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Supermax, Punishment, and the African-American Community

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Introduction

During the past few decades supermax confinement has become an increasingly common tool used by prison administrators in the United States. Many inmates placed in supermax facilities are deemed the ‘worst of the worst’, and all are forced to endure extremely long periods of isolation and sensory deprivation. The proliferation of such facilities is premised on the belief that they are the best way of achieving prison order. It is expected that by placing a subset of the inmates in supermax facilities the overall prison population will benefit from a safer and more secure environment.

In this paper I will argue that supermax confinement should be abolished in the United States. The harmful nature of the practice makes it hard to justify on any philosophical theory of punishment. Furthermore there are alienating effects to the use of supermax prisons that raise particular concerns. This essay puts forth reasons why any effort to vindicate the current practice of supermax will be futile. While there is not adequate space to refute the defense of supermax facilities under every theory of punishment, I argue that the most plausible justification of the practice is a consequentist one, but even that justification is insufficient. I do this by analyzing the most commonly touted defense of supermax—that it is the best way to achieve prison order—and show why this sort of argument hinges on unsupported beliefs about the benefits of supermax confinement. I then provide reasons why an attempt to justify supermax facilities under a retributive theory of punishment would also be deficient. While I admit that retributivism may justify supermax confinement for a few inmates, using retributive logic requires a radical

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change to be made to the current practice and forces the defenders of the practice to admit that most of the inmates currently housed in supermax facilities do not deserve to be there.

The issue of supermax confinement is extremely important for Americans in general and African-Americans in particular. Given the disproportionate percentage of African-Americans in prison in the United States, the conditions of imprisonment—for everyone, but particularly for African-Americans—are especially significant and disconcerting. While racial disparities exist across American institutions the price that is paid from unjust punishments makes it additionally troublesome. Setting aside the issue of whether supermax can be justified on a philosophical theory of punishment and focusing on the social realities of America illuminates a deeper problem with the practice. Supermax confinement forces people to suffer a debilitating form of isolation and forbids us from developing supportive institutions. Given the history of America this puts African-Americans in an especially vulnerable position. Supportive institutions in the form of family, church and the community have served as blacks most effective defense to alleviate the harms caused by the unjust social ordering in America. Thus, I will argue, even if I am wrong about the justification of supermax prisons—if supermax prisons can be justified under a philosophical theory of punishment—there are independent reasons for believing that supermax confinement as a form of punishment for African-Americans is especially worrisome. Punishment in the form of supermax confinement strips away the potential for communal nourishment that have played an essential role for African-American advancement. From this perspective we can regard supermax confinement as morally unjust practice not because it is unable to be supported by an abstract philosophical principle of punishment but because of the social realities of American history ought to structure the way we presently punish.

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The essay proceeds as follows: Part (II) discusses (A) the practice of supermax confinement and analyzes arguments justifying supermax facilities under (B) consequentialist and (C) retributive theories of punishment. Part (III) argues that the effects of supermax confinement on African-Americans provide additional reasons why we should abolish the practice. Part (IV) concludes.

(II)

A. Supermax Confinement

Let us begin by briefly describing the practice of supermax confinement. While this is not the place for a detailed rehearsal of complaints that have been brought against supermax confinement we should familiarize ourselves with the practice before we critique it. Clarifying what the practice is will help illustrate why it cannot be justified on consequentialist or retributive theories of punishment.

What is Supermax Confinement?

Supermax confinement refers to specialized segregation facilities, or isolation units within prisons, where prisoners are held. The prisoners brought there are normally categorized as one of two types—*disciplinary* detainees and *administrative* detainees. The former are inmates who committed punishable offenses while in prison and the latter are inmates who the administrators believe should be isolated from the general population on a long-term basis. The administrative detainees are the prisoners that supermax facilities are primarily designed to house (Lippke, 2004). Supermax confinement is often imposed by correctional administrators as a

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long-term method to manage and control the prison. Often this results in prisoners being placed in supermax confinement not for *what* they have done but for *who* they are. If someone convicted is perceived as a threat to the prison population then they risk being placed in supermax confinement. In many states, inmates are given indeterminate terms in supermax confinement because they have been labeled a gang member (Tachiki, 1995). An indeterminate term often means that the prisoner will serve his entire sentence in isolation. If the inmate is released then he is released directly into the community, and were the prisoner to recidivate, or return to prison because of a parole violation, then it is likely that he would be returned to supermax because he would have already acquired the label ‘supermax prisoner’.

