

Just Incarceration: A Moral Evaluation of Solitary Confinement

I. Introduction

My interest in the treatment of incarcerated individuals began in May of 2017 during a spring term course at Augusta Correctional Center through the Shepherd Poverty Program. About halfway through the course, the deputy warden took all of us on a tour of the entire facility, including the special housing unit (SHU), colloquially known as solitary confinement. As we passed through the SHU, I saw the blank stares of the individuals locked in their cells for 23 hours per day. I saw the cage with a singular pole inside of it that was these individuals' "exercise area." At that point, I knew instinctually that solitary confinement was wrong, but did not have the ethical or moral framework to formulate a cogent argument to better explain my instinctual feelings. That is what led me to this project. I hope to create a moral framework for incarceration, specifically just incarceration, and determine whether solitary confinement can be morally justified.

As I began researching the use of solitary confinement in America, I came across a set of institutions entirely new to me: so-called "supermax" prisons. Supermax prisons are in constant lockdown, meaning inmates are in their cells for 23 hours per day and access to communal activities is non-existent.¹ As of 1983, there was only one supermax prison in America.² Today, there are over 60.³ So why have supermax prisons become more prevalent? Have incarcerated individuals become more violent towards correctional officers or other inmates? According to

¹ Smith, Peter. "The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature." *Crime and Justice*, Vol. 34, No. 1, 2006, pp. 441-528. 443.

² Kurki, Leena and Norval Morris. "The Purposes, Practices, and Problems of Supermax Prisons." *Crime and Justice*, Vol. 28, 2001, pp. 385-424. 385

³ Smith 443

Leena Kurki and Norval Morris, researchers at the University of Chicago, “the data does not suggest so.”⁴ Instead, the exponential increase in the number of supermax prisons can be attributed to what they call, “the politics of punishment.”⁵ The tough on crime movement combined with a lack of strong ethical research about these facilities has led to a boom in supermax prisons without substantial push-back from the general public.

Supermax prisons are built to separate some inmates from the general prison population and usually constitute a branch of a maximum-security institution. Supermax prisons are created to separate individuals who have been disruptive or violent in the general population, and whose behavior can only be controlled through segregation.⁶ Some jurisdictions use supermax prisons only for the protection of other prisoners, but others use it for punishment based on broken rules, not endangering other incarcerated individuals.⁷ Kurki and Morris outline four characteristics of supermax prisons in America. First, placement in a supermax facility is indefinite and can often last for many years or even the rest of someone’s life.⁸ Second, prison administrators have broad discretion about who gets transferred to a supermax facility and why.

When transfer to a supermax is being considered, the prisoner has no right to advance written notice or a formal hearing, to present witnesses and evidence, to be represented by an attorney, or to obtain a written decision. An informal opportunity to give the prisoner's statement to the decision maker, within reasonable time after administrative segregation has taken place, is enough to satisfy constitutional requirements (Hewitt v. Helms, 459 U.S. 460 [1983]). Common criteria for admission include gang activity or disruption of the orderly operation of a prison, both inclusive catchall criteria.⁹

⁴ Kurki and Morris 385

⁵ Kurki and Morris 386

⁶ Kurki and Morris 388

⁷ *ibid*

⁸ *ibid*

⁹ *ibid*

Third, all supermax facilities subject their inmates to extreme isolation and sensory deprivation, allowing for little to no contact with any other individuals.¹⁰ Finally, supermax facilities have no organized activities and no opportunities for work, leisure, or group therapy.¹¹ These supermax facilities are the focus of this paper.

I will start by building an ethical framework for what constitutes just incarceration. Next, I will perform an in-depth analysis of the effects of the conditions of supermax prisons. For this analysis, I will synthesize existing literature about the psychological and psycho-somatic effects of solitary confinement from experimental data, meta-analyses, and anecdotal data from both research papers and an HBO documentary entitled, *Solitary: Inside Life at Red Onion*. I will then discuss whether the practices and effects of solitary confinement make it morally justifiable, given the just incarceration framework I built.

Before I proceed into the main substance of this paper, I want to be clear about something; I will not address prison abolition in this paper. While some scholars and activists have argued that prison is never justifiable, that argument is outside of this scope of this paper. This paper will focus specifically on the use of supermax prisons and whether they are morally justifiable - not on the whether prisons more generally are morally justifiable.

II. Statement of the Issue

A. Ethical Framework

James Childress, a prominent ethicist who writes about biomedical and war ethics argues that we, as human beings, have four *prima facie* duties to all other people: beneficence, non-

¹⁰ Kurki and Morris 389

¹¹ *ibid*

maleficence, autonomy, and justice.¹² *Prima facie* is literally translated as “at first sight.” In other words, we owe these *prima facie* duties to every person unless there is a circumstance in which these duties must be violated. For example, if someone wants to kill another person, it may be morally permissible or even required to violate our duty of autonomy to protect someone’s else’s life.

