

The Chronic Failure to Control Prisoner Isolation in US and Canadian Law

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The decision to place a prisoner in isolation can profoundly intensify the severity of a legal sanction of imprisonment. While the Canadian legislative regime offers some protections, prison officials are empowered with broad discretion to make this decision with no judicial input. Strikingly, prisoners can be placed in isolation for indefinite periods of time, which has invited critical scrutiny. Litigation under the Canadian Charter of Rights and Freedoms could challenge the current Canadian scheme, but the US experience of litigating solitary confinement warns of the limits of some forms of judicial intervention as a means to generate effective controls over this practice. In response to extreme forms of solitary confinement, American courts have only articulated minimal constraints and narrow individual exemptions—no court has found the basic practice of indefinite isolation to be constitutionally barred, and it is currently used on a widespread basis. The American example sheds light on the possibilities of litigation as a method of penal reform and reveals a judicial tendency to police only peripheral issues without addressing fundamental flaws in prevailing penal practices. Canadian prison legislation already includes many of the same protections that have been extracted from US courts, but essential protections remain absent in both countries. Law reform efforts should aim for a judicial declaration that prohibits isolation for indefinite and excessive terms, and mandates external oversight over all forms of isolation.

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Introduction

I. The Canadian and US Contexts

II. Common Elements and Critiques of Prisoner Isolation

A. *Isolation Targets and Triggers Mental Illness*

B. *Overuse Is a Feature of Isolation*

III. Canadian Administrative Segregation

A. *The Legislation*

B. *The Practice*

IV. US Litigation Outcomes

A. *Mental Health: Individualizing Harm*

B. *Due Process and Conditions: Civilizing Reforms*

V. Analysis: Litigating Prisoner Isolation

A. *Mobilizing Public Sentiment*

B. *Changing Values and the Question of Remedy*

Conclusion

Introduction

There are always two deaths. The real one, and the one people know about.

—Jean Rhys, *Wide Sargasso Sea* (1966)¹

A prisoner in isolation or solitary confinement spends the vast majority of the day locked inside a prison cell. Social, occupational and sensory experiences are highly curtailed, if not completely denied, creating a profoundly more intense punishment than time spent in the ordinary prison community. Isolation can have negative consequences on the health, well-being and future prospects of prisoners subjected to it. Despite these risks, prison managers maintain that easy access to prisoner isolation is a necessary and legitimate tool to preserve security in high-risk institutions. The practice has emerged as one of the most salient subjects of debate in contemporary penal policy.

Prisoner isolation is a powerful example of a prison's ability to "modulate" the severity of a judicially imposed sanction.² Michel Foucault points out that while it is a legal decision that generates a criminal penalty, prison officials—not the courts—control "its administration, its quality

1. Jean Rhys, *Wide Sargasso Sea* (London, UK: Deutsch, 1966) at 128.

2. See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Pantheon Books, 1977) at 244–47.

and its rigours”³ Notwithstanding its intensity and effects on prisoners, isolation falls within this administrative framework. Legal systems have generated rules to control, to some extent, the administration of this form of confinement. In the United States, legal limits on prisoner isolation are largely the product of litigation, whereas the Canadian scheme arrived through legislation. While the US and Canada have distinct constitutional traditions, penal histories and practices of isolation, the formal legal controls of the two countries’ systems share striking similarities. Both preserve a core level of power for prison officials, who can effectively modulate the severity of a prison sentence by isolating prisoners for indefinite and prolonged periods of time. This article will engage with the practice of prisoner isolation in both jurisdictions and analyze the prospects of using litigation to achieve reforms in the Canadian context.

Part I sets out the legal, historical and political background of each country on the subject of prisoner isolation and justifies a comparative analysis. Part II describes the common elements of prisoner isolation in its contemporary forms and sets out two prominent critiques of the practice: its effects on mental health and its tendency to be overused. Part III describes the law and practice of prisoner isolation in Canada, where indefinite isolation is known as “administrative segregation” and is prescribed by federal legislation. Part IV sets out American litigation reform outcomes to date. US federal courts have granted relief in many cases, but have limited the scope of protection to the seriously mentally ill and have stipulated only minimal due process controls on solitary placement decisions. Part V analyzes the prospects of using litigation to reform prisoner isolation in Canada by drawing lessons from the US experience, where litigation has brought hidden practices to the public’s attention and awoken moral sensibilities, sowing the seeds for negotiated reform with elected officials and correctional administrators.

There are signs of change. The American system has taken some small steps toward the difficult process of dismantling the super-maximum security (supermax) regime, and has started to shine a light on the notoriously secretive practices of solitary housing at regular maximum-security state prisons.⁴ There is newfound doubt about relying

3. *Ibid* at 246.

4. See David C Fathi, “United States: Turning the Corner on Solitary Confinement?” (2015) 4:1 *Can J Human Rights* 167 [Fathi, “Turning the Corner”].

on long-term isolation as a legitimate means of administering state punishment. Increasingly, the question in the American system is *how* to end the practice rather than *whether* to end it. Amidst depressed state economies, a national policy conversation has ignited about whether to retain expensive practices of prisoner isolation. In a remarkable reversal of trend, states are considering closing supermax prisons or having them repurposed to maximum-security institutions.⁵

Canada has seen progress too. The Correctional Service of Canada (CSC) now accepts that long periods in segregation are not conducive to prisoner health or correctional goals⁶—these facts are not in dispute. But Canada has not yet benefited from proactive leadership within corrections in terms of concrete reforms, and the turn to litigation is intensifying. In January 2015, comprehensive *Charter* challenges to the legislative provisions on administrative segregation were filed in British Columbia and Ontario.⁷ Within days of the BC filing, CSC Commissioner Don Head issued a statement to the media that the CSC was considering a “new model” for segregation.⁸ The official CSC position remains, however, that “the term solitary confinement is not accurate or applicable within the Canadian federal correctional system”—a disavowal articulated in the same report that explicitly refuses to place any time restrictions on the practice.⁹ Media coverage has embodied what seems to be sensible doubt

5. See Erica Goode, “Prisons Rethink Isolation, Saving Money, Lives, Sanity”, *The New York Times* (10 March 2012), online: <www.nytimes.com>.

6. Correctional Service Canada, “Response to the Coroner’s Inquest Touching the Death of Ashley Smith” (Ottawa: CSC, December 2014) at 3.2 [CSC, “Response to Smith Inquest”].

7. On January 19, 2015, the BC Civil Liberties Association and the John Howard Society of Canada filed a lawsuit in the BC Supreme Court. *British Columbia Civil Liberties Association v Canada (AG)* (19 January 2015), Vancouver, BCSC S=150415 (Notice of Civil Claim) [BCCLA]. On January 27, 2015, the Canadian Civil Liberties Association and the Canadian Association of Elizabeth Fry Societies filed a similar suit in the Ontario Superior Court of Justice. *Canadian Civil Liberties Association v Canada (AG)* (27 January 2015), Toronto, Ont Sup Ct J CV-15-520661 (Notice of Application) [CCLA].

8. Laura Stone, “Canada Looking at ‘New Model’ for Solitary Confinement: Top Prison Official”, *Global News* (27 January 2015), online: <globalnews.ca>.

9. CSC, “Response to Smith Inquest”, *supra* note 6 at 3.2.

that the CSC does not engage in a practice that it refuses to reform.¹⁰ As these proceedings unfold, Canadian law reformers can harness the expertise and energy emerging from an American-based, but increasingly global, social movement contesting solitary confinement. The question remains whether the Canadian judiciary will intervene to effectively end reliance on indefinite and excessive prisoner isolation.

I. The Canadian and US Contexts

In the US, debate about solitary has been shaped by the rise of a network of supermax prisons specifically designed to hold all prisoners in long-term solitary.¹¹ While prisoner isolation has been used since the outset of the US prison system, the practice arrived in this new form in the 1980s. Changes to sentencing policy in the 1970s sent unprecedented numbers pouring into state custody—creating tension, crowding and increased violence. In response, prison administrators advocated for new mechanisms to control increasingly large, complex and high-risk inmate populations.¹² In 1987, Arizona opened the first supermax specifically designed to deliver constant lockdown in cells,¹³ and over the next seven years, fifteen more were opened across the US.¹⁴ Unique to supermax is the use of cutting-edge technology to perfect physical separation, surveillance and inspection—allowing even staff contact to be virtually eliminated.¹⁵

10. For press coverage of the CSC response to the Ashley Smith Coroner recommendations, see e.g. Josh Wingrove, “Official Response to Ashley Smith Case Sidesteps Most Prison Proposals”, *The Globe and Mail* (12 December 2014), online: <www.theglobeandmail.com>; Colin Perkel, “Feds’ Response to Ashley Smith Inquest Panned as Cynical, Inadequate”, *Global News* (12 December 2014), online: <globalnews.ca>.

11. In 2003, the constitutionality of supermax confinement in the US was called “the most important new issue in large-scale inmate litigation”. Margo Schlanger, “Inmate Litigation” (2003) 116:6 *Harv L Rev* 1555 at 1668.

12. See Roy D King, “The Rise and Rise of Supermax: An American Solution in Search of a Problem?” (1999) 1:2 *Punishment & Society* 163 at 167–70.

13. See Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford: Stanford University Press, 2010) at 5.

14. See US, National Institute of Corrections, *Supermax Housing: A Survey of Current Practice* (Longmont, Colo: Department of Justice, 1997).

15. See Sharon Shalev, *Supermax: Controlling Risk Through Solitary Confinement* (Portland, Or: Willan, 2009) at 23 [Shalev, *Supermax*].

Canada has not followed the American trend of erecting a network of supermax-type facilities for administering solitary confinement.¹⁶ The Canadian prison system does, however, regularly rely on the continuous cellular confinement that is the central feature of supermax institutions, and such confinement is provided for in federal legislation.¹⁷ In 1982, the entrenchment of the *Canadian Charter of Rights and Freedoms*¹⁸ changed both the structure and culture of Canadian law and politics, and eventually triggered the passage of the country's first comprehensive prison legislation. The 1992 *Corrections and Conditional Release Act (CCRA)* established the first detailed rules for "administrative segregation".¹⁹

16. Canada does have one supermax-style institution in Quebec, called the Special Handling Unit, where all prisoners are held in near-constant cellular confinement, typically for months and years, and are subject to enhanced security protocols for any movement within the institution. See Correctional Service of Canada, "Special Handling Unit", Commissioner's Directive No 708 (Ottawa: CSC, 13 June 2012).

17. In 2008–09, the CSC made 7,619 placements in administrative segregation, with an average of 900 segregated prisoners on any given day. The Correctional Investigator calls this number of placements "astonishing" given that the total incarcerated population in the CSC's maximum- and medium-security institutions that have segregation units is less than 10,000 prisoners. A snapshot of the segregation population indicates that on April 12, 2009, 37% (311 of 848) of segregated offenders had spent over 60 days in administrative segregation. See Howard Sapers & Ivan Zinger, "The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections" (2010) 30:5 Pace L Rev 1512 at 1525–26. In 2011–12, 81.3% of segregation placements were involuntary admissions. Remarkably, only 2.2% of admissions were disciplinary, confirming that the more rights-protecting prison discipline system is subverted by the presence of the administrative segregation category. The average stay for a male offender was 35 days, but 16.5% of segregation placements in 2011–12 lasted longer than 120 days. See Ivan Zinger, "Segregation in Canadian Federal Corrections: A Prison Ombudsman's Perspective" (Paper delivered at Ending the Isolation: An International Conference on Human Rights and Solitary Confinement, University of Manitoba, 22 March 2013), online: <www.oci-bec.gc.ca/cnt/comm/presentations/presentations20130322-23-eng.aspx> [Zinger, "Segregation in Canadian Federal Corrections"].

18. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11 [*Charter*].

19. SC 1992, c 20 [*CCRA*]. I use the language of segregation, solitary confinement and isolation interchangeably. Prison officials often object to the use of "solitary confinement", but terminology is not the point. The central concern is with the removal of individuals from the ordinary prison community, including from peer contact and programming, to be held in cells for the vast majority of the day and night, with no specified or reasonable release date. In Canada, the formal legislative term that covers much of this mode of isolation is "administrative segregation".

