

# Superlative Subjects, Institutional Futility, and the Limits of Punishment

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Introduction.....	162
I. Criminology: Mad, Bad, and the “Disturbed Disruptive” .....	168
II. Psychiatric Perspectives on Illness and Deviance .....	174
III. Legal Practice: Toch’s “Humpty Dumpty” Meets All the King’s Lawyers .....	178
IV. Walking the Line, Drawing Distinctions: Correctional Staff Heuristics .....	185
Conclusion .....	188

## Introduction

In October of 2018, a coalition of national and state-level civil rights organizations announced a campaign to end the practice of solitary confinement in U.S. prisons: “Unlock the Box.”<sup>1</sup> The campaign builds on nearly ten years of intensive advocacy, including a series of hunger strikes between 2011 and 2013 in California state prisons; a United Nations

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<sup>1</sup> Jean Casella & James Ridgeway, *Advocates Join Forces to End Long-Term Solitary Confinement in U.S. Prisons in the Next 10 Years*, SOLITARYWATCH (Oct. 19, 2018), <https://solitarywatch.org/2018/10/19/advocates-join-forces-to-end-long-term-solitary-confinement-in-u-s-prisons-in-the-next-10-years/>.

Special Rapporteur on Torture statement that more than 15 days in solitary confinement presumptively constitutes cruel, inhuman, and degrading treatment, as well as a codification of this determination in the United Nations Mandela Rules setting international standards for prison conditions; and dozens of state-level reforms to limit or abolish solitary confinement.<sup>2</sup> Between the 1980s and 1990s, most states built one or more new, hyper-secure prison facilities designed to maintain prisoners in long-term solitary confinement.<sup>3</sup> Prisoners in these facilities spend anywhere from a few months to a few years, and sometimes as long as ten or more years, locked into poured concrete cells, for 23 or more hours per day. Unlock the Box and the associated local and international efforts to either constrain or abolish the use of solitary confinement thus respond to three decades of expanded solitary confinement use since the mid-1980s, in tandem with the rise in rates of incarceration across the United States.<sup>4</sup>

The criminological term-of-art for these long-term solitary confinement units is “supermaxes” – facilities that Franklin Zimring analyzed, with his long-time intellectual partner Gordon Hawkins, in a 2004 essay called “Democracy and the Limits of Punishment.” Zimring and Hawkins aptly described supermaxes as institutions of “high-tech paranoia,” explicitly “designed to impose unprecedented levels of individual isolation and psychological deprivation” and “to house and control the very worst prisoners imaginable.”<sup>5</sup> The 2004 essay (published at the peak of the long-term solitary confinement phenomenon<sup>6</sup>) focuses

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<sup>2</sup> Keramet Reiter, *After Solitary Confinement: A New Era of Punishment?*, 77 *STUD. IN L., POL. & SOC.* 1, 7-8 (2018); AMERICAN CIVIL LIBERTIES UNION, *Stop Solitary – Recent State Reforms to Limit the Use of Solitary Confinement*, <https://www.aclu.org/other/stop-solitary-recent-state-reforms-limit-use-solitary-confinement?redirect=criminal-law-reform-prisoners-rights/stop-solitary-recent-state-reforms-limit-use-solitary>.

<sup>3</sup> See LIS, Inc., *SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE*, Longmont, CO: U.S. Department of Justice, National Institute of Corrections Information Center, <https://s3.amazonaws.com/static.nicic.gov/Library/013722.pdf> (last visited 7 Dec. 2018): at 7, Table 2; see also Chase Riveland, *SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS*, Washington, D.C.: Government Printing Office, January 1999, <https://s3.amazonaws.com/static.nicic.gov/Library/014937.pdf> (last visited 7 Dec. 2018).

<sup>4</sup> Angela Browne, Alissa Cambier & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 *FED. SENTENCING REP.* 46 (2011).

<sup>5</sup> Franklin E. Zimring & Gordon Hawkins, *Democracy and the Limits of Punishment: A Preface to Prisoners' Rights*, in NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT*, 162, 162-63, 166 (Michael Tonry, ed., Oxford University Press 2004); see also KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 87-120 (2016).

<sup>6</sup> According to Browne et al., *supra* note 4, at 46: “[I]n just the five years between 1995 and 2000, the number of prisoners held in segregation beds increased 40 percent

on supermaxes as a category of punishment especially deserving of both further research and ethical oversight. Zimring and Hawkins note, however, that the supermax is also a category of punishment especially resistant to such attention and oversight, at least in part because of the supermax's labeling and appearance as "merely another form of prison," as opposed to a technologically novel and retributively extreme form of punishment.<sup>7</sup>

As Reiter argued in her recent book, *23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement* (based on a dissertation Zimring advised), supermaxes have, indeed, persistently resisted attention and oversight, through a combination of techniques, including promotion of propaganda about archetypally dangerous prisoners housed in supermaxes; refusal of access to outsiders, whether journalists, researchers, or lawyers; and limitations on the rights of prisoners to communicate, or to challenge the conditions of their confinement.<sup>8</sup> The renewed scrutiny in the last decade, culminating in the kick-off in October 2018 of the Unlock the Box Campaign, heralds a new sense of hope about the possibilities for illuminating the darkest corners of America's prisons and even for Eighth Amendment interpretations to evolve to account for a new standard of decency that prohibits long-term solitary, or supermaximum confinement.<sup>9</sup> But as Zimring and Hawkins argued in 2004, oversight is just the first step to limiting punishment.

The next step is reform of supermaxes, which Zimring and Hawkins argue is likely to be both costly and complex. In particular, supermaxes lump together a wide variety of prisoners into the vague (if definitively stigmatizing) category of the "worst of the worst."<sup>10</sup> To date, many reforms have focused on defining and limiting this category, precluding the placement in solitary confinement of prisoners who are not

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nationally. By 2004, more than forty U.S. states reported having some form of supermax housing."

<sup>7</sup> Zimring & Hawkins, *supra* note 5, at 163.

<sup>8</sup> See generally Reiter, *supra* note 2. See also Keramet Reiter, *The International Persistence & Resilience of Solitary Confinement*, 8 OÑATI INT'L SER. IN L. & SOC. (2018).

<sup>9</sup> For a summary of recent attention to supermaxes and associated reform efforts, see generally Reiter, *supra* note 2. The "evolving standards of decency" concept originated with Warren's majority opinion in *Trop v. Dulles*, 356 U.S. 86, 201 (1958).

<sup>10</sup> For an analysis of how this category is both legally vague and practically misused, see Reiter, *supra* note 2, at 166-93. See also David Lovell, Kristin Cloyes, David Allen & Lorna Rhodes, *Who Lives in Supermaximum Custody? A Washington State Study*, 64 FED. PROBATION 33 (2000).

actually dangerous, but simply difficult to categorize or manage – such as juveniles, pregnant women, transgender persons, people with unusual or controversial political beliefs, and others who do not fit easily into traditional prison settings, but do not actually require long-term solitary confinement for their own or for institutional security.<sup>11</sup>

But what of the prisoners who actually *are* exceptionally dangerous, and *do* present threats to individual and institutional security? Reform requires defining and addressing this category, too. First – again following Zimring and Hawkins – reform requires separating “dangerous from disliked prisoners,” and second, further disaggregating dangerous prisoners into those who are and are not “mentally disturbed.”<sup>12</sup> As scholar Lorna Rhodes put it: “[P]risoners are the targets of a basic – but often difficult-to-answer – question: rational choice maker or damaged patient?”<sup>13</sup>

During the 2010s, following public condemnations of solitary confinement from the likes of the United Nations Special Rapporteur on Torture, a number of state correctional systems across the United States, from Maine to Washington, have attempted to reduce their solitary confinement populations. In the process, states have directly confronted this problem of separating out mentally disturbed from dangerous from disliked prisoners.<sup>14</sup> As one example, between 2011 and 2015, Washington State correctional officials cut their long-term solitary population in half (from 600 to 300 prisoners).<sup>15</sup> As one of the administrators overseeing solitary confinement operations throughout Washington State explained to Reiter, the state’s Intensive Management (or supermax) Units should be “for prisoners staff are scared of, not prisoners they are mad at.” In spite of this clarity of purpose, this

<sup>11</sup> See Reiter, *supra* note 8, at 9. For further analysis of the pitfalls of these kinds of limited exclusions from harsh punishments, see generally J.H. Blume, S.L. Johnson & C. Seeds, *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625 (2008); Natalie Pifer, *The Scientific and the Social in Implementing Atkins v. Virginia*, 41 L. & SOC. INQUIRY 1036 (2016).

<sup>12</sup> Zimring & Hawkins, *supra* note 5, at 174.

<sup>13</sup> LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* 100 (2004).

<sup>14</sup> VERA INST. OF JUST., CTR. ON SENT’G & CORRECTIONS, *Promising Practices*, <https://www.safealternativestosegregation.org/promising-practices/> (last visited 7 Dec. 2018).