Incarceration certainly violates our *prima facie* duty of autonomy - but does that mean it is never justified? When analyzing whether certain aspects or types of incarceration are morally justifiable, we must consider other situations in which violating our *prima facie* duties of beneficence, non-maleficence, and autonomy are just. One such situation is *just war theory*. Just war theory explains that, in certain circumstances, it is morally justifiable to kill people even though that violates our *prima facie* duty of non-maleficence. Childress argues that just because a war may be justified does not mean you do not have certain duties during a war. In other words, just because one killing is justified, does not mean all killings or even all manners of killing are justified. To better explain this phenomenon, Childress lays out a number of principles that we must follow when violating our *prima facie* duties to other people including just cause, reasonable hope of success, and proportionality.¹³

Just cause explains that there must be a legitimate reason for violating a *prima facie* duty. In just war theory, this could mean killing a dictator who is abusing children and murdering his own people. The principle of reasonable hope of success argues that violating *prima facie* duties is just if and only if we can reasonably expect that violation to have a just outcome.

¹² Beauchamp, Tom and James Childress. “Principles of Biomedical Ethics, Seventh Edition.” *Oxford University Press*. 2013. 13

¹³ Childress, James. “Just-War Theories: The Bases, Interrelations, Priorities, and Functions of the Criteria.” *Kennedy Institute, Georgetown University*, 1 September 1928, pp. 427-445. 428.

Proportionality, also known as the minimum necessary force principle, explains that we must do as little harm as possible to achieve our goals. If there is another way to get the same outcome by doing less harm, we are morally required to take those alternative steps.

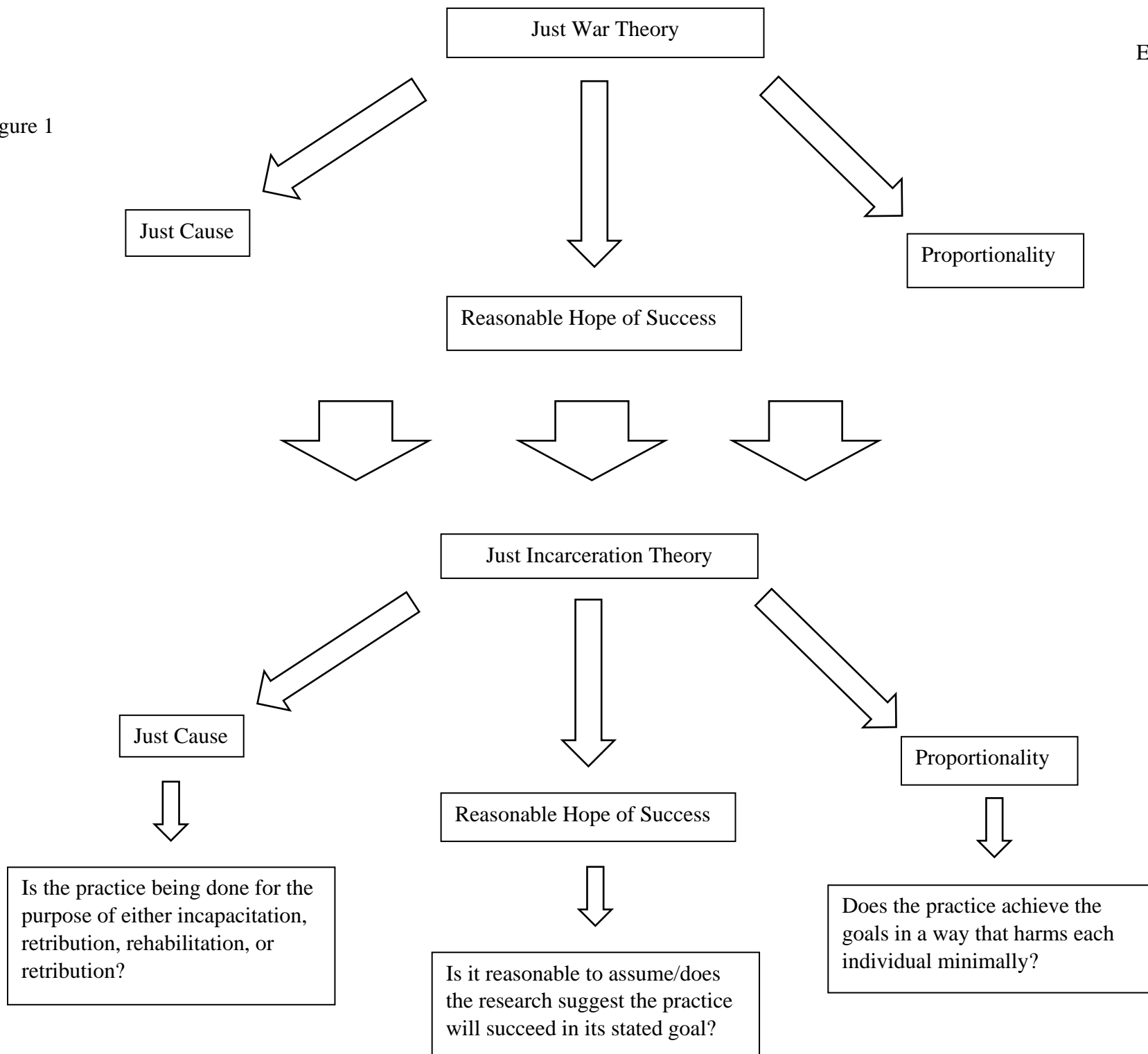
Now that we understand the basic principles of just war theory, we can use these principles to create a similar theory for incarceration: just incarceration theory (figure 1). Like war and murder, incarceration leads to the deprivation of certain *prima facie* duties. Specifically, incarceration inherently limits autonomy, as it is the state forcing someone to do something. Incarceration as it exists in our society inherently violates the *prima facie* right of autonomy. Just incarceration theory will follow the three principles Childress laid out for just war theory. If a form of incarceration fulfills those three principles, it is just. If it violates even one of those principles, it is morally unjustifiable.