The *CCRA* states that the purpose of administrative segregation is to “maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates”.²⁰ The authority to impose administrative segregation is lodged with the “institutional head”, who may order it only if “there is no reasonable alternative”.²¹ The institutional head must believe on “reasonable grounds” that (1) the inmate is acting in a way “that jeopardizes the security of the penitentiary or the safety of any person”; (2) that “allowing the inmate to associate with other inmates would interfere with an investigation”; or (3) that the inmate’s own safety is in jeopardy.²²

While the *CCRA* contains some robust formal rules governing administrative segregation that American reformers are still fighting for,²³ segregation is still used in abusive ways. The problem is that the broad language of the *CCRA* reserves for prison officials the power to segregate prisoners for indefinite periods with no external input. Under existing law and policy, officials can also keep segregated inmates in their cells for all but one hour of each day.²⁴ Although segregation can greatly enhance the severity of a prison sentence, prisoners do not know when or how they might be released from it. Judicial review is difficult to access and can occur only after the fact. The legislative scheme itself has not been tested by a systematic *Charter*-based lawsuit; however, the absence of such

20. *Ibid.*, s 31(1).

21. *Ibid.*, s 31(3).

22. *Ibid.*, ss 31(3)(a)–(c).

23. For example, many of the reforms recommended in the American Bar Association’s proposed Criminal Justice Standards on the Treatment of Prisoners, like regular internal reviews, are already part of Canadian law on a formal level. See Margo Schlanger, “Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners” (2010) 47:4 *Am Crim L Rev* 1421 [Schlanger, “Regulating Segregation”].

24. Prison policy stipulates that segregated prisoners must be allowed out-of-cell exercise for at least one hour per day. There is no other law or policy that mandates any time out-of-cell for segregated prisoners. See Correctional Service of Canada, “Administrative Segregation”, Commissioner’s Directive No 709 (Ottawa: CSC, 9 November 2007) [CSC, “Administrative Segregation”].

a challenge should not serve as evidence that the provisions are *Charter* compliant.²⁵

In an influential Commission of Inquiry report, Louise Arbour concluded that solitary is routinely administered in violation of law and policy, in what amounts to “a profound failure of the custodial mandate of the Correctional Service” of Canada.²⁶ Problems arise in relation to both the enforcement of the legal rules that govern the practice, and inadequacies in the rules themselves. Prison administrators’ reliance on solitary confinement appears to be increasing,²⁷ and the problem is likely worse in provincial jails.²⁸

25. Prisoner litigation in Canada faces multiple barriers. There is little expertise amongst lawyers and the subject is rarely taught in law schools. Provincial legal aid certificates are difficult to obtain for anything other than criminal trials, and there are only two legal clinics with specialized expertise in prison law: Prisoner’s Legal Services in British Columbia and the Prison Law Clinic at the Faculty of Law, Queen’s University. In addition, unlike the US, Canada has no history of civil rights legislation to ensure the payment of reasonable damages on successful suits for violations. Normal delays in court proceedings often make cases moot, and the federal Correctional Service settles viable cases before hearing and insists on non-disclosure clauses. It is also difficult to access penal institutions and even more difficult to access isolation units. Once individuals are released from solitary, they often want to move on with their lives, whether in the prison or the community. Individuals struggling to reconstruct their lives are likely to agree to settlement of their legal claims. Future cases should be filed with these risks in mind, and should name at least one organizational plaintiff so as to reduce the pressure on a single individual plaintiff to carry through the litigation. For a detailed case study that embodies these dynamics, see Lisa Coleen Kerr, “The Origins of Unlawful Penal Policies” (2015) 4:1 *Can J Human Rights* 89.

26. *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, by the Honourable Louise Arbour, Catalogue No JS42-73/1996E (Ottawa: Public Works and Government Services Canada, 1996) at 81 [*Arbour Report*].

27. In 2012–13, there were 8,221 admissions into segregation, up from 7,137 in 2003–04. See Kathleen Harris, “Isolation of Inmates Rising in Crowded Prisons”, *CBC News* (6 August 2013), online: <www.cbc.ca> (statistics provided by the CSC and obtained through Access to Information). In his 2013–14 annual report, the Correctional Investigator reported a 6.4% increase in administrative segregation over the preceding five years. In that year, there were 8,328 administrative segregation placements, with an average count of 850 placements per day. See Canada, Office of the Correctional Investigator, *Annual Report 2013–2014*, by Howard Sapers, Catalogue No PS100-2014E-PDF (Ottawa: OCI, 2014) at 32.

28. In this article, I focus on the federal system, where prisoners serving sentences of two years or longer are placed. Far less is known about conditions and practices in provincial

Given Canada's shifting politics of penal policy and the refusal of both Liberal and Conservative governments to respond to multiple expert, non-partisan calls for reform, acceptable reforms will not be achieved in the political realm.²⁹ Calls for reform have only intensified with the case of Ashley Smith, whose 2007 death after extensive periods in administrative segregation has become a national symbol of institutional failure and legal inadequacies.³⁰ A Coroner's Inquest into her death concluded that the punitive culture of segregation was a severely flawed means to address Smith's challenges, and that this punitive atmosphere cultivated the context within which correctional officers did not immediately intervene as she lay dying in her cell. Although the Coroner unequivocally recommended abolishing indefinite forms of segregation, the CSC defiantly rejected these recommendations.³¹ A *Charter*-based lawsuit is the only avenue that remains to remedy the persistent refusal of prison administrators and legislators to appropriately constrain the practice of prisoner segregation.

In recent decades, solitary confinement has proliferated within US prisons despite being challenged in the courts. That experience is relevant to a Canadian audience for several reasons. First, while the political and

jails, which are presumed to be in worse shape due to weaker oversight and accountability than the federal system. Debra Parkes, who is currently researching the use of segregation in Manitoba jails, has stated that "[s]olitary confinement may be used even more in provincial jails than in the federal system", but there are no accurate statistics because "[t]here are no meaningful mechanisms for accountability in provincial and territorial corrections". Kirk Makin, "Canadian Prisons 'Out of Step' on Solitary Confinement", *The Globe and Mail* (21 March 2013), online: < www.theglobeandmail.com >. See also Debra Parkes, "Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement" (2015) 4:1 Can J Human Rights vii.

29. For a detailed history of attempts to reform administrative segregation, see Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48:2 Can J Crim & Corr 157 [Jackson, "Litmus Test of Legitimacy"]. Jackson chronicles the multiple independent, expert commissions and investigations into the Canadian law and practice of administrative segregation over the past two decades. In every review that has ever been undertaken, the result has been a call for substantial reform, including widespread consensus on the need for independent oversight over all segregation placements. The Correctional Service and the Canadian government have consistently refused to act despite extraordinary unity in the calls for reform and notwithstanding the seriousness of the interests at stake.

30. Correctional Service of Canada, *Coroner's Inquest Touching the Death of Ashley Smith* (Ottawa: CSC, 2013) [CSC, *Coroner's Inquest*].

31. CSC, "Response to Smith Inquest", *supra* note 6.

legal context of state punishment differs to some degree, there are structural and institutionally specific difficulties inherent in prison laws and solitary regulations that arise in both countries. Isolation and separation are prevalent management techniques that give rise to common problems of limits and oversight. Canadian prison reformers are now forced to turn to the courts in order to pursue the project of improved legal controls for solitary confinement. We stand to benefit from the extensive American experience with that same pursuit. The extraordinary scale of American incarceration and the deeper history of constitutional litigation mean that this central topic of penal law has been more extensively adjudicated under reasonably similar democratic structures and constitutional language. Canada can borrow reform strategies and avoid replicating mistakes.

Second, American practices of solitary confinement represent an extreme point on the spectrum of penal severity. It is important for Canada to understand its own place on that spectrum, rather than dismissing comparisons on the basis of American “penal exceptionalism”³² or, conversely, by assuming similarities that do not exist. As Mayo Moran has said about this type of comparative approach: “[I]n studying the approach that another country takes to a problem we all face, the most valuable knowledge we may gain may be self-knowledge”.³³ This article specifies the features of each system and contemplates points of similarity and difference. Comparing the two countries’ systems also reveals that, absent the critically necessary reforms of reasonable time limits and regular external oversight, the articulation of additional legal rules in either country might be meaningless.

In his literary study of American punishment, Robert Ferguson remarks that the US system embodies a “thrust toward incarceration beyond all verifiable need”.³⁴ But Ferguson also thinks that it remains possible to challenge the habitual communal beliefs at the core of that

32. Penal exceptionalism tends to involve using simplistic tropes to explain the inevitable divergence of the US from its peers, such as claims that “Americans are Puritan, or vigilante, or racist, or individualistic”. David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Cambridge, Mass: Harvard University Press, 2010) at 20 [Garland, *Peculiar Institution*].

33. Mayo Moran, “Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech” [1994]:6 *Wis L Rev* 1425 at 1513.

34. Robert A Ferguson, *Inferno: An Anatomy of American Punishment* (Cambridge, Mass: Harvard University Press, 2014) at 7.

punitive severity.³⁵ Legal process has helped generate an emerging notion that indefinite solitary is an unacceptable practice—one that administrative need cannot justify. The question is how to achieve the translation of growing public concern into effective legal change, and how to resist reforms that could serve in the end to save a practice that we might wish to abolish.

II. Common Elements and Critiques of Prisoner Isolation

Prisoner isolation must be understood in contrast to life in the ordinary prison setting. Prisoners in general population have some measure of free movement, social interaction with peers, access to programming and are able to spend much of the day outside of their cells. Solitary removes individuals from this ordinary constrained liberty and imposes stigma along with isolation. Canadian Supreme Court Justices Wilson and Cory emphasized the significance of the treatment in a 1990 case about whether solitary is a “true penal [consequence]” sufficient to attract criminal procedural protections under the *Charter*.³⁶ They dissented from a majority holding that characterized solitary as a benign administrative measure, observing: “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.”³⁷ Similarly, as Kennedy J of the US Supreme Court said in a 2005 review of a supermax prison: It is “more restrictive than any other form of incarceration in [that state]”.³⁸

The isolation of prisoners is a standard managerial technique that can be used for a range of legitimate reasons, including: to separate prisoners who have a conflict with one another; to provide temporary protection for prisoners who are vulnerable in the open population; and to isolate those with communicable diseases. Sensible critiques do not contest these limited, legitimate uses. In appropriate cases, physical separation should

35. *Ibid.*

36. *R v Shubley*, [1990] 1 SCR 3 at 7, 71 OR (2d) 63.

37. *Ibid* at 9.

38. *Wilkinson v Austin*, 545 US 209 at 214–15 (2005).

be imposed during the time required to make an alternative arrangement, like an appropriate transfer or the delivery of healthcare. Critique of prisoner isolation is driven by the more problematic aspects of the practice that defy justification: the isolation of the mentally ill; isolation for petty reasons; indefinite isolation; isolation in lieu of appropriate safety measures; isolation to address overcrowding; isolation for excessive periods of time; lack of procedural safeguards for decision making and reviews; isolation in punitive conditions of confinement; failure to deliver meaningful mental and physical health care; and a lack of programs and social contact to ameliorate the effects of isolation. Such risks of abuse are inherent in the legal frameworks that currently govern the practice.

A formal distinction between administrative and disciplinary segregation appears often in prison codes and in the minds of prison officials. In one form, solitary is known as “administrative segregation” and is officially imposed on the basis of general managerial rationales, like protecting the “safety and security” of the institution. Prison officials typically maintain that this administrative form of segregation is “not punishment”, though critics point to an unmistakable punitive and control function, and identical conditions of confinement.³⁹ In its other form, solitary confinement is a formal part of institutional discipline. Disciplinary segregation is used to punish prisoners for violating specific prison rules, and prisoners facing disciplinary segregation in Canada are afforded important legal entitlements.⁴⁰ By contrast, administrative segregation can be imposed with little process, for indefinite periods of time and often for highly general reasons that prisoners do not know in advance. Administrative segregation and other forms of long-term solitary are prone to particular forms of abuse and have been scrutinized

39. See e.g. Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 287 [Jackson, *Justice Behind the Walls*].

40. As I discuss further, the Canadian federal system has a more rights-protecting prison disciplinary regime than most US systems. Most US systems rely on a hearing officer who is a prison staff member, and prisoners are either self-represented or represented by a designated fellow prisoner. Due process protections in the US require only that the inmate be informed of the facts and be given some chance to respond. See *Wolff v McDonnell*, 418 US 539 (1974). This is part of why the lack of controls for administrative segregation is so striking in Canada—the prison disciplinary system is far better.

in the US and Canada in recent years. What follows is a brief review of these critiques.⁴¹

A. Isolation Targets and Triggers Mental Illness

The most common critique of solitary confinement concerns its effects on mental health. In 1997, Craig Haney and Mona Lynch surveyed the historical and contemporary literature on the experiences and effects of prisoner isolation, finding “strikingly similar negative psychological effects” in various confinement settings, including “anxiety, panic, rage, loss of control, appetite and sleep disturbances, [and] self-mutilations”.⁴² More recent evidence indicates that even small doses of prisoner isolation can pose significant threats to mental health.⁴³ These effects can be particularly severe where it is used for long periods, on vulnerable prisoners, and where ameliorative features are not in place. US federal judges have repeatedly cited expert evidence to conclude that solitary can cause mental harm.⁴⁴

41. Most of the material relied on here emanates from the US, but I have focused on factors that are particularly relevant in Canada: the impact of solitary on the mentally ill and the factors that can lead to overuse. Canadian material on these points is expanded upon in Part III.