<sup>15</sup> VERA INST. OF JUST., CTR. ON SENT’G & CORRECTIONS, *Promising Practices: Congregate Classroom/Programming Activities*, [https://www.safealternativestosegregation.org/promising\\_practice/congregate-classroom-programming-activities/](https://www.safealternativestosegregation.org/promising_practice/congregate-classroom-programming-activities/) (last visited 7 Dec. 2018).

administrator found teaching staff to make the scared/mad, or dangerous/disliked, distinction to be rather challenging.<sup>16</sup> Moreover, staff could easily be frightened of seriously mentally ill prisoners, particularly if those individuals are violent, so the fearsome-versus-irritating heuristic proposed by the Washington administrator, while ostensibly prohibitive of inappropriately retaliatory behavior by staff, does not actually propose a definitive mechanism for excluding seriously mentally ill prisoners from solitary confinement, which remains a necessary second step.

The difficulty of this second step will be a major focus of our analysis. We will draw in particular on illustrative examples from the ongoing reform efforts in Washington State, where Reiter is in the middle of a three-year-long research project evaluating the impact of reform on prisoners and staff.<sup>17</sup>

Zimring and Hawkins suggested in 2004 that prisoners at the intersection of dislike, danger, and mental illness deserve the closest scrutiny and most concentrated reform attention: “The serious criminal offender . . . is the least attractive case for claims to limit government power, but he is, for that reason, the most important frontier for defending the limits on that power.”<sup>18</sup> We adopt this assertion, the crux of Zimring and Hawkins’s essay, as our opening premise: the institutional subject who inspires the harshest treatment, the fiercest contestation of limits and boundaries, and who is the hardest to classify as willfully deviant or

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<sup>16</sup> Reiter field notes, Aug. 2017. Confidential notes on file with author.

<sup>17</sup> In the summer of 2017, Reiter spent a total of three weeks divided across each of Washington State’s five Intensive Management Units (IMUs), or long-term solitary confinement facilities. During her 2017 research, Reiter spent as many as twenty hours per day in Washington State’s IMUs, observing operations and conducting interviews with a team of seven doctoral students. Together, the team interviewed 106 randomly selected prisoners housed in IMUs and 77 purposively selected staff members working in these units. In the summer of 2018, Reiter’s team returned to Washington State and conducted follow-up interviews with 80 of the 106 prisoners interviewed in 2017. The degree of research access was unprecedented, revealing a profusion of details about the lived experiences of both prisoners and staff in solitary confinement units, and the day-to-day operations of these prisons-within-prisons. Although analysis of the data collected in this project is ongoing, some examples from this research are used to illustrate the theoretical points proposed in this article.

<sup>18</sup> Zimring & Hawkins, *supra* note 5, at 158. David Lovell echoes this point when he argues that: “[O]nce we establish the authority to respond to dangerous prisoners through long-term segregation, it is likely to be applied far too freely . . . the power to segregate is likely to be overused because of the liability of not using it when the lives and limbs of staff and other prisoners are at stake.” David Lovell, *Isolation Vignettes: Practical Applications of Strict Scrutiny*, 26 CORRECTIONAL L. REP. 3 (2014).

impaired by mental illness – whom we might, given his extreme behaviors and defiance of classification, call *the superlative subject* – is exactly the one with whom agents of the criminal justice system should be most concerned, since his treatment sets the standard by which the entire system operates, and thereby, ultimately, defines the rights of every member of society.<sup>19</sup> To be clear, the superlative prisoner is important not because he or she is representative of all (or even most) prisoners in isolation, but because of the risk of designing extreme institutional policies in response to exceptional cases, and then overusing this extreme response in non-exceptional cases, as has arguably been done with solitary confinement in the United States since the 1980s.<sup>20</sup>

Given this premise, a major concern for us in this essay is the particular problem, among the most transgressive, most feared, and most disliked prisoners, of distinguishing dangerous from disturbed. We argue that a range of social institutions in the United States, including not only prisons and jails, but also courts and hospitals, face this problem of categorization. These institutions not only handle similar types of transgressive, or superlative, subjects, but actually, in many cases, house the same individuals over time. By analyzing the way administrators, judges, line officers, medical knowledge-brokers, and other agents of institutional practice have confronted this categorization problem, we suggest potential areas of intersection that might lead to the development of more appropriate responses to the superlative subject. This endeavor follows directly from a recommendation Zimring and Hawkins made in their 2004 essay, that one particularly fruitful path to reform might be to perform “a sort of transplant surgery of healthy values and appropriate practices found in other domains of government activity.”<sup>21</sup> For instance, Zimring and Hawkins argued that the “decency” of “the treatment of mentally ill prisoners in the supermax facility” should be evaluated in relation to “whether the same conditions imposed on the mentally ill in supermax prisons would be approved or allowed in public and private

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<sup>19</sup> For a thoughtful historical analysis of the use of the term “criminal justice system” and a pointed critique of its overuse and expansive conceptualization, see Sarah Mayeux, AM. J. CRIM. L. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050263). In fact, our argument aligns with Mayeux’s in that agents of the system actually function surprisingly independently of each other.

<sup>20</sup> In a special issue of the *Correctional Law Reporter* on exactly these kinds of extreme cases, each of the contributors pointed out that these extreme cases are not representative. See generally CORRECTIONAL LAW REPORTER, Vol. XXVI.1 (June/July 2014).

<sup>21</sup> Zimring & Hawkins, *supra* note 5, at 177.

hospitals for persons with the same mental health problems.”<sup>22</sup>

In sum, we seek to examine the professional habits surrounding categorization of prisoners seen as dangerous, mentally ill, or both, in criminological theory, in psychiatric practice, in legal practice, and in correctional practice, and suggest that these usually distinct realms have much to offer each other.<sup>23</sup> First, we examine criminological conceptions of “mad” versus “bad” prisoners, as these categories have been called, describing how criminologists studying “serious criminal offenders” have sought to humanize these prisoners, but have also sought to discourage their categorization as either mad or bad (Part I).<sup>24</sup> Second, we examine psychiatric conceptions of illness and deviance in historical perspective, showing that such a distinction remains unresolved, in both theory and practice (Part II). Third, we examine legal perspectives, through case law pertaining to both the insanity defense and the modification of conditions of confinement, and document further contestation of categorical distinctions (Part III). Finally, we examine on-the-ground practical conceptions of “mad” versus “bad” as articulated by prison officers working in isolation units, and we argue that prison staff members have intuitive understandings of this distinction that deserve more attention (Part IV). In conclusion, we consider two strategies for improved management of superlative subjects: individualization of management and communication between disciplines. Ultimately, however, we question whether the institutions themselves do not bear primary culpability for their subjects’ “superlativeness.”

### **I. Criminology: Mad, Bad, and the “Disturbed Disruptive”**

Who are these so-called “worst of the worst” prisoners who are so

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<sup>22</sup> *Id.* at 176. Whether correctional institutions are constitutionally capable of such parity is an open question.

<sup>23</sup> Because our focus is explicitly on analyzing (and critiquing) professional norms and perspectives, we do not emphasize prisoner voices or perspectives in this essay. For focused analysis of prisoner voices and experiences in solitary confinement and similar settings, *see generally* Reiter, *supra* note 8; HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT (Jean Casella et al. eds., The New Press 2016).

<sup>24</sup> Phrases like “worst of the worst” and “mad versus bad” appear frequently in the literature, both as shorthand to categorize the superlative subjects we are analyzing, and as echoes of the colloquial phrases frequently used on the ground by professionals managing these populations. Our use of the words does not represent an acceptance of either the label or the process of defining individuals by one act or characteristic. Rather, using these phrases in quotation marks allows us to interrogate the labels applied to superlative subjects, and connect these labels to specific analyses preceding ours.

difficult to sort between dangerous and disturbed? Existing scholarship has largely worked to identify the problem of the superlative subject, as opposed to addressing persistent practical, legal, and ethical questions about terms of confinement, and apportionment of treatment or punishment. Most existing analyses involve describing cases of specific prisoners, including their characteristics and the challenges prison staff have faced in categorizing and managing them. This section summarizes these formulations, outlines the challenges they seek to address, and suggests the limitations of existing paradigms.

