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Tony Ward  
*Victoria University of Wellington*

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Commentary: Disciplinary Segregation in Prisoners

Dignity, Virtue, and Punishment: The Ethical Justification of Disciplinary Segregation in  
Prisoners

Tony Ward

Victoria University of Wellington

Author for correspondence:  
Dr Tony Ward  
School of Psychology  
Victoria University of Wellington  
PO Box 600, Wellington  
New Zealand  
Email: [tony.ward@vuw.ac.nz](mailto:tony.ward@vuw.ac.nz)

### **Abstract**

In this paper I reflect on Bersot and Arrigo's argument that virtue ethics provides a sound ethical theory to guide judicial decisions concerning the legitimacy of subjecting mentality disordered offenders to long-term disciplinary solitary confinement. I expand on three issues evident in the Bersot and Arrigo paper: (1) the nature and justification of punishment; (2) the concept of dignity and its relevance to mentally disordered offenders placed in disciplinary solitary confinement, and (3) the nature and scope of virtue theory in the criminal justice context.

**Keywords:** Offender punishment; virtue theory; mentally disordered offenders

### **Introduction**

In their target article Heather Bersot and Bruce Arrigo analyse the ethical theoretical commitments evident in judicial decisions concerning the placement of prisoners with mental disorders into long-term disciplinary solitary confinement. They conclude that these decisions are ethically suspect, in part, because they are guided by two inadequate ethical theories, Consequentialism and Formalism (Kantian ethics). Bersot and Arrigo argue that the application of these theories to the issue of solitary confinement is flawed for a number of reasons. For one thing, they draw attention away from social science research on the vulnerability of mentally disordered prisoners and the likelihood they will experience an exacerbation of their symptoms when in solitary confinement.

Furthermore, the interests of offenders are inevitably overridden by the preferences of the rest of the community, often for unconvincing reasons. They suggest that virtue theory can provide a more comprehensive ethical theory which is better able to guide these kinds of judicial decisions, primarily because it assumes that all human beings

ought to be given the opportunity to live flourishing lives (i.e., experience satisfactory levels of well-being). This ethical requirement places a burden on the state to ensure penal policy and punishment practice reflect this, and related values, in their content and implementation. In their view a broad based (i.e., comprised of therapeutic jurisprudence, restorative justice, and commonsense justice) criminal justice policy called *psychological jurisprudence*, is consistent with virtue ethics, and as such, is ideally placed to underpin penal decisions and practices involving mentally disordered prisoners.

The Bersot and Arrigo paper is an excellent example of the value of interdisciplinary work and its combination of textual investigation and ethical analysis is illuminating. However, because of the wide scope of their paper there are some inevitable conceptual loose ends and areas in which the argument is a little underdeveloped. This is particularly evident in the rather thin discussion of virtue theory. For example, Solomon (1988) made an important distinction between theories of morality that contain virtue components and those that are virtue ethical in a stronger sense. Thus, Formalist and Consequentialist theories may refer to virtues (character traits) that are in some way related to their core ethical principles (e.g., compassion, respect) while not primarily *basing* their approach on these character traits and their moral development. It seems to me that Bersot and Arrigo's argument does not exclude this possibility and Consequentialism and Formalism may contain at least some virtue components. Furthermore, the question of (and controversies over) how to define virtues is not explicitly addressed in their paper. There is considerable debate over the definition of virtue with theorists disagreeing over whether it is pluralistic, monistic, facilitative of well-being or not necessarily so, and to what degree ethical judgements based on virtues are justified (Walker & Ivanhoe, 2007). The lack of attention to the definition of virtue is a shortcoming in the Bersot and Arrigo paper because it makes it harder for the reader to appreciate the soundness and force of their argument. For the purposes of this paper I will assume the validity of the following characterization of virtues by Walker and Ivanhoe (2007) is sufficient:

In general, virtue ethics views assess human character as a primary mode of understanding the rightness or wrongness of actions and the goodness or badness of lives lived, view traits of character as stable dispositions to act and feel in contextually appropriate or inappropriate ways, and understand the virtues and vices as the primary mode of assessing character (p.4).