The conditions of supermax confinement include extreme sensory deprivation and isolation from any meaningful human contact. Prisoners are restricted from having access to books, magazines, and other items that would be allowed to inmates in the general population. Inmates in supermax confinement rarely leave their cells and spending twenty-three hours a day inside a dimly lit concrete room is the norm. When prisoners are granted permission to leave they are often placed in restraints and escorted by the prison staff. The recreational time that they receive outside of the cell typically happens in a small area that is surrounded by cement walls or cages. Supermax confinement subjects prisoners to complete idleness for long periods of time, and damages their psychological well-being.

The adverse impact that supermax confinement has on prisoners is extreme. Inmates suffer mental anguish and irreparable psychological harm. But this is rarely contested. As Grassian and Kupers (2011) note, “just about everyone who has taken a serious look at long-term isolated confinement (as in supermaximum security or long-term administrative segregation) has concluded there is a serious harm from long-term isolated confinement”. Studies examining such

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confinement and concluding that it does not cause long-term damage to mental health are often based on relatively short periods of isolation—usually days opposed to months and years. Critics of those studies suggest that longer periods of isolation are the norm with supermax confinement and as a result the practice causes irreparable damage to inmates. (Lippke, 2004; Haney and Lynch, 1997). There is not any study that shows that non-voluntary confinement lasting more than ten days fails to cause negative psychological effects. People who experience solitary confinement for years on end suffer significant deterioration to their mental (and physical) health and will (if ever released) have a hard time adjusting to ordinary life after supermax confinement (Lippke, 2004).

Finally, to make matters worse correctional administrators use modern technology to exasperate the psychological torment that people experience while isolated. The ability to use cameras to monitor prisoners, and intercoms to speak to them, limits the direct contact that inmates have with correctional officers. Furthermore, in some of the newer facilities videoconferencing equipment eliminates face-to-face interaction completely. Not only are the prisoner's family and friends, who may have traveled hours, prevented from having any physical contact with them, but the same sort of technology can be used by medical staff to examine prisoners without seeing them in person. This increases the level of isolation and allows the individual to become more dehumanized than before. Instead of using technology to mitigate the harm of an isolated experience it seems that it is being used to augment the brutal experience.

Why Do Supermax Facilities Exist?

Now that we know a bit about supermax we are in a better position to assess the justifications for such facilities. Knowing what supermax confinement involves should

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immediately make us wonder why something consistently and unequivocally seen as damaging is accepted as a common practice in our correctional system. The most commonly expressed goal of supermax confinement is to increase prison order (Kurki and Morris, 2001). The rationale is to separate the most unruly prisoners from the general population and to make the environment safer for the staff and other prisoners. Supermax prisoners are considered to be the 'worst of the worst' and unable to be housed safely in ordinary maximum-security prisons. When inmates are placed in supermax confinement, the argument goes, the prison population is normalized and everyone else receives greater freedom. Thus, it appears, supermax confinement should be accepted since it is the most effective way of dealing with dangerous prisoners and achieving safety within the prison.

If this is correct then it seems that supermax confinement can be justified on consequentialist grounds. Consequentialism justifies a practice as permissible based solely on its ability to generate superior results. A consequentialist might accept a few people having to suffer the brutality of a harmful practice for the prison to remain orderly as a justifiable sacrifice for the greater good. They may argue that while the psychological burden placed on inmates who are put in supermax confinement is harmful the benefits that result from the practice outweigh the harm. Supermax seems to be a practice that effects a few people in a negative way but benefits the society.

But this is too quick. While consequentialism seems like a plausible principle to ground supermax confinement, when we analyze the underlying rationale of the prison order argument we can see that it is unstable. If there are any positive results that supermax confinement produces they are not sufficient to justify the costs. In the next section I will use consequentialist reasoning to show that supermax confinement cannot be justified. If the practice is not supported

by consequentialism then proponents of supermax confinement would have to find another principle to ground it on.