We start with two observations drawn from Reiter's research in Washington State, in order to provide real-world, contemporary examples of the kind of prisoner at issue here, and to demonstrate the continued relevance of this hard-to-categorize prisoner, in spite of decades of scholarship. The following description is drawn from Reiter's field notes from a 2017 visit to a Washington State Intensive Management Unit (or IMU):

I was sitting alone in a windowless office in the prison medical ward, at a big conference-room table, reviewing the medical files of prisoners we had interviewed. I paused, and realized I could hear a prisoner in the observation cell next door to me steadily banging his head against the cell door, over and over. He would be restrained soon.<sup>25</sup>

This head-banging prisoner is a perfect example of a hard-to-categorize prisoner in long-term solitary confinement. First, he was at least potentially dangerous – to himself, if to no one else. Second, he was clearly disruptive, to prison staff charged with maintaining institutional safety and security, to fellow prisoners who might be trying to sleep or pay attention to anything else, to healthcare staff charged with ensuring the physical and mental well-being of prisoners, and to Reiter reviewing medical files. But was he disturbed? Was he actually trying to harm himself by banging his head? Was he, perhaps, trying to make hallucinations go away? Was he trying to get attention, or to force staff to remove him from his isolation cell – as, indeed, they had already done, in order to place him in the observation cell next to the medical records office, where Reiter could hear him? For whatever combination of these reasons, head-banging is an unfortunately frequent occurrence in long-

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<sup>25</sup> Reiter field notes, Aug. 2017. Confidential notes on file with author.



term solitary confinement units.<sup>26</sup>

Another incident, also drawn from Reiter's field notes, presented a different set of disruptions:

I was in the hallway behind the Plexiglass-sealed visiting booths where we [Reiter and her team of doctoral students] conducted many of our interviews: a row of six or seven rooms, each separated by a wall, each containing a phone, connected through a Plexiglass window to another telephone-booth-sized room, sealed off by a steel door, with a slit at waist-level, through which a prisoner's hands could be cuffed and un-cuffed, without opening the door. I was standing on the prisoner side of this set-up, and the hallway was empty for once. I paused in front of the largest, attorney-visiting booth, on the near end of the hallway. A whiff of excrement overwhelmed me. I could see no evidence of the story I had been told: that a prisoner had pulled down his orange jumpsuit and taken a large dump, right on the speakers in the booth, during an emergency visit with a psychologist's assistant, the night before. I couldn't see anything, but I could smell it.<sup>27</sup>

This excrement-using prisoner, like the head-banger, inspired dislike all around: from the psychologist's assistant who first witnessed the incident, to the prisoner assigned to clean up the visiting booth, to the staff passing by the temporarily-unusable booth, inhaling the lingering scent. The excrement-using prisoner presented less of an immediate danger to himself than the head-banger, but he certainly generated immediate hygiene problems for the institution. But was this prisoner disturbed? Using excrement in this way is obviously not socially acceptable outside of a prison, but is it a sign of mental illness or manipulative behavior? Representative of mental illness or not, smearing or otherwise utilizing excrement, like head-banging, is a common occurrence in long-term solitary confinement.<sup>28</sup>

Indeed, the head-banger and the excrement-user represent two archetypes of hard-to-categorize prisoners in long-term solitary

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<sup>26</sup> See REITER, *supra* note 8, at 135; Madrid v. Gomez, 889 F. Supp. 1146, 1170-71 (N.D. Cal. 1995) (describing policies implemented to address system-wide head-banging in California's Pelican Bay State Prison Security Housing Unit, a supermax).

<sup>27</sup> Reiter field notes, Aug. 2017. Confidential notes on file with author.

<sup>28</sup> See REITER, *supra* note 8, at 165, n. 48; SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 73 (2009); RHODES, *supra* note 13, at 48; Carol Rosenberg, *Waste Wars: Captives 'Weaponize' Bodily Fluids*, MIAMI HERALD, Jun. 18, 2011, <https://www.miamiherald.com/latest-news/article1938250.html>.

confinement: persistent self-harmers, and persistent excrement-users. This problem of categorization actually involves two separate questions, each equally difficult to answer in these hard-to-categorize cases. First, is the individual head-banger or excrement-user driven to commit the disruptive behavior by psychological factors out of his or her control, and therefore not responsible for the action, or is the individual choosing to act in a certain way in order to achieve a specific outcome, and therefore responsible (as much, anyway, as an incarcerated person can be) for the action? Second, what is the proper institutional response to the action: to change the individual's surroundings, or to change the individual's management – whether through attempted medical care or punishment?

Prison scholars grappling with the first question tend to emphasize the great difficulty of sorting out mentally ill prisoners unable to control their actions from rational prisoners acting in order to achieve specific outcomes. Instead, scholars advocate for designating a new category that acknowledges the duality some prisoners inhabit, such as “both/and,” “disturbed disruptive,” or, simply, “disturbed.”<sup>29</sup> For instance, Lovell describes the kinds of “disturbed” prisoners he observed in Washington IMUs (in a study pre-dating Reiter's by more than ten years), prisoners whose actions were neither precisely rational nor precisely irrational:

When an inmate tries to hang himself or spends days in a corner of his cell covered by a blanket, clearly there is something driving him to desperate measures. That the inmate may hope to gain something by such actions—and how would this make him different from the rest of us?—does not erase the desperation. And it is this desperation, combined with seemingly irrational maneuvers to cope with their settings, that earned the label “disturbed” for men in our study who showed no other symptoms of mental illness.<sup>30</sup>

Psychologist and solitary confinement expert Terry Kupers calls this a “both/and” approach, and advocates categorizing these kinds of disturbed prisoners as people “suffering from mental illness,” who “had

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<sup>29</sup> See, e.g., TERRY ALLEN KUPERS, *SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT* 212 (2017); Hans Toch, *The Disturbed Disruptive Inmate: Where Does the Bus Stop*, 10 J. PSYCHIATRY & L. 327 (1982); David Lovell, *Patterns of Disturbed Behavior in a Supermax Population*, 35 CRIM. JUST. & BEHAV. 985 (2008).

<sup>30</sup> Lovell, *supra* note 29, at 999.

become bad actors.”<sup>31</sup>

Recognition of the problem of interpreting transgressive behavior in light of willful deviance versus involuntary manifestation of mental illness (or other deficiency of agency) is as old as the Enlightenment, if not Roman law or classical Athenian tragedy.<sup>32</sup> In contemporary criminology, the origins of this blended approach – categorizing at least some difficult prisoners as simultaneously ill and deviant – might be traced back to a 1982 essay by Hans Toch, a social psychologist and prison scholar.<sup>33</sup> Although Toch’s essay, “The Disturbed Disruptive Inmate: Where Does the Bus Stop?” was published just a few years before the first supermaxes even opened,<sup>34</sup> Toch described the kinds of prisoners – superlative subjects – whom many have argued are often found among the so-called worst-of-the-worst in supermaxes, and who present some of the greatest challenges to both management and reform.<sup>35</sup> Toch’s analysis is particularly helpful for laying out the potential usefulness of a “both/and” category that acknowledges the practical challenges of sorting “mad” from “bad.”

In defining the “disturbed disruptive,” Toch describes cases of the sorts of prisoners both Lovell and Reiter encountered in Washington, like the self-harmers and the excrement-users. For instance, Toch describes Ed, a prisoner who has trouble following prison rules, like showing up to meals on time or keeping his cell clean, but also has attacked other prisoners, guards, and himself – engaging in self-mutilation and suicide attempts. On one occasion, Ed even ate feces out of a toilet in the mess hall, a behavior that is hard for anyone to conceive as instrumental, even in a setting where people regularly harm themselves for ostensibly manipulative reasons. Toch calls Ed “a conceptual Humpty Dumpty,” noting that caretakers engage in a futile attempt to place him in one of

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<sup>31</sup> KUPERS, *supra* note 29, at 212.

<sup>32</sup> H.L. Krober & S. Lau, *Bad or Mad? Personality Disorders and Legal Responsibility – The German Situation*, 18 BEHAV. SCI. L. 679, 679-90 (2000).

<sup>33</sup> See generally Toch, *supra* note 29.

<sup>34</sup> According to Lynch and Reiter, Arizona opened the first modern supermax in 1986. See MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 136-37 (2010); Reiter, *supra* note 2, at 5, 105.

<sup>35</sup> For a discussion of the prevalence of these prisoners in supermaxes, see Reiter, *supra* note 2, at 166-93; Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); RHODES, *supra* note 23; Lovell et al., *supra* note 10; KUPERS, *supra* note 29, at 212-33.

“two watertight and irreconcilable” categories: “mad” or “bad.”<sup>36</sup> Through this analysis, Toch convincingly identifies a coherent category of “disturbed disruptive,” or more evocatively “Humpty Dumpty” prisoner, who displays both deviance and compromised agency.<sup>37</sup>

In defying categorization, the “Humpty Dumpty” also inspires frustration among custody and mental health care staff alike. As a result, prisoners like Ed end up “ping ponging,” or being repetitively transferred between mental health settings (e.g., a forensic hospital) or custody settings (e.g., a prison, likely one imposing solitary confinement). Toch argues that the very fact that a Humpty Dumpty like Ed is hard to categorize creates strong incentives for caretakers to assign Ed into categories outside of their purview: “The uninviting nature of the person’s disruptive behavior reliably overwhelms decisions, and inspires caretakers to classify the person so as to make him primarily the client of other caretakers.”<sup>38</sup> Such prisoners receive little empathetic or even consistent treatment as they “ping-pong” – a verb that aptly evokes their lack of agency in metaphorical movement from paddle, to table, to paddle – through different institutions of social control.<sup>39</sup> Ultimately, Toch argues that acknowledging the very category of the disturbed-disruptive is critical to breaking the ping-pong cycle.

But even once a new category is proposed to encompass the hard-to-categorize self-harmers and excrement-users, the question of proper institutional response remains. Ultimately, Toch hopes the disturbed-

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<sup>36</sup> Toch, *supra* note 29, at 330.

<sup>37</sup> The phrase “Humpty Dumpty” evokes both a nursery rhyme about an egg-person who falls from a wall, breaks, and cannot be put back together again, and a classic passage in Lewis Carroll’s *Through the Looking Glass* in which the character Humpty Dumpty says “When I use a word . . . it means just what I choose it to mean, neither more nor less,” signaling the multiple meanings words and phrases (like “disturbed disruptive”) can have. LEWIS CARROLL, *THROUGH THE LOOKING GLASS*, in *THE COMPLETE WORKS OF LEWIS CARROLL* 214 (First Modern Library ed. 1936). This passage has appeared in hundreds of judicial opinions, including two U.S. Supreme Court Cases. See Martin H. Redish and Matthew B. Arnould, *Dunwody Distinguished Lecture in Law: Judicial Review, Constitutional Interpretation, and the Democratic Dilemma*, 64 FL. L. REV. 1485, 1513, n.116 (2012).