I do not intend to comment any further on conceptual problems associated with the Bersot and Arriago definition and subsequent use of virtue theory but will concentrate instead on three other important issues raised by their paper: (1) the nature and justification of punishment; (2) the concept of dignity and its relevance to mentally disordered offenders placed in disciplinary solitary confinement, and (3) the nature and scope of virtue theory in the criminal justice context.

### **Punishment and its Justification**

It is a little strange that while the Bersot and Arriago paper is about a form of punishment and its judicial justification there is no discussion of the concept or an attempt to provide an ethical justification of punishment practices. In my view further examination of this legal concept is necessary and may provide an additional resource for contesting the ethically suspect practice of disciplinary solitary confinement.

What is punishment? In brief, state inflicted punishment in the criminal justice system involves the intentional imposition of a burden on individuals following their violation of important social norms that are intended to protect the significant common interests of members of the community (Boonin, 2008). According to Boonin (2008), punishment exhibits five separate, but collectively necessary, elements: *authorization* by the state; *intentionality* (consciously directed towards a particular outcome); *reprobative* (expresses disapproval or censure); *retributive* (follow a wrongful act committed by the offender); and *harmful* (result in suffering, a burden, or deprivation to the offender). Any action that does not exemplify these five elements is (arguably) not an instance of punishment

Bersot and Arrigo rightly point out problems with Consequentialism and Formalism's justification of punishment in the example of solitary confinement. In essence, the problem is that judges applying these ethical theories fail to sufficiently acknowledge the serious harm suffered by prisoners with mental disorders placed in disciplinary confinement. That is, they fail to appreciate that the nature of the suffering imposed by the state on prisoners greatly outweighs the gravity of the disciplinary infringements committed; there is a lack of proportionality. In short, the interests of the state and the wider community are unacceptably privileged over those of prisoners.

A difficulty with the Bersot and Arrigo discussion is that they tend to speak about Formalism and Consequentialism as ethical theories rather than as specifying them as justifications of *punishment*. I think it would be more valuable to address punishment practices and the arguments used to support them more directly and this means drawing from the criminal justice and legal philosophical literature on punishment. While the appeal to psychological jurisprudence (PJ) is useful and can be seen as a way of construing punishment, a more explicit and helpful move would be to appeal to a specific theory of punishment that is consistent with both PJ and virtue theory.

In my view, Duff's communicative theory of punishment fits the bill nicely (Ward & Salmon, 2009). According to Duff (2001), it is important to pay attention to the rights of all stakeholders in the criminal justice system, including offenders, because of their equal moral status; thus communicative theories of punishment have a *relationship focus*. Because offenders are viewed as fellow members of the moral community it is taken for granted that the aim of punishment is to communicate the wrongness of their actions to them so they have an opportunity to redeem themselves and ultimately be reconciled to the community. Crimes are viewed as violations of important community norms that the offender is assumed to endorse as well. Duff argues that there are three aims integral to the institution of punishment: *secular repentance* (an acknowledgment of the harm committed), *reform* (a determination to change), and *reconciliation* (reintegration into the community) through the imposition of sanctions. Any action the

meets the definition of punishment and that does not contain these three features, he argues, is ethically unjustified.

It is possible to make explicit links between Duff's theory and the elements of PF because of its emphasis on community participation and the assumption that all individuals are of equal, fundamental moral value. This also resonates with virtue theory and it is possible to derive ethical virtues that reflect this view of punishment. For example, empathic concern, forgiveness, respect, self-awareness, compassion, fairness can be viewed as aspects of character traits that will assist criminal justice actors to make ethical decisions about such matters as disciplinary solitary confinement. An advantage of introducing a theory of punishment such as Duff's is that the relationship between virtue ethics, PJ, and punishment practices are more clearly specified.

