



2014

Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization

J. Clark Kelso

Pacific McGeorge School of Law

Follow this and additional works at: <http://scholarlycommons.pacific.edu/facultyarticles>

 Part of the [Constitutional Law Commons](#), and the [Criminal Law Commons](#)

Recommended Citation

J. Clark Kelso, Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization, 46 McGeorge L. Rev. 897 (2014).

This Article is brought to you for free and open access by the McGeorge School of Law Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in McGeorge School of Law Scholarly Articles by an authorized administrator of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization

J. Clark Kelso*

TABLE OF CONTENTS

I. INTRODUCTION.....	897
II. DEHUMANIZATION ACCORDING TO THE PSYCHOLOGISTS	900
III. THE ROLE OF DEHUMANIZATION IN EIGHTH AMENDMENT JURISPRUDENCE	901
IV. CONCLUSION	906

I. INTRODUCTION

I have served now for seven years as the court-appointed Receiver responsible for medical care in California’s state prison system. Prior to my appointment as Receiver in 2008, I had no substantial contact with the day-to-day operations of any prison or jail system. So I came to the job largely free of preconceptions about what I would discover. That’s a nice way of saying that I had no real clue what I was getting myself into. Now, after seven years, I think I may have had enough experience with the challenge of reforming corrections and sentencing policy to make a useful observation or two.

The major part of my job as Receiver has been to identify and then take the steps that had to be taken to improve the quality of care available in the prisons and to ensure open access to that care. What I quickly discovered right after my appointment was that the steps to be taken were mostly obvious ones and were steps that would have been perfectly obvious to anyone with experience in managing any large healthcare organization.¹ Knowing what to do was not really the challenge.

But this realization—that the “what” was obvious—left me wondering why, if the solutions were so obvious, the State of California, along with quite a few other state and local governments around the country, had failed for so long to

* Associate Dean for Strategic Initiatives and Professor of Law, University of the Pacific, McGeorge School of Law. The views expressed in this article are entirely my own and do not constitute any type of official statement in my capacity as Receiver in charge of medical care within the California Department of Corrections and Rehabilitation.

1. J. CLARK KELSO, ACHIEVING A CONSTITUTIONAL LEVEL OF MEDICAL CARE IN CALIFORNIA’S PRISONS: THE FEDERAL RECEIVER’S TURNAROUND PLAN OF ACTION iii (June 6, 2008), *available at* http://www.cphcs.ca.gov/docs/court/plata/2008-06-08_Receivers_Turnaround_Plan_of_Action.pdf (on file with the *McGeorge Law Review*). The United States District Court approved the Receiver’s Turnaround Plan of Action on June 16, 2008. *See id.*

implement those solutions to avoid getting sued or to get out of a successful lawsuit. Why has prison healthcare been such a problem in California and around the country for the last thirty-five years?

One answer given by some is to blame the messenger, in this instance, the federal courts that have been applying the United States Supreme Court's 1976 holding in *Estelle v. Gamble* that the Eighth Amendment's cruel and unusual punishment clause requires prisons and jails to provide adequate health care to inmates.² According to these critics, including many in Congress who supported passage of the Prison Litigation Reform Act of 1995 (PLRA),³ it's not that health care in prisons is really unconstitutional, it's just that federal judges—very often referred to by these critics as “liberal federal judges”—get carried away and hold prisons and jails to unreasonably high standards.⁴ The passage of the PLRA may have slowed down some of the court action a little bit, as Professor Landsberg explained,⁵ but even under the PLRA's standards for injunctive relief, prisons and jails around the country still find themselves on the losing side of federal lawsuits, the State of Arizona being one of the most recent losers.⁶ As for the charge that this is just a liberal judicial cause, the decision authored by Justice Anthony Kennedy in *Brown v. Plata*⁷ gives the lie to that simplistic reasoning. Not all “conservative” judges are oblivious to the shortcomings of prisons in providing basic healthcare.⁸

Another explanation is that state political leaders—those who control budgets and policy—have no reason to pay attention to this issue in a meaningful way because there is no political benefit. Felons can't vote as a matter of law,⁹ and voting constituents not only don't care about the issue, a lot of them are actively hostile to providing health care to prisoners.¹⁰ The question I get asked most frequently by ordinary people is why we have to spend any money on prisoner health care when the public's own health care needs are not being met. Passage of the Affordable Care Act has made it a little easier to respond to that question, but the public's sentiment is clearly not in favor of prison healthcare.¹¹ In fact, in a public meeting down in Ventura County a few years ago, when members of my

2. 429 U.S. 97, 103 (1976).

