letters from librarians

Beard v. Banks: Deprivation as Rehabilitation

MEGAN SWEENEY

IN ITS 2006 DECISION *BEARD V. BANKS*, THE UNITED STATES SUPREME COURT DEEMED IT CONSTITUTIONAL FOR A PENNSYLVANIA PRISON TO deny secular newspapers, magazines, and photographs to approximately forty of its "most incorrigible, recalcitrant" male prisoners (qtd. in Breyer 2).[1] These prisoners are incarcerated in the Long Term Segregation Unit (LTSU) at the State Correctional Institution at Pittsburgh, where they spend at least ninety days confined to a cell for twenty-three hours a day; have no access to television, radio, or telephone (except in emergencies); and receive only one visit per month, from an immediate family member. Prisoners in the LTSU may not read secular newspapers or magazines borrowed from the prison library or from another prisoner, and they may not even read a clipping from a secular newspaper unless it relates to them personally. The prisoners therefore have no access to current news or news commentary. They are, however, permitted religious and legal materials, legal and personal correspondence, two library books, and writing paper.

The justices' arguments in *Beard v. Banks* raise a series of questions that have resurfaced, explicitly and implicitly, over the course of penal history in the United States: What is the relation between reading and reform, and which reading materials are most conducive to modifying prisoners' behavior? To what extent are various prisoners capable of reform? Indeed, to what extent can they be considered human? Is reading in prison a right or a privilege? In what ways might prisoners' reading be dangerous, and to what extent should the penal system control it? Finally, what is the relation between reading and citizenship and between reading and human subjectivity?

The majority opinion in *Beard v. Banks* constructs reading as a privilege that best serves the interests of the penal system when it is denied to uncooperative prisoners.[2] The secretary of the Pennsylvania Department of Corrections set forth three "penological rationales" as evidence that the policy supports the "legitimate penological objectiv[e]" of encouraging inmate compliance with prison rules (qtd. in Breyer 7, 8).[3] First, the policy provides "particularly

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difficult prisoners" with an incentive to improve their behavior and graduate from the higher level of the segregation unit (LTSU-2) after ninety days: in the lower level of the unit (LTSU-1), they can receive one newspaper and five magazines.[4] Second, the policy helps to minimize the amount of property held by "obdurate troublemakers," which better enables correctional officers to detect concealed contraband (7). Third, the policy diminishes the amount of material that prisoners might use "as weapons of attack," whether as spears, blowguns, tools for catapulting feces at guards, or tinder for cell fires (8). As evidence that prison officials "reached an experience-based conclusion that the policies help to further legitimate prison objectives" (10), the majority cites the following claim by the deputy superintendent of the prison:

> [O]bviously we are attempting to do the best we can to modify the inmate's behavior so that eventually he can become a more productive citizen. . . . We're very limited . . . in what we can and cannot deny or give to an inmate, and [newspapers, magazines, and photographs] are some of the items that we feel are legitimate as incentives for inmate growth. (qtd. in Breyer 8)

The majority dismisses the prisoner Ronald Banks's appeals to earlier legal cases that found increased contact with the world conducive to rehabilitation; that finding is moot, Breyer argues, when officials are "dealing with especially difficult prisoners" (11).

In his concurring opinion, signed by Justice Scalia, Justice Thomas draws on eighteenth- and nineteenth-century prison history as justification for the present-day restrictions on reading materials. "[I]mprisonment as punishment became standardized in the period between 1780 and 1865," Thomas writes, and it was "distinguished by the prisoner's isolation from the outside world. . . . Indeed, both the Pennsylvania and Auburn prison models, which formed the basis for prison systems throughout the Nation in the early 1800's, imposed this isolation specifically by denying prisoners access to reading materials and contact with their families." Thomas emphasizes that both prison systems allowed no reading materials of any kind except the Bible. He then argues, "Even as the advent of prison libraries increased prisoners' access to reading materials, that access was universally 'subject to some form of censorship,' such that 'inmates of correctional institutions are denied access to books which are freely available to the rest of the community'" (4). This history supports the current termination of prisoners' rights to newspapers, magazines, and photographs, Thomas concludes, because it demonstrates that Pennsylvania sentenced Ronald Banks "against the backdrop of its traditional conception of imprisonment, which affords no such privileges" (4, 5).

