action followed the decision by the U.S. Court of Appeals for the D.C. Circuit in February against the detainees in *Boumediene v. Bush* (2007) and *Al Odah v. United States* (2007). The court upheld the constitutionality of the MCA and directed that all such cases be dismissed for lack of jurisdiction. Then, having initially denied certiorari, the U.S. Supreme Court—in its first reversal in sixty years—announced that it would hear the consolidated *Al Odah* and *Boumediene* cases. On December 5, 2007, the Court heard oral arguments in *Boumediene*, the third time in the history of the Guantánamo detention camp that the Court considered whether foreign citizens imprisoned indefinitely as enemy combatants can claim constitutional entitlement to habeas corpus.

Status

In *The Origins of Totalitarianism*, Arendt describes what happens to those “out of legality altogether” or “outside the scope of all tangible law.”¹³ “In her catalog of the deprived—the refugee, the stateless, the Jew made rightless before being exterminated, and the Negro ‘in a white community’”¹⁴—Arendt distinguishes their legal status from that of the criminal. Not only do these entities lie outside the legal definition of persons, but they seem to occupy a space of incapacitation outside the claims of legality. What is the legal effect of a label such as “illegal enemy combatant”? The dispossessed person seems to exist nowhere. As Arendt claims, “The calamity of the rightless . . . is not that they are not equal before the law, but that no law exists for them.”¹⁵

In the current war on terror, the disappeared ghost detainees in Iraq, Afghanistan, the military base on Diego Garcia (an Indian Ocean island the United States leases from Britain), and numerous CIA secret prisons or “black sites” inhabit a spectral world that has no political boundaries, where even geographical boundaries do not necessarily separate state from state and nation from nation. Yet this anonymity or generality is also the source of lethal distinctiveness for those caught up in the grip of the new classificatory procedures. Labeling and the range and gradations of ever new categories of exclusion construct new persons in law. This legal, all-too-legalistic background is relied on by lawyers and other officials in the White House, the Department of Justice, and the Department of Defense.

Due Process

In *Hamdi v. Rumsfeld* (2004), the Supreme Court ruled that Fifth Amendment due process guarantees give citizens held in the United States as enemy combatants the right to contest their detention. The question before the Court, according to Sandra Day O’Connor, was “not whether Congress had authorized the President to detain enemy combatants, but whether the President’s exercise of that power to detain American citizens without serious judicial review violates the Constitution’s Fifth Amendment, which says that no person may be deprived of liberty without ‘due process of law.’”¹⁶ The Fifth and Fourteenth Amendments prohibit the government from depriving anyone of “life, liberty, or property, without due process of law.” The due process clause in the Fourteenth Amendment mimics the same clause in the Fifth Amendment, and therefore the meaning of that

clause in the latter controls the meaning in the former. In antebellum law, federally sponsored deprivation of an enslaved person's fundamental liberties never stopped because of the requirements of due process.¹⁷ The label "terrorists," according to the White House lawyers' reasoning, can suspend the requirement of due process without in any way touching or harming the core of constitutional and judicially ascertained principles of liberty and justice.

Derived from Magna Carta, the writ of habeas corpus guarantees that individuals cannot be imprisoned or restrained in their liberty without due process of law: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."¹⁸ What most troubled Justice David Souter as he heard oral arguments in *Hamdan v. Rumsfeld* on March 28, 2006, was the suspension of the writ, if Congress removed from the federal courts the jurisdiction to hear habeas petitions from detainees. When Solicitor General Paul D. Clement tried to exclude from the writ enemy combatants outside the United States, Souter interrupted: "The writ is the writ. . . . There are not two writs of habeas corpus for some cases and for other cases."¹⁹ Yet the imperatives of this antiterror administration demand such a doubling function or duplicitous procedure of law. In the new politically oriented legal persecution, which erases the vital tension between morality and law, both the formal law of evidence and the possibilities for legal appeal are being wiped out.

No concept has been as central to constitutional law as due process. The substance of the Bill of Rights applies to the states through the due process clause, since these rights are "fundamental" and articulate "principles of liberty and justice which lie at the base of all our civil and political institutions."²⁰ In the current war on terror and the Bush administration's treatment of suspected terrorists, no concept is more threatened. The cases that pertain to due process—when it is due and how much—are crucial to the lives of those restrained in their liberty.²¹

The legal-minded discourse of the war on terror, so rhetorically powerful, helps us to trace how the moral imagination can become fundamentally a legal imagination, to paraphrase the gist of R. W. Kostal's remarkable *A Jurisprudence of Power: Victorian Empire and the Rule of Law*.²² Guantánamo, black sites or secret prisons, and other detention centers throughout the world are not exactly regions in legal limbo. It all depends on which law you are talking about.

Due process and its slippery, difficult-to-define nature can be traced back to *Dred Scott v. Sandford* (1856) and the *Slaughter-House Cases* (1873).²³ Its antebellum history demonstrates how deeply the law counted on a philosophy of personhood in its delineation of the status or type of the slave or criminal. In *Dred Scott*, Chief Justice Roger Taney stripped federal courts of jurisdiction over suits brought by blacks whose ancestors were imported into the United States and sold as slaves. Thus, no matter where Scott finds himself, he is condemned never to be free of the status that consigns him to degradation in the eyes of the law. Although Taney's ruling was reversed soon enough—first by the Civil Rights Act of 1866 and then more conclusively by the Fourteenth Amendment, which passed Congress the same year and was ratified in 1868—Radical Reconstruction failed in the Supreme Court in a series of decisions from the 1870s to the end of the century.