3. Pub. L. 104–134, tit. VIII, 110 Stat. 1321, 1321–66 (1996).

4. See Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 1, 5–7 (2008) (noting the deficiencies in prison healthcare).

5. Brian K. Landsberg, *Does Prison Reform Bring Sentencing Reform?: The Congress, the Courts, and the Structural Injunction*, 46 MCGEORGE L. REV. -- (2014).

6. See *Graves v. Arpaio*, No. CV-77-00479-PHX-NVW, 2014 WL 4898717, at *37–39 (D. Ariz. Sept. 30, 2014) (denying a motion to terminate injunctive relief), *as amended by* 2014 WL 6983316 (D. Ariz. Dec. 10, 2014).

7. 131 S. Ct. 1910 (2011).

8. See *id.* at 1963 (discussing the deficiencies of California prison healthcare).

9. CAL. CONST. art. 2, § 4.

10. See Westhoff, *supra* note 4, at 1 (discussing Americans' views toward prison healthcare).

11. See *id.*

staff, in an effort to communicate how bad conditions were in prison, indicated that the average age of death in prison was fifty-six years old, there was wild applause. Working to improve or maintain the quality of health care in prisons does not produce votes for politicians.

Yet another explanation for state and local failure to act is that the administrators and bureaucrats who run prisons and jails just aren't up to the task. In deciding to appoint a receiver in California, one of Judge Henderson's concerns was that there was a pattern of learned helplessness that rendered correctional administrators and bureaucrats simply unable to do the right thing.¹²

Finally, there are some who blame custody officers and the custody mindset as the primary obstacle to the delivery of adequate healthcare. We heard Barry Krisberg talk this morning about the importance of that mindset change in reforming the Department of Juvenile Justice.¹³

There is some truth to each of these explanations. But as I have reflected on this question for the last seven years—why has it been so hard to provide adequate care—I think that each of these explanations identifies only the most visible symptoms of a much deeper challenge that affects not just prison healthcare, but nearly all aspects of corrections operations as well as attitudes towards sentencing policies. What we have been facing is a widespread and largely unchallenged dehumanization of all criminals and inmates.¹⁴ It is that dehumanization that lies at the heart of many of the problems in modern sentencing and corrections systems:

- Dehumanization of criminals and inmates makes it easier to impose extremely long and disproportionate sentences;
- Dehumanization makes it easier for legislators and governors to underfund and neglect corrections;
- Dehumanization makes it easier for corrections leaders to establish draconian punishment policies, such as indeterminate solitary confinement, and apply those policies broadly to inmates where solitary confinement really doesn't advance any legitimate goals;
- Dehumanization makes it easier for custody officers to employ excessive force; and

12. *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

13. Barry Krisberg, *Reforming the Division of Juvenile Justice: Lessons Learned*, 46 MCGEORGE L. REV. 773 (2014).

14. Milica Vasiljevic & G. Tendayi Viki, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, in HUMANNESS AND DEHUMANIZATION 129, 129 (Paul G. Bain, Jeroen Vaes & Jacques-Philippe Leyens, eds., 2014).

- Dehumanization causes even healthcare professionals who work in the prisons to treat their patients at arm's length and with fear and distrust.

I believe that if we could substantially rid ourselves of the unnecessary dehumanization of criminals and inmates, many of the problems we have seen over the last thirty years in sentencing policy and corrections operations would be much more readily solvable.

Now that's a somewhat interesting thesis and prediction, but where is the academic or empirical support for it? Why should this thesis be taken seriously?

The good news for me is that there is beginning to be at least some preliminary scholarly explorations of the topic of dehumanization and sentencing and corrections reform. I'd like to turn to some of that research now.

II. DEHUMANIZATION ACCORDING TO THE PSYCHOLOGISTS

Researchers in the field of psychology have recently been turning their attention to the systematic study of the impacts of dehumanization of criminals and inmates.¹⁵ This research has generally identified two very different types of dehumanization. The first is described as mechanistic dehumanization, and the second is described as animalistic dehumanization.¹⁶

Mechanistic dehumanization refers to words, attitudes, and behaviors that result in denying to a person attributes of interpersonal warmth, cognitive flexibility, and emotionality.¹⁷ When stripped of these attributes, a person is perceived as being inflexible, cold, unemotional, rigid, and machine-like.¹⁸

Animalistic dehumanization refers to words, attitudes, and behaviors that result in denying to a person those unique attributes that differentiate humans from animals—attributes such as use of higher order language and moral sensibility.¹⁹ Stripped of those attributes, a person can be likened to an animal, and in the case of dehumanization of criminals and inmates, most frequently as a wild, violent, dangerous, predatory animal.²⁰ Although there may be some examples of the mechanistic dehumanization of convicts and criminals, it is much more common to see language and to observe practices that fall into the animalistic category.²¹

15. *See id.* at 131.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See id.* (“Animalistic dehumanization refers to the denial of attributes that are uniquely human (e.g., civility, refinement, higher cognition, and moral sensibility).”).

