

**INMATE MENTAL HEALTH, SOLITARY CONFINEMENT, AND CRUEL AND UNUSUAL
PUNISHMENT: AN ETHICAL AND JUSTICE POLICY INQUIRY**

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ABSTRACT

In a recent study by Sellers and Arrigo (2009), the researchers questioned whether the theory and method of a critically-animated psychological jurisprudence (PJ) could advance the ethical and justice policy dynamics of automatic adolescent waiver, given the literature on developmental maturity and adjudicative competence. Situated within the law, psychology, and justice framework, the jurisprudential intent of the extant case law and the moral philosophy informing this intent were the source of qualitative scrutiny. This paper follows a similar trajectory. At issue is the relevant case law addressing Eighth Amendment challenges for persons with preexisting mental health conditions subjected to long-term disciplinary solitary confinement. Guided by interpretive textual analysis, both the jurisprudential intent and the ethical reasoning that informs it are the source of legal exegeses. Mindful of how insights derived from commonsense justice, therapeutic jurisprudence, and restorative justice promote the aims of PJ consistent with the philosophy of virtue ethics, this article speculatively and provisionally enumerates several policy recommendations. These recommendations challenge psychologists of law, criminologists,

and other investigators to rethink judicial decision-making on the issue of long-term disciplinary solitary confinement.

Keywords: long-term disciplinary solitary confinement; cruel and unusual punishment; psychological jurisprudence, textual legal analysis, virtue ethics

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INTRODUCTION

Historically, education, training, and research in the law and psychology field have emerged from within one of the following three traditions: clinical; law and social science; and law, psychology, and justice (Arrigo, 2001; Arrigo & Fox, 2009). While the clinical and law and social science perspectives emphasize evidence-based inquiry, the law, psychology, and justice framework is more deliberately theoretical in nature (e.g., Williams & Arrigo, 2002). Admittedly, while the methods of each orientation ostensibly overlap, the law, psychology, and justice approach is distinct in that it advocates “social change and action through theory-sensitive psychological jurisprudence” (PJ) (Arrigo & Fox, 2009, p. 161; see also, Fox, 1993). This broader and more critical conceptualization of the field guides the ensuing analysis.

Psychological jurisprudence fundamentally encompasses “theories that describe, explain, and predict law by reference to human behavior” (Small, 1993, p. 11). As such, more than an empirical assessment concerning the process of judicial decision-making, PJ endeavors to inform judges and legislators about how they *should* make such determinations. To accomplish this objective, PJ relies on pertinent data and prudent values that emphasize “not merely...what the law is but...what law ought to be” (Sellers & Arrigo, 2009, p. 436; see also Arrigo, 2004; Arrigo & Fox, 2009; Darley et al., 2002; Melton, 1992). The assumption underlying this rationale is that the mental health and justice systems are, in essence, “totalizing apparatuses” that can engender harm (Arrigo, 2004, p. vii). Thus, PJ’s reformist agenda seeks to translate worthwhile theory into meaningful policy that can effectively address the distinct needs of offenders, victims, and the larger society to which both are bound. This is how healing is promoted and justice is achieved (Arrigo, 2002a; Fox, 1993; Ogloff, 2002).

Interestingly, several principles and practices at the law-psychology divide have surfaced in an effort to realize PJ's progressive change strategy. Perhaps foremost among them are: 1) commonsense justice; 2) therapeutic jurisprudence; and 3) restorative justice. Collectively, these notions promote a quality of human social existence that, among other things, nurtures citizenship, communal well-being, and societal accord (Arrigo, 2004). In what follows, how each doctrine embodies these values is summarily delineated.

When determining matters of guilt or innocence, rather than relying on the "objective" nature of black-letter law (Finkel, 2001) commonsense justice draws attention to law's "subjective" dimensions (Huss et al., 2006; Finkel, 1997; Finkel, 2001). In this respect, commonsense justice "reflects what ordinary people think is just and fair" and, ultimately, what they believe "the law ought to be" (Finkel, 2001, p. 2). Thus, the legal, moral, and psychological reasoning employed by the everyday citizen rather than the prescriptive law should inform the decision-making process of jury members (Finkel, 2000), resulting in more organic, equitable, and harmonious outcomes. Indeed, by advancing unfettered deliberation as proposed here, the law is perfected and made more complete (Finkel, 1995, p. 3).

Therapeutic jurisprudence involves "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects" (Schma et al., 2005, p. 60). Proponents of therapeutic jurisprudence assert that the law, when informed by psychology, can be beneficial to parties in dispute such that it promotes healing rather than engenders harm (Wexler & Winick, 1996; Winick, 1997; Winick & Wexler, 2006). Given its deliberate salutary objective, therapeutic jurisprudence intends to preserve and/or to enhance the health-related needs of individuals through a reliance on legal institutions, programs, and practices (Glaser, 2003; McMahan & Wexler, 2003; Wexler, 2008).

Restorative justice endeavors to cultivate a reparative climate among persons affected by harm typically arising from interpersonal violence (Braithwaite, 2006; Tyler, 2006). It assumes that the injury impacts not only the victim and offender, but the community in which the transgression occurred (Bazemore & Boba, 2007; Braithwaite, 2006). As such, restorative justice seeks to engage all aggrieved parties in candid and constructive dialogue. This dialogue is designed to meaningfully (re)connect disputants in such a way that transformative resolutions are reached and genuine responsibility and forgiveness prevail (Bazemore & Boba, 2007; Tyler, 2006; Umbreit et al., 2006). Thus, the victim, the offender, and the community that joins both are, in essence, restored.

As noted by Sellers and Arrigo (2009), "although not identified as such, these collective principles and practices [commonsense justice, therapeutic jurisprudence, and restorative justice] are consistent with virtue-based ethics" (p. 438). Indeed, perhaps best articulated in Aristotle's treatise, *Nicomachean Ethics* (1998), virtue-based reasoning promotes the development of one's character in order to achieve what he termed *eudaimonia* (flourishing or excellence in being). In contrast to other prevailing moral philosophies that endorse a weighing of competing interests or the preservation of a duty, virtue-based ethics suggests that one's moral fiber is not so much determined by what one does. Instead, one must *develop* virtuous *habits* of character (Cahn, 2009; Williams & Arrigo, 2008). To do so, Aristotle (1998) explained:

"Anything that we have to learn to do we learn by the actual doing of it. People become builders by building and instrumentalists by playing instruments. Similarly, we become just by performing just acts, temperate by performing temperate ones, brave by performing brave ones" (p. 79).

Ultimately then, by embodying virtue, "we make ourselves into the sorts of persons we truly want to be. We make ourselves worthy of our own respect, lovable in our own eyes" (Leighton & Reiman, 2001, p. 12).

A virtue-based response to crime or delinquency – in which each individual affected by the harm is encouraged to heal and subsequently to flourish – is most likely achieved through the PJ practices of commonsense justice, therapeutic jurisprudence, and restorative justice (Sellers & Arrigo, 2009). Commonsense justice realizes this by allowing for the inclusion of felt regard in the process of courtroom decision-making. Therapeutic jurisprudence succeeds at this by discerning where and how the law can act as a healing agent and, as a result, can produce beneficial outcomes. Restorative justice accomplishes this by generating mutual empathy, compassion, and, ultimately, forgiveness among persons affected by injury. As such, these three law-and-psychology practices advance the possibility for participants to experience authentic connections with one another, to share a common sense of responsibility, and to embrace redemption as a necessary condition that maximizes prospects for societal well-being, communal accord, and human flourishing.

Within the realm of law and psychology, one topic in which the logic of psychological jurisprudence and the philosophy of virtue-based ethics applies, is the imprisonment of mentally ill offenders. Research overwhelmingly indicates that a significant number of those confined suffer from wide-ranging mental health problems (Baillargeon et al., 2009; Haney, 2003; James & Glaze, 2006; Kupers, 1999; Lamb & Weinberger, 1998; Rhodes, 2004, 2005). Indeed, as Rhodes poignantly asserted, “increasingly punitive sentences combined with the deinstitutionalization of psychiatric treatment centers have resulted in correctional facilities becoming the ‘asylum of last resort’ for the psychologically disordered” (2005, p. 1693).

In response to a burgeoning prison population – many of whom are mentally ill and arguably unable to conform their behavior to institutional rules and regulations – correctional administrators increasingly place incarcerates in solitary confinement. Although some prison segregation units vary slightly depending on the jurisdiction, the facilities are typically designed to house inmates 23 hours a day in steel-door-enforced cells measuring

approximately 6 by 8 feet in size (Arrigo & Bullock, 2008). One hour of exercise time a day is allowed for most segregated prisoners. Often referred to as the "dog run[s]," the exercise pens in isolation units and facilities are surrounded by concrete walls or are, essentially, a wire cage. Thus, segregated incarcerates have little to no daily exposure to fresh air, natural light, or opportunity for physical health enhancing activities (Haney, 2003; Shalev, 2009). To limit interaction with others, some facilities employ "tele-psychiatry" and "tele-medicine" procedures in which the prisoner may only be "examined" through video conferencing with medical and mental health professionals and staff (Haney, 2003, p. 126; see also Shalev, 2009). In addition to imposed seclusion, mechanical, physical, chemical, and technological restraints are utilized to ensure minimal psychological stimulation and to control nearly every aspect of an inmate's existence (Haney, 2003; Kupers, 2008; Toch, 2003).

Although the mental health of prisoners in isolative confinement is monitored according to policies delineated in each penal setting, the extreme solitude to which incarcerates are subjected raises a number of thorny ethical questions. Research, dating back as far as the mid-nineteenth century, delineates the deleterious effects of solitary confinement on prisoners' mental health (Grassian, 1983; Haney, 2003; Kupers, 2008; Mears, 2006; Rhodes, 2004, 2005; Toch, 2003). Indeed, as Haney observed, "there are few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psychopathology are manifested" (2003, p. 126).

According to the extant literature, isolation of varying types and durations negatively impacts the mental health of incarcerates with no known psychiatric disorders. However, the effects of placing inmates with preexisting mental health conditions in solitary confinement, particularly in extreme isolative conditions and for protracted periods of time, are especially devastating. Moreover, research suggests that mentally ill inmates are significantly more likely to be placed in segregation and supermax facilities (Haney, 2003;

Kurki & Morris, 2001; Toch, 2001; see also Mears & Watson, 2006). Indeed, psychiatrically disordered prisoners "are more likely...to break prison rules, engage in arguments with other inmates, and decompensate mentally" (Naday et al, 2008, p. 87; see also, Haney, 2003; Rhodes, 2004). Thus, given the frequency with which mentally ill inmates are placed in isolation and noting the gravity of the associated risks, the focus of the ensuing inquiry is on psychiatrically disordered inmates in prolonged disciplinary solitary confinement.

Regretably, the legal community has yet to incorporate the extant social and behavioral science findings on mentally ill incarcerates in protracted punitive segregation into the relevant case law on cruel and unusual punishment matters. Moreover, no study has yet to purposefully explore the essential ethical rationale that informs the courts' decision-making. This obtains especially when Eighth Amendment challenges proffered by prisoners in long-term disciplinary isolation who suffer from preexisting mental health conditions are the source of inquiry. In other words, the logic of psychological jurisprudence and the philosophy of ethics conveyed through the pertinent case opinions on the subject of punitive segregation and mentally disordered inmates have not been systematically examined.¹ A thorough analysis of both may very well be the basis for converting (tacit) theory into constructive public policy.

The following qualitative study focuses on these critical issues. Specifically, the moral philosophy discernable in the judicial opinions that communicates the courts' perspective on Eighth Amendment challenges raised by inmates with preexisting mental health conditions placed in long-term disciplinary solitary confinement will be made clear. Addressing this matter then makes it possible to evaluate whether, and to what extent, current punitive isolation practices impacting psychiatrically disordered incarcerates support (or fail to support) excellence in being for all participants in which the merits "of living virtuously [inform] the jurisprudential reasoning" (Sellers & Arrigo, 2009, p. 441).

Accordingly, Section one outlines the distinct types of solitary confinement, recounts the relevant literature on inmate mental health in both the general prison population and while in isolation, and describes the prevailing approaches to ethics. Section two delineates the qualitative methodology employed in this study. This includes the procedures followed that led to the selection of those court cases constituting the data set, and a description of the two levels of textual exegeses in which each case was analyzed. Section three presents the results, including the moral logic located within the jurisprudential reasoning for each judicial opinion and among all of the court decisions. Section four specifies a number of implications that emerge from the study's findings. Along these lines, several key recommendations are provisionally and tentatively enumerated based on commonsense justice, therapeutic jurisprudence, and restorative justice practices. These observations address whether the moral philosophy underlying long-term punitive isolation as endorsed by the legal apparatus is suspect or flawed, mindful of existing law and psychology strategies that promote virtue-driven solutions to the problems posed by delinquency and crime.²

LITERATURE REVIEW

Types of Solitary Confinement: An Overview

Although solitary confinement facilities are designed to physically isolate and constructively curtail the violent behavior of disruptive inmates, there are variations in the types and length of imprisonment. Segregation facilities and units are known by a number of names, including extended control units (ECUs) and secured housing units (SHUs) (Haney, 2003). While the names of the units may differ, the facilities share a number of psychological characteristics that often make the conditions within them indistinguishable from one another (Haney, 2003; see also Riveland, 1999). Indeed, what constitutes short-term and long-term administrative and disciplinary solitary confinement also varies

according to individual correctional institutions and their respective jurisdictions. Moreover, the degree of isolation imposed within each unit is not uniformly representative of every solitary confinement facility (Haney, 2003; Rhodes, 2004; Mears & Watson, 2006; Naday et al., 2008). Noting these definitional and generalization concerns, the ensuing discussion focuses on the research findings delineating the conditions of the two types of solitary confinement as they are formally designated by the Federal Bureau of Prisons (BOP) and recognized within the prevailing literature.

Administrative segregation (Ad-Seg) is one type of solitary confinement. As noted, the conditions under which inmates are placed in Ad-Seg vary slightly depending on the jurisdiction; however, many inmates are placed in this type of isolation based on a pending investigation of a rule infraction or a possible transfer to disciplinary segregation. According to Riveland, "inmates who have demonstrated that they are chronically violent or assaultive, who present a serious escape risk, or who have demonstrated a capacity to incite disturbances or otherwise are threatening the orderly operation of the [institution's] general population may become target populations" (1999, p. 6).

Conditions in administrative segregation are restrictive. However, in addition to basic necessities such as hygiene products and an hour of physical activity time, Ad-Seg incarcerates may also receive literary materials and mail. These and other items are often contingent upon the behavior of the inmate while in Ad-Seg. If the incarcerate is uncooperative or disruptive, these privileges can be removed (Federal Bureau of Prisons Guidelines, 2008; O'Keefe, 2008).

Perhaps one of the greatest concerns regarding administrative segregation is that an inmate may be placed there indefinitely. In fact, the typical stay of an inmate in Ad-Seg may exceed the average stay of an individual in disciplinary segregation. Placement in this type of solitary confinement relies solely on the discretion of correctional administrators and staff. As such, there is no formally imposed due process procedure that precedes

administrative isolation. Consequently, human rights advocates have raised concerns regarding prisoners in Ad-Seg receiving a "punishment disproportionate to the seriousness of the behavior" (O'Keefe, 2008, p. 126).

The second type of solitary confinement is disciplinary or punitive segregation. Unlike its administrative counterpoint, punitive isolation: "is a time-limited response to a disciplinary infraction after due process hearings resulting in a finding of guilt" (O'Keefe, 2008, p. 124). According to the Federal BOP, a designated Discipline Hearing Officer (DHO) is required to consider an inmate's violation of prison rules. If the DHO determines that no other "course of action will adequately punish the inmate or deter her or him from violating BOP rules again," then the DHO may order the inmate to be placed in disciplinary segregation (Federal Bureau of Prisons Guidelines, 2008, p.1).

Depending on the jurisdiction in which the correctional facility is operating, incarcerates placed in disciplinary segregation may only spend months in punitive solitude (Arrigo & Bullock, 2008; O'Keefe, 2008). However, if an inmate repeatedly violates BOP rules while in isolation, their period of segregation can extend to years (Kupers, 1999; 2008; Rhodes, 2004). Regardless of the length of confinement, the conditions of punitive isolation are intended to be extremely restrictive. While disciplinary segregation is considered by some to be excessively harsh, the BOP requires prison administrators and staff to ensure that inmates in said confinement receive "the basic living levels of decency and humane treatment" (Federal Bureau of Prisons Guidelines, 2008, p. 2). Moreover, the guidelines require that inmates' fundamental needs, such as a nutritionally adequate meals and access to a toilet, must be met (Federal Bureau of Prisons Guidelines, 2008).

Research on Imprisonment, Inmate Mental Health, and Solitary Confinement

Before considering the extant literature on solitary confinement, it is imperative to examine the prevalence of mental health problems within penal institutions. Reflective of

the current trend toward increasingly punitive sentences and overburdened psychiatric care resources, correctional facilities have quickly become a crude haven of sorts for the psychologically disordered (Rhodes, 2005). For example, a study published by the Bureau of Justice Statistics indicated that well over half of all prisoners suffer from a mental illness. In terms of percentages, 56% of State prisoners, 45% of Federal prisoners, and 64% of jail incarcerates are estimated to have a psychological health problem (James & Glaze, 2006).

To conduct the study, researchers utilized two measures for determining such problems. These measures included a history of mental health issues within the past 12 months or the presence of symptoms as delineated by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). Among the mental health concerns reported, major depression and mania were the most common. Perhaps unsurprising given the often volatile environment of correctional facilities, persistent anger and insomnia or hypersomnia were the most frequently reported symptoms. Only a small percentage of inmates indicated that they had attempted suicide in the last 12 months. Nearly a quarter of all jailed inmates (24%) had symptoms of a psychotic disorder. Among those in prison, 15% of State inmates and 10% of Federal inmates indicated that they had experienced at least one psychotic symptom (James & Glaze, 2006). Additional studies exploring various associations between mental illness and incarceration report similar findings (Abramsky & Fellner, 1999; Baillargeon et al., 2009; Haney, 2003; Kupers, 1999; Lamb & Weinberger, 1998; Rhodes, 2004, 2005).

