

## Article

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### "Contesting Expertise in Prison Law"

Lisa Kerr

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## CONTESTING EXPERTISE IN PRISON LAW

*Lisa Kerr\**

Prisons present a special context for the interpretation of constitutional rights, where prisoner complaints are pitched against the justifications of prison administrators. In the United States, the history of prisoner rights can be told as a story of the ebb and flow of judicial willingness to defer to the expertise-infused claims of prison administrators. Deference is ostensibly justified by a judicial worry that prison administrators possess specialized knowledge and navigate unique risks, beyond the purview of courts. In recent years, expansive judicial deference in the face of “correctional expertise” has eroded the scope and viability of prisoners’ rights, serving to restore elements of the historical category of “civil death” to the legal conception of the American prisoner. In Canada too, courts have often articulated standards of extreme deference to prison administrators, both before and after the advent of the *Charter of Rights and Freedoms*, and notwithstanding that the *Charter* places a burden on government to justify any infringement of rights. Recently, however, two cases from the Supreme Court of British Columbia mark a break from excessive deference and signify the (late) arrival of a *Charter*-based prison jurisprudence. In each case, prisoner success depended on expert evidence that challenged the assertions and presumed expertise of institutional defendants. In order to prove a rights infringement and avoid justification under section 1, the evidence must illuminate and specify the effects of penal techniques and policies on both prisoners and third parties. The litigation must interrogate the internal penal world, including presumptions about the workings of prisoner society and conceptions of risk management.

Les prisons, où s’affrontent les plaintes des détenus et les justifications des administrateurs du système correctionnel, présentent un contexte particulier pour l’interprétation des droits constitutionnels. Aux États-Unis, le développement des droits des détenus peut être interprété comme la fluctuation de la déférence aux allégations des autorités du système correctionnel par le pouvoir judiciaire. Cette déférence est soi-disant justifiée par le fait que ces administrateurs possèdent une expertise et une capacité à gérer des risques uniques qui échappent aux tribunaux. Dans les dernières années, l’ampleur de la déférence judiciaire face à l’« expertise correctionnelle » est venue éroder l’étendue et la viabilité des droits des détenus. Ce phénomène a contribué à faire resurgir certains éléments de la notion historique de « mort civile » dans la conception juridique du prisonnier américain. Au Canada aussi les tribunaux ont fréquemment formulé des normes de déférence très importante aux administrateurs du système correctionnel, avant et après l’entrée en vigueur de la *Charte canadienne des droits et libertés*, et ce, même si la *Charte* impose au gouvernement le fardeau de justifier toute violation des droits qu’elle protège. Récemment, néanmoins, deux décisions de la Cour suprême de la Colombie-Britannique ont marqué une rupture avec l’attitude de déférence excessive, signalant ainsi l’arrivée (plutôt tardive) d’une jurisprudence sur les droits des détenus qui s’appuie sur la *Charte*. Dans chacune de ces affaires, le succès du détenu demandeur est dû à des preuves d’experts qui sont venues défer les affirmations et l’expertise présumée des défendeurs institutionnels. Pour démontrer une violation des droits garantis par la *Charte* et en éviter la justification par l’article premier, la preuve doit mettre en lumière les techniques et politiques pénales à l’égard des détenus et en décrire les effets sur les détenus eux-mêmes ainsi que sur les tiers. Le litige doit s’intéresser à la structure interne du monde pénal, ce qui inclut les suppositions quant au fonctionnement d’une société carcérale et certaines conceptions de la gestion des risques.

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\* JSD Candidate and Trudeau Scholar at New York University, Faculty of Law. For the central ideas explored here, thanks is due to generous teaching and mentoring from Sharon Dolovich, particularly during her visit to New York University in 2012–2013. Thanks also to Eric Adams, Efrat Arbel, Benjamin Berger, Emma Cunliffe, David Garland, Anna Lund, Debra Parkes, Don Stuart and Jacob Weinrib for valuable comments on drafts of this article. Thanks finally to an anonymous reviewer who made important suggestions and to the excellent editors at the *McGill Law Journal*.

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“And it is terror, of course, that traditionally drives us into the arms of the experts.”

Adam Phillips, *Terrors and Experts*<sup>1</sup>

## Introduction

In adjudicating rights claims brought by prisoners, there are unique pressures on courts to refrain from close scrutiny. The structure of a prisoner lawsuit is that an incarcerated person complains about the nature of his treatment while held in state custody. The court is asked to review the content of prison law or the conduct of prison administrators that led to the treatment. From the outset and throughout the litigation, the defendant wears a cloak of expertise, typically attempting to justify the impugned law or conduct by pointing to the security concerns and limited resources that constrain the prison context. Judges are at risk of yielding uncritically in the face of their own corresponding lack of “correctional expertise”. The prospect of excessive judicial deference to the claims of prison administrators poses a chronic threat to the scope and viability of prisoners’ rights.