20. *Id.* at 131, 140.

21. *See id.* at 138 (attaching animalistic dehumanization to crimes “considered coarse, unrefined, immature, irrational, and lacking in civility, such as rape and murder” and mechanistic dehumanization to white-collar crimes).

The most immediate consequence of animalistic dehumanization is to rob inmates of their status as moral beings worthy of being treated with the same dignity and respect that is accorded to all other people. The tag of convict or inmate is used to strip away one's personhood. Bereft of the moral entitlement to be treated as a human being, convicts and inmates are easy prey for mistreatment and abuse.²² Indeed, it is not even seen as mistreatment or abuse precisely because of the moral devaluation of the convict's humanity.

The research also suggests that the language associated with animalistic dehumanization of criminals has an impact on public opinions regarding punishment and rehabilitation, leading to excessively long punishments and a belief that offenders cannot be rehabilitated.²³

There is a great deal more empirical work to be done on this topic, both to repeat and validate the early research results and to explore additional questions. One important example would be to study whether efforts to humanize the relationships between custody officers and inmates would have a positive impact upon rehabilitation and recidivism rates. There is reason to think that reducing dehumanization of inmates would lead to greater personal engagement between custody officers and inmates, and that, in turn, is likely to lead to better rehabilitation and lower recidivism rates. At the November 2014 symposium, California Department of Corrections and Rehabilitation Secretary Jeffrey a. Beard described new programs designed to improve an inmates' changes for reintegrating into society upon release; a special program focused on rehumanization should perhaps be part of the effort.

III. THE ROLE OF DEHUMANIZATION IN EIGHTH AMENDMENT JURISPRUDENCE

In addition to work by psychologists, there are a few pieces of legal scholarship that have started to explore the role that the concept of dehumanization might play in the proper interpretation of the Eighth Amendment's cruel and unusual punishment clause.²⁴

The Supreme Court's Eighth Amendment jurisprudence has always included language that connects to the concept of dehumanization, although that has not always been the centerpiece of the Court's reasoning or holding in particular cases.²⁵ From *Weems v. United States*²⁶ and *Trop v. Dulles*,²⁷ to *Estelle v.*

22. *Id.* at 133.

23. *See id.* at 135.

24. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007).

25. *Id.* at 115; Vasiljevic & Viki, *supra* note 14 at 133.

26. 217 U.S. 349, 368–77 (1910) (holding that a fine and fifteen year prison sentence for “falsifying a single item of a public document” is cruel and unusual punishment).

27. 356 U.S. 86, 99–103 (1958) (holding that “use of denationalization as a [criminal] punishment” is cruel and unusual because it is “a form of punishment more primitive than torture” that “strips the citizen of his status in the national and international political community”).

Gamble,²⁸ and through to *Brown v. Plata*,²⁹ the Court has recognized that, at its core, the Eighth Amendment protects the human dignity of inmates.

When Justice Kennedy wrote for the Court in *Plata*, he framed the primary issue in terms of fundamental human dignity. He wrote as follows:

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

. . . A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.³⁰

This language is the counterpart to the pictures of overcrowding attached to the Court’s opinion, which illustrated the conditions.

There is, among some scholars, commentators, and pundits, a tendency to skip over this type of lofty language in Supreme Court opinions as unimportant rhetoric or literary license. So for some, the decision by the Court in *Plata* was simply that the PLRA did not prevent a three-judge panel from setting a population density limitation on a prison in truly extraordinary circumstances, and that the evidence supported the 137.5% cap imposed by the three-judge panel, where that figure could later be adjusted upon a proper showing of changed circumstances. Under that reading, the state’s legal obligation is satisfied simply by hitting the 137.5% target, and when that is done, the case is over, and the State can move on.

I think that type of narrow reading misses the spirit of the Court’s holding and the lesson it tries to teach. It may be a correct interpretation of the holding insofar as prison overcrowding is concerned. But I think the importance of the *Plata* decision—and its true lesson—lies in the Court’s insight that inmates must be treated with the basic respect accorded to all persons by virtue of their

28. 429 U.S. 97, 101–06 (1976) (“[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.” (internal quotation marks and citations omitted)).