B. Supermax Confinement and Consequentialism

Much of the criticisms of supermax confinement focus on the harm it does to the individual. The practice is often criticized because it is inhumane and should not be accepted regardless of any benefits. This objection could be put in Kantian terms: a system that treat those who are punished “merely as means” to further social ends is unacceptable (Kant, 1948 p. 90). This seems, *prima facie*, correct and as I mentioned earlier there is abundant literature that attests to the grotesque nature of supermax. However, the expressed social welfare ends of supermax confinement make it a plausible candidate to justify with consequentialism. Some consequentialists, such as utilitarians, argue that the justification for any practice is contingent on the expected utility that derives from the practice: it is the right practice if it yields the best consequences and it is wrong if it does not. Hence, with consequentialism, it is acceptable to treat prisoners “as means” as long as it is beneficial. If supermax is the best practice that achieves the best results then it would be justified on a consequentialist theory of punishment.

I do not wish to spend time here defending consequentialism as a legitimate theory of punishment. A penal theory of consequentialism is vulnerable to the same criticisms as a moral theory of consequentialism and those criticisms are well noted¹. For those who are unimpressed with a consequentialist theory of punishment the arguments for supermax may seem unconvincing and they may reject the practice simply because of the conditions mentioned in the previous section. My goal, however, is to assess the strongest possible justification of supermax.

¹ The most popular, and perhaps obvious, objections are that consequentialism does not respect the separateness of persons (See Rawls 1972 pp. 22-33; Nozick 1974, pp. 33-35), or that fails to recognize individual rights that forbid us from being sacrificed for the societal good (see Dworkin 1978, Chapter 4).

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The argument that the practice is justified because it creates a more orderly prison environment, I believe, is the most plausible reason to continue the practice. It is also the most common justification that we hear from prison administrators (Mears and Reisig, 2006). As Kurki and Morris tell us “all express goals of supermax relate to safety and security” (p. 391). I will refer to the argument that suggests that safety, security, and crime reduction within prisons is best achieved with supermax confinement as the ‘prison order’ argument. If the prison argument is sound then the practice of supermax can be justified with consequentialism. However, because of the lack of empirical evidence to prove that prisons are more orderly when supermax confinement is a viable option we cannot determine the exact results. Still, a closer look at the underlying rationale that grounds supermax shows that it is unstable and why it cannot be justified with consequentialism.

Problems with a Consequentialist Justification of Supermax

The problem with justifying supermax confinement quickly emerges when we attempt to form a comparison of the benefits and costs of such facilities. It is, of course, a general feature of consequentialism that whatever the good that we aim to achieve, or the evil that we aim to avoid, under a system of punishment, we should choose the distribution of punishment that best allows us to achieve such aims. A Benthamite utilitarian, for example, would choose a system that causes only as much pain as necessary to achieve its desired end (Duff, 1996 p. 19). To justify supermax confinement then one must show not only that it does more good than harm but also that there is no feasible alternative that could be expected to bring about more (or equal) good at a lower cost. However, since the benefits of supermax confinement seem to be minimal, or nonexistent, the costs are substantial, and there are alternatives to the practice that achieves similar ends without placing as much as a burden, the practice should be rejected.

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Let us first look at the alleged benefits. We said that the goal of supermax confinement is to increase prison order. It is often claimed that certain prisoners create such a problem to the prison system that it is a threat to house them in ordinary maximum security prisons. These inmates may be disruptive, have a history of violence, pose as an escape risk, or have other reasons why they may need intense surveillance. By placing these inmates in supermax confinement the administrators believe they are able to reduce the incidents within the prison and maintain prison order. This argument can be made in deterrence or incapacitation terms. Each should be assessed in turn in order to estimate the weight we should give to the benefits of the practice of supermax confinement.

Deterrence

First, consider deterrence. A deterrent punishment is sometimes said to have a communicative function: it communicates to potential offenders that the threat of punishment ought to be taken seriously (Duff, 1996). The deterrent hypothesis for supermax confinement holds that because the conditions in supermax are restrictive and unappealing prisoners will commit fewer crimes so that they can avoid this treatment. Although imprisonment is bad, supermax is worse, and the threat or actual experience of supermax will reduce the likelihood that prisoners will cause problems in ordinary maximum security prisons (Lippke, 2004).

There are two ways a punishment can serve as a deterrent. First, a punishment serves as a *specific deterrent* if it prevents the individual from committing additional criminal acts. So if supermax confinement causes prisoners to refrain from engaging in disruptive acts out of fear that they will be put right back into isolation then it could be seen as having a specific deterrent effect. The prisoner will realize that ‘crime doesn’t pay’ and would be deterred from committing

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crimes in the future out of fear of returning to the supermax facility. Alternatively, a punishment can serve as a *general deterrent* if it sends a message to other potential offenders and prevents them from engaging in criminal behavior. Thus, if placing unruly inmates into supermax confinement causes other prisoners in the general population to comply with the rules out of the fear of being put in supermax then it has a general deterrent effect (Mears and Reisig, 2006). Both deterrent effects can potentially reduce crime and lend support to a consequentialist theory of punishment as a justification of supermax confinement.