At the present time, the approximate number of prisoners serving time in solitary confinement is regrettably imprecise. Definitional concerns coupled with the unwillingness of penal institutions to allow access to isolated prisoners have presented a challenge for researchers attempting to reach an accurate figure. While published reports estimate that between 5,000 to 100,000 incarcerates are serving time in supermax facilities, "the most frequently cited figure in the past 6 years is 20,000" (Naday et al., 2008, p. 77; see also

Haney, 2003; Mears & Watson, 2006; Pizarro & Stenius, 2004). Although this number has been referenced throughout much of the current literature, the estimate was obtained from two reports compiled in the 1990s using dated findings; thus, it fails to provide an accurate account (Naday et al., 2008).

Among segregated inmates, the estimate of those with a preexisting mental health condition is perhaps slightly more clear. Current findings indicate that nearly a third (29%) have been diagnosed with a psychiatric disorder (Haney, 2003; Lovell, 2008; Lovell et al., 2000). However, most researchers contend that the number of mentally ill incarcerates may be far greater. According to Kupers, "correctional mental health clinicians, on average, and without thinking about it in precisely this way, respond to the fact [that] there is such a large number of prisoners with mental illness they cannot treat by under-diagnosing mental illness in the prisoners they see" (2008, p. 1008). He claimed that there are significant numbers of segregated incarcerates who either receive no treatment or rotate between being placed in observation and segregation. As a psychiatric expert in litigation, Kupers provided a stark look at the forlorn plight of many mentally ill inmates in segregation:

"Often, after performing a chart review and briefly interviewing a prisoner in a supermaximum unit, I conclude that he suffers from schizophrenia, bipolar disorder, or recurrent major depressive disorder. For example, the individual may have been hospitalized two or three times in the community...may have been awarded Social Security Total Disability...and he may have been prescribed antipsychotic medications with good effect. Yet when I look further in the chart, I discover that...he has been given a diagnosis of "no mental illness on Axis I" (2008, p.1008).

Errors, from both the well-meaning and the beleaguered correctional psychiatric practitioner, significantly compromise the treatment that segregated prisoners with preexisting mental health conditions receive (Baillargeon et al., 2009; Kupers, 2008).

Although correctional psychiatric practitioners play a role in how incarcerated inmates cope with solitary confinement, it is crucial to consider how the condition and duration of segregation impacts prisoners. The extant literature on solitary confinement and its deleterious effects is, in part, ambiguous. As previously mentioned, administrative and disciplinary segregation include long and short timeframes. Depending on the jurisdiction of the particular correctional facility, Ad-Seg inmates may spend longer periods in isolation, but those in punitive segregation often live in far more restrictive conditions. Nevertheless, what is consistently borne out in the research is that prisoner isolation – particularly for long periods of time and under harsh conditions – is harmful to the incarcerated inmate's mental well-being (Arrigo & Bullock, 2008; Grassian, 1983; Haney, 2003; Haney & Lynch, 1997; Pizarro & Stenius, 2004; Toch, 2001, 2003).³ In what follows, the conditions and duration of isolation – as well as their impact on mental health – are discussed.

Mental health concerns and administrative segregation

Studies involving contemporary data on prolonged solitary confinement support early empirical evidence documenting the debilitating mental health effects of this penal practice (Toch, 2003). However, the current research specifically investigating the psychological consequences of administrative segregation is scant, particularly in regard to short-term isolation. Although widely used in correctional institutions throughout the United States, the literature exploring this form of isolation and its duration has mostly been conducted internationally. To illustrate, researchers in Canada have undertaken a number of studies with inmates isolated for periods varying from 7 to 60 days, and they have found little to no harmful effects on incarcerated inmates' psychological well-being (Bonta & Gendreau, 1995; Ecclestone, Gendreau, & Knox, 1974; Gendreau et al., 1972; Gendreau & Bonta, 1984; Zinger et al., 2001). However, the ability to generalize these findings to all Ad-Seg

inmates, particularly those in the United States, is spurious at best (Arrigo & Bullock, 2008; O'Keefe, 2008; Zinger & Wichmann, 1999).

In the early 1980s, Dr. Grassian of Harvard Medical School conducted a study to determine the effects of extended periods of administrative segregation on incarcerates. Grassian found that inmates in administrative isolation suffered from a notable decline in mental health. Specifically, the inmates exhibited the following symptoms: "massive free-floating anxiety, hyper-responsivity to external stimuli, perceptual disillusionings, hallucinations, derealization experiences, difficulties with thinking, concentration, memory, acute confusional states, aggressive fantasies, and paranoia" (Grassian, 1983, pp. 1452-1453).

Mental health concerns and disciplinary segregation

As noted previously, the psychological impact of short-term isolation remains empirically undetermined. Thus, the deleterious effects of punitive segregation, especially for a brief period, have yet to be adequately examined. However, similar to the research on long-term administrative segregation, the extant literature on long-term disciplinary segregation overwhelmingly indicates that such isolation affects the mental well-being of prisoners.⁴

Haney's study of 100 prisoners located at California's Pelican Bay supermax facility offers compelling insight into the living conditions of those housed in prolonged punitive isolation. As he explained, inmates in solitary confinement:

"...can live for many years separated from the natural world around them and removed from the natural rhythms of social life, are denied access to vocational or education training programs or other activities in which to engage, get out of their cells no more than a few hours a week, are under virtually constant surveillance and monitoring, are rarely if ever in the presence of another person without being heavily

chained and restrained, having no opportunities for normal conversation or social interaction (Haney, 2003, p. 127).

Indeed, at a U.S. Department of Health conference, Haney delineated the consequences of protracted solitary conditions as:

"...an impaired sense of identity; hypersensitivity to stimuli; cognitive dysfunction (confusion, memory loss, ruminations); irritability, anger, aggression and/or rage; other directed violence, such as stabbings, attacks on staff, property destruction, and collective violence; lethargy, helplessness and hopelessness; chronic depression; self-mutilation and/or suicidal ideation, impulses, and control; hallucinations; psychosis and/or paranoia; overall deterioration of mental and physical health" (Haney as cited in Elsner, 2004, pp. 150-151).

These symptoms have been found to be so common that researchers often refer to them collectively as "SHU Syndrome" (Haney, 2003).⁵ In Haney's study, he discovered that a number of inmates exhibited patented signs of mental deterioration. The symptoms commonly reported were heightened anxiety (91%), confused thought processes (84%), and hallucinations (41%). In order to ameliorate the psychological effects of isolation, some inmates develop social pathologies. Some of the behavioral adaptations include, difficulties exercising self-control, lack of self-efficacy, and a diminishing capacity to test reality (Haney, 2003).⁶

Although suicide attempts are less common among inmates housed in the general population of jails and prisons than their isolated counterparts, some empirical evidence substantiates the argument that incarcerated subjects subjected to long-term solitary confinement are more inclined to attempt suicide than any other imprisoned group. As previously noted, Kupers cited the rotation of inmates from observation to segregation as the reason for the astonishing suicide rate among convicts placed in extended isolation. Of all the inmates who commit suicide, "approximately half occur among the 6% to 8% of the prison

population that is consigned to segregation at any given time” (Kupers, 2008, p. 1009).

According to Way et al. (2005), 76 inmates housed in a New York solitary confinement facility committed suicide within a period of less than ten years. Similarly, 70% of the inmates in the California correctional system who committed suicide over a one-year period were those confined to long-term solitary isolation (Mears, 2006).

In addition to suicide attempts, research indicates that a number of inmates placed in long-term solitary confinement engage in self-injurious behavior (Haney, 2003; Kilty, 2006; Thomas et al., 2006). Providing an account of self-harm among male inmates, Rhodes suggested that, “Cutting, near-hanging, self-mutilation and swallowing sharp objects appear as bodily enactments of emotional pain that teeter at the brink of suicide (as cited in Thomas et al., 2006, p.196). Although self-harm has typically been considered an individual pathology, some researchers assert that it is a way for prisoners to cope with the unremitting and unbearable conditions of isolated confinement (Kilty, 2006; Thomas et al., 2006). According to Thomas and his colleagues, “In this view, self-injurious behavior becomes symptomatic not only of individual mental health, but of the pathology of prisons as well” (2006, p. 197).

In response, correctional administrators and officers typically seek to control and punish individuals who exhibit self-destructive behaviors (Kilty 2006; Thomas et al., 2006). Because the inmate is in state custody, self-injurious behavior is treated as “destruction of state property,-to wit, the prisoner’s body” (Fellner, 2006, p. 397). Further, because correctional workers fail to recognize that the conditions of the solitary environment may be a causal factor in self-injurious conduct, correctional facilities tend to “retain a myopic thrust that may in fact encourage such behaviors” (Thomas et al., 2006, p. 194). Thus, the segregated incarcerate is once again consumed in a cycle of behavior that ensures and extends their placement in long-term punitive isolation.

While the empirical findings on solitary confinement and their harmful effects are growing, the current research also includes a number of methodological weaknesses. As noted previously, a "lack of consensus" regarding how solitary confinement and supermax facilities are defined and classified presents a number of challenges for investigators seeking to accurately determine the number of inmates in isolation and to systematically examine the conditions of segregation (Naday et al., 2008, p. 73). Indeed, according to Mears and Watson (2006), the very nature of isolation precludes investigators from gaining meaningful access to those whom they seek to study. Interestingly, as Toch noted, the early studies on solitary confinement were unique in that they involved both "formal experimentation and the collection of evaluative data" (Toch, 2003, p. 221). However, since that time, few inquiries have utilized robust methods to determine the deleterious effects of short and long-term administrative and disciplinary solitary confinement on incarcerates with preexisting mental health conditions.

Approaches to Ethics

As a form of retribution, the punitive use of solitary confinement raises a number of profound moral and ethical questions. Within the extant literature, three distinct approaches to ethics are germane to the present inquiry. These moral philosophies include consequentialism, formalism, and virtue-based moral reasoning. In the discussion that follows, the principles of each ethical approach are succinctly delineated. In addition to a fundamental review of these approaches, applications in the appropriate criminal justice contexts are suggestively mentioned, especially where relevant to the ensuing empirical analysis.

Among the aforementioned moral philosophies, consequentialism is perhaps one of the

most important. Consequentialism claims that, "what makes an act morally right or wrong is its consequences and nothing more" (Banks, 2008, p. 299). As such, the motive for and nature of an individual's act is not considered. Within this school of moral thought, there are three forms: ethical egoism, contractualism, and utilitarianism (Cahn, 2009; Williams & Arrigo, 2008).

Ethical egoism asserts that "promoting one's own greater good is always to act in accordance with reason and morality" (Baier, 1991 as cited in Banks, 2008, p. 338). Based on the notion of how we ought to behave, ethical egoism proposes that an individual acts in a manner that will satisfy one's self-interest. Although our behavior may benefit the interests of others, ethical egoism implies that we have no obligation to be mindful of those interests (Banks, 2008; Cahn, 2009). As Thomas Hobbes, a psychological and ethical egoist, described in *Leviathan*:

"...every man is enemy to every man...wherein men live without other security, than what their own strength, and their own invention shall furnish...there is no place for industry... no culture of the earth... no navigation... no knowledge...no account of time...no arts...no letters...no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short" (1996, p. 89).

Hobbes and other ethical egoists propose a society in which individuals are divided into groups. Among these groups, the interests of one group supersede the interests of the other groups. Although the division may be arbitrary, ethical egoism requires attention only to that which will further one's self-interest (Banks, 2008; Cahn, 2009).

While egoism promotes a society in which individuals are motivated solely by self-interest, maintaining a sense of harmony and security remain a concern. To achieve these ends, Hobbes asserted that two guarantees are necessary: a guarantee "that people will not harm one another" and a guarantee that people will "rely on one another to keep their

agreements" (Williams & Arrigo, 2008, pp. 192-193). These guarantees involve contractualism, or as it is more commonly known, social contract theory. Social contract theory supports the notion that some form of an established government must be in place in order to ensure that these promises are upheld. In other words, the existence of the State is essential. The State helps to maintain a society in which the citizenry's most pertinent rules are enforced. The social contract not only legitimizes the need for the State, but also the need for State functions such as law enforcement (Sterba, 2003; Williams & Arrigo, 2008). According to philosopher Jean-Jacques Rousseau, an advocate of contractualism, "the existence of the [S]tate allows us to become fundamentally different types of people" (Williams & Arrigo, 2008, p. 193). Because the State creates a set of moral rules that provide individuals with the sense of security and welfare that they inherently desire, they are able to genuinely and mutually care about one another (Sterba, 2003).

Utilitarianism "holds that actions are morally right so far as they have beneficial consequences" (Williams & Arrigo, 2008, pp. 105-196). While ethical egoism proposes that one's sole concern should be self-interest, utilitarianism requires one to consider how their actions will affect others. Jeremy Bentham and John Stuart Mill, both classical utilitarian theorists, promoted the "principle of utility" (Bentham & Mill, 1973; Cahn, 2009). Later termed the "Greatest Happiness Principle" by Mill, the principle sought to establish that what is right and good is what creates the greatest happiness for all individuals affected (Banks, 2008, p. 299; Mill, 1957, pp. 15-16). Based on this principle, social policies should produce the most positive results for those whom the policies impact (Banks, 2008). However, Mill asserted that such strategies should be informed by empirical inquiry. That is, lawmakers must acquire the knowledge and empirical evidence necessary in order to accurately determine the consequences of their policymaking decisions (Mill, 1957).

Formalism is another school of moral philosophy discernable in the extant literature. Rather than focusing on the consequences of moral choices, formalism asserts that one must be mindful of moral duties. Often termed deontological ethics, this approach “shifts attention away from the effects of our actions, placing the focus squarely on the *actions themselves*” (Williams & Arrigo, 2008, p. 216). Within the formalist tradition, there are two schools of thought pertinent to the current inquiry: Kantian ethics and prima facie duties (Williams & Arrigo, 2008).

Perhaps one of the most influential philosophers to contribute to Western moral thought is Immanuel Kant. According to Kant, there are “absolute moral rules” to which one must adhere, regardless of potentially adverse consequences (Williams & Arrigo, 2008, p. 217). However, Kant also asserted that one may not justify utilizing another individual as a means to an end (Cahn, 2009; Kant, 2002; Mossman, 2006). He also asserted that “*all human beings have intrinsic worth or dignity*” (Williams & Arrigo, 2008, p. 223). In regard to punishment, Kant believed that it “can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime” (Shichor, 2006, p. 26).

However, there is one concern with Kant’s ethical approach. The approach fails to instruct individuals on how to reconcile conflicting moral duties. To address this predicament, W.D. Ross developed the ethics of *prima facie duties*. While Kant’s duties are based on absolutes, Ross’ notion of duties is conditional. That is, “certain duties can and should be violated if, given the situational factors in play, we determine that other duties override them” (Williams & Arrigo, 2008, p. 227).

Unlike the consequentialist and formalist concerns with how to behave in a moral manner, virtue ethics is concerned with how we must morally evolve to cultivate an ethics-based life. Based on Aristotle’s, *Nicomachean Ethics*, virtue ethics emphasizes developing

one's moral character as opposed to speculating about consequences or upholding duties (Aristotle, 1998; Cahn, 2009). Aristotle asserted that, "when we develop as we "ought," we live well, thrive, and flourish, and when we do not, we suffer and decay" (Darwall, 1998, p. 195). In order to flourish, we must interact with others. According to Aristotle, humans are "naturally social" (Perl et al., 2006, p. 214). Indeed, he believed that individuals are not meant to live a solitary life. Aristotle argued that, "man is born for citizenship" (Perl et al., 2006, p. 215).

By consistently engaging in virtuous activity, one realizes one's own happiness. Aware of often conflicting situations, Aristotle proposed that individuals "find the mean" between two extremes. In other words, one must thoroughly consider the facts of a given situation, mindful of growing the excellence of one's character. Thus, for example, between the excess vice (e.g., foolhardiness) and the deficiency vice (e.g., cowardice) is the "golden mean" or virtue (e.g., courage) that provides us with the knowledge necessary to act in an ethical manner (Banks, 2008, p. 320).

METHOD

This study examines the underlying ethical thought in the extant case law concerning: (a) prisoners placed in long-term, disciplinary solitary confinement⁷; (b) with preexisting mental health conditions; (c) where the Eighth Amendment's prohibition on cruel and unusual punishment is at issue. The moral philosophy discerned from the judicial decisions will focus on the ethical principles, and corresponding rationale, that both guide and influence the courts' interpretations, analyses, and judgments (Hogg et al., 2007; Paul & Elder, 2006). **This perspective does not imply that jurists who engage in case review, commentary, and subsequent decision-making are legally required to deliberate mindful of a particular ethic (e.g., utilitarianism). On the contrary, the method systematically exposes the *underlying* ethical reasoning lodged within a**

given case. Thus, to access this core moral philosophy, the jurisprudential intent of the courts' rulings will first be identified. In order to **carefully** review the courts' intent or decision-making rhetoric, the "judicial construction of the opinion" necessitates **close** textual scrutiny (Arrigo, 2003, p. 59; see also Sellers & Arrigo, 2009). A review of these legally constructed narratives, then, makes it possible to ascertain the plain meaning of the courts' rulings (Arrigo, 2003; Hogg et al., 2007). This is meaning that reflects jurisprudential intent (Sellers & Arrigo, 2009).⁸

In the context of legal analysis, the relationship between jurisprudential intent and the moral philosophy that informs it represents a qualitative inquiry. Following the law-psychology-justice method first utilized by Sellers and Arrigo (2009), this investigation employs both an intra-textual (within one case) and inter-textual (between multiple cases) evaluation of the judicial decisions themselves. As some researchers have suggested, the interpretive nature of this undertaking reveals "how and for whom justice is served" (Arrigo, 2003, p. 55). However, before commenting further on the qualitative nature of this project, it is important to delineate the criteria used to determine which court decisions warranted textual examination.

The data set of relevant cases was compiled through a LexisNexis search. The search terms included "long-term," "disciplinary," "solitary confinement," "mental illness," "Eighth Amendment" and "cruel and unusual punishment." The constructs "long-term" and "disciplinary" were deemed essential. Mindful of the prevailing literature chronicling the harmful effects of solitary confinement and the relevance of this research for the ensuing study, both terms fundamentally signify the worst case scenario for psychiatrically disordered offenders as delineated by the BOP. Admittedly, the length of time constituting "long-term" varies according to institution-specific standards and practices. However, the phrase was selected in order to yield only those cases involving prisoners subjected to a protracted period of confinement as defined by the penal facility.