In sharp contrast to the majority opinions, the dissenting opinions in *Beard v. Banks* construct reading as a constitutional right that fosters the development of identity and provides crucial access to the world of ideas. Justice Stevens, in an opinion also signed by Justice Ginsburg, argues that the ruling "strikes at the core of the First Amendment rights to receive, to read, and to think," and he insists on the need "to apply the rule of law in an evenhanded manner to all persons, even those who flagrantly violate their social and legal obligations" (2, 1). According to the 1965 Supreme Court decision *Griswold v. Connecticut*, "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought" (qtd. in Stevens 2). Stevens underscores these rights in his impassioned critique of *Beard v. Banks*. "What is perhaps most troubling," he writes, "is that the rule comes perilously close to a state-sponsored effort at mind control. The State may not 'invad[e] the sphere of intellect

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and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.'" The prohibition of secular newspapers and magazines "prevents prisoners from 'receiv[ing] suitable access to social, political, esthetic, moral, and other ideas,' which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment." Arguing that LTSU-2 inmates "are essentially isolated from any meaningful contact with the outside world," Stevens insists, "The severity of the constitutional deprivations at issue in this case should give us serious pause before concluding, as a matter of law, that the challenged regulation is consistent with the sovereign's duty to treat prisoners in accordance with 'the ethical tradition that accords respect to the dignity and worth of every individual'" (12).

Stevens argues that, given the gravity of infringing on prisoners' constitutional rights, the Pennsylvania prison has failed to justify its actions adequately either as a security measure or as a means of rehabilitating inmates. Considering the long list of flammable and potentially dangerous items permitted in prisoners' cells in the LTSU-2 unit—including a blanket and bedsheets, clothing, several other paper goods, and a lunch tray with a plate and a cup—Stevens reasons that preventing inmates from possessing a single copy of a secular newspaper, newsletter, or magazine will not prevent them from setting fires, hiding contraband, or hurling feces. He also notes that it would pose little security risk if, as Ronald Banks suggested, the prison allowed LTSU-2 inmates to access news periodicals in the LTSU mini–law library, where they are permitted to view legal materials during two-hour blocks of time.

Moreover, Stevens critiques the "deprivation theory of rehabilitation" evident in the prison's claim that the ban on secular reading materials encourages "compliance with orders and remission of various negative behaviors" (qtd. in Stevens 6). This theory of rehabilitation, which relies on the premise that "[a]ny deprivation of something a prisoner desires gives him an added incentive to improve his behavior," poses great danger because it "has no limiting principle" and can justify any regulation that deprives a prisoner of a constitutional right as long as the prisoner can theoretically regain the right at some future time by modifying his or her behavior.[5] In fact, Stevens notes, "the more important the constitutional right at stake (at least from the prisoners' perspective), the stronger the justification for depriving prisoners of that right" (6).[6]

In her additional dissenting opinion, Justice Ginsburg underscores the arbitrariness of the security rationale by noting that it forbids the *Christian Science Monitor* but allows the *Jewish Daily Forward* on the grounds that "the latter qualifies as a religious publication and the former does not." Even more disturbing, in Ginsburg's view, is the fact that prisoners "are allowed to read Harlequin romance novels, but not to learn about the war in Iraq or Hurricane Katrina" (3). The "asserted right to read . . . is indeed an 'important one,'" Ginsburg insists, and "even in highest security custody, a constitutional interest of that order merits more than peremptory treatment" in a summary judgment, as occurred in the federal district court (4).

Beard v. Banks thus raises crucial questions about the relations among reading, citizenship, and human subjectivity. The majority opinion depicts the LTSU-2 prisoners as so dangerous that they are unlike other human beings: they do not share the basic human need for contact with the world, which recent legal cases have found conducive to rehabilitation. Although the prison deputy characterizes the Pennsylvania policy as designed to make LTSU-2 prisoners "productive citizen[s]," the majority opinion conveys little faith in the possibility that these prisoners can become productive citizens or that reading can play a significant role in that process. The deputy's invocation of citizenship

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sounds even more hollow given that only about twenty-five percent of those confined to level 2 have been moved to level 1 or moved out of the LTSU altogether since the unit opened (Breyer 3).[7] Writing in 2003, Angela Davis argues, "No one—not even the most ardent defenders of the supermax—would try to argue today that absolute segregation . . . is restorative and healing" (50).[8] Yet in 2006 the majority decision in *Beard v. Banks* rests on such a claim in justifying the Pennsylvania prison's deprivation policy as an "incentiv[e] for inmate growth."

In their dissenting opinions, Stevens and Ginsburg insist that, regardless of prisoners' proclivity for dangerous or disruptive behavior, they are human beings and citizens who must be protected from the prison's policy, which effectively cuts prisoners off from human contact, current events, and the world of ideas. As the American Civil Liberties Union states in its amicus brief, "To deny prisoners all traditional outlets for learning about political affairs and other news is to deny their very citizenship—i.e., to say that because they are deemed 'recalcitrant,' their knowledge and understanding on matters of public affairs no longer matter" (Shapiro et al. 11).[9] The fact that African Americans and Latinos/as are vastly overrepresented in supermax prisons and control units (Davis 49) makes this denial of citizenship even more troubling.

