A PLACE APART:
THE HARM OF SOLITARY CONFINEMENT

by

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ABSTRACT

A Place Apart: The Harm of Solitary Confinement
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This thesis examines the world of solitary confinement within the Canadian prison system. My research was inspired by Ashley Smith, a 19-year old segregated inmate who died from self-asphyxiation while seven guards watched. This outrageous occurrence prompted me to question the practice of solitary confinement and a prison system in which such an event could occur. Studying the history of solitary confinement left me surprised to learn that it was originally intended as a therapeutic and merciful alternative to the punishments of the day. This revelation was one of a series of inversions that led me to conclude that solitary confinement is a world apart, not just physically, but also socially, temporally and legally. I have concluded that improving the lives of those segregated within our prisons requires the world of solitary confinement to become anchored within the broader legal and social context.
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Alexandra Campbell
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CHAPTER ONE
THROUGH THE LOOKING GLASS WITH ASHLEY SMITH

Winston Smith, the protagonist in George Orwell’s novel *Nineteen Eighty-Four,* did not delude himself into believing that his dissidence would go unpunished. The Thought Police were too sophisticated to allow that. Throughout his illicit affair with his girlfriend Julia, Winston knew that he would be captured and tortured at the Ministry of Love. Once there, he would be asked to confess to things that he had done and things that he had not done. He would confess to it all and, ultimately, he would be killed. This outcome was inevitable. Everyone confessed to both real and to imaginary crimes. Every enemy of the Party was exterminated.

Despite an awareness of their fate, Winston and Julia were comforted by a belief in their ability to retain control over one thing: “the few cubic centimeters within [their] skull[s].” They could be made to say that \(2 + 2 = 5\) but they could not be made to *believe* that this was true. Regardless of the torture they would be forced to endure, the things they would be made to say and the people they were bound to betray in the process, Winston and Julia would continue to love each other and to hate the Party, the enemy of their love and all other compassionate feelings. To die hating the Party and loving each other would be a triumph of the human spirit.

Winston Smith died loving no one other than Big Brother and believing that \(2 + 2 = 5\). During his period of torture, he betrayed Julia, not only by his words, which

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he always knew was inevitable, but fundamentally, wishing her a scapegoat for his pain.

The tragedies of *Nineteen Eighty-Four* are many, but perhaps the greatest is Winston and Julia’s realization that we cannot control the few cubic centimeters inside our skulls. The mind is not inviolate, but rather can be broken down just as the body can. Meeting again by chance after their period of confinement at the Ministry of Love, Winston and Julia exchange only a few words:

‘Sometimes,’ she said, ‘they threaten you with something – something you can’t stand up to, can’t even think about. And then you say, ‘Don’t do it to me, do it to somebody else, do it to so-and-so.’ And perhaps you might pretend, afterwards, that it was only a trick and that you just said it to make them stop and didn’t really mean it. But that isn’t true. At the time when it happens you do mean it. You think there’s no other way of saving yourself, and you’re quite ready to save yourself that way. You want it to happen to the other person. You don’t give a damn what they suffer. All you care about is yourself.’
‘All you care about is yourself,’ he echoed.
‘And after that, you don’t feel the same towards the other person any longer.’
‘No,’ he said, ‘you don’t feel the same.’

In researching solitary confinement within Canadian prisons and penitentiaries, I encountered many critiques of the practice. One that gave me particular pause was that of Dr. Stephen Fox, professor of Psychology at Iowa University, who described the deleterious effects of prolonged solitude in terms that do not usually appear within the legal arena. Solitary confinement, says Dr. Fox, renders a person incapable of feeling love. Like Winston and Julia, inmates who spend extended time within an isolation cell suffer a permanent injury that is not visible to the naked eye: they are unable to resume their previous loving

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relationships or to start new ones. While leaving the body merely singed, the torture of prolonged isolation scorches some capacity within the mind or soul to empathize with fellow human beings.

What do we do with people who are too difficult to manage, even within the highly controlled prison community? People who avoid their problems are sometimes told to stop burying their head in the sand. Problems will not go away simply because you are not looking at them. Rather, whatever it is that is plaguing you will wait at the sand’s surface for your head to emerge. Even with that knowledge, the temptation to put off until later a problem you do not want to confront can be too tempting to resist. Within a correctional facility, placing the most difficult to manage inmates in solitary confinement is an act of burying our collective head in the sand. To push the metaphor further, confining inmates within segregation is an example of burying our problem in the sand while knowing all the while that, no matter how many layers we place on top, the issue will resurface.

As a society, we “deal” with our most antisocial citizens by sending them away to the holding centres that we call prisons. Prisons, of course, are communities of their own, possessing their own cast of characters and their own outliers who either refuse or are unable to respect the institutional order of things. Again, the most difficult to manage are sent away, this time to the prison within a prison: solitary confinement. There, inmates sit doubly isolated, first from the community at large and next from the general population of the prison. The problem that these individuals present to both worlds (inside and outside the
prison walls) is snuffed out through brute extraction, but not from its root. Rather, the root of problem festers as the inmate is deprived of a social context in which to learn and to heal. And eventually, when the isolated inmate’s prison term expires, our head is yanked from the sand and we are forced to confront the creature, inevitably more anti-social, that we have created. In short, one does not need to be a prisoners’ rights activist to care about the treatment of prisoners in isolation. We all have a vested interest in critically assessing the band-aid “solution” that is solitary confinement.

Recently, the practice of solitary confinement has garnered considerable attention from the Canadian media; the 2007 death of young inmate Ashley Smith has raised questions about the propriety of holding prisoners in conditions of isolation, even spawning a greatly anticipated inquest. The truth is that the practice of solitary confinement has been criticized heavily since shortly after its inception, yet it continues to be a primary tool in the administrative and punitive toolkits of the Canadian correctional officer. Canadian prisoners have been held in solitary confinement since the mid-nineteenth century. Correctional officers will

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5 University of British Columbia’s law professor Michael Jackson describes in Justice Behind the Walls a talk given at the law school by penitentiary inmate named Gary Allen. Allen commented on the anger that built up within himself while in jail, stating that “when he felt his anger rising, it was as if an electrical energy pulsed through his veins, and there were times when that force was so great it seemed the electricity flowing out of his hands and feet would have the power to electrocute anyone standing close to him.” (Justice Behind the Walls (Vancouver: Douglas & McIntyre, 2002), at 141.) Bill Frederick, another inmate who was interviewed by Jackson, claimed that his greatest fear was that his time in segregation would turn him into the callous killer that people believed him to be (Ibid. at 308).

tell you that they are often left with no other choice when dealing with incorrigible inmates such as Ashley Smith. Ashley’s death within her solitary confinement cell at the age of 19 has left many convinced that there simply must be a better option. I dedicate this thesis to the quest to understand how such an atrocious event could have taken place within the Canadian prison system and to find alternatives to or modifications of the practice of solitary confinement.

Ashley Smith’s Story

On October 19, 2007, Ashley Smith asphyxiated and died in her solitary confinement cell as a result of a ligature that she had tied around her neck. Seven guards watched as her face turned purple and the period between her breaths grew longer. By the time they intervened, it was too late to save Ashley’s life.

When she died, Ashley Smith had been incarcerated for four years, having commenced a youth sentence for throwing crab apples at a postal worker at the age of 15. Her index offence seemed innocuous enough. No one would have expected Ashley’s sentence to balloon the way it did as a result of the litany of additional convictions registered against her during her time in custody. Once incarcerated, however, Ashley’s assaults on prison staff, verbal and physical, as well as her destruction of institutional property, were never-ending. The words “oppositional” and “defiant” seem understated when applied to her. During the course of Ashley’s

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7 The details in the following four paragraphs are based on two documentaries by The Fifth Estate: “Out of Control” The Fifth Estate (8 January 2010), online cbc.ca http://www.cbc.ca/fifth/discussion/2010/01/out_of_control.html and “Behind the Wall” The Fifth Estate (12 November 2010), online cbc.ca http://www.cbc.ca/fifth/2010-2011/behindthewall/.
time as a federal inmate, she gained a reputation for being the most difficult to manage female prisoner within the correctional system, quite a noteworthy distinction considering both her young age and peer group.

Toward the end of her life, Ashley’s penchant for harming herself increased greatly. She had a habit of cutting herself and, as she did on the day of her death, frequently restricted her airway using cloth ligatures that she fashioned from any material that she was able to shred. Unable to cope with Ashley, prison staff kept her in solitary confinement and passed her from institution to institution. Her presence at any correctional facility tended to monopolize its staff and it seems that Ashley was rotated, at least in part, in order to prevent any one penitentiary from having to bear the brunt of Ashley’s presence. It seems, as well, that Ashley was moved in order to circumvent the rules surrounding the maximum period of time that any inmate can spend in solitary confinement without a regional review. By the time of her death, Ashley had spent years in isolation.

Ashley Smith was a notable inmate for several reasons. Her young age and her tragic death are two. Notable as well was her steadfast refusal to be ignored. Despite their efforts to efface her through continual isolation, Ashley’s rebellious behaviour demanded attention from the correctional officers around her. Her need for attention was so acute that many believe that it cost Ashley her life.

While Ashley struggled to get attention in her last years, she has received considerable attention since the time of her death; Hana Gartner of the Canadian Broadcasting Corporation’s The Fifth Estate hosted two documentaries dedicated to
Ashley Smith’s case: “Out of Control” and “Behind the Wall”. In the latter, Gartner commented: “When you are looking for answers, getting into prison is as hard as breaking out.” She described the resistance that she faced when trying to examine the inner life of Canadian penitentiaries.

There is no question that the Correctional Service of Canada (CSC) is the least visible branch of the criminal justice system. Unlike the police and the various actors within the judicial branch of the criminal justice system, members of the CSC are not accustomed to having their performance evaluated on a regular basis. The online comments section related to the documentary “Behind the Wall” reflects a tension between viewers horrified that the tragedy of Ashley Smith’s death could happen within a Canadian prison and members of the CSC who assert that those of us outside the prison system are unable to understand the challenges of their work and, as such, cannot pass judgment. Two remarks representative of this tension are reproduced from The Fifth Estate website. The emphasis has been added and a passage from the first comment has been excerpted. Otherwise, the comments are reproduced as they appear on the website:

[Anna:]

... the additions of baby cams in the wards of women would stop a lot of the abuse, especially if the public was invited to review/scrutinize the tapes or footage every week or so. Such oversight would be appropriate. I would like to see John Walsh or

\[8\] Ibid.

\[9\] Public Works and Government Services Canada, Commission of Inquiry into certain events at the Prison for Women in Kingston by the Honourable Louise Arbour (Ottawa: Canada Communication Group Publishing) at v [Arbour Report].

\[10\] “Behind the Wall”, supra note 7.
DR. Phil review this incident, in the court of public opinion. The ultimate responsibility lies with the prison officials at the highest level and other senior levels of govt. A shameful story that will no doubt be repeated if steps are not taken to modernize the prison system and move it into the 20th century...

[In response to “Anna”:

Anna..have you ever been incarcerated? Have you ever worked as a guard in an institution? I have..I was a guard for 8 years. Its not rosy in there ..its JAIL. Try having feces thrown at you or being spit at by AIDS patients. Try having a young girl display the remnants of her monthly period to you. Try being called every name in the book because you counted someone for head count. You people haven’t got a clue.

These two comments reflect a fundamental catch-22: those of us outside of prison “haven’t got a clue” about how things should run within Canadian penitentiaries because we are not inside, but we cannot get a clue because we cannot get inside. We have only the words of those more intimately acquainted with the world “inside” to help inform our opinion on the practices of Corrections Canada.

Different stakeholders have made various comments on the untimely death of Ashley Smith. A review of these different perspectives, the perspectives of insiders, is instructive in gaining a glimpse into the cloistered world of Canadian corrections and an appreciation of the factors that led to the tragic end of Ashley’s life.
Report of the New Brunswick Ombudsman

In June of 2008, the New Brunswick Ombudsman and Youth and Child Advocate released a report\(^{11}\) about Ashley Smith’s time as an inmate within New Brunswick detention centres, particularly the New Brunswick Youth Centre (NBYC) where she spent approximately three years.\(^{12}\) The report makes recommendations aimed at improving the care given to youth with serious mental health and behavioural problems who become involved in the criminal justice system.

The NBYC is the only secure custody youth facility in the province of New Brunswick. It can accommodate 100 adolescents at a time, both male and female, and it houses youth from across the province. The NBYC is a modern institution, opened in 1998, which follows a therapeutic model designed to encourage inmates to work collaboratively as they improve their ability to work within a structure while gaining respect for authority.\(^{13}\) According to the report, the NBYC:

> [f]eatures amenities essential to the therapeutic community, including a gymnasium, library, wood working centre, art room, computer lab, horticulture station, and educational facilities. Medical services and nursing staff are also on site to attend to any medical needs of the youths.\(^{14}\)

Confined within segregation for two-thirds of her sentence at the NBYC, Ashley was unable to benefit from the therapeutic community and the various

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\(^{12}\) Between April 2003 and October 2006, Ashley Smith was a resident at the New Brunswick Youth Centre in either a part-time or a full-time capacity.

\(^{13}\) *Report of the New Brunswick Ombudsman, supra* note 11 at 13-14.

\(^{14}\) *Ibid.* at 12.
related facilities. Barely a day went by in which Ashley did not get herself in some kind of trouble, resulting frequently in her placement in, or her continued detention within, segregation, or “therapeutic quiet” as it is often called. Over her three years at NBYC, Ashley accumulated over 800 documented “incidents” as a result of her volatile behaviour and her attempts to harm herself. In fact, she amassed over 150 incident reports relating to her efforts at self-harm. On one occasion, Ashley reported to staff that her fear of amassing more charges, and thereby extending her sentence, made her want to end her life. Staff responded by placing her in solitary confinement.

Ashley was a large girl who weighed approximately 250 pounds and was therefore, at times, difficult to physically subdue. Backup staff members called in frequently to respond to incidents involving Ashley resulted in a drain on institutional resources. On one occasion in June of 2004, Ashley’s behaviour was controlled by placing her in a type of restraint called the “WRAP” for a period of fifty minutes. In the “WRAP”, Ashley’s entire body was bound and a hockey helmet was placed on her head so that she was unable to move in any way. In March of 2005,

15 Ibid. at 41.
16 Ibid. at 18-19.
17 Ibid. at 21.
18 Ibid. at 20-21.
19 Ibid. at 23.
20 Ibid. at 22.
pepper spray was used upon Ashley when she refused to leave the shower area and staff were concerned that she might have been in possession of a razor blade.\textsuperscript{21}

While the Ombudsman’s report expressed sympathy for the difficult position faced by the correctional officers responsible for Ashley’s supervision, the Ombudsman criticized the extensive use of solitary confinement and physical restraints as a means to “correct” Ashley’s behaviour. It was clear that the threat of solitary confinement went no distance to deter Ashley from attempting self-harm or from further violations of law or institutional rules, yet it remained the most commonly employed response when Ashley was charged with an institutional infraction.\textsuperscript{22} The inefficacy of solitary confinement as an agent of behavioural modification in Ashley’s case was evident most particularly in her demand, on one occasion, to be removed from the general population and returned to solitary confinement.\textsuperscript{23} Still, guards chose to control Ashley by restricting her freedom of movement, either placing her within a solitary confinement cell for twenty-three hours a day, or by rendering her movement entirely impossible through the imposition of restraining devices such as the “WRAP”. The Ombudsman’s report condemned Ashley’s extensive placement in solitary confinement in no uncertain terms:

‘Living’ is [sic] segregation as Ashley did essentially meant that she was on a modified program and as a result, was excluded from regular programming. Her opportunities to participate in productive activities for

\textsuperscript{21} \textit{Ibid.} at 23.

\textsuperscript{22} \textit{Ibid.} at 20.

\textsuperscript{23} \textit{Ibid.} at 28.
herself or to be with her peers were limited. She lived in extreme idleness for countless number of hours and was only allowed personal items when her behaviour was deemed appropriate to have them.

I found it distressing to think that for approximately two thirds of her sentence, this teenager was alone in a cell most of the time, with very little loving physical contact (the only constant physical contact she had with others was mainly when she was restrained, sometimes forcefully). **There is in fact evidence in what we have shown in this report that Ashley’s mental health state was deteriorating as the months went by. I challenge anyone with a sane mind to live in conditions similar to the ones described above, for half the time Ashley had to endure, and to come out having maintained a perfect mental equilibrium.**

The Ombudsman’s report emphasized the significance of Ashley’s transfer to an adult facility at the age of eighteen pursuant to an application by the Superintendent of the NBYC. This transfer took place on October 5, 2006, despite the efforts of Ashley’s counsel to delay the transfer until she turned twenty, the age at which the transfer would have happened as a matter of course. In a diary entry written a month before she was moved to an adult facility, Ashley expressed her fear of this transfer and her profound suicidal thoughts:

Mom, If I die then I will never have to worry about upsetting my Mom again. It would have been nice today to stick my head in the lawn mower blade. F***, I really did have to hold back the urge. Maybe next time I will give it a try. Most people are scared to die. It can’t be any worse then living a life like mine. Being dead I think would just suit me fine. I wonder when the best time to do it would be. I’m not going to get locked because then I’m back on checks and they will expect me to act up then. I will call my Mom before bed and have one more chat. Somehow I have to let her know that none of this is her fault. I don’t know why I’m like I am but I know she didn’t do it to me. People say there is nothing wrong with me. Honestly I think they need to f*** off because they don’t know what goes on in my head. When I use to try to hang myself I was just messing around trying to make them care and pay attention. Now it’s different. I want them to f*** off and leave me alone. It’s no longer a joke. It kind of scares to

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think that they might catch me before it’s done and then I will be a vegetable for the rest if my life. That’s why the most important thing right now is to stay unlocked so they don’t think anything is up. It’s over. ...

I went to court yesterday and I thought he was going to send me to adult! Time is running out. My chances are getting fewer and fewer. F***. I give up! I’m done trying.\textsuperscript{27}

At the transfer hearing, the Superintendent argued that Ashley’s negative influence over the other youth militated in favour of moving her to an adult facility.\textsuperscript{28} The court hearing the application seemed persuaded that Ashley would be better served by the programs that would be available to her at an adult facility, failing to take into consideration that Ashley would have to demonstrate “appropriate behaviour” before she would be entitled to participate in such programming. As suggested by her time in youth custody, Ashley did not satisfy this prerequisite.\textsuperscript{29} Transferred to an adult jail on October 5, 2006, Ashley died after just over one year in adult facilities.\textsuperscript{30}

\textsuperscript{27} Excerpt from the journal of Ashley Smith (4 September 2006), cited in Report of the New Brunswick Ombudsman, supra note 11 at 23-24.

\textsuperscript{28} The report points out that it is difficult to understand how Ashley would have had the opportunity to exert such a negative influence on her peer group at the NBYC considering the extent to which she was kept in isolation. Report of the New Brunswick Ombudsman, supra note 11 at 26.

\textsuperscript{29} Report of the New Brunswick Ombudsman, supra note 11 at 27.

\textsuperscript{30} Ibid. at 24.
“A Preventable Death” is what the Correctional Investigator of Canada, Howard Sapers, entitled his report on the death of Ashley Smith, released on June 20, 2008.\(^{31}\) As revealed by his choice of title, the Correctional Investigator found that Ashley’s improper treatment while in adult federal custody contributed significantly to the loss of her life. Toward the end of his report, Sapers made pointed comments with respect to Ashley’s extended placement in solitary confinement:

> I believe strongly that a thorough external review of Ms. Smith’s segregation status could very likely have generated viable alternatives to her continued and deleterious placement on such a highly restrictive form of confinement. **There is reason to believe that Ms. Smith would be alive today if she had not remained on segregation status and if she had received appropriate care.** An independent adjudicator – as recommended by Justice Arbour – would have been able to undertake a detailed review of Ms. Smith’s case and could have caused the Correctional Service to rigorously examine alternatives to simply placing Ms. Smith in increasingly restrictive conditions of confinement. At that point, if it had been determined that no immediate and/or appropriate alternatives to segregation were available for Ms. Smith, the independent adjudicator could have caused the Correctional Service to expeditiously develop or seek out more suitable, safe and humane options for this young woman.\(^{32}\) [Emphasis added]

Sapers was particularly critical of the Correctional Service of Canada for, in his estimation, placing its own administrative needs ahead of Ashley’s human needs.\(^{33}\) Her repeated transfers had little to do with helping Ashley but rather seemed to serve as a response to institutional issues such as staff fatigue\(^ {34}\) and,


\(^{32}\) *Ibid.* at para. 93.

\(^{33}\) *Ibid.* at para. 84.

\(^{34}\) *Ibid.* at para. 19.
potentially, to circumvent the mandatory 60-day regional review of her detention in solitary confinement. By “lifting” Ashley’s segregation status whenever she was moved and setting the clock to zero once she was placed in a new institution or even when she returned to the same institution after a brief absence (e.g., when she was brought to court to make a required appearance), the Correctional Service of Canada made sure that Ashley’s time in segregation did not meet the requirements for a regional review. Sapers described this practice as “totally unreasonable.” The illegal evasion of regional review precluded the criticism from those outside the facility where Ashley was being held and, thus, helped to maintain the illusion that keeping Ashley in indefinite isolation was an acceptable way to deal with the challenges that Ashley presented. The CSC was well aware that the NBYC had described the prolonged use of solitary confinement as “detrimental to [Ashley’s] overall well-being” yet they continued to employ this strategy in their struggle to control her.