In *Slaughter-House*, the Court construed the privileges or immunities clause of the Fourteenth Amendment—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—so narrowly as to render it a practical nullity. In so doing, it rejected the notion that the clause incorporated Bill of Rights freedoms against the states. Yet this rejection and the limitation of the privileges or immunities clause led to the Court's frequent reliance on the Fourteenth Amendment's due process clause as a significant source of substantive rights: the "fundamental liberty interest" or "unenumerated right" offshoot of substantive due process.²⁴

The most obvious meaning of the due process clause of the Fourteenth Amendment is that a state has to use sufficiently fair and just legal procedures whenever it is going to use legal means to take away a person's life, freedom, or possessions. In the prison context, any transfer or treatment for disciplinary proceedings generally expects certain procedures necessary to satisfy the minimum requirements of procedural due process: advance written notice of the alleged violation, a written statement of evidence, and the ability to call witnesses. Yet civil rights and legal capacities are often rationalized as dispensable for those held under close, special, or secure management. As early as 1976, Justice Byron White in *Meachum v. Fano* set the stage for prison transfer that allowed no redress:

Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct. . . . Whatever expectation the prisoner may

have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.²⁵

According to the Court, “confinement”—no matter where or why—“in any of the state’s institutions” is considered “within the normal limits or range of custody, which the conviction has authorized the state to impose.”²⁶ Even if harm comes to the prisoner in being transferred—and some transfers amount to a death sentence—transfer is part of imprisonment and thus implicates neither a liberty interest nor any grievous loss. Commenting on *Meachum*, a deputy warden in Arizona explained to me, “Due process doesn’t mean anything when it comes to transfer. We can move him whenever we like.”²⁷

In his dissent, Justice Stevens stressed that liberty and custody are not mutually exclusive concepts. He emphasized the “residuum of constitutionally protected liberty” possessed by an individual, even within prison walls. Appealing to ethical tradition and the substance of liberty and custody as being mutually adaptable, Stevens concluded his argument by pitting “prison regulations” against “protected liberty interests.” He reminded the Court that if what the state allows becomes the yardstick for liberty, thereby erasing claims to dignity and worth, then the inmate “is really little more than the slave described in the 19th century cases.”²⁸

Atypical and Significant

It was Chief Justice William Rehnquist’s decision in *Sandin v. Conner* on June 19, 1995, that not only redefined the constitutional limits of confinement but set the stage for legally ordaining the supermax prison as an administrative, not a disciplinary, necessity. Focusing on the nature of the hardship imposed—and not on the language of the state prison’s regulations (as in *Hewitt v. Helms*, 1983)—Rehnquist gutted the meaning of solitary confinement.²⁹

In August 1987, a correctional officer subjected DeMont Conner, who was serving a sentence of thirty years to life at a maximum-security prison in Hawaii, to a strip search, including an inspection of his rectal area for contraband. During the search, Conner used profanity and made sarcastic statements to the guard. Several days later, the prison gave Conner written notice that he had been charged with “high misconduct” for physically

interfering with correctional functions and with “low moderate misconduct” for using obscene language and harassing a prison guard (*Sandin*, 475).

At the disciplinary hearing, the adjustment committee found Conner guilty of all charges and sentenced him to thirty days of disciplinary segregation in solitary confinement. Prior to the administrator’s finding that the high misconduct charge was inappropriate and his expunging the guilty charge from Conner’s record, Conner had instituted a civil rights action against the adjustment committee chairperson and other prison officials in the U.S. District Court for the District of Hawaii. His amended complaint alleged, among other claims, that the committee’s refusal to allow him to call witnesses deprived him of adequate procedural due process.

The district court granted the defendant’s motion for summary judgment. On appeal, the Ninth Circuit Court reversed the decision, concluding that Hawaii’s prison regulations created a liberty interest in avoiding disciplinary segregation and remanded the case to determine whether Conner had in fact received sufficient due process. The Supreme Court agreed to hear the case and “reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause” (*Sandin*, 474).

The Supreme Court had previously stated in dictum that solitary confinement is a “major change in conditions of confinement”³⁰ that should be governed by the same procedures as deprivation of statutory good time (*Wolff v. McDonnell*, 1974), and the lower federal courts had almost universally adopted this view. In a five-to-four decision, the majority in *Sandin* rejected it and claimed that Conner’s punitive confinement “did not present the type of *atypical, significant deprivation* in which a State might conceivably create a liberty interest” (*Sandin*, 486; emphasis added).

Acknowledging that states may create liberty interests protected by due process, Rehnquist explained that these “will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” (*Sandin*, 484). What are these “ordinary incidents”? An extension of the hands-off reasoning of *Meachum*, *Sandin* explained that prison litigation is qualitatively different from other due process litigation, since the inmate’s deprivation must be judged against prison security. The “residuum of liberty”

recognized in *Wolff* as remaining even within the walls of the prison is no longer as important as the maintaining of order. Dispensing with the usual grievous loss test, the majority instead judged that Conner's sentence to disciplinary segregation was not atypical because it was "within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life" (*Sandin*, 487).

