

Arguing the 8th Amendment for the Mentally Ill: Can Aristotle Help?

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Virtue is excellence, something uncommonly great and beautiful, which rises far above what is vulgar and ordinary.

Adam Smith, *The Theory of Moral Sentiments* (Part I, Section I, Chapter V. Online)

In their article "Inmate Mental Health, Solitary Confinement, And Cruel and Unusual Punishment: An Ethical and Justice Policy Inquiry" Heather Bersot and Brice Arrigo give us a careful examination of the moral philosophy underpinning the adjudication of 8th Amendment claims made by prisoners with pre-existing mental illness subjected to long-term disciplinary solitary confinement. Bersot and Arrigo argue that the courts' failure to recognize the imposition of such solitary confinement as cruel and unusual punishment for the mentally ill is traceable to a primarily utilitarian moral philosophy. Though they identify some instances of Kantian or deontological moral theory as in evidence in the judgments they examine, they seem most concerned with the influence of utilitarian thinking – that if the greater good (the protection of other inmates and guards) is served by locking a mentally ill person away in a cell by themselves then it is morally justified no matter the harm to the prisoner. Rather than focus on deontological morality as the antidote to this kind of thinking, Bersot and Arrigo argue that Aristotelian virtue ethics provides the best philosophical foundation upon which to build a convincing argument for the unconstitutionality of solitary confinement for the mentally ill.

As I understand it, the argument is that virtue, in the Aristotelian sense, is only attainable in association with others. By depriving the mentally ill of the

possibility of association through solitary confinement we deprive them of all opportunity of the development of excellence of character, we take them completely out of the group for whom it is possible to aim at virtue. For Bersot and Arrigo, this Aristotelian insight dovetails into three criminological trends which the authors also seek to draw on: commonsense justice which should tell us that it is cruel and unusual to discipline a mentally ill person in a way that will exacerbate their mental illness, especially when the behaviour for which they are being disciplined is itself a product of mental illness; therapeutic jurisprudence which would tell us that it is cruel and unusual for the law to act so as to exacerbate mental illness; and restorative justice which would tell us that in order to heal wrongdoing, offenders must be given the opportunity to restore right-relation and there can be no right-relation where there is no relation at all.

In what follows I would like to pursue two related questions: first whether virtue ethics really is the best argument against what is, to my mind, the self-evidently inhumane treatment involved in long-term disciplinary solitary confinement of the mentally ill and second, whether drawing on virtue ethics is likely to be more persuasive than consequentialist or deontological arguments to judicial decision makers. I shall argue that while Bersot and Arrigo's argument from virtue ethics provides a novel way of looking at the question of solitary confinement and while their discussion certainly shows how the argument from virtue ethics is consistent with and supported by the criminological trends mentioned, it provides neither the best nor the most persuasive grounding for arguments that such treatment constitutes cruel and unusual punishment.

Let us begin by recalling that Aristotle's *Nicomachean Ethics* is about excellence. It is a description of nobility and a handbook for greatness. Of all Aristotle's works, this text paints the most vivid picture of Hellenistic culture of the

third century B.C; its resolutely public nature, its competitiveness, its commitment to style, good taste, refinement and beauty, its preoccupation with honour, its insistence on a this-worldly understanding of life, its focus on action rather than capacity, on achievement rather than potential. Aristotle's virtues by their very nature tell us that we are in the realm of supererogation. The book is concerned with basic virtues like courage (by which he primarily means military courage) and temperance. But it is likewise concerned with virtues that presuppose wealth, for example liberality, which is to be found between prodigality and niggardliness; and magnificence, which relates to the spending of large sums for the public good and is to be found between ostentation and stinginess. Other important virtues for Aristotle include ready-wittedness, good temper, pride and right ambition.