42. Craig Haney & Mona Lynch, “Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement” (1997) 23:4 NYU Rev L & Soc Change 477 at 530.

43. See e.g. Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement” (2003) 49:1 Crime & Delinquency 124; Stuart Grassian, “Psychiatric Effects of Solitary Confinement” (2006) 22:1 Wash UJL & Pol’y 325; Jesenia Pizarro & Vanja Stenius, “Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates” (2004) 84:2 Prison J 248. For a literature review of the health effects of solitary, see Sharon Shalev, *A Sourcebook on Solitary Confinement* (London, UK: Mannheim Centre for Criminology, 2008).

44. See e.g. *Jones ‘El v Berge*, 164 F Supp (2d) 1096 (WD Wisc 2001). The judge in *Jones ‘El v Berge* concluded from the expert evidence that supermax confinement “is known to cause severe psychiatric morbidity, disability, suffering and mortality”, adding that this can occur in prisoners with no history of serious mental illness, and in those who are prone to breakdown in the face of stress and trauma. *Ibid* at 1101. The judge concluded: “Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.” *Ibid* at 1102. See also *Madrid v Gomez*, 889 F Supp 1146 (ND Cal 1995) (“[s]ocial science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances” at 1230).

The US government has even agreed that the effects of solitary can be grave when used on those who are already mentally ill.⁴⁵

The concern about health effects reached a new pitch in 2011 when the United Nations Special Rapporteur on Torture unequivocally concluded that “solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions”, and that the practice is “contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society”.⁴⁶ The UN report found that solitary should *never* be used on the mentally ill, juveniles or those in pretrial confinement, and that the practice amounts to torture when it extends beyond a fifteen-day period for any person. The law and practice in the US and Canada does not come close to abiding by these recommended standards.⁴⁷

Rather than being protected from such high-risk treatment, mentally ill prisoners are likely to be targeted for a solitary placement. This is because they often struggle to adjust to prison life and may exhibit symptoms that are mistaken for behavioural defiance.⁴⁸ These groups are also difficult to house elsewhere in the prison, and yet their struggles only

45. See US, National Institute of Corrections, “Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit” (Washington, DC: Department of Justice, 2004) [NIC, “Liability Concerns in the ECU”]. The report notes that isolation units are “hazardous to the mental health of inmates with certain types of mental conditions. Some of these inmates should not be placed in an ECU at all, and others may require very careful monitoring in the ECU and may have to be removed from the ECU should their mental condition deteriorate.” *Ibid* at xvi.

46. *Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UNGA, 66th Sess, UN Doc A/66/268 (2011) at para 79 [UN Report].

47. For example, Oklahoma, Indiana, Ohio, Texas and Illinois continue to hold mentally ill prisoners in supermax prisons. See Shalev, *Supermax*, *supra* note 15 at 69. Canada has formally refused to commit to not placing mentally ill prisoners in solitary. See Canada, Office of the Correctional Investigator, *Annual Report 2011–2012*, by Howard Sapers, Catalogue No PS100-2012E-PDF (Ottawa: OCI, 2012) at 64–65 [OCI Report 2011–2012].

48. See NIC, “Liability Concerns in the ECU”, *supra* note 45 (“the types of behaviors that make placement in an ECU likely are commonly associated with mental illness” at 15). See also *Madrid v Gomez*, *supra* note 44. In this leading class action prisoner lawsuit, the warden of Pelican Bay supermax prison testified at trial that: “By virtue of its mission, Pelican Bay now houses most of the psychiatrically disabled inmates who have a history of violent and assaultive behavior.” *Ibid* at 1215.

intensify in segregation. Not only does mental health erode in the highly non-therapeutic conditions of segregation, segregated prisoners often become increasingly unable to meet the behavioural standards required for release. Contrary to popular misconception, segregation units of American prisons are “full not of Hannibal Lecters”, but of the “young, the pathetic, the mentally ill”.⁴⁹ As a result of structural realities, solitary is a technique that is often used by prison officials to punish and contain the irritating and the unwell.

B. Overuse Is a Feature of Isolation

The second prevalent critique concerns the application of long-term solitary to an ever-growing cohort of prisoners, often on flimsy grounds. During the time that supermax prisons were built, the use of administrative segregation also expanded within ordinary high-security prisons, in wings known as special housing units (SHUs). Approximately 80,000 US prisoners are thought to be in long-term solitary, with 25,000 in supermax and the remainder in SHUs.⁵⁰ Guards’ unions and prison administrators justify supermax and other forms of administrative segregation as a means to control prison violence and disrupt gang hierarchies. In practice, however, these institutions have grown beyond their original purposes. Prison officials operate under flexible standards without independent oversight, and line officers lack incentives to manage complex situations without simply resorting to isolation.

Overuse also has a political economy dimension. In some states, the motivation to build supermax prisons was a political decision, rather than an actual need within corrections. Chase Riveland, the former Secretary of Corrections in Washington and Colorado, has explained that supermax prisons became “political symbols of how ‘tough’ a jurisdiction

49. Schlanger, “Regulating Segregation”, *supra* note 23 at 1432, citing Rob Zaleski, “Supermax Doesn’t Reflect the Wisconsin Dickey Knows”, *Capital Times [of Madison, Wis.]* (27 August 2001) B1 (quoting Walter Dickey, former head of the Wisconsin Department of Corrections).

50. Angela Browne, Alissa Cambier & Suzanne Agha, “Prisons Within Prisons: The Use of Segregation in the United States” (2011) 24:1 Federal Sentencing Reporter 46; Alexandra Naday, Joshua D Freilich & Jeff Mellow, “The Elusive Data on Supermax Confinement” (2008) 88:1 Prison J 69.

has become”.⁵¹ In order to achieve economies of scale, the state may build more isolation cells than are required, simply because it is more cost effective to build a 500-bed facility than a 100-bed unit. Once built, the system tends to be motivated to fill these costly spaces.⁵²

In one prisoner lawsuit, evidence emerged that wardens in Wisconsin requested the addition of 25 segregation cells to the 4 major adult male institutions to deal with the most “dangerous and recalcitrant inmates”.⁵³ Instead of delivering upon that request, the governor and legislature chose to build a 500-bed supermax.⁵⁴

While rising violence in American prisons precipitated the rush to supermax styles of confinement, Roy King concludes that the use of supermax custody today has become, at best, “a pre-emptive strategy that is almost certainly disproportionate in scale to the problems faced”.⁵⁵ At worst, it is a “routine and cynical perversion of penological principles”.⁵⁶ Forty-four American states now have a supermax facility, although King points out that it is possible that some states chose to define some of their accommodation as supermax so as not to appear out of step.⁵⁷ It is highly improbable that states as diverse as Maine, Connecticut, Virginia and Nevada all require regular reliance on supermax confinement. It is highly doubtful, for example, that the problem of prison gangs in each of those systems is comparable to the serious gang problem that troubles the prison system and motivates much of the reliance on segregation in a state like California.⁵⁸

Even outside supermax, long-term solitary has been extended to petty wrongdoers convicted of minor disciplinary infractions. A 2012 New York Civil Liberties Union report concluded that the “SHU sweeps in a wide

51. US, National Institute of Corrections, *Supermax Prisons: Overview and General Considerations*, by Chase Riveland (Washington, DC: NIC, 1999) at 5 [NIC, *Supermax Prisons*].

52. As Roy King explains: “The extra accommodation, of course, had to be used and has been filled by ‘make-weight’ prisoners who nevertheless endure supermax conditions, and become labelled as ‘needing’ them.” King, *supra* note 12 at 177.

53. *Jones v El v Berge*, *supra* note 44 at 1102.

54. See NIC, *Supermax Prisons*, *supra* note 51.

55. King, *supra* note 12 at 182.

56. *Ibid.*

57. *Ibid* at 173.

58. *Ibid* at 182.

swath of prisoners” for “prolonged periods of time for violating a broad range of prison rules, including for minor, non-violent misbehavior”.⁵⁹ In Colorado, a legislature-sponsored study concluded that the state was overusing solitary and that only twenty-five percent of prisoners in extreme isolation had been placed there for injuring prisoners or staff, which was the original rationale for the unit.⁶⁰ These risks are now well understood even from within corrections, as one US government report observed: “Pressures will always exist to send troublesome inmates to an [Extended Control Unit (ECU)] and keep them there. Unless the keepers of the keys to both the front and back doors of the ECU make their decisions carefully, the unit can quickly fill to capacity, with very little turnover.”⁶¹

Most American prisons are under state control, and only recently has an effort been made to comprehensively collect state policies on segregation. In 2013, the Arthur Liman Public Interest Program at Yale Law School published a report collecting the state and federal policies related to SHU placements.⁶² It concluded that most segregation policies are marked by shared characteristics: vagueness and overbreadth in the reasons that may authorize isolation. The policies invariably cite the general category of the “safety and security” of inmates and staff, just like the Canadian legislation. The breadth of these policies ensures that prison officers have

59. Scarlet Kim, Taylor Pendergrass & Helen Zelon, *Boxed In: The True Cost of Extreme Isolation in New York’s Prisons* (New York: New York Civil Liberties Union, 2012) at 2.

60. See US, National Institute of Corrections, *Colorado Department of Corrections Administrative Segregation and Classification Review*, by James Austin & Emmitt Sparkman (Washington, DC: NIC, 2011) at 17.

61. NIC, “Liability Concerns in the ECU”, *supra* note 45 at 48. See also NIC, *Supermax Prisons*, *supra* note 51 (which recommends lodging the admissions and retention powers in the highest levels of the organization to “preclude—or minimize—potential abuse of the policy criteria for admission and release” at 9).

62. Working with the Association of State Correctional Administrators, the Liman Report reviews the written policies related to administrative segregation in 47 jurisdictions, including 46 states and the Federal Bureau of Prisons. These are the rules drafted from within correctional systems: the written rules promulgated by prison officials to structure decisions on the placement of persons in administrative segregation. Hope Metcalf et al, “Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies” (2013) Yale Law School Public Law Working Paper No 301, online: Social Science Research Network <ssrn.com/abstract=2286861> [Liman Report].

wide discretion, which feeds a common concern that solitary is often imposed not for legitimate security reasons, but because the officials are frustrated with or “‘mad’ at a prisoner”.⁶³ Since prison employees have personal experience with prisoners, the possibility is raised that errors, resentment and laziness may find their way in to placement decisions.⁶⁴

Under the highly general standards in both US and Canadian law, the classification criteria used to place prisoners in segregation capture a wide range of prisoners, including those with petty behavioural difficulties and those with mental illness. In the contemporary penal context, prisoner isolation is a technique that will be chronically vulnerable to proliferation and overuse.

III. Canadian Administrative Segregation

The legal architecture for administrative segregation in Canada is set out in the *Corrections and Conditional Release Act*.⁶⁵ In contrast with the sparse legislation that preceded the *CCRA*, the Act contains a set of governing principles and a detailed regime of prisoner entitlements, including rules with respect to grievance mechanisms, discipline procedures, segregation, transfers and parole. The passage of the *CCRA* distinguishes Canadian federal prison law from the American context: In the US, prisoner entitlements have been articulated largely through piecemeal litigation with few legislative interventions to clarify and comprehensively articulate the law.