Deprivation and containment are the basis of the Court's holding. Although it might appear that the Court set limits to brutality, its curious logic makes a fiction of protection. Rehnquist gives inmates a new bottom line in terms of conditions of confinement: *restraint*, with the certainty that new hardships calling for due process will have to be ever more extreme to get the attention of the courts. What the Court accomplished by putting "atypical and significant" in league with "ordinary" is to level the distinction, to make it difficult to prove when the due process clause should kick in: how atypical must something be in order to be extraordinary?³¹

The Court reasoned that disciplinary confinement, "with insignificant exceptions," was similar in "duration and degree" to administrative segregation and protective custody (*Sandin*, 486). Thirty days in the special housing unit of Halawa Correctional Facility in Hawaii, the Court concluded, is not "a major disruption in his environment" (*Sandin*, 486).³² But how typical are twenty-three-hour lockdown and Conner's removal from the general population, without the possibility of presenting witnesses in his defense?

Justice Ruth Bader Ginsburg, joined by Stevens, dissented, concluding that Conner had a liberty interest in avoiding disciplinary confinement, which, unlike administrative confinement, stigmatized him and adversely affected his parole prospects. The practical meaning of "atypical and significant hardship" is far from clear. "What design lies beneath these key words? The Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation,' . . . and yet not trigger protection under the Due Process Clause directly" (*Sandin*, 490 n. 2).

Echoing arguments made by Justices Brennan, Marshall, and Stevens in dissents to other due process cases that had severely narrowed the applicability of procedural rights for prisoners, Ginsburg viewed the due process clause itself, rather than state prison regulations, as the source of the prisoner's protected liberty interest. In his dissent in *Meachum*, Stevens writes: "I had thought it self-evident that all men were endowed by their Creator

with liberty as one of the cardinal inalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.”³³

In contemporary uses or misuses of due process in the global war on terror, what qualifies as ordinary? What does *atypical* or *significant* mean not only in the prison context, but in the elaborate legal justifications for the uses of terror in the current jurisprudence of the White House—justifications critical to the radical substitution of penal for civil life?³⁴

Koch v. Lewis

For three years, from 1996 to 1998, I had access to Special Management Unit II (SMU II) in Florence, Arizona, a high-tech, state-of-the-art prison, even harsher than the well-known Pelican Bay in California. I was helmeted, vested, and warned about paper darts, urine, and feces thrown out of cells by prisoners. I had been prompted to try out leather shackles made by the Humane Restraint Company. It seemed unlikely that I would be threatened by inmates, since the cells where “the worst of the worst” were locked down for twenty-three hours a day—without human contact except for the violent cell extractions—had doors covered with thick steel plates perforated with small ventilation holes, described by one officer as “irregular Swiss cheese.”³⁵ Nothing ever happened to me. I walked down the corridors on impeccably clean floors. There was no paint on the concrete walls. The light seemed too bright, forcing me to blink uneasily. Although the corridors had skylights, the cells had no windows. Nothing inside the cells could be moved or removed. There was nothing inside except a poured concrete bed, a stainless steel mirror, a sink, and a toilet.

According to Terry Stewart, director of the Arizona Department of Corrections until 2000 (in 2003, Stewart accompanied three other corrections professionals to reform prisons in Iraq, including the security and operations of Abu Ghraib), SMU II is “the most secure super-maximum security prison in the United States.”³⁶ Alleged gang members are locked down under the most draconian rules in the history of the contemporary prison. This locale—a model for other special housing or special treatment units in the United States—was built for those inmates called security threat groups (STGs; meaning gangs), special needs groups (meaning psychologically disabled), or assaultive (meaning never divulged).

The process by which such words are specified, by which their technical

meaning is determined, remains curious and illogical. While disruptive inmates who threaten or injure inmates or staff, repeatedly try to escape, or possess contraband are often placed in the supermax, inmates who are merely perceived to be threats (whether based on gang, political, or religious associations) end up in indefinite solitary confinement. Most of these segregation decisions are based only on alleged status of gang affiliation, not on evidence of an actual infraction of prison rules. In other words, something assumed to be criminal intent is not based on criminal action: “a prisoner who commits a violent crime in prison could receive less harsh punishment and enjoy greater procedural protection than a prisoner who is a gang affiliate but who has not committed a crime.”³⁷

The severe sensory deprivation and enforced idleness of the supermax have been condemned since the 1980s by the United Nations Committee against Torture, Human Rights Watch, Amnesty International, the American Civil Liberties Union, and the Center for Constitutional Rights. The UN Convention against Torture (May 2006) and the UN Human Rights Committee (July 2006) documented in detail the psychic violence endured by supermax prisoners. Labels demarcating those identified as threats to the secure and efficient operations of prisons carry with them the unwholesome possibility that solitary confinement can extend indefinitely, that twenty-three-hour lockdown status cannot be judged a constitutional violation, and that the absence of training programs, vocational training, education, personal property, and even human contact is nothing but the expected element of confinement when administrative security is the primary goal.