Our society gives four general justifications for incarceration: incapacitation, retribution, rehabilitation, and deterrence.¹⁴ Incapacitation is the idea that someone is unable to harm another person because they are locked up. Retribution is the idea that someone must be punished for breaking society's rules. Rehabilitation is helping an individual get their life back on track so that they do not commit more crimes. Deterrence is trying to ensure that someone does not commit a crime by making the punishment for that severe; deterrence is similar to disincentivizing a crime based on the punishment. If the justification for a certain type of incarceration falls into one of these categories, it would satisfy the just cause principle. Reasonable hope of success is connected to just cause; if we can reasonably assume that the type of incarceration will fulfill one of the four justifications given research about that type of incarceration, it would satisfy the

¹⁴ McFatter, Robert. "Purposes of Punishment: Effects of Utilities of Criminal Sanctions on Perceived Appropriateness." *Journal of Applied Psychology*. Vol. 67, No. 3, 1982, pp. 255-267. 255.

reasonable hope of success principle. For the purposes of just incarceration theory, the proportionality principle means that we must use the type of incarceration that yields the best outcome while limiting the violation of our *prima facie* duty of non-maleficence.

Figure 1



B. Effects of Solitary Confinement

To understand whether long-term solitary confinement at supermax prisons falls within the definition of just incarceration theory, we must fully understand the effects of it. These effects fall into three broad categories: effects from sensory deprivation, effects from loneliness, and effects from solitary confinement specifically. Individuals housed in solitary confinement have extremely limited access to sensory stimulation and other people. Craig Haney, a psychologist at the University of California, Santa Cruz who studies solitary confinement and its effects on health outcomes, explains the situation of individuals placed in solitary confinement.

Prisoners in these units live almost entirely within the confines of a 60- to 80-square-foot cell, can exist 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 educational training programs or other meaningful 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, have no opportunities for normal conversation or social interaction, and are denied the opportunity to ever touch another human being with affection or caring or to receive such affection or caring themselves.¹⁵

Psychologists have long studied the acute sensory deprivation and isolation that Haney describes. These effects, along with the effects specific to solitary confinement rather than other forms of isolation and sensory deprivation, will inform our ethical framework and help us understand whether solitary confinement constitutes just incarceration.

Effects of Sensory Deprivation

¹⁵ Haney, Craig. "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement." *Crime & Delinquency*. Vol. 49, No. 1, January 2003, pp. 124-156. 127.