If there is a deterrent effect from supermax confinement then it seems that the effect is very small. Even on an intuitive level prisoners seem to be poor candidates for deterrence. They were not deterred by the threat of imprisonment when they committed the crimes that landed them in jail so it is unlikely that the threat of supermax is going to deter them from committing more crimes while incarcerated. Before being incarcerated the difference was between prison and no prison but while incarcerated the difference is between prison conditions (Lippke, 2004). Thus deterring prisoners from committing further crimes seems like a strenuous task. Furthermore, the potential for a deterrent effect decreases when we consider some of the current practices of supermax. A look into administrators' use of supermax quickly shows its ineffectiveness as a deterrent.

Specific Deterrence

Consider the specific deterrent effect. For this effect to work prisoners must be deterred from committing a crime based on the experience they had while in supermax confinement. The horrific effects of isolation are supposed to deter individuals from behaving disorderly when they return to the general population. But, as I stated earlier, supermax confinement is often used as a

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penalizing tool for prisoner's reputations and not their actions. Many times prisoners are placed in supermax without ever committing an offense and there is little evidence that suggests that supermax is used as a tool to penalize the most disorderly inmates (Kurki and Morris, 2001). Since the prisoner did not end up in supermax confinement because of a disorderly act there is little reason for them to believe that engaging in disorderly acts if they are released will result in them returning to supermax confinement. Moreover, since many prisoners are released to the community (if they ever get a chance to leave supermax), and not back into the general population, often the specific deterrent effect does not get a chance to occur². Thus, if supermax confinement has a specific deterrent effect it is not substantial.

General Deterrence

For similar reasons it seems that supermax confinement cannot have much of a general deterrent effect either. In order for a punishment to have a general deterrent effect it must communicate to inmates in the general population that disorderly conduct leads to hard punishments. The inmates that are never released, or are released directly into the community,

² I am limiting myself to focusing on the 'prison order' argument in this section. If I wasn't an opponent may reply here that for prisoners released directly back into the community the specific deterrent effect does occur and it has as much (if not more) of a benefit as the prisoner being released back into the population. They may suggest that the severity of supermax confinement can invoke a fear in someone that makes them less likely to commit a crime than they would be had they been in regular maximum security. While this is a plausible rebuttal (that doesn't really apply to my argument here) I should briefly highlight two points. First, it is not clear that more severe sanctions deter would be offenders. In fact, much evidence suggests that prisoners are normally not deterred by penalties because they do not believe that they will get caught (Lippke, 2004; Paternoster, 1987). This should reduce the force of the deterrence effect as an aim to reducing crime using supermax confinement (and maybe other forms of punishment). It could be the case, however, that since ex-prisoners have already been caught they are more likely to be effected by severity of penalties because they have seen that it is a real possibility that they can suffer them. This brings me to my second point, which is that penalties that are too severe for crimes can sometimes have the harmful effect of inciting violence instead of decreasing it. So a gang member who believes that she will be caught selling a small amount of drugs may attempt to shoot a cop to avoid returning to supermax confinement if they fear they would be caught. These two points suggest that the specific deterrent effect does not have any benefit (and may cause more harm) within or outside prisons. But fully analyzing the effects of supermax confinement outside of prisons goes beyond the scope of this article although I briefly mention some of the costs below.

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are unable to communicate the brutal effects of supermax to other prisoners. Moreover, those who are released may have been put there for multiple reasons that are unrelated to the seriousness of their crime. This can communicate to the offender that anyone could be placed in supermax and, as a result, they may feel less compelled to change their behavior. Of course, it will be known that some of the most disorderly acts greatly increase ones chances of being put in supermax confinement. Someone who lashes out at the guards or commits other acts which prevent the prison program from operating efficiently is likely to end up in supermax if it is a feasible option. But the inmates who commit these actions likely lack the self-control to modify their behavior regardless of the sanction of risk (Mears and Reisig, 2006; Lovell et al. 2000). Thus, they too are unlikely to be deterred.