In the precedent-setting decision *Koch v. Lewis* (2001), Senior Judge James B. Moran of the U.S. District Court ruled that Mark Koch’s five and a half years in SMU II, with no end in sight, gave rise to a protected liberty interest under the “atypical and significant” clause of *Sandin*.³⁸ Koch was locked in his cell for 165 of the 168 hours in a week. His three weekly hours out of his cell were spent in shackles, and during those three hours, he had only eight minutes to shower and shave. For the three hours a week out of his cell, Koch walked twenty feet down the hall in one direction for a shower and ten feet down the hall in another direction to an empty exercise room (twelve feet by twenty feet), also known as the dog pen, a high-walled cage with a mesh screening overhead. The light was always on, though it was sometimes dimmed. When Koch appeared in district court in Phoenix, he had not seen the horizon or the night sky for more than five years.

SMU II is singular among control units in that it arbitrarily includes inmates on death row. None had exhibited threatening behavior. They had lived in a regular maximum-security wing without any serious infraction of rules. The psychic stress experienced by death-row inmates is now compounded by the psychological deterioration of indefinite solitary confinement. As one inmate wrote to me, “We are dead twice over, killed in our mind and tortured as we await the death of our bodies.” At the time of Koch’s case, SMU II housed 620 inmates, including those on death row. “They are treated worse than individuals with the Ebola virus,” forensic psychiatrist Dr. Jack Potts wrote in a report to the court on Koch’s behalf. “There is an unequivocal toll on individuals placed in such isolation.”³⁹

After years of analyzing the effects of supermaxes on inmates’ mental health, Harvard psychiatrist Dr. Stuart Grassian defined the environment as “strikingly toxic.” What he has called “a supermax syndrome” includes such symptoms as hallucinations, paranoia, and amnesia. Inmates have difficulty remaining alert, thinking, concentrating, and remembering due to prolonged sensory deprivation.⁴⁰ During a *60 Minutes* episode on California’s Pelican Bay, Grassian complained, “In some ways it feels to me ludicrous that we have these debates about capital punishment when what happens in Pelican Bay’s Special Management Unit is a form of punishment that’s far more egregious.”⁴¹

In seeking legal representation for injunctive relief from detention, Koch chronicled the arbitrary detention that followed his classification as an STG member. Writing about Arizona’s SMU II in 2000, a year before the probable cause and due process protections of the Constitution were repealed in the wake of the global war on terror, Koch gives some insight in his appeal into the legal incapacitation suffered by those detained offshore at Guantánamo:

I have been validated as a member of the Aryan Brotherhood, after three previous hearings that cleared me of gang activity. My validation is based on nothing that I did. Instead, it is based on the simple fact that other inmates possessed my name after I have been a jail house lawyer, approved legal assistant and representative—educated by the Arizona Department of Corrections for over ten years. . . . Due process has been violated in every manner possible. The most frequent claims are denial of witnesses and denial of access to alleged evidence. . . . I was denied all my witnesses and denied the opportunity to see any evidence by the blanket reasoning of “confidential.”⁴²

Koch had been the subject of fourteen state and court opinions over twenty years of litigation. Most of his allegations involved matters that preceded his first STG hearing and transfer to SMU II.⁴³ When lead counsel Daniel Pochoda and Timothy Eckstein of Osborn Maledon in Phoenix took on Koch's civil rights litigation in 2000, they were able to take numerous depositions and to submit a second amended complaint with primary focus on the two STG validations and solitary confinement. They dropped many of the original incidents and some defendants. Since the procedural due process deficiencies of the first STG hearing had been repaired and the necessary procedures instituted in 1998, the plaintiff's lawyers decided to streamline the case, drop all issues before 1995, and identify a substantive due process claim.⁴⁴

According to Pochoda, the reliance on substantive not procedural due process was absolutely necessary:

You can have all the procedures in the world to prove that x is true, but if there is no connection between x being true and the actions taken in connection with that assumption, you've got a substantive due process violation. It's as if the officials had said, "If he's got red hair, then we're going to put him in SMU." If x leads to y, then there's got to be some rational connection between x and y. Otherwise, it's absolutely arbitrary.

In other words, there is no rational, reasonable, demonstrable connection between Koch allegedly being a member of the Aryan Brotherhood and his being put in lockdown in SMU II. Pochoda explains, "A finding of imminent danger based on gang membership alone is an abstraction without foundation."⁴⁵

The vague contours of "substantive due process" give a broader interpretation of the clause, one that protects basic substantive rights, as well as the right to due process. Perhaps the most influential substantive due process opinion is still Justice Marshall Harlan II's dissent in *Poe v. Ullman* (1961), where he lays out the nature of the liberty guaranteed by the due process clause, which

cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and

bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.⁴⁶

We can rationalize *Koch* within the existing and ordinarily accepted adjudication of substantive due process by considering the irrationality or arbitrariness of his STG classification, as well as the particularly harsh and oppressive conditions of confinement in SMU II. Substantive due process holds that the due process clauses of the Fifth and Fourteenth Amendments guarantee not only that appropriate and just procedures (or processes) be used whenever the government or the state is punishing a person or otherwise taking away a person's life, freedom, or property, but that a person cannot be so deprived without appropriate justification, regardless of the procedures used to do the taking.