In the early 1950s, a group of researchers at McGill University including W.H. Bexton, W. Heron, and T.H. Scott performed a series of experiments about the effects of sensory deprivation on otherwise healthy individuals. While these experiments were ethically questionable, they revealed information about the direct effects of sensory deprivation in a way that non-clinical studies are unable to do. The researchers paid 22 male students to participate in the study. These 22 students laid on a lighted cubicle bed for 24 hours per day, save for the time spent using the bathroom and eating.¹⁶ The participants also wore “translucent goggles which transmitted diffuse light but prevented pattern vision.”¹⁷ The researchers also had the participants wear gloves and cardboard cuffs to limit tactile sensations, and built the cubicles to be soundproof to limit auditory stimulations.¹⁸

Early on in the experiment, the participants slept often. This, however, did not last long. Participants quickly became restless, bored, and emotionally volatile. Other symptoms included confusion, headaches, nausea, and fatigue. Even though the researchers paid more than double what most of the participants were making, these negative effects of the study caused most of the participants to quit within 2-3 days.¹⁹ There are two important differences to point out between these experiments and solitary confinement itself. First, the study lasted only an average of 2-3 days. Solitary confinement, on the other hand can last years.²⁰ These negative symptoms that the study participants experienced were based on a tiny fraction of the time that some individuals spend without sensory stimulation. Second, people could leave the study at any point, which is obviously not the case with solitary confinement. This feeling of being trapped, unable to escape

¹⁶ Bexton, WH, W Heron, and TH Scott. “Effects of Decreased Variation in the Sensory Environment.” *Canadian Journal of Psychology*, Vol. 8, No. 2, 1954, pp. 70-76. 71.

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ Haney 127

even if you want to may add an additional layer of psychological stress to the individuals experiencing sensory deprivation.

Arnhoff and Leon, psychologists at the National Institute of Health and the University of Tennessee respectively, explains that the participants in Bexton et al.'s study experienced those negative symptoms because the body perceives sensory deprivation the same way it perceives stress.²¹ For people in solitary confinement, this means that their minds are in a constant state of stress, 24 hours per day, 7 days per week. Arnhoff and Leon describe other similar sensory deprivation studies that yield similar symptomatic results as the ones associated with Bexton et al.'s study.²²

G.D. Scott and Paul Gendreau take this general research about the psychological effects of sensory deprivation and apply it specifically to maximum security prisons and solitary confinement. Scott and Gendreau report that people in solitary confinement suffered from withdrawal, spoke without feeling, and lacked intellectual energy.²³ Scott and Gendreau also found that time in solitary confinement matters for rehabilitation purposes. "From a rehabilitative point of view, the long-term prisoner does not receive sensory input sufficient to keep his mental processes receptive and active. Because of this, he cannot help himself in a constructive rehabilitation program."²⁴ In other words, solitary confinement's acute sensory deprivation limits rehabilitation opportunities.

²¹ Arnhoff, Franklyn and Henry Leon. "Psychological Aspects of Sensory Deprivation and Isolation." *Merrill-Palmer Quarterly of Behavior and Development*. Vol. 10, No. 2, 1964, pp. 179-194. 187.

²² Bexton et al. 185

²³ Scott, GD, and Paul Gendreau. "Psychiatric Implications of Sensory Deprivation in a maximum Security Prison." *Canadian Psychiatric Association Journal*. Vol. 14, 1969. 337.

²⁴ Scott 340

Effects of Loneliness

Haney's description of solitary confinement in America's prison system describes situations of extreme isolation. In the words of someone who spent years in solitary confinement, "the main thing segregation means to me is extreme loneliness as boredom."²⁵ Loneliness, like sensory deprivation, has been studied extensively by psychologists for many years. Daniel Perlman and Letitia Peplau have written extensively about humans' need for interactions and the consequences of loneliness. Perlman and Peplau describe four common manifestations of loneliness: affective, motivational, behavioral, and social.²⁶ The affective manifestation refers to loneliness causing feelings of hostility, anger, and anxiety along with general feelings of pessimism.²⁷ The motivational manifestation of loneliness refers to symptoms including paralysis and loss of will to perform tasks.²⁸ The motivational manifestation also causes lonely individuals to have high volatility of energy level.²⁹ The behavioral manifestation of loneliness leads to difficulty talking about loneliness with other people, including psychologists. Even if someone wants to help someone experiencing severe loneliness, the behavioral manifestation may not allow the individual to express their feelings.³⁰ The social manifestation of loneliness, also referred to as the medical manifestation, relates to the psycho-somatic symptoms associated with loneliness. For example, this manifestation can lead to headaches, poor appetite, lessened self-worth, and suicidal thoughts.³¹

²⁵ Jacobsen, Kristi. "Solitary: Inside Red Onion State Prison." *HBO*. 2016.

²⁶ Perlman, Daniel and Letitia Peplau. "Toward a Social Psychology of Loneliness." *Personal Relationships in Disorder*. London: Academic Press, 1981, pp. 31-56. 33.