The obvious first question then is what help can an incarcerated, mentally ill and presumably violent offender subjected to disciplinary solitary confinement hope for from a moral theory that is concerned with the highest levels of refinement of the human character? Why would one argue from an analysis of the supererogatory to conclusions about minimally acceptable treatment for violent offenders suffering from psychiatric disorders? One reason might be that the argument from virtue ethics harnesses the authority of Aristotle in the service of a progressive interpretation of the 8th Amendment. However Bersot and Arrigo's argument – that prisoners should be entitled to the society of others as basic precondition for the attainment of virtue - rests on a number of implied premises for which Aristotle is not authority and for which Bersot and Arrigo have not otherwise argued.

One implied premise of their argument is that everyone has a right to be afforded the preconditions of virtue. A second is that such a right cannot be lost as a result of bad behaviour. A third is that the whole task of the cultivation of virtue remains relevant and applicable even to those persons who are suffering from severe

mental illness. Bersot and Arrigo's argument rests, in other words, on premises that the state has a duty to afford to all individuals the opportunity to cultivate good character in the future no matter how much their past behaviour demonstrates either bad character or an incapacity for good character because of mental illness; that the community necessary for citizenship must be extended to all people at all times whether they pose a danger to the life or wellbeing of others; and that the society necessary for citizenship is a right not a privilege and cannot be withdrawn even if a person's violent character threatens the lives of others.

Again, Aristotle is not an authority for any of these premises. Indeed, we would have good reason to believe that he would disagree on every point. There is nothing in the *Nicomachean ethics* that would suggest that the vicious person, one who has done base rather than noble deeds, could not be deprived of the privileges of citizenship and society. Indeed, far from thinking that the opportunity for virtue should remain open to all despite past conduct, Aristotle thought that virtue could become a logical impossibility for a person as a result of past vice. Speaking of the licentious and unjust he writes, "now that they have become what they are, it is no longer open to them not to be such." (Aristotle, J.A.K. Thomson trans., 25) Though Aristotle saw punishment as a kind of cure - something for the benefit of the offender - there is nothing in his writings that would suggest that he saw banishment - the third century B.C. equivalent of solitary confinement - to be per se wrong. We see in Aristotle no trace of the idea that person of bad character has a right to a never-ending opportunity to develop good character in association with others.

Furthermore, Aristotle's conception of virtue presumes voluntariness. He explicitly excludes the mentally ill from the realm of both virtue and vice. Not even the most ardent desire to be virtuous is a sufficient condition for the cultivation of virtue. Inability to conform one's actions to the demands of virtue may make virtue

impossible. Aristotle opens Book III of the *Nicomachean Ethics* this way, "Since virtue is concerned with passions and actions, and on voluntary passions and actions praise and blame are bestowed, on those that are involuntary pardon, and sometimes also pity, to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for legislators with a view to the assigning both of honours and of punishments." (Aristotle, W.D. Ross trans. Online.) Virtue and vice, honour and punishment presume voluntariness. Madness is a condition in which "the moving principle is outside." (Aristotle, W. D. Ross trans. Online.) Thus though pity and pardon should be extended to the mentally ill on Aristotle's reasoning, they cannot be expected to be capable of virtue. Though it might be cruel to deprive them of society its not cruel because you are depriving them of the possibility of attaining virtue. Virtue is already, sadly, unattainable for the insane.

The vulnerability of virtue ethics to these objections in the context the authors want to use it means that virtue ethics do not ground a first-best argument against punitive long-term solitary confinement for the mentally ill. For Aristotle neither the bad nor the mad come within the logic of either citizenship or virtue.

If Bersot and Arrigo, however, were wedded to the notion of citizenship they might have supplemented their argument with reference not so much to Aristotle but the Supreme Court of the United States decision in *Trop v. Dulles* (1958) which held that deprivation of citizenship "... is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." Had they drawn on this decision they might have made a better case for relevance of deprivation of citizenship to the 8th Amendment in the context of solitary confinement – the court here showing a clear willingness to entertain the idea of citizenship as something so fundamental that it cannot be lost even as a

result of bad behaviour. Although the case deals with the notion of statelessness in a modern context it would have been an interesting source for Bersot and Arrigo to refer to in arguing for their implied premises.