As noted previously, administrative and disciplinary segregation are often indistinct when categorized psychologically. However, the term "disciplinary" was chosen solely based on how this type of solitary confinement is identified by the respective jurisdiction and correctional facility. Moreover, a preliminary exploration undertaken without these specific parameters yielded a substantial number of cases involving both long and short-term administrative and disciplinary solitary confinement. The attention to short and long-term administrative segregation is not pertinent to the present inquiry.

Use of the search term "punitive" rather than or in addition to "disciplinary" was also considered. However, the latter construct more accurately yielded cases involving the specific type of confinement concerns germane to the ensuing exploration. "Solitary confinement" was chosen over "segregation." The latter construct is not exclusively used by jurisdictions to identify conditions consistent with extreme isolation; thus, it produced a considerable number of cases involving: (1) forms of separation (e.g., in housing, education); and (2) various types of seclusion tactics employed in correctional facilities (e.g., restrictions on reading material). These issues are not relevant to this study.

Phrases such as "mental health" and "mental health condition" combined with the other established search terms produced too few case law results (N = 2); thus, these terms were not considered useful. A search was also executed utilizing the word "preexisting." However, its inclusion did not increase the number of relevant cases. Mindful of these collective results, the term "mental illness" was included. This ensured that all cases involving individuals with psychological disorders, particularly those with recognized diagnoses, would be incorporated into the analysis. The phrases "Eighth Amendment" and "cruel and unusual punishment" were included, given the present inquiry's obvious focus on solitary confinement conditions that potentially inflict a particularly atypical and harsh penalty on prisoners.⁹ Accordingly, based on these search term criteria, the LexisNexis search yielded 20 U.S. District Court and U.S. Appellate Court cases.

The preliminary search regarding the extant case law was undertaken in an effort to identify all precedent-setting decisions. These include court rulings that establish a standard for subsequent judicial deliberations addressing Eighth Amendment challenges involving prolonged punitive segregation and inmates with psychological disorders. Thus, initial focus was directed toward opinions rendered by the United States Supreme Court. The social science and legal literature point to decisions, such as *Farmer v. Brennan* (1994) and *Rhodes v. Chapman* (1981), that have guided the courts' rule-making on issues related to harsh conditions in segregation (Harvard Law Review, 2008; Perlin & Dlugacz, 2008; Weidman, 2004).¹⁰ However, the Supreme Court has yet to hear a case that meets the specific parameters established for the ensuing inquiry.¹¹ As such, an exploration of the current state of this correctional law entailed a critical examination of district and appellate court cases identified through the previously articulated LexisNexis search.

A cursory review of these twenty cases revealed that a number of them discussed long-term segregation and mental illness. However, in these instances, administrative confinement was at issue. Thus, the second step in the process was to discern which judicial opinions dealt exclusively with disciplinary confinement. Among the court rulings initially identified through the LexisNexis search, four cases were eliminated given their clear focus on administrative segregation or some other form of non-punitive confinement. These decisions included: *Adnan v. Santa Clara County Department of Corrections* (2002), *Ruiz v. Estelle* (1980), *Giano v. Kelly* (2000), and *Pearson v. Fair* (1989). *Rennie v. Klein* (1981) was removed from the data set, as the case involved treatment within a civil psychiatric hospital. A sixth case, *Ruiz v. Johnson* (1999), was also excluded. This judicial ruling is often cited in the extant social science and law review literature as a landmark decision in which the court considered the deleterious effects of long-term *administrative* segregation on prisoners with preexisting mental health conditions (Fellner, 2006; Haney, 2003; Harvard Law Review, 2008; Perlin & Dlugacz, 2008). The inmates in this case sought

protection under the Eighth Amendment's prohibition against cruel and unusual punishment based on the conditions of the Ad-Seg unit in which they were confined.¹²

After excluding judicial decisions that did not involve disciplinary solitary confinement, the next step was to determine which of the remaining cases involved prisoners raising Eighth Amendment challenges based on the claim that the confinement itself exacerbated a preexisting mental health condition. Clearly, several judicial rulings considered mental health issues that relate to long-term punitive segregation. These cases include: *Tillery v. Owens* (1989), *Dawson v. Kindrick* (1981), *Laaman v. Helgemoe* (1977), *Kane v. Winn* (2004), *Davenport v. DeRobertis* (1987), and *Dantzler v. Beard* (2007). However, in each instance, prisoners did not assert that they suffered from a previously diagnosed psychological disorder. As such, these court opinions were removed from the data set.

The next matter was to determine if the remaining eight court cases were appropriate for textual analysis. *Comer v. Stewart* (2002) involved a prisoner exhibiting symptoms of SHU syndrome after being confined in disciplinary segregation. However, in this case, the court considered whether Comer's claim of suffering from SHU syndrome affected his competency to waive his right to habeas appeal. Thus, the case was eliminated. *Coleman v. Wilson* (1994) explored the conditions within the solitary confinement unit at Pelican Bay State Prison. However, the court's deliberation chiefly focused on inadequate mental health care throughout the California correctional system. As such, *Coleman v. Wilson* (1994) was excluded.

In *Farmer v. Kavanagh* (2007), an inmate sought protection from cruel and unusual punishment after being placed in solitary confinement at a supermax facility. Farmer, who suffered from a number of physical ailments and psychological disorders, argued that the conditions of his confinement worsened his mental health problems. While the court acknowledged his Eighth Amendment claim, the court focused on Farmer's assertion of a

due process violation based on a sudden transfer to the supermax segregation unit. As such, *Farmer* was deemed not suitable for critical examination.

Redden v. Ricci (2008) was considered for review, but it was eventually eliminated. The case met each investigatory parameter, with one exception. While the Eighth Amendment challenge was raised in part because of the inmate's time in disciplinary segregation, the duration of confinement was only 15 days. Furthermore, the claim that time spent in solitary confinement exacerbated a preexisting mental health condition was made strictly on a prolonged period in administrative segregation. Therefore, *Redden v. Ricci* (2008) was removed from consideration.

Having excluded those cases that did not meet the criteria delineated for this study, four judicial decisions remained. These cases included the following: *Madrid v. Gomez* (1995), *Scarver v. Litscher* (2006), *Jones 'El v. Berge* (2004), and *Goff v. Harper* (1997). Cited by both social science and legal scholars as the foremost case addressing long-term disciplinary solitary confinement and prisoners with preexisting mental health conditions, the court in *Madrid v. Gomez* (1995) contemplated the issue of excessive use of force on inmates confined in the SHU (Haney, 2003; Haney & Lynch, 1997; Harvard Law Review, 2008; Lobel, 2008; Perlin & Dlugacz, 2008; Pizarro & Narag, 2008; Weidman, 2004; Wynn & Szatrowski, 2004). More importantly for purposes of the present qualitative exploration, the court also considered the "totality of conditions" in the segregation unit and their effect on inmates with psychological disorders. As such, the judicial ruling was included for consideration.

An appellate court case, *Scarver v. Litscher* (2006), is also often identified in the existing social science and legal literature as a significant ruling for mentally ill incarcerates seeking Eighth Amendment protection from segregation conditions (Fellner, 2006; Kupers, 2008; McConville & Kelly, 2007; Perlin & Dlugacz, 2008). Scarver was an inmate suffering from severe schizophrenia and delusions. He was placed in prolonged punitive solitary

confinement. As he alleged, the conditions in segregation were so severe that they dramatically aggravated his psychological disorders. Thus, the case was included in the data set.

In *Jones 'El v. Berge* (2004), a group of inmates housed in extended disciplinary segregation, including six diagnosed with mental illnesses, sought protection from cruel and unusual punishment. Although a consent decree agreement was reached, a judgment was entered. In spite of the agreement, the opinion itself is widely referred to in the extant literature as particularly useful in discerning the court's understanding of matters related to long-term disciplinary segregation and incarcerates with psychological disorders (Arrigo & Bullock, 2008; Harvard Law Review, 2008; Perlin & Dlugacz, 2008; Pizarro & Narag, 2008; Weidman, 2004). Consequently, the case was included in the analysis.

Goff v. Harper (1997) involved three inmates who sought protection from cruel and unusual punishment after spending a prolonged period in punitive segregation. Although the Eighth Amendment violation claim included time in administrative segregation, the court focused primarily on the conditions in disciplinary solitary confinement and their effect on prisoners with alleged mental health conditions. While the case does not appear frequently in the social science or law review literature, it met the criteria delineated for this study. As such, it was included in the data set.

For the purpose of thoroughness, the judicial opinions cited and subsequently referenced in each of the four aforementioned cases were reviewed to determine if any of them warranted inclusion in the data set. This step in the process produced a significant number of judicial opinions. However, mindful of the extant social science and law review literature, the vast majority of these cases did not meet the specific criteria established for this investigation (Haney & Lynch, 1997; Perlin & Dlugacz, 2008; Weidman, 2004). Notwithstanding this finding, two cases were appropriate for consideration. Citing *Scarver v. Litscher* (2006), *Vasquez v. Frank* (2006) involved an incarcerate who sought protection

from cruel and unusual punishment given his prolonged disciplinary solitary confinement. Vasquez claimed that the conditions in which he was held were so severe that they exacerbated his mental health condition.¹³ Citing *Madrid v. Gomez* (1995), the court in *Torres et al. v. Commissioner of Correction et al.* (1998) reviewed an Eighth Amendment violation claim based on prisoners' extended confinement in a disciplinary isolation unit in which some alleged deteriorated psychological conditions. Thus, both cases were retained for critical textual examination.¹⁴

Having selected six district court and appellate court cases that met the evaluative criteria, two levels of qualitative analysis were performed.¹⁵ As discussed previously, the present inquiry sought to determine the jurisprudential intent by examining the plain meaning evident in the courts' rulings. This and similar methodologies have been utilized in the past to discern legislative intent. In these investigations, the "ordinary usage" of terms and the "textual context" distinguishable in the statutes were examined (Hall & Wright, 2008; Phillips & Grattet, 2000; Randolph, 1994). Interestingly, some investigators note that this is an anecdotal approach that perhaps fails to adequately reveal the meaning underlying legislative intent (Easterbrook, 1994; Posner, 2008). Indeed, critics argue that meaning depends upon context and, as such, may be interpreted differently based on an individual's understanding of certain rhetoric (Posner, 2008). Thus, subjecting the courts' rulings themselves to *systematic* textual exegeses is preferred when determining jurisprudential intent. Mindful of this, an interpretive analysis was conducted to ascertain the plain meaning of the legal language communicated in the court decisions that comprise this data set.

Following the law-psychology-justice approach employed by Sellers and Arrigo (2009), a series of queries were compiled to assist in identifying the plain meaning located within the judicial opinions. These investigators adopted the qualitative strategy first delineated by Ritchie and Spencer (2002). The questions were both contextual (i.e., the

state of what is) and diagnostic (i.e., the cause or rationale for what is) in nature, and were specifically designed to yield an empirically sound direction when conducting applied policy research (Ritchie & Spencer, 2002, p. 307). This ensuing inquiry utilized a similar method.

The following queries were posed in relation to each judicial opinion:

- 1) What are the dimensions of attitudes or perceptions that are held?
- 2) What factors underlie particular attitudes or perceptions?
- 3) Why are decisions or actions taken or not taken?
- 4) Why do particular needs arise?
- 5) Why are services or programs not being used?
- 6) What are the goals, purposes, and concerns of the decisions or actions taken or not taken?
- 7) What needs of society are represented by the decisions or actions taken or not taken?

These seven questions guided the following investigation and facilitated the textual assessment of the legal rhetoric.

The first query seeks to determine how the courts understand the legal issues and controversies surrounding solitary confinement. For example, do the rulings indicate the courts' awareness of their influence and role in how correctional institutions operate? The second question addresses factors that influence these attitudes and perceptions. To illustrate, how does the perception that such disciplinary confinement is necessary in order to house prisoners deemed the "worst of the worst" (see, Arrigo & Bullock, 2008; Pizarro & Narag, 2008; Rhodes, 2004) affect the courts' opinions? Queries three, four, and five attempt to ascertain the courts' rationale in weighing issues such as what constitutes the basic provisions of life or what determines if a punishment is overtly severe. For example, do the courts perceive prisoners with preexisting mental health conditions as capable of psychologically withstanding the harmful effects of solitary confinement? Moreover, given

the literature indicating that the public strongly supports increasingly punitive sentences (Pizarro & Narag, 2008; Rhodes, 2004; Sellers & Arrigo, 2009), are the courts' opinions on long-term disciplinary solitary confinement influenced by this sentiment? Do the rulings reflect an understanding of prison conditions (e.g., frequency in which mentally ill inmates have access to a psychiatric care worker) and the needs of prison administrators (e.g., to prevent a psychiatrically disordered inmate from engaging in self-injurious behavior)? Are the decisions informed by prison administrators' insistence that solitary confinement is imperative to ensure effective correctional management? The final two questions attempt to determine what the court believes is important. In other words, these queries explore specific terms and phrases found in the judicial opinions that disclose what the courts value when considering long-term disciplinary segregation and incarcerates with mental health conditions. For example, do the jurists believe that the discretion afforded to prison administrators in maintaining a secure environment takes precedence over inmates' constitutional rights?

Although the ensuing investigation specifies the jurisprudential intent located in the courts' rulings, this is not the same as delineating the moral philosophy that informs this intent (Sellers & Arrigo, 2009). To address this matter, a second level of qualitative analysis was applied to each of the judicial opinions. This subsequent level of analysis is more textual and interpretive in design (Arrigo, 1993; 1999, 2003; Macken, 2006; Sellers & Arrigo, 2009). Textual analysis as employed here intends "to explicate how assumptions about self and society, private and public, and state and society – the essentials that underlie traditional legal thought – are encoded in law" (Mercurio & Medema, 1998, p. 169).

In order to uncover or to make explicit the courts' ethical reasoning, the legal language that constituted jurisprudential intent was carefully scrutinized. After relying on the seven questions to extrapolate the plain meaning and to discern the underlying jurisprudential intent of the judicial opinions, the textual content was itself the source

inquiry. Specifically, the terms and/or phrases indicating plain meaning were examined.

Each word or expression was analyzed mindful of the three principal schools of ethics.

These schools include consequentialism and its variants ethical egoism, contractualism, and utilitarianism; formalism; and virtue-based moral reasoning.

The purpose of this second level of qualitative analysis was to determine what Holsti described as a text's "manifest content" (1969, p. 12). Essentially, manifest content represents the message conveyed during a court proceeding or within a legal opinion. When manifest content is made explicit, it is then possible to identify the content's underlying ethical import. To illustrate, if a court employs rhetoric noting a duty to uphold deference to correctional institution administrators, then this constitutes manifest content. Moreover, this content advances the moral philosophy of formalism. Additionally, if a legal opinion employs rhetoric specifying that the due process interests of a mentally disordered inmate in solitary confinement must be weighed against the prison's concerns for effective management and correctional control, then this signifies manifest content. Moreover, what informs this content is an underlying ethic of utilitarianism. In those instances where manifest content does not convey ethical reasoning, no moral philosophy can be specified.

Sequencing from jurisprudential intent, to manifest content, to ethical rationale represents a data point that begins to specify the core moral philosophy within a judicial opinion (Sellers & Arrigo, 2009). However, this analysis is incomplete. In order to more completely ascertain the ethic of a given legal opinion, it is necessary to engage in a thematic investigation. Thus, as a dimension of this study's methodology, an identification of ethical-philosophical themes as derived from the particular instances of manifest content (words/phrases) in each judicial opinion was conducted. This is what is meant by intra-textual analysis. Additionally, as a basis to determine the *overall* moral philosophy informing the case law regarding: (1) prisoners placed in long-term, disciplinary solitary confinement; (2) with preexisting mental health conditions; (3) where the Eighth

Amendment's prohibition on cruel and unusual punishment is at issue, a similar thematic examination was conducted between the six cases constituting the data set. This is what is meant by inter-textual analysis.

In summary, the method utilized in this study was both qualitative and interpretive in design. In order to determine jurisprudential intent, plain meaning was the source of inquiry. This was ascertained by eliciting information about the six cases as guided by the seven previously specified questions. This undertaking represented the first level of analysis. The second level of analysis was more textual in orientation and it consisted of two layers. First, the manifest content was reviewed as derived from the jurisprudential intent. At issue here were the actual words or phrases communicated by jurists in rendering their opinions. Second, these words or phrase were themselves evaluated against the logic of three schools of ethics as a way to determine what moral philosophy informed this manifest content. To more completely specify the ethics of a particular case in the data set, thematic analysis was performed. All instances of manifest content informed by an ethical rationale were identified and compared against all others within that judicial opinion (i.e., intra-textuality). The same strategy was employed across the six cases, yielding a collective assessment of the moral philosophy informing the prevailing judicial opinions in this area of correctional law (i.e., inter-textuality).

DISCUSSION

Level 1 Analysis

Data for the Level 1 analysis specify the underlying jurisprudential intent contained in each judicial opinion (see Appendix A). In *Madrid v. Gomez* (1995), the court communicated its perceptions regarding prisoners with preexisting mental health conditions serving time in long-term solitary confinement. For example, the court noted that: "By virtue of their conviction, inmates forfeit many of their liberties and rights" (p. 1244). This

statement conveys the judicial attitude that, under certain delineated circumstances, incarcerates are not guaranteed the same lawful protections that are otherwise afforded to those not criminally confined. As such, the court did not perceive the rights and liberties of prisoners in the same manner as non-prisoners who might bring a complaint before a legal tribunal.

Furthermore, the decision in *Madrid* clearly expressed the court's perception regarding its role in determining how correctional administrators ought to manage prison facilities. As the case opinion explained, "It is not the Court's function to pass judgment on the policy choices of prison officials" (p. 1262). Thus, correctional administrators are "entitled to design and operate the SHU consistent with the penal philosophy of their choosing" (p.1262), which may include punitive responses that "emphasize idleness, deterrence, and deprivation" (p. 1262). In fact, the court acknowledged the challenges prison officials face in maintaining penal institutions designed to confine individuals who cannot conform to society's or the institution's rules and regulations. As such, the attitude expressed by the *Madrid* court maintained that it is "well within defendants' far ranging discretion" (p. 1261) to segregate "inmates for disciplinary or security reasons" as it "is a well established and penologically justified practice" (p. 1261).

Statements made in the *Madrid* decision also offered some clues regarding the degree to which correctional conditions might inflict psychological harm on incarcerates. To illustrate, the court observed that, "the very nature of prison confinement may have a deleterious impact on the mental state of prisoners" (p. 1262). In regard to the SHU discussed in this case, the legal opinion acknowledged that such confinement "will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods" (p. 1265).

