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## Prisoners of Isolation - Solitary Confinement in Canada

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# Review

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*Prisoners of Isolation — Solitary Confinement in Canada.* By Michael Jackson. Toronto: University of Toronto Press, 1983. Pp. 330. Price \$35.00 (cloth); \$12.50 (paper).

This book is a first-rate contribution to Canadian legal scholarship and is a compelling but not sensationalized account of life behind bars in Canada. Jackson combines a sense of history with thorough legal scholarship and deep concern for humanity in this unique and insightful book. He makes masterful use of his personal interviews with prisoners who have been subjected to solitary confinement to infuse the book with a subdued sorrow about man's inhumanity to man. He successfully walks the fine line between identifying with the plight of the victims of solitary confinement and presenting an objective and scholarly account of the legal problems implicit in the process.<sup>1</sup>

Jackson provides an exposé of prison life and in that respect follows a line of books written to remove the veil of secrecy that enshrouds prison life.<sup>2</sup> The book is aimed not merely at a legal audience but at a broader readership which Jackson feels should be aware of the inhumanity of prison life. More than the books that have gone before, this one combines competent legal research with a readable and interesting style, which greatly broadens its appeal. A good example of the book's appeal to both general and legal audiences is provided by chapter 4. The major legal arguments against solitary confinement are presented in concise and understandable form in the text, while a detailed commentary in the notes explores American case law, the limitations of the *Canadian Bill of Rights*<sup>3</sup> and the potential of the *Canadian Charter of Rights and Freedoms*<sup>4</sup> for prisoners.

One of the virtues of this book is that the issues of solitary

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1. In an earlier book review of Claire Culhane, *Barred From Prison — A Personal Account*. Vancouver: Pulp Press, 1979, I suggested that the virtues of the "personal account" were counter-balanced by the sacrifice of objectivity and in some instances credibility. W. MacKay (1980), 6 Dal. L. J. 193, at 199.

2. G. McNeil and S. Vance, *Cruel and Unusual*, Toronto: Deneau and Greenberg, 1978 and C. Culhane, *Barred From Prison*, Vancouver: Pulp Press, 1979 are two examples. The value of these books as an exposé of prison life is explored by MacKay, *ibid*.

3. R.S.C. 1970, Appendix III.

4. *Constitution Act*, 1982, Schedule B of *Canada Act 1982* (U.K.), 1982 c. 11.

confinement provide a sharp focus. As Jackson indicates in his preface, “dissociation” is the ultimate exercise of carceral power and as such provides a useful vehicle for exploring the proper limits of the state’s power in respect to prison inmates. By organizing the book around the particular issue of solitary confinement the author provides a unity and coherence that is lacking in other books about prisons.

One of the fringe benefits provided for readers is an excellent historical account of the parallel rise of the penitentiary and solitary confinement. In the first two chapters of the book Jackson traces the evolution of solitary confinement in the United Kingdom, the United States and Canada. He emphasizes the irony that “dissociation”, as it is euphemistically called, was introduced as a type of prison reform in a time when execution was the consequence of even very minor crimes. As the book unfolds the reader questions, along with Jackson, whether solitary confinement is any more humane than the hangings and physical torture that it was designed to replace. John Howard, with the best of motives, may well have introduced a new form of psychological torture that is more horrible than the physical punishments it displaced.

Michael Jackson’s impetus for the book came from his personal involvement in the classic Canadian prisoners’ rights case — *McCann v. The Queen*.<sup>5</sup> It is when he turns to this case in chapter 3 that he demonstrates an admirable balancing of first hand experience and objective scholarship. Jackson may overstate the importance of the *McCann* case in Canadian law but this can be viewed as an act of legal advocacy rather than a distortion born of subjectivity. Moreover, the case is significant in at least two respects. First, the *Canadian Bill of Rights*, in one of its rare judicial applications, was used to declare that the conditions of solitary confinement in the British Columbia Penitentiary violated the prohibitions against cruel and unusual punishment. Second, the evidence presented in the case provides a wealth of empirical evidence about the brutal conditions of solitary confinement.

With regard to the application of the *Canadian Bill of Rights* Jackson was well aware that the victory was a limited one. In the next chapter he laments the superficial and inadequate response of prison authorities to the declaratory judgment of Mr. Justice Heald in *McCann*. Jackson also points out that the *McCann* ruling itself was a judicial aberration and the cases which followed it were more

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5. (1976), 29 C.C.C. (2d) 337 (F.C.T.D.).

typically deferential to prison authorities.<sup>6</sup> He quickly emphasizes, however, that the real value of a prisoner's rights case is in bringing prison conditions to the attention of the public and providing the basis for a political lobby.

It is the second, educational, aspect of the *McCann* case which justifies its designation as significant. The impressive array of evidence from psychological experts and prison inmates educated not only the judge but indirectly the Canadian public about the inhumane conditions that characterized dissociation in the British Columbia Penitentiary in 1975. By summarizing and highlighting this evidence Jackson has made an important contribution to the educational significance of the case. He underscores two vital points in his description of conditions in solitary: first, that the psychological pain inflicted by solitary confinement is worse than physical torture; second, that the particular inmate involved was left with bitterness and hatred for a system which he considers unjust and inhumane. He welds these two points in the insightful observation that Dostoyevsky is a surer guide than Glanville Williams in understanding what we do in the name of the criminal law (p. 64).