While the *CCRA* was ushered in as part of the new legal culture of the *Charter*, the provisions regarding administrative segregation may be one dimension of the *CCRA* that is not, in fact, *Charter* compliant. Several years of jurisprudential progress have clarified that the *Charter* is underpinned, primarily, by a commitment to human dignity and a requirement for proportionality in state conduct where rights are

63. *Ibid* at 4.

64. See Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge, UK: Polity Press, 1985) at 191–96. Even where an error is discovered, the prison can resist reform. A prisoner classification or placement mistake “rarely evokes troublesome ideological questions and never threatens professional interests”. *Ibid* at 193.

65. *Supra* note 19.

at stake.⁶⁶ These principles suggest that a harsh technique like solitary confinement can only be used in the most restrained ways, and only in justified cases. But the current scheme grants extraordinary powers to prison officials, who operate in a high-pressure context within malleable standards.

At this stage, the federal law is ripe for further challenge and development, and the basic architecture of a new *Charter* challenge appears clear. Section 7, which stipulates that life, liberty and security of the person may only be deprived in accordance with the principles of fundamental justice, may mandate external oversight of segregation decisions and more objective criteria to govern the reasons for placement in segregation.⁶⁷ Section 12, which prohibits cruel and unusual punishment, may bar the psychological suffering and powerlessness that indefinite solitary placements are known to generate.⁶⁸ Section 15, which prohibits the differential treatment of individuals in relation to certain protected grounds, may be violated by the ways that solitary exacerbates the disadvantage of indigenous prisoners and the mentally ill.⁶⁹ In a recent provincial case, the BC Supreme Court considered a complaint from a petitioner who was isolated while he faced multiple homicide charges in relation to gang activity. The prisoner was clearly a high risk for placement

66. See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 (“the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity” at para 21). See also Sujit Choudhry, “So What Is the Real Legacy of *Oakes*?: Two Decades of Proportionality Analysis Under the Canadian *Charter*’s Section 1” (2006) 34 SCLR (2d) 501.

67. *Charter*, *supra* note 18, s 7.

68. *Charter*, *supra* note 18, s 12. For analysis of administrative segregation in Canada as a possible section 12 violation, see Debra Parkes, “The Punishment Agenda in the Courts” (2014) 67 SCLR (2d) 589 at 605–12. The Supreme Court of Canada has addressed this practice once, but it is extremely unlikely that this case could still be considered good or governing law. It was brought *pro se*, with little evidentiary record, by a notorious serial killer, Clifford Olson, in 1987. *R v Olson*, [1989] 1 SCR 296, 68 OR (2d) 256, aff’d (1987), 62 OR (2d) 321 (CA). For the successful challenge of the scheme that pre-existed the *Charter* and the *CCRA*, see Jackson, “Litmus Test of Legitimacy”, *supra* note 29.

69. *Charter*, *supra* note 18, s 15.

in general population, but McEwan J declared the specific features of his isolation to be unconstitutional.⁷⁰

Compared to other fields of rights jurisprudence, the common law of prisoners' rights is relatively underdeveloped. Structural barriers such as limited access to counsel, the hidden nature of penal institutions and lack of public attention have prevented prison litigation from following the "rights revolution" instigated by the *Charter*.⁷¹ As suggested in the literature, Canadian prisoners have not experienced the full benefit of the transformation of public law and individual rights brought in by the *Charter*.⁷² Given that the *CCRA* appears facially invalid and has produced constitutional wrongs on the ground, a constitutional complaint challenging administrative segregation seems like low-hanging fruit.

A. The Legislation

The *CCRA* introduced significant reforms for prison discipline, including independent adjudication and clearly defined sanctions.⁷³ While Parliament stopped short of imposing similar limitations on the

70. *Bacon v Surrey Pretrial Services Centre*, 2012 BCSC 1453, 266 CRR (2d) 304. The prisoner in *Bacon* was confined to a cell in a provincial facility for twenty-three hours a day, with no visits permitted except with his lawyer and parents, no other social contact and limited access to exercise. This was a provincial case, however, where the judge granted individual relief rather than striking down the enabling legislation. By abandoning an appeal, the government ended the case, thus limiting the reach of the holding.

71. See Michael Ignatieff, *The Rights Revolution*, 2nd ed (Toronto: House of Anansi Press, 2007). Kent Roach explains that Canada's more statist traditions have in the past produced more judicial deference to state action than in the US, but that this is changing. Since the arrival of the *Charter*, Canada increasingly places more emphasis on judicially enforced individual rights, at a time when US courts frequently defer to executive action, particularly in areas involving security. The recognition of individual entitlements is now surpassing US doctrine in several areas. See Kent Roach, "Uneasy Neighbors: Comparative American and Canadian Counter-Terrorism" (2012) 38:5 Wm Mitchell L Rev 1701.

72. For a comprehensive review of *Charter*-based prisoner litigation, see Debra Parkes, "A Prisoner's *Charter*?: Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*" (2007) 40:2 UBC L Rev 629; Jackson, *Justice Behind the Walls*, *supra* note 39.

73. Disciplinary segregation is limited to a thirty-day period following adjudication before an independent administrative body (and forty-five days if consecutive sentences are imposed). *CCRA*, *supra* note 19, s 44(1)(f); *Corrections and Conditional Release Regulations*, SOR/92-620, s 40(2) [CCRR].

use of administrative segregation, the *CCRA* did establish administrative segregation review boards to conduct periodic reviews.⁷⁴ This internal mechanism was an improvement on the pre-1992 regime, and many American prisons lack similar protections. However, the drafters of the *CCRA* refused to implement additional limits on administrative segregation because the prison authority was anxious to retain full control over its use.⁷⁵ The peculiar result is that although administrative segregation is potentially more severe and long-term than disciplinary segregation, the practice is subject to fewer constraints and less review. Further, while administrative segregation is not in theory meant to be punitive, it is often imposed in a punitive fashion on those considered to be a general security risk.

While the reasons that administrative segregation may be imposed are vague, segregated prisoners in Canada do have clear legal entitlements as to their treatment. Here, the problem is more about enforcement. Section 31 of the *CCRA* permits indefinite administrative segregation for reasons related to the “safety and security of the institution”, but stipulates that it should be used only if there is “no reasonable alternative” and that release should occur at the “earliest appropriate time”.⁷⁶ Section 36 provides that a prisoner in administrative segregation shall be visited at least once every day by a registered health care professional, and section 87 directs that all decisions affecting a prisoner, including decisions related to administrative segregation, should “take into consideration an offender’s state of health and health care needs”.⁷⁷ According to section 37, segregated prisoners are to retain the same rights as other inmates, except those necessarily lost because of segregation or impeded by “limitations specific to the

74. *CCRR*, *supra* note 73, s 21. The institutional head is initially responsible for the decision to place a prisoner in administrative segregation. The Segregation Review Board then conducts a hearing within 5 working days, and once every 30 days thereafter. Every 60 days, the prisoner is entitled to a regional review. These are internal reviews. Prisoners are typically allowed to attend but have no right to attend with legal counsel.

75. Jackson’s legislative history of the *CCRA* sets out how and why compromises were made with respect to administrative segregation. See Jackson, “Litmus Test of Legitimacy”, *supra* note 29.

76. *CCRA*, *supra* note 19, s 31.

77. *Ibid.*, ss 36, 87.

administrative segregation area, or security requirements”.⁷⁸ There is also federal policy for administering segregation that echoes the legislation.⁷⁹

The plain language of the law and policy suggests that administrative segregation is to be used sparingly and with protections. This reflects the long-standing *CCRA* core principle that the CSC must administer sentences in the “least restrictive” way possible, “consistent with the protection of the public, staff members and offenders”.⁸⁰ Critical questions remain: first, whether these legal standards are sufficient, and second, whether they are enforced.

B. The Practice

Despite the layers of formal protections that regulate administrative segregation in Canada, correctional officers often use the practice in problematic ways, contrary to its legal spirit and framework. By policy, all segregated prisoners are entitled to correctional programs, spiritual services and psychological counselling. However, the lack of regular external oversight means that officers face little risk of repercussions if they sacrifice these requirements for what they consider to be legitimate staffing reasons, lack of resources and security routines. While the legislation provides for periodic reviews, these are conducted by internal staff members who are reviewing the decisions of their colleagues, typically in a *pro forma* fashion. Every 60 days, the prisoner is entitled to a regional review, but transfer to a different prison can be done on the final day of that period in order to reset the clock. While the legislation states that segregation should be used as a last resort, plans to remove

78. *Ibid*, s 37.

79. The relevant policy specifies that administrative segregation is not meant to be punitive, that a range of services and programming will be delivered to segregated prisoners, and that the “special needs” of segregated prisoners will be respected. Prisoners are to receive one hour outside per day and a shower every second day. The policy affirms that prisoners will be returned to general population at the “earliest appropriate time”. See CSC, “Administrative Segregation”, *supra* note 24.

80. *CCRA*, *supra* note 19, s 4(d). The language of “least restrictive” has now been replaced with “necessary and proportionate” by the recent *Safe Streets and Communities Act*. It is unclear what this terminological change actually means, or whether and how it alters correctional practice. If the new language does generate change, it might invite a legal challenge given that the concept of “least restrictive” was considered to reflect a constitutional standard. SC 2012, c 1, s 54, amending *CCRA*, *supra* note 19, s 4(d).

prisoners from isolation develop and are executed very slowly; even voluntary placements go on much longer than they should. In his review of administrative segregation in the post-1992 period, Allan Manson concludes: “[T]he statutory scheme is implemented in a casual manner”.⁸¹

The death of Ashley Smith illustrates the continued excessive and unlawful use of administrative segregation. Smith was held for over a year in highly punitive conditions of administrative segregation despite multiple vulnerabilities, extreme youth and a minimal criminal record. In 2013, the Office of the Chief Coroner of Ontario concluded that Smith’s death was a homicide, which occurred because correctional officers followed a standing order not to intervene while she tied ligatures around her neck and slowly suffocated.⁸² Smith’s death occurred after weeks and months of life in a bare segregation cell, throughout which both the letter and spirit of correctional law were regularly violated. The Correctional Investigator concluded that abuse of transfer powers and other circumventions allowed officials to avoid any real limits on the use of solitary in her case.⁸³ While the case has raised awareness, it is rarely understood as representing a systemic problem. Rather than a unique tragedy or the outcome of a series of contingent misguided decisions, Ashley Smith’s death is a predictable outcome of the current legislative regime that governs the administration of segregation. The Smith case confirms that legislative breaches happen even for inmates who are plainly vulnerable.

The Coroner’s Inquest into Smith’s death recommended an “absolute prohibition on the practice of placing female inmates in conditions of long-term segregation, clinical seclusion, isolation, or observation”.⁸⁴ The Coroner would permit fifteen-day periods of separation, with a cumulative limit of sixty days of segregation per year in limited cases.⁸⁵ The CSC accepted that long periods in administrative segregation are not conducive

81. Allan Manson, “Canada” in Dirk van Zyl Smit & Frieder Dunkel, eds, *Imprisonment Today and Tomorrow: International Perspectives on Prisoners’ Rights and Prison Conditions*, 2nd ed (The Hague: Kluwer Law International, 2001) 124 at 138.

82. CSC, *Coroner’s Inquest*, *supra* note 30.

83. Correctional Investigator of Canada, *A Preventable Death*, by Howard Sapers (Ottawa: CIC, 20 June 2008) at 6–8.

84. CSC, *Coroner’s Inquest*, *supra* note 30 at para 28. Long-term was defined as any period in excess of fifteen days.

85. *Ibid* at paras 28–29.

to prisoner health or correctional goals, but it refused to commit to the recommended limits, maintaining that any new limits would cause “undue risk to the safe management of the federal correctional system” and that existing “legislation and policy surrounding segregation is very rigorous”.⁸⁶ The CSC employed its standard bureaucratic habit: reciting legislative standards as if their mere existence serves as evidence of both the adequacy of the standards and compliance.