Notwithstanding the court's contention that prison officials must be given deference in managing correctional facilities – including solitary confinement units that may induce or

expedite mental deterioration – the *Madrid* decision communicated a fundamental belief that “all humans are composed of more than flesh and bone” (p. 1261). This assertion includes prisoners who are so irascible that they must “be locked away not only from their fellow citizens, but from other inmates as well” (p. 1261). In support of these statements, the court expressed the perception that psychological well-being is as significant as is corporal health. Indeed, the court opined that mental wellness “is a need as essential to a meaningful human existence as other basic physical demands our bodies may make for shelter, warmth or sanitation” (p. 1261). Additional statements emanating from the decision indicated that while conditions of confinement might be “restrictive and even harsh...,” “basic human need[s]” and “life’s basic necessities” (p. 1262) must be met and availed to those serving prison time, including those held in long-term disciplinary solitary confinement.

In the *Madrid* case, the conditions that met (or failed to meet) the “basic necessity of human existence” (p. 1263) constituted the core Eighth Amendment challenge. As the court reasoned:

“On the one hand, a condition that is sufficiently harmful to inmates or otherwise reprehensible to civilized society will at some point yield to constitutional constraints, even if the condition has some penological justification. Thus, defendants' insistence that the SHU is “working” as a secure environment for disruptive prisoners does not and cannot determine whether the SHU passes constitutional muster. No prison, for example, can deprive inmates of a basic human need, even though the underlying conditions might otherwise arguably promote some penological objective. On the other hand, a condition or other prison measure that has little or no penological value may offend constitutional values upon a lower showing of injury or harm” (pp. 1262-63).

However, as the court explained, "'psychological pain" that results from idleness in segregation is not sufficient to implicate the Eighth Amendment" (p. 1262), nor does the prohibition against cruel and unusual punishment "guarantee that inmates will not suffer some psychological effects from incarceration or segregation" (p. 1263).

Finally, the *Madrid* court articulated a perspective on what it deemed best for society. As a source for communicating jurisprudential intent, the opinion commented on how inmates who serve time in long-term disciplinary solitary confinement might nevertheless thrive once released from prison. As the legal opinion stipulated, "those who have transgressed the law are still fellow human beings – most of whom will one day return to society" (p. 1244). As such, "even those prisoners at the "bottom of the social heap...have, nonetheless, a human dignity" (p. 1244). Basing its rationale on the view that our nation "aspires to the highest standards of civilization," the court maintained that "there is simply no place for abuse and mistreatment, even in the darkest of jailhouse cells" (p. 1245). These comments disclosed the court's felt obligation to recognize the humaneness of incarcerates and responsibility to ensure that they were psychologically equipped to engage others in a pro-social manner should custodial release and community reentry follow.

Given these collective assertions, perceptions, and attitudes, the court did not extend the Eighth Amendment's prohibition against cruel and unusual punishment to all prisoners serving time in long-term disciplinary solitary confinement. Although mindful that "the conditions in the SHU [might] press the outer bounds of what most humans can psychologically tolerate" (p. 1267), the court communicated its intentions when stating that "the record does not satisfactorily demonstrate that there is a sufficiently high risk to all inmates of incurring a serious mental illness from exposure to conditions in the SHU to find that the conditions [themselves] constitute a per se deprivation of a basic necessity of life" (p. 1267). Consequently, the *Madrid* court ordered that only those inmates with preexisting mental health conditions must not be placed in long-term punitive segregation.

Data collected from the *Scarver v. Litscher* (2006) case also provided insight into underlying jurisprudential intent. Similar to the decision in *Madrid*, the *Scarver* court held a similar perception that "Federal judges must always be circumspect in imposing their ideas about civilized and effective prison administration on state prison officials" (p. 976), especially since judges "know little about the management of prisons" (p. 977). Statements made that **affirmed the trial court's decision** communicated the attitude that "managerial judgments generally are the province of other branches of government" (p. 977) and, furthermore, that "it is unseemly for federal courts to tell a state...how to run its prison system" (p. 977).

Mindful of the lack of judicial authority to determine and/or evaluate penal institutional administration, the court attempted to strike a "delicate balance" (p. 976) by stating that, "Prison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias beyond what is necessary for security" (p. 976). Following the rationale for the use of long-term disciplinary solitary confinement employed in the *Madrid* case, the *Scarver* court **affirmed the trial court's view that such** custodial placement was necessary, especially in curbing the behavior of extremely volatile inmates who either refuse to follow or are incapable of adhering to prison rules and regulations. *Scarver*, a diagnosed schizophrenic who murdered two fellow inmates while incarcerated, was perceived by the court as "extremely dangerous" (p. 973) and "undeterrable" (p. 976).

The court acknowledged the dearth of policies and programs designed to address the unique needs of both correctional administrators and inmates, like *Scarver*, who suffer from psychiatric illness and consistently violate prison rules. Revealing its intent, the court opined, "Maybe there is some well-known protocol for dealing with the *Scarvers* of this world, though probably there is not (we have found none, and his lawyer has pointed us to none)" (p. 976). Indeed, the *Scarver* case indicated that, "the treatment of a mentally ill

prisoner who also happens to have murdered two other inmates is much more complicated than the treatment of a harmless lunatic" (p. 976). Thus, while the conditions in a solitary confinement unit "disturb psychotics" (p. 974) like Scarver, the lower court's decision was nonetheless upheld. As the appellate case intimated, "It is a fair inference that conditions at Supermax aggravated the symptoms of his mental illness and by doing so inflicted severe physical and especially mental suffering" (p. 975). Ultimately, the *Scarver* court reasoned that while segregating the petitioner from fellow "inmates and staff...[might] unavoidably aggravate his psychosis...the measures [did] not violate the Constitution" (p. 976).

In the case of *Jones 'El v. Berge* (2004), the court's commentary regarding the placement of mentally ill incarcerates in long-term disciplinary segregation was based on its knowledge of the supermax prison. The court recognized that the "Supermax was built to respond to a perceived need by wardens" to house "dangerous and recalcitrant inmates" (p. 1103). Although the language of the legal opinion considered the assertion by correctional officials that, at times, prisoners "manipulate[d] staff" (p. 1118), the court reasoned that "this does not mean that they [incarcerates] are not seriously mentally ill" (p. 1118).

The rhetoric employed in the *Jones 'El* case indicated the court's acute awareness of how prolonged segregation might exacerbate the mental health conditions of inmates with preexisting diagnoses. To illustrate, the court stated that, "Supermax is known to cause severe psychiatric morbidity, disability, suffering and mortality" (p. 1101). Indeed, the court poignantly expressed concern and a resolute sense of motivation to act regarding the potentially cruel and unusual circumstances surrounding long-term disciplinary segregation. The following description of the correctional facility in the *Jones 'El* case conveys this attitude:

"Several features of Supermax are particularly damaging to inmates with serious mental illnesses. The almost total sensory deprivation in Levels One and Two is relentless: inmates are kept confined alone in their cells for all but four hours a

week. The exercise cell is devoid of equipment. The constant illumination is disorienting, as is the difficulty in knowing the time of day. The vestibule architecture and solid boxcar doors prevent any incidental interaction between inmates and guards" (p. 1118).

Like the ruling in *Madrid*, the *Jones 'El* court deliberated on whether confining incarcerated inmates in solitary confinement served a "legitimate penological interest" (p. 1117). In determining the reasonableness of prolonged segregation for inmates, the judicial opinion engaged in the weighing of relevant interests. That is, the court sought to ascertain a "balance of harms" in which the interests expressed through the testimony of supermax administrators were balanced against the interests stated by those suffering under the alleged cruel and unusual solitary confinement conditions. With respect to correctional officers, the court communicated a desire to "interfere" (p. 1125) only to a "minimal degree" (p. 1125) in the operation of the supermax facility. However, the court also revealed its unease with confining mentally ill prisoners in prolonged punitive segregation, and ultimately elucidated its intent in the following passage:

"Defendants assert that an order from this court requiring the transfer of seriously mentally ill inmates is not the least intrusive means of alleviating the problems the inmates are experiencing. Instead, defendants suggest, increasing the mental health staff would be a way to lessen the court's interference with prison management. I disagree. I am convinced that the staffing ratio is not the sole factor making up the potentially damaging conditions for mentally ill inmates; the physical architecture of Supermax and the customs and policies also contribute to the conditions" (pp. 1123-24).

The court's language disclosed a second balancing test. Similar to the *Madrid* and *Scarver* decisions, the *Jones' El* opinion undertook a review of competing interests in order to discern what would be of the greatest benefit to society. As the court noted, "the public

interest is not served by housing seriously mentally ill inmates at Supermax under conditions in which they risk irreparable emotional damage and, in some cases, a risk of death by suicide" (p. 1125). Affirming the intent revealed in the previous statement, the court concluded that, "the public interest will be served by protecting the Eighth Amendment rights of inmates housed at Supermax" (p. 1125).

Although the decision in the *Jones 'El* case confirmed that conditions in the supermax facility were a factor in the deterioration of psychologically disordered inmates, the court was also fully aware of its restricted influence on prison management. Specifically, the "Prison Litigation Reform Act limits the scope of preliminary injunctive relief available in challenges to prison conditions" (p. 1116). As such, the Act provides no basis for a court to significantly impose correctional policy changes. Mindful of this, the *Jones 'El* court ordered that only incarcerates suffering from diagnosed mental health conditions were protected under the prohibition of cruel and unusual punishment, as delineated by the Eighth Amendment. Consistent with this perspective, the legal opinion stipulated: "Supermax was designed to house especially disruptive and recalcitrant prisoners but not mentally ill ones" (p. 1118). Thus, while the decision in *Jones 'El* recognized that correctional administrators "should be afforded due deference," the court concluded that "it does not overstep these bounds to order that [prisoners] not be housed at Supermax" (p. 1124)

Consistent with previous Eighth Amendment cases involving long-term disciplinary solitary confinement and mentally ill incarcerates, an evaluation of the plain meaning of the legal language found in the *Goff* case revealed its underlying jurisprudential intent. In ascertaining whether *Goff* was capable of invoking protection from overtly harsh prison conditions, the court cited the Eighth Amendment standards set forth in several Supreme Court decisions. This undertaking conveyed the *Goff* court's perception of what constitutes cruel and unusual punishment, and how a legal tribunal must act when presented with such circumstances. As the court opined:

"Justice Douglas's pronouncement that, "The Eighth Amendment expresses the revulsion of civilized man against barbarous acts – the 'cry of horror' against man's inhumanity to his fellow man." Along these same lines, Justice Brennan described a court's duty in Eighth Amendment cases as the need to determine "whether a challenged punishment comports with human dignity" (pp. 111-12).

The rhetoric employed in the *Goff* ruling articulated a duty to provide "great deference to the expertise of the officials who perform the always difficult and often thankless task of running a prison" (p. 153). Supporting this statement, the legal opinion reasoned that "The Court does not pretend that it knows more than the men and women who run the Penitentiary" (p. 153), and, accordingly, "is not attempting to run or micromanage the prisons" (p. 157). Although the court intimated that it "could have easily taken the position that a hands-off position as to these violations [was] the only way to go based on today's law-and-order mentality" (p. 156), it ultimately disagreed with this perspective. Instead, underlying jurisprudential intent was made evident in the assertion that, "the Court's job is only to identify constitutional violations if any exist" (p. 153).

Similar to previous judicial rulings on the subject, the *Goff* court expressed concern for the lack of programs available to mentally ill inmates in solitary confinement. For example, commenting on testimony related to the prison's failure to meet the distinct needs of incarcerates with psychological disorders, the legal opinion observed that:

"...there is a great demand for a special needs program at the Penitentiary which can handle maximum security inmates. The Court also found Dr. Loeffelholz has expressed this professional opinion to his bosses (presumably the director of the Iowa Department of Corrections) but no action has been taken. Then-Warden Acevedo, testified that the Illinois Department of Corrections, his immediate past employer, had special needs programs such as separate wings of prisons devoted to taking care of inmates with mental problems, that were far superior to those

established by the Iowa Department of Corrections. He said, when a facility devotes itself exclusively to taking care of mentally ill patients, it can provide much better psychiatric care" (p. 118).

In consideration of this testimony, the court reasoned that "The State has had opportunities to rectify or partially rectify the situation and has done nothing" (p. 156). In addition to the court's attitude conveyed through this statement, the language of the decision communicated an intention to hold correctional administrators responsible for their "deliberate indifference" (p. 113) with respect to the mental health status of prisons. The *Goff* court was "unpersuaded" (p. 153) that the "extraordinary long lockup sentences" (p. 153) and the considerably "small size of the cells in which lockup inmates serve twenty-three or twenty-four hours a day" (p. 153) constituted an Eighth Amendment violation. However, it did indicate that psychologically disordered incarcerates were not suited for confinement in segregation. As such, the *Goff* court concluded that "inmates with mental health disorders at ISP [Illinois Supermax Prison] who are not receiving treatment for their needs, are being held under conditions which violate the Eighth Amendment" (p. 120).

A review of the data extracted from the *Vasquez v. Frank* (2006) case revealed the court's knowledge of the debilitating effects isolation poses for inmates with preexisting mental health conditions, especially as discussed in those cases previously subjected to textual exegeses. The court's rhetoric communicated a concern for certain conditions in solitary confinement units, such as continuously illuminated cells, that "may inflict severe suffering on mentally ill inmates" (p. 541). In this instance, the appellate court acknowledged that Vasquez "suffers from emotional distress, depression, anxiety, and "other psychological problems" (p. 540). While in segregation, Vasquez's cell "was illuminated 24 hours a day. Although he was able to lower the lighting, he could not turn it off completely. [Vasquez] allege[d] that the constant illumination aggravated his mental

illness and caused him to suffer from insomnia, migraines, eye pain, and blurry vision” (p. 540).

Citing the lower court’s ruling, the *Vasquez* judicial opinion asserted that petitioner’s “allegations about the lighting and air quality in his cell [were] not so fantastical that the district court could dismiss them out of hand” (p. 540). Moreover, even though “a district court [might] strongly suspect that an inmate's claims lack merit...[this] is not a legitimate ground for dismissal” (p. 540). Similar to the previous cases analyzed thus far in the data set, the *Vasquez* decision elucidated the standard by which jurists must determine an Eighth Amendment violation. As the court opined, “prison officials violate the Eighth Amendment when they deliberately ignore a serious medical condition...or create ‘an unreasonable risk of serious damage’ to an inmate's future health” (p. 540).

In determining whether correctional administrators subjected Vasquez to cruel and unusual conditions of confinement, the court considered the extent to which management officials were cognizant of his psychological maladies. As the court noted, Vasquez “filed grievances and told medical personnel about these conditions, but prison personnel did not rectify the problem for over three years” (p. 540). The *Vasquez* court further asserted that “Prison officials were aware of these adverse reactions” (p. 541), but failed to respond appropriately. As such, petitioner’s claims that the segregation conditions exacerbated his mental illness were deemed meritorious.

In *Torres et al. v. Commissioner of Correction et al.* (1998), the court affirmed the trial court’s decision. The opinion of the court was consistent with previously analyzed cases regarding the perceived role of the judiciary in matters related to Eighth Amendment challenges and mentally ill prisoners in long-term segregation. However, unlike these earlier cases, the *Torres et al.* court limited its scope of analysis to the testimony of mental health professionals. This included witness evidence from Dr. Stuart Grassian, who offered his expert testimony on the deleterious effects of prolonged punitive segregation in the

Madrid case. Departing from the ruling in these respective cases, the *Torres et al.* court reasoned that, "expert opinion regarding what constitutes cruel and unusual punishment is entitled to little weight" (p. 614). Indeed, the court explicitly delineated its position by stating that, "whether prison conditions are sufficiently harmful to establish an Eighth Amendment violation, is a purely legal determination for the court to make" (p. 614).

However, following the *Madrid*, *Scarver*, *Jones 'El*, *Goff*, and *Vasquez* rulings, the *Torres et al.* court established the standard that must be met in order to succeed on an Eighth Amendment challenge. Utilizing a two-prong test, the court noted that the "plaintiff-inmate" must demonstrate that the "conditions of confinement presented "a substantial risk of serious harm" and that correctional officers "acted with "deliberate indifference" to prisoner safety and well-being (pp. 613-14). Further, the opinion of the *Torres et al.* court was informed by previous decisions made by both the U.S. Court of Appeals and the presiding court on Eighth Amendment challenges raised by incarcerates alleging psychological harm stemming from the conditions of their confinement. Consider the following passage found in the *Torres et al.* decision:

"As the United States Court of Appeals for the First Circuit has observed, 'federal appellate decisions during the past decade which have focused on the factor of segregated confinement and lack of inmate contact reveals to us a widely shared disinclination to declare even very lengthy periods of segregated confinement beyond the pale of minimally civilized conduct on the part of prison authorities. Similarly, in *Libby v. Commissioner of Correction*, 385 Mass. 421, 431, 432 N.E.2d 486 (1982), we held that a prison isolation unit whose conditions were more restrictive than those in DDU [Department Disciplinary Unit] did not offend the Eighth Amendment because its inmates were provided adequate food, clothing, sanitation, medical care, and communication with others' *Libby*, 385 Mass. at 431-432. The isolation and

loneliness of which the plaintiffs complain, we concluded, is not in and of itself unconstitutional" (p. 615).

Relying primarily on previous rulings, the *Torres et al.* court affirmed the lower court's decision. In this instance, the harsh conditions claimed by the plaintiff-inmates were balanced against those asserted in the case of *Libby v. Commissioner of Correction* (1982). This judicial opinion reasoned that, "If conditions of confinement [that were] harsher than those posed by DDU did not offend the Eighth Amendment, it follows that DDU's confinement is likewise constitutional" (p. 615). As such, the *Torres et al.* court based its opinion on the fact that the "only arguable dispute" concerns the "extent to which these conditions generally caused inmates' psychological problems" (p. 614). As a result, the court determined that "The judge's findings and the parties' stipulation demonstrate that DDU confinement, while uncomfortable, is a far cry from... 'barbaric' conditions" (p. 617), and that the "judge acted properly in allowing the defendants' motion for summary judgment" (p. 615).