<sup>38</sup> Toch, *supra* note 29, at 332.

<sup>39</sup> For analyses of institutions of social control, and the overlap between control mechanisms in hospitals and prisons, see generally ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage Books 2d ed. 1995/1977); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (1965/1988).

disruptive category might function as a tool to help institutional staff (whether guards or healthcare providers) identify a category of difficult prisoners, re-evaluate their interrelated behavioral and health challenges, and design new, more empathetic and consistent treatments in response.<sup>40</sup> As Toch says: “Eventually, we must generate new ameliorative settings and restorative settings for Frank and Ed and Ben. We must care for these walking wounded, for men driven to extremes by a despair that transcends and surpasses the range of the familiar – of mental illness in its more passive and congenial manifestations.”<sup>41</sup> As we discuss in our conclusion, some combination of individualization of treatment and changes to institutional environments tend to dominate prison scholars’ recommendations for how to respond to Toch’s disturbed-disruptives and Kupers’ both/ands.

Nonetheless, the fact that Reiter encountered disturbed-disruptive prisoners again and again in solitary confinement in Washington State, in 2017, more than 35 years after Toch formulated the category, suggests that these prisoners are still defying classification, ending up in settings that likely exacerbate their symptoms, and ping-ponging from isolation cells to observation rooms to treatment units and back to isolation, like the head-banger Reiter witnessed. Even Toch has acknowledged, elsewhere, that “attempting to screen out disturbed or vulnerable prisoners . . . cannot be easily and reliably done.”<sup>42</sup> Problems of categorization persist, and conditions of confinement are arguably no more humane in 2018, generally, than they have been at any point in the long history of incarceration.<sup>43</sup>

## II. Psychiatric Perspectives on Illness and Deviance

The problem of conceptualizing illness and deviant behavior in

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<sup>40</sup> Toch, *supra* note 29, at 338.

<sup>41</sup> *Id.* at 347.

<sup>42</sup> Hans Toch, *The Contemporary Relevance of Early Experiments with Supermax Reform*, 83 PRISON J. 221, 226 (2003). In an earlier piece, Toch also pointed out that few successful mechanisms to control offending have ever actually been developed: to “affect the situations in which offenders offend” has only been accomplished through “imprisonment or banishment.” See Hans Toch, *Toward an Interdisciplinary Approach to Criminal Violence*, 71 J. CRIM. L. & CRIMINOLOGY 646, 653 (1980).

<sup>43</sup> For arguments about the continuity of punishment over time and the arguable persistence and increase in its harshness, see generally FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 39; Reiter, *supra* note 8; Ashley Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, LAW & SOC. INQUIRY (2018).

light of each other – in institutional settings and in general – has deep roots in psychiatry, and remains contested in that professional sphere, as in corrections or jurisprudence. In psychiatric practice as in prison scholarship, superlative subjects generate problems of both categorization and treatment. For instance, in a recent editorial for a professional newsletter, two forensic psychiatrists, Nicolas Badre and Sanjay Rao, discuss their frustrations with the extent to which resources (and various forms of perceived leniency in the criminal justice system) intended for people with serious mental illnesses, such as schizophrenia or bipolar disorder, are diverted to people with personality disorders, such as antisocial personality disorder. Reviewing an archetypal case of the latter in their own forensic practice, they discuss a patient in the criminal justice system who brags openly about getting disability income and health care coverage based on his diagnosis of schizophrenia (despite his and their shared belief that the diagnosis does not actually apply to him), and uses ostensible mental illness to mitigate consequences of his own antisocial behaviors, such as seeking physical conflict or selling narcotics, and then claiming to have done so because he was psychotic.

Addressing their fellow psychiatrists, the authors summarize their motivating editorial concern as follows: “We are often too pleased in advocating for more resources by saying that all crimes, all substance misuses, and all annoying behaviors are forms of mental illness when, in reality, the criminal, the addictive, and the less common are not always biologically based mental disorders or even the real problem, for that matter.”<sup>44</sup> To Badre and Rao, the strictly deviant, in short, are playing the illness card, and reaping benefits intended for people with actual mental illness. In other words, even psychiatrists have trouble parsing ill from deviant, and even when they think they have done so, judicial or correctional forces can supersede their judgments.

Given the central relevance of psychiatric nosology – the systemic classification of mental illness – for the legal questions at hand, we will briefly consider contributions by psychiatric thought to mad/bad taxonomic problems, understanding of volition, and the practical question of the extent to which antisocial behavior should be medicalized and treated as a mental illness, or simply constrained. The basis of modern classification of psychiatric disease formed in Europe, in the latter decades of the nineteenth century, culminating in the exhaustive, iterative

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<sup>44</sup> Nicolas Badre & Sanjay S. Rao, *Personality Disorders and the Court System*, CLINICAL PSYCHIATRY NEWS, Dec. 2017, at 5.

observational work of Emil Kraepelin, on which the system delineated in the most recent version of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5) still relies heavily.<sup>45</sup> This diagnostic system continues to depend largely on symptoms reported by the subject in question, those close to him, or observers; a given classification is thus both subjective and contextual.

Kenneth S. Kendler's contemporary work in historical psychiatric nosology is particularly noteworthy for its systematic, empirical approach to understanding definitions of disease over time. By examining the detailed characterization of specific diagnostic entities such as schizophrenia<sup>46</sup> or paranoia<sup>47</sup> by medical authorities, such as textbook authors, Kendler demonstrates both the coherence and the mutability of these illnesses' definitions. In psychiatry as in the rest of medicine, disease entities – which are absolutely indispensable, as they define populations for research, thereby providing the basis for clinical knowledge, and also dictate choice of treatment – have remained dynamic and contested.

In application to criminology, such historical inquiry into, for instance, the definition of psychosis naturally dovetails with consideration of volition and “free will.” Research informed by both neuroscience and philosophy, such as that of Joseph Pierre, supports what Pierre calls “a continuous model of volitional self-control,” or a spectrum of agency, including recognition that some conditions, such as schizophrenia, might be considered “disorders of agency.”<sup>48</sup> Having disordered agency entails occupancy of what Hans Krober has called a “zone of diagnostic

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<sup>45</sup> EDWARD SHORTER, *A HISTORY OF PSYCHIATRY* (Wiley and Sons 1997); AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (American Psychiatric Publishing, 5th ed. 2013). More generally, Georges Canguilhem has traced the roots of modern conceptions of disease and abnormality to the seventeenth century, with further development over the following centuries as cellular pathology and statistics advanced and enabled, respectively, visually concrete and robustly mathematical conceptualizations of deviance from health, in demonstrably abnormal tissue or the person whose attributes were sufficiently different from a mathematically-defined mean to be labeled “abnormal.” See GEORGES CANGUILHEM, *THE NORMAL AND THE PATHOLOGICAL* (Zone Books 1991/1966).

<sup>46</sup> See generally K.S. Kendler, *The Genealogy of Dementia Praecox I: Signs and Symptoms of Delusional Psychoses From 1880 to 1900*, *SCHIZOPHRENIA BULL.* (2017).

<sup>47</sup> See generally K.S. Kendler, *The Clinical Features of Paranoia in the 20th Century and Their Representation in Diagnostic Criteria From DSM-III Through DSM-5*, 43 *SCHIZOPHRENIA BULL.* 332 (2017).

<sup>48</sup> Joseph M. Pierre, *The Neuroscience of Free Will: Implications for Psychiatry*, 44 *PSYCHOL. MED.* 2465 (2014).

insecurity,”<sup>49</sup> in which psychiatry and legal institutions alike have struggled, for decades, if not centuries, with the question of how much culpability to assign for transgressive behavior.

At the level of forensic application, Kenneth Weiss has identified what he calls “nosological impotence.” The taxonomic project of medical science, looking to Plato and Aristotle, is to “carve nature at its joints,” distinguishing one entity from another completely; this is a basic goal of nosology.<sup>50</sup> Cases in which law-breakers appear both volitionally intact and mentally ill would seem to frustrate such a project; they occupy Krober’s “zone of diagnostic insecurity,” and diagnosticians are thereby, in Weiss’s words, “[nosologically] impotent.” Antisocial personality disorder, which is defined by a pattern of disregard for others’ well-being, involving some combination of crime, lying, violence, and lack of remorse, beginning in adolescence, and not better explained by a major psychiatric disorder, such as schizophrenia or bipolar disorder,<sup>51</sup> often sits at the crux of such cases. A person may act against his own apparent interest, in a manner pathological to society, and yet appear to do so volitionally. In what sense is such a person “ill,” or deserving of the accommodations that might be fairly granted to a person who has broken the law in response to a delusion, or due to having the problems with self-restraint that commonly result from severe head injuries?

