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

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Heather Y. Bersot and Bruce A. Arrigo have provided an important service in legal philosophy: assessing the unstated underlying philosophical assumptions in federal court decisions about the complicated issue of placing prisoners with serious mental illness in solitary confinement for any length of time. The empirical data presented to the courts includes convincing evidence of great psychiatric harm. As the authors reflect in their review, the courts do rule that there are constitutional violations, but then they do not go far enough in alleviating the problem. For example, while the Madrid v. Gomez and Jones 'El v. Berge courts required the respective departments of correction to remove prisoners with serious mental illness from long-term confinement in supermaximum segregation units, there was nothing to prevent the states from moving those very same prisoners to administrative segregation units in different prisons, where the harsh conditions of isolation and idleness would be essentially equivalent to those in the supermax units.

The authors study the implicit judicial logic in six major court decisions on point, including Madrid v. Gomez and Jones 'El v. Berge. Everyone knows such placement can be very harmful, the question facing the courts is always whether the risk of harm to individuals thus placed is justified, given the security concerns of prison administrators. In fact, this is the kind of equation the authors determined preoccupied the courts issuing the relevant decisions: "The predominant moral reasoning situated within the courts' jurisprudential intent advanced philosophical principles emanating from utilitarianism and Kantian formalism…. Specifically, within

each case and across the decisions, an ethic of interest-balancing was employed wherein the needs of correctional administrators and the pubic were weighed against the rights of individual prisoners." In other words, is any sound "penological objective" served by the consignment of individuals suffering from serious mental illness to isolation, or, on the other hand, is there "deliberate indifference" to the predictable harm done to these individuals?

There is an uncanny and chilling parallel here with current debates about the morality of torture when security stakes seem high, and the compromising of constitutional safeguards is equivalent in the two forums. The problem is that the debate does not occur on a level playing field. When I, as a psychiatric expert in court, opine that the harsh conditions of idleness and isolation in supermax segregation causes psychiatric damage, I am required under the Daubert standard (reigning court precedent and rule governing the admissibility and scientific credibility of findings presented by experts[1]), to prove that there is an objective basis for my opinion. But the side that argues security trumps psychiatric damage is not required to prove any such assertion - rather, the court resorts to authority, essentially accepting there is a strong security concern because someone of high rank - a warden or commissioner - says that the harsh conditions are warranted on security grounds.

There actually isn't any objective data to support the utility of supermax confinement. Research does not reflect a downward effect on the prevalence of violence or use of force in correctional systems when more prisoners are consigned to long-term isolation. In fact, my research at Mississippi's Unit 32 supermaximum security unit proved that when prisoners with mental illness are removed from isolation, their disciplinary infractions become far less frequent and the violence

[1] See <http://en.wikipedia.org/wiki/Daubert_standard>

levels in the state's prisons actually decreased.[2] Such findings do not seem to undermine the authority of wardens and commissioners in court when they assert that security concerns contraindicate the removal of prisoners with mental illness from segregation.

Of course, courts' decisions involve the art of compromise, and inevitably the plaintiff in each case has substantial grounds for disappointment. The entire legal venture takes place in the context of a very volatile political debate about state's rights vs. federal authority. In a California lawsuit not considered by the authors, Gates v. Deukmejian,[3] the federal judge held the state of California in contempt of court subsequent to the main ruling, opining that the state was dragging its heals in implementing the court's orders. That contempt determination was appealed, and a higher court ruled that the federal judge could not hold the state of California and its officials in contempt because, essentially (when you read through all the legal jargon), a federal judge cannot tell a state how to run its prisons. The original decision was not reversed, only the contempt holding was overturned.

Judicial restraint is prominently written into the 1996 Prison Litigation Reform Act, i.e. federal courts must go no further in designing remedies than absolutely necessary to correct the constitutional violation.[4] Bersot and Arrigo point out the limitations of prior court rulings and recommend that courts in the future go much further, employing a logic beyond the utilitarianism of individual harm vs. the government's interest in maintaining security and order. They recommend that the courts consider, "collectively, the principles of therapeutic jurisprudence, restorative

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[2] see T. Kupers, T. Dronet et al, Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs," Criminal Justice and Behavior, 36, 1037-1050, October, 2009

[3] reported as Gates v. Rowland, 987 F.2d 1392 9th Cir. 1993

[4] *See generally No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH (2009) (urging Congress to amend the PLRA to remove barriers that severely limit prisoners' access to courts).

justice, and commonsense justice (including their assorted practices)…. 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." This is an admirable call for the courts to attend to the human factor in civil litigation about actual human beings, the prisoners, as well as the human costs to victims, staff and the community-at-large.

Of course, I like the direction Bersot and Arrigo are moving in. But it is not at all clear that the courts will go much further at this historical juncture. Law is a conservative enterprise, more sensitive to public opinion and legislation than the Founding Fathers meant it to be when they designed checks and balances. The recent advent of the supermax form of solitary confinement parallels three decades of massive crowding of prisons, dismantling of rehabilitation programs, and calls for a halt to the "coddling" of prisoners. What is needed is a sea change in public attitudes about criminal justice and criminals. As long as the citizenry keeps calling for harsher punishment, and less-than-liberal politicians remain afraid of appearing to their constituencies "soft on crime," it will continue to be very difficult to reform the prisons. It is possible that the sheer expense of solitary confinement will cause states to turn away from it as a penological strategy, without ever having to consider deeply the human costs of the harsh deprivations. I admire the authors' attempt to convince jurists to think more profoundly about human aspects of the problem in arriving at their decisions, but until our society views prisoners as human beings deserving of an opportunity to do their time and return to their communities with a fair chance at "going straight," the courts are likely to continue their vacillations and limited rulings.

Class action litigation is a very limited method for reforming the criminal justice system, but in many instances it is all we have. There needs to be a stronger grass roots, popular movement to end repressive and racist aspects of our

contemporary criminal justice policies and practices. That movement would provide the persuasive power needed to signal judges to halt their vacillating and write some truly transcendent rulings.