Level 2 Analysis

After the data obtained from each of the six cases were examined for purposes of delineating unstated jurisprudential intent, the second level of analysis was the focus of qualitative scrutiny (see Appendix B).¹⁶ This second and more textual stage entailed an interpretation of the legal language (manifest content) itself, and the underlying ethical meaning communicated through and embedded within the words and/or phrases that constituted the level 1 data. In other words, "the goal of this [subsequent] inquiry was to determine what moral philosophy was conveyed through jurisprudential intent, mindful of the three ethical schools of thought under consideration as well as their corresponding principles" (Sellers & Arrigo, 2009, p. 471).¹⁷

A review of the phraseology employed in the *Madrid* decision revealed the court's orientation toward consequentialism and its variant utilitarianism. The following passage is illustrative of the court's weighing of interests:

"Conditions may be harsher than necessary to accommodate the needs of the institution with respect to these populations. However, giving defendants the wide-ranging deference they are owed in these matters, we can not say that the conditions overall lack any penological justification" (p. 1263).

Central to the philosophy of utilitarianism is the notion of consequences in choice-making and action that advance the greatest happiness or interests for the greatest number of citizens (e.g., Bank, 2008; Cahn, 2009; Mill, 1957). Consistent with this ethical reasoning, the *Madrid* court expressed concern for the conditions of disciplinary solitary confinement units, especially if excessively severe ("harsher than necessary"), potentially impacting adversely incarcerates suffering from preexisting psychological disorders. However, the court was also cognizant of the need to afford great discretion to prison administrators ("wide-ranging deference") in determining policies and procedures essential to effectively managing penal institutions. Thus, the manifest content communicated the court's utilitarian ethic of balancing the mental well-being of incarcerates against the rights of prison administrators, in order to promote the greatest happiness for and interests of the majority of individuals affected by the ruling.

The manifest content discernable in the *Madrid* court's rhetoric aligned with a second moral philosophy. Words and phrases employed in the court's decision were consistent with the logic of formalism and, in particular, Kantian ethics. As noted previously, ethical formalism is based on moral duty. Mindful of this dimension of Kantian philosophy, statements such as "duty and responsibility of this Court to ensure that constitutional rights are fully vindicated" (p. 1263) and "duty to assume some responsibility" (p. 1245) explicitly conveyed the *Madrid* court's ethical commitment to uphold both a legal *and* moral

obligation. Moreover, other statements such as, "prisoners...have, nonetheless, a human dignity" (p. 1244) and "must ensure that prisons...do not degenerate into places that violate basic standards of decency and humanity" (p. 1245), were consistent with the Kantian maxim that all individuals are deserving of dignity. Accordingly, when subjecting the manifest content located in the *Madrid* decision to level 2 textual exegeses, both utilitarian and Kantian reasoning informed the court's jurisprudential intent.

Similar to the *Madrid* ruling, the manifest content found in the *Scarver v. Litscher* (2006) decision advanced the consequentialist perspective of utilitarianism. Specifically, the case attempted to strike a "delicate balance" (p. 976) between the competing interests of correctional administrators and incarcerated. As the court declared, "Prison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias beyond what is necessary for security" (p. 976). Endorsing the utilitarian objective of achieving the greatest good for the largest possible constituency, the court sought to "protect other inmates or guards from Scarver or Scarver from himself" (p. 977). Thus, informing the case's jurisprudential intent was an ethic that endeavored to reach a decision based on an assessment of what was deemed in the best interest of those employed by and serving time in the supermax prison, including Scarver himself.

The rhetoric employed by the court in the *Jones 'El v. Berge* (2004) case was also reviewed to determine its underlying moral philosophy. Interestingly, similar to the *Madrid* opinion, the *Jones 'El* court embraced both utilitarian and formalistic ethical principles in its manifest content. To illustrate, the court engaged in a "balancing of harms" (p. 1123). Statements, such as "the court interferes in the management of Supermax to a minimal degree yet casts the net wide enough to catch any seriously mentally ill inmates" (p. 1125) reflected some consideration of competing interests. On the one hand, the court sought to afford deference to Supermax administrators; on the other hand, the court recognized the

psychological welfare of inmates. In other instances, the rights of incarcerates were measured against societal protection. Illustrative of this point are the following passages: "the public interest is not served by housing seriously mentally ill inmates at Supermax" (p. 1125) and "the public interest will be served by protecting the Eighth Amendment rights of inmates" (p. 1125). As manifest content, these statements indicated a utilitarian approach that endeavored to ensure the greatest happiness for the greatest number of people.

Elsewhere, the *Jones 'El* court also appropriated legal language consistent with formalist ethics. Consider the following phrase: "defendants should be afforded due deference" (p. 1124). The notion of availing to one that which one is due reflects judicial obligation to honor prison administration rights. This interpretation is consistent with comparable studies involving textual analyses of court opinions (Sellers & Arrigo, 2009).

A textual evaluation of the legal rhetoric expressed in the *Goff* opinion signifies that the case was guided by consequentialist and formalist logic. For example, the court stated that its goal was to "serve justice with a minimum of judicial intervention and provide prison officials with the maximum possible discretion to manage their own institution" (pp. 155-56). This manifest content is indicative of an interest-balancing argument in which the need to remedy a potential Eighth Amendment violation was weighed against the need to respect those who create and implement prison policies. When interpreted ethically, the underlying meaning situated within this legal language is made evident. Although the court wanted to ensure that inmates were lawfully protected from cruel and unusual punishment, it sought to limit its imposition on the rights and interests of correctional administrators.

In addition to utilitarian principles informing the *Goff* court's jurisprudential intent, a formalistic orientation was also apparent. Indeed, the manifest content revealed the court's perceived obligations regarding prisoners with preexisting mental health conditions placed in long-term disciplinary solitary confinement. As the case opinion stipulated, "[T]he Court's job is only to identify constitutional violations if any exist; it is in the province of the

Penitentiary's officials to attend to those violations" (p. 153). Similar to *Madrid, Scarver*, and *Jones 'El*, the *Goff* court expressed a duty to demonstrate "great deference to the expertise of the officials...running a prison" (p. 153). Consistent with the Kantian maxim of ensuring that all individuals are afforded a sense of dignity, the legal decision stated that, "a court's duty in Eighth Amendment cases [is] to determine "whether a challenged punishment comports with human dignity" (pp. 111-12). As previously noted, textual exegeses of this manifest content endorse Kantian ethics.

In the *Torres et al.* ruling, the court conveyed its reliance on consequentialist thinking. As with the other cases comprising the data set, the *Torres et al.* court focused on whether correctional officers denied inmates their basic necessities of life, including psychological wellness. Once again, the manifest content signified a commitment to interest-balancing in which the rights of incarcerates were assessed in relation to the rights of prison administrators. As the judicial opinion explained, "conditions...more restrictive than those in DDU did not offend the Eighth Amendment because its inmates were provided adequate food, clothing, sanitation, medical care, and communication with others" (p. 615).

The *Torres et al.* decision also relied on legal rhetoric that, when interpreted ethically, indicated that formalist principles informed the court's underlying jurisprudential intent. While *Madrid, Scarver, Jones 'El*, and *Goff* discussed a duty to show deference to penal institution administrators, the *Torres et al.* court expressed its primary obligation differently. Specifically, the case opinion declared that, "whether prison conditions are sufficiently harmful to establish an Eighth Amendment violation, is a purely legal determination for the court to make" (p. 614). The conviction in *Torres et al.* that the judiciary bears sole responsibility for such legal determinations is consistent with the notion of duty as found in formalist thought.

Having subjected the six cases that constitute the data set to additional textual exegeses, the results indicate that the courts' underlying jurisprudential intent was informed

by the philosophies of consequentialism (including its variant utilitarianism) and ethical formalism (including its variant Kantian moral reasoning). Intra-textually, consequentialism and the utilitarian perspective were most prominent in the cases of *Jones 'El* and *Scarver*. Multiple examples of interest-balancing or comparable rhetoric were discerned from these legal opinions. In contrast, the *Madrid and Goff* courts were intra-textually more closely associated with formalism and Kantian ethics. The courts' language communicated numerous instances of this underlying ethical rationale; conversely, only one instance of utilitarian thinking was found in each of these two cases. The underlying moral philosophy informing the jurisprudential intent of *Torres et al.* endorsed utilitarianism and Kantian ethics. One example of each type of ethical reasoning was detected vis-à-vis the interpretive, though systematic, methodology.

Inter-textually, each of the legal opinions engaged in interest-balancing arguments intended to promote the greatest good for the greatest number of individuals affected by the courts' decision-making rhetoric. Moreover, in several other notable instances, the manifest content significantly aligned inter-textually with formalism and its variant, Kantian ethics. Indeed, underscoring the jurisprudential intent of all the legal opinions but *Scarver* was an obligation to uphold a particular duty to correctional administrators, to inmates, or to both.

Thus, the textual analyses performed within and across the six cases involving: (1) Eighth Amendment challenges; (2) raised by incarcerates with preexisting mental health conditions; (3) confined in long-term disciplinary solitary confinement yielded compelling ethical findings. In short, the predominant moral reasoning situated within the courts' jurisprudential intent advanced philosophical principles emanating from utilitarianism and Kantian formalism.

IMPLICATIONS AND CONCLUSION

This qualitative study critically explored the extant case law regarding Eighth Amendment challenges raised by inmates with preexisting mental health conditions serving time in prolonged disciplinary solitary confinement. In order to determine the courts' rationale, two levels of analyses were performed. The first level involved an examination of plain meaning that was educible from six judicial opinions. A series of seven questions were put to each of the cases. These queries allowed for an extraction of data from the legal language itself in the form of key terms and/or phrases that revealed underlying jurisprudential intent. After eliciting this pertinent information, the second level of analysis was performed. This additional stage, more textual in nature, resituated the courts' specific words or phrases within their respective contexts, filtering them through prevailing moral philosophy as a way to ascertain the ethical reasoning embedded in the courts rhetoric.

The results indicated that principles traceable to utilitarian and Kantian moral philosophy informed the courts' decision-making logic. Specifically, within each case and across the decisions, an ethic of interest-balancing was employed wherein the needs of correctional administrators and the public were weighed against the rights of individual prisoners. In other words, the legal opinions constituting this study's data set overwhelmingly sought the greater good for the majority (penal officials and society) over the minority (psychiatrically disordered inmates). Additionally, underscoring the courts' jurisprudential intent was a commitment to upholding a duty as delineated by Kantian ethics. In some instances, the bench expressed an obligation to defer to correctional administrators in their respective roles as prison managers. In other instances, the bench endorsed a deontological duty to ensure that incarcerates benefited from the dignity that they deserved as human beings, notwithstanding their segregation from society and/or from others criminally confined.

The qualitative findings also showed that legal tribunals largely disregard the social and behavioral science literature on inmate mental health, solitary confinement, and the potentially cruel and unusual conditions of long-term punitive isolation. Moreover, the preceding exegetical analysis revealed that the underlying ethical reasoning that informs judicial decision-making concerning mentally ill offenders subjected to protracted disciplinary solitary confinement is inadequate. This is because virtue-based moral philosophy does not underscore, does not anchor, the jurisprudential intent of the court.

While these results are significant, the research is not without several limitations. First, because this investigation explored a narrowly conceived (though clearly relevant) law and psychology issue, the sample of cases was relatively small (N=6). Thus, findings based on these judicial opinions raise questions about generalizability. Second, the legal decisions under review were rendered by district and appellate courts. Opinions delivered in the lower courts typically are not considered precedent-setting (e.g., Hall & Wright, 2008; Harvard Law Review, 2008; Perlin & Dlugacz, 2008; Weidman, 2004). Nevertheless, the decisions chosen for inclusion represented the *prevailing* case law that most fully revealed the courts' statements on the matter of Eighth Amendment challenges for prisoners with preexisting mental health conditions placed in long-term disciplinary solitary confinement. Third, no statutory analysis was undertaken to determine legislative intent. Arguably, an assessment of such data would contribute to a more comprehensive understanding of the courts' fundamental intent and the moral logic conveyed through its jurisprudence. Fourth, the research methodology was largely experimental. However, as Sellers and Arrigo (2009) noted in response to the novelty of their own method on which the present study was based, "concerns over whether various types of quantitative analyses of the law would yield similar findings warrant future [research] attention" (p.476). Along these lines, subsequent empirical investigations might entail the construction of a survey instrument administered to judges. The instrument would elicit information on the moral philosophy that jurists claimed

informed their decision-making when deliberating on the issue of psychiatrically disordered prisoners confined to punitive isolation for protracted periods.¹⁸ These self-report data would then be compared against the actual narrative construction of the respective judicial opinions (i.e., jurisprudential intent discerned from plain meaning; moral reasoning ascertained through this intent).

A fifth limitation attaches more generally to virtue ethics as addressed in the present inquiry. Specifically, MacIntyre (2007) questioned whether who we are inherently denies our effort to develop habits of character. Thus, as he warned, "Where virtues are required...vices may also flourish" (p. 193). Guided by the overwhelming statistical evidence emanating from cognitive neuroscience, MacIntyre reasoned that we cannot cultivate excellence in being, especially since viciousness and mean-spiritedness seemingly prevail in the "Dark Age" of contemporary society and in its social systems (p. 263). Whether it is possible to rise above our wicked inclinations is, most assuredly, debatable. However, when considering the complex and compelling ethical concerns surrounding inmate mental health and solitary confinement, the question is not whether our nature betrays our efforts to develop moral character. Rather, the question is whether we should, nevertheless, aspire to embody virtue. Accordingly, the *potential* implied by Aristotle's moral philosophy was deemed significant for purposes of analyzing and critiquing the relevant case law.

Despite these shortcomings, the results drew attention to a number of pressing and unambiguous matters regarding mentally ill offenders and prolonged punitive isolation. First, although the manifest content of the courts' opinions indicated, to varying degrees, a concern for the psychological well-being of incarcerates, the findings showed that legal tribunals largely disregard the empirical literature when determining Eighth Amendment violations alleged by psychiatrically disordered prisoners in long-term disciplinary solitary confinement. Second, the court opinions stipulated that incarcerates who sought protection from so-called cruel and unusual isolative conditions were so confined because they were a

threat to the correctional milieu as much as to society. Third, the case opinions specified that inmates did not enjoy the same protections and liberties that were afforded to non-prisoners presenting a complaint before the bench. As such, the courts' primary concern focused on the safety of society and the security of penal institutions. Fourth, the respective courts relied on prescribed standards when determining whether confinement conditions should be deemed cruel and unusual. In doing so, their obligation was to adhere to the legal protocol established for Eighth Amendment cases rather than to consider if placement in extreme solitude could reasonably be construed as inhumane. Fifth, overall, the judicial opinions demonstrated a concern for empirical research and expert witness testimony regarding the inability of mentally ill offenders to conform their behavior in such a way that they could, essentially, earn their way out of isolation. However, the case opinions failed to acknowledge the assorted adjustment deficits psychiatrically disordered inmates struggle to overcome. These deficiencies include compliance problems with the rules of isolation units and supermax prisons, as well as transfer difficulties when returned to the general prison population and community reentry impediments following their release back into society (Fellner, 2006; Haney, 2003; Kupers, 2008; Lovell et al., 2007; Rebman, 1999; Rhodes, 2004; Weidman, 2004).

Thus, as this qualitative and interpretive study demonstrated, the courts endorsed an order-maintenance approach and, as such, advanced the needs of an organized society. However, the case decisions woefully failed to address the concerns raised by the social and behavioral science literature regarding psychiatrically disordered prisoners subsequently placed in prolonged disciplinary solitary confinement. Perhaps this critical finding furthers the position that mentally ill offenders are not suited for isolation or any other type of strictly punitive confinement (e.g., Fellner, 2006; Haney, 2003; Johnson, 2002; King et al., 2008), especially when the psychosocial attention they so desperately need is denied to them. This is stimulation that enables incarcerates to retain a sense of autonomy, to

improve mental well-being, and to interact productively with others (Arrigo & Bullock, 2008).¹⁹

The criminal justice system seeks to ensure the protection and welfare of its citizens. However, the validity of this notion must be assessed in relation to how the legal edifice effectively achieves that which it intends for *all* societal members. As the foregoing inquiry suggested, the judicial apparatus is not addressing the specific needs of incarcerated offenders with preexisting mental health conditions. As such, policies delineated to ensure that “the greater good” is realized must be reevaluated. Indeed, this “deeper level of investigation entails a re-assessment of the moral philosophy through which the court’s logic could be communicated, mindful of the more current trends in the law-psychology-justice sub-field, and as developed in psychological jurisprudence” (Sellers & Arrigo, 2009, p. 477).

Inmate Mental Health and Solitary Confinement: A Preliminary Law-Psychology-and-Justice Perspective

The moral philosophy of utilitarianism and Kantian formalism inform the prevailing Eighth Amendment cases involving mentally ill prisoners placed in protracted disciplinary isolation. Reflecting the legal system’s long-held perception that its role is to safeguard citizens and to promote their moral rights, these ethical stances disregard the notion that “the proper end of the law is [the] promotion of human flourishing” (Farrelly & Solum, 2008, p. 2). Rather than enabling offenders to pursue lives of excellence, the prescribed response of confining them in segregated units – where social interaction and mental stimulation are minimal – all but eliminates the possibility that they will learn how to engage others in a constructive manner that is consistent with a correctional institution’s rules and with society’s expectations.

Indeed, as noted previously, a moral logic steeped in utilitarian principles is problematic in that the needs of some individuals are subjectively perceived as more worthy than those of others. As Leighton and Reiman asserted, "If...morality requires that individuals be treated in certain ways no matter how many others may profit from their mistreatment, then utilitarianism seems to miss something crucial about morality" (2001, p. 7). A utilitarian ethic endorses, if not requires, that the interests of some be wholly neglected and/or disregarded. Determining the value of an individual according to their ability to contribute to the satisfaction of the majority is inherently troubling.

Moreover, relying upon deontological principles is equally distressing. While treating others with unqualified dignity is fundamental, decisions made about the welfare of citizens based on prescribed duties primarily fails to acknowledge, let alone account for, the complexity of being human. As Mossman (2006) explained, Kant "informs us about what sorts of interactions we may have with others in an ideal realm where everyone acts justly. But to figure out how to act in the real world, we must contend with the fact that not everyone will comply with rules" (p. 600). Thus, judicial decision-making that relies chiefly upon utilitarian and deontological reasoning both legitimizes and ensures that the distinct needs of vulnerable populations, particularly mentally ill offenders, will not be met.