The United States experience provides a valuable illustration of what is at stake. In recent years, what appears to be judicial unwillingness to scrutinize the claims of administrators in prisoner litigation has sharply curtailed prisoners’ rights in that legal system. American plaintiffs have a difficult time rebutting judicial deference to the claims of institutional defendants, particularly at the level of the United States Supreme Court. As Sharon Dolovich has shown, the “imperative of restraint—aka deference—has emerged as the strongest theme of the Court’s prisoners’ rights jurisprudence.”<sup>2</sup> Deference is offered even when a defendant’s claims rest on unproven assumptions as to what is required or effective in prison settings. The good judgment of the putative expert is presumed but not tested.

Such weak modes of constitutional review for prisoners may be understood as part and parcel of the unique American penal state:<sup>3</sup> marked by features such as the persistence of the American death penalty<sup>4</sup> and an extraordinary range of collateral consequences that follow silently from

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<sup>1</sup> (Cambridge, Mass: Harvard University Press, 1996) at xii.

<sup>2</sup> Sharon Dolovich, “Forms of Deference in Prison Law” (2012) 24:4 Fed Sent’g Rep 245 at 245.

<sup>3</sup> See generally David Garland, “Penalty and the Penal State” (2013) 51:3 Criminology 475.

<sup>4</sup> See generally David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Cambridge, Mass: Belknap, 2010).

conviction.<sup>5</sup> One historian suggests that these features are part of “a long, deep strain in American legal and moral culture” that convicts are “unfit to share in the full fruits and protections of citizenship [and] that the convict ought rightly to be fully or partially civilly dead.”<sup>6</sup> As this article describes, both American and Canadian law has been long marked by this same history—a notion of prisoners as lacking full or ordinary legal status. The *Charter of Rights and Freedoms*<sup>7</sup> prescribes a different route, but post-*Charter* prisoner law has not consistently taken it.

Prisoner claims grounded in the *Charter* constitute a relatively young jurisprudential field.<sup>8</sup> In one of the few leading cases, the Supreme Court of Canada makes clear that prisoners are not to be excluded from the ordinary constitutional analysis that applies to rights infringements by the government. At the core of that holding was the question of the empirical burden on government to justify a rights infringement. In *Sauvé v. Canada (Chief Electoral Officer)*,<sup>9</sup> a majority of the Court rejected an argument, advanced by the government, that legislation directing prisoner disenfranchisement should be upheld because it is connected to legitimate penological goals and is thus constitutionally permissible.<sup>10</sup> Significantly, the case turned on the character and quality of the evidence, where non-state experts appeared on both sides of the case. The government relied largely on evidence from political philosophers, who testified that the loss of political rights for those convicted of federal offences accords with particular theories of democracy.<sup>11</sup> The majority opinion found that evidence

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<sup>5</sup> See e.g. Michael Pinard, “Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity” (2010) 85 NYUL Rev 457; Jeremy Travis, “Invisible Punishment: An Instrument of Social Exclusion” in Marc Mauer & Meda Chesney-Lind, eds, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002) 15; Nora V Demleitner, “U.S. Felon Disenfranchisement: Parting Ways with Western Europe” in Alec Ewald and Brandon Rottinghaus, eds, *Criminal Disenfranchisement in an International Perspective* (New York: Cambridge University Press, 2009) 79.

<sup>6</sup> Rebecca McLennan, “The Convict’s Two Lives: Civil and Natural Death in the American Prison” in David Garland, Randall McGowen & Michael Meranze, eds, *America’s Death Penalty: Between Past and Present* (New York: New York University Press, 2011) 191 at 211–12.

<sup>7</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>8</sup> Three *Charter* provisions are highly significant in the prison context: the protection of residual liberty and security of the person (section 7), equality (section 15), and the prohibition of cruel and unusual punishment (section 12).

<sup>9</sup> 2002 SCC 68, [2002] 3 SCR 519, rev’g [1996] 1 FC 857, 132 DLR (4th) 136 [*Sauvé*].

<sup>10</sup> *Ibid* at para 25.

<sup>11</sup> The plaintiffs also relied on “considerable academic and theoretical evidence,” but the trial judge found their evidence to be “less lofty” and “more tangible, particularly in re-

to be unpersuasive and also rejected the government's claim that denying prisoners the vote sends an expressive message about the sacred character of political participation.<sup>12</sup> The majority held that a voting ban is "more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them."<sup>13</sup> The majority concluded that the government's "vague and symbolic objectives" were insufficient to legitimize a law that stripped prisoners of fundamental rights.<sup>14</sup>

The reasoning in *Sauvé* seems to make clear that prisoner rights cannot be infringed without a justification grounded in evidence. For this reason, the *Sauvé* holding is commonly upheld as a symbol of Canada's commitment to prisoner rights, particularly as England and much of the United States do not permit prisoner voting.<sup>15</sup> There are, however, several reasons why a victory in *Sauvé* might be considered low-hanging fruit, rather than a symbol of a deep jurisprudential commitment to prisoners' rights. First, the right is occasional: the practical effect of the majority opinion is only that prison administrators must allow infrequent access to a polling station. Protection of the right entails minimal resources and requires little administrative attention. Second, and most significantly for this article, the case concerned legislation rather than a policy or decision of a prison administrator, and that legislation covered a topic unrelated to prison management. No prison administrator appeared to defend the voting ban on the basis of plausible assertions about security dynamics and

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lation to Canadian penology, social justice, and prisons" (*Sauvé v Canada (Chief Electoral Officer)*, [1996] 1 FC 857 at 866, 132 DLR (4th) 136, rev'd 2002 SCC 68, [2002] 3 SCR 519).