²⁷ Perlman and Peplau 35

²⁸ *ibid*

²⁹ *ibid*

³⁰ Perlman and Peplau 36

³¹ Perlman and Peplau 37

Four psychologists in Nigeria furthered our understanding of the psychological effects of loneliness through survey research they performed in 2014. These researchers asked 337 students from Niger Delta University a series of questions from three different questionnaires related to loneliness and health. These researchers found similar results to Perlman and Peplau; interpersonal alienation is highly correlated with psychological distress.³² Another study performed by three Scandinavian psychologists found that social isolation specifically increases the risk of morbidity from cardiovascular disease.³³

John Cacioppo, Louise Hawkley, Greg Norman, and Gray Berntson, psychologists at Ohio State University, performed a more in-depth analysis of the specific psychological and somatic effects of loneliness and isolation on adults. They repeat that,

humans need others to survive and prosper... Perceived social isolation... predicts greater vascular resistance, elevated blood pressure, morning rise in cortisol, less salubrious sleep, and sedentary lifestyles. Perceived... social isolation has also been associated with gene expression.³⁴

The idea of loneliness affecting gene expression is especially noteworthy. Cacioppo et al. found that approximately 50% of the genetic changes caused by loneliness are heritable, meaning that loneliness affects not only an individual, but that individuals' children as well.³⁵

Effects of Solitary Confinement

³² Ifeagwazi, Chuka, JohnBosco Chukwuorji, and Endurance Zacchaeus. "Alienation and Psychological Wellbeing: Moderation by Resilience." *Social Indicators Research*, Vol. 120, No. 2, 2015, pp. 525-544. 533.

³³ Johnson, Jeffrey, Ellen Hall, and Tores Theorell. "Combined Effects of Job Strain and Social Isolation on Cardiovascular Disease Morbidity and Mortality in a Random Sample of the Swedish Male Working Population." *Scandinavian Journal of Work, Environment & Health*, Vol. 15, No. 4, 1989, pp. 271-279. 275.

³⁴ Cacioppo, John, Louise Hawkley, Greg Norman, and Gary Berntson. "Social Isolation." *Annals of the New York Academy of Sciences*. 2001, pp. 17-22. 18.

³⁵ Cacioppo et al. 20

Stuart Grassian and Nancy Friedman synthesized existing literature about how the interaction of sensory deprivation and loneliness manifests itself in individuals in solitary confinement. Based on their literature review, they found ten symptoms commonly experienced by people in solitary confinement:

- 1) Massive free-floating anxiety.
- 2) Hyper-responsivity to external stimuli.
- 3) Perceptual distortions and hallucinations in multiple spheres (auditory, visual, olfactory).
- 4) Derealization experiences.
- 5) Difficulty with concentration and memory.
- 6) Acute confusional states, at times associated with dissociative features, mutism, an subsequent partial amnesia for those events.
- 7) The emergence of primitive, ego-dystonic aggressive fantasies.
- 8) Ideas of reference and persecutory ideation, at times reaching delusional proportions.
- 9) Motor excitement, often associated with sudden, violent destructive or self-mutilatory outbursts.
- 10) Rapid subsidence of symptoms upon termination of isolation.³⁶

The researchers refer to this group of symptoms as, “solitary confinement syndrome.”³⁷ While not all individuals experience all these symptoms, if someone has at least one of these symptoms as a result of solitary confinement, that would constitute them having the syndrome. Grassian furthers the idea of this set of symptoms creating a syndrome in a different paper published in the *American Journal of Psychiatry*. Grassian explains that the evidence from various psychological studies proves that the effects of solitary confinement certainly constitute a “clinically distinguishable syndrome.”³⁸

³⁶ Grassian, Stuart and Nancy Friedman. “Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement.” *International Journal of Law and Psychiatry*. 1986, pp. 49-65. 54.

³⁷ *ibid*

³⁸ Grassian, Stuart. “Psychopathological Effects of Solitary Confinement.” *American Journal of Psychiatry*. Vol. 140, No. 11. 1983, pp. 1450-1454. 1453.

Peter Smith, a researcher at the Danish Institute for Human Rights, has also done extensive work analyzing the specific effects of solitary confinement on individuals. Smith, like Grassian, describes a wide array of symptoms associated with solitary confinement including severe headaches, heart palpitations, hallucinations, trouble sleeping, muscle pains, problems with digestion, and suicidal thoughts.³⁹ While the severity of these symptoms differ person to person, Smith found that almost 90% of individuals housed in solitary confinement suffered from social withdrawal, irrational anger, and confusion.⁴⁰ These symptoms also differ based on length of stay in solitary confinement. While serious symptoms can begin within a few days of getting put into solitary confinement, the risk of adverse health outcomes increases every day someone is in those conditions.⁴¹ Furthermore, multiple studies have shown that these adverse outcomes last beyond the time of incarceration, an idea known as chronic isolation syndrome.⁴² Overall, Smith finds that, “solitary confinement harms prisoners who were not mentally ill on admission to prison and worsens the mental health of those who were.”⁴³