In his report, Sapers opined that Ashley was in desperate need of therapeutic consistency but that, regretfully, the only consistency that she experienced throughout her custodial life was being held in administrative segregation. Despite her brief placement in CSC’s Regional Psychiatric Centre in Saskatoon, and

\[35\text{ Ibid. at para. 43.}\]
\[36\text{ Ibid.}\]
\[37\text{ Ibid. at para. 39.}\]
\[38\text{ Ibid. at para. 37.}\]
her contact with mental health practitioners at various institutions, there was no long-term treatment plan for Ashley nor any continuity to her care in terms of attending staff. Regular transfers between institutions made consistent care impossible for Ashley while a general dearth of mental health services for federal inmates meant that the mental health care that she did receive was restricted to suicide assessments. The limited insight into Ashley’s psychological condition that did exist was not effectively communicated to the frontline staff who interacted with her most regularly and were responsible for her oversight; most significantly, it was not relayed to the correctional staff who were supervising Ashley at the time of her death that, only days before, she had been assessed being “highly suicidal.”

With respect to Ashley’s unrelenting attempts at self-injury, Sabers referred to a post-mortem psychological assessment of Ashley and notes that "... although these behaviours were maladaptive and dangerous, they could be understood in part as a means of drawing staff into her cell in order to alleviate the boredom, loneliness and desperation she had been experiencing as a result of her constant isolation." In light of the tremendous persistence of Ashley’s self-injury, Sabers characterized the “wait-and-see” approach to Ashley’s self-harming behaviour as wrong-headed. According to the Correctional Investigator, staff should have intervened to remove any potentially dangerous item from Ashley’s cell as soon as they became aware of its existence. What in fact happened was that staff members

39 Ibid. at paras. 31, 88-90.

40 Ibid. at para. 32.

41 Ibid. at para. 62.
waited to enter Ashley’s cell until Ashley had secured ligatures around her neck, was turning blue and was experiencing difficulty breathing. This intentional delaying of a response represented a fundamental misunderstanding of the CSC’s duty to provide for the safe and humane custody of inmates. In Sapers’ opinion, it also reflected a failure on the part of the CSC to learn from the deaths of other inmates who might have survived had frontline staff responded in a timely fashion.

Response of the Union of Canadian Correctional Officers

In October 2008, the Union of Canadian Correctional Officers released their own report on the death of Ashley Smith entitled “A rush to judgment: A report on the death in custody of Ashley Smith, an inmate at Grand Valley Institution for Women”. Again, the title of this report speaks volumes about the content of this more defensive perspective on the death of an inmate. Written with great candor, the report makes clear the Union’s position that CSC management has made scapegoats of the front-line workers who happened to be present at the time of Ashley’s death and who were following explicit management protocol not to enter Ashley’s cell as long as she continued to breathe. The Union issued this report to

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42 Ibid. at paras. 70-71.

43 Ibid. at para. 73.

44 Ibid. at paras. 109-114.

support the three correctional officers who were criminally charged\textsuperscript{46} in relation to Ashley Smith’s death and the four others who were suspended without pay, as well as to “shed light on the catastrophically dysfunctional culture at Grand Valley Institution, a problem that pervades the federally sentenced women (FSW) sector of Correctional Service Canada”.\textsuperscript{47}

According to the Union’s report, federal correctional officers were Ashley’s closest friends during her last year of life. Many correctional officers went to great lengths to establish a positive relationship with Ashley despite the risk that they incurred to their physical safety by so doing. Federal correctional officers who worked with Ashley were provided no information about her time in youth custody and were therefore left with only Ashley’s self-reported experiences to help explain how she had become an oppositional inmate bent on self-destruction.\textsuperscript{48} Cutting a ligature from around Ashley’s neck became a regular occurrence for her correctional officers. When they did so, sometimes as often as seven times a day, Ashley’s guards were frequently met with violence, including biting and spitting.\textsuperscript{49} On the eve of her death, Ashley informed one of her favourite guards that she knew

\textsuperscript{46} These charges were ultimately withdrawn by the Crown on the basis that there was no reasonable prospect of conviction: Melinda Dalton, “Charges dropped against jail-death guards” (8 December 2008), online: thespec.com http://www.thespec.com/print/article/115094.

\textsuperscript{47} A rush to judgment, supra note 45 at 5.

\textsuperscript{48} Ibid. at 7.

\textsuperscript{49} Ibid. at 8.
that the correctional officers would always intervene before she caused her own death.\textsuperscript{50}

Guards were in uncharted territory with this inmate, the local union at Joliette describing Ashley as the most difficult inmate that they have encountered in their institution’s then 10-year history.\textsuperscript{51} The Union’s report included the comment of one correctional officer who was at a loss with how to deal with Ashley, knowing at once that she was excruciatingly bored and in desperate need of stimulation, and that she would be likely create some kind of security incident if she were released from her solitary confinement cell.\textsuperscript{52} Making matters worse, federal correctional officers at Grand Valley Institution (GVI), where Ashley died, did not feel that they had the support of management but rather were doubtful that management was concerned with protecting the interests of those working most closely with the inmate population. They found management to be interested in little besides leaving GVI, considered to be an undesirable post. Most managers were in “acting” positions and few had a deep understanding of their roles. Operational rules were often contradictory and in flux, creating a sense of tension amongst the staff who could not predict how management would next criticize their various attempts to control Ashley’s outbursts.\textsuperscript{53} At Nova Institution, another federal institution where Ashley was held, many staff members took stress leaves due to their anxiety over

\textsuperscript{50} Ibid. at 34.

\textsuperscript{51} Ibid. at 23.

\textsuperscript{52} Ibid. at 10.

\textsuperscript{53} Ibid. at 12, 20.
the possibility of unanticipated disciplinary actions in relation to decisions they
made concerning Ashley. The Union’s report painted a picture of a staff that felt
poorly equipped to face the challenge of Ashley Smith and vulnerable to
unprincipled exercises of disciplinary power.

Amongst the general chaos of contradictory policies at GVI, management
made one instruction very clear: if Ashley was still breathing, staff were not to enter
her cell. The Union’s report makes plain that it is as a result of this mandate that
correctional officers were left standing outside of Ashley’s cell during her numerous
attempts at self-strangulation, forced to make the determination of whether she was
still breathing without any training to recognize the moment at which Ashley
required intervention in order to save her life. They were fearful of disciplinary
action if they intervened too soon. Staff had the impression that management’s
policy that no one enter Ashley’s cell if she was still breathing was designed to
reduce the number of documented incidents in which force was used against an
inmate, a number that had elevated following Ashley’s arrival at the institution. Not
entering Ashley’s cell while she continued to breathe was not a policy that was
designed to protect Ashley or to dissuade her from self-harm, but rather a strategy
put into place in order to protect GVI from the negative attention received when the
number of “use of force” incidents became too high.55

Toward the end of her life, correctional officers wondered why Ashley was
not being transferred to a psychiatric hospital in light of her deteriorating mental

54 Ibid. at 20.
55 Ibid. at 31.
health.\textsuperscript{56} According to the Union, it was these correctional officers who cared for Ashley and cut countless ligatures from her neck under the threat of reprimand who were being unfairly branded as the ones responsible for Ashley’s untimely death. The report clearly stated that the Union considers the luring of staff members to the scene of their arrest, under the guise of a meeting at the request of the Deputy Warden, the final affront in a series of betrayals by senior management.\textsuperscript{57} The conclusion of the Union’s report is terse:

It is clear that, in addition to Ashley Smith, there are many other victims in this story. The people who worked diligently to save her life, despite management impediments, are being made to bear the consequences of her death. The Union of Canadian Correctional Officers will never accept this rank injustice. The union will use every avenue it has to defend the correctional officers caught in a trap not of their making. We will continue to push for policies that deal the high-risk female offenders in a secure, humane manner that minimizes risk.\textsuperscript{58}

**Smith Family Statement of Claim**

Dated July 14, 2009, the Smith Family Statement of Claim\textsuperscript{59} alleged that various actors within the federal correctional system committed negligence and other civil wrongdoings in their treatment of Ashley. Specifically, Ashley’s mother Coralee Smith (on her own behalf and as the litigation administrator for the estate of Ashley Smith), Ashley’s father Herb Grober, and Ashley’s sister Dawna Ward allege that, among other wrong-doings, the various defendants to their civil action:

\textsuperscript{56} Ibid. at 32.

\textsuperscript{57} Ibid. at 38.

\textsuperscript{58} Ibid. at 41.

\textsuperscript{59} Coralee Smith et al. v. Attorney General of Canada, Statement of Claim (July 14, 2009).
a) transferred Ashley between federal institutions in an unlawful fashion by failing to respect the procedural rules surrounding involuntary transfers of inmates;

b) detained Ashley in administrative segregation in contravention of the rules surrounding the use of segregation and the conditions of segregation;

c) unlawfully ignored or summarily dismissed Ashley's inmate grievances;

d) failed to report “use of force” incidents regarding Ashley, contrary to law and policy, in an effort to evade regional review of their treatment of Ashley;

e) failed to provide Ashley with regional health care and the necessaries of life;

f) conspired to keep Ashley in administrative segregation by transferring her between institutions in an effort to evade regional review of her prolonged period in solitary confinement;

g) conspired to deprive Ashley of the necessaries of life by establishing a policy that no correctional officer was to enter her cell as long as she was still breathing;

h) were negligent in their care of Ashley;

i) inflicted mental suffering and psychiatric damage upon Ashley and her family;

j) abused their public office by flouting the law in a way they knew was likely to injure the plaintiffs. If they did not know that injury was likely to result, they were at least reckless that injury would occur;

k) falsely imprisoned Ashley in solitary confinement;

l) breached their fiduciary duty to Ashley as an inmate under their care.

The Smith family relied on the facts set out in the report of the New Brunswick Ombudsman and the report of the Correctional Officer.60

60 Ibid. at para. 24.
On May 4, 2011, the Canadian Broadcasting Corporation reported that the Smith family had reached an 11-million dollar out-of-court settlement in their lawsuit against the Correctional Service of Canada.\(^{61}\)

The tragic death of Ashley Smith has brought public attention to the inside of Canadian prisons, a side of life we can be quick to forget because it is outside of our range of vision. As Michael Ignatieff writes in the preface of *A Just Measure of Pain*:

> It is easy to take prisons for granted. For those who manage to stay out of trouble with the law, prisons and punishment occupy the marginal place in the social awareness reserved for facts of life.\(^{62}\)

The walls of the prison were not always so impermeable, however, nor were the lives of those inside so shadowy and mysterious. The succeeding chapters will review the basic framework of the current use of solitary confinement in Canada, as well as the advent of the practice of solitary confinement and the changes in penal practice that have resulted in a thickening of carceral walls. In the pages and chapters that follow, I will attempt to demonstrate that the segregation unit of a penitentiary, where the state imposes its greatest penal authority, is also a juridical space of tremendous lawlessness. Although several jurists and scholars have made note of this reality, the invisibility of the solitary confinement cell allows it to slip quickly from public consciousness in a way that makes gathering momentum for


change quite difficult. However, away from the gaze of public scrutiny, tremendous psychological harm is being inflicted upon a highly vulnerable population.

The case of Ashley Smith, a review of Canadian case law and legislation, and the research into the psychological harm that is inflicted upon prisoners who are confined to isolation demonstrate that the practice of solitary confinement (as opposed to its original governing theory or legislative framework) is extra-legal. The solitary confinement cell is a place apart. In order to prevent well-publicized tragedies like the death of Ashley Smith and the quiet tragedies of inmates currently suffering in solitude, the law must re-exert its dominion over the agents of segregation and establish solitary confinement’s place within, rather than outside of, the Canadian legal landscape.

In the following chapter, I will review the basic legislation governing Corrections Canada, as well as central case law representing judicial consideration of the practice of solitary confinement, in order to explore the legal framework that exists. Particular attention will be paid to the distinction between punitive and administrative segregation. Next will follow an historical review of the practice of solitary confinement with an emphasis on the philosophical disconnect between the genesis of solitary confinement and its current practice, as well as the movement of punishment from the public square to the periphery of our communities. Chapter Four will explore solitary confinement as a separate space, divorced from the rule of law as well as the surrounding world. My final chapter is devoted to suggesting how the law might be brought back into the prison and how the solitary confinement cell, if indeed it must persist, may become part of the Canadian legal system, rather than
what it is now: a place outside of time, and space, and law. Throughout, I will attempt to demonstrate that the tragic story of a young girl who choked herself to death in solitary confinement while guards watched is endemic of a larger illness within Canadian corrections, a topsy-turvy world that has become too remote to feel the normative influence of the broader community.
CHAPTER TWO
ADMINISTRATIVE AND PUNITIVE SEGREGATION: A DISTINCTION WITHOUT A DIFFERENCE?

We shall crush you down to the point from which there is no coming back. Things will happen to you from which you could not recover, if you lived a thousand years. Never will you be capable of ordinary human feeling. Everything will be dead inside you. Never again will you be capable of love, or friendship, or joy of living, or laughter, or curiosity, or courage, or integrity. You will be hollow. We shall squeeze you empty, and then we shall fill you with ourselves.63

It must be remembered that loss of liberty upon incarceration is not absolute. Canadian courts have recognized on numerous occasions that, despite their incarceration, Canadian inmates retain residual liberties. In R. v. Miller (1985), 23 C.C.C. (3d) 97 (S.C.C.), the court noted:

Confinement in a special handling unit, or in administrative segregation as in Cardinal, is a form of detention that is distinct and separate from that imposed on the general inmate population. It involves a significant reduction in the residual liberty of the inmate. It is in fact a new detention of the inmate, purporting to rest on its own foundation of legal authority.64 [Emphasis added]

Other judgments have recognized the additional loss of liberty, and thus the heightened punishment, associated with confinement in segregation as opposed to detention within the general population of a prison. In R. v. Shubley, [1990] 1 S.C.R. 3, the court addressed whether criminal proceedings against an inmate who had already been punished within the institution by placement in solitary confinement

63 Orwell, supra note 1 at 268.

violated the principle against double jeopardy enshrined in s. 11(h) of the Charter of Rights and Freedoms. Though the majority of the court found that it did not, Wilson and Cory JJ. dissented in result, finding that confinement in segregation is a punishment fundamentally different in kind from incarceration in the general population, and that the imposition of additional penal consequences after an inmate had spent time in solitary confinement would amount to being punished twice for the same offence:

Prisons within prisons have been known to man as long as prisons have existed. As soon as castles had dungeons there were special locations within those dungeons for torture and for solitary confinement. The grievous effects of solitary confinement have been almost instinctively appreciated since imprisonment was devised as a means of punishment. Prisons within prisons exist today, exemplified by solitary confinement.

**The complete isolation of an inmate from others is quite different from confinement to a penal institution where some form of contact with people both inside and outside is the norm.** Close or solitary confinement is a severe form of punishment. The vast majority of the human race is gregarious in nature. To be deprived of human companionship for a period of up to thirty days can and must have very serious consequences. Literature of yesteryear and today is replete with the deterrent effects of such punishment.

Solitary confinement certainly cannot be considered as a reward for good conduct. **It is, in effect, an additional violation of whatever residual liberties an inmate may retain in the prison context and should only be used where it is justified. To say otherwise would mean that once convicted an inmate has forfeited all rights and could no longer question the validity of any supplementary form of punishment.**

[Emphasis added]

In *Winters v. British Columbia (Legal Services Society)* (1999), 137 C.C.C. (3d) 371 (S.C.C.), Cory J., again writing in dissent, found it a matter of settled law that

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“incarcerated persons continue to possess a residual liberty interest that can be implicated by institutional action.”

In order to understand the residual liberties possessed by inmates, and the impact of solitary confinement upon those residual liberties, a closer look at the legislation governing Corrections Canada is required.

**Guiding Principles of the CCRA**

Section 3 of the *Corrections and Conditional Release Act* (CCRA) sets out the purpose of the federal correctional system of Canada. It states as its goal:

... contribut[ing] to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of provisions in penitentiaries and in the community.

According to s. 4 of the CCRA, the principles guiding the Correctional Service of Canada in fulfilling the goal expressed in s. 3 include:

- carrying out sentences in accordance with the “stated reasons and recommendations of the sentencing judge” (subsection b);

- promoting “openness” through “a timely exchange of information” with other members of the criminal justice system, and communication with offenders, victims and the public (subsection c);

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• restraint in imposing restrictions on inmates, “us[ing] the least restrictive measures consistent with the protection of the public, staff members and offenders” (subsection d);

• respecting the residual rights of inmates who “retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence” (subsection e).

The existence of the Correctional Service of Canada (CSC) is statutorily mandated by s. 5 of the CCRA. This section expresses the responsibilities of the CSC as:

(a) the care and custody of inmates;

(b) the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community;

(c) the preparation of inmates for release;

(d) parole, statutory release supervision and long-term supervision of offenders; and

(e) maintaining a program of public education about the operations of the Service.

**Segregation and the CCRA**

**Administrative segregation**

Administrative and punitive segregation are distinguished within the CCRA. Pursuant to s. 31(1), the purpose of administrative segregation is defined as “keep[ing] an inmate from associating with the general inmate population”. If the institutional head believes that there is no “reasonable alternative”, an inmate may be placed in administrative segregation for three main reasons, as outlined by s. 31(3) (paraphrased here):
(a) protecting "the security of the penitentiary or the safety of any person";

(b) preventing an inmate from interfering with a criminal investigation or an investigation of a serious disciplinary offence;

(c) protection of the inmate’s own safety.

The first of these three justifications, s. 31(1)(a), is very broad and can be invoked based on ways that the inmate has acted, ways that the inmate has “attempted” to act, or things that the inmate “intends” to do.68

Once placed in administrative segregation, an inmate retains his entitlement to the “same rights, privileges and conditions of confinement as the general inmate population” except for those that can only be enjoyed by virtue of association with other inmates, or those that cannot be provided to the segregated inmate for security reasons or the limitations inherent to the administrative segregation area.69

The CCRA entitles administratively segregated inmates to reviews of their status, though it does not specify review periods.70 Inmates are entitled to attend status review hearings, unless their presence would be seriously disruptive or would

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68 “Under very broad discretionary powers given to wardens, a prisoner may be placed in administrative segregation, there to be confined in a cell indefinitely for twenty-three hours a day without the necessity of either a formal disciplinary charge or a conviction in disciplinary court. Because the time spent in administrative segregation can extend to months, even years, it represents the most powerful form of carceral authority; historically, it has also been the most abused.” Michael Jackson, Justice Behind the Walls: Human Rights in Canadian Prisons (Vancouver: Douglas & McIntyre, 2002), at 9-10.

69 CCRA, supra note 67 at s. 37.

70 Ibid. at s. 33(1).
jeopardize the safety of any person present. Administratively segregated inmates are entitled to daily visitation by a registered health care professional and can request a meeting with the institutional head who is required, by virtue of s. 36(2) of the CCRA, to visit the administrative segregation area of the institution at least once every day. Pursuant to s. 31(2), the CSC must endeavour to return an inmate in administrative segregation to the general inmate population, either of that institution or another institution, “at the earliest appropriate time.”

Punitive segregation

Punitive segregation, as opposed to administrative segregation, is addressed in the section of the CCRA entitled “Discipline”. An inmate who is found guilty of committing one of the many disciplinary offence enumerated in s. 40 (including disobeying a justifiable order (s. 40(a)); willfully or recklessly destroying property (s. 40(c)); being “disrespectful or abusive” toward a staff member in a manner that could undermine the staff member’s authority (s. 40(f)); being “disrespectful or abusive” toward anyone in a manner that could incite that person to violence (s. 40(g)), and many more) is subject to a disciplinary measure. Such disciplinary measure can be a warning, a loss of privileges, a fine, an order to perform extra duties, or, in the case of a “serious disciplinary offence”, segregation from other inmates for a period of no more than 30 days. Whether or not an institutional

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71 Ibid. at s. 33(2).
72 Ibid. at s. 36(1).
73 Ibid. at s. 44(1).
offence constitutes a “serious disciplinary offence” as opposed to a garden-variety disciplinary offence is a matter to be determined by the institutional head based on the seriousness of the conduct alleged and the various aggravating and mitigating factors at play.\textsuperscript{74}

For a finding of guilt to be registered, the person conducting the hearing must be satisfied that the offence has been made out beyond a reasonable doubt.\textsuperscript{75}

The procedure for the hearing is not laid out within the CCRA, but, as with the administrative segregation status hearings, the inmate as the right to be present unless his presence would be seriously disruptive or there are reasonable grounds to believe that the inmate’s presence would jeopardize the safety of anyone present.\textsuperscript{76}

**Segregation and the CCRR**

The *Corrections and Conditional Release Regulations* (CCRR)\textsuperscript{77} fills in some of the important gaps left by the CCRA. Pursuant to s. 3(a) of the CCRR, every corrections staff member is obliged to be familiar with the CCRA, the CCRR and every policy directive that relates to his or her duties. It is the CCRR, as opposed to the CCRA, that outlines the entitlement of administratively segregated inmates with respect to the review of their status. Section 21 of the CCRR establishes the review

\textsuperscript{74} Ibid. at s. 41(2).

\textsuperscript{75} Ibid. at s. 43(3).

\textsuperscript{76} Ibid. at s. 43.