As Badre and Rao identify, the inclusion of antisocial personality disorder (which essentially amounts to a pattern of callous and hurtful behavior without a better explanation than habitual aggression and indifference) as a psychiatric illness creates problems for those who would like to preserve a “mad” sphere in which to mitigate the culpability of persons with serious mental illness, due to, for instance, psychotic removal from socially shared reality. When guidelines for mitigation of culpability or psychiatric accommodation of offenders include “severe personality disorders,” as they do in New York,<sup>52</sup> or “impulse-ridden personalities,” as in the federal case of *Madrid v. Gomez*,<sup>53</sup> mere

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<sup>49</sup> Krober & Lau, *supra* note 32, at 683.

<sup>50</sup> Kenneth J. Weiss, *At a Loss for Words: Nosological Impotence in the Search for Justice*, J. AM. ACAD. PSYCHIATRY & L. 36 (2016).

<sup>51</sup> For example, such behavior might be better explained by schizophrenia if one were remorselessly violent because of paranoia due to psychosis, or by bipolar disorder if one were disinhibited due to mania.

<sup>52</sup> D.L. Hall, R.P. Miraglia, & L.W. Lee, *The Increasingly Blurred Line Between “Mad” and “Bad:” Treating Personality Disorders in the Prison Setting*, 74 ALBANY L. REV. 1277, 1287 (2011).

<sup>53</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1265, 1267 (1995); *see also* Reiter, *supra* note



“badness” seems to sneak back into the realm of accommodations intended for the mentally ill. Mitigation of sentencing and other aspects of punishment due to antisociality may be extremely limited in practice, but the presence of antisocial personality disorder among other psychiatric conditions that are more ostensibly impairing of volition limits anyone’s willingness to accommodate any form of mental illness in the first place. In brief, if true sociopaths are lumped with true schizophrenics, the resulting “group” looks much less deserving of accommodation than people with schizophrenia alone.

Ultimately, modern psychiatric medicine, after more than 140 years of working in the shared territories of neuroscience, epidemiology, and philosophy to develop a nosological system that has scientific integrity and everyday applicability, struggles with the “mad versus bad” question just as much as criminology or law. The set of descriptors (diagnostic labels from the DSM) and tools of control (psychotropic medications) might differ from those seen in law or corrections, but the conundrum is the same.

### **III. Legal Practice: Toch’s “Humpty Dumpty” Meets All the King’s Lawyers**

Lawyers are forced to categorize people as either mad or bad in two contexts relevant especially for thinking about disturbed-disruptive prisoners. First, judges (or juries) make this distinction as part of determinations of guilt, when a defendant or his lawyers raise an insanity defense. Second, judges make a distinction in post-conviction cases challenging conditions of confinement for prisoners, when determining which prisoners are entitled to what standards of treatment.

Perhaps unsurprisingly, the process for categorizing defendants as “insane” for purposes of determining guilt has been as fraught over time as the process for parsing volitional deviance from the impaired agency of serious mental illness after incarceration. U.S. state courts are nearly evenly divided between two different governing standards for determining insanity: a slightly narrower standard, focused on knowledge of right and wrong, sometimes called a “rationality deficit” (the M’Naghten Rule), and a slightly broader standard, requiring either comprehension of the criminal law, or actual ability to act in conformity with that law, sometimes called a “control deficit” (the American Law

Institute's Model Penal Code Test).<sup>54</sup> Both standards generally put the burden of proof on the defendant who asserts the defense.<sup>55</sup>

As with the categorization challenges prison officials face in housing and treating disturbed-disruptive prisoners, emotions like fear and anger complicate both the establishment of categories and the process of sorting people into these categories. The legal aftermath of two attempted murders, one perpetrated by Daniel M'Naghten in 1843 and one by John Hinckley in 1981, exemplifies both the definitional and the process problems. The M'Naghten Rule stems from the 1843 English case of Daniel M'Naghten, who attempted to murder Prime Minister Robert Peel and was subsequently tried for his crime, but found not guilty by reason of insanity. This verdict inspired both public frustration and the subsequent adoption of a more restrictive rule by which to determine insanity: the M'Naghten Rule, requiring proof that the defendant either did not know what he was doing or could not distinguish right from wrong.<sup>56</sup> The Model Penal Code Test, proposed by the American Law Institute (ALI), and explicitly intended to be both broader than the M'Naghten Test and to incorporate more modern understandings of mental illness, gained widespread traction in the 1970s.<sup>57</sup> But a more modern, high-profile assassination attempt – John Hinckley's 1981 shooting of then-President Ronald Regan, and Hinckley's 1982 acquittal on the basis of a defense of insanity – inspired public outrage akin to the outrage surrounding the M'Naghten case, along with an associated movement to constrict the application of insanity defenses for criminal

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<sup>54</sup> For a foundational outline of the definitions and applications of these rules, see "The M'Naghten Rule," FINDLAW, <http://criminal.findlaw.com/criminal-procedure/the-m-naghten-rule.html>; "The Model Penal Code Test for Legal Insanity," FINDLAW, <http://criminal.findlaw.com/criminal-procedure/the-model-penal-code-test-for-legal-insanity.html>. For an analysis of their application over time, see generally Donald H.J. Hermann, *Assault on the Insanity Defense: Limitations on the Effectiveness and Effect of the Defense of Insanity*, 14 RUTGERS L.J. 241 (1983). For an operationalization of the rationality-control distinction in an experimental trial, see generally Rebecca K. Helm, Stephen J. Ceci, & Kayla A. Burd, *Unpacking Insanity Defence Standards: An Experimental Study of Rationality and Control Tests in Criminal Law*, 8 EUR. J. PSYCHOL. APPLIED TO LEGAL CONTEXT 63 (2016).

<sup>55</sup> See DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, STATE COURT ORGANIZATION 2004 Table 35, 199-202 (Bureau of Justice Statistics 2006).

<sup>56</sup> "M'Naghten Rule," LegalDictionary, <https://legal-dictionary.thefreedictionary.com/M%27Naghten+Rule>; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 275-77 (4th ed. 2006).

<sup>57</sup> DRESSLER, *supra* note 56, at 379-80.

defendants.<sup>58</sup> Just two years after Hinckley's acquittal, in 1984, the U.S. Congress passed the Insanity Defense Reform Act, which shifted the burden of proving insanity to defendants and limited the application of the defense.<sup>59</sup> Both M'Naghten and Hinckley resemble Toch's conceptual Humpty Dumpties: individuals whose actions do not quite make logical sense (are they mad?) but at the same time seem calculated to offend social norms (are they bad?).

Nearly four decades later, neither U.S. legislators nor courts have reached consensus on which rule to apply. Currently, 25 states use some variation of the M'Naghten Rule, 21 states and the District of Columbia use some variation of the ALI's Model Penal Code Test, and 4 states (Idaho, Kansas, Montana, and Utah) permit no insanity defense whatsoever.<sup>60</sup> Among the majority of states permitting an insanity defense, defendants rarely raise the defense, and even more rarely win a determination of insanity. While robust national data does not exist regarding either the exact prevalence of insanity defenses raised or the success rate of these defenses in the United States, one particularly rigorous and often-referenced study found that only one percent of felony defendants in eight sampled states raised an insanity defense, and of these, only about one-quarter were successful.<sup>61</sup>

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<sup>58</sup> See generally Hermann, *supra* note 54.

<sup>59</sup> 18 U.S.C. § 17.

<sup>60</sup> The data about M'Naghten Rule and the American Law Institute Rule come from a 2004 Bureau of Justice Statistics survey of state court policies, the most recent report available tracking insanity defense policy. See ROTTMAN & STRICKLAND, *supra* note 55. The data about states that have disallowed the insanity defense is more recent. See Natalie Jacewicz, *With No Insanity Defense, Seriously Ill People End Up In Prison*, NAT'L PUB. RADIO (Aug. 5, 2016), <https://www.npr.org/sections/health-shots/2016/08/05/487909967/with-no-insanity-defense-seriously-ill-people-end-up-in-prison>. In some cases, courts have allowed defendants to raise claims of diminished capacity, usually to defeat claims of planned, pre-meditated action and to reduce the seriousness of the resulting criminal charge. Whereas an insanity defense is an affirmative defense to guilt, a diminished capacity claim is an attempt to mitigate the degree of guilt. As with the insanity defense, successful claims of diminished capacity have produced public outrage about criminals who have faced reduced punishments for serious crimes. For instance, in California following the 1979 murders of a mayor and city supervisor by former city supervisor Dan White, White's lawyer raised a defense of diminished capacity based on White's junk food (or "Twinkie") diet. California voters subsequently voted to eliminate the defense in 1982, though it remains permissible in some jurisdictions. "Diminished Capacity," WEX LEGAL DICTIONARY, Cornell Law School: Legal Information Institute, [https://www.law.cornell.edu/wex/diminished\\_capacity](https://www.law.cornell.edu/wex/diminished_capacity).