29. 131 S. Ct. 1910, 1923 (2011) (holding that a “court-mandated [prison] population limit [was] necessary to remedy the violation of prisoner’ constitutional rights” where overcrowding caused the “severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care”).

30. *Id.* at 1928 (parallel citations omitted).

personhood.³¹ Inmates cannot be cast out of society, stripped of their moral essence, and treated as savage animals.

What are the possible implications of taking the Court's human dignity language seriously, as I do? In terms of prison operations, there are lots of possible implications. Let me give a couple of specific examples.

First, we had a bad death this last year where an inmate with a history of tracheostomy and tracheal stenosis³² had been placed on suicide watch in an acute mental health crisis bed. A complicated series of events contributed to his possibly preventable death. On the evening of his death, he harmed himself by placing food and feces in his tracheostomy, discarding the tracheostomy appliance, and self traumatizing his trachea. Custody officers used pepper spray on the patient without first checking with medical staff, and then refused to extract the patient for decontamination and assessment of airway adequacy, despite a medical order to do so, citing a danger of assaultive behavior. He continued to be observed by nursing staff at regular intervals, but several hours later was noted to be unresponsive in his cell. Although an attempt was made at resuscitation, the attempt was unsuccessful. An autopsy concluded the patient had died of asphyxiation from foreign material and blood in his airway.

Now my guess is that if the custody officers in charge of this situation thought of this inmate as a fully morally valued person, there would have been a very different result. But that is not the current culture in California's prisons.

Let me turn to a broader example that I've already mentioned once before. Let's think about the relationship between custody officers and inmates. In most California prisons today, there really isn't much of a personal relationship between officers and inmates. In many prison yards, you see inmates gathering amongst themselves in the middle of the yard, and custody officers line up against walls surrounding the yard. There is little intermingling of officers and inmates. Officers are simply monitoring inmates, like visitors watching the animals at the zoo, waiting to see if some violence or other misbehavior erupts that requires intervention.

If we were serious about treating inmates as human beings, you can imagine custody officers actually interacting with inmates throughout the yard on a regular basis.

Now I am informed by my custody staff, who have served for thirty-plus years in corrections, that custody officers in California prisons used to behave the

31. *Id.*

32. A "[t]racheostomy is an operative procedure that creates a surgical airway in the cervical trachea. It is most often performed in patients who have had difficulty weaning off a ventilator, followed by those who have suffered trauma or a catastrophic neurological insult." Jonathan Lindman, *Tracheostomy*, MEDSCAPE (last updated Jan. 21, 2015), <http://emedicine.medscape.com/article/865068-overview> (on file with the *McGeorge Law Review*). Tracheal stenosis is a narrowing of the trachea. Salomon Waizel-Haiat, *Tracheal Stenosis Imaging*, MEDSCAPE (last updated Nov. 7, 2013), <http://emedicine.medscape.com/article/362175-overview> (on file with the *McGeorge Law Review*).

way I have just described. They were engaged with inmates. They knew the inmates as people.

Academic research supports the view that this type of engagement is not only good for inmates and custody officers, but tends to reduce recidivism.³³ But this type of engagement will be hard to sustain unless we can do something about the culture of inmate dehumanization.

Turning to sentencing policy, I think there can be no question that the language of dehumanization has been part and parcel of the get-tough-on-crime policies of the last thirty years. With all felons dehumanized and demonized, any notions of proportionality in sentencing become lost amid the rhetoric of locking up the animals for as long as possible.

Over the last decade around the country, and more recently here in California, the public rhetoric about criminals and punishment has become more nuanced and sophisticated. The days when all felons could be painted with the broad brush of murderers, rapists, and child molesters, has hopefully faded into history. There is a greater recognition that not all criminals are equally dangerous to society, and that it is possible to see a substantial reduction in prison populations while also seeing a substantial reduction in crime.

One of the great fears I had in watching the implementation of Governor Brown's courageous realignment program was that we would have one or two really bad results—a realigned prisoner who would commit some heinous murder—that might turn the tide of public opinion against the program. So far, that hasn't happened.

Proposition 47 now goes a few steps further than realignment by re-categorizing a number of felonies as misdemeanors.³⁴ We'll have to see over the next several years whether Proposition 47 is equally successful.