### **Dignity and Disciplinary Solitary Confinement**

Bersot and Arrigo point out that a number of the court decisions concerning the issue of solitary confinement raise the question of human dignity and stress the need to ensure that punishment does not violate prisoners' objective and subjective sense of worth. Dignity has been conceptualized in a number of ways but has at its centre the core meaning of the worthiness of all human beings and its manifestation in their autonomy, self-perception, level of well being, conduct, social status, and living circumstances (Beyleveld & Brownsword, 2001; Waldron, 2009). Offenders and prisoners share this dignity with nonoffending members of the community and, as such, ought to be treated in ways that reflect their high rank or intrinsic worthiness.

In their paper, Bersot and Arrigo appear to link references to dignity to Formalist ethical theories, pretty much exclusively. However, this is a mistake as the concept of human dignity is apparent in most ethical theories and extends beyond human beings capacity for self-governance or autonomy, a Kantian, formalist idea (Ward & Syversen, 2009). In other words, the concept of dignity is an ethically more basic idea and as such constitutes common ground between rival ethical theories. According to Beyleveld and

Brownsword, (2001), the concept of dignity has two major strands, *empowerment* (conditions that enable the exercise of agency and decision making, being able to live a life) and *constraint* (conditions that protect individuals from social denigration and ridicule, such as living in abject poverty or acting in ways that do not reflect the high status of a human being). With the enriched concept of dignity in mind it is evident that placing prisoners with mental disorders in disciplinary solitary confinement may well violate the requirements of dignity. Lack of goods such as social stimulation, access to leisure, meaningful work and so on, may cause an individual to decline to the point where he or she is unable to meet the standards of an acceptable human life.

In other words, the concept of dignity is a flexible idea that can do quite a lot of ethical work on its own, and what's more, is consistent with a wide range of ethical theories. In my view, it provides another point of critical attack on the unacceptable practice of the institution of solitary disciplinary confinement. In fact, in an earlier paper we have suggested that mid level ethical concepts such as dignity, and human rights provide a non question begging way for theorists and researchers to critically evaluate their practices, because they are almost universally endorsed. By way of contrast, there are fierce and somewhat partisan disputes between proponents of different ethical theories concerning which is the deepest, has the widest scope, is more consistent, and so on. Disputes that make it hard for individuals with varying theoretical allegiances to appreciate what they each have in common.

### **Ethical and Epistemic Virtues: Persons and Insinuations**

In general, virtues are stable character traits that dispose individuals to perceive, feel, and act in certain ways that have ethical significance. A positive virtue will prompt someone to act in ethically good ways while a vice will lead to actions that are frowned upon, and are viewed as unjustified. For example, a callous person is predisposed to act in a manner that result in suffering to others and ignores their well-being and core interests. By way of contrast, a compassionate individual takes others interests into



account before deciding how to proceed in a given situation. Ideally, with appropriate moral socialization virtues become so ingrained that right actions flow effortlessly and individuals do not have to explicitly agonize over every ethically salient choice. In this situation, problems are intuitively framed in ethically appropriate ways and a person's thoughts and associated feelings reliably lead him or her to doing the right thing.

With this background in mind it is easier to appreciate the force of Bersot and Arrigo's claims. Reconstructing their argument somewhat, they assert that appropriate professional socialisation and self-reflection guided by virtue theory is more likely to result in ethical role related traits in criminal justice personnel. That is, when making decisions about how to respond to mentally disordered prisoners transgressions, (virtuous) correctional personnel should take into account their mental disorder, the relevant scientific and circumstantial data, and make punishment decisions that will not unjustifiably increase their suffering. The presence of empathic concern and a corresponding respect for prisoners in general and mentally disordered prisoners in particular, will reinforce this tendency. In addition, it will be easier for personnel who have acquired the appropriate virtues to embrace the humanistic and constructive policy and practices comprising PJ.