Considering the severe conditions of Koch's confinement and the duration of the deprivation at issue, the court found that Koch's solitary confinement violated his right to due process under the Fourteenth Amendment, which is applicable to states, because there was no evidence that Koch had committed any overt act to warrant such action. The claim that he was a member of the Aryan Brotherhood was not sufficient. Substantive due process required that the evidence used should bear a logical relation to the specific deprivations. "The labeling of plaintiff Mark Koch as a gang member does not itself create legal concerns. Rather, it is the placement in SMU-II as a result of this alleged association that is constitutionally significant."⁴⁷

Judge Moran explained in the middle of the trial: "We are not talking about punishment for misconduct; we are talking about incarceration because of status and subsequent indefinite confinement in SMU." He questioned what the Arizona Department of Corrections called "a basic and irrebuttable presumption" that "status=risk": "We are not unmindful of the danger posed by prison gangs . . . but we do not agree with the defendant's conclusion that indefinite segregation in SMU II based on status alone passes constitutional muster" (*Koch*, 1005-7). In other words, according to Moran, Koch "cannot constitutionally be held indefinitely in virtual isolation because of his status and not because of any overt conduct."⁴⁸ Unless

there is overt misconduct, gang status alone does not justify the “extreme nature of the deprivation at issue here” (*Koch*, 1004).

What had Koch done to be certified as a member of the Aryan Brotherhood STG? In 1996, when Koch was notified that he had been identified as an STG member, he was validated at a hearing but received little or no details of the charges against him. Then, in 1998, he was revalidated under new procedures instituted by the Arizona Department of Corrections. The evidence was tenuous at best: a 1981 photograph of Koch posing with alleged STG members at a rodeo; incident reports noting that he had been seen associating with known members; and purported membership lists that identified Koch as an STG member.

Moran noted that Koch’s “legal practice has been remarkable” (*Koch*, 996 n. 3). Over a period of twenty years, Koch had helped other prisoners understand their convictions and file suits. According to his testimony, retaliation by correctional officers consisted of numerous attacks on his person and his property, and transfers to harsher units. Because of Koch’s assumed gang involvement, the only way out of SMU II was to debrief (name names of gang members) and renounce. But how could he debrief if, as he continued to argue, he was not a gang member? Falsely accused, he would be condemned to serve out his time indefinitely because he knew of nothing to tell and could not, therefore, effectively debrief. Further, since debriefers are targeted for death by gang members, Koch would have had to be sent to another restrictive segregated facility, protective custody in SMU I. Anyone suspected of gang affiliation, whether he debriefs or not, is thus condemned to what amounts to solitary confinement for the rest of his life.

Debriefing, as Koch later explained to me, is “a fixed process designed to generate false numbers and . . . to justify massive ADOC [Arizona Department of Corrections] spending and create your ‘scapegoat’ labels so the ADOC can impose whatever dictatorial controls they can throw in under the umbrella of ‘security.’” Disgruntled or bored inmates or those seeking vengeance help the interrogators to artificially inflate the gang membership roll. “They take out a list of names and ask, starting in alphabetical order, if ‘this guy’ is a member or not. If you answer ‘yes,’ then they want any information you have (or can create) on this individual. You see, by first providing the suspect’s name they have sealed someone’s fate. After a few positive answers they have an entire list of what they declare to be ‘CONFIRMED STG MEMBERS.’”⁴⁹

Only in Arizona, Moran stated, are gang members held in these facilities

without the prospect of returning to the general population and without any chance of reclassification for good behavior. Arizona's restriction on the return of inactive gang members to lower custody units, Moran noted, "is apparently unique. . . . A policy preference is not without constitutional limitations. It would certainly ease the burdens of a correctional system if all prisoners were executed or perpetually chained to a wall, but no one, we believe, would suggest that such a system would pass constitutional muster."⁵⁰

After hearing evidence of SMU conditions and the psychological harm faced by inmates, the court not only found a significant liberty deprivation but also that the very practice of sending inmates to supermaxes based on status alone—with no charges or evidence of misconduct—violated due process. The court concluded that there must be some evidence to justify placing Koch in SMU II for an indefinite (and very likely permanent) term.

The harsh logic of supermax detention, and its reliance on arbitrary deprivations based on status, attests to the magnitude of what is happening at Guantánamo. The STG label in U.S. prisons has been extended to anyone thought to threaten national security, even to the point of extending criminal jurisdiction over foreigners in foreign countries. Though the Supreme Court has ruled against military commissions (in *Hamdan*), decided that Guantánamo is legally within the jurisdiction of the United States (in *Rasul*), and will determine whether alternative procedures for habeas corpus (such as combatant status review tribunals) are adequate (in *Boumediene*), virtually lifelong supermax detention for alleged STGs in our domestic prisons continues to be judged constitutional. What began as the labeling of gangs as "predators" or the "worst of the worst" has been extended to "illegal enemy combatants," "security detainees," or "terrorists." The future of lethal incarceration seems assured.

