A Therapeutic Jurisprudence Deconstruction of Seclusion and Restraint Law: Thinking About Humiliation, Shame and Dignity

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Abstract:

Although a robust and contentious body of caselaw has developed around the area of the right of institutionalized persons to refuse antipsychotic medication, there has been virtually *no* attention paid to the constitutional dimensions of the potential right to refuse other modalities of treatment -- such as seclusion and restraint -- that are frequently used in public psychiatric hospitals. While there is a substantial body of case law in this latter area, cases are based mostly on standard legal principles that have developed over the centuries: principles involving standards of care, proximate cause, duty, and other factors familiar to anyone who has ever read a survey article about medical malpractice.

Importantly, none of the cases that have been decided have considered the ways that the practices of seclusion and restraint can lead to feelings such as "anger, helplessness, powerlessness, confusion, loneliness, desolation, and humiliation."[1] Importantly, literature written by patients who have been restrained or secluded *do* detail the "liberty interferences and negative psychological effects, including embarrassment, humiliation, and dehumanization, that can result from

[1] Raija Kontio et al., *Seclusion and Restraint in Psychiatry: Patients' Experiences and Practical Suggestions on How to Improve Practices and Use Alternatives*, 48 PERSP. PSYCHIATRIC CARE 16, 17 (2012).

the use of restraint and seclusion."[2] Yet this literature has had little impact on judicial decisionmaking.

In this presentation, we will consider how the caselaw that has developed around seclusion and restraint practices ignores this literature (and the experiences of patients), the ways that these practices can shame and humiliate those who are affected, how they rob those subjected to these practices of their right to dignity (in spite of "Patients' Bills of rights" that are law in almost every state, mandating the right to such dignity), and how these practices further frontally violate the principles of therapeutic jurisprudence, a school of legal thought that acknowledges that the law can have therapeutic or anti-therapeutic consequences.[3]

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[2] Stacey A. Tovino, *Psychiatric Restraint and Seclusion: Resisting Legislative Solution*, 47 SANTA CLARA L. REV. 511, 570 (2007), citing STEPHANIE HAIMOWITZ ET AL., RESTRAINT AND SECLUSION - A RISK MANAGEMENT GUIDE 11 (Sept. 2006), available at http://www.power2u.org/downloads/R-S%20Risk%CC20Manag%CC20Guide%CC20Oct%2006.pdf (noting that restraint and seclusion can be humiliating); OHIO LEGAL RIGHTS SERV., A CLOSER LOOK: SECLUSION AND RESTRAINT PRACTICES IN CHILDREN'S RESIDENTIAL FACILITIES IN OHIO (Apr. 2002), available at http://www.olrs.ohio.gov/asp/pub_3_PhysicalRestraint.asp (noting that it is embarrassing to be restrained and secluded); Lisa W. Foderaro, *Hospitals Seek an Alternative to Straitjacket*, N.Y. TIMES, Aug. 1, 1994, at A1 (noting that physical restraints can be dehumanizing).

[3] Michael L. Perlin, **Error! Main Document Only.***"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?* 42 AKRON L. REV. 885, 912 (2009); Mehgan Gallagher & Michael L. Perlin, *"The Pain I Rise Above": How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*, 29 FLA. J. INT'L L. 271 , 280-81 (2018).