\textsuperscript{77} *Corrections and Conditional Release Regulations*, SOR/92-620.
periods of the “Segregation Review Board”, the internal administrative body designated by the institutional head of the institution. In the case of administrative segregation that is involuntary, i.e., when the inmate has not requested to be segregated, the inmate is entitled to a hearing before the Segregation Review Board within five working days.\textsuperscript{78} Thereafter, he is entitled to a review at least every thirty days.\textsuperscript{79} If the administratively segregated inmate remains so segregated for sixty days, the inmate is entitled to a review of his status by a staff member of the regional headquarters at that point, and every sixty days thereafter.\textsuperscript{80} It is only at the sixty-day mark that anyone outside of the institution where the inmate is housed is bound to consider his segregated status. Even then, it is someone who works within the Correctional Service of Canada conducts the review.

The insular nature of the review process with respect to involuntary administrative segregation must be contrasted with the procedural safeguards that come into play when an inmate is charged with a serious disciplinary offence. When an inmate is charged with a serious disciplinary offence, the adjudicative hearing is presided over not by an internal board but by one of the region’s independent chairperson appointed by the Minister of Public Safety.\textsuperscript{81}

\textsuperscript{78} \textit{Ibid.} at s. 21(2)(a).

\textsuperscript{79} \textit{Ibid.} at s. 21(2)(b).

\textsuperscript{80} \textit{Ibid.} at s. 22. This is the review that Ashley Smith was denied by virtue of the constant resetting of the clock measuring the time she had spent in solitary confinement.

\textsuperscript{81} \textit{Ibid.} at ss. 24(1) and 27(2).
Why are those charged with serious disciplinary offences entitled to special protections under the CCRR? The heightened safeguards and special procedure that apply in the case of serious disciplinary offences, as opposed to minor disciplinary offences, seems to reflect an implicit acknowledgement of the particularly punitive nature of time spent in isolation. As reviewed previously, it is only when an inmate is found guilty of a serious disciplinary offence can he be *sentenced* to a period of segregation (minor disciplinary offences do not warrant such a severe consequence), although not exceeding thirty days. If the inmate is sentenced to multiple periods of segregation that are to be served consecutively, the total period in segregation must not exceed forty-five days.\(^{82}\) The potential to be punished by time spent in segregation is the only potential penalty distinguishing serious disciplinary offences from minor disciplinary offences. Hearings with respect to minor disciplinary offences are conducted before an institutional head or his staff member designate, while an inmate charged with a serious disciplinary offence is entitled to the objectivity of an independent chairperson, except in “extraordinary circumstances.”\(^{83}\) Unlike those charged with minor disciplinary offences, an inmate charged with a serious disciplinary offence must be given a “reasonable opportunity to retain and instruct legal counsel for the hearing.”\(^{84}\)

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\(^{82}\) *Ibid.* at s. 40(2).

\(^{83}\) *Ibid.* at s. 27.

\(^{84}\) *Ibid.* at s. 31(2).
All this implicit acknowledgement of the severe punitive effect of time spent in segregation seems undone, however, by an unassuming subsection of the CCRR. Section 40(3) reads:

An inmate who is serving a period of segregation as a sanction for a disciplinary offence shall be accorded the **same conditions of confinement as would be accorded to an inmate in administrative segregation.**

[Emphasis added]

With these words, Corrections Canada invokes a type of Orwellian doublethink. Segregation is very bad indeed and those who face it as a penalty deserve extra protections. At the same time, inmates who are placed in segregation for administrative and not punitive reasons, i.e., through no fault of their own, receive the same “conditions of confinement” as those who are sent there for punishment. Though, at first, this provision may seem to be merely a protection to those in punitive segregation, the effect of this regulation is that punitive and administrative segregation are made the same. In fact, administrative segregation is worse in that those housed in administrative segregation are entitled only the most basic procedural protections despite the fact that there is no time limit to their stay in segregation. And yet, the governing legislation distinguishes punitive and administrative segregation as if to suggest that punishment is not punishment if it is imposed for administrative purposes. $2 + 2 = 5.$

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85 With respect to the administrative segregation of the female inmates in the Kingston Prison for Women, Louise Arbour noted: “The segregation was administrative in name only. In fact it was punitive, and it was a form of punishment that courts would be loathe to impose, so destructive are its consequences.” *Arbour Report, supra* note 9 at 144.
Administrative Segregation in Practice

Recently, the British Columbia Superior Court had an opportunity to consider the intense punitive effect that administrative segregation can have. In *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805, administratively segregated inmate James Bacon brought a petition against the Warden of the detention centre where he was being held (Surrey Pretrial Services Centre) for *habeus corpus* and *certiorari in aid*. Bacon’s allegation was that he was being detained illegally and his wish was to be released from solitary confinement where he had spent seven months as a presumptively innocent man awaiting his trial. In June of 2010, the British Columbia Supreme Court allowed Bacon’s petition after an extensive consideration of the conditions in which Bacon had been forced to live. The *Bacon* decision is significant as it reflects the last time a Canadian court has taken a cold, hard look at the conditions of solitude in which Canadian prisoners are forced to live. Notably, after a thorough and thoughtful judgment, the court found that it was unable to comment on the constitutionality of the governing legislation because the correctional staff had failed to honour the law to such a degree that there was no record to assess the true effects of the legislation. The evidence revealed, however, that Bacon’s s. 7 and s. 12 *Charter* rights had been violated; his security of the person, both physically and psychologically, had been compromised and he had been subjected to cruel and unusual punishment at the hands of Correctional Service of British Columbia.86

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86 *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805, at paras. 338, 355 [*Bacon v. SPSC*].
The judgment ends with a critique of the conduct of the Attorney General of British Columbia that is exceptional in its severity. Justice McEwan chastised the Crown for failing to acknowledge the unjustifiable nature of the respondent’s behaviour and revealed a sense of mistrust that the Attorney General was living up to its responsibilities as a proponent of the law:

There was certainly a point in the proceeding when it became clear that some of the respondent’s conduct was indefensible. The Attorney General has not conceded this in any formal sense, and late in the day was still describing his position relative to the petitioner as "adversarial". This is a troubling development. While the courts are, among other things, arbiters of the rights and freedoms of the individual as against the state, they are not the sole protectors of those rights and freedoms. The Attorney General has, as a primary responsibility, the protection of the public interest. ... The Attorney General is obliged to ensure that the government, including other Ministries, conforms to the laws the Legislature passes, and that the Constitutional rights of those entrusted to it, even those the public deems odious, are protected. Until it is clear that the Attorney General is taking the necessary steps to ensure that the petitioner’s treatment at the hands of the responsible Ministry accords with proper legal and procedural norms, this Court will be obliged to supervise the conditions of his incarceration.\textsuperscript{87}

A more fulsome overview of the case is required to understand what drove the court to find that there was no basis to consider the constitutionality of the \textit{Correction Act},\textsuperscript{88} and the accompanying regulations, and to feel the need to remind the Attorney General of its dual role as both prosecutor and guardian of rights and freedoms.

The petitioner, Bacon, was charged with a single count of first degree murder and one count of conspiracy to commit murder in relation to a 2007 gang shooting

\textsuperscript{87} \textit{Ibid.} at paras. 341-345.

\textsuperscript{88} \textit{Correction Act}, SBC 2004.
that left six people dead. He was not released on bail\textsuperscript{89} and, at the time of his petition, was in custody pending the resolution of his charges. In light of the voluminous nature of disclosure, it was anticipated at the time of the \textit{habeus corpus} application that it could be a matter of years before the case was tried\textsuperscript{90}.

By way of affidavit, the petitioner outlined the conditions of his confinement in segregation which commenced when he was taken into custody. While the circumstances of his confinement varied somewhat based on occasional relocations within the facility, the petitioner’s account of his treatment in the remand centre went largely unchallenged. Among other complaints, he drew attention to the following conditions to which he was subjected:

\begin{itemize}
  \item[a)] 23 hours a day confinement in a small cell;
  \item[b)] the hour spent outside of the cell changed constantly such that it was impossible to arrange with counsel a time to speak;
  \item[c)] phone calls limited to those with his lawyer;
  \item[d)] visits limited to those with his parents on a weekly basis;
  \item[e)] no sound-proofing to allow for privileged conversations;
  \item[f)] being forced to eat cold food within feet of the toilet in his cell;
  \item[g)] having no control over the lighting in his constantly illuminated cell;
\end{itemize}

\footnote{\textsuperscript{89} In fact, at the time of the hearing the petitioner had not attempted to show cause as to why he should be released pursuant to the reverse onus provisions of the \textit{Criminal Code} pertaining to allegations of serious offences such as murder (see \textit{Bacon v. SPSC, supra} note 86, at para. 4). There are legitimate reasons relating to credit for pretrial custody why a person in the petitioner’s position might not seek a bail hearing, particularly if he thought that his detention was inevitable. Additionally, a person in the petitioner’s position might want to delay a bail hearing until they have a release plan in place that they believe will satisfy the concerns of the court.}

\footnote{\textsuperscript{90} \textit{Bacon v. SPSC, supra} note 86 at paras. 1-4.
h) being forced to shower in water that was either too hot or too cold to tolerate.

With respect to his psychological state, the petitioner expressed concern that his mental health was deteriorating to the point that he would be unable to defend himself at trial. Justice McEwan summarized the petitioner’s account of his psychological deterioration as follows:

The petitioner said that he does not believe that he can maintain his sanity in the present conditions. He feels that the isolation of his confinement is destroying him. He said that the days all seem the same, that he feels powerless, and that there are some days when he has difficulty controlling feelings of rage. ... The petitioner said he feels that his memory is deteriorating. He said he has problems focusing and loses control of his thoughts. He said he finds himself daydreaming and has difficulty concentrating. He said he has difficulty following through with any tasks such as letter writing. He said he can only write a few pages and then must put his writing away. He said he often finds on re-reading that the letters make no sense. He said that he sometimes finds himself laughing at nothing. ... He said that he finds himself not wanting to go out of his cell at all. He said he is now uncomfortable around other people. He said he does not want to talk to guards. He said he starts to panic when he hears keys in his door. He said he does not even want to meet with counsel because he is forced to think about the situation he is in. He said this makes him angry and that it may take him hours to calm down afterwards. The petitioner said he fears that if these conditions persist, he will not be in any frame of mind to face his trial. ... He believes that the respondent is part of a conscious effort to break him, in collaboration with the police.91

Bacon’s perception of his detention was not without good reason. In fact, the court found that the correctional officers charged with the petitioner’s care had not carried out their role as mandated by their governing statutory authority, but rather had acted as an “extension of the police”;92 they took their directions from the police, who wished to keep the petitioner as isolated as possible lest he compromise

91 Ibid. at paras. 101-105.

92 Ibid. at para. 270.
their investigation in any way through his communication with others. Significantly, the concern of the police was speculative and ungrounded in any historical behaviour on the part of the petitioner. However, correctional officers were content to comply with police preference, detaining the petitioner in conditions of segregation on the basis of what he might do, rather than any statutorily recognized basis for detention. In so doing, the detention centre created an impossible situation for the petitioner as he was unable to modify his behaviour in any way to satisfy his jailors of an unachievable standard, that is that there was no possibility that he might communicate with others to the detriment of the police investigation. The speculative “risk” of what the accused might do was incontrovertible in its vagueness and hypothetical nature. As Justice McEwan stated:

Because the respondent has inappropriately substituted a test of what the petitioner might do for the tests set out in the Regulation, and substituted police-driven media reports for evidence, the petitioner has been left in a position where he was unable to demonstrate adherence to any achievable standard in order to work his way out of the restrictions imposed upon him. Due process for the petitioner at the hands of the respondent has been characterized by perfunctory adherence to form, and a near-total disregard of substance.

The court was troubled by the respondent’s lack of transparency, commenting in particular on the respondent’s manipulative use of language in defending the petitioner’s action. According to the respondent, the petitioner was kept in “separate confinement” as opposed the “segregation”, a linguistic attempt to

93 Ibid. at para. 261.

94 Ibid. at para. 265.
distinguish solitary confinement, which was ostensibly imposed for the protection of the inmate, from the punishment of segregation that is imposed in response to an inmate’s misconduct. In reality, however, there is no difference in the conditions experienced by the inmates in separate confinement and segregation.\textsuperscript{95} It turns out that a thorn by any other name is still a thorn. The petitioner’s status in separate confinement, rather than solitary confinement, served only to obscure what was obvious upon a more probing examination: if those in punitive segregation are being punished, then so are those separate confinement, though they have committed not institutional wrong. Addressing the “doublespeak” employed by the respondent, the court noted that:

the only practical effect of the distinction between "separate confinement" and "segregation" was that by applying the semantic fiction of "separate confinement" for "protective" purposes the deprivations could go on indefinitely.\textsuperscript{96}

Furthermore, the court found the respondent’s reference to the Mission Statement of the Adult Custody Division of the detention centre to be “dissociative” in these circumstances. (The Mission statement expressed the preeminence of due process, treating inmates with dignity and respect, and ensuring their safe and secure custody.) The evidence of the operation of the pretrial detention centre, as

\textsuperscript{95} \textit{Ibid.} at para. 269.

\textsuperscript{96} \textit{Ibid.} at para. 259. This comment of the court in \textit{Bacon v. Surrey Pretrial Services Centre} echoes the words of Professor Michael Jackson in \textit{Justice Behind the Walls} (Vancouver: Douglas & McIntyre, 2002), at p. 287:

Many elements of the tension between rhetoric and reality in the contemporary prison can be found in the regime of administrative segregation. True to the rhetoric of corrections, the very term “administrative segregation” provides apparently benign semantic camouflage for the most intensive form of imprisonment.
reviewed by the court, "suggest[ed] an institution operated in a manner at serious odds with its purposes."\textsuperscript{97}

Though the petitioner himself reported having no concerns with respect to his physical safety anywhere within the facility, the institution believed that the notorious nature of his criminal charges meant that his safety would be at risk were he housed in the general population. The respondent insisted that the petitioner had to kept in separate confinement, at least in part, to maintain his own safety. Rejecting this argument, the court held that the duty to keep an inmate “safe” has a psychological as well as a physical dimension. The respondent's perception of keeping an inmate safe, however, was based on a misconception that being able to “deliver a live body to the courts when required to do so” discharged the obligation.\textsuperscript{98} The court rejected this interpretation of the obligation strongly, finding that it could not be the case that the only way to ensure the physical security of certain inmates was to maintain them in conditions that threatened their psychological health or trammeled upon their residual liberty interests:\textsuperscript{99}

When the judiciary delivers a person to the jailer with a direction to keep him "safe", the mandate obviously includes protecting health in mind and body. It means that his or her residual rights will be respected. While the content of such rights is not precisely defined, it certainly includes the "privileges" set out in s. 2 of the Correction Act Regulation. It also includes the right to a fair trial and to treatment that ensures that a fair trial is possible. This means that an inmate is not held so that the police can improve their case, or so that Corrections can, without the nuisance of judicial authorization, assist them. An inmate is a person with positive rights to

\textsuperscript{97}Bacon v. SPSC, supra note 86 at para. 344.

\textsuperscript{98}Ibid. at para. 295.

\textsuperscript{99}Ibid. at para. 296.
counsel, to approach witnesses, and to prepare his case unimpeded by rules or practices having the effect of frustrating such access. It is truly shocking that a facility called a PreTrial Services Centre has no accommodation for reasonable communication with lawyers (i.e. privacy, desks, telephones, paper) during ordinary business hours. It is scandalous that the staff, willingly and unlawfully abet the police in their investigative objectives. It is difficult to imagine a less even-handed system than which the respondent currently administers.100 [Emphasis added]

Having found that the petitioner had been unjustly deprived of almost all of his residual liberties and kept in “deplorable” conditions that have been “condemned internationally,”101 it is unsurprising that the court found a violation of his s. 7 Charter rights to life, liberty and security of the person and the imposition of cruel and unusual punishment.102 Describing the need to issue this direction as “remarkable”, the court ordered that the respondent to begin treating the petitioner in accordance with the law:

... I direct that the respondent start by limiting her treatment of the petitioner strictly to the authority vested in her under the Correction Act and the Correction Act Regulation. I expect the petitioner, in his day to day dealings with the prison administration, to be dealt with in accordance with the Adult Custody Policy Manual, unless something better is implemented. I do not suggest it is a perfect or necessarily an adequate template for due process, but it is a starting point. As matters stand, it is not possible to meaningfully critique standards of practice and procedure honoured so much more in the breach than in the observance.103

With respect to a remedy, the court found that the petitioner was entitled to careful consideration of whether it was possible to create spaces within the

100 Ibid. at para. 299.
101 Ibid. at para. 292.
102 Ibid. at paras. 319, 324.
103 Ibid. at para. 339.
institution that eliminated *bona fide* security concerns created by contact with some of the general prison population without eliminating social contact or unfairly restricting his residual liberties. The court held that limited resources could never justify treatment of an inmate that does not live up to constitutional standards. If resources do not allow for constitutionally sound treatment, resource allocation must change.\(^{104}\) The judgment of the court made clear its belief that the respondent had not applied a modicum of creativity or ingenuity in an effort to facilitate the petitioner’s rights. Granting the petitioner special costs,\(^ {105}\) the court ordered that the petitioner’s visiting and telephone “privileges” be restored immediately and that he be released into the general population if possible.\(^ {106}\) If proper grounds existed to detain the petitioner in separate confinement, the court ordered that the respondent either place the petitioner in a setting with inmates who would not pose a risk and to whom he would not pose a risk, and improve his conditions so that his treatment is “comparable” to an inmate in the general population.\(^ {107}\)

*Bacon v. Surrey Pretrial Services Centre* suggests that not much has changed since the significantly earlier decision of *McCann v. Canada*, [1976] 1 F.C. 570. In *McCann*, eight inmates of the British Columbia Penitentiary who had been forced to serve time in the solitary confinement unit (SCU) sought a declaration from the Federal Court that their confinement pursuant to s. 2.30(1) of the *Penitentiary


\(^{106}\) *Ibid.* at paras. 337, 351.

Service Regulations violated their right, under the Canadian Bill of Rights, to be free from cruel and unusual punishment. The court made this declaration, but not without subsequent controversy; the court in *R. v. Bruce* (1977), 36 C.C.C. (2d) 158 (B.C.S.C.), found that the court in *McCann* had applied an incorrect test for cruel and unusual punishment or treatment.\(^ {108} \)

Although the court in *McCann* was willing to make a declaration of cruel and unusual punishment, it was unwilling to declare that the practice of solitary confinement itself was necessarily cruel and unusual. Rather, the court optimistically surmised that "adequate alternatives" must exist to the way solitary confinement was then practiced to remove its cruel and unusual effects.\(^ {109} \) The *McCann* hearing and judgment was significant, in part, as a result of the considerable amount of social science evidence that was marshaled on behalf of the plaintiffs. Justice Toy in *R. v. Bruce*, above, found that such evidence did not translate well into the legal arena, and that terms and concepts appropriate to the psychological and psychiatric milieu were overstated and exaggerated when applied to a legal analysis.\(^ {110} \) It is unsurprising that subsequent courts felt uncomfortable acknowledging the harsh indictment of the way solitary confinement that had been observed to take place within a Canadian jail.

At the *McCann* hearing, Dr. Richard Korn gave expert evidence with respect to the conditions of the SCU in the B.C. Penitentiary. Dr. Korn held a Ph.D. in social

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\(^ {109} \) *McCann v. Canada*, supra note 4 at para. 91.

\(^ {110} \) *Bruce*, supra note 108, at para. 13.
psychology and, at the time of his testimony, had conducted research in the field of criminology and penology for 23 years. The court summarized the crux of Dr. Korn's opinion evidence in this way:

He expressed the view generally that the purpose of solitary confinement was to break a man down, to break his capacity to resist and to get him into a submissive state. He explained how the prison forms a separate society where the prisoner has his role, his job, his friends and these things are related to maintaining his sense of dignity and autonomy. When he is removed from that society for reasons he knows not and for a duration he knows not, "he passes into a nightmare. He becomes a non-person... He is condemned to survive by techniques which would unfit him for that open society." Of these plaintiffs, Dr. Korn said "... they pointed out the ways they had found to survive in isolation interfered with them when they went out into the open prison". He further stated that, in his experience, this process is foolproof and if you keep it up long enough, it will break anybody. In a U.S. prison where he was employed, he stopped the practice of lengthy period of solitary. He said "this is a form of murder, it has to stop".

After surveying the B.C. Penitentiary and its SCU, Dr. Korn formed the opinion that the SCU was cruel to both the inmates and the staff; according to Dr. Korn, the correctional staff had every reason to believe that men who were caged and treated with that degree of cruelty would behave like animals. Inmates in such a situation would turn to self-harm, a type of pain which they could start and stop at their discretion, as a way to have some control over their personal circumstances. He opined that the psychological effects on the plaintiffs would be “lifelong.”