William Blackstone warned in his *Commentaries on the Laws of England* that execution and confiscation of property without accusation or trial signaled a despotism so extreme as to herald "the alarm of tyranny throughout the whole kingdom." Yet he added that even these practices were not as serious an attack on personal liberty as secret forms of imprisonment. The "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten" because it is "less public" and "less striking" is, he wrote, "therefore a more dangerous engine of arbitrary government."⁵¹ Captured on battlefields, pulled from beds at midnight, grabbed

off streets as suspected insurgents, tens of thousands have passed through U.S. detention, the vast majority in Iraq. Secret prisons, unknown in number and location, remain available for future detainees now that Bush has (as he claims) “emptied” the CIA sites. In Iraq, the U.S. Army oversees more than thirty thousand prisoners in supermaxes at Camp Cropper near Baghdad airport, Camp Bucca in the southern desert, and Fort Suse in the Kurdish north.

The ever more inclusive propensities of labels such as “threat” or “terrorist” can subsume all kinds of individuals, especially the low-level detainees sold into custody by bounty hunters. Suspects considered the most dangerous will probably have the most rights, while others will not have the ability to challenge their imprisonment. At Guantánamo Bay, where only ten of the nearly three hundred inmates have been charged with crimes, a new, \$38 million supermax, called Camp 6, stands in stark contrast to the cages that housed detainees when they began arriving in January 2002. Although the military claimed that Camp 6 housed terrorists such as Khalid Sheikh Mohammed and the thirteen other recent transfers from CIA detention, officials have now confirmed that the alleged “high-value detainees” are actually being held in Camp 7, “run by a special unit code-named Task Force Platinum.” The camp is off-limits to media and even military defense lawyers.⁵² The innocent, more than the guilty, are fated to remain confined with no end in sight.

Notes

Versions of this essay were presented at the University of California at Santa Barbara for the colloquium “Torture and the Future: Perspectives from the Humanities,” May 18, 2007; at the inaugural of the Vanderbilt History Seminar, January 28, 2008; at the Institute for the Humanities, University of Illinois, Chicago, on February 27, 2008; and at “From the Plantation to the Prison: Incarceration and U.S. Culture,” Yale University, April 12, 2008. For assistance in research and editing and for genuine support, I thank Julie J. Miller.

- 1 For a bracing discussion of the hyperlegality of contemporary practices of detention and the justifications of torture that accompany them, see Nasser Hussain, “Beyond Norm and Exception: Guantánamo,” *Critical Inquiry* 33 (Summer 2007): 734–53.
- 2 Robert Cover, “Violence and the Word,” in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1993), 203.
- 3 Hannah Arendt, *The Origins of Totalitarianism* (1951; New York: Schocken Books, 2004), 376, 379. In *Trop v. Dulles* (1958), Chief Justice Earl Warren echoed Arendt in articulating how the loss of citizenship and the loss of status that accompanied it were cruel and unusual punishment in violation of the Eighth Amendment. Emphasizing the mental

- suffering and anguish of such deprivation, he argued that although there is “no physical mistreatment, no primitive torture,” there is “instead the total destruction of the individual’s status in organized society,” since the individual has “lost the right to have rights.” *Trop v. Dulles*, 356 U.S. 86, 101–2 (1958).
- 4 For earlier studies of the legal history of civil death, incarceration, and negative personhood, see Colin Dayan, “Legal Slaves and Civil Bodies,” *Materializing Democracy* (Durham, NC: Duke University Press, 2002), 53–94; Colin Dayan, “Legal Terrors,” *Representations* (Fall 2005): 42–80; and Colin Dayan, *The Story of Cruel and Unusual* (Cambridge, MA: MIT Press, 2007).
 - 5 *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795–96 (2006).
 - 6 Note that although much has been made of the difference between the legislation proposed by President Bush and that of the so-called rebels on the Senate Armed Services Committee, the section of the MCA on detainee treatment is the same, except for the replacement of the prohibition of “serious violations of Common Article 3” with the prohibition and definition of “grave breaches of Common Article 3.” U.S. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2632, 2635 (October 17, 2006); hereafter cited as MCA. Neither addressed outrages on personal dignity or humiliating and degrading treatment. This silence confirms the continued refusal to recognize degradation, whether we turn to McCain’s “torture ban” in the Detainee Treatment Act of 2005, to the continued reservation to Article 16 of the UN Convention against Torture, or to the perpetual White House attack on the “vagueness” attached to any concern with dignity or degradation, the intangible aspects of personhood that manifest no physical injury.
 - 7 Jeremy Waldron warns against the effort to clarify the meaning of torture on a continuum of brutality: “There are some scales one really should not be on, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go.” Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House,” *Columbia Law Review* 105 (October 2005): 1701.
 - 8 George W. Bush, “President Discusses Creation of Military Commissions to Try Suspected Terrorists,” White House, September 6, 2006, www.whitehouse.gov/news/releases/2006/09/20060906-3.html; and “Rushing off a Cliff,” editorial, *New York Times*, September 28, 2006.
 - 9 MCA, section 7, subsection (a) (1) at 2636.
 - 10 MCA, section 7, subsection (b) at 2636.
 - 11 MCA, section 3, chapter 47A, subchapter 7 at 2628 and section 6 at 2635.
 - 12 In an editorial, the *New York Times* condemned the Military Commissions Act of 2006 not only for prohibiting claims of habeas corpus, but for expanding “the definition of illegal enemy combatant” so that Bush can designate *any* person as an illegal combatant, outside the protection of all customary rules of law. “Guilty until Confirmed Guilty,” editorial, *New York Times*, October 15, 2006.
 - 13 Arendt, *Origins of Totalitarianism*, 373, 371, 383.
 - 14 Dayan, “Legal Terrors,” 70.
 - 15 Arendt, *Origins of Totalitarianism*, 375.
 - 16 Sandra Day O’Connor, quoted in Ronald Dworkin, “What the Court Really Said,” *New York Review of Books*, August 12, 2004.