Incapacitation

Next, let us consider incapacitation. This effect seems to have more of an intuitive appeal than the argument from deterrence. The incapacitation argument holds that by placing inmates in supermax confinement they are no longer capable of committing disruptive acts within the general population. Thus, with the disorderly inmates removed crimes within the prison are reduced and the order of the prison is restored. While this seems persuasive, we should note, however, that the aim of the incapacitation effect is quite narrow. While incapacitation, normally in the form of imprisonment, is often directed at disabling offenders from committing crimes against the law-abiding community, the incapacitation effect of the prison order argument is aimed at preventing prisoners from committing crimes against other prisoners or staff members who agree to work in such facilities (Lippke, 2004). While this is beneficial it is not as substantial as the argument for incapacitating criminals from committing crimes against law-abiding citizens. Thus, it will be calculated differently on a consequentialist scale.

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Additionally, there are still problems with the argument for the incapacitation effect of supermax confinement having value on a consequentialist scale. First, it requires that the most (actual or potential) disruptive inmates be correctly identified. The ability to do this is often rejected by prison researchers: “what [prison administrators] cannot do is magically to unlock the problem of order for a prison system as whole. Their inherent [trouble] lies in being used as a distraction by those who would argue that just because prison ‘control problems’ are ‘caused’ by real individuals they are entirely individual in nature” (Sparks, Bottoms, and Hay 1996, p. 313). Even if we assume that administrators can identify the most problematic individuals in a prison it is still unclear how great the effect will be. For example, if gang leaders, who seem to be the main targets of these facilities, are placed in supermax why should we believe that new leaders would not emerge who pose as much of a problem for prison order? Indeed it may be the case that placing gang leaders in supermax leads to more disorder in the general population. If members of gangs feel that their leaders have been unjustly placed in supermax they may retaliate against prison authorities. This may cause a special problem to the prison system because of the organized nature of gang activities within prisons (Mears and Reisig, 2006).

Furthermore, incapacitating prisoners with supermax confinement seems problematic because there are alternatives that are just as effective and causes less suffering. Gang leaders can be handled by interstate transfers: “the Illinois gang leader is rendered far less a threat in prison or to the community outside the prison if held in a Maine or Florida prison rather than an Illinois prison” (Kurki and Morris, 2001 p. 419). This may lower the gang leader’s influence and not result in gang members acting out because it will not be perceived as a punishment. For other inmates there are normally disciplinary units within the prison that temporarily segregate them from other inmates. Prison authorities have been able to communicate to inmates that disorderly

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acts are intolerable by placing those who are disruptive in these segregated facilities (Lippke, 2004). These practices have the ability to be just as beneficial as supermax and they are achieved without many of the costs.

Weighing the Costs and the Benefits

My point is not that there is nothing to be gained with supermax confinement. Although I believe that the underlying rationale on which the prison order argument rests is unsound there may be some benefits to the institution that I have not considered. But regardless of what these benefits are, I contend, they are not enough to justify the costs of supermax. Earlier I mentioned the effects of supermax confinement on the prisoners who are forced to endure it. We should also include the negative impact that supermax facilities have on inmates' family and friends. By isolating the prisoner they too have to suffer from a loss of contact. Given the stigmatizing effect of supermax confinement parents may also suffer by knowing that they have raised the 'worst of the worst'. These costs must be weighed. The harms suffered by those who have immediate contact with supermax prisoners must also be weighed. The staff at these facilities must cope with the reality that they are taking part in a system that is treating inmates as inhumane. This can cause emotional torment on people and affect their life negatively. Furthermore, the financial cost to build such facilities affects everyone. The technology that are put in these facilities combined with the staffing costs make these prisons a lot more expensive to run than other facilities. When we recognize the scarcity of governmental funds, and that the money put into supermax facilities could have been used in other areas (such as education or mental health treatment) that would be a lot more effective in reducing crime and creating social welfare, the balance seems to tell against such facilities. Taking these considerations, and the considerations from the previous section into account, the justification for supermax confinement on

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consequentialist grounds fails. All the alleged benefits of supermax confinement are surely outweighed by the costs and it appears that we have less costly means, with regular maximum security and short-term segregation, for achieving these benefits.