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111 McCann v. Canada, supra note 4 at para. 53.
112 Ibid. at para. 54.
113 Ibid. at paras. 59-60.
114 Ibid. at para. 57.
115 Ibid. at para. 56.
Dr. Stephen Fox, an expert in the field of sensory deprivation, also testified on behalf of the plaintiffs in *McCann*. In his extensive experience studying conditions of solitude in prisons, Dr. Fox found the B.C. Penitentiary’s SCU to be one of the worst facilities that he had ever experienced. According to Dr. Fox, the SCU at the B.C. Penitentiary was a place where inmates were broken down to a point where their lives had no meaning, where they came to be nothings. In such a setting, inmates lost all sense of identity and dignity, came to have no respect for their own lives and certainly lost any respect that they had for anyone else’s life. They became a danger to all they met as they had been transformed, as a result of their torture, into a kind of “sub-human”. They lost the ability to love.\(^{116}\)

Finally, Dr. Anthony Marcus, a then-practicing psychiatrist in Vancouver, testified on behalf of the plaintiffs based on his interviews with them. Dr. Marcus opined that the crushing conditions of solitary confinement had burnt into the plaintiffs’ personalities a sense of “hate, mistrust, and tension,”\(^ {117}\) and he conveyed his clinical opinion that the conditions of the SCU had “seriously affected” each one of the plaintiffs.\(^ {118}\)

Much of what these experts were claiming in 1975 is echoed in the more recent work of Dr. Stuart Grassian, psychiatrist and former faculty member of Harvard’s medical school. Grassian has extensive experience studying the effects of

\(^{116}\) *Ibid.* at paras. 62-64.

\(^{117}\) *Ibid.* at para. 66.

\(^{118}\) *Ibid.* at para. 67.
isolation within disciplinary settings. In his scholarly article “Psychiatric Effects of Solitary Confinement”, Grassian posits that changes to the brain of someone kept in solitary confinement begin to happen within just a few days. Deprived of any meaningful stimulation, inmates grow prone to finding it difficult to focus their attention and to redirect their attention once they have achieved a state of focus. Their topics of rumination tend to be unpleasant, such as an annoying sound or smell, a perceived slight or an unpleasant bodily sensation. Grassian describes this state as one of “stupor and delirium.”

Significantly, Grassian’s evaluation of over two hundred inmates who have experienced solitary confinement has caused him to believe that the constellation of psychological symptoms common to such inmates reflects a distinct psychiatric syndrome. The features of this syndrome include hyperresponsivity to external stimuli, e.g., becoming very annoyed by an unobtrusive noise such as the sound of a faucet turning on; experiencing perceptual distortions and hallucinations; experiencing panic attacks; having difficulty with thinking, concentration and memory; suffering frightening intrusive thoughts (often violent and vengeful); paranoia; and experiencing problems with impulse control, e.g., “snapping” and finding oneself engaged in property destruction or self-harm. Grassian notes that some of these symptoms are psychiatrically very unusual and the clustering of

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120 Ibid. at 327-331.

121 Ibid. at 335-336.
symptoms that has observed amongst isolated prisoners virtually unique.122 According to Grassian, hyperresponsivity to stimuli to the point of creating a painful response in the subject is so rare that it suggests “organic brain dysfunction.”123 While many of these symptoms will reverse upon social reintegration, Grassian warns that many people who are forced to endure the effects of prolonged isolation will suffer harm that is permanent.124 As Lisa Guenther argues in “The Living Death of Solitary Confinement,” the harm done by solitary confinement, by removing people from a social context, is ontological; as relational creatures who, by nature, look to one another for confirmation of our own experience, prolonged solitude affects human beings at their very core.125

Addressing the plight of the already mentally ill inmate who finds himself in segregation, the Ontario Court of Appeal in the recent decision of Centre for Addiction and Mental Health v. Ontario, 2012 ONCA 342 acknowledged the further damage that is done to the mentally ill within such settings:

When a facility with a Special Needs Unit does not have space in the Unit, and in other jails that do not have such Units, the mentally ill person is commonly (although not always) held in segregation. The evidence indicates this experience can exacerbate their symptoms, lacking as it does the “therapeutic quiet” offered to agitated psychotic patients in a psychiatric facility.126

[Footnote omitted]

122 Ibid. at 337.

123 Ibid. at 337.

124 Ibid. at 332.


As the following chapter will indicate, the court did not select the expression “therapeutic quiet” by accident.
CHAPTER THREE
FROM PENITENCE TO PUNISHMENT: AN HISTORICAL ACCOUNT OF SOLITARY CONFINEMENT

If there was anyone still alive who could give you a truthful account of conditions in the early part of the century, it could only be a prole. Suddenly the passage from the history book that he had copied into his diary came back into Winston’s mind, and a lunatic impulse took hold of him. He would go into the pub, he would scrape acquaintance with that old man and question him. He would say to him: ‘Tell me about your life when you were a boy. What was it like in those days? Were things better than they are now, or were they worse?’

While solitary confinement may seem to be the most brutal punishment exacted by the modern Canadian penal system, it was not intended as such. An understanding of how dramatically divorced the practice of solitary confinement has become from the philosophy of its conception requires a journey through the history books. Only then does it become apparent how adrift are our penal practices from their original justifications. More worrisome still is the impression that justifications for penal practice are ever-changing stopgaps that fill in, as might a substitute teacher, to respond to the demands of the particular day.

John Howard is the oft-considered father of the penal practice of solitary confinement. Michael Ignatieff concluded his work A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750-1850 with the comment: “Had Howard lived to see his offspring, he might well have denied paternity; but the

\(^{127}\) Orwell, supra note 1 at 90.
Birminghams and the Pentonvilles were his children nonetheless.”128 In an English House of Commons debate, circa 1800, one member stated that “the late Mr. Howard was certainly one of the worthiest men who had ever existed ... [but] if he had been one of the worst, he could not have suggested a punishment of a more cruel and mischievous description.”129 Given the common attribution of the practice of solitary confinement to the John Howard, an appropriate place to begin this historical review is with the man himself. Who was John Howard and why was he so well-respected?

John Howard (1726-1790) is remembered primarily as a prison reformer. In 1977, he wrote The State of the Prisons, a work that ultimately proved to be a template for the first penitentiaries.130 The State of the Prisons was a product of Howard’s work as county sheriff, work which caused him to tour and documented all prisons in England and Wales in order to gain an appreciation of what aspects of penal practice were succeeding and what needed reform.131

An understanding of Howard’s interest in and views on prisons and penitentiaries requires an understanding of Howard the man. Howard was a member of a moderate Calvinist sect,132 his membership in which, according to Ignatieff, formed the basis of his Spartan lifestyle:

128 Ignatieff, supra note 62 at 208.

129 Ibid. at 130.

130 Ibid. at 47.

131 Ibid. at 52.

132 Ibid. at 49.
Throughout life, he rose at dawn, took a cold bath every morning, and after prayers dressed himself “after the style of a plain Quaker.” His diet for a whole day consisted of nothing more than “two penny rolls with some butter or sweetmeat, a pint of milk and five or six dishes of tea with a roasted apple before going to bed.” He was a “lover of order and regularity” in all his affairs and was particularly noted for strict punctuality and for “the exact and methodical disposition of his time.”

Howard’s wife died in childbirth leaving to Howard the job of parenting his son, his approach to which seemed informed by his aesthetic principles of restraint. Instead of hitting the boy with a cane or administering any other form of physical punishment, Howard chose to confine him to the root cellar of their home when he felt the need to impose discipline. Howard would not comfort his son when he cried lest he learn that he could obtain the things he wanted through complaint and protest. The boy was fed a strictly vegetarian diet. At the age of five years, Howard sent his son away to boarding school and, thereafter, saw him infrequently. At the age of 21, the young man became mentally ill. Though Howard wrote letters to his troubled son, he left him alone in the asylum where he was committed. In a letter to his son’s guardian, Howard asserted his belief that only solitary confinement could heal the young man. Even Howard’s closest friends were disturbed by the dispassionate aloofness with which he treated his

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133 Ibid. at 50.
134 Ibid. at 48.
135 Ibid. at 48.
136 Ibid. at 49.
own child. With the clarity of hindsight, it might be said that Howard’s son’s decent into mental illness may have portended the fate of those inmates who would later be subjected to Howard’s regime of solitary confinement.

Arguably, the severity that Howard showed his son was magnified in his harsh reflections upon his own character. Howard’s diaries, wherein he referred to himself as a “worm” and “vile creature” with a “polluted soul”, reveal him to be someone who was highly self-critical if not self-loathing. He was a wealthy man who did not need to work to earn a living but who greatly desired to discover his vocation so that he could make a contribution to his community. In light of his self-concept, it is perhaps not surprising that Howard felt at home in prison settings and found his vocation in his role as sheriff when he began touring the prisons of England and Wales. It seems that the prisoner represented to Howard his own sinful nature.

Motivated by his empathic identification with inmates, Howard conducted his review of prisons with the same unrelenting discipline that he displayed in all facets of his life; he documented the details of each prison methodically, taking note of the inmate population, the dimensions of a cell, the diet provided, the weight of

\[137\] Ibid. at 49.
\[138\] Ibid. at 51.
\[139\] Ibid. at 50-51.
\[140\] Ibid. at 52.
\[141\] Ibid. at 54; Christopher Harding et al., *Imprisonment in England and Wales: A Concise History* (London: Croom Helm, 1985), at 112-113.
the shackles used and many other facts of daily institutional life.\textsuperscript{142} It was this rigorous methodology that distinguished John Howard from the other prison reformers of his day. Ahead of his time, Howard conducted his analysis in the manner of a true social scientist and, as such, was able to paint the world of the prison with exacting detail.\textsuperscript{143}

A religious man, Howard credited God with revealing his vocation to him, thereby pulling him out of his lost and aimless state.\textsuperscript{144} It was his own reformation that gave Howard faith in the possibility that all inmates could be improved and turned into productive citizens.\textsuperscript{145} Ignatieff expressed Howard’s identification with prisoners most artfully:

\begin{quote}
From his own internal battle, he knew how faint the line was between those on either side of the moral law. His proposals for the abolition of fees and fetters, the establishment of a regular diet, the provision of religious instruction, and protection against disease were moved by the belief that these were the due of all sinners, be they felons or judges.\textsuperscript{146}
\end{quote}

Significantly, especially in light of how we have come to consider prisoners, Howard rejected the notion that criminals constituted a societal “other”. Rather, he believed that inmates, like all people, were imbued with reason and were capable of both feeling shame for their misdeeds and of becoming better citizens. In fact, it was

\textsuperscript{142} Ignatieff, supra note 62 at 52.

\textsuperscript{143} Ibid. at 52.

\textsuperscript{144} Ibid. at 56.

\textsuperscript{145} Ibid. at 56.

\textsuperscript{146} Ibid. at 56.
Howard’s belief in the universality of reason that gave him confidence in his regime of solitary confinement: left in peace and quiet with time to reflect, inmates would inevitably recognize the error of their ways.\textsuperscript{147} Placed in solitude, nothing “would divert offenders from contemplating their own guilt.”\textsuperscript{148} Howard had confidence that, when set apart from the noise and distraction of society, the inmate’s rational nature would prevail. As Professor Michael Jackson commented in his work *Prisoners of Isolation*, Howard considered solitude a pre-requisite to moral re-education.\textsuperscript{149}

The expression “timing is everything” has particular import with respect to the history of the practice of solitary confinement. John Howard’s proposal for change, namely the substitution of punishments targeting the mind and the soul for punishments that targeted the body, had particular resonance during the late 18\textsuperscript{th} century. A brief historical overview of punitive practice is required to facilitate an understanding of why Howard’s proposals for change made the impression that they did. This overview will provide a background to understanding how two seemingly unrelated events, the American War of Independence and the death of inmate Ashley Smith, are, in fact, connected.


\textsuperscript{148} Ignatief, *supra* note 62 at 72.

\textsuperscript{149} Jackson, *Prisoners of Isolation, supra* note 147 at 15.
Though it is difficult to imagine given our society’s current penchant for remanding offenders into the custody of the state, prior to 1775, England used imprisonment only rarely as a punishment for criminal offences.\textsuperscript{150} When imprisonment was used as punishment, it was in response to an offence that was relatively minor in nature (e.g., vagrancy, desertion of one’s family, theft of field produce, etc.) and the period of incarceration was generally less than three years.\textsuperscript{151} The punishments that were imposed with greater frequency than incarceration were quick and acute, and included flogging, placement in the pillory stocks, transportation to the colonies, or hanging. The criminal’s body was the locus of punishment; it was bound, or it was whipped, or it was deported, or it was hanged. Punishment was a spectator sport. It took place in public squares and invoked denunciation in a way unknown to today’s less public modes of punishment. The most dramatic “performance” of the day, and the ultimate expression of denunciation, was the public hanging.

Given the very real outcome for the offender, it might seem callous to refer to a public hanging as a performance. However, as Ignatieff expressed in his historical review of punitive practice, the deterrent success of a hanging depended upon the public’s willingness to play their role as horrified and condemning onlookers. He commented:

All such ritual punishment depended for their effectiveness as a ceremonial of deterrence on the crowd’s tacit support of the authorities’ sentence. Hence, the magistrates’ control of the ritual was limited. In theory, the

\textsuperscript{150} Ignatieff, \textit{supra} note 62 at 15.

\textsuperscript{151} \textit{Ibid.} at 15, 24.
processional to the gallows and the execution itself were supposed to be a carefully stage-managed theatre of guilt in which the offender and the parson acted out a drama of exhortation, confession, and repentance, before an awed and approving crowd.\footnote{Ibid. at 21.}

Notably, the crowd gathered to observe a hanging or other public punishment did not always yell out “Crucify him!” as per their scripted part. On occasion, the crowd identified with the condemned, offered him their support and refused to acknowledge his guilt. Sometimes, the execution was followed by a public revolt.\footnote{Ibid. at 22-23.}

Short of heroic intervention, the public could not change the fate of an offender being led to the gallows. On the other hand, public non-compliance could entirely undermine punishment effected through the pillory. Used especially in response to crimes which commonly incited public indignation, such as the use of false weights by shop-keepers or hoarding and speculation by members of the grain trade, locking the offender in head stocks in the public marketplace was designed to leave him open to the abuses of a scorned and indignant public.\footnote{Ibid. at 21.} If, instead, the members of the public did not consider themselves abused but rather felt sympathetic to the plight of the man held in the stocks, they would not play their part in the spectacle of blame and contrition. By refusing to hector the offender, the community precluded punishment, exercising, in effect, an early version of jury nullification.
When London magistrates, realizing the vulnerability of public punishment to the emotions of the crowd, attempted to move executions from the public square to within the prison wall, the idea was decidedly unpopular. The public feared the abuses that might take place outside the scope to the public scrutiny. The offender might be tortured or, the ultimate error, the wrong person might be executed. As stated by Ignatieff, “[t]he crowd knew its role as witness in these matters.”

The suggestion that hangings within prison walls would be an entirely novel concept requires some qualification. Prisons certainly existed in the pre-1775 era, but the membranes separating inside from outside were far more permeable than those belonging to today’s penal institutions. A symbiotic relationship existed between the prison world and its larger community such that, much more than today, inmates belonged to two communities at once: the world of the prison and the larger world to which the prison belonged. Ignatieff claimed that the prison was a “state within a state” when it came to matters of “power and finance”. That may be true, but when compared with the impenetrability of the penitentiary walls that were to come, the degree of communication that existed between those on the inside and those on the outside is remarkable.

As mentioned previously, the prisoners in eighteenth century jails included some petty offenders. Some of those confined were awaiting trial, transportation to the colonies, or execution. For the most part, however, inmates were debtors who

155 Ibid. at 24.
156 Ibid. at 35.
157 Jackson, Prisoners of Isolation, supra note 147 at 14.
were unable to discharge their financial burdens.\textsuperscript{158} Though, in theory, inmates were entitled to different treatment depending on their reason for their incarceration, the reality of the eighteenth century English jail was that they were chaotic. Regardless of their reason for being there, prisoners were mingled together and no predictable distinction in treatment could be observed between those who had been found guilty of a criminal offence, those who were presumptively innocent and awaiting trial for a criminal offence, and those who were detained as a result of unpaid fees. Some stayed in jail only because they lacked the funds to pay the prison keeper the requisite exit fee.\textsuperscript{159} In all, it was a motley crew.

Notably, prisons were private institutions run by their keeper for profit. The state was uninterested in being responsible for the maintenance and care of inmates. The keepers of the prison did not want to spend their funds on feeding or clothing those under their control. From a fiscal perspective, it made sense to allow interaction at the prison gates between inmates and their families and friends who would provide the inmates with what they needed to survive.\textsuperscript{160} Food, notes, and letters were thrown to and fro over the prison walls, which, at least with respect to communication, did not form a barrier but rather an obstacle. With respect to visitation from loved ones:

\begin{quote}
[i]t was common for wives to appear daily at the gates bearing meals for their jailed husbands. They were given the run of the prison yards from
\end{quote}

\textsuperscript{158} Ignatieff, supra note 62 at 28.

\textsuperscript{159} Ibid. at 31.

\textsuperscript{160} Ibid. at 34.
dawn until locking up, and a judiciously placed bribe would make it possible to remain inside at night.\textsuperscript{161}

With the care of inmates left to the goodwill of the larger community, the prison world lacked any kind of minimum standards. Prisons were overcrowded and unsanitary. Inmates, and members of the justice system who had contact with them, died of communicable diseases such as typhus.\textsuperscript{162}

Along with forcing inmates to rely on the charity of their friends and family, a further effort to minimize costs resulted in keepers hiring a minimal number of “turnkeys” to supervise the inmate population.\textsuperscript{163} Furthermore, the inmates themselves were often left to maintain the internal discipline of the prison world. Aggrieved parties often resolved their disputes through boxing matches.\textsuperscript{164} Drawing upon their own experiences with the court system, inmates would sometimes hold mock trials that “were often savagely accurate burlesques of the official ritual”.\textsuperscript{165} A prisoner elite existed which was composed of inmates who were responsible for enforcing the rules. This elite was established by the keepers of the prisons or selected by the prisoners themselves.\textsuperscript{166}

\textsuperscript{161} Ibid.

\textsuperscript{162} Ibid. at 44.

\textsuperscript{163} Ibid. at 30; Jackson, Prisoners of Isolation, supra note 147 at 9.

\textsuperscript{164} Ignatieff, supra note 62 at 41.

\textsuperscript{165} Ibid. at 40.

\textsuperscript{166} Ibid. at 39.
It was this world of disease, disorder and carnivalesque self-policing that John Howard explored in his role as sheriff. The obvious inadequacies of the prison system were not the only factors militating in favour of the changes in penal practice for which he, and other reformers, advocated. After all, it was only a minority of offenders who were sentenced to time in custody. There were other tensions at play, one of which was a growing discomfort with the severity of the Bloody Code, the name by which the public commonly referred to the criminal law of the day.\textsuperscript{167}

During the eighteenth century, the number of crimes for which an offender would be put to death increased steadily. They included not only murder but also robbery, breaking into homes, arson, and even offences such as stealing animals or forgery.\textsuperscript{168} The severity of the black letter law was tempered by flexibility in its application, inspired largely by a rejection of the severity of the system. Judges would often pardon first-time offenders guilty of capital crimes in order to spare them the death penalty, or order them transported to the colonies so that they would escape the gallows.\textsuperscript{169} Some prosecutors only adduced partial evidence in order to prevent a conviction being registered, while some victims, knowing the penalty that would be imposed, did not want their offender to be prosecuted.\textsuperscript{170} Crowds gathered to observe a hanging often identified with the condemned and made this sentiment well known through their defiant behaviour. As such, there

\textsuperscript{167} \textit{Ibid.} at 17.

\textsuperscript{168} \textit{Ibid.} at 16-17.

\textsuperscript{169} \textit{Ibid.} at 19.

\textsuperscript{170} \textit{Ibid.} at 19.
was an “inversion of ritual, from a solemn act of the state to a popular bacchanal” which “led some eighteenth century observers to doubt the efficacy of public hangings as a deterrent.”171 In this climate of social unrest, and given what was known of the prisons, punishment by transportation to the colonies became a much more promising penal option. However, just when the importance of banishing offenders to the colonies was most important, the 1775 outbreak of the American War of Independence resulted in a halt in the transportation of convicts.172

The American War of Independence meant that, very rapidly, imprisonment went from an infrequently imposed punishment to a punishment of first resort.173 Previously, most offenders sentenced to transportation were sent to the American colonies of Maryland and Virginia. The outbreak of the American revolt sealed off these depositories for convicts,174 and, essentially, there was nowhere left to send inmates who would ordinarily be sentenced to transportation.175 A new penal approach was desperately required. Old punishments, such as flogging, the pillory or irregularly imposed hanging, did not seem to have the moral authority of yore.176 Furthermore, the loss of the colonial market, due to the War of Independence, resulted in economic depression and the predictable associated rise in crime rates.