The response to the Coroner’s Inquest echoed previous CSC refusals to stop using administrative segregation on the mentally ill. The 2010 death of Eddie Snowshoe, following 162 days in solitary at Edmonton Institution, appears as another paradigmatic case. A public inquiry into Snowshoe’s death concluded that the institution was clearly aware of a risk of suicide and self-harm but segregated Snowshoe without any degree of “care or alertness” to these issues.⁸⁷ The psychological attention that Snowshoe received in isolation was “cursory” and “practically non-existent”, and his mental and physical health deteriorated significantly.⁸⁸ Despite legislative requirements, internal review mechanisms were not properly followed and no regional review was ever conducted. Snowshoe’s case affirms the need for concrete rules regarding the timely removal of individuals from segregation cells and the need for external checks on that process, since even the minimal legal rules that are currently in place are not regularly followed.

The CSC’s refusal to stop subjecting mentally ill prisoners to segregation has been raised repeatedly. In its 2011–12 annual report, the Office of the Correctional Investigator (OCI) called for “an end to the unsafe practice that allows for prolonged segregation of mentally disordered inmates in Canadian penitentiaries”.⁸⁹ In May 2012, the UN Committee Against Torture criticized Canada for its use of “solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness”.⁹⁰

86. CSC, “Response to Smith Inquest”, *supra* note 6 at 3.2.

87. Alberta, *Report to the Attorney General: Public Inquiry into the Death of Edward Christopher Snowshoe* (4 June 2014) (Wheatley J) at 4.

88. *Ibid.*

89. *OCI Report 2011–2012*, *supra* note 47 at 19.

90. UNHCR, Committee Against Torture, *Considerations of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture*, 48th Sess, UN Doc CAT/C/CAN/CO/6, June 2012 at para 19.

The Committee recommended that Canada “limit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with a possibility of judicial review” and “[a]bolish the use of solitary confinement for persons with serious or acute mental illness”.⁹¹ Similarly, the OCI recommended that “in keeping with Canada’s domestic and international human rights commitments, laws and norms”, the CSC should commit to “an absolute prohibition on the practice of placing mentally ill offenders and those at risk of suicide or serious self-injury in prolonged segregation”.⁹² The CSC refused to make this commitment and, in doing so, explicitly refuses to follow the human rights and constitutional norms that apply to protect the mentally ill under Canadian law.⁹³ The CSC’s official position makes clear that the mentally ill are at great risk for being housed in prolonged segregation in Canada.

The shortcomings of the administrative segregation regime also nullify the *CCRA* protections for prison discipline. Officials seeking to avoid the procedural rights that apply to disciplinary segregation can simply abuse the fungible and easily manipulated categories by designating the placement as administrative.⁹⁴ For example, it is not unusual for an offender found guilty of a serious disciplinary offence to spend just a few days in disciplinary segregation, paired with months in administrative segregation for jeopardizing security or while the institution investigates the offence.⁹⁵ The lack of controls under the administrative system thus

91. *Ibid.*

92. *OCI Report 2011–2012*, *supra* note 47 at 13.

93. *Ibid* at 64–65. In response to the OCI recommendation, the CSC states that it “supports this recommendation in principle” and asserts that the “CSC works assiduously to return a segregated inmate to the general population as soon as it is safe to do so”. *Ibid* at 64. The CSC states that it considers mental health issues in segregation placements, but admits that mentally ill prisoners might be placed in segregation if “there are no reasonable alternatives”. *Ibid* at 65.

94. This is a standard problem. See e.g. Fred Cohen, “Isolation in Penal Settings: The Isolation-Restraint Paradigm” (2006) 22 *Wash UJL & Pol’y* 295 at 299–300 (explaining generally that while disciplinary segregation tends to have time limits, corrections officials can reclassify disciplinary segregation prisoners as “administrative” if there is a desire to extend the isolation).

95. See Zinger, “Segregation in Canadian Federal Corrections”, *supra* note 17 (in 2011–12, only 2.2% of admissions to segregation were “disciplinary” in nature, confirming that the CSC regularly opts to avoid the protections of the disciplinary regime).

renders the disciplinary controls illusory: The prison can simply reclassify the isolation under the more convenient regime. The line between official categories is further blurred as prisoners segregated for administrative reasons or due to a serious disciplinary offence tend to be housed in the same prison wing or the same high-security facility. This means that segregated prisoners, no matter the reason for their placement, face identical conditions, the same correctional staff and the same atmosphere. Practically speaking, prisoners isolated for disciplinary, administrative or voluntary reasons are an undifferentiated class.

Canadian officials like to suggest that only the US relies on supermax prisons and inmate sensory deprivation, which are not part of the formal Canadian legal framework or official practice.⁹⁶ Even the Canadian Federal Ombudsman accepts that there are “fundamental differences between solitary confinement and disciplinary and administrative segregation” in Canada and the US.⁹⁷ Canadian penal practice does, however, rely on administrative segregation as an everyday management technique in medium- and maximum-security institutions. Central features of solitary practices that Canada shares with the US include: placing prisoners in a cell for the vast majority of the day and night, for an unknown period of time; removing their access to ordinary liberties, programming and peer contact; and failing to arrange external input into the decision, with no regular access to external oversight. Time in solitary in Canada might be expected to be shorter than in the US supermax model, partly because movement to and from a supermax requires complex reclassification along with physical transfer.⁹⁸ In both countries, however, there are particular prisoners who spend months and years in this form of confinement without any formal legal rule to protect them.

The following Part analyzes the lessons that should be drawn from the US experience of litigating solitary. In Canada, the question that courts may have to answer is whether a legislative scheme that permits the placement of an individual in administrative segregation with no external controls and no specified release date is *Charter* compliant. The

96. See *OCI Report 2011–2012*, *supra* note 47 at 12–13.

97. *Ibid.*

98. Jurisdictions like California have also made it extremely difficult for prisoners in supermax to achieve release. See Keramet A Reiter, “Parole, Snitch or Die: California’s Supermax Prisons and Prisoners, 1997–2007” (2012) 14:5 *Punishment & Society* 530.

most significant lesson from the US experience is that judicial responses to this topic may have a tendency to amount to partial interventions. For instance, limiting relief to those with current, serious mental illnesses, or recognizing the need for procedural reforms at the margins without addressing the fundamentally problematic core practice. On the more positive side, the American experience also reveals that legal process has the power to expose hidden penal practices, instigate negotiation with corrections officials and trigger a larger social movement.

IV. US Litigation Outcomes

The US law governing solitary cannot be traced to any single legislative moment or central legislative scheme. The administration of state prisons, which hold the bulk of American prisoners, is a matter of state rather than federal control, and states tend not to pass detailed prison legislation. Congress has only rarely attended to matters of prison quality.⁹⁹ Through litigation in the federal courts, a model of American legal control flows from a patchwork of rules and standards obtained in court orders and settlement agreements.¹⁰⁰

The general story of judicial intervention into American prisons in the twentieth century involves an initial period of intense reform and innovation, followed by patterns of withdrawal and retrenchment.¹⁰¹ In the 1960s and 1970s, procedural reforms enabled prisoners to access federal courts. Systemic challenges to prison conditions and prisoner rights violations followed, along with innovative judicial remedies designed to monitor improvements. By the 1980s, the reform period had receded: A

99. With the *Prison Rape Elimination Act of 2003*, Congress attempted to reduce the sexual assault of prisoners through federal law and provide economic incentives to states for compliance. Pub L No 108–79, 117 Stat 972 (codified as amended at 42 USC §§ 15601–15609 (2015)). Such national-level interventions have been exceedingly rare.

100. David Fathi, Director of the National Prison Project of the American Civil Liberties Union (ACLU), points out that most supermax cases have seen many or all issues settled without trial. David C Fathi, “The Common Law of Supermax Litigation” (2004) 24:2 Pace L Rev 675 at 677 [Fathi, “Common Law of Supermax”].

101. For this history, see Malcolm M Feeley & Edward L Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (Cambridge, UK: Cambridge University Press, 1998).

shift in judicial attitude and political atmosphere reduced and constrained prisoner litigation.¹⁰²

Supermax litigation arose in the 1990s when the judiciary had largely stepped back from intervention, and the policies that underpinned mass incarceration had created significant population stresses in the prison system.¹⁰³ Prison administrators demanded broad authority to manage institutions under pressure. As Philip Smith theorizes, solitary is a “defensive, boundary-maintaining manoeuvre” that can help a prison preserve a claim to orderliness.¹⁰⁴ The fact that solitary can deliver a certain degree of calm helps explain why the practice expanded during the rapid rise of incarceration rates in the US and the corresponding struggle to cope with unprecedented population influx. Prison administrators lost the power of early release as an incentive for good behaviour, and they fought to maintain total discretion over other disciplinary tools like solitary confinement. Prisoners were also frustrated: They were held under longer sentences previously unknown in the criminal law and faced the widespread abolition of parole and sentence remission for good behaviour.

Keremet Reiter’s research suggests that early forms of judicial intervention on prisoner isolation may have contributed to the design and proliferation of supermax prisons in California. In the first wave of litigation in the 1960s and 1970s, courts articulated limits on the practice that mostly related to the physical conditions in which prisoners were isolated.¹⁰⁵ While these early decisions established a number of constraints

102. The 1996 *Prison Litigation Reform Act*, aimed at curtailing prisoner litigation and limiting the scope of judicial intervention, reflects the new political atmosphere that pervaded in both courts and Congress at this time. Pub L No 104–134, §§ 801–810, 110 Stat 1321, 1321–66 to 1321–77 (codified as amended in scattered sections of 11, 18, 28 & 42 USC). For discussion, see Margo Schlanger & Giovanni Shay, “Preserving the Rule of Law in America’s Prisons: The Case for Amending the *Prison Litigation Reform Act*” (2009) 11:1 U Pa J Const L 139.

103. See Alfred Blumstein & Allen J Beck, “Population Growth in US Prisons, 1980–1996” (1999) 26 *Crime & Justice* 17 at 17 (between 1980 and 1996 alone, state and federal incarceration rates grew by over 200%).

104. Philip Smith, *Punishment and Culture* (Chicago: University of Chicago Press, 2008) at 82.

105. Keremet Ann Reiter, “The Most Restrictive Alternative: A Litigation History of Solitary Confinement in US Prisons, 1960–2006” in Austin Sarat, ed, *Studies in Law, Politics and Society* (UK: Emerald Group) vol 57, 71 [Reiter, “The Most Restrictive Alternative”].

on isolation, they may have contributed to the building of supermax prisons by articulating a roadmap for “constitutional” segregation.¹⁰⁶ The claim is that the judicial response of “permitting isolation, but specifying the exact conditions under which it would be permissible, contributed to the development of the modern supermax”.¹⁰⁷ As federal courts addressed isolation conditions and ordered remediation in multiple jurisdictions, department of corrections officials eventually followed with some local form of supermax prison. While Reiter admits that the exact causal story is difficult to trace, her work shows a parallel between the narrow terms of judicial intervention from the 1960s to the 1980s and the design features of new supermax prisons built in California.

Extreme forms of isolation do raise viable constitutional claims under US law. As one government report admits, facilities with extremely restrictive conditions “operate on the edge of constitutionality and are, therefore, vulnerable to inmate lawsuits”.¹⁰⁸ Litigation has established the right to minimal procedural due process for a supermax placement and has generated bans on the use of solitary on the seriously mentally ill. Apart from these constraints, discussed in more detail below, US courts have affirmed a scheme that permits prison administrators to impose indefinite and severe isolation on most prisoners, often based on information that is not disclosed or challenged by prisoners, or subject to external review.

106. *Ibid* at 74. For example, Reiter describes how, in *Hutto v Finney*, the first modern solitary case that reached the US Supreme Court, the Court addressed the use of punitive isolation in the Arkansas prison system, where prisoners were held indefinitely in overcrowded cells without access to fresh air, ordinary programming or regular prison food. 437 US 678 (1978). The Arkansas district court ordered remediation, which the Supreme Court upheld. Reiter emphasizes that the *Hutto* Court found only that a combination of factors, including terrible food and indefinite confinement, created a constitutional violation. Implicit in the court’s reasoning was that indefinite isolation could be acceptable under better physical conditions. Reiter, “The Most Restrictive Alternative”, *supra* note 105 at 87–91.

107. Reiter, “The Most Restrictive Alternative”, *supra* note 105 at 94–95.

108. See NIC, “Liability Concerns in the ECU”, *supra* note 45 at xvi. Also, “[i]t is not surprising that courts would regard ECU placement—with its typically long duration, very strict conditions, and limited privileges—as an atypical deprivation [sufficient to trigger protections under the Fourteenth Amendment], compared to the ordinary conditions of prison life.” *Ibid* at 51.