C. Supermax Confinement and Retributivism

Of course the proponents of supermax will not give in that easily. Since the practice cannot be justified on consequentialist grounds they may attempt to find another principle of punishment to vindicate supermax confinement. A plausible candidate is retributivism. While retributivism is not often used as a justification for supermax it is a popular principle often touted in the literature of philosophical theories of punishment. Thus we should evaluate its credibility as a principle to justify supermax facilities and show why it would be detrimental for prison authorities to try to ground the practice with retributivism.

Unlike consequentialists, retributivists argue that a punishment is justified not by its intended consequences but by it being deserved by the wrongdoer. While consequentialism could be seen as a ‘forward-looking’ principle of punishment (it is based on the future good that comes from punishing the criminal) retributivism should be seen as ‘backwards-looking’ (it is based on the harm caused by the individual) (Hart, 2008). A central feature of retributivism is that sanctions be proportionate to the severity of the offense. Proportionality is only respected when equally guilty offenders get equally deserving punishment (Duff, 1996).

Problems with a Retributive Defense of Supermax

Trying to construct an argument justifying supermax on retributive grounds quickly shows why this sort of rationale is never used. For one, it is unclear who would be placed in these facilities. A pure retributivist would not allow any inmates to be placed in supermax merely

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for preventative reasons. Since retributivism is a backwards-looking theory anyone who is placed in supermax must be placed there for acts that they already committed. Hence the administrative detainees, those who are not housed there for disciplinary purposes, would not be confined in supermax facilities under a retributive theory of punishment. The only candidates for supermax confinement will be inmates who deserve to be disciplined harshly for acts that they have committed. However, it is not clear who those inmates would be under the retributive theory. Disciplinary detainees are normally those who commit violations within prison. Under retributivism, of course, some of the violations that currently lead to inmates being placed in supermax confinement would not be able to be justified. For example, not many retributivists would suggest that the brutal conditions of supermax is deserved by those who make an attempt to escape prison to see their love ones or refuse to follow rules and cause minor disruptions in the general population. The severity of supermax confinement would not be proportional to these acts. Thus, these violations would not lead to supermax confinement under a retributive theory of punishment.

But what about the more violent crimes? Perhaps a retributivist could argue that those who rape or murder people within prisons deserve to be placed in supermax confinement. Those who have committed brutal acts against persons, the argument suggests, deserve to receive brutal treatment. While this argument would not justify the imposition of supermax confinement on many inmates it may provide minimal support to the practice. The retributivist may argue that at least *some* detainees currently in supermax deserve to be there. To punish prisoners in this way, however, ignores a key retributive principle that is commonly held. It is argued that in order to be morally deserving of a punishment a person must have the full opportunity to avoid the imposition of the criminal law (Hart, 2008 chap 1). Those who are imprisoned are stripped of

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this opportunity. They cannot move freely and for some raping or murdering another inmate will be an inevitable consequence because of their limited options. Thus, it would be difficult to show inmates who commit crimes within prison deserve solitary confinement. The limited opportunities at their disposal diminish their capacity to make free choices. Hence it appears that under a retributive theory of punishment neither administrative nor disciplinary detainees could be deserving of supermax confinement.

Changing Supermax

I do not want to engage too closely with these issues at the moment. Given that supermax confinement invokes particular harms on a person it seems possible that some crime may be deserving of the penalty. Perhaps proponents of the practice may argue that we can sentence people to supermax before they enter prison for crimes in which death is not an option—either because their crimes fall just short of deserving the death penalty or because the penal theory does not death is ever permissible. This would get rid of the current categories of supermax detainees and radically change the practice as we know it. There would also be changes in the sentencing feature. Since retributivists punish offenders in proportion to the wrongness of acts that they have committed there would no longer be indeterminate sentences in supermax. The sentence that supermax detainees receive should be known before they enter the facility. But then a plethora of problems open up when you consider the different ways that people will handle the isolated experience and analyze whether they are receiving similar punishment for similar crimes. The point that should be noted, however, is that if any retributive argument does justify the practice of supermax it only justifies it for a few people. Therefore administrators would still have to justify these large facilities that are designed to house a large number of inmates. This could not be done using retributivist logic. Thus it seems obvious why a retributive

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defense of supermax is not used (and should not be used) by the advocates of supermax confinement.