The essence of Jackson's viewpoint is captured by the testimony of two psychological experts quoted at page 73 to the following effect:

Dr. Korn, in assessing the process which he had helped initiate in New Jersey and which, based on the evidence, he saw being continued at the British Columbia Penitentiary, told the court,

This process is fool-proof. If you keep it up long enough, it will break anybody, the more heroic they are, and the more they resist, the more determined you get . . . We kept them there for years and when they were finally broken down, we let them out . . . Then I began to see what I was doing . . . and said, 'We must stop this, the ends do not justify the means, this is a form of murder, it has to stop.'

Dr. Fox explained in equally graphic language the implications of the process of breaking prisoners down psychologically:

The demand for ultimate and total compliance is to create a

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6. At the time that *McCann* was decided *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401 (B.C.C.A.) had not yet come down from the Supreme Court of Canada. Heald J. found the dissenting views of McIntyre J. more appealing than those expressed in the more conservative majority opinion. However, the Supreme Court did later pronounce on *R. v. Miller* and adopted a narrow view of "cruel and unusual punishment" concluding that the death penalty did not violate the *Bill of Rights*. [1977] 2 S.C.R. 680. There was a direct retreat from *McCann* in *R. v. Bruce, Sucas and Wilson* (1977), 36 C.C.C. (2d) 158 (B.C.S.C.).

creature who has no respect for their life, and to make a creature that has no respect for their own life, they already long ago have no respect for your life. They write your life off long before they write their own life off. Do you follow what I am trying to say? I am trying to say, when a person comes to have no dignity, and no self-respect, no identity, you are faced with the most violent, the most dangerous possible human being. You can't reduce men to that, you risk your life to reduce them to that . . . This desire, the good intentioned desire to create compliance . . . forgets that there is a place beyond which you don't want to go, there is an area you do not want to enter, and that is to move to the place where you have eliminated all possible dignity. (p. 73).

Chapter 4 is Jackson's most legalistic chapter but even it is presented in a way which makes it readily understandable to a broader audience. The author uses the *McCann* case as an illustration of how the courts can inject the rule of law into prisons (which he has characterized in an earlier article as "lawless societies").<sup>7</sup> Like the Parliamentary Committee which investigated Canadian prisons in the late 1970's (headed by the Honourable Mark MacGuigan),<sup>8</sup> Jackson concludes that prison authorities must operate on a "model of justice" and teach by example that the system is fair and equitable. Inmates imbued with a sense of injustice will only become more hostile to society and more likely to react violently to its rules. This was recognized by John Howard and the early reformers and has been emphasized repeatedly since the first penitentiary was built. Needless to say the cry for "a model of justice" has not resulted in implementation of this lofty theory.

The vehicle for bringing the rule of law to the prisons, in Jackson's view, is the courts. Extending justice to life behind bars was a major objective of the *McCann* case and it is a central tenet of this book. For precedents he turns to the American cases which have articulated a four-step test for determining whether a particular punishment is acceptable or "cruel and unusual". In American terms a punishment is not acceptable if it is (1) degrading, (2) contrary to public standards of decency, (3) arbitrarily applied and (4) excessive.

Jackson is attracted to the American cases because they articulate a role for the courts in maintaining the human dignity of the inmate

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7. M. Jackson, "Justice Behind the Walls — A Study of the Disciplinary Process in a Canadian Penitentiary" (1974), 12 Osgoode Hall L. J. 1.

8. Sub-committee on the Penitentiary System in Canada, *Report to Parliament 1977* (Ottawa: Printing and Publishing, Ministry of Supply and Services, Canada, 1977).

and setting the limits of decency in a society. The following excerpts illustrate this point.

The basic concept underlying the [clause] is nothing less than the dignity of man. While the State has the power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards.

At bottom, then, the cruel and unusual punishments clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual' therefore if it does not comport with human dignity.<sup>9</sup> (p. 88).

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[These standards] put a limit on the kind of punishment we will inflict on anyone regardless of his offence. Though we may be dealing here with some of the most incorrigible members of our society (although not solely), how we treat these individuals determines, to a large extent, the moral fibre of our society as a whole and if we trespass beyond the bounds of decency, such excesses become an affront to the sensibility of each of us.<sup>10</sup> (p. 94).

In light of the *Charter* Jackson suggests that Canadian courts can acquire a significant role as the protector of basic human rights in the prisons. In addition to the protections against "cruel and unusual punishment or treatment" contained in section 12, he also sees an extension of section 7 to the prison environment. This is a rather broad and open-ended section which reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In respect to the particular problem of solitary confinement Jackson asserts that being taken from the general inmate population and placed in "dissociation" is a deprivation of liberty. Such conduct should be accompanied by fair procedures both as a matter of *Charter* interpretation and as an extension of the principles of common law fairness which were applied to prisons in *Martineau (No. 2)*.<sup>11</sup> However, the content of the duty of fairness in the prison context has been narrowly defined. Indeed the ruling in *Cardinal and Oswald*

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9. *Trop v. Dulles* (1958), 78 S. Ct. 590, at 598.

