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Justice Kennedy shines light on prisons' dark side in concurrence

Justice Anthony M. Kennedy had a busy June. For all his hard work, I am awarding him a compliment sandwich.

Kudos to him for his historic opinion on gay marriage in *Obergefell v. Hodges*. It will be remembered as one of the most important decisions of the 21st century.

But a loud boo for his view that the First Amendment would force the Texas Department of Motor Vehicles to accede to a person's demand that the state allow him to get a specialty license plate emblazoned with the Confederate flag. *Walker v. Texas Div., Sons of Confederate Veterans Inc.*

How lucky for Kennedy that five of his colleagues on the court had the good sense to reject this view, especially since it came on the heels of Confederate flag-loving Dylann Roof's atrocity in Charleston, S.C.

But I want to give Kennedy a final tip of the hat for his concurrence in a little-noted case called *Davis v. Ayala*, No. 13-1428 (June 18). In a habeas corpus review of a murder conviction, the court held 5-4 that any constitutional error that occurred when Hector Ayala's defense attorney was excluded from part of a *Batson* hearing was harmless.

Kennedy's concurrence, however, had nothing to do with peremptory challenges. Instead, it focused on an old problem that has recently been attracting significant attention: the use of solitary confinement in American prisons.

Kennedy begins by noting that ever since Ayala was sentenced to death in 1989, he had served the great majority of his time in "ad-

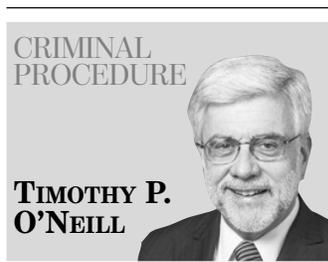
ministrative segregation," more commonly known as solitary confinement. Kennedy observes that it is likely that Ayala "has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day."

Such deprivation takes a toll. He cites a prior Supreme Court opinion that described the effects of solitary confinement on prisoners: "A considerable number of the prisoners fell, even after a short [solitary] confinement, into a semi-fatuous condition ... and others became violently insane; others, still, committed suicide." A new phenomenon? Hardly. The court said this 125 years ago. *In re Medley*, 134 U.S. 160, 168 (1890).

So why has nothing been done? As Kennedy notes, "[T]he condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. ... Too often [we] concentrate simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away out of sight, out of mind."

Inmates in solitary exhibit evidence of agitation, paranoia, memory lapses and irrational anger.

Kennedy cites a law review article that lists common side effects of solitary confinement as including anxiety, panic, withdrawal, hallucinations, self-mutilation and suicidal thoughts and behavior. Grassian, "Psychiatric Effects of Solitary Confinement," 22 Wash-



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ington University Journal of Law and Policy 325 (2006).

And the reality of this was brought home recently by the tragic story of Kalief Browder. Browder, unable to post bail, spent three years in New York City's Rikers Island facility awaiting trial on a charge of stealing a backpack. Much of his confinement was in solitary.

The charges were eventually dropped. But the damage Browder suffered apparently could not be reversed: Last month, he committed suicide. (For the full account of this tragic story, see Jennifer Gonnerman's article about the case in "Before the Law," *The New Yorker*, Oct. 6, 2014, and Michael Schwirtz and Michael Winerip, "Man, Held at Rikers for 3 Years Without Trial, Kills Himself," *New York Times*, June 9, 2015.)

Kennedy is not alone in his criticism. The disgraceful use of solitary is one of the themes of Adam Benforado's new book "Unfair: The New Science of Criminal Injustice" (Crown, 2015). Benforado

estimates that America currently has more than 80,000 prisoners held in solitary confinement.

What does it feel like to be in solitary? Benforado recommends that "To get a sense, walk into your bathroom, shut the door, lie down in your bathtub and close your eyes. When you reopen them, imagine that this is where you will spend the next five years of your life."

Benforado cites evidence that solitary confinement "appears not only to aggravate existing mental illnesses but to breed new ones." Inmates in solitary exhibit evidence of agitation, paranoia, memory lapses and irrational anger. Some of these problems can appear within mere days of confinement. Tellingly, about half of all prison suicides are by prisoners in isolation.

Benforado's conclusion? That we realize that solitary confinement is not merely inhumane it should be considered nothing less than torture. For as awful as the death penalty is, "Few of us stop to consider whether burying people alive is really such an enlightened alternative."

Kennedy closed his concurrence by noting, "In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."

Kennedy has offered the legal equivalent of an engraved invitation to defense counsel to litigate this issue. For, in the words of Fyodor Dostoyevsky, "The degree of civilization in a society can be judged by entering its prisons."