Craig Haney performed studies comparing the mental and physical health of people in solitary confinement with people in the general prison population. Haney found that individuals housed in solitary confinement had substantially higher rates of all negative health outcomes including dizziness, ruminations, chronic depression, and confusion.⁴⁴ In the case of chronic depression, for example, Haney found that 77% of individuals in solitary confinement suffered from chronic depression while that number for the general prison population was only 23.5%.⁴⁵

³⁹ Smith 488-9

⁴⁰ Smith 493

⁴¹ Smith 494-5

⁴² *ibid*

⁴³ Smith 504

⁴⁴ Haney 136

⁴⁵ Smith 136

While 23.5% is still high, it is nowhere near 77%. Haney also found that people living in solitary confinement for long periods of time lose their grip on reality and “live in a world of fantasy.”⁴⁶ This, along with the deterioration of social abilities, leads to a much greater difficulty returning to society after imprisonment.⁴⁷

The most telling analysis, however, may come from the individuals who have spent time in solitary confinement themselves. While researchers can give formal diagnoses to the symptoms that incarcerated individuals experience, those incarcerated individuals’ words are sometimes more informative than any academic paper. “In segregation, it’s like I’m forgotten about.”⁴⁸ “You have this rage that just builds and builds and builds... and then little things will make you go crazy.”⁴⁹ “Time descends in your cell like the lid of a coffin.”⁵⁰ These testimonies speak to the terrible effects of spending time in solitary confinement and make us think twice about whether it is an effective or morally permissible method of incarceration.

III. Analysis

Just Cause

As I mentioned before, our society justifies incarcerations for four reasons: incapacitation, retribution, rehabilitation, and deterrence. The most common of these causes cited to justify the use of solitary confinement are incapacitation and deterrence. The incapacitation argument is that individuals who harm other individuals within prison must be separated from the general prison population to ensure the safety of other incarcerated individuals. The

⁴⁶ Haney 140

⁴⁷ *ibid*

⁴⁸ Jacobsen

⁴⁹ Jacobsen

⁵⁰ Haney, Craig and Mona Lynch. “Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement.” *NYU Review of Law and Social Change*. No. 23, 1997, pp. 477-570. 512.

deterrence argument also relates to behavior within prison - that the use of solitary confinement deters individuals from acting violently within prison. At face value, these justifications constitute just cause. If solitary confinement does in fact stop someone from violating the *prima facie* duty of non-maleficence either currently or in the future, that constitutes just cause according to our just incarceration framework. Solitary confinement passes the first stage of our just incarceration test.

Reasonable Hope of Success

Our next step to decide whether solitary confinement constitutes just incarceration is to look at whether it has a reasonable hope of accomplishing either of the stated causes. In other words, does solitary confinement either prevent individuals from acting violently in the future through deterrence or in the present through incapacitation? Unfortunately, researchers have only been able to quantitatively answer the first of those two questions. Israel Barak-Gantz, a sociologist at Wayne State University, studied who commits violent acts within prisons and whether solitary confinement is an effective deterrent for those individuals. His study found that putting someone in solitary confinement makes it statistically no less likely that that person will act violently in the future.⁵¹ Because we have quantitative evidence showing that solitary confinement is not an effective deterrent, we cannot say that solitary confinement has a reasonable hope of successfully preventing future violation of the *prima facie* duty of non-maleficence.

Incapacitation, on the other hand, is a bit more complicated. I found no evidence that solitary confinement does or does not lower rates of violence within the general prison

⁵¹ Barak-Gantz, Israel. "Who's in the Hole." *Criminal Justice Review*, Vol. 8, No. 29, 1983, pp. 29-37. 36.

population. The theory, of course, is that if we separate the violent offenders from the non-violent ones, there will be less overall violence. This seems like a plausible story - plausible enough, at least, that it would constitute a reasonable hope of success. Until further research shows otherwise, I believe that solitary confinement in supermax prisons weakly and tentatively passes the second prong of the just incarceration test - that it has a reasonable hope of preventing the *prima facie* duty of non-maleficence from being violated. By keeping individuals completely separated from all other people, the prison system does not allow those individuals to harm other people. Whether supermax prisons are the best way to achieve this goal, however, is a different story.

Proportionality

This brings us to the final step in our analysis: proportionality. Does solitary confinement achieve its goals in a manner that minimizes the suffering of the individuals experiencing it? The answer to this question lies in the psychological research regarding how solitary confinement affects individuals. Specifically, we must examine how solitary confinement affects individuals differently than other forms of punishment. If there are other forms of punishment that can protect other people with less overall harm, then solitary confinement in supermax prisons is unjustifiable. To start, we must analyze whether supermax incarceration leads to substantially worse outcomes than general incarceration. While general incarceration may have proportionality issues of its own, it is a good starting place for our analysis.