- 17 For an acute analysis of the double uses of the word *due* in both the fugitive slave clause and the Bill of Rights, see Andrew Hymen's "The Little Word 'Due,'" *Akron Law Review* 38.1 (2004-2005): 1-51.
- 18 Magna Carta, chapter 39. See A. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University of Virginia Press), 388.
- 19 Supreme Court of the United States, *Hamdan v. Rumsfeld*, oral argument transcript, 59, lines 3-7, www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf (accessed on January 24, 2008).
- 20 *Powell v. Alabama*, 287 U.S. 45, 67 (1932).
- 21 The idea that prisoners retain certain due process liberty rights even after they have been incarcerated was not clearly articulated until *Wolff v. McDonnell* (418 U.S. 539, 556 [1974]).
- 22 R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2006).
- 23 Robert Bork claims that the concept of substantive due process originated in Chief Justice Taney's decision that no state can have a law making slavery illegal since the right to own slaves is protected by the due process clause. Therefore, the Missouri Compromise's ban on slavery in some of the territories deprived slave owners of property without due process of law. Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 93. Three years after Bork's *Tempting of America*, Ronald Dworkin made a moral argument central to the application of the due process clause: "The Supreme Court early decided that this clause was not to be understood as simply procedural, but that it imposed substantive limits on what government could do no matter what procedures it followed." Ronald Dworkin, *Life's Dominion* (New York: Vintage Books, 1993), 127.
- 24 Substantive due process is a tricky and contentious issue. See John Harrison, "Substantive Due Process and the Constitutional Text," *Virginia Law Review* 83 (April 1997): 493-557; and especially, Peter J. Rubin, "Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights," *Columbia Law Review* 103.4 (2003): 833-85. Rubin gives a detailed analysis of the status of substantive due process. There are, according to him, two aspects to substantive due process claims: one pertains to fundamental rights, the other to irrational or conscience-shocking governmental action.
- 25 *Meachum v. Fano*, 427 U.S. 215, 228 (1976).
- 26 *Id.* at 225.
- 27 Interview with deputy warden by author, Arizona State Prison Complex, Tucson, August 10, 1995. The name is withheld by mutual agreement.
- 28 *Meachum*, 427 U.S. at 232-33. Dissenting in *Slaughter-House*, Justice Stephen J. Field in his interpretation of the first clause of the Fourteenth Amendment created "citizens of the United States," making their citizenship "dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any state, or the condition of their ancestry." *Slaughter-House Cases*, 83 U.S. 36, 38 (1873).
- 29 *Sandin v. Conner*, 515 U.S. 472 (1995); hereafter cited parenthetically by page number as *Sandin*.
- 30 *Wolff*, 418 U.S. at 572 n. 19.
- 31 As early as *Hewitt*, Rehnquist had begun to skirt the requirements of due process. In a

subtle maneuver, he removed the distinction between administrative custody and punitive isolation—“the two types of confinement are substantially identical”—except in one particular: “Unlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation.” Arguing that the inmate’s “private interest” is not very consequential, he concluded, “He was merely transferred from one extremely restricted environment to an even more confined situation.” *Hewitt v. Helms*, 459 U.S. 460, 464 n. 1, 473 (1983). Imagine that. If you use a different name, you can remove the stigma and treat an inmate who is not guilty of misconduct the same as an inmate who is.