Review

Supermax confinement subjects prisoners to harmful conditions that are comparable to torture. We have seen that the primary justification for the practice is that it reduces crime within the prison and creates a more orderly environment. I have suggested that if supermax confinement is the best way of achieving these goals then it could be justified on consequentialist grounds. However, although there is no empirical evidence to support the ‘prison order’ argument I argued that the philosophical tenets that it was grounded on were unstable. A closer look at the deterrence and incapacitation effect that supermax was supposed to produce showed that the benefits, if any, were not enough to outweigh the costs and any of the benefits that such facilities aim to achieve could be achieved with less costly means. Hence, supermax facilities could not be justified using consequentialist reasoning. Next, I briefly looked at whether supermax confinement could be justified on retributive grounds. While I admitted that this was not a justification used by prison authorities I suggested that it was a potential principle that proponents of supermax confinement may turn to since the practice could not be justified under a consequentialist penal theory. A quick analysis, however, showed that a retributive theory of punishment would only be able to justify few, in any, prisoners being in supermax and result in a radical change in the practice. Thus it appears obvious why administrators do not use retributive logic to justify supermax prisons. Therefore I conclude that neither consequentialist nor retributivist theories of punishment provide strong support for justifying supermax confinement.

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While I believe that supermax facilities should be eradicated I am aware that others will be less inclined to dismiss the practice. I have tried to present the most plausible case for supermax but there are justifications that seemed to be unlikely candidates and, hence, were not engaged in this essay. For example, some defend a contractarian version of punishment that sits somewhere in between consequentialist or retributivist theories. Many ground their principle using the Rawlsian exercise of the veil of ignorance. But given the harshness of supermax confinement combined with arbitrariness of who currently get placed in such facilities I did not think that it was plausible that those in the original position would agree to supermax confinement; thus, I did not present argument against justifying supermax from a contractarian penal theory. Or again one might remind me that rehabilitation is often used as an aim of consequentialist theories and should also be considered along with deterrence and incapacitation. But the fact that the prisoner is isolated and not participating in any programs to help them with the issues that got them sent to supermax immediately dismisses this as a plausible aim of supermax facilities. As I said at the outset it is beyond the scope of this essay to engage with every justification of supermax confinement. I have focused on the primary justifications given for such practices and the most plausible principles of punishment that could ground supermax facilities. If there is a stronger defense of supermax prisons then the burden is now on the advocates of such facilities to put forth the argument. However, in the next section I show why supermax confinement as a punishment for African Americans is particularly worrisome. If I am correct then even those who believe that the practice can be justified under a philosophical principle of punishment should be cautious about advocating for this feature in the American criminal justice system.

(III)

Supermax Confinement and African Americans

Black philosophers and political theorists rarely write about punishment. This is unfortunate because the criminal justice system is probably the biggest impediment to the advancement of the African American community. Blacks are legally denied the opportunity to vote, obtain employment, housing, and other public benefits because of a legal system that is inherently designed to hinder our growth. This disables us from becoming successful citizens, workers, and parents, and prevents us from ameliorating some of the damage that has been done to us in the past. The rate at which blacks are punished is unjust and philosophical insights into the American legal system can highlight the unwarranted punishments that are received by African Americans. There is, I believe, an epistemic privilege that comes with experiencing certain things and being black in America allows people to provide insights into the unfairness of the criminal justice system that are often overlooked. But putting the issue of the *rate* at which African Americans are punished to the side one must also be worried about the *way* in which blacks are punished. Supermax confinement is an especially troubling method of punishment for African Americans because it forces people to suffer a debilitating form of isolation and forbids us from developing supportive institutions that have been available even during the most dreadful established practices.

There is no doubt that blacks are disproportionately represented in the United States prison population. While studies differ slightly in their numbers there is much evidence that shows that the general American population is about 12-13 percent black and the prison population is about 46-50 percent black (Tonry, 2011). There is less evidence about the representation of African-Americans in supermax prisons, but it is hard to imagine that African-American representation there is less than in other prison facilities. So it seems fair to assume