Notes

1. The prisoner Ronald Banks filed the suit as a class action in 2001, alleging that the Pennsylvania policy violated the First Amendment. Jeffrey A. Beard, secretary of the Pennsylvania Department of Corrections, successfully filed a motion for summary judgment of the case in district court. The appeals court reversed the district court's decision, but the Supreme Court upheld it.

2. Justice Breyer wrote the majority opinion, and it was signed by Justices Roberts, Kennedy, and Souter. Justice Thomas wrote a concurring opinion signed by Justice Scalia. Justice Alito abstained because he had voted in support of the prison policy as a judge in the Third Circuit Court of Appeals.

3. The majority based its decision on two earlier cases: *Turner v. Safley* (1987) and *Overton v. Bazzetta* (2003). *Turner* holds that prison regulations that impinge on inmates' constitutional rights are permissible if they are "'reasonably related' to legitimate penological interests" and do not constitute an "exaggerated response" to such objectives. *Overton* holds that courts owe "substantial deference to the professional judgment of prison administrators" (Breyer 5).

4. The ban on photographs is not lifted until prisoners leave the LTSU (Breyer 3).

5. Justice Ginsburg concurs that the "deprivation/'rehabilitation'" rationale "could be recited, routinely, to immunize all manner of prison regulations from review for rationality" (3). Indeed, the majority opinion "effectively tells prison officials" that "it suffices for them to say, in our professional judgment the restriction is warranted" (4).

6. In response to prison officials' claim that they have no choice but to deprive inmates of core constitutional rights in order to make LTSU-2 more unattractive than other types of segregation, Stevens counters that prisoners already have "a powerful motivation" to move from LTSU-2 to LTSU-1 irrespective of the ban on newspapers, magazines, and personal photographs. In addition to the aforementioned restrictions, prisoners in LTSU-2 are not permitted General Educational Development (GED) or special education, they have extremely limited opportunities for counseling, and they may not receive compensation if they work as a unit janitor (8). In contrast, LTSU-1 inmates are permitted in-cell GED or special education and a wider range of counseling services, they are eligible for compensation, they may have two visitors and may make one phone call per month, and they have access to the commissary. Furthermore, Stevens reasons that the possibility of regaining the right to possess personal photographs will not likely have any appreciable effect on prisoners' behavior in LTSU-2 because they only regain that right when they leave the LTSU entirely, at which time they regain far more significant privileges, including an end to solitary confinement and access to television and radio (9, 10).

7. As the Court of Appeals argued, "The LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a place for 'Long Term' segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella" (qtd. in Stevens 11). Since a significant majority of inmates have remained in LTSU-2 since its inception over two years earlier, Stevens contends that the prohibition on newspapers, magazines, and personal photographs constitutes an exaggerated response to legitimate penological objectives.

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8. The first supermaximum-security ("supermax") facility began operating in Marion, Illinois, in 1983. As of 2003, approximately sixty supermax federal and state prisons were located in thirty-six states, and virtually every state had at least one supermax unit housed in a regular prison (Davis 49).

9. Reading is crucial for those who lose many ways to stay active and involved as citizens while incarcerated (Shapiro et al. 25). The decision in *Beard v. Banks* violates the United Nations' Standard Minimum Rules for the Treatment of Prisoners, which states, "Prisoners shall be kept informed regularly of the more important items of news" (qtd. in Shapiro et al. 22).

Works Cited

Breyer, Stephen. Majority opinion. Beard, Secretary, Pennsylvania Department of Corrections v. Banks. No. 04–1739. Supreme Ct. of the US. 28 June 2006.

Davis, Angela. *Are Prisons Obsolete?* New York: Seven Stories, 2003.

Ginsburg, Ruth Bader. Dissenting opinion. Beard, Secretary, Pennsylvania Department of Corrections v. Banks. No. 04–1739. Supreme Ct. of the US. 28 June 2006.

Shapiro, Steven R., et al. *Brief of the American Civil Liberties Union, ACLU of Pennsylvania, the Legal Aid Society, People for the American Way Foundation, American Friends Service Committee, and California Prison Focus as Amici Curiae in Support of the Respondents. American Civil Liberties Union*. 17 Feb. 2006. 18 Aug. 2006 <http://www.aclu.org/scotus/2005/24193lgl20060217.html>.

Stevens, John Paul. Dissenting opinion. Beard, Secretary, Pennsylvania Department of Corrections v. Banks. No. 04–1739. Supreme Ct. of the US. 28 June 2006.

Thomas, Clarence. Concurring opinion. Beard, Secretary, Pennsylvania Department of Corrections v. Banks. No. 04–1739. Supreme Ct. of the US. 28 June 2006.

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