Although not without its noted shortcomings, virtue ethics endeavors to see that *all* individuals are valued and encouraged to thrive. As Aristotle (1998) asserted, people are social beings. Long-term disciplinary solitary confinement denies prisoners that which is within their nature: The fundamental need to connect with other humans. Thus, while courts may reason that an isolated and mentally disordered inmate's "basic life necessities" are met while in isolative care, their longing for affirmative interaction is not met. Indeed, as Haney (2009) explained,

"because so much of our individual identity is socially constructed and maintained, the virtually complete loss of genuine forms of social contact and the absence of

routine and recurring opportunities to ground thoughts and feelings in recognizable human contexts is not only painful but also personally destabilizing. This is precisely why long-term isolated prisoners are literally at risk of losing their grasp on who they are, of how and why they are connected to a larger social world" (p. 16).

While this perilous prospect unquestionably threatens the well-being of inmates without preexisting mental health conditions, it profoundly endangers those with psychiatric disorders who consistently struggle to maintain a sense of self and of place in society. Furthermore, it makes the promise of being able to do so for these individuals all but unattainable. As a result, significant confinement and recidivism problems persist (Briggs et al., 2003; Elsner, 2004; Gagliardi et al., 2004; Lovell et al., 2007; Pizarro & Stenius, 2004; Rhodes, 2005). Accordingly, the security of society and the well-being of its citizenry are, at best, dubious.

If virtue-based ethics are to underscore the decision-making of legal tribunals, it follows, then, that proposed resolutions must enable all individuals involved to flourish (Farrelly & Solum, 2008, p. 16). Further, as Solum (2008) noted, judges must become "fully virtuous agent[s]" (p. 190). That is, they must promote an excellence in being for offenders, rather than strictly adhering to prescribed legal protocols or acting in deference to social norms (see also, Chappell, 2006). In order to move beyond the utilitarian and deontological reasoning that engulfs judicial decision-making, an alternative jurisprudence must be explored.

Mindful of the principles espoused by virtue ethics, PJ raises the issue of "whether something more, or something better can (and should) be done for all parties" (Sellers & Arrigo, 2009, p. 478). Within its domain, the practices of therapeutic jurisprudence, restorative justice, and commonsense justice all promote the law-psychology-justice agenda and, as such, support an integrity-oriented morality. In what follows, key practices stemming from these three PJ principles are applied to the dilemma of psychiatrically

disordered prisoners and solitary confinement. The aim of this exposition is to provisionally delineate an alternative ethic to juridical decision-making that meaningfully endeavors to reconnect offenders, their victims, and the communities that bind them, in ways that enable excellence in character for all.

As noted previously, therapeutic jurisprudence draws "attention [to] the emotional well-being of those who come into contact with law and the legal system" (Winick, 2007, p. 1; see also Winick & Wexler, 2003, 2006). Thus, its practice relies on the role that the actors within the system (e.g., judges, attorneys) can assume so that they can act therapeutically. As Winick (2007) suggested, "when consistent with other justice values, the law's potential for increasing emotional well-being of the individual and society as a whole will be increased" (p. 1). Indeed, as he and his colleague Wexler asserted, the current criminal justice system is antitherapeutic in nature and engenders harm (2006, pp. 605-606).

In order to maximize the potential for salubrious outcomes, an ethic of care must be adopted (Winick & Wexler, 2006). Care ethics emphasizes "relationships, situational and contextual factors, and the unique needs and interests of affected parties as key considerations in the face of conflicts and dilemmas" (Williams & Arrigo, 2008, p. 262). This approach requires jurists to embody a "judge-as-counselor" role and to "know the defendant, consider her or his life circumstances and motives, and take these into consideration when making a ruling" (Williams & Arrigo, 2008, p. 265; see also Strang & Braithwaite, 2001; Winick & Wexler, 2006). By doing so, virtues such as empathy, benevolence, and tolerance supersede the need to weigh competing interests or rigidly uphold duties that could subsequently result in greater injury (Bernstein & Gilligan, 1990; Noddings, 2003). Thus, this care ethic "is a form of substantive justice" in which legal decision-brokers "cultivate a sense of otherness" (Arrigo & Milovanovic, 2009, p. 69).

When practiced as described above, therapeutic jurisprudence makes salubrious outcomes possible for psychiatrically disordered offenders (Wexler, 2008). To ensure that judges and attorneys have the skills necessary to respond appropriately to mentally ill prisoners, psychologists of law must provide counseling advice and clinical training to justice professionals (Winick & Wexler, 2003). Under these conditions, an approach based on the insights of therapeutic jurisprudence yields a response to harm absent the prescribed punitive confinement resolution. Instead, its care ethic stresses a "readiness for rehabilitation" (Wexler, 2008, p. 169) as a more effective way to address the emotional needs of the mentally ill incarcerate. In this way, the offender is afforded an increased opportunity to develop moral character so vital to curbing persistent criminal behavior that often leads to prison management concerns, at times resulting in protracted placement in a solitary confinement unit.

As Hancock and Sharp (2004) noted, "It is important to bear in mind that penal sanctions, like crimes, are intended harms" (p. 398). Thus, as opposed to a strictly retributive response to crime, restorative justice seeks to acknowledge the injury resulting from an offense and, essentially, to repair those individuals affected by it. Its practice is to challenge the "character of justice" as delineated by the State (Bayley, 2001, p. 211). In other words, a restorative strategy contests the legal system's prescription of how and for whom justice is served. Moreover, as Bayley asserted, the perception of justice advanced by an organized society's legal edifice is one in which attorneys stand guard, codified rules instruct judges and juries on determining a defendant's guilt or innocence, and an appeal is a reasonable avenue through which those alleging a wrongful conviction have recourse (2001, p. 211). However, while the system is consumed with preserving a "just order," restorative justice enables a community to nurture a "just peace" (Strang & Braithwaite, 2001, p. 14; cf., Arrigo & Milovanovic, 2009, pp. 42-44). In other words, it endeavors not only to heal the relationship between the offender and victim, but also to reinstate the

moral equilibrium of a community (Braswell et al., 2001, p. 141; see also Sullivan & Tifft, 2005; Van Ness & Heetdirks Strong, 2007). As Quinney (1991) noted:

“crime is suffering and...the ending of crime is possible only with the ending of suffering. And the ending both of suffering and of crime, which is the establishing of justice, can come only out of peace, out of a peace that is spiritually grounded in our very being. To eliminate crime – to end the construction and perpetuation of an existence that makes crime possible – requires a transformation of our human being” (pp. 11-12).

In contrast to restoration, the current response to crime leaves psychiatrically disordered inmates feeling “alienated, more damaged, disrespected, disempowered, less safe and less cooperative with society” (Braswell et al, 2001, p. 142; see also Christie, 1981). This is particularly problematic for such offenders. Not only are they isolated socially (and, at times, physically) from others, they effectively feel detached from the dynamics of their own being as their mental states fluctuate or progressively deteriorate beyond their control (Arrigo, 2002b; Haney, 2003; Rhodes, 2004). Thus, rather than further disaffecting and stigmatizing incarcerates with (preexisting) mental health issues, restorative justice offers a pro-social alternative.²⁰ Further, as Van Ness and Heetdirks Strong (2007) noted, engaging offenders in healing efforts may also encourage the community to become more active in determining and abating some of the social and economic barriers that contribute to (neighborhood) criminality. In this respect, then, the needs of psychologically disordered individuals, those they injure, and the milieus they all inhabit are more completely addressed.

Commenting on the relationship between restorative and community justice, Presser (2004, p. 105) remarked: “Crime fundamentally silences, justice gives voice.” Thus, commonsense justice, as described and advocated by Finkel (1995), seeks to inject public sentiment into the juridical decision-making process. Offenders with psychological health

conditions are often presented in court as dangerous and irascible, warranting confinement and sometimes placement in an isolation unit or a supermax facility. Without question, untreated mental disorders can facilitate risk-taking and violent behavior, deeply affecting the ability of those afflicted to conform to societal and institutional rules. However, a PJ approach informed by the logic of commonsense justice offers a considerable remedy. Where restorative justice endeavors to dialogically connect the offender, the offended, and their community, commonsense justice encourages all parties in dispute to adopt a resolution that they deem fair and just (Finkel 1997, 2000).

Indeed, through interventions such as victim-offender mediation, restorative justice provides a critical opportunity for all aggrieved citizens to heal through an interactive and reparative exchange where felt harm is voiced candidly, where lived injury is acknowledged remorsefully, and where this mutuality is embraced respectfully, mercifully, and forgivingly (Arrigo & Schehr, 1998; Braithwaite, 2002; Presser, 2004). This healing dialogue, when guided by public sentiment that re-engages "the conscience of the community" (Sellers & Arrigo, 2009 p. 480), challenges the necessity for retributive responses such as solitary confinement. Instead, as an integrative and applied expression of psychological jurisprudence steeped in the moral philosophy of virtue, commonsense justice as proposed here enables legal tribunals to render decisions that are as salubrious as they are reparative; that are as fair-minded as they are empathic.

Efforts to translate theory into meaningful public policy undoubtedly are challenging. While retributive responses remain the prescribed recourse, the question lingers whether something more salutary in nature can be done for offenders with mental health conditions serving time in long-term disciplinary solitary confinement. Along these lines, the preamble to the 19th century Philadelphia Society for Alleviating the Miseries of Public Prisons suggested the following:

“When we reflect upon the miseries [seen in prisons]...it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries. By the aids of humanity, their undue and illegal sufferings may be prevented...and such degrees and modes of punishment may be discovered and suggested, as may, instead of continuing habits of vice, become the means of restoring our fellow creatures to virtue and happiness” (Vaux, 1826 as cited in Craig, 2004, p. 938).

When reviewing law and psychology matters such as inmate mental health and solitary confinement, the legal reasoning employed by the courts demands critical reexamination. As demonstrated by this qualitative study, the jurisprudential intent discernable through the courts’ decision-making conveys an unmistakable reliance on utilitarianism and Kantian formalism. The prevailing case law aspires to achieve a “greater good” in which the interests of society (and its correctional apparatus) supersede the mental health concerns of prisoners in prolonged punitive isolation. Moreover, the bench perceives an obligation to uphold a particular duty (e.g., deference to prison managers), rather than to thoughtfully consider those circumstances that led incarcerates to raise Eighth Amendment challenges regarding their confinement. However, as provisionally delineated, something more can and should be done to effectively address the distinct needs of society and psychiatrically disordered offenders.

Developed within the law, psychology, and justice tradition, as well as the theorizing of psychological jurisprudence, an alternative policy-based agenda was proposed. Collectively, the principles of therapeutic jurisprudence, restorative justice, and commonsense justice (including their assorted practices) are consistent with Aristotelian ethics. This moral philosophy seeks to grow character so that citizens can lead lives of excellence. Accordingly, legal tribunals are encouraged to incorporate virtue-based reasoning into their judicial rulings. Moreover, courts are reminded that when they promote such flourishing, all parties affected by harm benefit: the possibility of recovery and

transformation thrives. This is how healing is promoted and justice is achieved for individuals and within institutions by a society that affirms, indeed celebrates, the unrealized potential of both.

ENDNOTES

¹ Additionally, the logic of psychological jurisprudence and the philosophy of ethics conveyed through the judicial opinions on disciplinary solitary confinement and incarcerates *without* preexisting psychiatric disorders has yet to be explored. The prevailing research suggests that the risks of placing these inmates in isolation are, most assuredly, serious. However, the extant literature overwhelmingly demonstrates that confining mentally ill prisoners in punitive segregation is acutely devastating. Nevertheless, future research regarding the former offender group (those without preexisting mental health conditions) is both undeniably worthwhile and altogether necessary.

² A literature base exists that explores the ethics of solitary confinement from the academic (Kleinig & Smith, 2001; Lippke, 2004; Schwartz, 2003), the programmatic (Shalev, 2008), and the correctional practice (American Psychological Association, 2003; Bonner & Vandecreek, 2006) perspectives. However, the purpose of this study is to examine the moral reasoning that informs the courts' decisions on long-term disciplinary isolation. As such, dialogue involving the ethical practice of solitary confinement is not germane to the ensuing inquiry.

³ Early empirical research is also useful to the ensuing analysis. For example, a study by Toch (2003) examined data from the mid-nineteenth century identifying the effects of solitary confinement on prisoners. Among the accounts he assessed was a report prepared in 1845 by Dr. Thomas Cleveland who indicated that 25% of inmates kept in solitary confinement "manifested decided symptoms of derangement" (p. 223). In addition to his empirical findings, Dr. Cleveland included written observations of prisoners who were placed in solitary confinement:

"Now, suddenly abstract from a man these senses, to which he has been so long accustomed; shut him up...in a solitary cell, where he must pass the same unvarying round, from week to week, with hope depressed, with no subjects for reflection but those which give him pain to review, in the scenes of his former life; after a few days, with no new impressions made upon his senses...one unvarying sameness relaxes the attention and concentration of his mind, and it will not be thought strange, that, through the consequent debility and irritability of its organ, the mind should wander and become impaired" (Gray, 1847/1973 as cited in Toch, 2003, p. 223).

⁴ It is important to note that, like the general prison population, those placed in long-term solitary confinement disproportionately represent economically disadvantaged individuals. Further, research indicates that the deleterious effects of extended isolation are perhaps uniquely harmful to women (Arrigo & Bullock, 2008). For example, Shaylor's (1998) study at the SHU at Valley State Prison for Women in Chowchilla, California described how female incarcerates are more vulnerable to sexual harassment and abuse by male prison guards. Cell extractions performed with force, common in long-term solitary confinement, may also trigger post-traumatic episodes in women who have experienced violent sexual assaults in their past. For an overview of the mental health issues women confront, especially while confined see, Gido and Dalley (2009).

⁵ In *Ruiz v. Johnson*, the court considered the extant research on the adverse psychological consequences of placing prisoners with preexisting mental health conditions in long-term administrative segregation. Acknowledging the deleterious effects of such confinement, the court ruled that exposing mentally ill inmates to extended isolation violated the Eighth Amendment's prohibition against cruel and unusual punishment. See *Ruiz v. Johnson*, 37 F. Supp. 855 (1999).

⁶ Citing the extant literature, two landmark cases established an Eighth Amendment violation regarding prisoners with preexisting mental health conditions in long-term disciplinary segregation. In *Madrid v. Gomez* and *Jones 'El v. Berge*, the court determined that placing inmates with such disorders in isolation constituted cruel and unusual punishment. See *Madrid v. Gomez*, 889 F. Supp. 1280 (N.D. Cal. 1995) and *Jones 'El v. Berge*, 164 F.Supp.2d 1096 (2001).

⁷ In the past, prisoners in the United States were considered "slaves of the State" and, as such, had no constitutional rights. Beginning with the prison reform movement in the 1960s, the courts began to acknowledge that these protections extended to inmates. Even with this recognition, the courts largely maintain a "hands-off" approach to cases involving incarcerated offenders. As Weidman noted, "Concerns about separation of powers, federalism, and courts' lack of expertise in prison management [are] sometimes cited in support of this position" (2004, p. 3).

⁸ The methodology focuses on ascertaining prevailing case law and analyzing the extant legal history. The methodology describes how the prevailing case law was determined. The extant legal history refers to the most fully developed statements on disciplinary long-term solitary confinement for prisoners with preexisting psychiatric disorders as rendered by the courts. This latter strategy entails selecting those judicial opinions, guided by the identified qualitative methodology, that advance jurisprudential knowledge of the psycho-legal problem under consideration. Thus, the stipulated methodology (i.e., Lexis/Nexis search followed by two levels of textual analysis) is complemented by evaluating the evolution of

the correctional law in this area. Presenting the most fully developed statements concerning protracted and punitive solitary confinement for mentally ill inmates, is not governed by appellate court decision-making wherein a contraction or dimunition of the law is subsequently delineated. All cases chosen for review were guided by the logic of both research strategies. For more on this complementary strategy of capturing the most advanced legal history in relation to the present inquiry, compare, for example, *Goff v. Harper (1997)* and *Goff v. Harper (1999)*. In 1997, the trial court determined four constitutional violations and, in rendering its decision, ordered a remedial plan. The subsequent review in 1999 involved an evaluation of the Iowa State Penitentiary's efforts to correct the violations. Thus, *Goff v. Harper (1997)* more fully captures the court's statement on long-term disciplinary solitary confinement and the Eighth Amendment. For more on qualitatively analyzing the evolution of a cognate area of mental health law, see Arrigo (1993, 2002b).

⁹ The Supreme Court has delineated a two-prong test by which the courts must assess violation of Eighth Amendment claims. To satisfy the objective requirement of the test, courts must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In others words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate" (*Helling v. McKinney, 509 U.S. 25 (1993)*). To meet the subjective requirement, the prisoner must prove that an individual acted with "deliberate indifference" to an inmate's health or safety if he is aware that the prisoner will face a risk of serious harm and fails to acknowledge or avert it. Interestingly, although the Court established this standard, it failed to distinguish what "contemporary standards of decency" are or to provide specific insight into how the analysis should be conducted (Fellner, 2006).

¹⁰ In *Farmer v. Brennan (1994)*, the Supreme Court employed the two-prong test for determining if a preoperative transsexual inmate's Eighth Amendment protection against cruel and unusual punishment had been violated when the prisoner was placed in segregation. Farmer raised the challenge based on the conditions of the confinement being so volatile that they placed him (as Farmer is referred to in the court's language) at risk of being sexually assaulted. In *Rhodes v. Chapman (1981)*, the Court heard arguments relating to double ceiling inmates in segregation. In delivering their opinion, the Court noted that the Constitution does not guarantee a comfortable prison environment. The Court gave deference to the legislature and prison administrators in their responsibility to implement and oversee correctional institution policies and procedures. See *Farmer v. Brennan 511 U.S. 825 (1994)* and *Rhodes v. Chapman, 452 U.S. 337 (1981)*.