As I have discussed at length, the research unequivocally shows that solitary confinement has extreme negative effects on peoples' mental health. The loneliness and sensory deprivation that solitary confinement causes have been studied extensively. Those studies all come to the same conclusion: sensory deprivation and loneliness cause severe psychological problems.

Furthermore, Haney's studies showed that these negative effects are substantially worse than the effects of general incarceration in terms of rehabilitation and chances of success outside of prison. If these negative psychological effects were not bad enough, a recent study showed that, "in the United States, nearly half of prison suicides occur in solitary confinement, even though estimates of the percentage of those in solitary confinement range between 2-8%."⁵² While solitary confinement does satisfy the just cause and, to a lesser degree, reasonable hope of success principles, it does not satisfy the proportionality principle. As such, solitary confinement does not constitute a just form of incarceration. In the words of someone who has spent years in solitary confinement, "when I first came to segregation, I had no problems... being in segregation so long made me worse. I had to go get medication. When I didn't take medication, I cut myself. That's what segregation did to me."⁵³ These words get to the heart of what makes supermax solitary confinement unjust- that prolonged solitary confinement harms the people experiencing it so much that it simply cannot be justified.

General population incarceration, however, may not be the solution. It is possible that some individuals are threats in the general prison population, so the prison system must design an alternative form of incarceration to house them. If there is a different type of incarceration that stops violence from occurring within prison while also minimizing the detrimental effects of supermax detainment, that means supermax prisons and the long-term solitary confinement it uses are unjustifiable. One such program was created by the Washington Department of Corrections. Instead of placing individuals at severe risk of victimization, including former gang members and members of the LGBTQ community, in long-term segregation as other states do,

⁵² Bennion, Elizabeth. "Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment." *Indiana Law Journal*. No. 90, pp. 741-786. 757.

⁵³ Jacobsen

Washington has created special housing units with extra programming. According to the Washington DOC, this more humane method of incarceration has actually better protecting other incarcerated individuals and correctional officers than standard long-term solitary confinement.

The unit provides out-of-cell programming, including daily opportunities to interact with each other and staff during meals and recreation in the dayroom. Unit residents also participate in supported work and other activities to help them function more independently while in prison and upon release. Corrections officers assigned to the unit are trained how to respond appropriately to people with special needs and help them live healthy and safe lives.⁵³ The Washington Department of Corrections reports that the unit has resulted in safer living conditions for these incarcerated people and safer working conditions for corrections staff.⁵⁴

Another example of an alternative solution to violence in prison comes out of Pennsylvania. Pennsylvania instituted a policy directed at keeping people struggling with mental health disorders out of supermax facilities. Generally, people with mental illnesses are substantially more likely to be put in supermax facilities than those without mental illnesses.⁵⁵ Thus, Pennsylvania decided to house individuals with mental illnesses who would normally be put in long-term solitary confinement in therapeutic units.⁵⁶ This, like the Washington alternative, has had positive results with significantly fewer negative effects than long-term solitary confinement.

These are just two examples of ways in which departments of correction are trying to make prisons safer while also ensuring that incarceration is humane. It is unsurprising that alternatives to supermax prisons have been successful while doing less harm to the incarcerated

⁵⁴ Shames, Alison, Jessa Wilcox, and Ram Subramarian. "Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives." *VERA Institute of Justice*. May 2015. 22.

⁵⁵ Haney "Mental Health" 148

⁵⁶ Shames 22

individuals. Long-term solitary confinement has such heinous and horrible effects, that it would be surprising if there was not an alternative that proved that solitary confinement did not satisfy the minimum necessary force principal. It was just about finding ways to protect the prison population without subjecting people to the loneliness and isolation prevalent in supermax facilities. At this point, it is important to differentiate between supermax facilities and general solitary confinement. Solitary confinement can be used for a variety of reasons, including safety awaiting transfer and short-term punishment. While those forms may be unjustifiable, that analysis is outside the scope of this paper. I am focusing specifically on supermax prisons and the long-term incarceration that leads to the outcomes I discussed earlier.

Do Supermax Prisons Constitute Just Incarceration?

Based on the just incarceration framework derived from Childress's just war theory, solitary confinement as it exists today in America's supermax prisons is absolutely and unequivocally unjustifiable. Incapacitating individuals to avoid violence in prison is still an important cause, the means of achieving it however cannot be solitary confinement. Solitary confinement at supermax facilities, as I discussed above, causes irreversible damage to people housed in it. It creates both somatic and psychological symptoms and strips individuals of their dignity. Just because this method of incarceration is unjustifiable, however, does not mean that all forms of separating individuals within a prison are necessarily unjustifiable as well. In fact, if an individual is harming other people in the general prison population, the criminal justice system may be morally obliged to take certain steps to rectify that situation.