171 Ibid. at 23.
172 Ibid. at 80; Jackson, Prisoners of Isolation, supra note 147 at 14.
173 Ignatieff, supra note 62 at 81.
175 Harding et al, supra note 141 at 111.
176 Ignatieff, supra note 62 at 83.
Government attempts at inspiring terror through public executions were not effective. Instead, the solemnity of the ritual was subverted and the event turned into a “thieves’ holiday and poor people’s carnival.”\textsuperscript{177} The state began to prefer imprisonment as a form of punishment as it was set away from the public’s mocking gaze.\textsuperscript{178} Quite quickly, it seems that the “problem of punishment became the problem of imprisonment.”\textsuperscript{179}

We cannot know whether John Howard’s \textit{The State of the Prisons} would have altered the course of penal history the way that it did had it not been published two years after the outbreak of the American War of Independence. However, we do know that the historical events around the beginning of the last quarter of the eighteenth century made those in power more receptive to the ideas of John Howard and the other reformers who advocated for new, more moderate punishments to address crimes of intermediate severity;\textsuperscript{180} with transportation to America suspended, new prisons had to be built and very quickly. The clear problems with the existing prisons, exposed by \textit{The State of the Prisons}, made Howard’s proposal of solitary confinement more interesting than it would otherwise have been. Howard’s campaign for punishments targeting the mind rather than the body received attention, consideration, and ultimately acceptance. Hence, some

\begin{enumerate}
\item \textsuperscript{177} \textit{Ibid.} at 88.
\item \textsuperscript{178} \textit{Ibid.} at 90.
\item \textsuperscript{179} Markus Dirk Dubber, “The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought” (Spring, 1998) 16:1 Law & History Rev. 113, at 122.
\item \textsuperscript{180} Jackson, \textit{Prisoners of Isolation}, supra note 147 at 9.
\end{enumerate}
might say that, in the rise of the practice of solitary confinement, timing was everything.\textsuperscript{181} After all, within the span of a single decade, the traditional approaches to punishment had been thrown into doubt “by a crime wave that refused to respond to the old remedies, by the suspension of transportation, and by the arguments of reformers who contended that there was a more just and rational way for the state to inflict pain on its subjects.”\textsuperscript{182} This more rational way was by means of the penitentiary, a place set apart from the rest for society for doing penance, for expressing remorse and achieving forgiveness.

John Howard and the other penal reformers responded to the chaos of the existing prisons by recommending a new prison structure defined by unflinching routine and structure. To guard against corruption or unequal treatment, jailers were to be dispassionate in the administration of their duties, bringing nothing of their personalities to their role, but rather moving from task to task as emotionlessly as a cog in a wheel.\textsuperscript{183} Everything inside the penitentiary wall was to be ordered, predictable and expressive of “a new conception of social distance epitomized by uniforms, walls, and bars.”\textsuperscript{184} Significantly, punishment was to be a matter for the state to control, not private businessmen.\textsuperscript{185} Many of the new rules

\textsuperscript{181} Ignatieff, supra note 62 at 79.

\textsuperscript{182} Ibid. at 93.

\textsuperscript{183} Ibid. at 104.

\textsuperscript{184} Ibid. at 113.

\textsuperscript{185} Ibid. at 77.
applied to the guards and were aimed at preventing fee taking, physical violence and other abuses directed toward inmates.\textsuperscript{186}

While these new regulations aimed to protect the inmate, the public had lost its role as audience and guardian of convicts’ rights. No one from the outside was watching to ensure that what should be happening was actually happening:

As a ritual of state power, penitentiary discipline contrasted sharply with the ritual of public punishment. Whereas the public execution afforded both the public and the offender a role that the state was unable to control, the rites of discipline allowed no such opportunity. They were played out in private, behind the walls of the institution, according to the state’s rules. The inmate could still defy those rules, but that defiance could not call on the support of the watching crowd. Discipline, therefore, was a new rite, one from which the public was locked out. Unlike the condemned man, the prisoner was bound to silence. Even if he or she did cry out, there was no one to listen.\textsuperscript{187}

A new era of crime and punishment had dawned in which the world of the offender had been extracted from the world of the offended community. Corporeal punishment, considered to possess no rehabilitative value, had been largely rejected.\textsuperscript{188} Instead of being whipped and sent on their way, those accused of petty crimes were sent to prison for the reformation of their souls.\textsuperscript{189} According to Howard, it was the moral legitimacy of punishment that was imperative. Brutal physical punishments by the state, such as flogging, engaged the sympathy of the masses and detracted from the criminal conduct that was being addressed. Solitary confinement, on the other hand, was rational and just, made the offender the subject

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{186} \textit{Ibid.} at 77.
\item \textsuperscript{187} \textit{Ibid.} at 105.
\item \textsuperscript{188} Jackson, \textit{Prisoners of Isolation}, supra note 147 at 12.
\item \textsuperscript{189} Ignatieff, \textit{supra} note 62 at 108.
\end{itemize}
\end{footnotes}
of no one’s pity, and left him to be his own worst tormenter as he realized his own sins. The inequalities and abuses of existing prisons had to be redressed so that the public could have confidence in the administration of justice, so that all rational creatures were treated with the dignity that they deserved and so that the offender did not become another victim in his own eyes and the eyes of society. According to Howard:

...the most painful punishments, those that aroused the greatest guilt, were those that observed the strictest standards of justice and morality. From such punishment there could be no psychological escape into contempt for the punisher, assertions of innocence, or protests against its cruelty. Nothing in the penalty’s infliction would divert offenders from contemplating their own guilt. Once convinced of the justice of their sentence and the benevolent intentions of their captors, they could only surrender to the horrors of remorse.\footnote{Ibid. at 72.}

Howard approved of the plans for the first English penitentiaries, built in the 1790s, which he believed reflected his plan for the reformation of offenders.\footnote{Ibid. at 95.} However, not everyone shared Howard’s enthusiasm for the regime of solitary confinement, even in the natal days of its widespread practice. The moral legitimacy of solitary confinement, which Howard had considered beyond reproach, was attacked by some who claimed that targeting the mind and not the body failed to make the treatment any less brutal. Some questioned the notion that rehabilitation could take place in the absence of a social context.\footnote{Ibid. at 118.}
Howard, who died in 1790, did not live to hear much of this criticism. We are left to wonder what he would have thought of his legacy. Howard himself never advocated for extensive periods of unbroken solitary confinement. He worried that perpetual isolation would break, rather than reform, a man’s spirit. In light of his views on the dangers of relentless isolation, Ignatieff asked:

What would [Howard] have thought of solitude enforced for eighteen months; of the walled pens where prisoners exercised alone; of the masks, the drills, the silence? Hearing the screams issuing from the dark cells, would he have begun to think again about replacing “punishment directed at the body” with “punishment directed at the mind”?194

Knowing what we do of Howard’s philosophy, it seems likely that Howard would not have approved of the extreme implementation, and thus the grave distortion, of his penal plan. Howard was not alive to protest, but the good name of a man with a “quasi-saintly character” was available to legitimate a practice that bore little resemblance to what he intended. In short, a genie was out of the bottle. The “rule of silence”, whereby inmates were either kept in total isolation or were forced to abstain from any type of interaction with fellow inmates, became a popular mode of control in prisons from the 1820’s onwards. American prisons in New York and particularly in Pennsylvania followed suit. Inmates in Philadelphia

193 Jackson, *Prisoners of Isolation*, supra note 147 at 15.

194 Ignatieff, *supra* note 62 at 207.

195 However, before his death, Howard did reject the Philadelphia prison model of total seclusion as “an excessively zealous application of his ideas.” Ignatieff, *supra* note 62 at 194.

196 Harding *et al.*, *supra* note 141, at 113.

197 Ignatieff, *supra* note 62 at 177.
would sometimes spend five years in total seclusion. Our prisons bear the mark, however distorted, of John Howard.

In his article “The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought”, Markus Dirk Dubber addressed the “golden age” of modern criminal law (1750-1850), analyzing the progression away from corporeal punishment based on its cruelty and moral indefensibility to the imposition of “therapeutic” approaches, such as solitary confinement, to the point of a new cruelty. By way of summary, he commented:

[...]he story of the right to be punished begins with an affirmation of the offender’s autonomy and ends in its denial. Along the way identity turns into difference as empathy gives way to indifference. In the end, the transformation of the right to be punished into the need for treatment poignantly illustrates that the Enlightenment project to legitimize state punishment has failed and that hypocrisy has taken the place of legitimation.

Dubber’s article helps to bridge the gap between John Howard’s vision for a more humane prison system and the system we have today. Before the historical review of this chapter is complete, we must acknowledge that, in the span of little more than two centuries, the predominant goal of punishment has shifted from

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198 Ibid. at 194.
In In Defense of Flogging (New York: Basic Books, 2011), at 40, Peter Moskos described New York’s early practice of solitary confinement thus: “To maintain silence, guards wore slippers to muffle footsteps, and tracks carried food carts with leather-covered wheels. When not in the cells (coming or leaving prison, for instance), inmates’ heads were covered in hoods. The goal, prison commissioners said, was to keep prisoners so isolated that if they were in prison on election night, they wouldn’t know who was the president of the United States when they were released.”

199 Dubber, supra note 179 at 116.
restoring sameness to curing difference and, then, to hiding or eliminating difference. Each philosophical pivot was subtle but significant and moved us from a prison reformer who hoped that a man’s reason could be recovered by a brief period of solitude to a system in which people are kept in isolation for years, with no hope of improving them.

Howard and the other penal reformers of the Enlightenment emphasized the common humanity, the sameness, of the offender and the punisher. The concept of “empathic identification” with the offender was essential to their rejection of the violent punishments of the day such as flogging and hanging. The idea that the inherent reason of those punished could be strengthened in conditions of solitude such that the offender could recognize his transgressions was, in fact, an assertion of the offender’s essential humanity and reasonableness.

In contrast to the succeeding rehabilitationists, the penal reformers of the late eighteenth century recognized that, even under their scheme, the offender was being punished. The locus of the punishment was different than before, aimed, as it was, at the offender’s soul rather than his physical body. However, the experience of solitary confinement would necessarily result in a degree of pain as the inmate would ultimately and inevitably be forced to experience remorse for his wrongdoing.

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200 Ibid. at 133.

201 Ibid. at 133.

202 Ibid. at 124.
The rehabilitationists, on the other hand, classified their plan for offenders as treatment rather than punishment. Any pain that was occasioned was merely an undesirable side-effect of the treatment that the offender needed to get well.\(^{203}\) As, according to the rehabilitationists, the state was not intentionally inflicting pain but rather helping provide treatment for those who required it and were entitled to it, the need to legitimize the actions of the state was not nearly as pressing. Treatment of an illness is presumptively a good thing, whereas inflicting pain is presumptively bad. Recasting pain as treatment went along with a recasting of the offender as sick and different instead of equal but misguided. Dubber noted:

The offender no longer deserved punishment because he was a fellow member of the community of rational agents to which the observer also belonged. He now needed correctional treatment to overcome whatever deficiency had proved him unworthy of membership in that community. Punishment no longer affirmed the offender’s dignity as a fellow person; instead it corrected the offender’s abnormality.\(^{204}\)

Choice of language became increasingly important in the effort to promote goal-oriented treatment and minimize punitive side effects. “Civil commitment” in the United States does not sound much like punishment.\(^{205}\) Similarly, under the legislation reviewed in Chapter Two, “administrative segregation” does not sound like punishment, particularly when “punitive segregation” exists as a distinct category of treatment.

According to Dubber, this change in approach of the rehabilitationists led to

\(^{203}\) \textit{Ibid.} at 125.

\(^{204}\) \textit{Ibid.} at 137.

\(^{205}\) \textit{Ibid.} at 131.
the final shift in penal practice toward our current preference for incapacitation as the goal of punishment. After all, once we decide that the offender is fundamentally deficient in some way such that he cannot be socially reintegrated without treatment, and then we realize that our rehabilitative efforts are largely ineffective, it is only one small step to concluding that the deviant offender must simply be kept away from the rest of society in order to keep the community safe. Peter Moskos, author of In Defense of Flogging, notes that “[w]ithout even the lip service of rehabilitation ... long-term indefinite isolation has become the ultimate punishment.”

From pre-Enlightenment, to Enlightenment, to post-Enlightenment times, we have seen penal practice transition based on an evolution in how we view the offender in relation to ourselves. Enlightenment reformers saw prisoners as being like them and their empathetic approach led to the deinstitutionalization of many of the more sympathetic inmates such as debtors. Those who remained within prison walls tested the boundaries of empathic identification, however, and came to be viewed as sick, different, and in need of treatment. Once the bonds of empathy had been broken, it became much easier to throw away the key. The fact that life inside today’s prisons is removed from public view makes developing an empathetic relationship with inmates all the more difficult. Without the affirmation of our common humanity engendered by exposure or contact, and in light of established

206 Ibid. at 141.


208 Dubber, supra note 179 at 144.
rhetoric that the offender’s deviance requires treatment, today’s punishment is “unchecked by empathy and unjustified by autonomy.”

The impenetrability of the modern Canadian penitentiary is perhaps most stark when it becomes clear that not even the judiciary can do more than recommend what takes place within its walls. In *R. v. Desjarlais*, [2008] A.J. No. 721 (S.C.J.), the trial judge sentenced the accused to ten year’s incarceration followed by a period of ten years of supervision as a long-term offender. Dismissing the Crown’s application to have the accused declared a dangerous offender, the court found that the Crown had failed to demonstrate the prerequisites for a dangerous offender designation, and that the lack of programming that had been provided to the accused meant that his potential for rehabilitation was largely unknown. On its own, the latter factor would have been sufficient for the sentencing judge to exercise her discretion to refuse to declare the accused a dangerous offender. Furthermore, the court heard evidence that the accused would be highly unlikely to receive any programming if he were declared a dangerous offender. Even with the importance of treatment at the fore of the sentencing judge’s consideration, she was only able to express a hope that he would receive the treatment he needed when remanded into custody:

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It is my hope, however, and no doubt would be the hope of any reasonable informed member of the public that Mr. Desjarlais will be given access to all appropriate medical, psychological and psychiatric treatment available in the federal penitentiary system as well as access to all available programs designed to meet his needs, delivered in a fashion so as to address his learning disability so that when he is eventually released he will stand the maximum chance for success.\(^{212}\)

As is customary, the sentencing judge directed that her recommendations with respect to the accused’s sentence, noted below, be marked on his warrant of committal:

- that Mr. Desjarlais be tested for brain damage and receive medical, neuropsychological and psychiatric treatment should the results of that testing reveal brain damage; a copy of these written reasons should be provided to any physician, psychologist or psychiatrist participating in such testing and treatment;

- that Mr. Desjarlais should be examined at the RPC in Saskatoon to determine if he suffers from a condition for which he could be treated and to receive treatment for any such condition; a copy of these written reasons should be sent to the attention of the administration of that institution when he is transferred there;

- Mr. Desjarlais should receive all available programming for anger management while in the penitentiary; if anger management programming is available which is designed for the learning disabled he should receive that programming; all programming he receives should be programming tailored for the learning disabled if that version is available; and,

- as a condition of any eventual release Mr. Desjarlais should be prohibited from being present within, including residing within, the geographical area served by the Drayton Valley or Stony Plain R.C.M.P. detachments.\(^{213}\)

\(^{212}\) *Ibid.* at para. 92.


That even the judges tailoring an accused’s prison sentence can do no more than recommend that such essential aspects of a sentence be followed reveals the extent of carceral autonomy. The sentencing judge decides only the time to be spent in custody but is powerless to control essential aspects of how that sentence is imposed. In fact, one might argue that not even the length of the sentence is sacred. As the following chapter will address, correctional officials can manipulate the
effective length of the sentence by controlling the conditions an inmate is forced to endure.

Returning to the question of what the American War of Independence has to do with the death of Ashley Smith, it seems that the answer is both a little and a lot. It was likely that it was the American War of Independence, and the resultant suspension of the practice of transporting offenders to the colonies, that forced the serious consideration of Howard’s notion of the penitentiary and the practice of solitary confinement. It was this transitional time in the history of penal practice that moved punishment indoors and away from public surveillance. Punishment from that time forth was to be meted out locally, behind concrete walls and beyond the purview, not only the community, but to a considerable extent the judiciary as well.

In the Preface to the report Commission of Inquiry into Certain Events at the Prison for Women in Kingston (“The Arbour Report”), the Honourable Louise Arbour described Corrections Canada as the “least visible branch of the criminal justice system, a state which is in “stark contrast to accountability processes in the law enforcement and judicial branches.”214 Arbour noted the “robust adversarial fashion” of the inquiries into the performance of police officers, prosecutors and judges alike,215 an approach that does not seem to continue inside the prison walls. It must be asked: do we care about procedural fairness only up until the passage of sentence? More likely it is that we only respond to what we see and know. Today,

214 Arbour Report, supra note 9 at v.

215 Ibid.
we do not have the opportunity to undermine a sentence by embracing the inmate locked in the pillory stocks if we believe that his treatment is unjustified. In short, the public has been shut out from the process of punishment. This closing of the door on a concerned public may have contributed to the death of Ashley Smith.

Of course, in a more linear sense, the death of Ashley Smith and the American War of Independence are two discrete points on an historical timeline with very little connecting them. The solitary confinement that Howard envisioned as an alternative to the practices of the day bears little resemblance to the treatment that Smith experienced during her final years, the term “therapeutic quiet” merely a vestige of an earlier era when therapy or rehabilitation was the goal of isolation. Over time, isolation inspired by empathic identification with inmates who were believed to be capable of rehabilitation gave way to an attitude that inmates were fundamentally deficient and could only be isolated and controlled.

The history of solitary confinement is a troubling chronicle of shifting justifications. Solitary confinement was proposed as a humane way to treat inmates who were deserving of dignity and possessed the same power of reason as all other human beings. It was hoped that time spent in a state of quiet contemplation would reveal to them their deficiencies. The rehabilitative aim of punishment, however, seems to have eroded the premise that all humans are fundamentally equal as a result of their shared ability to reason, instead recasting the prisoner as sick, deficient, and requiring a cure. With this shift in thinking, the community’s empathic identification with the offender began to slip away; he was no longer someone fundamentally like them but was rather fundamentally different from
them. When our belief in the prospect of rehabilitation wore thin, the offender was successfully alienated from our conception of ourselves as law-abiding members of the non-offending population. Conveniently, the cells that were once intended for quiet reflection during an offender’s reformation doubled nicely as concrete vaults in which to isolate dangerous offenders who could be controlled in no other way. As Michael Jackson comments in Justice Behind the Wall, “[w]hen the reasons change and the activity remains, the reasons begin to look like excuses.”

The current practice of solitary confinement is divorced from its original intended purpose. What was meant to be a practice of compassion has been reinvented as the harshest of punitive sanctions. Though hopefully hyperbolic in this context, the words of William Bulter Yeats’ “The Second Coming” come to mind. The poem begins:

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

216 Michael Jackson, Justice Behind the Wall (Vancouver: Douglas & McIntyre, 2002), at 22 [Jackson, Justice Behind the Wall]. In a similar vein, Joane Martel noted: “it remains that the exclusionary rationales underlying the practice of segregation seem to move seamlessly in a flexible fashion between punishment, protection, prevention and quiet time, hereby participating to the longevity of this governance strategy for the management of problem populations.” Joane Martel, “To Be, One Has to Be Somewhere: Spatio-temporality in Prison Segregation” Brit J. Criminol. (2006) 46, 587-612.

CHAPTER FOUR
A PLACE APART

In the Ministry of Love there were no windows. His cell might be at the heart of the building or against its outer wall; it might be ten floors below ground, or thirty above it. He moved himself mentally from place to place, and tried to determine by the feeling of his body whether he was perched high in the air or buried deep underground.218

The Honourable Louise Arbour was commissioned to investigate the state and the management of the Correctional Service of Canada in so far as it pertained to the aftermath of a 1994 prisoners’ riot at what was then the Kingston Prison for Women. In particular, the public outcry caused by the release of video depicting a male emergency response team strip-searching female inmates in the segregation unit within the prison demanded an investigation into the way that the Correctional Service of Canada ran its operation.219 In the Commission of Inquiry into certain events at the Prison for Women in Kingston, known as the Arbour Report, Louise Arbour emphasized the obligation of Corrections Canada to preserve the “integrity of the sentence” imposed by the court. This concept is essential to understanding the state of lawlessness that currently exists within the world of solitary confinement. The correctional branch of the justice system is responsible for carrying out sentences pronounced by the courts. By unilaterally increasing the severity of the sentence imposed, correctional authorities overstep their boundaries

218 Orwell, supra note 1 at 241.

219 Jackson, Justice Behind the Walls, supra note 216, at 353-354.
just as surely as if the judiciary investigated criminal activity or the police decided what evidence was admissible at trial. The separation of these powers is essential to the transparency of the criminal justice system. The behaviour of each class of participant within the system can be assessed only if the public is aware of the boundaries of its respective role. When roles are overstepped, behaviour is unexpected and is more likely to remain unknown and unchallenged.

In *R. v. Barton*, [2002] O.J. No. 4105 (C.A.), the court held that, when determining the amount of credit to be assigned to an offender based on a period spent in pre-sentence custody, the sentencing judge should consider not only the duration of pre-sentence custody but also whether that time was spent in segregation. The court’s recognition that time spent in segregation is more onerous than time spent in the general population underscores the damage that is done to the integrity of the sentence by the over-use of segregation. In essence, when correctional authorities decide that an inmate will spend significant time in segregation, without considering alternatives, they are fundamentally changing the sentence imposed by the court. As Arbour stated in her Report:

> Eight or nine months of segregation, even in conditions vastly superior to those which existed [at the Kingston Prison for Women in 1994], is a significant departure from the standard terms and conditions of

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220 *R. v. Barton*, [2002] O.J. No. 4105 (C.A.), at para. 16. This decision was rendered before the *Truth in Sentencing Act*, S.C. 2009 came into force, limiting judicial discretion with respect to awarding sentencing credit for time spent in pre-sentence custody. Under the recent amendments to the *Criminal Code*, credit of 1.5 days for each day spent in pre-sentence custody is the maximum credit that can be given, thereby ending the judicial norm of awarding 2:1 credit. While the amendments do not make the court’s comment in *R. v. Barton* moot, sentencing judges’ ability to recognize pre-sentence time spent in segregation has been limited.
imprisonment, and is only justifiable if explicitly permitted by law. If it is not legally authorized, it disturbs the integrity of the sentence.\textsuperscript{221}

In an effort to suggest how to remedy the improper intensification of custodial sentences caused by correctional mismanagement, Arbour proposed that inmates be permitted to apply for a remedy of sentence reduction when held too long in segregation. Reducing a sentence in such circumstances would not amount to a windfall for the inmate, rather it would ensure that the integrity of the sentence was respected; tinkering with the length of the sentence would serve as a countervailing force to the improper adjustment made to the intensity of the sentence. Arbour envisioned that an inmate could apply to the court that imposed the original sentence for either a reduction in sentence or, in the case of a mandatory sentence, an order directing the Parole Board to consider an earlier release.