I think that the potential for virtue theory to enhance the ethical treatment of mentally disordered offenders is very promising and I very much like the way Bersot and Arrigo develop their analysis and related ideas to this end. However, their argument could be even stronger if they apply virtue theory in a more comprehensive way. There are two recent elaborations of virtues theory that are relevant here: extending the concept of virtues to institutions, and utilizing the notion of epistemic or knowledge derived (intellectual) virtues. I will discuss each in turn.

Andre (2002) has recently proposed that communities and institutions can be assessed from the perspective of virtue theory. First, the culture of a community or an institution might facilitate the flourishing and well-being of individuals through the nature

of its policies and practices independently of the character traits of the individuals who work, or live, within it. A community with harsh law and order policies where offenders are viewed as moral strangers is unlikely to make a significant effort to welcome them back once they have served their sentences. Second, a prison with an anti rehabilitation culture may regard offenders' psychological problems as ethically irrelevant and fail to appreciate the extent to which subsequent disciplinary infractions are, at least partially, caused by them. Andre suggests that stable features of institutions can be conceptualized as analogous to character traits in individuals and therefore, be the subject of ethical evaluation. In the above two examples the institutionally rooted pejorative view of offenders and lack of appropriate concern for their suffering reveals a considerable degree of callousness and lack of empathy, both serious moral flaws (vices). I suggest that scrutinizing criminal justice systems from this viewpoint would further boost Bersot and Arrigo's overall argument for the utility of virtue ethics. It seems to me that neither Consequentialism nor Formalism has the theoretical resources to extend their scope in this way.

A second, recent development of virtue theory has been to apply it to knowledge related virtues, and also, to explicitly think about the interaction between ethical and epistemic virtues (DePaul & Zagzebski, 2003). What are epistemic or intellectual virtues? Andre (2002) states that "Intellectual virtues, then, are acquired dispositions, in individuals and communities that promote growth in knowledge and understanding (p.205)." In the criminal justice system knowledge related virtues in both individuals and institutions could include cognitive flexibility, self-awareness, persistence, openness, curiosity, attention to detail, tolerance, responsiveness, knowledge (of policies, laws, theories, psychology etc), impartiality, constructive criticalness, and so on. It is conceivable that virtues such as those listed above would mean that the personal circumstances of prisoners' situations and the relevant facts surrounding any disciplinary transgressions would be sought and taken into account. That is, epistemic virtues may

well help decision makers to acquire a better appreciation of the nature of offenders' problems and their relationship to any subsequent rule violations.

Within individuals and institutions /communities there is an interaction between moral and intellectual or epistemic virtues. An empathic person (moral virtue) will try to find out why a person acted as he or she did and attempt to put to one side any partisan feelings and attitudes. In turn, someone who approaches a problem with an open mind (intellectual virtue) will find it easier to appreciate another person's perspective and to see him or her as a flesh and blood individual rather than an abstraction, as simply a member of a stigmatized group (e.g., "prisoner", "guard" etc). There is an interaction between moral and epistemic virtues because both are required for effective and ethical action in the world. And because a flourishing human life depends on values, beliefs, and actions, it is to be expected that stable individual (and institutional) traits will increase, or decrease, the chances of this occurring.

### **Conclusions**

In conclusion, the target paper by Bersot and Arrigo is a timely and important one. The analysis of judicial decisions concerning the placement of prisoners with mental disorders into disciplinary solitary confinement has highlighted the crucial role of ethical thinking and the theories that underpin it. The argument that virtue theory and its justification of the components of PJ can help us to understand why disciplinary confinement is wrong is I think sound, and is groundbreaking work. Furthermore, it promises to significantly advance the field of criminology and forensic psychology. While I applaud the creativity and scholarship displayed by Bersot and Arrigo I do think their argument has some gaps and could be strengthened. More specifically, there is greater scope for drawing from virtue theory and also for making better use of the concepts of dignity and punishment. To this end, I hope the ideas contained in my commentary will help to open up some additional avenues for research into the relationship between criminal justice policy and practice.

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