The two main problems with solitary confinement fall within the categories of loneliness and sensory deprivation. Individuals housed in solitary confinement are in their cells for 23 hours per day without human contact and very little, if any, stimulation. These two facets of solitary

confinement have been shown to be associated with the many negative symptoms plaguing individuals housed in solitary confinement. So, if there could be a type of incarceration that kept other people safe while also doing minimal harm by limiting the effects of loneliness and sensory deprivation, that may be justifiable or even required. Doing it through long-term solitary confinement, however, regardless of the severity of someone's offense or how much danger they pose, is necessarily unjustifiable.

IV. Policy Recommendation

While Pennsylvania and Washington's alternatives to long-term solitary confinement have proven that long-term solitary confinement is morally unjustifiable, I would like to offer a different solution. I suggest a new form a solitary confinement that is solitary only in terms of physical separation from other incarcerated individuals. I will refer to this new form of incarceration as un-solitary confinement. Individuals in un-solitary confinement must get a visit from a psychologist every day. Individuals in un-solitary confinement must have sensory stimulation of some sort for multiple hours each day. Individuals in un-solitary confinement must have the opportunity to talk to other individuals in a focus group or other controlled environment, something individuals in the class I mentioned in the introduction explained is very rehabilitative for incarcerated individuals. Individuals in un-solitary confinement will know exactly what they must do or not do to return to the general population, limiting temporal uncertainty prevalent in solitary confinement.

Another important aspect of un-solitary confinement is a much more limited use. Solitary confinement constituted just cause and reasonable hope of success only to protect other incarcerated individuals. Un-solitary confinement is the same in that regard. No one may be put in un-solitary confinement for simply breaking the rules or arguing with a guard. That would not

satisfy the conditions of just cause or reasonable hope of success. In sum, the only justifiable reason someone can be put in un-solitary confinement is because that person is an immediate threat to other incarcerated individuals, and this un-solitary confinement must limit the effects of loneliness and sensory deprivation, as those two facets of incarceration cause serious negative consequences for incarcerated individuals.

V. Conclusion

As I walked past the men whose entire existence was a small cell, I assumed that something was wrong. I believed that solitary confinement was an inhumane and unjustifiable way to treat people, but I did not have the conceptual tools to explain why. Drawing from James Childress's just war theory to create a framework of just incarceration, it becomes clear the solitary confinement does not satisfy the proportionality principle; it does not achieve its goals while limiting *prima facie* duty violations. It does not protect all individuals in the criminal justice system, including those in solitary. It causes unnecessary harm and violates our *prima facie* duty of non-maleficence when it need not. As Childress makes clear, just because we are justifiably violating our *prima facie* duties to someone, does not mean we can do whatever we want. In war, that means we cannot kill without reason even if the war itself is just. For incarceration, that means we must limit suffering, even if some form of incarceration is justifiable.

While the framework of just incarceration was helpful in determining whether solitary confinement in supermax facilities is necessarily unjustifiable, its applicability does not end there. Just incarceration gives us a new framework to think about incarceration. Often, when researchers are evaluating whether policies are justifiable, they look only at the results without

an ethical framework on which to base their analysis. This is especially problematic for criminal justice issues.

Many legal injustices can only be challenged through the eighth amendment, which prohibits the use of cruel and unusual punishment. As such, the most effective way to stop an unjust policy is to prove that it is cruel. The best way to prove something is cruel is to have a persuasive ethical framework and make an argument based on that framework. That is exactly what just incarceration theory gives us, a set way to analyze whether certain practices in the criminal justice system are justifiable. To determine whether a certain practice constitutes unjust incarceration, we must apply this simple, three-pronged test.

- 1) Is the type of incarceration being used for rehabilitation, deterrence, incapacitation, or retribution? If so, move on to question two.
- 2) Does the type of incarceration have a reasonable hope of successfully achieving one of the goals from part 1? If so, move on to question three.
- 3) Are there any other types of incarceration that achieve the same goals while also inflicting less harm on the incarcerated individuals? If so, the type of incarceration is unjust. If not, it is just.

When faced with a situation that seems potentially unjustifiable, we must find the right moral tools to evaluate it. I believe that this just incarceration theory gives scholars a basic framework to consider whether certain forms of incarceration are justifiable and, if they are not, what we can do to make them so. Just incarceration theory can, and should, be applied to situations to determine how we should punish people for breaking society's rules.