Allowing inmates to make such applications would mean the potential for repercussions to flow from a failure on the part of Corrections Canada to honour their governing legislation, just as the potential exclusion of evidence serves as a disincentive to police officers who might otherwise exceed the scope of their authority.\textsuperscript{222} The nature of Arbour’s disincentive is far less dramatic than the exclusion of evidence under s. 24(2) of the \textit{Charter}, however. Excluding key evidence in the context of a criminal prosecution may destroy the Crown’s case and result of the acquittal of a factually guilty person. Even acknowledging the significance of many breaches of \textit{Charter} rights, in the context of very serious

\textsuperscript{221} Arbour Report, \textit{supra} note 9 at 144-145.

\textsuperscript{222} \textit{Ibid.} at 183-184.
charges for which the accused would stand to lose his liberty, it could be said that
the remedy more than restores the accused to his original position. On the other
hand, a reduction in sentence to account for what may only be euphemistically
described as procedural irregularities serves only to restore the offender to his
position at the time when his sentence was pronounced.

Despite her relatively modest proposal, Arbour anticipated resistance to her
idea and preemptively rejected any interpretation that she was opening a loophole
whereby inmates could avoid serving their sentence:

The rule that I am advocating here is nowhere near as drastic a form of
redress as the Charter exclusionary rule. It creates no “windfall” for the
benefit of the inmate, as the exclusionary rule is often perceived to do for the
accused. Rather, a reduction of the term of imprisonment to reflect the
illegally or unjustly imposed harsher conditions of imprisonment merely
restores the original sentence to its full intended effect. There is truly no
“windfall” for the inmate.\footnote{Ibid. at 184.}

Furthermore, Arbour expressed her awareness that the Correctional Service
of Canada might not take kindly to her suggestion that it was in need of external
judicial supervision in order to properly manage its own affairs.\footnote{Ibid. at 185.}
The reticence with which Corrections Canada participated in the inquiry into the events at the
Kingston women’s prison helped to confirm for Arbour that the root of the problem
lay with the “deplorable defensive culture” within the Correctional Service of
Canada.\footnote{Ibid. at 175.} More than a hint of cynicism can be detected in Arbour’s expression of
disappointment at the fact that, despite a tremendous amount of effort devoted to
“the creation of a mass of documentation,” there did not appear to be an effective method of retrieving those documents for review.\(^{226}\) However, in her estimation, the insular nature of Corrections Canada was at the very heart of what went wrong at the Kingston Prison for Women in 1994 and what helped to foster the misnomer that, in a situation of crisis, following the law becomes optional.\(^{227}\) According to Arbour, only an open dialogue between the participants in the justice system would help to engender respect for the rule of law within the correctional branch:

In my view, if anything emerges from this inquiry, it is the realization that the Rule of Law will not find its place in corrections by “swift and certain disciplinary action” against staff and inmates. The absence of the Rule of Law is most noticeable at the management level, both within the prison and at the Regional and National levels. The Rule of Law has to be imported and integrated, at those levels, from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously.\(^ {228}\)

These words of Louise Arbour create the sense of longing to throw open the windows of a long-cloistered attic, to clear the air and relieve some of the bottled up tension therein. The world of corrections, however, is a world apart. Prying open its windows is not easily done. Professor Michael Jackson has spent a great deal of his professional life attempting to pry open some portal to Canadian correctional facilities. He began his latest text, *Justice Behind the Walls*, with a brief historical overview of his efforts to learn what life is like within prison:

My journey to better understand what we do in the name of justice when we sentence men and women to prison has taken me inside federal penitentiary as a university researcher, an advocate and lawyer for prisoners, and a human rights activist and reformer. I have interviewed hundreds of

\(^{226}\) *Ibid.* at 172.

\(^{227}\) *Ibid.* at 52 and 61.

\(^{228}\) *Ibid.* at 180.
prisoners, some considered to be among the most dangerous men and women in the country. I have also interviewed the men and women charged with guarding and “correcting” those sentenced to prison. I have been inside prisons in the midst of riots, hostage takings, homicides, and stabbings, and I have borne witness to the explosive power of prisoners’ rage and frustration. My journey has taken me into segregation units – contemporary versions of Dante’s Inferno – where prisoners scream abuse and hurl their bodily fluids and guards respond violently with fire hoses and nightsticks. I have sat with prisoners hopeless beyond tears as they contemplate suicide, and I have knelt at the segregation cell door, scanning through the narrow food slot and barren interior of a prisoner’s world, begging a man not to use a razor blade to slash his eyeballs.229

Echoing concerns expressed in the Arbour Report, Jackson is concerned by the invisibility of prison life. Up until the passage of sentence, and perhaps until the final appeal is dismissed, the process of the criminal justice system is accessible for scrutiny. However, once the sentence is absolute and the paddy wagon deposits the inmate at the correctional institution to serve his time, the ability to scrutinize is all but exhausted. Members of the public often celebrate a feeling of closure following a criminal trial and experience satisfaction at justice having been served. Presumably, though, justice is only served if the sentence that is exacted is the one that was imposed. While some vengeful or particularly aggrieved members of the public may delight in a sentence becoming more severe than was intended, there is surely no true justice in a sentence that is largely arbitrary, with only rough boundaries set and the content left to be coloured in at the pleasure of the correctional system.

Arguably, once an inmate enters custody, his need for social and judicial oversight is greater than ever. As Jackson remarked:

229 Jackson, Justice Behind the Walls, supra note 216 at 2-3.
The point at which the criminal justice system will have its greatest impact on the individual is the point at which for the legal profession the process has run its course. It is simply assumed that the prison sentence, whether by deterring, apportioning just desserts, rehabilitating, or simply incapacitating the prisoner for the duration of the sentence, serves the ends of justice. A significant part of [Justice Behind the Walls is] directed to challenging the legal profession to take seriously its responsibility to those men and women who are sentenced to imprisonment, as well as to challenging the assumption that the prison sentence, as administered by prison administrators and staff, does indeed serve the ends of justice.\(^\text{230}\)

In an effort to determine whether life behind bars serves the ends of justice, Jackson has spent a significant portion of his professional career exploring how the justice system within prisons compares to the public criminal justice system.\(^\text{231}\) He has focused on the internal disciplinary system within the prison with the goal of assessing whether the system of prison justice was a fair one and, if not, to determine how it could be made to be fair. As Jackson is arguably Canada’s most prolific scholar on the legalities of Canadian prison life, his work deserves particular attention. Though he has made strides in helping to realize Louise Arbour’s goal of integrating the rule of law into the landscape of incarceration, Jackson’s work reveals that, legally speaking, the world within prison is a fundamentally separate space. This is particularly the case with respect to solitary confinement, a topic to which Jackson is especially devoted.\(^\text{232}\)

\(^{230}\) Ibid. at 16.

\(^{231}\) Ibid. at 187.

\(^{232}\) Professor Jackson’s Prisoners of Isolation, supra note 147, is a more focused text. Justice Behind the Walls, supra note 216, places the world of solitary confinement within the broader prison community, particularly its regime of decision-making.
A Legal World Apart

While an inmate may be held in segregation for administrative or punitive reasons, Jackson’s focus with respect to his investigation into procedural fairness within the prison system rested with disciplinary hearings and reviews of inmates’ administrative segregation status. When Jackson began his research on procedural fairness within the prison system in 1972, the legislative scheme was significantly different from that of today; the legislation of the day, the Penitentiary Act and the Penitentiary Service Regulations provided only a skeletal framework for the procedure of disciplinary hearings.\footnote{Jackson, Justice Behind the Walls, supra note 216 at 188.} While Jackson’s initial impression regarding prison disciplinary hearings was that the basic tenets of procedural justice were respected, four months of observing such hearings led him to revise this initial assessment. Instead, Jackson found that, in practice, there was a presumption of guilt rather than of innocence, issues of conviction were not kept distinct from issues of sentencing, there was undue reliance on hearsay and rumour, and there was a lack of concern over achieving parity in sentencing.\footnote{Ibid. at 189.} Rather than a quest to discover the truth with respect to an event alleged to have taken place within the institution, Jackson discovered that prison administrators considered disciplinary hearings to be about having inmates take responsibility for their actions.\footnote{Ibid. at 189.} The presumption of guilt implicit in this perspective is self-evident and likely accounted for the frequent practice of notifying the accused inmate no earlier than the morning.
of the hearing; after all, a presumptively guilty inmate did not need time to prepare for a hearing as he would have nothing meaningful to say in his defence. Giving him some time to prepare for his hearing would only subvert “justice” by presenting him with an opportunity to concoct a fabricated version of events.

The greatest problem that Jackson identified with the prison disciplinary system, however, was the lack of independent decision-making. Commenting on the lack of impartiality, Jackson wrote:

The overarching flaw in the warden’s court system was that the very people responsible for maintaining the good order of the institution were the ones judging whether prisoners had committed offences against that good order. The judges, in other words, were the offended parties. Furthermore, in most cases these adjudicators brought to the hearings considerable personal knowledge of the prisoners, based on their previous dealings, and it was therefore impossible for them to approach a particular case free of that bias. A further source of bias prejudicing objective judgement was a perceived need of prison administrators to maintain staff morale by accepting the testimony of guards where it conflicted with that of prisoners.\(^{236}\)

Jackson’s comments make intuitive sense. In what other context would we allow the aggrieved party to sit in judgment of the accused? Many of the common institutional charges laid against inmate accused, such as assault, threatening or destruction of property, directly involve the institution or institutional staff as the complainant. At the very least, all institutional charges involve the institution as an indirect complainant as the accused inmate is alleged to have breached the institution’s code of conduct. Despite the obvious drawbacks and highly questionable optics associated with having a party to the litigation sit in judgment of the matter, Jackson faced considerable resistance in seeking to introduce

\(^{236}\) *Ibid.* at 190.
independent decision makers into the prison system. To this day, independent
decision makers sit in judgment of only serious disciplinary offences. Hearings with
respect to alleged “non-serious” disciplinary offences and hearings to determine
whether inmates will remain in administrative segregation continue to be
adjudicated by institutional personnel.

Pursuant the recommendation of a 1975 Study Group on Dissociation, the
Solicitor General accepted that legally-trained independent chairpersons should be
employed within maximum and medium security institutions on an experimental
basis. The first of such appointments was made in 1977. In 1983, Jackson
returned to Matsqui Institution, the medium security penitentiary in British
Columbia where he had made his initial observations, to assess the changes brought
about by the independent chairperson. He also observed the disciplinary
proceedings at the maximum security Kent Institution, also in British Columbia.
After six months of observation, Jackson concluded that the introduction of an
independent decision-maker had resulted in substantial change and an almost
tripling of the acquittal rate:

...there had been a significant number of acquittals before the Independent
Chairpersons in circumstances where, under the old regime, convictions
would almost certainly have been entered; the difference was attributable to
the Chairperson’s being prepared to render a decision based upon a
reasonable doubt, notwithstanding strong institutional pressures for a
conviction.

The introduction of independent decision makers, where they were in fact
introduced, did not make for procedurally perfect disciplinary hearings, however.

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237 Ibid. at 191-192.
238 Ibid. at 192-193.
At Matsqui, Jackson found that the independent decision makers were not so independent when it came to determining sentence, often accepting automatically the sentence recommended by the staff advisors. Considering that most inmates charged with a disciplinary infraction either pleaded guilty or were found to be guilty, this overreliance on the staff members’ opinions as to sentence had a huge practical effect and substantially undermined the potential value of the independent decision makers. Staff advisors recommended sentences based on the room available in the segregation cells, recommending segregation if there was space, and other sanctions if there was not. As a result, Jackson found that the principle of treating like offenders alike, important to our public criminal justice system, was given short shrift.\textsuperscript{239} At Kent, Jackson did not find that there was the same blind adoption of the staff recommendation as to sentence, but, as inmates were excluded from the proceedings when the staff member made sentencing recommendations, the convicted inmate remained ignorant of the process and, likely, suspicious.\textsuperscript{240}

Although the introduction of independent decision makers was a positive development, Jackson found that the unfairness and the lack of transparency in the sentencing process slowly ate away at inmates’ respect for their jailers:

Life in the prison must go on, and most prisoners do not spend much time trying to figure out why some of them are sent to the hole for five days for an offence and others end up there for ten or fifteen days – to serve no segregation time at all – for doing the same thing. But like waves on a beach, this knowledge washes through the prison every day, continually eroding prisoners’ respect for authority that imprisons them.\textsuperscript{241}

\textsuperscript{239} Ibid. at 195.

\textsuperscript{240} Ibid. at 194.

\textsuperscript{241} Ibid. at 195.
The CCRA, reviewed in part in Chapter Two, was passed in June of 1992. This Act set a limit of 30 days on the amount of time a person can be detained in segregation for a single disciplinary offence (45 days is the limit in the case of sentencing for multiple offences), established that charges involving serious disciplinary offences would be adjudicated by the Independent Chairperson, although minor charges would be adjudicated by an internal staff member, and proclaimed inmates’ right to counsel when charged with serious disciplinary offences. Subject to limited exceptions based on an inmate’s behaviour, the new legislation affirmed an inmate’s right to be present throughout all aspects of the hearing. These legislative changes were positive, but perhaps provided a false sense of progress when more fundamental changes were still required. In an effort to determine whether the new disciplinary process operated fairly in practice, Jackson attended over 500 prison disciplinary hearings which, unlike criminal trials, are not open to the general public.242

Jackson identified a major obstacle to the internal prison disciplinary system achieving procedural justice in the lack of consistency with regard to whether inmates are detained in administrative segregation pending the resolution of their disciplinary charge.243 When such segregation occurs, the inmate may serve the entire “sentence” before being acquitted at trial. In fairness, such injustices do take place in the criminal justice system as well. When an accused person is denied bail

242 Ibid. at 201.

243 Ibid. at 212-213.
pending the resolution of his criminal charges, it is not unusual for that individual to face more time in custody awaiting trial than they would face upon conviction. However, when an inmate is detained in administrative segregation pending the resolution of disciplinary charges, there is no bail hearing to be had, no opportunity to test the strength of the case or to present a plan by which the inmate could safely remain in the general population. In this context, the possibility that an inmate might spend more time in segregation awaiting a hearing than he would be ordered to spend upon a finding of guilt is particularly repugnant. Jackson does not shy away from suggesting that pre-hearing segregation may be a technique used by prison officials to wrest back some power from the independent decision makers who are more likely to acquit than were those who used to call the shots.

Emphasizing the importance of the informal decision-making that takes place around the margins of the procedure established by the legislation, Jackson noted:

...the formal disciplinary process is but one area of prison decision-making, and in many cases decisions made by non-independent prison administrators regarding segregation ... may overshadow, even supersede, the formal disciplinary outcome. Consider the numerous cases I have described here in which prisoners awaiting a hearing on disciplinary offences were confined in administrative segregation for longer periods than those to which they could be sentenced if found guilty. In these cases, regardless of the outcome of the process, the administrative practice of

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244 Faced with this impossible scenario, many accused will choose to plead guilty rather than take their matter to trial. Though the courts have not overturned a guilty plea on this basis, the prospect of months spent waiting for trial in the case of an accused person who knows himself to be innocent, or to be facing less time upon conviction than he would awaiting trial, throws into question the voluntariness of a guilty plea. This issue, though highly problematic, is beyond the scope of this paper. It is mentioned here so as not to leave the reader with an unbalanced presentation of the prison justice system when compared with the criminal justice system.

245 Jackson, Justice Behind the Walls, supra note 216 at 248.
segregation constituted the effective punishment. ... It is therefore no surprise that prisoners view the disciplinary process as part of a seamless administrative web which they judge to be unfair.246

With respect to his experiences of the staff-run hearings for minor disciplinary charges (which, of course, are not governed by an independent decision maker), Jackson described a kangaroo court in which a plea was often not taken from the accused, a presumption of guilt pervaded the proceedings, the accused were excluded from key portions of the proceedings, in direct contravention of the CCRA, and were not permitted to question the institution’s witnesses. One particularly zealous prison supervisor managed to decide 38 cases within three hours in what Jackson described as a “veritable tour de force” privileging administrative efficiency over due process.

Unfortunately, Jackson’s description of the resolution of minor disciplinary offences and the circumvention of independent decision making in the case of serious disciplinary charges is reminiscent of the trial scene in Alice in Wonderland:

“Let the jury consider their verdict,” the King said, for about the twentieth time that day.
“No, no!” said the Queen. “Sentence first – verdict afterwards.”
“Stuff and nonsense!” said Alice loudly. “The idea of having the sentence first!”
“Hold your tongue!” said the Queen, turning purple.
“I won’t!” said Alice.
“Off with her head!” the Queen shouted at the top of her voice.247

Alice, the independent outsider, may point out the absurdity of the process, but she cannot truly change a system that is fundamentally adrift.

246 Ibid. at 283.

The most pernicious aspect of the system, the lack of independent decision-making in the context of administrative segregation, noted in Chapter Two, causes the legislative safeguards that do exist to ring hollow. As it stands, an inmate can be detained in administrative segregation indefinitely with no review by an independent adjudicator. For convenience, s. 31(3) of the CRRA is reproduced below:

(3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

- (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;

- (b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or

- (c) allowing the inmate to associate with other inmates would jeopardize the inmate’s safety.

Section 31(3)(a) is particularly permissive, allowing the institution to detain an inmate in administrative segregation based on a reasonable belief that the inmate’s presence in the general population would somehow jeopardize the security of the institution or the safety of any person inside the institution.248 At no point, according to the CCRA or the accompanying regulations, is the inmate entitled to

248 Jackson, *Justice Behind the Walls*, supra note 216 at 315.
have his segregation status assessed by someone outside of Corrections Canada.

Frustrated by the broad scope of s. 31(3) of the CCRA, Jackson proposed his own Model Segregation Code according to which an inmate could be segregated on several bases. In the case of an inmate who is implicated on reasonable and probable grounds in a specified criminal or disciplinary offence, he may be detained:

a) for up to one month if the presence of the inmate in the general population would intimidate potential witnesses, or

b) in the case of actual or threatened violence, the willful destruction of property, disobedience to orders and “a substantial likelihood that the offence will be continued or repeated”

Jackson’s Model Segregation Code allows for the exceptional detention of an inmate in administrative segregation based on the belief that that inmate is a threat to the security of the institution or the physical safety of staff or other prisoners if and only if an independent adjudicator was satisfied beyond a reasonable doubt that the threat posed by the inmate was serious and immediate.249 In all cases, the institution would be required to defend the administrative segregation of the inmate before an independent adjudicator within 72 hours of imposing the segregated status. If unsatisfied with the evidence presented, the independent adjudicator would be compelled to order the inmate returned to the general population.250 According to the Model Code, administrative segregation would only be permitted to exceed 30 days in the rarest of circumstances.251 Jackson insisted,

249 Ibid. at 321-322.

250 Ibid. at 312.

251 Inmates interviewed by Jackson commented that administrative segregation was much harder than punitive segregation as there was no known endpoint. With punitive
however, that the linchpin of the Model Code is independent adjudication. All the reasons why independent adjudication was established with respect to serious disciplinary charges hearings apply in the context of administrative segregation and, given the possibility of indefinite segregation on an administrative basis, they apply all the more. Jackson summarized persuasively the need for independent adjudication in the realm of administrative segregation:

First, the issues surrounding involuntary segregation are such that the interests of prisoners and correctional administrators are in conflict and facts and allegations are often in dispute; fairness requires an independent and unbiased decision-maker. Second, the recommendations of the Study Group on Dissociation failed to bring about real change, and there is a continuing issue of non-compliance with the law when segregation decisions are left with correctional administrations. Third, the potential for abuse and the potentially debilitating effects of long-term segregation require that limits be placed upon segregation in the form of specific criteria for placement, review, and the length of time for which segregation can be maintained; effective application and enforcement of these limits requires an independent adjudicator. Fourth, there is a need for a process to ensure that the rights and privileges of prisoners in segregation are respected, and this will be better achieved through an independent adjudicator.

While time spent in segregation pursuant to a conviction for multiple serious disciplinary offences cannot exceed 45 days, only the length of an inmate’s sentence limits the length of time that an inmate may spend in administrative segregation. Jackson’s Model Segregation Code and other efforts have failed to change this

segregation, an inmate knows the amount of time he is required to serve and have an end to anticipate. Inmates in administrative segregation do not know the endpoint of their suffering and feel powerless to hasten it. It is no doubt with these comments in mind that Jackson recommended a maximum time period that could be spent in administrative segregation, except in the rarest of circumstances. Jackson, Justice Behind the Walls, supra note 216 at 294.