Let us turn now to the question of whether virtue ethics might promise a better persuasive foundation for convincing judicial decision makers to see such treatment as an 8th Amendment violation. Here again, I think virtue ethics is a harder sell than arguments that would more squarely join issue with utilitarian concerns or than deontological arguments that would identify such treatment as torture.

Allow me to interject here a word about methodology. Much of Bersot and Arrigo's text is taken up with an explanation of their methodology, their choice of cases to examine as well as their method of extracting the moral philosophical assumptions informing the judges' reasoning; their manner of bringing the disciplinary rigours of the social sciences to bear on the analysis of judicial decisions. However, one has the sense that the detailed discussion of method is an attempt to give the appearance of greater precision than is actually attainable in this kind of inquiry.

Interestingly, Aristotle opens the *Nicomachean Ethics* with a discussion of precision and method. In Book I he writes, "Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts.... it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs." (Aristotle W.D. Ross, trans. Online) Bersot and Arrigo may perhaps be accused of

being rhetoricians who offer scientific proofs. And the difficulty here is not just that they pretend to a precision that cannot be attained in this type of inquiry but it is also that by processing the cases in their seemingly scientific method instead of reading them more holistically, they miss out, I think, on insights contained in the cases about how judges might successfully be persuaded that solitary confinement for mentally ill offenders is an 8th Amendment violation.

Here I would like to take a closer look at *Scarver v. Litscher* (2006): a case in which I think holds some interesting clues to how courts might be successfully persuaded that such solitary confinement is an 8th Amendment violation. *Scarver v. Litscher* is one of the cases the authors analyze and peg as an instance of utilitarian moral reasoning. The decision is written by Judge Richard Posner, a former law professor at University of Chicago and a man widely considered to be the father of the law and economics movement. Bersot and Arrigo locate Judge Posner's utilitarian bent in his statement, "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." (Scarver, 2006, p. 975)

Interestingly, Posner's book *The Economics of Justice* first published in 1980 contains an extensive analysis of the moral pitfalls of different modes of moral reasoning. Posner wrote, "If monstrosity is a peril of utilitarianism, moral squeamishness, or fanaticism is a peril of Kantian Theorists." (Posner, 1980, p. 58) Posner's economic theory was an explicit attempt to combine the moral insights of both utilitarianism and Kantian theory while eliminating their flaws. While no one, including Posner himself,¹ would claim that he was successful in doing so, Posner is

¹ See in for example in the preface to the book written after two years on the bench Posner writes, "...I hope the ethical theory propounded in Part I of this book will be

one judge who can't be accused of lack of awareness of the limits of either utilitarian or Kantian moral theory. And it would, I think, be a mistake to read his judgment in *Scarver* as being without insight into the difficulties of an either purely utilitarian or deontological approach to the issues in the case. Further, it would be a mistake not to see the ways in which his judgment gestures toward ways of framing both utilitarian and deontological arguments that would be more persuasive in the quest to persuade the courts that solitary confinement of the mentally ill is an 8th Amendment violation.

Scarver was a violent schizophrenic incarcerated for murder who had also murdered two prison inmates. One of his prison victims was serial killer Jeffrey Dahmer. Both of the prison murders were apparently committed in a delusional state and Scarver believed he was acting under orders from God. Of course, millions of people around the world thought Dahmer had it coming and, far from blaming Scarver, applauded the killing and perhaps even endorsed Scarver's delusion of a divine commandment to kill. Posner gives us a clue that if Dahmer had been Scarver's only victim, the weight the court gave to the prison authorities' estimation of Scarver's dangerousness, and hence the court's utilitarian analysis of the case, might be different. "Dahmer, who doubtless would have been executed in any state that retains the death penalty, was a unique target. The other inmate whom Scarver murdered was not." (*Scarver*, 2006, p. 976)

Further, and more importantly for our purposes, Posner highlights the fact that Scarver was "well behaved" in two Colorado prisons where he was held before and after the time complained of in the Wisconsin "Supermax." (*Scarver*, 2006, p. 974) Posner notes that in the first Colorado prison Scarver, "was given audio-tapes

taken in the spirit in which it was intended; as a subject of speculation rather than a blueprint for social action." (Posner, 1980. p. iv.)