With luck, we have entered a period in California where the rhetoric of sentencing has largely turned away from dehumanization of all criminals to a more thoughtful approach. Does that get us to a sentencing commission? I'm not sure. The policy and political challenges of successfully advancing a sentencing commission through the legislative process are significant.³⁵ So I'm not going to hazard a prediction on that topic. I know that it would require extraordinary leadership to make it happen, and Governor Brown has already several times demonstrated his extraordinary capacity for leadership. At a minimum, I think we need to give the idea some time to come together.

33. See D.A. Andrews & Jerry J. Keissling, Program Structure and Effective Correctional Practices: A Summary of the CaVic Research, in *EFFECTIVE CORRECTIONAL TREATMENT* 441, 462 (Robert R. Ross & Paul Gendreau eds., 1980); Tony Ward & Mark Brown, *The Good Lives Model and Conceptual Issues in Offender Rehabilitation*, 10 *PSYCHOL., CRIME, & L.* 243 (2004).

34. STATE OF CAL., TEXT OF PROPOSED LAWS 71, available at <http://vig.cdn.sos.ca.gov/2014/general/pdf/text-of-proposed-laws1.pdf> (last visited Feb. 14, 2015) (on file with the *McGeorge Law Review*).

35. W. David Ball, *Redesigning Sentencing*, 46 *MCGEORGE L. REV.* -- (2014).

Let me suggest one final area where taking the Court's human dignity language seriously may have an important consequence. As we all know, California's death penalty is broken; in my judgment, irretrievably broken. Fifteen years ago, I worked with Governor Wilson's office, Attorney General Dan Lungren's office, and the Chief Justice of the California Supreme Court to try to streamline certain elements of the death penalty process and to increase the number of attorneys willing to take on the very difficult task of representing death row defendants before the California Supreme Court. At that time, as I recall, there were around 550 inmates on death row.³⁶ Well, we were so successful in our efforts, that now there are approximately 750 inmates on death row.³⁷

Even if we were to start executing one inmate every two weeks, it would take us twenty-nine years to clear death row, and that assumes zero new death penalty judgments for the entire twenty-nine year period. And those 750 inmates cost the State of California an enormous amount of additional money to house, care for, and provide lawyers for. Is there any rational person anywhere who believes we can fix the current system?

As most of you are aware, in July 2014, Federal District Judge Cormac Carney held that California's death penalty system was so dysfunctional and riddled with so much delay and arbitrariness, that it constituted cruel and unusual punishment to subject a convict sentenced to die in 1995 with the continuing but remote threat of execution.³⁸ I would add to his rationale that the death penalty is the ultimate act of dehumanization. As the character portrayed by Clint Eastwood in the movie *Unforgiven* famously said, "It's a hell of a thing; killin' a man. You take away all he's got, and all he's ever gonna have."³⁹ Now I don't know whether Judge Carney's opinion will hold up on appeal.⁴⁰ I hope it does. But if it doesn't, I hope we can then have a serious conversation among the State's leaders and with the people of California about the inhumanity of our death penalty system, its expense, and its permanent dysfunction. Perhaps some good can come out of that conversation.

36. See *Capital Punishment 2000*, POLICY ALMANAC, http://www.policyalmanac.org/crime/archive/bjs_capital_punishment.shtml (last visited Feb. 23, 2015) (on file with the *McGeorge Law Review*) (stating that in 2000, California had 586 prisoners on death row).

37. See *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Feb. 14, 2015) (on file with the *McGeorge Law Review*) (stating that as of October 1, 2014, the number of death row inmates in California was 745).

38. Order Declaring California's Death Penalty System Unconstitutional and Vacating Petitioner's Death Sentence at 28–29, *Jones v. Chappell*, Case No. CV 09–02158–CJC (C.D. Cal. 2014) (on file with the *McGeorge Law Review*).

39. UNFORGIVEN (Malpaso Productions 1992).

40. See Maura Dolan, *California AG Kamala Harris to Appeal Ruling Against Death Penalty*, L.A. TIMES (Aug. 21, 2014, 2:41 PM), <http://www.latimes.com/local/lanow/la-me-ln-death-penalty-appeal-20140821-story.html> (on file with the *McGeorge Law Review*) (stating that the ruling in *Jones v. Chappell* will be appealed).

IV. CONCLUSION

In closing, I hope my comments have at least raised in your minds some legitimate questions that are worthy of further discussion, debate, and research. Although I think much progress has been made in recent years in reforming California's corrections and sentencing policies, that progress may simply be a swing in the pendulum. For these changes to become lasting and sustainable, I believe we need to fundamentally alter our perception of criminals and inmates, and recognize that treating them as dehumanized animals reflects poorly upon our own moral compass.