¹¹ The extant social science and law review literature offers insight into why prisoners in solitary confinement – including those with and without preexisting mental health conditions – fail to succeed on Eighth Amendment violation claims. Indeed, a significant number of cases are either dismissed or proceed on another claim, such as Due Process (Fellner, 2006; Haney, 2003; Haney & Lynch, 1997; Perlin & Dlugacz, 2008; Weidman, 2004). Some researchers point to the difficulty of overcoming the two-prong test, in which the harm to be considered is traditionally interpreted by the court to mean one that is corporeal in nature (Haney & Lynch, 1997; Perlin & Dlugacz, 2008; Romano, 1996; Weidman, 2004). As such, many inmates are unable to successfully associate their psychological harm to that of physical injury. Others assert that the Prison Litigation Reform Act (PLRA), passed by Congress in 1996, has hindered cases in which prisoners are seeking relief. Under the PLRA, correctional administrators are exempt from judicial supervision in most cases and when relief is granted, it becomes ineffective after two years (Lobel, 2008; Perlin &

Dlugacz, 2008; Rebman, 1999; Weidman, 2004). Further, inmates incarcerated at Supermax facilities face a particularly difficult hurdle to overcome. As the *Madrid* court poignantly noted, "a challenge to supermax incarceration is not a case about inadequate or deteriorating physical conditions. There are no rat-infested cells, antiquated buildings, or unsanitary supplies...it is a case about "a prison of the future." (Weidman, 2004, p. 7; see also Lobel, 2008).

¹² Interestingly, the social science and law review literature indicates that the conditions at issue in *Ruiz v. Johnson* (1999) were similar in nature to those found within punitive solitary confinement (Haney, 2003; Harvard Law Review, 2008; Perlin & Dlugacz, 2008; Weidman, 2004). However, the present study examines only those cases involving confinement conditions formally classified as disciplinary segregation. Clearly, a subsequent study exploring administrative solitary confinement case law would be worthwhile.

¹³ The *Vasquez* case differs slightly from the other cases comprising the data set. In this instance, a psychiatrically disordered inmate raised an Eighth Amendment violation claim asserting that specific conditions, including constant illumination and poor ventilation, in long-term disciplinary isolation exacerbated his mental illness. Although the *Vasquez* court did not consider the *totality* of the conditions of isolation, the case was deemed appropriate for inclusion based on a twofold rationale. First, the conditions, constant illumination and insufficient ventilation (e.g., heating, cooling, and lack of access to fresh air), are featured prominently in solitary confinement facilities. Second, the deleterious effects of these environmental factors, among others, on the mental well-being of inmates are noted in the social science and law review literature (Cohen, 2008; Haney, 2003; McConville & Kelly, 2007; Rebman, 1999; Toch, 2003).

¹⁴ Admittedly, some of the cases comprising the data set have lengthy procedural histories and differing statuses. However, for the purpose of this qualitative endeavor, only those judicial decisions that most thoroughly captured the courts' statements on psychiatrically disordered inmates, prolonged disciplinary segregation, and the Eighth Amendment were included. Additionally, it is imperative to acknowledge the distinction between the type of review that occurs in a trial court versus an appellate court. Trial courts hear evidence and determine findings of fact. In contrast, appellate courts assess substantive or procedural errors occurring in the trial court's judicial decision-making. Although mindful that the method of review employed by the respective courts differs, this is not the source of analysis for the ensuing inquiry. Rather, the focus of this study is to examine the meaning conveyed by the courts' rhetoric (i.e., the jurisprudential intent and the moral reasoning that informs it) in the precedent setting or prevailing cases on these matters.

¹⁵ The six judicial decisions selected for critical examination did not include any dissenting opinions. Consequently, the majority opinions were analyzed in order to obtain data appropriate for the two levels of analysis employed in the ensuing inquiry.

¹⁶ To be clear, discerning the underlying moral philosophy of a legal case by examining its jurisprudential intent, understood as manifest content, represents an exercise in interpretive reasoning. In other words, this is not a precise process of data finding; rather, it is a more heuristic, though clearly systematic, meaning-making endeavor. The method's conviction is that "it is possible to go beyond the surface meaning of legal texts [manifest content] to explore the structure and the ideological content... [and in doing so] to search for the values expressed by the law (Mercurio & Medema, 1998, p. 169).

¹⁷ The application of level 2 analysis did not yield textual exegeses regarding the moral philosophy in the *Vasquez v. Frank* (2006) decision. Accordingly, the following discussion focuses on the results from the remaining five cases.

¹⁸ There are two clear limitations that must be acknowledged when utilizing a self-report survey instrument to gather data. An instrument designed to elicit the ethical reasoning employed by judges is particularly problematic in that moral attitudes are often complex and, as such, are not easily interpreted. Moreover, given their obligation to remain neutral arbiters of the law, judges may not be forthcoming in their responses.

¹⁹ Given the harsh conditions of long-term disciplinary solitary confinement, a number of leading domestic and international researchers as well as human rights activists advocate the abolition of its use within American correctional institutions. Abolitionist proponents assert that isolative confinement, of any type or duration, is psychologically devastating to both inmates with and without preexisting mental health conditions (Fellner, 2006; Lobel, 2008; Rhodes, 2005). Indeed, according to the Inter-American Court of Human Rights, "prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person's psychic and moral integrity" (Lobel, 2008, p. 123).

²⁰ Efforts to implement the principles and practices of restorative justice within the correctional system have been preliminarily undertaken with the inclusion of conflict resolution and victim empathy programs (Johnstone & Van Ness, 2008; Liebmann & Braithwaite, 1999; Monahan et al., 2004). However, the application of restorative justice within the penal system has been a source of debate. Advocates argue that it reduces instances of prison violence and encourages offenders to emotionally connect with their victims (Blad, 2003; Coyle, 2001). However, critics assert that restorative efforts in correctional institutions "distract the public and policy-makers from the bankruptcy of prisons" and only serve to legitimize imprisonment (Roberts & Peters, 2003, p. 116).

REFERENCES

- Abramsky, S. & Fellner, J. (1999). *Ill-equipped: U.S. prisons and offenders with mental illness*. New York, NY: Human Rights Watch.
- American Psychology Association. (2003). *Ethical principles of psychologists and code of conduct*. Retrieved April 2, 2009, from <http://www.apa.org/ethics/code2002.html>.
- Arrigo, B. A. (1993). *Madness, language, and law*. Albany, NY: Harrow and Heston.
- Arrigo, B.A. (1999). Martial metaphors and medical justice: Implications for law, crime and deviance. *Journal of Political and Military Sociology*, 27(2), 307-322.
- Arrigo, B. A. (2001). Reviewing graduate training models in forensic psychology: Implications for practice. *Journal of Forensic Psychology Practice*, 1(1), 9-31.

- Arrigo, B.A. (2002a). The critical perspective in psychological jurisprudence: Theoretical advances and epistemological assumptions. *International Journal of Law and Psychiatry*, 25(1), 151-172.
- Arrigo, B.A. (2002b). *Punishing the mentally ill: A critical analysis of law and psychiatry*. Albany, NY: SUNY Press.
- Arrigo, B.A. (2003). Justice and the deconstruction of psychological jurisprudence: The case of competency to stand trial." *Theoretical Criminology*, 7(1), 55-88.
- Arrigo, B. A. (Ed.) (2004). *Psychological jurisprudence: Critical explorations in law, crime, and society*. Albany, NY: SUNY Press.
- Arrigo, B.A. & Bullock, J.L. (2008). The psychological effects of solitary confinement on prisoners in supermax units: Reviewing what we know and recommending what we should change. *International Journal of Offender Therapy and Comparative Criminology*. 52(6), 622-640.
- Arrigo, B. A. & Fox, D. (2009). Psychology and the law: The crime of policy and the search for justice. In D. Fox & Prilleltensky, I. (Eds.), *Critical psychology: An introduction (2nd Ed.)* (pp. 159-175). London, UK: Sage.
- Arrigo, B. A., & Milovanovic, D. (2009). *Revolution in penology: Rethinking the society of captives*. Lanham, MD: Rowman & Littlefield.
- Arrigo, B.A. & Schehr, R.C. (1998). Restoring justice for juveniles: A critical analysis of victim-offender mediation. *Justice Quarterly*, 15(4), 629-665.
- Aristotle. (1998). *Nicomachean ethics*. London, UK: Dover.
- Baier, A. (1991). *A progress of sentiments*. Cambridge, MA: Harvard University Press.
- Baillargeon, J., Binswanger, I.A., Penn, J.V., Williams, B.A., & Murray, O.J. (2009). Psychiatric disorders and repeat incarcerations: The revolving prison door. *The American Journal of Psychiatry*, 166, 103-109.
- Banks, C. (2008). *Criminal justice ethics: Theory and practice*. Thousand Oaks, CA: Sage Publications, Inc.
- Bayley, D.H. (2001). Security and justice for all. In Strang, H. & Braithwaite, J. (Eds.) *Restorative justice and civil society* (pp. 211-221). Cambridge, UK: Cambridge University Press.
- Bazemore, G., & Boba, R. (2007). Doing good to make good: Community theory for practice in a restorative justice civic engagement reentry model. *Journal of Offender Rehabilitation*, 46(1/2), 25-56.
- Bentham, J. & Mill, J.S. (1973). *The utilitarians*. New York, NY: Anchor Press (Original work published 1789).
- Bernstein, E. & Gilligan, C. (1990). Unfairness and not listening: Converging themes in Emma

- Willard girls' development. In Gilligan, C., Lyons, N.P., & Hanmer, T.J. *Making connections: The relational worlds of adolescent girls at Emma Willard School* (pp. 147-161). Cambridge, MA and London, UK: Harvard University Press.
- Blad, J. (2002). Community mediation, criminal justice, and restorative justice: Rearranging the institutions of law. In Walgrave, L. (Ed.). *Repositioning restorative justice*. (pp. 191-207). Devon, UK: Willan Publishing.
- Bonner, R. & Vandecreek, L.D. (2008). Ethical decision making for correctional mental health providers. *Criminal Justice and Behavior*, 33(4), 542-564.
- Bonta, J. & Gendreau, P. (1995). Reexamining the cruel and unusual punishment of prison life. *Law and Human Behavior*, 14(4), 347-372.
- Braithwaite, J. (2002). Restorative justice and therapeutic jurisprudence. *Criminal Law Bulletin*, 38(2), 244-262.
- Braswell, M., Fuller, J. & Lozoff, B. (2001). *Corrections, peacemaking, and restorative justice: Transforming individuals and institutions*. Cincinnati, OH: Anderson Publishing Co.
- Briggs, C., Sundt, J., & Castellano, T. (2003). The effect of supermaximum security prisons on aggregate levels of institutional violence. *Criminology*, 41(4): 1341-1376.
- Cahn, S.M. (2009). *Exploring ethics: An introductory anthology*. New York, NY: Oxford University Press.
- Chappell, T. (Ed.) (2006). *Values and virtues: Aristotelianism in contemporary ethics*. New York, NY: Oxford University Press.
- Christie, N. (1981). *Limits to pain*. Oxford, UK: Martin Robertson & Co. Ltd.
- Cohen, F. (2008). Penal isolation: Beyond the seriously mentally ill. *Criminal Justice and Behavior*, 53(8), 1017-1047.
- Coyle, A. (2001, May). Restorative justice in the prison setting. Paper presented at the Conference of the International Prison Chaplains Association, Driebergen, Holland.
- Craig, S.C. (2004). An organizational theory of prison management. *The Prison Journal*, 8(4), 92-114.
- Darley, J., Fulero, S., Haney, C., & Tyler, T. (2002). Psychological jurisprudence: Taking psychology and law into the twenty-first century. In J. R. P. Ogloff (Ed.), *Taking psychology and law into the twenty-first century*, (pp. 35- 59). New York, NY: Springer.
- Darwall, S. (1998). *Philosophical ethics*. Boulder, CO: Westview Press.
- Easterbrook, F.H. (1994). Text, history, and structure in statutory interpretation. *Harvard Journal of Law & Public Policy*, 17(1): 61-70.
- Ecclestone, C.E.J., Gendreau, P., & Knox, C. (1974). Solitary confinement of prisoners:

- An assessment of its effects on offenders' personal constructs and andrenocortical activity. *Canadian Journal of Behavioral Science*, 6, 178-191.
- Elsner, A. (2004). *Gates of injustice: The crisis in America's prisons*. Upper Saddle River, NJ: Prentice Hall.
- Farrelly, C. & Solum, L.B. (Eds.) (2008). *Virtue jurisprudence*. New York, NY: Palgrave Macmillan.
- Federal Bureau of Prisons Guidelines. (2008). Federal Bureau of Prisons. Washington, DC.
- Fellner, J. (2006). A corrections quandary: Mental illness and prison rules. *Harvard Civil Rights & Civil Liberties Law Review*, 41(2), 391-415.
- Finkel, N.J. (1995). *Commonsense justice: Jurors' notions of the law*. Cambridge, MA: Harvard University Press.
- Finkel, N. J. (1997). Commonsense justice, psychology, and the law: Prototypes that are common, sensible, and not. *Psychology, Public Policy, and Law*, 3(2/3), 461-489.
- Finkel, N. J. (2000). Commonsense justice and jury instructions: Instructive and reciprocating connections. *Psychology, Public Policy, and Law*, 6(3), 591-628.
- Finkel, N. J., Harre, R., & Rodriguez-Lopez, J. (2001). Commonsense morality across cultures: Notions of fairness, justice, honor, and equity. *Discourse Studies*, 3(1), 5-27.
- Fox, D. R. (1993). Psychological jurisprudence and radical social change. *American Psychologist*, 48(3), 234-241.
- Gagliardi, G., Lovell, D., Peterson, P., & Jemelka, R. (2004). Forecasting recidivism in mentally ill offenders released from prison. *Law & Human Behavior*, 28(2): 133-155.
- Gendreau, P. & Bonta, J. (1984). Solitary confinement is not cruel and unusual punishment: People sometimes are! *Canadian Journal of Criminology*, 26, 467-478.
- Gendreau, P., Freedman, N.L., Wilde, J.S., & Scott, G.D. (1972). Changes in EEG alpha frequency and evoked response latency during solitary confinement. *Journal of Abnormal Psychology*, 79(1), 54-59.
- Gido, R. L., & Dalley, L. (Eds.). (2009). *The mental health issue of women across the criminal justice system*. Upper Saddle River, NJ: Prentice Hall.
- Glaser, B. (2003). Therapeutic jurisprudence: An ethical paradigm for therapists in sex offender treatment programs. *Western Criminology Review*, 4(2): 143-154.
- Grassian, S. (1983). Psychopathological effects of solitary confinement. *American Journal of Psychiatry*, 140(11), 1450-1454.
- Gray, F.C. (1973). *Prison discipline in America*. Montclair, NJ: Patterson Smith. (Original work published 1847).

- Hall, M.A. & Wright, R.F. (2008). Systematic content analysis of judicial opinions. *California Law Review*, 96, 63-122.
- Hancock, B.W. & Sharp, P.M. (2004). *Public policy, crime, and criminal justice*. Upper Saddle River, NJ: Prentice Hall.
- Haney, C. (2003). Mental health issues in long-term solitary and "supermax" confinement. *Crime & Delinquency*, 49(1), 124-156.
- Haney, C. (2009). The social psychology of isolation: Why solitary confinement is psychologically harmful. *Prison Service Journal*, 181(1), 12-20.
- Haney, C. & Lynch, M. (1997). Regulating prisons of the future: A psychological analysis of supermax and solitary confinement. *New York University Review of Law and Social Change*, 23, 477-570.
- Harvard Law Review. (2008). The impact of the prison litigation reform act on correctional mental health litigation. *Harvard Law Review*, 121, 1145-1155.
- Hobbes, T. (1996). *Leviathan* (R. Tuck, Ed.). Cambridge, UK: Cambridge University Press (Original work published 1651).
- Hogg, J., McConville, M., & Chui, W.H. (2007). *Research methods for law*. Edinburgh, Scotland: Edinburgh University Press.
- Holsti, O.R. (1969). *Content analysis for the social sciences and humanities*. Reading, MA: Addison-Wesley Publishing Company.
- Huss, M. T., Tomkins, A. J., Garbin, C. P., Schopp, R., & Killian, A. (2006). Battered women who kill their abusers: An evaluation of commonsense notion, cognitions, and judgments. *Journal of Interpersonal Violence*, 21(8): 1063-1080.
- James, D. & Glaze, L. (2006). *Mental health problems of prison and jail inmates*. Washington, DC: US Department of Justice, Bureau of Justice Statistics, NCJ-195670.
- Johnson, R. (2002). *Hard time* (3rd ed.). Belmont, CA: Wadsworth.
- Johnstone, D.W. & Van Ness, G. (Eds.). (2008). *Handbook of restorative justice*. Dover, UK: Willan Publishing.
- Kant, I. (2002). *Groundwork for the metaphysics of morals* (A. Zweig, Trans. and T. E. Hill, Jr. & A. Zweig, Eds.). Oxford, UK: Oxford University Press (Original work published 1785).
- Kilty, J.M. (2006). Under the barred umbrella: Is there room for a women-centered self-injury policy in Canadian corrections? *Criminology & Public Policy*, 5(1), 161-182.
- King, K., Steiner, B., & Breach, S.R. (2008). Violence in the supermax: A self-fulfilling prophecy. *The Prison Journal*, 88(1), 144-168.

- Kleinig, J. & Smith, M.L. (2001). *Discretion, community, and correctional ethics*. New York, NY: Rowman & Littlefield.
- Kupers, T. (1999). *Prison madness: The mental health crisis behind bars and what we must do about it*. San Francisco, CA: Jossey-Bass, Inc.
- Kupers, T. (2008). What to do with survivors? Coping with the long-term effects of isolated confinement. *Criminal Justice and Behavior*, 35(8), 1005-1016.
- Kurki, L. & Morris, N. (2001). Supermax prisons. In M.H. Tonry (Ed.), *Crime and justice: A review of the research* (pp. 385-424). Chicago, IL: University of Chicago Press.
- Lamb, H.R. & Weinberger, L.E. (1998). Persons with severe mental illness in jails and prisons: A review. *Psychiatric Services*, 49(4), 483-492.
- Leighton, P. & Reiman, J. (2001). *Criminal justice ethics*. Upper Saddle River, NJ: Prentice Hall.
- Liebmann, M. & Braithwaite, S. (1999). Restorative justice in custodial settings: Report for the restorative justice working group in Northern Ireland. Retrieved February 21, 2009, from <http://www.extern.org/restorative/Rjreport.htm>.
- Lippke, R.L. (2004). Against supermax. *Journal of Applied Philosophy*, 21(2), 109-124.
- Lobel, J. (2008). Prolonged solitary confinement and the Constitution. *Journal of Constitutional Law*, 11(1), 115-138.
- Lovell, D. (2008). Patterns of disturbed behavior in a supermax population. *Criminal Justice and Behavior*, 35(8), 985-1004.
- Lovell, D., Cloyes, K., Allen, D., & Rhodes, L. (2000). Who lives in super-maximum custody? A Washington State study. *Federal Probation*, 64(2), 33-38.
- Lovell, D., Johnson, L.C., & Cain, K.C. (2007). Recidivism of supermax prisoners in Washington state. *Crime & Delinquency*, 53(4): 633-656.
- MacIntyre, A. (2007). *After virtue: A study in moral theory* (3rd ed.). Notre Dame, IN: University of Notre Dame Press.
- Macken, C. (2006). Preventive detention and the right to personal liberty and security under article 5 ECHR. *The International Journal of Human Rights*, 10(3): 195-217.
- McConville, B. & Kelly, D.C. (2007). Cruel and unusual? Defining the conditions of confinement in the mentally ill. *The Journal of the American Academy of Psychiatry and the Law*, 35(4), 533-534.
- McMahon, M. & Wexler, D.B. (Eds.) (2003). *Therapeutic jurisprudence*. Australia: The Federation Press.
- Mears, D.P. (2006). *Evaluating the effectiveness of supermax prisons*. Washington, D.C.: Urban Institute Justice Policy Center.