A. Mental Health: Individualizing Harm

The pivotal US case on solitary confinement and mental health is *Madrid v Gomez*, which involved a systemic attack on administration at the Pelican Bay SHU in California. Pelican Bay housed prisoners in near-constant cellular confinement, in single cells with no windows. To limit the need for officer-prisoner contact, doors opened electronically. Prisoners ate meals alone in their cells, and on the rare occasions that they were released from their cells, they would be placed in a slightly larger cement yard. At trial, a former federal warden described the conditions as “virtual total deprivation, including, insofar as possible, deprivation of human contact”.¹⁰⁹

The trial judge in *Madrid*, Thelton E. Henderson CJ, found constitutional violations based on health care and use of force, along with due process violations in the transfer of prisoners to Pelican Bay. In addition, Henderson CJ ordered the removal of seriously mentally ill prisoners from Pelican Bay, citing the Eighth Amendment requirement that prisons meet the “serious medical needs” of prisoners.¹¹⁰ *Madrid* defined a “serious medical need” in the area of mental health as: “a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and manifested by substantial pain or disability”.¹¹¹ For mentally ill prisoners, placement in the isolated and punitive conditions at Pelican Bay was “the mental equivalent of putting an asthmatic in a place with little air to breathe”.¹¹² While the Supreme Court has not granted leave to address this issue, David Fathi has suggested that a rule against placing the seriously mentally ill in solitary is no longer in dispute under American law: Every federal court

109. *Madrid v Gomez*, *supra* note 44 at 1230.

110. See *Estelle v Gamble*, 429 US 97 at 104 (1976). The legal standard that the court drew upon is that the prison must not be *deliberately indifferent* to the *serious medical needs* of prisoners. *Ibid* at 116.

111. For discussion of the mental health standard, see Fred Cohen, *The Mentally Disordered Inmate and the Law* (Kingston, NJ: Civil Research Institute, 1998) at 2–6, n 5.

112. *Madrid v Gomez*, *supra* note 44 at 1265.

to consider the question has held that supermax-style confinement of the seriously mentally ill is unconstitutional.¹¹³

Jonathan Simon describes *Madrid* as a case that, legally speaking, “offered a mix of victories and defeats for both the plaintiff prisoners and the state defendants”.¹¹⁴ Judicial oversight of Pelican Bay continued until March 2011, at which time substantial improvements had been achieved in terms of reducing the use of force.¹¹⁵ While the court held that the violent control tactics and lack of mental health care violated the Eighth Amendment, it did not declare the broader practice of long-term solitary confinement to be unconstitutional; it allowed a practice that it found “may well hover on the edge of what is humanly tolerable for those with normal resilience”.¹¹⁶ The court backed away from a more comprehensive holding, stating that the conditions of the Pelican Bay SHU did not demonstrate a “sufficiently high risk to all inmates of incurring a serious mental illness” so as to deprive them “of a basic necessity of life”.¹¹⁷ For those prisoners who could show only generalized psychological pain without “overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness”, there would be no relief.¹¹⁸ Chief Judge Henderson reasoned that “the Eighth Amendment simply does not

113. Fathi, “Common Law of Supermax”, *supra* note 100 at 681–84. Fathi notes that while much turns on the definition and proof of serious mental illness, the basic proposition is formally agreed upon even within US corrections. “Given this professional and judicial consensus, it seems unlikely that prison officials in future litigation will vigorously defend their right to house mentally ill prisoners in the conditions of extreme deprivation that characterize supermax facilities.” *Ibid* at 685. See also NIC, *Supermax Prisons*, *supra* note 51. “Insofar as possible, mentally ill inmates should be excluded from extended control facilities . . . [M]uch of the regime common to extended control facilities may be unnecessary, and even counterproductive, for this population”. *Ibid* at 12.

114. Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014) at 48.

115. *Ibid* at 64.

116. *Madrid v Gomez*, *supra* note 44 at 1280.

117. *Ibid* at 1267.

118. *Ibid* at 1265.

guarantee that inmates will not suffer some psychological effects from incarceration or segregation”.¹¹⁹

The mental health distinction suggested in *Madrid* allows US courts to impose some limits on a disturbing practice, but in a way that diminishes and individualizes the interests at stake. Judicial analyses of isolation’s constitutionality have largely “truncated the crucial inquiry into the psychological risks that such units pose”.¹²⁰ Rather than adjudicating the conditions of supermax itself, the individualized mental illness approach “links any court-ordered relief to the character of the inmates, rather than the nature of the conditions themselves, and thus allows the courts to protect some inmates without even asking whether the conditions themselves violate the Constitution”.¹²¹ The issue is transformed into a question of individual vulnerability rather than an investigation into a potentially unacceptable practice.

The abuses that Henderson CJ uncovered at Pelican Bay did not affect only the severely mentally ill. Systemic abuses were connected to the normalized culture of deprivation exercised inside a hidden institution purportedly holding the “worst of the worst”. The “tremendous potential for abuse” flowed from the “total control” that guards had over inmates in an isolated context that “reinforce[d] a sense of isolation and detachment from the outside world, and help[ed] create a palpable distance from ordinary compunctions, inhibitions and community norms”.¹²² Some of the excessive force violations that Henderson CJ documented at Pelican Bay included breaking a prisoner’s arm by bending it back through a food slot, leaving prisoners naked or inadequately dressed in outdoor holding

119. *Ibid* at 1264. The court noted:

[T]he record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods. Clearly, this impact is not to be trivialized; however, for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards.

Ibid at 1265.

120. Haney & Lynch, *supra* note 42 at 539.

121. Mikel-Meredith Weidman, “The Culture of Judicial Deference and the Problem of Supermax Prisons” (2004) 51:5 UCLA L Rev 1505 at 1532.

122. *Madrid v Gomez*, *supra* note 44 at 1160.

cages during inclement weather, leaving prisoners tied in restraints for hours, and performing unnecessary and violent cell extractions.¹²³ These findings capture the culture of a setting where prison officials have total authority over a reputedly troublesome population.

The US approach also hinges on a dubious presumption of clear categorical boundaries between states of health and sickness, and denies relief to groups that lack a current evidentiary claim as to severe mental illness. As Benjamin Berger points out in the criminal law context, the assertion of clear categories of mental illness can serve particular functions.¹²⁴ In the context of supermax review, distinguishing between the “well” and the “ill” generates boundary lines that allow judges to grant some relief while denying protection to large categories of prisoners. These “reified distinctions take up residence in our minds as being the basis for natural categories, such that the law appears as simply epiphenomenal”.¹²⁵ The law appears to be responding to categories of mental health that clearly exist, but in reality, these categories are difficult to distinguish. While in isolation, individuals can easily slide from one to the other. The approach fails to grapple with evidence that even prisoners with more stable mental health may become ill while held in isolation.¹²⁶

B. Due Process and Conditions: Civilizing Reforms

Litigation in the US has also delivered limited improvements for the decision-making processes associated with prisoner isolation and has generated basic rules regarding the physical conditions of segregation units. But the cases have generated only minimal protection for the most extreme forms of prisoner isolation. In *Sandin v Connor*, the US

123. *Ibid* at 1165, 1171–72.

124. Benjamin L Berger, “Mental Disorder and the Instability of Blame in Criminal Law” in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart, 2012) 117.

125. *Ibid* at 117.

126. See e.g. *Davenport v DeRobertis*, 844 F (2d) 1310 (7th Cir 1988), *cert denied*, 488 US 908 (1988) (“the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total” at 1313). Chief Judge Henderson seemed to accept this in *Madrid v Gomez*. *Supra* note 44 at 1230.

Supreme Court held that due process protection applies to the decision of a prison official only where it results in an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”.¹²⁷ On the facts of *Sandin*, placing a prisoner in disciplinary segregation for 30 days was not considered an atypical hardship. The Court reasoned that since lengthy lockdowns regularly occur in ordinary maximum-security settings, no due process protection was required. The question remained whether any form of segregation would trigger constitutional protection.¹²⁸

Only in 2005 did the Supreme Court confirm that prisoners facing a transfer to supermax are entitled to due process.¹²⁹ In *Wilkinson v Austin*, the Court held that supermax conditions were “atypical and significant” given that only a small percentage of prisoners were placed there.¹³⁰ It found that these conditions were more severe than both the general prison population and the state’s administrative segregation units. The *Wilkinson* decision is generally considered a victory from the prisoners’ perspective because it makes clear that supermax is an “atypical deprivation” that triggers constitutional protection. But the holding does not insist on high-quality evidence to support such decisions. The lower district court had ordered additional protections: that the prison must record all classification committee proceedings, exercise precautions when relying on confidential informants, and allow prisoners to call witnesses and

127. 515 US 472 at 491–92 (1995).

128. Even where courts have found a right to due process, very little is required to meet the standard. See e.g. *Toussaint v McCarthy*, 801 F (2d) 1080 (9th Cir 1986). The Court condoned a highly subjective classification process and minimal due process for placement in the segregation units at Quentin, Folsom, Soledad and Deuel Vocational Institute. The Court found that the prisoners were entitled to know the reasons for the segregation, and that they should be given some opportunity to respond. It specified that due process did not require written notice of charges, an advocate, an opportunity to present witnesses, or written reasons. *Ibid* at 1106. The Court rejected the claim for any additional process by saying that the state’s interest in security and safety “weighs heavily in favor of avoiding prolonged and cumbersome administrative proceedings”. *Ibid* at 1100. Remarkably, it stated further that prison administrators were entitled to make decisions on the basis of subjective impressions and future predictions, such that additional process would make no difference: “A trial-like proceeding is unlikely to inform a prison administrator regarding such subjective considerations.” *Ibid*.

129. *Wilkinson v Austin*, *supra* note 38.

130. *Ibid*.

present documentary information unless it would be unduly hazardous.¹³¹ Without explaining why these measures were inappropriate, the Supreme Court held that procedures that give an inmate written notice for the reasons of transfer and some opportunity for rebuttal were sufficient. The Court reasoned that these rules would safeguard against cases of mistaken identity or inmates being singled out for insufficient reason, as if such palpable instances of error were the sole concerns at stake.¹³² The court also stipulated only annual internal reviews.¹³³ These legal boundaries place little burden on prison administrators, who retain an extraordinary scope of authority to indefinitely segregate most prisoners. The procedural protections in the *CCRA* are significantly more robust.

US prisoners have also experienced limited success in challenging the physical conditions of long-term segregation. Under the Eighth Amendment, courts ask whether conditions are adequate for meeting the basic human needs of prisoners.¹³⁴ On the right to exercise, courts have articulated only weak entitlements for segregated prisoners.¹³⁵ In terms of out-of-cell time, courts have held that five hours per week is

131. For a summary of the district court orders, see *ibid* at 218.

132. *Ibid* (“[r]equiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate’s being mistaken for another or singled out for insufficient reason” at 226).

133. In *Hewitt v Helms*, the Court said that periodic reviews of placements were required to prevent administrative segregation from being “used as a pretext for indefinite confinement of an inmate”. 459 US 460 at 447, n 9 (1983). See also *Madrid v Gomes*, *supra* note 44 at 1273 (where the Court approved the practice of reviewing confinement on the SHU every 120 days). See also *Toussaint v McCarthy*, *supra* note 128 (where the Ninth Circuit said that annual reviews were too infrequent, but did not specify further).

134. Basic human needs include: medical and mental health care, personal safety, food (adequacy of diet and whether food is served in a way that does not risk health), clothing, shelter (including heating, cooling, ventilation, lighting, noise levels), sanitation and exercise (including outdoor exercise). See *Wilson v Seiter*, 501 US 294 (1991).