to help quiet the voices in his head, worked, and was permitted daily contact with other inmates in the prison's recreation yard, all without incident." (*Scarver*, 2006, p. 974) Acknowledging these periods of good behaviour, Posner gestures toward a willingness to be persuaded by evidence that means other than solitary confinement might be effective in controlling the violence of someone like Scarver. Indeed Posner comes close to lamenting the fact that counsel for Scarver did not provide the court with evidence that other measures could have achieved the same security objectives. Posner writes, "Scarver has presented no evidence concerning the techniques that the two prisons in Colorado use to allow a dangerous prisoner to mingle with other inmates without endangering them or staff." (*Scarver*, 2006, p. 976) Posner suggests here a willingness potentially to reject, not utilitarian calculation itself, but the particular utilitarian calculus that sees solitary confinement as serving the greatest good of the greatest number. He appears to be willing to do so *if* the plaintiff prisoner were to put before him evidence to show that other techniques could be as or more effective in preventing violence.

There is an important insight to be gained here. Ultimately opponents of solitary confinement must have something persuasive to say in response to the utilitarian argument that no matter how cruel, damaging or destructive it is for the mentally ill offender to be placed in long term solitary confinement such, treatment may be necessary to protect the lives of fellow inmates and prison staff. To reply that the treatment deprives the inmate the opportunity for the development of virtue and good character hardly joins issue with the concern at its strongest. You can't honour one prisoner's right to society if doing so will deprive other prisoners of their right to life.

Where might one obtain the kind of evidence Posner seemed willing to consider: the kind of psychiatric evidence that would show that solitary confinement

because it exacerbates mental illness, renders a mentally ill person more rather than less dangerous? One place to look might be to research done in the context of mental health facilities where identical safety concerns arise but where the health, wellbeing and cure of patients is more squarely on the table as a paramount consideration and where punitive aspirations are presumable not present.

Consider the work of psychiatrist Dr. Steven S. Sharfstein trying to reduce the use of restraint and isolation in mental hospitals. Sharfstein argues that helping violent patients to understand the triggers of violent episodes and training hospital staff in a new culture of violence prevention reduces the need for confinement of patients. "At our hospital we have moved away from an emphasis on the proper use of restraint and seclusion to an emphasis on reducing their use by changing the culture of the inpatient stay and by developing tools and techniques to prevent aggressive episodes from ever escalating to the point of needing an intervention that requires restraint or seclusion... Interventions that reduce violence not only improve safety but also improve the treatment experience for patients and families."

(Scharfstein, 2008, p. 197)

Those arguing against solitary confinement in prisons should note however that even in the hospital, where the well-being of the patient is paramount, concerns about preventing harm are still given top priority. Dr. Sharfstein writes: "Without safety, there is no treatment." (Scharfstein, 2008, p. 198) Nevertheless the hospital model offers a starting point from which to challenge the calculations about risk assumed in the prison context – that solitary confinement is the most effective means of minimizing the risk of violence. Such arguments are unlikely to persuade judges to view solitary confinement for the mentally ill as *per se* a violation of 8th Amendment rights. However, because they do directly address legitimate utilitarian concerns such arguments might offer more hope for shifting the courts' thinking in

this area and opening up the possibility that such treatment might, at least under some circumstances, come to be seen as unnecessary and, therefore, gratuitously cruel.

No judge in Posner's position could responsibly dismiss utilitarian concerns by shifting to reasoning based on virtue ethics. He simply could not have said, 'never mind about the risk Scarver poses to fellow inmates and staff, to live a properly human life he must be afforded the opportunity to cultivate the virtues and for that he needs the society of others.' The utilitarian concerns must be met. But what should not be overlooked in Posner's judgment is the way he gestures toward possible ways of shifting the outcome of any utilitarian calculus on the basis of evidence that shows that the good of security for fellow inmates and staff can be had without the harm of solitary confinement for the prisoner.