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that a relatively large number of blacks are currently being housed in supermax prisons. However, placing blacks in supermax alienates them from themselves and others and assaults their psychological well-being. Let me be clear here. It is not my contention that long-term isolation only poses a problem for African American inmates. I merely contest that this form of punishment penalizes blacks in a way that even the most unjust legal institutions in the past did not. Historically blacks have experienced racial discrimination, hostility, and poverty, yet have still been able to formulate and utilize institutions like family, church, and the community to maintain their humanity and self-dignity. Even during slavery blacks were able to form their own supportive communities that help to mitigate the assault of this unjust social ordering (McGary, 1997 p. 292). This continued through the Jim Crow era and the Civil Rights Movement where communal bonds played a major role in African American advancement. In supermax facilities this is no longer an option. It alienates individuals and restricts them from acquiring any sense of community. This is important because communal support could be said to be the most important defense that blacks have to mitigate the effects of a hostile racial social ordering. It has been argued that “even during the period of slavery, there was still a slave community that served to provide a sense of self-worth and social cohesiveness for slaves” (293). I would argue further that many prisoners are able to formulate a similar sense of community in the general population³. They are able to converse and form bonds that are unavailable in supermax. Even within a hostile environment they are still able to maintain a sense of self-worth that allows them to avoid a moral and social death.

This is not to suggest that communities, alone, provide people with the ability to flourish or live meaningful lives. My point is that communities can, and have been, used to minimize

³ The community argument here should make us particularly skeptical about prison administrators’ focus on ‘gang members’.

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some of the damaging effects caused by racist social institutions. Supermax confinement takes this away and, thus, poses an unprecedented problem for African Americans. Given the history of injustice to blacks in America we should be especially worried about this social climate.

Nor do I mean to suggest that every African American cares about the value of community. Some may argue that those African Americans that have committed crimes against other African Americans and whose lifestyle was especially damaging to the black community *deserve* to be isolated. They may ask “why should we provide communal support to the people who crimes have done nothing but hurt the community?” While I think the issue of what African-Americans who commit crimes deserve is an intricate topic and warrants special consideration let me just say a few (insufficient) remarks about the idea of blacks deserving supermax.

The first point is that if we are to believe that certain crimes warrants supermax for African Americans it would be tough to determine which crimes. While I mentioned crimes that are damaging against the community as a possible candidate it seems unlikely that we could hold black individuals fully responsible for those crimes that they commit. Not only do many of blacks lack sufficient alternatives that would fulfill the full opportunity requirement, which we saw was necessary for many retributive theories of punishment, but the communities that blacks are raised in ought to take a sense of responsibility for the way that they are raised. Many times blacks may rebel against the community because they feel that they have been let down or abandoned by those communities. We should use communities to increase solidarity and when crimes are committed we should take responsibility as a group and not view individuals as solely culpable.

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The second point is that even if it turns out that some blacks are deserving of isolation we may conclude that supermax confinement is not the best way to achieve this. Given prison authorities the permission to isolate each other may lead us down a slippery slope that results in many blacks who do not deserve to be isolated being placed in supermax. Thus, we may decide to penalize blacks internally and express dissatisfaction with their actions. This could be expressed in public disapproval or family and friends distancing themselves from certain individuals who are incarcerated for certain crimes⁴. Hence, even if it turns out that some blacks are deserving of supermax we may have pragmatic reasons to avoid the practice.

Thus, I conclude that, supermax confinement disables African Americans from utilizing a tool that has allowed us to mitigate the harms of the most dreadful establishments. Communal bonds are important for African Americans to deal with the terrible plight caused by unjust social institutions. Even if we can make sense of the idea of blacks deserving supermax confinement I think it is a bad approach. Instead we should aim at solidifying the black community and oppose the seizure of the one thing that continuously allows us to attain self-respect in a society that devalues our worth.

(IV)

Conclusion

The increase in supermax facilities has been premised on the belief that they are valuable tools to protect the order of the prison. I, however, see something more important that needs protection. The psychological well-being of individuals along with African Americans special entitlement to communal nourishment are too important for us to put at risk for the minimal

⁴ Perhaps it may turn out that certain crimes against the community are seen as so bad that even other inmates will distance themselves from those who commit these crimes.

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benefits that supermax confinement may be able to provide. Anyone who wants to defend the practice, on philosophical grounds, will have to provide an argument grounding the institution on a philosophical theory of punishment and offer additional reasons why many African Americans, who are disproportionately represented in prisons, should be stripped of the one thing that have always been available to deal with unjust social establishments. Such an argument would also have to defend the criminal justice system as a whole and show that people who commit crimes had adequate opportunities in life (how can one defend a just punishment in an unjust society). The people looking into these issues will, I hope, discover that the problem lies not in any individual but in the unjust social institutions in America. The criminal justice system is a particular institution that needs radical assessment. But even within unjust institutions there are features that will always be more unjust than others. Supermax confinement is such a feature and should be abolished because it is the 'worst of the worst'.

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