135. Lack of exercise may rise to a constitutional violation in certain limited circumstances “where movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened”. *Thomas v Ramos*, 130 F (3d) 754 at 763 (7th Cir 1997), citing *French v Owens*, 777 F (2d) 1250 at 1255 (7th Cir 1985). Denial of out-of-cell exercise for four weeks was upheld in *Harris v Fleming*. 839 F (2d) 1232 (7th Cir 1988). The Department of Justice manual advises only that prisoners should probably be allowed to exercise outside their cells several hours per week and that some exercise should take place outdoors. NIC, “Liability Concerns in the ECU”, *supra* note 45.

the constitutional minimum.¹³⁶ On sensory deprivation, the court held in *Jones 'El v Berge* that constant lighting in cells was disorienting,¹³⁷ and the prison accordingly agreed to lower nighttime lighting.¹³⁸ Apart from these few concrete boundaries, administrators muddle through and are regularly tested in litigation. Where practices press upon the boundaries of constitutional violations, policies are in place to avoid legal challenges.¹³⁹ But since the law is often unclear, practices are invariably mixed and carried out in isolated settings.

To summarize, court-ordered reforms have delivered some improvements to decision-making processes and conditions in US prisons. But judicial intervention has not addressed the central issue of the power to separate an individual indefinitely from her community and basic liberties. According to Fred Cohen, “the basic concept of prolonged isolation, of very restricted social contacts, sensory stimulation, and even exercise is not itself challenged”.¹⁴⁰ Keramet Reiter remarks upon the judicial willingness to engage in physical details but not the core moral question of isolating humans from social life. Reiter observes that this jurisprudence resembles that of the death penalty: where American courts in the post-*Furman*¹⁴¹ era refused to adjudicate the central issue of the

136. See *Davenport v DeRobertis*, *supra* note 126 at 1310, 1315; *Spain v Procunier*, 600 F (2d) 189 at 199 (9th Cir 1979).

137. *Supra* note 44 at 1118.

138. *Freeman v Berge*, 2003 WL 21462603 at 2 (7th Cir).

139. The dynamic of ambiguous legal boundaries and adversarial legalism on the topic of conditions is evidenced in a Justice Department manual for correctional facilities, where administrators are advised on topics such as whether they are required to clean feces and urine that a disturbed prisoner in isolation may smear all over his cell. The manual advises that some delay may be justified in light of the prisoner’s bad conduct. In the end, however, “[p]rudence suggests that at some point, regardless of inmate behavior, officials should intervene to correct sanitation hazards, even though inmates may recreate the problem almost immediately . . . [P]eriodic cleanup will help officials show that they were not deliberately indifferent to the problem, should it arise in litigation.” NIC, “Liability Concerns in the ECU”, *supra* note 45 at 38.

140. Fred Cohen, “Penal Isolation: Beyond the Seriously Mentally Ill” (2008) 35:8 *Criminal Justice & Behavior* 1017 at 1020.

141. *Furman v Georgia*, 408 US 238 (1972).

constitutionality of the practice, instead adding numerous legal rules to the edges.¹⁴²

New limits may emerge from the *Ashker v Brown* litigation underway in California.¹⁴³ In May 2012, a group of Pelican Bay inmates filed this class action on behalf of 500 inmates who have spent between 10 and 28 years in solitary confinement. The plaintiffs allege that prolonged solitary violates the Eighth Amendment prohibition against cruel and unusual punishment, and that the absence of meaningful review violates prisoners' rights to due process. In June 2014, the federal court certified the prisoners' class action.¹⁴⁴ The *Ashker* litigation seeks to generate concrete time limits and meaningful review of solitary. But the idea that a constitutional rule is even required to address cases where prisoners are isolated for 10 continuous years is a distressing reminder of the state of California's prison system and the state of US law on this topic.

V. Analysis: Litigating Prisoner Isolation

Between 1995 and 2000, the number of US prisoners held in segregation increased forty percent nationally.¹⁴⁵ The narrow scope of judicial intervention into prisoner isolation may partly explain why litigation did not secure abolition nor seem to impede its growth during this period. In 2013, the Liman Report revealed how, along with disciplinary and voluntary segregation, all of the forty-seven American jurisdictions studied provided for some form of administrative segregation.¹⁴⁶ The policies share the same basic features: "a non-punitive purpose,

142. Reiter, "The Most Restrictive Alternative", *supra* note 105 at 117. Reiter observes that:

Federal courts evaluating challenges to both long-term solitary confinement and death sentences have focused mainly on two kinds of claims: (1) the application of scientific evaluations (of mental health, competency, DNA evidence, etc.) to highly individualized cases and (2) the procedural rights that should accompany either a sentence to death or an assignment to solitary confinement.

Ibid at 74.

143. *Ashker v Governor of the State of California*, No 09-5796 (ND Cal 2 June 2014).

144. *Ibid*.

145. See Browne, Cambier & Agha, *supra* note 50 at 46.

146. Liman Report, *supra* note 62.

open-ended duration, close confinement, and restricted activities and social contact”.¹⁴⁷ From this angle, it appears that solitary proliferated despite litigation. Keramet Reiter’s research goes even further to suggest that limited judicial intervention on prisoner isolation in the 1960s and 1970s may have contributed to the modern supermax, as department of corrections officials designed “constitutional” modes of segregation in response to legal challenges.¹⁴⁸

The spectre of unintended consequences of litigation has surfaced in Canada too. In 2011, a *Charter* claim challenged an extreme form of long-term solitary used on female prisoners. In response to the public criticism that preceded the lawsuit, the CSC suggested building the first supermax prison for women.¹⁴⁹ It reasoned that a supermax for women would allow the prison to address the resource-intensive challenge of delivering extreme isolation within an ordinary maximum-security facility. Rather than removing the small number of segregated women who were draining resources, the CSC sought to solve the problems associated with long-term segregation by building a dedicated facility. This response indicates that the threat of litigation can cause prison officials to react defensively and attempt to fix a perceived problem without addressing the human rights concern at the core of critique.

On the more positive side, more recent litigation has generated settlement discussions and agreements to remove large numbers of prisoners from isolation in several states. In Mississippi, for example, a collaborative process emerged out of American Civil Liberties Union litigation.¹⁵⁰ Mississippi transferred more than seventy-five percent of its isolated population back to the general prison population after an external expert conducted a comprehensive file review and concluded that it was safe to implement the transfers.¹⁵¹ Prison administrators in Mississippi

147. *Ibid* at 2.

148. See Reiter, “The Most Restrictive Alternative”, *supra* note 105.

149. Women Offender Sector, *Management of Higher-Risk Women: Results of Consultation on an Alternative to Management Protocol* (Ottawa: Correctional Service Canada, 2010) at 28. For discussion, see Kerr, *supra* note 25.

150. See Terry A Kupers et al, “Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs” (2009) 36:10 *Criminal Justice & Behavior* 1037 at 1039–41, discussing *Presley v Epps*, No 4:05CV148-JAD (ND Miss 2005).

151. Kupers et al, *supra* note 150 at 1040.

“eventually welcomed the changes demanded by the plaintiffs in a series of class-action lawsuits, which cleared the way for the changes to be put into effect in an atmosphere of strong collaboration”.¹⁵² Two levels of collaboration emerged out of the Mississippi litigation: Expert witnesses effectively became consultants to the prison, and enhanced collaboration between custody and mental health staff followed.

The US experience makes clear that a final legal judgment may not be the only or even the central goal of litigation: Equally important is how the legal process can generate access to an institution and put pressure on prison administrators to review their practices. The following two sections emphasize two more general dimensions of the isolation issue: the way that litigation can spark a public conversation about penal practices, and the significance of the form of judicial remedies.

A. Mobilizing Public Sentiment

The history of punishment displays a clear relationship between punishment methods and evolving moral attitudes. According to Philip Smith, penal measures are shaped not only by their instrumental uses but also by public sensibilities.¹⁵³ For this reason, there is often a battle for meaning between the official account of a practice and the public perception of it.¹⁵⁴ For example, reliance on the electric chair ended for cultural reasons because of a cultural “sea change” that was “grounded in visceral imagery and the use of a set of bodily signifiers”.¹⁵⁵ Through photographs of botched executions, the electric chair came to symbolize a disturbing excess of violent state power, rather than delivering the deterrent message that the state intended with capital punishment. The legal system moved away from this mode of execution when it began to produce more social disorder than reverence for sovereign power. Once

152. *Ibid* at 1048.

153. Smith, *supra* note 104.

154. This battle for meaning can, according to Smith, result in constraints and reforms that Foucault’s account of totalizing bureaucratic penal power fails to predict. Smith attempts to revive the work of Émile Durkheim, which emphasizes the expressive and communicative aspects of punishment and can help to explain the relationship between changing social values and evolving demands for penal reform. *Ibid* at 12–29.

155. *Ibid* at 159.

the executioner lost control of the narrative of his work, the door opened to formal reforms.

Extreme forms of solitary confinement are, like executions, meant to punish, deter and control social disorder. However, like executions, solitary is a mode of punishment that is vulnerable to reform based on excess and dysfunction. As Smith notes, solitary can itself produce new forms of disorder, such as causing or aggravating mental illness, and in this way “its very austerity has been renarrated as a marker of excess”.¹⁵⁶ This may explain why reform efforts and judicial interventions have proceeded largely out of a concern for mental health. The potential for reform arises where practices collide with the modern emphasis on human dignity, as “punishments have increasingly needed to preserve the dignity of the individual, and so authorities have become acutely sensitive to problems of meaning in this sphere”.¹⁵⁷ Prisoner isolation is a striking example of a practice that has become incongruent with cultural values, and courts are the appropriate forum in which to demand a response.

The values at stake in prisoner isolation have changed over time. Earlier modes of isolation, such as those relied upon in nineteenth-century prisons, were thought to induce moral reform in the prisoner. David Garland explains that careful prison architecture and rigorous silence was thought to catalyze contemplation and to “allow essential reason to prevail” and thus enable the prisoner to return to productive society.¹⁵⁸ In this paradigm, prisoners are rational actors who can be rehabilitated and returned to productive society. The practice had a positive penal purpose, which was only challenged once evidence began to undermine that narrative.¹⁵⁹

Contemporary modes of prisoner isolation garner more complex reactions than the nineteenth-century version, given that prisoners in supermax and other forms of extreme isolation are not treated like salvageable subjects. Today’s isolated prisoner represents a set of risks to be minimized by advanced technologies of separation and exclusion.

156. *Ibid* at 82–83.

157. *Ibid* at 175.

158. David Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot, UK: Gower, 1985) at 18.

159. See *In Re Medley*, 134 US 160 (1890) (where the Supreme Court first accepted evidence that prisoners in prolonged and comprehensive isolation were becoming irretrievably mentally ill).

Particularly given what we now know about the negative effects of isolation, it is difficult to construe the practice as a reformist endeavour. As Sharon Shalev puts it: “Unlike their earlier incarnations, supermax prisons do not officially endeavour to reform, rehabilitate, change or ‘correct’ prisoners, and their design is not meant to shape prisoners’ morality, but to control them and their environment to the greatest degree possible.”¹⁶⁰ Shalev notes that “[t]he language of control is now articulated in bold, unapologetic terms”, and the language of reform is largely gone.¹⁶¹

The upshot is that the familiar ways of construing the penal system—as a means to achieve retribution or ensure public safety by deterring or otherwise preventing crime—no longer apply.¹⁶² Sharon Dolovich argues that, while every polity that incarcerates as punishment must remove and restrain those who are sentenced to prison, the American system, exemplified by the supermax prison, is driven by “exclusion and control” rather than the more familiar or official purposes of punishment.¹⁶³ Zygmunt Bauman suggests that earlier models of solitary were “*factories of discipline*” designed to inure potential workers to the habits of modern industrial labour.¹⁶⁴ Today’s models, by contrast, are “*factor[ies] of exclusion*”, designed to contain and permanently exclude a category of workers who have become extraneous to contemporary labour markets.¹⁶⁵

Legal claims that contest solitary confinement are driven by a notion that the practice is inhumane and excessive; that isolation represents a denial of human worth and the social experience that is basic to human health. The public conversation that has unfolded alongside litigation has helped announce and affirm those values. In 2009, physician and journalist Atul Gawande generated widespread attention with his 2009

160. Shalev, *Supermax*, *supra* note 15 at 54.

161. *Ibid* at 22.

162. Sharon Dolovich, “Exclusion and Control in the Carceral States” (2011) 16:2 Berkeley J Criminal L 259. For an argument that extreme forms of solitary cannot satisfy any of the standard normative justifications of punishment, see Richard L Lippke, “Against Supermax” (2004) 21:2 J Applied Philosophy 109.