Let us turn now to the potential of deontological arguments to move judges closer to viewing such treatment as unconstitutional. Here one could argue that for a mentally ill individual long-term solitary confinement may be tantamount to torture. To demonstrate this let's look again at *Scarver v. Litscher*. What is interesting about the case is the way that Posner identifies so many of the conditions collateral to the solitary confinement itself as inhumane. Scarver was on anti-psychotic medication and was kept in a cell where the temperature in summer was over one hundred degrees. Posner describes the brutality of the conditions in detail: "The heat of the cells during the summer interacted with Scarver's antipsychotic drugs to cause him extreme discomfort; antipsychotic medication puts a person at risk of heat stroke, dangerously low blood pressure, and a rare and often fatal heat-related disease called neuroleptic malignant syndrome (NMS). The constant illumination of the cells disturbs psychotics. And without audiotapes or a radio or any other source of sound Scarver could not still the voices in his head." (*Scarver*, 2006, p. 974) Posner

suggests that the constant illumination (so brutal a treatment that I personally can hardly bear to think about it) was gratuitous since the guards only looked in on the prisoner occasionally. In the tone of Posner's judgment we see an acknowledgment that these conditions – the heat, its interaction with the anti-psychotic drugs, the constant light, the absence of any sound to quite the voices he heard due to his schizophrenia inflict gratuitous torment on the mentally ill prisoner. They are tantamount to torture.

But here again Posner points to an evidentiary roadblock in the way of his finding them to amount to an 8th Amendment violation. Posner points out that 8th Amendment jurisprudence requires that the plaintiff prove a mental element amounting to "deliberate indifference" to the suffering of the prisoner on the part of the prison authorities. Again Posner comes close to lamenting the lack of evidence provided by the plaintiff. He writes: "Scarver's lawyer has not contested the defendants' denial that they knew that the conditions of confinement at the Supermax prison would aggravate Scarver's mental disease and has not argued that the literature was so widely disseminated in correctional circles that it is a fair inference that despite their denials they did know that." (*Scarver*, 2006, p. 976) What Posner gestures to here is the need for better education of prison officials of the detrimental psychological effects of solitary confinement on mentally ill prisoners. Had the plaintiff Scarver been able to prove that the defendants knew that the treatment he was given "inflicted severe physical and especially mental suffering" (*Scarver*, 2006, p. 975) the 8th Amendment violation might well have been made out.

This does not point to a need for virtue ethics. Rather it points to a need for education of prison authorities on the detrimental effects of solitary confinement on the mentally ill. It points to a need to disseminate information in the prison system

about the ways in which solitary confinement for mentally ill prisoners amounts to torture and is therefore something that all prison personnel have a deontological moral duty (hopefully translatable into a constitutional duty) to refrain from inflicting except in circumstances of extreme necessity.

Finally, in Posner's decision we also see an important recognition of the moral inappropriateness of inflicting any punishment whatsoever on a mentally ill person. Posner points to the obtuseness of the system which subjects a mentally ill prisoner to conditions which exacerbate his mental illness and make it impossible to behave more normally and then punish him for erratic behaviour by keeping him in the conditions that caused him to behave that way. Posner writes, "Their reactions were at times bizarre, as when they denied him a promotion to a higher level because 'the incident of you banging your head on the wall and other bizarre behavior is not appropriate. We highly recommend that you cooperate w/ clinical services so that advancement can be considered in the future.' He was banging his head because he is crazy, not because he was unwilling to cooperate." (*Scarver*, 2006, p. 975)

In Posner's judgment then we see a flicker of insight that the whole logic of "disciplinary" solitary confinement is inapt for mentally ill prisoners. If as a result of mental illness a prisoner pose a serious risk to the lives of others that will likely always be seen as justifying some measure of solitary confinement. But it is a very different thing to suggest that the mentally ill should be punished for psychotic behaviour by subjecting them to conditions that exacerbate their psychosis. This is ludicrous and it completely ignores a fundamental premise for which Aristotle is perfectly good authority: that voluntariness is a precondition for both praise and blame, both honor and punishment.

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