<sup>61</sup> Lisa A. Callahan, Henry J. Steadman, Margaret A. McGreevy, & Pamela Clark Robbins, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State*

Both the M’Naghten Rule and the ALI’s Model Penal Code Test have faced persistent criticism for being too restrictive in certain ways, too permissive in others, and also too vague to apply in practice.<sup>62</sup> Should insanity be defined by a general inability to reason, an inability to control one’s own actions, a lack of understanding of the specific action and its implications, a lack of understanding of the criminal charges and trial (as opposed to the crime itself), or some combination of these elements? This unresolved debate is yet another example of the persistent and cross-disciplinary struggle over how to understand the superlative subject, who, due to the same recurrent transgressive behavior, is especially likely to find himself in yet another categorical gray area once in prison. Some scholars, in fact, have argued that the question of insanity should be addressed at a later stage in the criminal process, after a determination of guilt. Insanity, then, would shift from being a theoretical question about *mens rea* at the moment of commission of a crime to a practical question about whether the proper response to the defendant’s actions, once confirmed as having taken place, is punishment or treatment.<sup>63</sup>

Of course, even once a judge or jury finds that a defendant is sane and eligible for punishment, the question can be re-opened over the course of imposing the punishment. In particular, prisoners can continue to challenge the conditions of their confinement and the terms of their punishment, on the basis that they need more or different treatment because of mental illness. These claims are usually brought as Eighth Amendment claims: prisoners allege that their lack of psychiatric treatment or their conditions of confinement violate the Eighth Amendment prohibition against cruel and unusual punishment.<sup>64</sup> Prisoners have raised such challenges in two relevant contexts: isolation conditions and the death penalty.

In terms of isolation conditions, the foundational case is *Madrid*

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*Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991).

<sup>62</sup> See Dressler *supra* note 56, at 375-82; Hermann, *supra* note 54, at 247-48. The rules have also been criticized as sexist (in particular, stripping women of agency in their application) as well as racist. See, e.g., Hava B. Villaverde, *Race in the Insanity Defense*, 50 U. MIAMI L. REV. 209 (1996); Siobhan Weare, “The Mad”, “The Bad”, “The Victim:” *Gendered Constructions of Women Who Kill within the Criminal Justice System*, 2 LAWS 337 (2013).

<sup>63</sup> Daniel N. Robinson, *The Insanity Defense as a History of Mental Disorder*, in THE OXFORD HANDBOOK OF PHILOSOPHY AND PSYCHIATRY 35 (2013); see generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

<sup>64</sup> See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146 (1995); *Ford v. Wainwright*, 477 U.S. 399 (1986).

v. *Gomez*, a federal court case decided in 1995 in the Northern District of California. In *Madrid*, prisoners challenged many aspects of the conditions of confinement in one of the first U.S. supermaxes, the Pelican Bay Security Housing Unit (SHU). Testimony in the case established that, at the time of the prisoners' challenge, an estimated one-third of the prisoners in the Pelican Bay SHU had a "serious mental illness," defined to include prisoners who had been identified as psychotic based on symptoms, been placed on anti-psychotic medications, or required other psychiatric attention.<sup>65</sup> The court ultimately held that prisoners with mental illnesses – including "the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression" – could not be housed in the SHU. The conditions in the SHU, according to the court, "press the outer bounds of what most humans can tolerate."<sup>66</sup> Notably, this definition of prisoners with mental illness does not explicitly account for the "both/and" or "disturbed-disruptive" prisoners, but rather attempts an inclusive definition for the "mad" side of the dichotomy – effectively incorporating superlative subjects by defining madness broadly.

The *Madrid* ruling seemed to provide a workable definition of those prisoners who should be excluded from placement in supermaxes or solitary confinement. In her book *23/7*, Reiter recounts an interview with Judge Henderson, who presided over the *Madrid* litigation. Henderson described haunting memories of his early visits to the Pelican Bay SHU, where he frequently saw seriously mentally ill prisoners. Then he described his later visits to new units designed for these mentally ill prisoners (which, unlike the SHU, had cells with windows), when some of the formerly "crazy, wild-eyed" prisoners stopped to thank him for his decision in *Madrid* and for the subsequent judicial oversight.<sup>67</sup> Shortly following *Madrid*, another district court judge in California ordered improvements in the provision of mental healthcare throughout the state's prisons.<sup>68</sup> In fact, in *23/7*, Reiter notes that *Madrid* has been cited in over

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<sup>65</sup> *Madrid*, 889 F. Supp. at 1215, 1227.

<sup>66</sup> *Id.* at 1265, 1267; *see also* Reiter, *supra* note 2, at 136.

<sup>67</sup> Reiter, *supra* note 2, at 143.

<sup>68</sup> *Coleman v. Wilson*, 912 F. Supp. 1282 (1995); *see also* Reiter, *supra* note 2, at 137. The *Coleman* case was ultimately combined with *Plata v. Davis*, which alleged healthcare of all kinds throughout the state prison system was unconstitutionally inadequate. The case ultimately went to the Supreme Court, which upheld an order to drastically reduce the state's overcrowded prison population. *Brown v. Plata*, 563 U.S. 493 (2011); *see also* Reiter, *supra* note 2, at 136.

292 cases, most of which “refer to the principle that mentally ill prisoners must be excluded from restrictive isolation conditions.”<sup>69</sup> The sheer number of cases citing *Madrid* for the principle that mentally ill prisoners should be excluded from solitary confinement further suggests that other states and courts have also faced ongoing disputes over how to categorize prisoners.

Indeed, California, like Washington, continues to grapple with prisoners who do not fit neatly into the “mental illness” category established more than twenty years ago in the *Madrid* case. Joseph Duran, a prisoner who breathed through a tracheostomy tube, and who died in a “suicide watch” isolation cell in 2013 in California, is one such example of a potentially mis-categorized and misplaced prisoner. The California Department of Corrections labeled Duran’s death a suicide, but later investigations by both *Sacramento Bee* reporters and lawyers in the *Plata* case (which alleged constitutionally inadequate provision of healthcare throughout the state prison system) established that Duran had actually asphyxiated in his cell. He had refused to let corrections officers close the “food port” on his cell door, in response to which officers filled his cell with the noxious aerosolized substance known commonly as “pepper spray.” Duran then pulled out his tracheostomy tube, apparently due to contamination of his surgical airway with the burning aerosol. Officers witnessed this, but left him alone in the aerosol-contaminated cell for more than 12 hours, until he was found dead the next morning.<sup>70</sup> The correctional response to Duran clearly indicates both acknowledgement of serious mental illness (“suicide watch”) and also application of a type of punishment (noxious gas, in this case with the medically predictable consequence of asphyxiation via aerosolization into the tracheostomy tube) presumptively reserved for those outside *Madrid*’s “mad” sphere. Judging from institutional responses to him, Duran looks like an archetypal “disturbed-disruptive” prisoner.

Ultimately, courts disagreed with prison officials in their assessment of Duran: the judge in the *Plata* case chastised officials for hiding evidence of the actual mechanism of death behind the “suicide” label, and Duran’s parents won a large settlement in a wrongful death lawsuit brought against the California Department of Corrections and

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<sup>69</sup> Reiter, *supra* note 2, at 139, n.88.

<sup>70</sup> For a close analysis of this case, see KERAMET REITER, MASS INCARCERATION 30-36 (2017); KERAMET REITER & THOMAS BLAIR, PUNISHING MENTAL ILLNESS: TRANS-INSTITUTIONALIZATION AND SOLITARY CONFINEMENT IN THE UNITED STATES, *in* EXTREME PUNISHMENT 177 (Keramet Reiter & Alexa Koenig, eds. 2016).

Rehabilitation.<sup>71</sup> Courts like those in *Madrid* and *Plata* grapple with how to sort prisoners between mad and bad after conviction. The judicial solution: attempt to lay out clear definitions of which prisoners are “mad” and, therefore, should not be placed in conditions that are demonstrably productive of psychosis, like long-term solitary confinement. Applying these definitions meaningfully in correctional settings has, however, not yet proved feasible.

Prisoners have demanded protections based on mental illness in the context of being sentenced to death, as well as in the context of being placed in long-term solitary confinement. Three Supreme Court cases have dealt explicitly with the question of when a prisoner sentenced to death is sufficiently competent to be executed: *Ford v. Wainwright* (1986), *Atkins v. Virginia* (2002), and *Panetti v. Quarterman* (2007). In *Ford*, the Supreme Court held that the Eighth Amendment prohibited executing an insane prisoner. Therefore, Ford, who was not incompetent at the time of his trial but later developed delusions that were diagnosed as severe paranoid schizophrenia, was entitled to an evidentiary hearing to assess his sanity. The Court further held that such a hearing must give the defendant the opportunity to be present and to challenge any evidence presented by the state and that the competency assessment cannot be made solely within the executive branch of government (e.g., by a gubernatorially appointed commission).<sup>72</sup> The decision did not, however, provide any specific definition of insanity – just a process for assessing competence.

In *Atkins*, the Supreme Court held that the Eighth Amendment also prohibits executing a “mentally retarded” (intellectually disabled) prisoner, overturning a case with the opposite holding decided in 1986, the same year as *Ford*. But the Court said: “As was our approach in *Ford v. Wainwright*, with regard to insanity, ‘we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.’”<sup>73</sup> Finally, in *Panetti*, the Court further elaborated on *Ford*, holding that “a prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it,” and requiring courts assessing competency for

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<sup>71</sup> *Id.*

<sup>72</sup> 477 U.S. at 403, 410, 414-17.