- Mears, D.P. & Watson, J. (2006). Towards a fair and balanced assessment of supermax prisons. *Justice Quarterly*, 23(2), 232-270.
- Melton, G. B. (1992). The law is a good thing (Psychology is, too): Human rights in psychological jurisprudence. *Law and Human Behavior*, 16(3): 381-398.
- Mercuro, N., & Medema, S. G. (1998). *Law and economics: From Posner to post-modernism*. Princeton, NJ: Princeton University Press.
- Mill, J. S. (1957). *Utilitarianism* (O. Piest, Ed.). Indianapolis, IN: Bobbs-Merrill Educational Publishing (Original work published in 1861).
- Monahan, L.H., Monahan, J.J., Gaboury, M.T., & Niesyn, P.A. (2004). Victims' voices in the correctional setting: Cognitive gains in an offender education program. *Journal of Offender Rehabilitation*, 39(3): 21-33.
- Mossman, D. (2006). Critique of pure risk assessment or, Kant meets Tarasoff. *University of Cincinnati Law Review*, 75, 523-609.
- Naday, A., Freilich, J.D., & Mellow, J. (2008). The elusive data on supermax confinement. *The Prison Journal*, 88(1), 69-93.
- Noddings, N. (2003). *Caring: A Feminine Approach to Ethics and Moral Education* (2nd ed.). Berkeley, CA: University of California Press.
- Ogloff, J. R. P. (2002). Two steps forward and one step backward: The law and psychology movement(s) in the 20th century. In J. R. P. Ogloff (ed.), *Taking psychology and law into the twenty-first century*, (pp. 1-34). New York, NY: Springer.
- O'Keefe, M.L. (2008). Administrative segregation from within: A corrections perspective. *The Prison Journal*, 88(1), 123-143.
- Paul, R. & Elder, L. (2006). *The thinker's guide to understanding the foundations of ethical reasoning: Based on critical thinking concepts and tools, 2nd Edition*. Retrieved December 4, 2008, from <http://www.criticalthinking.org/storepage.cfm?P=products&itemID=169&cateID=132&subcatID=0&catalogID=224>.
- Perl, J.M., Stone, G.B., Bok, S., McCall, S.G., & Colegate, I. (2006). Unsocial thought, uncommon lives. *Common Knowledge*, 12(2), 214-218.
- Perlin, M. & Dlugacz, H. (2008). *Mental health issues in jails and prisons*. Durham, NC: Carolina Academic Press.
- Phillips, S. & Grattet, R. (2000). Judicial rhetoric, meaning-making, and the institutionalization of hate crime law." *Law & Society Review*, 34(3): 567-606.
- Pizarro, J., & Stenius, V.M.K. (2004). Supermax prisons: Their rise, current practices, and effect on inmates. *The Prison Journal*, 84(2), 248-264.

- Pizarro, J.M. & Narag, R. E. (2008). Supermax prisons: What we know, what we do not know, and where we are going. *The Prison Journal*, 88(1), 23-42.
- Posner, R. (2008). *How judges think*. Cambridge, MA: Harvard University Press.
- Presser, L. (2004). Justice here and now: A personal reflection on the restorative and community justice paradigms. *Contemporary Justice Review* 7(1): 101-106.
- Quinney, R. (1991). The way of peace: On crime, suffering, and service. In Quinney, R. and Pepinsky, H. (Eds). *Criminology as peacemaking* (pp. 3-13). Bloomington, IN: Indiana University Press.
- Randolph, A.R. (1994). Dictionaries, plain meaning, and context in statutory interpretation. *Harvard Journal of Law & Public Policy*, 17(1): 71-78.
- Rebman, C. (1999). The eighth amendment and solitary confinement: The gap in protection from psychology consequences. *DePaul Law Review*, 49(1), 567-586.
- Ritchie, J & Spencer, L. (2002). Qualitative data analysis for applied policy research. In Huberman, A.M. & Miles, M.B. (Eds.), *The qualitative researcher's companion* (pp. 305-329). Thousand Oaks, CA: Sage Publications.
- Riveland, C. (1999). *Supermax prisons: Overview and general considerations*. Longmont, CO: US Department of Justice, National Institute of Corrections.
- Rhodes, L. (2004). *Total confinement: Madness and reason in the maximum security prison*. Berkeley and Los Angeles, California: University of California Press.
- Rhodes, L. (2005). Pathological effects of the supermaximum prison. *American Journal of Public Health*, 95(10), 1692-1695.
- Roberts, L. & Peters, T. (2003). How restorative justice is able to transcend the prison walls: A discussion of the project "restorative detention." In Weitkamp, E. & Kerner, H.J. (Eds.). *Restorative justice in context*. Dover, UK: Willan Publishing.
- Romano, S.M. (1996). If the SHU fits: Cruel and unusual punishment at California's Pelican Bay state prison. *Emory Law Journal*, 45(3), 1089-1138.
- Schma, W., Kjervik, D. & Petrucci, C. (2005). Therapeutic jurisprudence: Using the law to improve the public's health. *Journal of Law, Medicine & Ethics*, 33(4), 59-63.
- Schwartz, B.K. (2003). *Correctional psychology: Practice, programming, and administration*. Kingston, NJ: Civic Research Institute.
- Sellers, B.G. & Arrigo, B.A. (2009). Developmental maturity, adjudicative competence, and adolescent transfer: An ethical and justice policy inquiry. *The Journal of Criminal Law and Criminology*, 99(1): 435-488.
- Shalev, S. (2008). *A sourcebook on solitary confinement*. London, UK: Manheim Centre for Criminology.

- Shalev, S. (2009). Inside a supermax. *Prison Service Journal*, 181(1), 21-25
- Shaylor, C. (1998). "It's like living in a black hole": Women of color and solitary confinement in the prison industrial complex. *New England Journal of Criminal and Civil Confinement*, 24(2), 385-416.
- Shichor, David. (2006). *The meaning and nature of punishment*. Long Grove, IL: Waveland Press.
- Small, M. (1993). "Advancing psychological jurisprudence." *Behavioral Science and the Law*, 11(1): 3-16.
- Solum, L.B. (2008). Natural justice: An aretaic account of the virtue of lawfulness. In Farrelly, C. & Solum, L.B. (Eds.) (2008). *Virtue jurisprudence (pp. 167-192)*. New York, NY: Palgrave Macmillan.
- Sterba, J.P. (2003). *Social and political philosophy: Classical western texts in feminist and multicultural perspectives (3rd Ed.)* Belmont, CA: Wadsworth/Thompson Learning.
- Strang, H. & Braithwaite, J. (Eds.). (2001). *Restorative justice and civil society*. Cambridge, UK: Cambridge University Press.
- Sullivan, D., & Tifft, L. (2005). *Restorative justice: Healing the foundations of our everyday lives (2nd Ed.)*. Money, NY: Criminal Justice Press.
- Thomas, J., Leaf, M., Kazmierczak, S., & Stone, J. (2006). Self-injury in correctional settings: "Pathology" of prisons or of prisoners? *Criminology & Public Policy*, 5(1), 193-202.
- Toch, H. (2001). The future of supermax confinement. *The Prison Journal*, 81(3), 376-388.
- Toch, H. (2003). The contemporary relevance of early experiments with supermax reform. *The Prison Journal*, 83(2), 221-228.
- Tyler, T.R. (2006). Restorative justice and procedural justice: Dealing with rule breaking. *Journal of Social Issues*, 62(2), 307-326.
- Umbreit, M. S., Coates, R. B., & Armour, M. (2006). Victims of severe violence in mediated dialogue with offender: The impact of the first multi-site study in the U.S. *International Review of Victimology*, 13(1): 27-48.
- Van Ness, D. & Heetderks Strong, K. (2007). *Restorative justice: An introduction to restorative justice*. Cincinnati, OH: Lexis/Nexis Anderson.
- Vaux, R. (1826). *Notices of the original and successive efforts to improve the discipline of the prison at Philadelphia, and to reform the criminal code of Pennsylvania: With a few observations on the penitentiary system*. Philadelphia, PA: Kimber and Sharpless.
- Way, B., Miraglia, R., Sawyer, D., Beer, R., & Eddy, J. (2005). Factors related to

- suicide in New York state prisons. *International Journal of Law and Psychiatry*, 28(3), 207-221.
- Weidman, M.M. (2004). The culture of judicial deference and the problem of supermax prisons. *UCLA Law Review*, 51(5), 1505-1554.
- Wexler, D. B. and Winick, B. J. (Eds.) (1996). *Law in a therapeutic key: Developments in therapeutic jurisprudence*. Durham, NC: Carolina Academic Press.
- Wexler, D. B. (Ed.) (2008). *Rehabilitating layers: Principles of therapeutic jurisprudence for criminal law practice*. Durham, NC: Carolina Academic Press.
- Williams, C.R., & Arrigo, B. A. (2002). *Law, psychology, and justice: Chaos theory and the new (dis)order*. Albany, NY: SUNY Press.
- Williams, C.R. & Arrigo, B.A. (2008). *Ethics, crime, and criminal justice*. Upper Saddle River, NJ: Pearson Prentice Hall.
- Winick, B. J. (1997). *Therapeutic jurisprudence applied: Essays on mental health law*. Durham, NC: Carolina Academic Press.
- Winick, B. J. & Wexler, D. B. (Eds.) (2003). *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*. Durham, NC: Carolina Academic Press.
- Winick, B.J. & Wexler, D.B. (2006). The use of therapeutic jurisprudence in law school clinical education: Transforming the criminal law clinic. *Clinical Law Review*, 13, 605-632.
- Wynn, J.R. & Szatrowski, A. (2004). Hidden prisons: Twenty-three-hour lockdown units in New York state correctional facilities. *Pace Law Review*, 24(2), 497-526.
- Zinger, I. & Wichmann, C. (1999). *The psychological effects of 60 days in administrative segregation*. (Research Report R#85). Ottawa, ON: Correctional Services of Canada.
- Zinger, I., Wichmann, C., & Andrews, D.A. (2001). The psychological effects of 60 days in administrative segregation. *Canadian Journal of Criminology*, 43(1), 47-83.

Court Cases

Adnan v. Santa Clara Co. Dept. of Corr., 2002 LEXIS 28368 (N.D. Cal. 2002)

Coleman v. Wilson, 912 F.Supp. 1282 (E.D. Cal. 1995)

Comer v. Stewart, 230 F.Supp.2d 1016 (D. Ariz. 2002)

Dantzler v. Beard, 2008 LEXIS 21309 (W.D. Pa. 2008)

Davenport v. DeRobertis, 653 F.Supp. 649 (N.D. Ill. 1987)

- Dawson v. Kendrick*, 572 F.Supp. 1252 (S.D. W.Va. 1981)
- Farmer v. Brennan*, 511 U.S. 825 (1994)
- Giano v. Kelly*, 2000 LEXIS 9138 (W.D.N.Y. 2000)
- Goff v. Harper*, 1997 LEXIS 24186 (S.D. Iowa 1997)
- Goff v. Harper*, 59 F.Supp.2d 910 (S.D. Iowa 1999)
- Helling v. McKinney*, 509 U.S. 25 (1993)
- Jones 'El v. Berge*, 164 F.Supp.2d 1096 (W.D. Wis. 2001)
- Kane v. Winn*, 319 F.Supp.2d 162 (D. Mass. 2004)
- Laaman v. Helgemoe*, 437 F.Supp. 269 (D. N.H. 1977)
- Libby v. Commissioner of Corr.*, 385 Mass. 421 (1982)
- Madrid v. Gomez*, 889 F.Supp. 1146 (N.D. Cal. 1995)
- Pearson v. Fair*, 935 F.Supp.2d 401 (D. Mass. 1989)
- Redden v. Ricci*, 2008 LEXIS 95000 (D.N.J. 2008)
- Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981)
- Rhodes v. Chapman*, 452 U.S. 337 (1981)
- Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980)
- Ruiz v. Johnson*, 37 F.Supp. 855 (S.D. Tex. 1999)
- Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006)
- Tillery v. Owens*, 719 F.Supp. 1256 (W.D. Pa. 1989)
- Torres et al. v. Commissioner of Corr. et al.*, 611 N.E..2d 200 (Mass. 1998)
- Vasquez v. Frank*, 2006 LEXIS 30395 (7th Cir. 2006)

APPENDIX A

Level I Analysis: Underlying Jurisprudential Intent

	<u>Madrid v. Gomez</u>	<u>Scarver v. Litscher</u>	<u>Jones 'El v. Berge</u>	<u>Goff v. Harper</u>	<u>Vasquez v. Frank</u>	<u>Torres et al. v. Comm'r of Corr. et al.</u>
<u>1</u>	No prison can deprive inmates of a basic human need, even if the conditions promote a penological objective	"Prison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias. It	"Supermax is known to cause psychiatric morbidity, disability, suffering, and mortality"	Court's job is to identify Eighth Amendment violations and show deference to officials in their role as prison managers	Conditions exacerbated Vasquez's mental health condition, but prison officials refused to lessen their impact	Court determines whether conditions are cruel and unusual

		is a delicate balance”				
<u>2</u>	Prison officials are “entitled to design and operate the SHU consistent with the penal philosophy of their choosing, absent constitutional violations”	Inmates like Scarver, who are already serving a life sentence, are undeterrable	Supermax was built to house recalcitrant inmates; mentally ill prisoners cannot conform their behavior	Court could have taken a “hands-off” position	Prison officials violate the Eighth Amendment when they deliberately ignore an inmate’s mental health condition	Conditions must put inmates at a substantial risk of harm and prison officials must be deliberately indifferent to this risk
<u>3</u>	Conditions may be harsher than necessary to house mentally ill inmates, but deference must be given to prison officials	Federal courts must not tell a state how to “run its prison system”	The PLRA limits the scope of injunctive relief; conditions can lead to mental deterioration	The conditions are not cruel and unusual, but the prison officials were deliberately indifferent to those with preexisting mental health conditions	Although Vasquez has been released from segregation, he may still be entitled to damages	Isolation is not unconstitutional
<u>4</u>	Prison officials were aware that a number of inmates are mentally ill and such conditions could exacerbate their preexisting conditions	The Constitution is unclear on prison conditions; treating a mentally ill inmate is complicated	Many of the conditions serve no penological purpose	The needs of mentally ill inmates are not being met	Prison officials were aware of Vasquez’s adverse reactions to the conditions	Dr. Grassian opined that such conditions can cause mental harm and deterioration
<u>5</u>	Current staffing	“Maybe there is	“mentally ill inmates do	There is “great	No Data Ascertained	No Data Ascertained

	levels are not sufficient to respond to prisoners exhibiting signs of mental deterioration	some well-known protocol for dealing with the Scarvers of this world, though probably there is not "	not have access to the programming because they are not able to control their behavior to reach higher levels"	demand for a special needs program"		
<u>6</u>	Conditions may hover above what is humanly tolerable, particularly for mentally ill inmates	Court must seek to protect inmates, guards, and Scarver from himself	"Balancing of harms" in which mentally ill prisoners are protected from being placed in segregation, but prison officials are not overburdened logistically or financially	Mentally ill prisons have serious health needs which are unlikely to be addressed by officials	Vasquez may proceed on Eighth Amendment claims	No Data Ascertained
<u>7</u>	Prisoners are "still fellow human beings...most of whom will one day return to society... [and] have nonetheless, a human dignity"	No Data Ascertained	"...the public interest will be served by protecting the Eighth Amendment rights of inmates housed at Supermax"	No Data Ascertained	No Data Ascertained	No Data Ascertained

APPENDIX B

Level II Analysis: Underlying Ethical Reasoning Conveying Jurisprudential Intent

**Consequentialism
(Utilitarianism)**

**Formalism
(Kantian Ethics)**

**Virtue
Ethics**

**Madrid
v.
Gomez**

"Conditions may be harsher than necessary to accommodate the needs of the institution with respect to these populations. However, giving defendants the wide-ranging deference they are owed in these matters, we can not say that the conditions overall lack any penological justification"

"duty and responsibility of this Court to ensure that constitutional rights are fully vindicated"
"prisoners...have, nonetheless, a human dignity"
"duty to assume some responsibility for his safety and general well being"
"must ensure that prisons...do not degenerate into places that violate basic standards of decency and humanity"

**Scarver
v.
Litscher**

"Prison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias. It is a delicate balance"
"protect other inmates or guards from Scarver or Scarver from himself"

**Jones 'El
v. Berge**

"balancing of harms"
"court interferes in the management of Supermax to a minimal degree yet casts the net wide enough to catch any seriously mentally ill inmates"
"public interest is not served by housing seriously mentally ill inmates at Supermax"
"public interest will be served by protecting the Eighth Amendment rights"
"the potential harm to yet unidentified seriously mentally ill inmates is just as detrimental as to those who have already been identified"

"defendants should be afforded due deference"

**Goff v.
Harper**

"serve justice with a minimum of judicial intervention and provide prison officials with the maximum possible discretion"

"court's duty [is] to determine "whether a challenged punishment comports with human dignity"
"courts owe great deference to officials"
"Court's job is only to identify constitutional violations"

**Torres
et al. v.
Comm'r
Corr. et
al.**

"conditions...more restrictive than those in DDU did not offend the Eighth Amendment because its inmates were provided adequate food, clothing, sanitation, medical care, and communication with others"

"an Eighth Amendment violation, is a purely legal determination for the court to make"