252 Jackson, Justice Behind the Walls, supra note 216 at 313-314.
253 Ibid. at 313-314.
254 Ibid. at 316.
reality. The CCRA’s assurance that an inmate in segregation enjoy the same right and will be provided with the same conditions of confinement provided to inmates in the general population is almost entirely deflated when the caveat is considered: segregated inmates may be deprived of services and amenities that cannot reasonably be granted due to the limitations of the segregation area and the effective operation of that area.255 Essentially, the segregated inmate is told that he can have everything except that which he cannot have.

**A Social World Apart**

While researching the world of Canadian penitentiaries, Jackson was a student of the culture of prison life as well as the nature of internal disciplinary systems. In writing *Justice Behind the Walls*, he was careful to express the viewpoints of the correctional staff as well as the inmates and to consider the particular stresses that affect both groups. Prisons are their own microcosms, but, unlike other systems, they are largely closed. This insular quality causes an intensification of regular emotions and reactions. Describing this unique environment as a breading ground for stress and suspicion, Jackson wrote:

The closed nature of prison society is such that prisoners, and to a lesser extent guards, cannot take steps, as the rest of us in the larger society can, to change their life circumstances so as to remove themselves from the danger zone. Prison society is a pressure cooker in which hostilities and paranoia are intensified and in which personal insecurity and physical risk loom large.256

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255 CCRA, *supra* note 67 at s. 37.

256 Jackson, *Justice Behind the Walls*, *supra* note 216 at 447.
Louise Arbour made similar comments with respect to the insular nature of segregation in her report on the aftermath to the 1994 riot at the Kingston Prison for Women, when she remarked:

... it is not healthy for victims and aggressors to be locked in with each other, without intervention from anyone from the outside, particularly when the victims are the custodians of the aggressors. At that time more than at any other, it is imperative that openness prevail, and that every effort be made to involve persons or groups who, at more peaceful times, interact so effectively with both inmates and staff at the prison.257

Prison is a world full of rumours;258 inmates are often keen to exchange secrets with correctional staff in exchange for a benefit. It is very difficult to develop trust for your fellow human being in a situation in which a tip from a peer, whether true or fictitious, could result in a transfer to a higher security classification (called “reverse cascading”, true to Corrections Canada’s fondness for euphemisms), or being placed within administrative segregation. Jackson’s experiences within the prison world revealed to him that the allegations upon which transfers to higher security levels and segregation units were made were often described in paperwork as “information from a reliable source,” despite the fact that no independent investigation was conducted to determine the truthfulness of such allegations.259

Inmates will often never know the identity of their accusers, let alone be able to test their credibility in cross-examination. In such a world, feelings of paranoia are inevitable. Inmates serving lengthy or life sentences lamented to Jackson that the

257 Arbour Report, supra note 9 at 61.

258 Jackson, Justice Behind the Walls, supra note 216 at 465.

259 Ibid. at 473.
“con code” was a thing of the past; inmates used to show each other respect and demonstrate a sense of solitary, but, now that they are treated as victims rather than people who have chosen a criminal lifestyle, they have lost their sense of pride and gained instead a willingness to sell each other out for any perceived potential gain.260

Correctional staff opened up to Jackson about the stresses that they felt as well. Long-serving staff members of staff, like long-term inmates, expressed some disappointment in the changes that they have perceived over the years. More and more, they sensed increasing pressure to create a paper trail, not because they felt that it improved the quality of their work with inmates, but rather to appease management and to protect themselves from any future inquiry.261

Psychologist Craig Haney has written about the particular pressures faced by correctional staff, as well as inmates. Some of his work has focused on correctional staff who spend time in the portions of prisons devoted to solitary confinement. The particular pressure-cooker of solitary confinement comes, in part, from the self-fulfilling prophecy that segregation houses the inmates who are the “worst of the worst.”262 As a result of this general perception, correctional staff assigned to work in solitary confinement, or “super-max” in the language of American corrections,

260 Ibid. at 96.

261 Ibid. at 94-96.

expect their safety to be constantly under threat. The result of this expectation is constant hyper-vigilance and anxiety:

The extreme deprivation, the isolating architecture, the technology of control, and the rituals of degradation and subjugation that exist in supermax prisons are inimical to the mental health of prisoners. But it would be naïve to contend that the nature of supermax environment does not also affect the staff that works inside. In many such places, an atmosphere of thinly veiled hostility and distain prevails, and the tension and simmering conflict are often palpable. The stress can be read on the faces of the correctional officers, who seem on edge, hypervigilant, even “pumped up.”

Haney has remarked that reticence to acknowledge the harmful effects of the supermax environment does a disservice, not only to the prisoners who are held there, but also to the guards who are forced to work in the austere and threatening conditions of segregation. These men and women are also the “captives” of the “untenable supermax environment.”

While the notion that the inmates housed in solitary confinement are the “worst of the worst” is based on a false understanding of what leads to placements within solitary confinement in the first place, a failure, for example, to recognize that many of the inmates placed in solitary confinement find themselves there as a result of a mental illness that prevented them to conforming to the institution’s expectations when housed in the general population, the perception pervades nonetheless. The “macho” culture of corrections encourages responding to the


threat posed by an inmate population considered to be the “worst of the worst” with decisive force.\textsuperscript{267}

Significantly, correctional staff and inmates are trapped together by virtue of the correctional officers’ chosen occupation. The closed nature of the solitary confinement ecosystem prevents any dissipation of tensions. Rather, solitary confinement units within prisons are kettles placed on hot elements and sealed off so that no steam can escape. Hostility amasses, producing dysfunction reactions and counter-reactions. An oppressive cycle continues.\textsuperscript{268}

**A De-Contextualized (Non) Space**

In his article “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement”, Haney emphasized the barren and de-personalized landscape of solitary confinement:

... prisoners in these units live almost entirely within the confines of a 60- to 80-square foot cell, can exist for many years separated from the natural world around them and removed from the natural rhythms of social life, are denied access to vocational or educational training programs or other meaningful activities in which to engage, get out of their cells no more than a few hours a week, are under virtually constant surveillance and monitoring, are rarely if ever in the presence of another person without being heavily chained and restrained, have no opportunities for normal conversation or social interaction, and are denied the opportunity to ever touch another human being with affection or caring or to receive such affection or caring themselves. Because supermax units typically meld sophisticated modern technology with the age-old practice of solitary confinement, prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past.\textsuperscript{269}

\textsuperscript{267} Ibid. at 966.

\textsuperscript{268} Ibid. at 960-961.

\textsuperscript{269} Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (January 2003) 49:1 Crime & Delinquency 124, at 126-127.
Not only is the landscape of solitary confinement an incredibly barren one, the total control of segregated inmates extends to what they are permitted to bring with them into solitary confinement. Joane Martel has commented on how, unlike in the general population of a prison, inmates in isolation are unable to bring with them any personal effects to keep in their cells. Martel, who has studied the experience of female Canadian prisoners in isolation since 1995, has noted that it is not uncommon for women in prison to attempt to make their cells their own. Be they photographs or books or letters, whatever possessions she has are very important to an inmate’s ability to regain her sense of self within the prison world. Having something that links the inmate back to before her period of incarceration is essential to maintaining a sense of continued identity in the face of the stress of incarceration; objects, in effect, are essential to “ensur[ing] continuity in one’s biographical narrative.”

Women placed in segregation, however, are not permitted to bring along personal artifacts that would allow them to “territorialize” their new space. In this way, movement to segregation forces inmates to forego the items that they rely upon to perpetuate their sense of self despite their dramatic change of circumstances. Instead of an attenuation, placement within segregation means a definitive break from the life of the outside world.

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271 Ibid. at 601-602.
In addition to the stress of being moved to a de-contextualized space, inmates in isolation lose a sense of control over the passage of time. According to Martel, the passage of time is marked differently in prison. Instead of marking days by days, months and years, the monotony of prison life causes these units to lose their significance. What is important, in terms of marking time, are the rituals of prison life including mealtime, mail time, recreational time, and visiting time. Inmates maintain some power with respect to time by exercising their limited choices, such as deciding whether or not to go check on the receipt of mail. In Martel’s experience, inmates become very attached to the rituals of prison life and become quite upset when they are somehow disrupted.272

Notably, in solitary confinement, the rituals of prison life are permanently disrupted. Women interviewed by Martel reported that daily events, e.g., mealtime, shower time, and time outside of one’s cell, rarely happened at a predictable time from day to day. The constant illumination of the cells renders indistinguishable night and day, causing a further sense of confusion with respect to time. Furthermore, with such a perpetual state of idleness and loneliness, time seems to pass more slowly in isolation, and may actually seem to stop entirely. Dr. Richard Korn, who gave expert evidence on the effects of solitary confinement in the McCann case, eloquently described the relationship between the conditions of incarceration and the subjective experience of the passage of time:

Experienced prisoners can nicely calculate the impact of different spatial settings on the inner duration of the same unit of calendar time. How long does a calendar year last in the county jail? "Twice as long as a year in San Quentin," answers the ex-con from California. And a year in San Quentin?

272 Ibid. at 596-597.
"Four times as long as a year on the street." And how long is a week in the "hole"? The respondent’s eyes become dream-like. "A month, two months . . . limbo." . . .

Constricting a man’s space while simultaneously restricting his activities has a fantastically expansive effect on the crucial third dimension of Time. As space collapses inward toward the vanishing point, Time is ballooning out toward infinity.273

Thus, the conditions of solitary confinement effectively remove the inmate from both space and time. According to Martel, this special and temporal dislocation has a profound effect on an inmate's sense of identity, as it is through our understanding of time and space that we develop and maintain a sense of ourselves. We know who we are in terms of where we have come from, where we are now and where we plan to go later on: "...here I am in this familiar space at this particular moment in time. I come from somewhere specific and recognizable with the objective of going somewhere identifiable in a certain amount of time."274 By placing the segregated inmate in a position where she has no sense of connectedness to her past and no rootedness in the present, solitary confinement erodes her sense of who she is. Her de-contextualized environment goes a long way to reducing her to a non-person. As described by Martel, "...prison segregation adds up to being a space with a (non)story as women slip from collective memory—a space which, then, becomes a place of human insignificance."275

The de-contextualization of solitary confinement affects the way in which


274 Martel, supra note 270 at 594.

275 Ibid. at 607.
correctional staff view inmates and the way inmates consider correctional staff. Solitary confinement allows for no sense of history, no perception that the inmate or the guard might have been something else at another point in time, and no exploration of causal relationships. Furthermore, guards tend only to interact with inmates held in solitary confinement in response to bad behaviour:

...it is hard for prisoners to initiate behavior at all in these places, let alone to act and represent themselves as full human beings with true personhood and multidimensional lives and relationships that predate their stay in supermax. To be sure, there is nothing in the day-to-day limited and contorted interactions they have with guards and other staff to remind those in charge of who they really are, were, or could become. A self-fulfilling prophecy is created in which guards see prisoners acting in precisely the degraded terms and within the narrow dehumanized constructs that have been assigned to them, confirming their disparaging views, and justifying—even escalating—their mistreatment.276

Haney’s research suggests that both inmates and guards make a fundamental error of attribution by deciding that the behaviour displayed in solitary confinement is a reflection of the person rather than the incredibly stressful circumstances in which both parties find themselves. Thus, the inmate’s aggressive behaviour is not a result of his psychological deterioration due to unrelenting solitude, but is rather confirmation that he is, indeed, one of the worst of the worst. The correctional officer’s hostility and defensiveness is not a response to the hazards and uncertainties of his work environment, but is rather a reflection of his unreasonable and even malicious personality.277 The creation of a non-space, divorced from time, makes this attribution error easy to make. It is also very dangerous, as the failure of

276 Haney, “A Culture of Harm”, supra note 262 at 976.

277 Ibid. at 975-976.
inmates and staff to realize the effect that the austere environment is having upon them only serves to confirm their worst suspicions and to heighten tension and hostility. The failure to recognize that solitary confinement is producing at least some of the unruly behaviour displayed by inmates allows for that behaviour to serve as the continued justification for their segregation.278

A recurring theme within the Arbour Report is that the correctional branch of the justice system considers compliance with the law to be optional, particularly in a state of emergency. Arbour notes that “even if the law is known, there is a general perception that it can always be departed from for a valid reason, and that, in any event compliance with prisoners’ rights is not a priority.”279 In the aftermath to the 1994 riot, the decision to allow a male emergency response team to strip search female prisoners in segregation was based, at least in part, on a belief that, in the context of a serious emergency, the law did not need to be followed. This belief prevailed despite the fact that the relevant legislation specifically addresses emergency situations.280

The isolated nature of the segregation unit within a prison creates a highly stressful situation for inmates and guards alike. Correctional officers, themselves victims of their work environment, have the impression that they are alone in their assignment of dealing with the difficult inmates they guard. Not only does the

278 Ibid. at 965.
279 Arbour Report, supra note 9 at 52.
280 Ibid. at 75.
outside world seem far away, in some respects it ceases even to exist. Solitary confinement, known to house the worst of the worst, is a place removed from the support of community and the familiar vestiges marking time and space. In these challenging circumstances, it is unsurprising that a sense of emergency generally prevails such that the governing legislation seems to hold little relevance or moral authority for those in charge of maintaining order.
CHAPTER FIVE
IN SEARCH OF A BETTER SYSTEM

“To the future or to the past, to a time when thought is free, when men are different from one another and do not live alone- to a time when truth exists and what is done cannot be undone:
From the age of uniformity, from the age of solitude, from the age of Big Brother, from the age of doublethink – greetings!”

In May 2012, the harrowing tale of Californian university student Daniel Chong made international headlines. Chong was investigated pursuant to a drug raid, taken into police custody for investigation, but was ultimately told that he would not be charged with any offence. While handcuffed in a windowless holding cell waiting to be released, police forgot about him. The lights to his cell turned off and remained off for several days. Though he could hear the muffled voices of those outside his cell, his own cries for help failed to attract any attention. Detained without food or water for five days, Chong was forced to drink his own urine to stay alive. In a state of dehydration, starvation and despair, Chong attempted to carve the words “Sorry Mom” into his arm before ingesting shards from his broken glasses in a possible attempt to end his life. When discovered, Chong was close to death, having lost 15 pounds, suffering from dehydration, kidney failure and a perforated

281 Orwell, supra note 1 at 30. (Excerpt from Winston Smith’s diary)

esophagus. He recovered in hospital while correctional staff where left to figure out how it was that such an error occurred.

On one hand, it is very difficult to understand how this kind of tragedy could take place. How could someone taken into police custody be left totally unaccounted for, to the point that he disappeared from his custodians’ consciousness for a period of five days? On the other hand, Chong’s story is very much the natural consequence of the modern prison system and a tragic example of what this paper addresses. We have been so successful in creating a place apart in our prisons and, apparently, police holding cells, a place that is removed not only from public consciousness but from the consciousness of guards themselves, that a young man was forgotten, not just symbolically, but actually.

Chong was not the worst of the worst offenders. He was not even going to be charged with a criminal offence. Undeniably, Chong was the victim of negligent officers and staff, but he was also the victim of architecture, of a windowless cell and of walls so thick that they muted his cries for help. Had he been left a day longer, it is believed that Chong’s cell, in which he was buried alive, would have indeed entombed his body. Chong’s ordeal will no doubt spawn a considerable lawsuit (news sources report that Chong is seeking $20 million in damages\(^{283}\), but hopefully it will also inspire discussion about how terribly wrong our system of crime and punishment has gone. After all, Chong is not a hardened criminal who the public may assure themselves “got what he deserved.” He was a citizen who was

\(^{283}\) “Daniel Chong drank own urine, wants $20-million” Macleans.ca (4 May, 2012), online: Macleans.ca on campus http://oncampus.macleans.ca/education/2012/05/04/student-forgotten-in-jail-cell-for-five-days/.
supposed to be released free of charges. It cannot be said that he was punished as punishment implies wrongdoing, and we have no reason to believe he was anything except in the wrong place at the wrong time. Simply and undeniably, Chong was the victim of a horrific oversight that resulted in terrible and nearly tragic consequences.

The brutality of Daniel Chong’s story gives some credence to the self-admittedly bold suggestions for punitive reform of Peter Moskos. In his provocatively titled book *In Defence of Flogging*, Moskos recommends the lash as an alternative to our current system of locking up offenders and throwing away the key. Challenging those who reject flogging as an alternative to incarceration based upon its cruelty, Moskos’s words could speak directly to Daniel Chong’s terrible experience:

Is anything worse than being entombed alive? Edgar Allan Poe may as well have been commenting on the morality of the prison system when he wrote, ‘To be buried while alive is, beyond question, the most terrific of these extremes which has ever fallen to the lot of mere mortality.’ From this, seeing life in prison as the burial of the human soul is but a small metaphorical step. At the same time that Poe was writing, an early Sing Sing warden told inmates, “You are to be literally buried from the world.” Charles Dickens called the prison cell a ‘stone coffin’.  

Moskos, a Baltimore police officer turned criminologist, has written about the utter failure of the American war on crime that has led to the mass incarceration of American citizens. The United States of America has a much higher level of

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284 Moskos, *supra* note 207 at 50.
incarceration than we do in Canada,²⁸⁵ and a preference for longer sentences as well, but Moskos’ comments about and criticism of the modern practice of incarceration apply just as readily to the Canadian correctional system. Moskos’ work drew some much-needed attention to some of the absurdities of the current practice of incarceration hereto unexplored within this paper. First, there is the tremendous cost of incarceration, both financially and in terms of the trickle down harm to the un-incarcerated. Moskos bemoans governments’ unwillingness to spend money on citizens in an effort to prevent criminal behaviour despite their enthusiasm for spending money on punishment. Rather than devoting resources to skills training and job creation, governments seemingly prefer to spend money on the 24-hour a day surveillance of an inmate.²⁸⁶ But the cost of housing, watching and feeding the inmate population are certainly not the only costs of incarceration. By plucking people from their lives and placing them in jail, we are preventing them not only from doing bad things (except for those inmates who manage to do bad things while in custody), but also from doing good things to help both themselves and their families and communities.²⁸⁷ By making a person an inmate, our system reduces their identity to a single dimension: criminal. And, sadly, that person is not the only one who suffers. As Moskos wrote:

²⁸⁵ Moskos indicates at more than 1% of America is incarcerated and more than 50% of black Americans without a high school diploma will be incarcerated at some point in their lives: Moskos, supra note 207 at pp. 13 and 63.

²⁸⁶ Moskos, supra note 207 at 88.

²⁸⁷ Ibid. at 63.
... even bad people have some attributes that help their family and community function. From behind bars a prisoner can’t take care of elderly grandparents. His girlfriend suffers. His baby’s mother suffers. Their children suffer. Because of this, in the long run, we all suffer.288

And “we” continue to suffer after the inmate is released. After all, his dissociation from society and criminal record makes securing employment much more difficult, if not impossible.289 Not surprisingly, considering the kinds of alliances that are formed and anecdotes that are shared behind bars, time in prison is itself criminogenic.290

With the backdrop of the cruel, expensive and ineffective system of incarceration, Moskos's work challenges the reader to consider presenting offenders with the option of enduring the sting of the lash rather than the slow burn of time in prison. The lash (two lashes for every year in prison, one lash for shorter sentences and no more than 30 lashes in any case where the lash was imposed) is efficient, “essentially free”, severe and brief.291

The person to be flogged would be inspected by a doctor, tied to a whipping post, and stripped at the butt. The flogger would enter the room, perform a few warm-up snaps of the cane, and then commence. After the proper number of lashes, the offender would again be examined by a doctor, have any wounds tended to, and be sent on his or her way. The punishment would be complete after only a few minutes of brutal pain.292

\[288 \text{Ibid. at 64.}\]

\[289 \text{Ibid. at 65.}\]

\[290 \text{Ibid. at 62.}\]

\[291 \text{Ibid. at 140, 144.}\]

\[292 \text{Ibid. at 146.}\]
According to Moskos’ scheme, flogging would never be forced upon anyone, but would rather be presented as an option to those offenders who must be punished though are not so dangerous that they require separation from society. Moskos asked those who think that his scheme means that criminals will be getting off easy to consider their own humanity. For those who suggest that flogging is too cruel to be entertained, he alluded to the violence, including sexual violence, that occurs in prison and suggested that it is not, in fact, cruelty that they oppose, but rather being confronted with cruelty:

Indeed, we would be deeply deluded – if not downright duplicitous – to express horror at the violence inherent in legal judicial flogging and, by doing so, condone the much more insidious violence inherent in jail and prison. Opposition to flogging often seems to come not from a desire to protect the person being flogged but from a more selfish desire to protect the punisher.

Moskos is not a sadist. He does not relish the idea of inflicting physical harm to others. However, he sees in flogging a transparency and honesty so desperately needed in the correctional system. To its credit, flogging does not involve sending human beings into a black hole where few know what takes place and the rest of us are spared the affront to our eyes. While he wishes the prison reformers well, he believes that “tinker[ing] at the edge of a massive failed system” is simply not

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293 Ibid. at 20-21, 144.

294 Ibid. at 113-114.

295 Ibid. at 57.

296 Ibid. at 147.

297 Ibid. at 90.
enough to make a meaningful difference. Something as dramatic as reintroducing the lash is necessary to shake us from our complacency and force us to consider what our governments do to people in the name of punishment.