<sup>73</sup> *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). For an analysis of how contested and vague the state processes attempting to define mental retardation and implement *Atkins* have been, see generally Pifer, *supra* note 11, at 1046.

execution to inquire into understanding as well as awareness.<sup>74</sup> Nonetheless, the Court acknowledged that “a concept like rational understanding is difficult to define.” This acknowledgement provides further room for case-by-case definition, as well as opening up the possibility that some prisoners who are sentenced to death, like some prisoners in solitary confinement, will be extremely difficult to exclude from the “mad” category.<sup>75</sup>

The combination of flexible (and often broad) definitions laid out by courts both in the insanity defense and in regulating which prisoners need protections from extreme conditions of confinement (whether long-term solitary or the death penalty) has left a wide area of discretion for prison officials to interpret and apply these definitions and regulations. Even if these official interpretations fail to resolve the underlying injustices that originally attracted judicial attention, judges tend to defer to the regulatory regimes prison officials design.<sup>76</sup> In many cases, these practices suggest that prison officials are manipulating the system for efficiency or engaging in “compliant resistance.”<sup>77</sup> But a closer examination of prison officials’ own challenges in categorizing and managing superlative subjects suggests that perhaps they have developed their own heuristics, in addition to simply tightening institutional practice to make their own jobs easier.

#### **IV. Walking the Line, Drawing Distinctions: Correctional Staff Heuristics**

Correctional workers, like judges and forensic psychiatrists, make everyday judgments about which prisoners are mentally ill and which are volitionally deviant, often with little reference to the various theoretical

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<sup>74</sup> *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007).

<sup>75</sup> *Id.*

<sup>76</sup> More generally, Edelman and others have called this concept legal endogeneity. *See generally* Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedure as Rational Myth*, 105 AM. J. SOC. 406 (1999). For examples of this kind of critique in punishment and prison law specifically, *see* Pifer, *supra* note 11, at 1052-56 (critiquing the ultimately inadequate protections offered by *Atkins*); Keramet Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 STUD. IN L., POL. & SOC., 69, 106, 118 (2012) (critiquing the ultimately inadequate protections offered by courts attempting to improve conditions of confinement, especially in isolation, in the 1970s and 1980s); and *see generally* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT’G REP. 245 (2012) (critiquing judicial deference to prison officials more broadly).

<sup>77</sup> *See id.*; Reiter, *supra* note 2, at 72.



categories described in Parts I and II. The mechanisms by which staff on the ground grapple with these assessments deserve further attention. Returning to Washington, we will describe two approaches to the mad/bad dichotomy, as articulated by individual staff members working in Washington State solitary confinement units.

First, in Washington, a Sergeant overseeing an isolation unit articulated a surprisingly clear rubric he applies to distinguish “bad” excrement-using prisoners from “mad” excrement-using prisoners:

Respondent: But then there’s the guys that are not crazy but are willing to go to extreme lengths to make people think that they’re crazy. Like, we had an offender in here that... takes his fecal matter and he smears it all over the cell. But he will never get any on himself or anywhere where he sleeps, right?... So, that’s not crazy. That’s acting crazy...

Interviewer: And are there guys who smear fecal matter and get it all over themselves?

Respondent: Yes... They finger-paint with it.

Interviewer: Okay. And that is...

Respondent: That’s crazy... Like, “Let me see your hands.” If there’s nothing on your hands, then I can be like, “You’re pulling a game.” And then, of course, naturally – then they go on this thing called a hygiene contract... where I got to ask them if they clean their cell and stuff like that. But when they’re doing that, the crazy ones don’t want anything. They don’t want nothing. The not crazy ones, they always want something. “I want to talk to this person. I want to talk to that person. I need this. I need that. I need this.”<sup>78</sup>

Washington State prison administrators have recently attempted to codify this Sergeant’s intuitions in the form of a “Disruptive Hygiene Behavior Response Protocol,” adopted in October 2016, which provides step-by-step instructions for attempting to interact with excrement-smearing prisoners rationally, assessing whether or not they have smeared themselves with excrement, immediately providing cleaning supplies, notifying mental health care providers of the problem, and responding with an escalating combination of mental health responses (i.e. record review, dialogue, placement in a holding or “strip” cell) and restrictive responses (i.e. withholding meals or providing cold meals instead of hot

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<sup>78</sup> Reiter Interview, Jul. 2017. Confidential transcript on file with author.

meals).<sup>79</sup>

Another correctional staff member in Washington State, in this case a psychologist, described a similar, though less dichotomous process of distinguishing a “bad” act of “self-harm” in which a prisoner is trying to achieve a certain outcome (like more attention or movement to a different cell) from a “mad” act of self-harm in which a prisoner was actually trying to take his own life. Describing one repetitively self-harming prisoner, the psychologist said: “There were times he actually wanted to end his life, but other times I could tell that he simply hadn’t learned how to communicate with words; he communicated with actions.”<sup>80</sup> In the latter case, the psychologist advocated an individualized response that sought to protect the prisoner when he was actually trying to end his life, but to relax the environmental restrictions placed on him in response to his attempts to “communicate” through other repetitive acts of self-harm: “The traditional way of dealing with his self-harming behavior was to further restrict his environment, but we realized that this might be hurting more than helping. I tried all sorts of special programs to help him manage, including private yoga lessons.”<sup>81</sup> In other words, the psychologist responded to ostensibly volitional, instrumental, outcome-oriented acts of self-harm – acts that appear “bad” – with environmental changes geared toward being *less* rather than more restrictive.

Washington officials have also sought to codify this psychologist’s intuitions in the form of a “Suicide Prevention and Response” Policy. Adopted in April 2017, the policy calls for systematic responses to suicide attempts, including mental health consultations and specific observation procedures.<sup>82</sup> The “Suicide Prevention” policy echoes the “Disruptive Hygiene” policy implemented to respond to prisoners engaging in scatolia.<sup>83</sup> Notably, the codified policy response does *not* include disciplining prisoners for suicide attempts or acts of self-harm (for instance with removal of privileges or extensions of time in solitary confinement), as had previously been permitted, and is common

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<sup>79</sup> Washington Department of Corrections, Disruptive Hygiene Response Protocol, Offender Classification Policies, Sec. 630.550: Restrictive Housing, Attachment 1, <http://www.doc.wa.gov/information/policies/default.aspx?show=300>.

<sup>80</sup> Ryan Quirk, ‘*I can help this person*’, THE MARSHALL PROJECT, Mar. 30, 2017, <https://www.themarshallproject.org/2017/03/30/i-can-help-this-person>.

<sup>81</sup> *Id.*

<sup>82</sup> Washington Department of Corrections, Suicide Prevention and Response Policy, Offender Classification Policies, Sec. 630.550, <http://www.doc.wa.gov/information/policies/files/630550.pdf>.

<sup>83</sup> The medical term for playing with feces.

in other correctional settings.<sup>84</sup> This “answer” to the question of volitional deviance versus mental illness applies the both/and approach, in a sense, by effectively rejecting the question when it comes to self-harm. In a correctional setting, self-harm may reflect “mad” and/or “bad” behavior, but the pragmatic response to it might best exclude punishment, in either situation.

In the case of both the sergeant and the psychologist, Washington state prison officials had strong intuitions about both how to categorize and how to treat two common subsets of superlative subjects – excrement-users and self-harmers. Although legal scholars have criticized the deference courts have given to prison officials’ intuitions and the subsequent codification of these intuitions in policies like the Disruptive Hygiene Response Protocol or the Suicide Prevention and Response Policy,<sup>85</sup> a closer examination of these intuitions suggests that they are grounded in extensive and ongoing experience with superlative subjects. Indeed, the experiences of the sergeant and psychologist, both of whom worked day-after-day in long-term solitary confinement units, were certainly more extensive than the experiences of judges or lawyers in limited courtroom interactions with superlative subjects, and even, perhaps, more extensive than the experiences of forensic psychiatrists in one-time evaluations of such subjects. Moreover, the reactions of both the sergeant and the psychologist reveal both compassion and acknowledgment of the effects of environment on behavior. Both are, at least, an important part of the interdisciplinary conversation we seek to frame.

### Conclusion

To close, we will propose two specific approaches to reducing harm: individualization of management, after Lovell, and communication between disciplines, after Kupers. However, as Zimring and Hawkins observed, “the criminal justice system is not a vehicle of social progress.”<sup>86</sup> We agree, and we conclude with ultimate pessimism regarding the capacity of correctional institutions to improve the situation of superlative subjects, if only because correctional institutions tend to create and re-create these subjects. Indeed, prison scholars, grappling with how to respond to disturbed-disruptives since Toch formulated the

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<sup>84</sup> See, e.g. KUPERS, *supra* note 29, at 117 (describing how “the failure of the treatment is turned into a disciplinary problem”).

<sup>85</sup> See *supra* note 70.

<sup>86</sup> Zimring & Hawkins, *supra* note 5, at 157.

category, generally focus on the need to change both individual treatment protocols and institutional environments.