10. *Jordan v. Fitzharris* (1966), 257 F. Supp. 674, at 676.

11. [1980] 1 S.C.R. 602.

v. *Director of Kent Institution*<sup>12</sup> may snuff out the candle of hope that was ignited by *Martineau (No. 2)*. Given the Canadian judicial tradition of deferring to prison authorities, I would not hold out great hope that the flame of prisoners' rights would again be ignited by section 7 of the *Charter*.<sup>13</sup>

There were some general repercussions from the *McCann* decision within the penitentiary system. Even before the decision was rendered, the perplexing issue of solitary confinement was explored by a Study Group on Dissociation which produced the Vantour Report. In an example of history repeating itself, the Group recommended, in the name of reform, that new super maximum units be created to house the dangerous and disruptive inmates who would previously have been banished to solitary confinement. This reform like its predecessor was to become yet another vehicle for psychological punishment of the inmates. Jackson recounts how guards would leave razor blades within reach of the prisoners on Christmas Eve while wishing the inhabitants a Merry Christmas.

In theory these new units were to promote reformation of the prison inmate who would graduate through phases of decreasing isolation. This promise of reformation was hollow as the phasing was not applied in practice. The euphemistic new label of "special handling units" did not disguise the fact that these new units were just the "hole" by another name.

Jackson effectively portrays the psychological impact of these new super maximum units by recounting an interview with an inmate, Edgar Roussel:

A man to be a man must be able to exercise initiative. In here they take that away from you. The worst thing about the SHU is that you are totally dependent on the guards. You need them for everything. They even control the temperature of your shower. A man must have ideals. In here there is no respect for your ideals. You are nothing to them except a dangerous animal. A man needs to have a sense of territory even if it is only very small. In here there is no respect for that. Even inside your cell, because of the catwalk above you, the guards are stepping on

12. [1982] 3 W.W.R. 593 (B.C.C.A.). (Leave to appeal to S.C.C. granted (1983) 46 N.R. 180).

13. There has been a rather surprising number of victories for inmates and parolees in the early *Charter* cases but there are few court of appeal decisions and the Supreme Court of Canada has yet to speak on the issue. *Re Collins and the Queen*, 4 C.R.R. 78 (Ont. Cty Ct.); *R. v. Cadeddu*; *R. v. Nunery*, 3 C.R.R. 312 (Ont. H.C.); *Re Conroy*, 4 C.R.R. 278 (Ont. H.C.); *Reynolds v. A.-G. B.C.*, 4 C.R.R. 332 (B.C.S.C.).

your territory. Outside your cell, particularly in the common room where you are with ten men chosen as your companions by the guards, you are always stepping on someone's territory. A man must have a clear sense of who he is. In here in order to get out you have to borrow a personality that is not your own. This place breeds deceit at the same time as it breeds violence. I could go along with a segregation unit if it served some purpose. This place doesn't. It's like living on another planet. (p. 184).

Even the Kent Institution which was intended as the Cadillac of prisons turned out to be a lemon. However, one of the virtues of *Prisoners of Isolation* is that the author does not stop with a critique of the existing order. In chapter 6 Jackson puts forward his own model for reform which includes a detailed Model Segregation Code which is appended to the book. He advocates structured discretion within prisons and an end to rule by intuition and whim. His general position is that the person in dissociation should have all the benefits of the general population except for the mandatory loss of mobility. The details of his programme include meaningful hearings, provision of legal counsel, a ninety day limit on segregation and a shifting of the burden of proving beyond a reasonable doubt that the inmate committed an offence which justifies dissociation.

His plan is clearly premised upon the vital role of lawyers in bringing justice to Canadian prisons. In that respect Jackson views the *Charter* as an important new tool to enhance the life of prison inmates. Whether lawyers and judges will rise to the challenge remains to be seen. One thing is clear. Michael Jackson's book is an effective and compelling piece of advocacy which by means of subtle and passionate understatement sounds a call to legal arms. It is a book that should be read by everyone concerned about prisoners and human rights in Canada. Perhaps this readership would be considerably expanded if we followed the advice of a prison inmate who was segregated in both the British Columbia Penitentiary and Kent.

I ask you, the outside free community, to picture yourselves locked up in your washroom for weeks and months on end. This is the dilemma that prisoners in segregation units are confronted with. It slowly drives you insane. It eats away at you until the hate inside you somehow gives you the strength to survive. (p. 188).

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14. J. Vantour, *Report of the Study Group on Dissociation* (Ottawa: Solicitor General of Canada, 1975).

All Canadians should be concerned about the protection of human dignity and the need for the state to punish within the limits of decency. However, the central message that Michael Jackson brings us in *Prisoners of Isolation* is that lawyers have a special responsibility to teach justice by example both inside and outside the prison walls.

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