- 32 In *Wolff*, the Court had expressed willingness to apply the same procedural safeguards afforded to deprivations of good-time credits to discipline imposed through solitary confinement, categorizing solitary as a “major change in the conditions of confinement.” *Wolff*, 418 U.S. at 572 n. 19. Conner expressed his shock at finding that the *Wolff* analysis no longer held: “Their erroneous decision is clear because they never even discussed the fact that the law that existed at the time I filed my claim had supported me 100% because from the very beginning I used as a basis to file my claims: *Toussaint v. McCarthy*, *Hewitt v. Helms*, and *Wolff v. McDonnell*.” DeMont Conner, personal correspondence with author, June 17, 1999.
- 33 *Meachum*, 427 U.S. at 230.
- 34 In his critique of Richard Posner’s *Not a Suicide Pact: The Constitution in a Time of National Emergency*, David Cole, the most acute analyst of the erosion of constitutional freedoms in the war on terror, focuses on due process—especially Harlan’s dissent in *Poe v. Ullman*—in order to demonstrate just how shocking is the ease with which Posner summarily dismisses principles of liberty, equality, and dignity in the quest for national security. David Cole, “How to Skip the Constitution,” *New York Review of Books*, November 16, 2006.
- 35 Anthony Zellenek, interview with author, Department of Corrections, Phoenix, Arizona, June 1996.
- 36 Stewart deposition, *Koch v. Lewis*, November 13, 2000.
- 37 Scott N. Tachiki, “Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements,” *California Law Review* 83.4 (July 1995): 1117–48. His analysis of the constitutional shortcomings of due process protections in *Madrid v. Gomez* (1993), the notorious Pelican Bay case, is especially relevant to the new penology based on status.
- 38 The “saga” of Koch’s “epic journeys,” as described by Moran, is contained in *Koch v. Lewis*, 96 F. Supp.2d 949 (D. Ariz. 2000); *Koch v. Lewis*, 216 F. Supp.2d 994 (D. Ariz. 2001) (hereafter cited parenthetically by page number as *Koch*); and *Koch v. Lewis*, 2001 WL 1944737 (D. Ariz. 2001). For a discussion of STG classification, due process, and Koch’s case, see Maximilienne Bishop, “Supermax Prisons: Increasing Security or Permitting Persecution?” *Arizona Law Review* 47 (2005): 480–91, which came to my attention after the completion of this essay.
- 39 Personal communication with author, June 1999. The name is withheld by mutual agreement. Jack Potts’s words communicated in an e-mail message from Daniel Pochoda to the author, July 20, 2003.

- 40 Dr. Stuart Grassian, *Lee v. Coughlin*, 26 F. Supp.2d 615, 637 (1998).
- 41 Mike Wallace, "California's High Tech Maximum Security Prison Accused of Torture and Mental Abuse," *60 Minutes*, September 12, 1993.
- 42 Mark Koch, personal e-mail correspondence with author, July 2003.
- 43 After the case, Pochoda explained to me that the ruling created "new law" and could be far-reaching if other inmates in similar confinement joined in a class action lawsuit. In *Wilkinson v. Austin* (2005), at the same time that the Supreme Court heard *Rasul v. Bush*, the Court had the chance to decide against supermax confinement. Instead, while the Court found the prisoners to have a due process liberty interest in avoiding supermax placement, it upheld the written policy that includes annual review of such placement as comporting with due process. Most significantly, there is no substantive limitation on prison officials' ability to put prisoners in supermaxes in the first place. In *The Law Is a White Dog* (Princeton University Press, forthcoming), I analyze this case at length, along with *Beard v. Banks* (2006), a First Amendment case. See Colin Dayan, "Words Behind Bars," *Boston Review* (November/December 2007), www.bostonreview.net/BR32.6/dayan.php (accessed January 30, 2008).
- 44 Substantive due process is the fundamental constitutional legal theory on which the *Griswold*, *Roe*, and *Casey* privacy rights are based. "Substantive" rights are those general rights, unlike basic procedural rights, that give the individual the power to possess or do certain things, regardless of the government's desire. See John Harrison, "Substantive Due Process and the Constitutional Text," *Virginia Law Review* 83.3 (April 1997): 493–558. It is important to distinguish between economic due process, an entirely discredited doctrine that held from *Lochner v. New York* (1905) through *West Coast Hotel v. Parrish* (1937), and the basis for substantive law more broadly, as derived from Harlan in *Mugler v. Kansas* (1887). In words reminiscent of his attack on "sterile formalism" in his dissent in the *Civil Rights Cases* (1883), he wrote the oft-repeated words: "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).
- 45 Daniel Pochoda, telephone interview with author, July 2003.
- 46 *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (John Harlan dissenting). Cited in Rubin, "Square Pegs and Round Holes," 862–63.
- 47 Plaintiff's Post-Trial Brief and Request for Injunctive Relief (June 15, 2001), *Koch v. Lewis*, No. CIV90-1872-PHX-ROS (JBM), 19.
- 48 *Koch*, WL 1944737 at 3.
- 49 Mark Koch, personal e-mail correspondence with author, July 2003.
- 50 *Koch*, WL 1944737 at 2. Terry Stewart, who succeeded Sam Lewis as director of the Arizona Department of Corrections in 1995, changed the rules of supermax confinement for alleged gang members. Department Order 806 rescinded the active/inactive provision, which allowed validated STG members to demonstrate that they were no longer active gang members and therefore eligible for transfer out of SMU II. According to Stewart, "blood in/blood out" was the rule: once a gang member, always a gang member. "Once you've 'blooded in' to a gang, you are like a loaded weapon to that gang." Deposition of Terry Stewart, Florence, Arizona, November 14, 2000. It is no accident that Stewart, the

harshest of directors in the history of the Arizona prison system, who initiated death-row chain gangs, what he called “humane restraint,” the indefinite confinement of SMU II, cell extractions with unmuzzled German shepherds, and the cover-up of rape by correctional officers—was chosen, along with three other corrections professionals, to reform the prison system in Iraq in the summer of 2003. By the time he left, he had directed the training, security, and operations of Abu Ghraib.

- 51 William Blackstone, *Commentaries on the Laws of England* (1769; Chicago: University of Chicago Press, 1979), 1:131–32.
- 52 See Carol Rosenberg, “‘Platinum’ Captives in Off-Limits Camp,” *Miami Herald*, February 7, 2008.