As to individualization, scholars recommend blending security responses with treatment responses through individualized plans targeting specific prisoners.<sup>87</sup> For instance, Lovell advocates flexibility and targeted responses: “Case histories illustrate that regardless of diagnosis, the symptomatic behavior of disturbed inmates responds to nonclinical features of settings, in particular how much flexibility is allowed for responding to the particular issues of each inmate.”<sup>88</sup> And Kupers advocates for “close collaboration between custody and mental health staff.”<sup>89</sup> One answer to the “both/and” nature of the superlative subject, then, is to individualize management in a manner that both addresses the willful aspects of transgressive behavior and acknowledges the extent to which such behavior might reflect the compromised agency of a mental illness, rather than the instrumental deviance of manipulative actions. Individualization would seek to use personal knowledge, rapport, and real-time negotiation and reinterpretation to manage challenging behavior according to its place on the continuum of agency, and in light of its enactors’ occupation of Krober’s “zone of diagnostic insecurity.” Such individualization would respond to people who transgress from bases that are both relatively volitional (reasoned, manipulative) and involuntary (delusional, or resulting from neurologic injury leading to poor impulse control, for instance).

Another example from Washington is illustrative of individualization in this zone of diagnostic insecurity. Again, drawing from Reiter’s field notes:

Talking with prison staff in a break room, I asked them what kinds of changes they were seeing in treatment of prisoners in isolation. One officer said, with incredulity: “I was ordered to give one of these guys in isolation a football.” I immediately imagined giving someone in isolation a rubber football, heard the echoing sound of a prisoner just throwing the football against his wall, the sound reverberating through the concrete pods, how annoying that would be for everyone. Like the officer, I was shocked such a

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<sup>87</sup> KUPERS, *supra* note 29, at 212. See also RHODES, *supra* note 13, 131-90 (describing the tensions between security and treatment and the individualized ways those tensions play out in particular cases); Lovell et al., *supra* note 10, at 37 (discussing the “variability” of prisoner profiles and the need for individualization).

<sup>88</sup> Lovell, *supra* note 29, at 1000.

<sup>89</sup> KUPERS, *supra* note 29, at 212.

thing had been permitted in isolation. When I left the staff break room, I asked the unit manager and the headquarters official supervising my research team: “Did someone in isolation get a football?” The headquarters official, as surprised as I was, echoed my question at the unit manager: “Did someone in isolation get a football?” The unit manager responded, defensively: “I gave him a Nerf ball, and it keeps him so calm to hold on to it in his cell.”<sup>90</sup>

Giving a Nerf ball represents a small accommodation in the highly restrictive conditions of long-term solitary confinement, and yet, it was interpreted by staff as a radically transgressive act, against protocol and inappropriately accommodating. However, the decision showed obvious pragmatic value in the resulting improvement in agitation.

This individualized approach has benefits. It creates the possibility for empathic understanding of difficult individuals and challenging behaviors. It acknowledges the fluid, blurred relationships between volition, compromised agency, and institutional context. Finally, it suggests the complexity of the problem cases, and the need for collaboration across professional contexts to address this complexity.

This collaboration constitutes a second critical approach to reducing harm in the treatment of superlative subjects. Following Kupers, a central purpose for us in this essay is to demonstrate that sociological, medical, legal, and correctional spheres all struggle with interpretive and practical uncertainties in managing superlative subjects. All have identified the problem of “both/and” among the mad-and-bad, and none has more than begun to resolve it. This shared challenge could be mitigated by improved channels of communication, both within institutions and between scholars. For instance, the Washington correctional officer’s observation that a prisoner who smears feces gets them on himself in a manner consistent with non-instrumental action, motivated by compulsion or psychosis, could assist a treating psychiatrist or a sentencing judge in making the accommodations appropriate for serious mental illness. Likewise, Badre and Rao’s assessment of their case study patient as sociopathic and not psychotic could assist a judge or correctional officer in diverting that individual from the “mad” sphere of practice, where individuals with illnesses such as schizophrenia or intellectual disability could be victimized by him, to a strictly correctional environment. The observation of Judge Henderson that class members classified as seriously mentally ill in *Madrid* were better-behaved after

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<sup>90</sup> Reiter field notes, Apr. 2017. Confidential notes on file with author.

transfer out of solitary confinement could be used to modify institutional practice more broadly, specifically in the limitation (or elimination) of solitary confinement as an administrative prerogative. The insolubility of the both/and conundrum appears to be universal among relevant professions. That is all the more reason to develop capacity to inform each other and optimize institutional practice.

Ultimately, our enthusiasm for the viability of these measures remains, however, very limited. There is widespread agreement, for instance, that the restrictive environments in supermaxes and long-term solitary confinement units, like Washington State's IMUs (and the comparable units that exist in the federal prison system, every state prison system, and most jails), exacerbate existing mental illnesses, and cause new symptoms.<sup>91</sup> As Lovell et al. have noted, "[T]he setting itself may induce psychiatric symptoms."<sup>92</sup> Mitigating the harsh conditions of solitary confinement, to make them less conducive to creating superlative subjects, therefore needs to be at least one aspect of the institutional response to the "both/and" or "disturbed" prisoner.<sup>93</sup> As David Lovell argued recently, solitary confinement should be imposed (if at all) only following an analysis modeled on the jurisprudential concept of "strict scrutiny": when necessary to serve a compelling state interest (like acute dangerousness) and narrowly tailored (in specific conditions and duration).<sup>94</sup>

In a twist on the title of Rosenhan's classic study of psychiatric hospitalization,<sup>95</sup> our concern is that the both/and conundrum of mad-and-bad is, more than anything else, a case of "being insane in insane places." To the extent that the measures we discuss help to make institutions less insane – by facilitating access to natural light, or the possibility of physical

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<sup>91</sup> See generally KUPERS, *supra* note 29; Lovell et al., *supra* note 10, at 35; Reiter & Blair, *supra* note 70, at 181-82. For negative findings in a limited study of the psychological effects of solitary confinement, see Maureen L. O'Keefe, Kelli J. Klebe, Alysha Stucker, Kristin Sturm & William Leggett, One Year Longitudinal Study of the Psychological Effects of Administrative Segregation, Doc. No. 232973, National Criminal Justice Research Service, National Institute of Justice (2011), available at [www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf). See also Stuart Grassian, 'Fatal Flaws' in the Colorado Solitary Confinement Study, SOLITARY WATCH, Nov. 15, 2010, <http://solitarywatch.com/2010/11/15/fatal-flaws-in-the-colorado-solitary-confinement-study/>.

<sup>92</sup> Lovell et al., *supra* note 10, at 35.

<sup>93</sup> See generally KUPERS, *supra* note 29; Quirk, *supra* note 80.

<sup>94</sup> Lovell, *supra* note 18.

<sup>95</sup> D. L. Rosenhan, Symposium, *On Being Sane in Insane Places*, 13 SANTA CLARA LAWYER 379 (1973).

contact with other humans, or even the gift of a Nerf ball – those measures might be worthwhile. What is unequivocally not sane, however, is for those who should know better to continue using such destructive practices as long-term solitary confinement or overcrowding, and expect any outcome other than insane reactions to insane places – the creation of superlative subjects. The sooner this premise is accepted, the sooner prisons might become, if not a “vehicle of social progress,” at least *less* of a vehicle of regression and brutality. In a setting where smearing feces is so common that institutional staff develop their own taxonomies for patterns of smearing and contamination, we should not ask (as we did above) how to use those taxonomies to distinguish “truly ill” from manipulative feces-smearers, but rather why and how we continue to operate institutions in which feces-smearing is considered predictable behavior.

The very existence of the disturbed-disruptive prisoner often seems to justify these institutions. In fact, in an earlier essay, we argued that solitary confinement not only exacerbates mental health problems, but also produces prisoners with exacerbated problems, who, in turn, justify the very same conditions of solitary confinement that cause further problems. In other words, the difficulty of managing such prisoners appears to validate the need to keep them in such extreme settings.<sup>96</sup> Without significant changes in institutional context, then, neither perceptions nor treatment of disturbed-disruptives are likely to change.

On the other hand, contextual shifts can drastically re-shape the interpretation of superlative subjects. Zimring himself recently argued that context has immense power in determining how “dangerous and disliked” subjects are interpreted – albeit in the case of Hollywood history, rather than prison history. In 1954, Zimring’s father, working under the name Maurice Zimm, wrote the screenplay that became the 1954 cult classic movie *Creature from the Black Lagoon*: an archetypal depiction of a socially ambiguous monster. The 1954 movie, generally categorized as “horror,” depicts the Creature as a “monster.” But Zimring has argued that the Creature was intended to be “powerful, but not predatory, innocent about the motives of those in pursuit of him, but only inclined to use force in self-defense.” The 2017 re-interpretation of the original film, *The Shape of Water*, finally captured the Creature’s true nature, as originally conceived by Zimm, as compassionate, humanoid, and even aesthetically pleasant. *The Shape of Water* won Best Picture at

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<sup>96</sup> See Reiter & Blair, *supra* note 70, at 183, 188-9.

2018

*SUPERLATIVE SUBJECTS*

193

the 90<sup>th</sup> Academy Awards.<sup>97</sup> Just as the words and the setting of the screenplay re-framed the audience's interpretation of the Creature, redeeming Zimring's father's initial vision, so institutional recontextualization might re-frame professional categorizations of superlative subjects, and even, potentially, redeem them.

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<sup>97</sup> Leah Garchik, *Maurice Zimm, Who Put the 'Create' into the Movie 'Creature'*, S.F. CHRONICLE, Mar. 19, 2018, available online at: <https://www.sfchronicle.com/entertainment/garchik/article/Maurice-Zimm-who-put-the-create-into-the-12760256.php>.