The scope of Moskos’s critique is broader than that of this paper. He recommends a total revolution in the way we punish offenders, suggesting that the pre-mass incarceration times, which we typically consider so barbaric were, in fact, less barbaric than our current practice. More narrowly, this paper addresses the practice of solitary confinement within penal institutions. The scope is smaller, but some of Moskos’s themes are useful in considering ways to improve the current practice of segregation.

First, we must promote greater transparency in punishment. As noted in Chapters Three and Four, our modern prison system has removed the offender from society in an unprecedented manner. Once punishment is hidden from public view, the public is largely removed from any discussion of how inmates should be treated. This alienation allows for complacency among those who prefer to remain willfully blind about any abuses that occur behind the closed doors of the penitentiary. Moskos expressed the “progression” towards alienating society’s least wanted most pithily:

Institutionalization – in prisons, asylums, and public housing – has effectively created a disposable class of people to be locked away and discarded. This was not always the case. Historically, even though great efforts were made in early America to keep “outsiders” and the “undeserving” poor off public welfare rolls, society’s undesirables – the destitute, disabled, insane, and even criminals – were still considered part of the community. The proverbial

\[298\] Ibid. at 148.
village idiot may have been mocked, beat up, and even abused, but he was still the village's idiot. Some combination of religious charity, public duty, and familial obligation provided (not always adequately) for society's least wanted. Then reformers got involved. Although designed in part to benefit the public in a free and self-governing society, the almshouse, orphanage, public hospital, and prison all shared a similar and more nefarious purpose: to effectively manage and remove society's least wanted.299

Moskos's words are all the more applicable to the inmates of solitary confinement who are not once but twice removed from society.

Secondly, Moskos challenged his readers to be bold in their recommendations for penal reform. His recommendation of reintroducing the lash provokes a knee-jerk rejection which, upon further reflection, lessens to a nagging discomfort with the idea; the knee-jerk rejection was based, after all, on a naïve understanding of how bad the current system of punishment actually is. Moskos believes that the way we deal with offenders is sufficiently wrong-headed that we should not be afraid to bring out the wrecking ball. So do I. In light of this position, it may be surprising that this paper does not advocate for the end of solitary confinement. There is a reason for that, although it is not a great one. I do not have a better suggestion, a lash if you will. As long as there are prisons, it seems that there must be a more secure place to hold inmates who are completely out of control, or to house particular troublemakers when tensions must be reduced. The recommendation of this paper is that, while there is need for a physical space apart within our current prison system, the psychic distance between segregation and the rest of the world must be diminished. While Moskos might believe that I am not dreaming big enough, I submit that this recommendation is still a bold one,

299 Ibid. at 90.
premised, to put it simply, on making segregation less segregated. To achieve this goal, I recommend a multi-pronged approach, each prong aiming to strengthen the connection between segregation and the outside world.

**The Criminal Offence of Unlawful Confinement**

Perhaps my most ambitious recommendation involves the criminal justice system itself: correctional officers who willfully fail to respect the CCRA and the CCRR in their confinement of an inmate should be subject to criminal prosecution for unlawful confinement. Former inmates who were improperly held in segregation have, on occasion, been successful in suing civilly for false imprisonment.\(^3\) There is no case law to indicate that Canadian correctional staff have ever been found guilty of unlawful confinement for failing to segregate inmates in accordance with the governing legislation. This lack of precedent is not surprising. It is somewhat counterintuitive to posit that jailers could be guilty of unlawfully confining inmates who they are required to guard. In fact, the jailer confining an inmate is a classic example of a situation in which the restriction of another person’s mobility is not unlawful (this assumes, however, that the confinement is within the bounds of the law). However, a civil remedy is simply not sufficient to safeguard inmates’ rights. While in custody, inmates have very limited ability to make the justice system work for them, both financially and logistically. Once released, many former inmates continue to face financial barriers. Furthermore, the damage is already done. Financial compensation is the best that a

system of civil liability can do, and it is unlikely that the actual prison official who decided to flout the rules will be the one with pockets deep enough to compensate the inmate or former inmate.

Notably, recent jurisprudence in the area of unlawful confinement has demonstrated two significant developments. First, two appellate level decisions have upheld convictions of unlawful confinement against parents who, like jailers, have traditionally been considered to possess total authority over the mobility of their children. Secondly, the Manitoba Court of Appeal in Kematch, 2010 MBCA 18 demonstrated the incremental change of the common law by recognizing that psychologically imposed barriers to physical mobility can be sufficient to establish unlawful confinement. This flexibility may suggest that the courts are ready to consider an unlawful confinement allegation against prison guards.

It is important that correctional officers feel the force of the criminal law in order for the laws of Canadian society to permeate the walls of segregation such that the guards who stood outside of Ashley Smith’s cell have a code of conduct to consider beyond the orders of their superiors. Several Canadian decisions have recognized that incarceration does not mean a total loss of liberty and that inmates have the right to enjoy the aspects of their residual liberty unless there is sufficient reason to take them away.\textsuperscript{301} The threat of criminal prosecution for unlawful confinement would send the message that Canadian society cares about the fair treatment of inmates and would serve to remind correctional staff that they share

\textsuperscript{301} See Shubley, supra note 65, at paras. 6-8. Also Miller, supra note 64, at para. 36 and Winters v. BC, supra note 66, at para. 63.
humanity and vulnerability with the inmates that they guard. Civil proceedings, on the other hand, are available only to the few who can afford them and do not carry the same denunciatory message. I believe that the criminal prosecution of correctional officers for the offence of unlawful confinement should be reserved for flagrant violations of the CCRA, or relevant governing legislation, so not to capture innocent and minor mistakes. The offence of unlawful confinement is a more attractive option than criminal negligence causing either bodily harm or death as unlawful confinement can be alleged before irreparable harm, at least physically speaking, has been inflicted.

This suggestion for reform invites several critiques. First and foremost, it would be very difficult to motivate police to lay charges against correctional officers. Inmates’ stories are hidden from view and thus easily forgotten or brushed under the rug by a police department reticent to impugn another branch of corrections and law enforcement. Additionally, correctional officers have a notoriously difficult job and many may find my suggestion draconian. However, I believe that, just as lawyers are aware that they are vulnerable to criminal charges of contempt of court if their behaviour departs dramatically from the established limits of professional conduct, and police officers are aware that they may be charged with assault if they inflict gratuitous violence,\textsuperscript{302} so too should correctional officers feel the weight of the law in order to remind them of their subjugation to it.

As I have already stated, of late Canadian courts of appeal have demonstrated a willingness to think expansively about the offence of unlawful confinement, extending its boundaries to areas previously believed untouchable. In *R. v. E.B.*, the Ontario Court of Appeal upheld a conviction for forcible confinement and second-degree murder in a case of tremendous abuse perpetrated by grandparents against their 5-year-old grandson (who died) and their 6-year-old granddaughter (who survived). Finding the appellants guilty of unlawful confinement, the trial judge held that unlawful confinement does not require total physical restraint but rather only a restriction on liberty.

The court rejected the appellant grandparents’ argument that they confined their grandchildren to their locked, filthy and freezing bedroom as part of a legitimate exercise of parental authority, holding that the right to control children’s behaviour and to restrict their mobility does not permit this kind of degrading treatment. This decision and the decision of *Kematch*, discussed below, represent the first reported decisions in which parents have been convicted of forcibly confining their children. The dearth of other such case law is likely based on a perceived right on the part of parents to restrict the mobility of their children however they see fit.

The court described the terrible abuse endured by the children, J.B.(1) and J.B.(2), as follows:

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J.B.(1) and J.B.(2) were treated like unloved and unwanted animals. They were confined for upwards of 12 hours a day in a locked, barren and unheated room that was more like a dungeon than a bedroom. The most basic needs of J.B.(1) and J.B.(2) were ignored and they were left in utter squalor in their room. That room reeked of urine and feces. Neither child was toilet trained. Their isolation within the home is perhaps best demonstrated by the evidence of a neighbour, who was unaware that J.B.(1) and J.B.(2) even existed, although he visited the home three or four times a week in the year before J.B.(1)’s death.

J.B.(1) and J.B.(2) were allowed out of their room each morning around 10:00 or 11:00 a.m. They were placed on a mat in the kitchen and required to eat the meagre food given to them from a bowl placed on the floor. J.B.(1) was never allowed to go to school. He was made to remain on the mat while out of his room. J.B.(2) attended school part-time. Her teachers noticed that she was filthy, her clothes were dirty and her hair was lice infested. She was always hungry.305

J.B.(1) and J.B.(2) were locked in their bedroom for more than 12 hours a day.306 While the appellants acknowledged that the decision to so confine their grandchildren amounted to “bad parenting”, they argued through their counsel (neither grandparent testified at trial) that they were not acting unlawfully, but rather within the ambit of their parental authority. In particular, they mentioned a concern that the children would drink out of the toilet bowl if they were not so confined. The court described this argument as “patently preposterous”.307 The grandparents had no lawful authority to treat their helpless grandchildren in such a way, neither under s. 43 of the Criminal Code,308 which addresses the physical

305 E.B., supra note 303 at paras. 18-19.
306 Ibid. at para. 98.
307 Ibid. at para. 100.
discipline of minors, nor any other statutory or common law authority.\textsuperscript{309} Both children were unlawfully confined to their bedrooms by their grandparents who had vastly exceeded their authority as guardians.

In \textit{R. v. Kematch}, the Manitoba Court of Appeal upheld a conviction for first-degree murder of a five-year-old girl, Phoenix, who was beaten to death by her parents during the course of a forcible confinement executed in her family home. While the young girl was not kept in her family’s basement under lock and key, she was detained in the basement by the very real threat of abuse that awaited her if she left the basement and came upstairs. For the first time in \textit{Kematch}, an appellate court recognized that unlawful confinement could be affected by imposing a psychological barrier preventing movement as opposed to a purely physical restraint.\textsuperscript{310}

On appeal, both parent appellants argued that their convictions for first-degree murder could not stand as the murder convictions had been elevated to first-degree as a result of the unlawful confinement of the deceased,\textsuperscript{311} and the deceased had not been unlawfully confined. Like the grandparents in \textit{E.B.}, the parents argued that keeping Phoenix in the basement of the family home for extended periods of time was a matter of parenting strategy. The court rejected this position, and quoted the trial decision of Justice Watt in \textit{E.B.} in so doing:

\begin{quote}

\textsuperscript{309} \textit{E.B.}, \textit{supra} note 303 at paras. 101 and 103.

\textsuperscript{310} \textit{Kematch}, \textit{supra} note 304 at para. 89.

\end{quote}
I reject any notion that the treatment of Phoenix can be considered in the context of a parent-child relationship or that this is a case of child discipline being properly and lawfully administered supposedly by care givers. A complete answer to McKay’s allegation of error is again to be found in E.B. where Watt J. deals with the use of force for corrective purposes (at para. 121):

To illustrate a claim of lawful authority, consider the justification contained in section 43 of the Criminal Code, which is in these terms:

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction towards a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

The provision justifies the use of force for corrective purposes only. And the nature and extent of the force used must not exceed what is reasonable under the circumstances. Section 43 does not permit or justify degrading, inhuman or harmful conduct. See, Canadian Foundation for Children, Youth and the Law v. Canada (A.G.), [2004 SCC 4], [2004] 1 S.C.R. 76, 180 C.C.C. (3d) 353. The force used must be corrective, not preventative. The justification also appears directed at what might be determined “situational” correction, not a long-term and invariable or routine practice.312

In his instruction to the jury, the trial judge in Kematch distinguished lawful confinement from unlawful confinement, stating that: “In our society, the law authorizes certain people to confine others. A jailer, for example, may confine a person to a prison in accordance with the terms of a lawful court, order of a court”.313 The use of the jailer as an example of a person who lawfully confines another is noteworthy in the context of this paper. As with parents, however, there are limits to the authority of the jailer's authority to confine an inmate. The Canadian courts have recognized that time in solitary confinement is fundamentally different from time that is spent in the prison’s general population in that is far

312 Kematch, supra note 304 at para. 102.

313 Ibid. at para. 101.
more restrictive. When solitary confinement is imposed in a way that does not honour the requirements of the governing legislation, it is confinement without lawful authority. The courts should be willing and able to see past the fact that it is a prison guard, or another correctional authority figure, who is doing the unlawful confining, just as the appellate courts of Ontario and Manitoba have shown an ability to identify unlawful confinement perpetrated by parents and those standing in the place of parents, another class of persons who, traditionally, have been considered to exercise total control over their charges.

In “The Year in Review: Developments in Canadian Law in 2009-2010”, authors Matthew Law and Jeremy Opolsky selected Kematch as a noteworthy decision that changed the definition of unlawful confinement and the types of fact-patterns which may give rise to the charge. While Law and Opolsky comment that the particular vulnerability of the victim may affect its future applicability, they suggest the possibility for a far-reaching effect. I believe that the Kematch decision, as well as the court’s decision in E.B., illustrates the flexibility of the common law, an appreciation for the psychological state of victims of confinement, and an awareness of a distinction between permissible and impermissible subjugation on the part of authority figures which may inspire confidence that prison guards could be found guilty of unlawful confinement when they imprison inmates in a matter that exceeds their legislative entitlements.

Independent Adjudication and Sentence Reduction for Inappropriate and Extended Administrative Segregation

Michael Jackson and Louise Arbour have both made recommendations for improving the practice of solitary confinement the implementation of which I consider essential to the quest of establishing solitary confinement as a space within a broader community. As referenced in earlier chapters, Jackson insists on independent adjudication for determinations of administrative segregation as well as punitive segregation (contrary to the current practice whereby independent adjudicators outside of the prison system only determine punitive placements in segregation). Louise Arbour insists that inmates who are improperly held in segregation be able to apply to the courts for a reduction in their sentence. I will address the Arbour’s recommendation first as it is particularly timely in light of the Harper government’s Truth in Sentencing act, also known as Bill C-25, which came into effect on February 22, 2010.315

Bill C-25 changed the previously standard practice of awarding 2:1 credit for time spent in pre-sentence custody. In particularly difficult custodial conditions, such as the triple bunking at the Don Jail, courts sometimes awarded 3:1 credit for jail time spent pre-sentence. Prior to Bill C-25, courts gave 2:1 credit for pre-sentence custody in order to recognize the particular hardships (remember Mr. Bacon from Chapter Two?) associated with being detained as a presumptively innocent person awaiting trial: the lack of programming typical of pre-trial detention centres and the lack of earned remission. It is unusual for Canadian

inmates to serve the entirety of their sentences; they are eligible for release after one-third or two-thirds of their sentences, depending on whether they are inmates of the federal or provincial systems. In part, 2:1 credit was given for time spent in pre-sentence custody to recognize the fact that time spent pre-sentence does not count toward the one-third or two-third calculation. The lack of earned remission and educational, retraining, and rehabilitative programming available in pre-sentence custody has led inmates and criminal law practitioners to refer to pre-sentence custody as “dead time”. The name is particularly apt in those circumstances in which the inmate is ultimately acquitted; in those cases, the time served, often a period of several months, counts toward nothing, is in no way compensated, and represents time outside of the person’s life. Often the relief of an acquittal distracts from the injustice inherent in months of punishment endured by someone who is ultimately found not guilty.

The name of Harper’s legislation, “Truth in Sentencing”, suggests that the conservative government was not persuaded by the reasons given for awarding enhanced credit for pre-sentence custody. It implies, and not so subtly, that prior to the Act, there was a lack of truth in sentencing. Under the new regime, 1:1 credit is the new norm for pre-sentence credit, which may be extended to 1:1.5 credit if the circumstances justify it. Two-for-one credit is off the table. Furthermore, if an accused is detained pre-trial based on his criminal record or due to the alleged commission of a breach of a bail condition or a new offence, 1.5:1 credit if off the

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317 Criminal Code, R.S.C. 1985, c. C-46, s. 719(3.1).
table as well. In those cases, 1:1 credit is the new maximum. By creating these ceilings of credit, the conservative government responded to complaints that some detained accused were manipulating the system by delaying their pleas of guilt until they were in a “time served” position based the expected receipt of 2:1 credit. In short, the government reacted to complaints that a sixteen-month sentence became an eight-month sentence, at least according to the calendar.

If we are going to have “truth in sentencing” of the kind established by the Harper government, it seems only fair that we extend that “truth” to the time spent by inmates following their convictions. It seems only appropriate and balanced that we acknowledge the obvious truth that time spent in solitary confinement and segregation, where there is a total lack of stimulation, distraction, or comfort of any kind, lasts longer than time spent in the general population. Often, inmates are placed within solitary confinement or segregation not because of something that they did, but to assist in the smooth functioning of the institution. If this is the case, and an inmate is required to endure harder time through no fault of his own, should he not be compensated by way of a reduced sentence?

Admittedly, the conservative government’s changes to the sentencing regime which took place despite the particular hardships of time spent in pre-sentence custody does not bode well for any acknowledgement, by way of sentence reduction, of the additional burden of solitary confinement. However, the government’s use of the word “truth” evokes my response that truth of the kind advocated by Louise Arbour is just what we need. If we, as a community, based on what I assume to have been the government’s motivation for Bill C-25, have expressed that we are not
going to suffer the manipulation of inmates who strategically exploit the courts’
compassion, surely we must offer truth in sentencing to those inmates who are
exploited by virtue of their powerlessness. To suggest otherwise betrays a
collective impression that, post-sentencing, inmates cease to matter.

Importantly, allowing inmates to appeal to the court for the remedy of
sentence reduction when segregated improperly would strengthen the bond
between the segregated inmate and the rest of the world. It would mean that the
courts would retain stronger oversight over the convicted inmate and that, in
appropriate circumstances, the inmate could initiate a dialogue with the court. Such
a system would also call attention to routine abuses of inmate rights and motivate
prisons and penitentiaries to abide by the governing legislation lest frequent
litigation tarnish their reputations. Again, there is an absurdity inherent in the fact
that abusive state conduct may result in the exclusion of the only incriminating
evidence against an accused, and thereby bring a prosecution to a halt, while no
timely and meaningful remedy is available for inmates who suffer abuses at the
hands of prison officials.\footnote{Arbour Report, supra note 9, at pp. 183-184.}

Michael Jackson’s recommendation of independent adjudication for both
administrative segregation hearings as well as punitive segregation hearings is also
essential for connecting isolated inmates to the outside world, as well as inserting
some truth into sentencing. After all, unlike punitive segregation, there is no
maximum placed on the time that inmates may be required to spend in
administrative segregation. As such, the procedural safeguards in place for

\footnote{Arbour Report, supra note 9, at pp. 183-184.}
disciplinary hearings for serious disciplinary offences are all the more needed for administrative segregation hearings where an inmate's jeopardy is potentially greater. Again, remember that Mr. Bacon, whose *habeus corpus* application was described in Chapter Two, was segregated for seven months while waiting for his trial. The necessity of independent adjudication does not mean, and should not be taken to mean, that Corrections Canada cannot do its job. It is simply recognition of the difficulty that anyone would have in dispassionately assessing matters rooted so close to home. It would help to prevent inmates from being forgotten, and it would help to protect inmates who are difficult or unpopular with the staff from being relegated to the shadowy edges of prison life. It would also serve to protect correctional staff who, no doubt, feel pressure to make decisions that will be popular amongst their colleagues and may be more inclined to segregate demanding inmates as a result.319 Allowing for independent adjudication in *all matters* involving or potentially involving segregation would provide a much-needed conduit between segregation or solitary confinement and the rest of the world.

**Contextualize Segregation**

My final recommendation for improving the current system of segregation is that guards be provided with the personal histories of segregated inmates. The terrible history of Ashley Smith reveals that guards are not always provided with this information. The Union of Canadian Correctional Officers complained that the guards within the federal correctional system who were responsible for Ashley's

supervision felt frustrated by the lack of information they were provided about Ashley's history. Without any historical information about her, without, for example, any information about her loving adoptive family or the fact that the offence that landed her in prison was throwing crab apples at a postal worker, Ashley was nothing beyond her terrible behaviour while in custody. Stripped of the details of their lives and their humanizing qualities, inmates become nothing more than their worst behaviour in their worst moments. Without a sense of history, absent the details as to why an inmate has found himself little more than a caged animal, he is too easily “other”-ized. As Stanley Milgram’s obedience study revealed, people have an easier time inflicting pain as the physical distance between them and the victim increases. It seems that the distance need not be physical. It is easier to ignore the pain of the inmate who one may dismiss as a monster for lack of humanizing information. However, just as abuse begets abuse, compassion, patience and understanding propagate the like. Inmates treated with respect would have an easier time imagining a prison guard as a father, husband and brother, and as someone who has a difficult job to do.

Each of my chapters has been prefaced by an excerpt from Nineteen Eighty-Four, one of English literature’s most celebrated dystopias. Within my prison utopia, prison guards would be expected to sit on a committee seeking to improve conditions within segregation. They would be encouraged to criticize current practices that they believe need fixing. Such a practice would help to normalize dissent within the correctional community and would help to destabilize attitudes

\footnote{A Rush to Judgment, supra note 45 at 7.}
that segregation and solitary confinement must operate in a certain way. Perhaps I am dreaming too boldly, but there simply must be a better way to manage segregation and solitary confinement than our current way of doing business. An historical review of how solitary confinement came to exist in our modern prisons and penitentiaries, an honest evaluation of the terrible harm that it causes, and a fair assessment of the perversities of the practice demand that we do better. The first step may be to open a window.
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