163. Dolovich, *supra* note 162 at 261.

164. Zygmunt Bauman, “Social Issues of Law and Order” (2000) 40:2 British J Criminology 205 at 210 [emphasis in original].

165. *Ibid* at 209–12 [emphasis in original].

New Yorker piece asking whether solitary confinement is torture.¹⁶⁶ In 2014, Colorado Commissioner Rick Raemisch followed in the footsteps of charismatic leaders on solitary in that state by spending a night in solitary, and then wrote about his experience in the *New York Times*.¹⁶⁷ In 2012 and 2014, experts testified before the United States Senate Judicial Committee, with Senator Dirk Durbin leading a push for national law reform on these issues.¹⁶⁸ After facing multiple lawsuits, states as diverse as Maine, Colorado and Mississippi have elected to drastically reduce their reliance on solitary.¹⁶⁹

A social movement has coalesced around solitary confinement because the harm and disorder of exclusion from community is contrary to contemporary values. There is a risk, however, that active democratic dissent can be transformed and muted by courts through proceduralism and discrete exemptions, so as to defer to prison administrators and permit the practices they deem essential. To date, formal legal outcomes in US courts have delivered marginal improvements but have not responded to that core concern about exclusion. A successful challenge will depend on understanding these obstacles. At this stage, the question therefore arises as to what legal remedies might be helpfully, or unhelpfully, deployed in the legal movement against solitary.

166. Atul Gawande, "Hellhole", *The New Yorker* (30 March 2009), online: <www.newyorker.com>.

167. Rick Raemisch, "My Night in Solitary", Editorial, *The New York Times* (20 Feb 2014), online: <www.nytimes.com>; Lance Tapley, "Reform Comes to the Supermax", *The Phoenix* (25 May 2011), online: <thephoenix.com>; Christopher N Osher, "Colorado Prison Chief Tom Clements Pushed Reforms Before His Killing", *The Denver Post* (20 March 2013), online: <www.denverpost.com>.

168. US, *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences—Hearing Before the Subcommittee on the Constitution, Civil Rights and Human Rights*, 112th Cong (2012); US, *Reassessing Solitary Confinement, II: The Human Rights, Fiscal, and Public Safety Consequences—Hearing Before the Subcommittee on the Constitution, Civil Rights and Human Rights*, 113th Cong (2014).

169. See Kupers et al, *supra* note 150; Lance Tapley, "Maine's Dramatic Reduction of Solitary Confinement", *The Crime Report* (20 July 2011), online: <www.thecrimereport.org>; Goode, *supra* note 5; Fathi, "Turning the Corner", *supra* note 4.

B. Changing Values and the Question of Remedy

Insight into the effects of partial or inadequate judicial intervention can be drawn from David Garland's study of the American death penalty, which asks how decades of reform work failed to achieve the abolition of capital punishment. As one part of his explanation, Garland points to the difference between civilizing and humanizing sentiments, and their distinct impact on legal development.¹⁷⁰ These two categories of sentiment have distinct sources and sites of concern. For example, civilized sensibilities try to reduce the violent imagery involved in putting a person to death. By contrast, a humanitarian norm objects to the unnecessary human suffering that capital punishment delivers. The difference between these two norms is clear: "One aims to reduce the sight of pain, the other aims to reduce its infliction. One is primarily about manners and appearances, the other about underlying moral substance."¹⁷¹ While these two sentiments often appear and run together, they are distinct and will eventually demand different remedies. For example, some US Supreme Court justices are concerned with execution methods from the perspective of the visual experience of the audience, while others are concerned with the effect of an execution method on the actual experience of the condemned person.¹⁷²

These two distinct norms also appear in the legal developments that respond to contemporary practices of prisoner isolation. Civilizing sentiments have motivated reforms that are associated with the vision of a floridly mentally ill person, alone in a cell and getting worse. The result is special protections for the seriously mentally ill. Similarly, civilizing sentiments might demand the rule of law in the administration of segregation, with the result of improved procedural controls. A humanizing sentiment, by contrast, would focus more on the disorientation and fear experienced by any individual indefinitely placed in segregation, as well as the declining health associated with removing a prisoner from meaningful social interaction. These are risks faced by all segregated prisoners regardless of the reason for their separation or their

170. Garland, *Peculiar Institution*, *supra* note 32 at 150.

171. *Ibid.*

172. *Ibid.* at 268–72, discussing *Baze v Rees*, 553 US 35 (2008) (majority and dissenting judgments).

personal circumstances. With these distinctions in mind, reformers must seek reforms that will humanely control the actual experience and effects of all instances of prisoner isolation.

In Canada, plaintiff's counsel should seek a declaration that the administrative segregation provisions of the *CCRA* are inconsistent with the *Charter* and thus void.¹⁷³ While the task of redrafting legislation belongs to Parliament, counsel should press the court to specify that a constitutionally compliant scheme requires time limits and external oversight. Several acceptable alternative models have been articulated in the literature,¹⁷⁴ and the Coroner's Inquest into the death of Ashley Smith echoed many of these longstanding recommendations.¹⁷⁵ A court might specify that a *Charter*-compliant scheme would include limiting features such as: (1) approximately 30-day time limits on separation, within which the prison can decide whether and how to arrange a transfer, dispute resolution, enhanced supervision protocols, medical treatment or other technique to facilitate return to the ordinary prison community; (2) a requirement that the prison obtain a court order for any separation that extends beyond the prescribed time limit; and (3) an independent, external authority to review placement decisions, conduct regular inspections of segregation units, and ensure the provision of ordinary programming and health care to segregated prisoners.

173. Precisely this relief is being sought in both Canadian cases filed in January 2015. See *BCCLA*, *supra* note 7; *CCLA*, *supra* note 7.

174. See e.g. *Arbour Report*, *supra* note 26. One model contemplates allowing the institutional head to segregate a prisoner for 3 days in order to diffuse a situation. If further segregation was then required, a maximum of 30 additional days could be imposed. Segregation could not be imposed for more than 30 days, twice a year. Alternative options that address the reasons for segregation could be used, including transfer, placement in mental health unit and intensive supervision: all with interaction with general population. If the prison felt that segregation beyond these boundaries was necessary, they could apply to the court for judicial approval in advance of further segregation. See *ibid* at 105. Michael Jackson and Graham Stewart emphasize the need for independent adjudication along the lines of the federal prison disciplinary scheme. In their opinion, independent adjudication is required in order "to ensure a fair and unbiased hearing, compliance with the statutory framework, protection of prisoners' rights and privileges while segregated, and the implementation of re-integration plans to ensure that the correctional authorities, in administering the sentence, use the least restrictive measures". Michael Jackson & Graham Stewart, *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety* (Vancouver: justicebehindthewalls.net, 2009) at 68.

175. CSC, *Coroner's Inquest*, *supra* note 30 at paras 27–37.

Conclusion

Prison officials in Canada are no longer permitted to lawlessly throw prisoners in “the hole”. In the *Charter* era, Parliament passed comprehensive legislation to clarify and stabilize penal law and to ensure its compliance with human rights and constitutional standards. The *CCRA* contains standards, however general, that govern the use of administrative segregation. It stipulates formal rules that suggest segregated prisoners should be released as soon as possible, and that they should retain access to health care and other basic rights. An internal review mechanism is meant to serve as a check on the regime, and an independent ombudsman reports on violations. These protections reflect the values foundational to the Canadian prison system: rehabilitation as the core purpose of corrections, and a prohibition on penal methods that violate standards of decency.

While the Canadian legislation articulates comparatively good governing standards and procedural controls, experience has shown that it lacks a reliable mechanism to oversee and limit prisoner isolation. The administrative segregation scheme allows the correctional authority itself to implement decisions and conduct reviews, creating a system vulnerable to overuse and abuse, especially for the prisoners who require the most protection. The problems of Canadian solitary are of excess and non-compliance, which arise from two curious omissions in the legislation itself: no time limits, and no fixed and regular external oversight. The time is ripe for courts to declare that any scheme for prisoner isolation that lacks those two criteria is unconstitutional. The US experience of judicial intervention, where courts have largely avoided ruling on the fundamental central problems of a proliferating practice, warns us against reforms that fall short of concrete limits and checks.

American judges individualized the need for relief by limiting protection to severely mentally ill prisoners. Courts civilized the margins of an extreme practice but affirmed and condoned the central feature of indefinite isolation from ordinary social, occupational and sensory experience. Despite decades of litigation, solitary confinement in the United States is often delivered in ways that defy both sentencing rationales and any notion of legitimate penological purposes. As Michael Mushlin writes:

Virtually every court which has considered the issue has held that the imposition of solitary confinement, without more, does not violate the Eighth Amendment. Arguments that isolation offends evolving standards of decency, that it constitutes psychological torture, and that it is excessive because less severe sanctions would be equally efficacious, have routinely failed.¹⁷⁶

Canadian litigation is likely to explore what the CSC has avoided admitting: that prison officials could manage institutions safely even in the face of substantial reforms to administrative segregation. Clear time limits could restore a measure of predictability and fairness for prisoners who are separated and motivate the CSC to select from a range of alternatives within a particular time frame. The idea is not to abolish all forms of segregation but to ensure that it is truly a last resort and an interim measure. Implementing external oversight would serve as a check on the system and conceivably allow the CSC to seek judicial approvals for dealing with extreme cases. These reforms could be beneficial not only for the health of prisoners, but could better protect CSC employees by clarifying options available to them and preventing traumatizing system failures followed by *post facto* external critique and additional consequences.

The trial record in a Canadian case is likely to be compelling: Decades of non-partisan review of the administrative segregation regime have all generated calls for reform. The Canadian regime has been criticized by every single independent assessment that has ever been conducted, with recommendations for independent decision makers and other limits being repeatedly made.¹⁷⁷ Canadian courts are often more compelled to intervene in the face of political failure to act on a topic of widespread policy agreement—these are cases where government calls for judicial deference ring hollow. Also, the chances of elevating a case to the Supreme Court and achieving a robust federal reform are much higher in Canada than in the US. There are risks to litigation, and requests for judicial intervention and remedy must be grounded in a deep appreciation of these risks. The US experience teaches that advocates or legislators might be tempted to pursue reforms on behalf of the most vulnerable groups. We have already seen the CSC respond to calls for reform by reciting

176. Michael B Mushlin, *Rights of Prisoners*, 3rd ed (Thomson West, 2002) vol 1 at 92–93.

177. See e.g. Jackson, “Litmus Test of Legitimacy”, *supra* note 29; *Arbour Report*, *supra* note 26; CSC, *Coroner’s Inquest*, *supra* note 30.

promises of improved housing for seriously mentally ill prisoners. But there are downsides to individualizing the harm of solitary and limiting the vision of its potential harms. Craig Haney argues that reform work on this topic should focus on “material deprivation, the lack of activity and other forms of sensory stimulation, and especially, the absence of normal or meaningful social contact that prisoners experience in these settings”.¹⁷⁸ Haney also explains how correctional officers are impacted by the solitary context, and the heightened risks for abuse in the general ideological context that is created.¹⁷⁹ These are the basic features and risks of prisoner isolation that appear in segregation ranges across US and Canadian prisons—not only in the individual cases of Ashley Smith and Eddie Snowshoe. Reform strategies should focus on adducing the entire social context of deprivation, uncertainty and stigma that is currently permitted by the formal law.

The history of prisoner isolation reveals how law reform efforts have a complex relation to the internal practices of penal institutions. The benefits of litigation may not be exclusively in the judicial intervention itself but in the public conversation that is sparked, the information obtained, and the new spaces for lobbying and negotiating that arise adjacent to the courts. Law reform can also have unintended consequences, such as mobilizing resistance and creating limits only for the most egregious aspects of a practice. Constraining just enough of the excess can mean the evasion of complete abolition or serious constraints. In his attempt to explain the puzzling retention of the American death penalty, David Garland argues that civilizing reforms can mask and mute the humanitarian concerns that give rise to legal claims.¹⁸⁰ In this way, opposition can actually help preserve contested practices, and reformers must therefore approach adversarial litigation with caution. Through careful navigation of the legal system, litigators can press for change that will substantially reform a practice that has become incompatible with our commitments and sensibilities.

178. Craig Haney, “A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons” (2008) 35:8 *Criminal Justice & Behavior* 956 at 957.

179. *Ibid.*

180. Garland, *Peculiar Institution*, *supra* note 32.