<sup>12</sup> This theory emerged from the evidence of American punishment philosopher Jean Hampton, who testified that the loss of political rights for those convicted of federal offences accords with an expressive theory of retribution. See Jean Hampton, "The Moral Education Theory of Punishment" (1984) 13:3 *Phil & Publ Aff* 208. As the Hampton example reveals, the *Sauvé* case is a fascinating instance where philosophers appear on both sides of a lawsuit, but where both the trial judge and the majority of the Supreme Court of Canada express real doubt about the relevance of these fields to the empirical questions at the heart of *Charter* analysis.

<sup>13</sup> *Sauvé*, supra note 9 at para 58.

<sup>14</sup> *Ibid* at para 22.

<sup>15</sup> Debra Parkes is more wary, pointing out that "the *Sauvé* decision represents a departure from the usual judicial approach to prisoners' rights claims, an approach that gives those rights little meaningful content" ("Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts" in Christopher Mele & Teresa A Miller, eds, *Civil Penalties, Social Consequences* (New York: Routledge, 2005) 237 at 238). For another hesitant account, Efrat Arbel stresses that the normative principles articulated in *Sauvé* are subordinated in the daily administration of corrections. See Efrat Arbel, "Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment", 3:2 *Can J Human Rights* [forthcoming in 2014].

the mechanics of sound penal administration. The expert evidence in *Sauvé* did not suggest that imprisonment is incompatible with the retention of the right to vote explicitly protected in section 3 of the *Charter*. Rather, much of the evidence was theoretical, controversial, and unrelated to the daily demands of prison operations.<sup>16</sup>

Cases where prisoners seek to vindicate a right that potentially interferes with the preferences of prison administrators in their daily operations will be more controversial than the *Sauvé* context. In these cases, the institutional defendant charged with operating the facility begins the proceedings as de facto expert. These are also the cases where, unlike matters of political philosophy, judges are less likely to have their own expertise and intuitions to draw from. This article emphasizes the necessity of expert evidence to contest the deference that will otherwise be offered to prison administrators in cases where rights are adjacent to operational imperatives. Apart from that practical claim, the related normative claim is, quite simply, that prisoners should receive the same level of constitutional protection as other litigants. The state should be put to the usual burdens of justifying an infringement, rather than benefiting from undue deference to the unquestioned expertise of prison officials. This is what is required so as to fully transition to a *Charter*-based penal law. Completion of this transition is likely to hinge on particular litigation approaches. Two recent cases from the Supreme Court of British Columbia serve as models, marking a new mode in the litigation of prisoner claims under Canadian constitutional law and a new level of judicial scrutiny in response.<sup>17</sup>

This article has two main aims. The first is theoretical and historical, and aims to show something general about the structure of prisoner litigation. Prisons have a stark advantage at the outset of a complaint, due to an element of Foucauldian power/knowledge imbalance that is more extreme than in other contexts of judicial review of government action. In-

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<sup>16</sup> As Justice Gonthier observed in dissent, there was “copious expert testimony in the nature of legal and political philosophy,” but “very limited social scientific evidence, e.g. in the field of criminology, that seeks to establish the practical or empirical consequences of maintaining or lifting the ban on prisoner voting” (*Sauvé*, supra note 9 at para 101). While the majority thought this meant that the rights infringement was not adequately justified, Justice Gonthier thought this meant that deference to Parliament was warranted and that the legislation should be upheld. He noted that the issues in the case rest on “philosophical, political and social considerations which are not capable of ‘scientific proof’” (*ibid* at para 67). The difference between Justice Gonthier and the majority—as to what is required to justify a rights infringement—is a central issue for the project of generating a *Charter*-based penal law.

<sup>17</sup> See below (Part IV) *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805, [2010] BCWLD 8074 [*Bacon*]; *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, 237 ACWS (3d) 380 [*Inglis*].

deed, for the bulk of prison history, courts refused entirely to adjudicate internal prison conditions. A lineage of judicial reticence is still apparent in both American and Canadian law; it forms part of the “buried structures of legal thought” that remain in this legal field.<sup>18</sup> At times, this judicial reticence can be traced to a frank prejudice against offenders. In modern times, however, courts take a more tactful approach by purporting to defer to executive functions. Courts now use the language of limited judicial capacity and lack of expertise in a way that covertly resurrects the civilly dead prisoner. Rather than seeing the emergence of prisoner law as an “overthrow of a firm judicial principle”<sup>19</sup>—namely, the principle that prisons are beyond the jurisdiction of courts—we might see that modern penal law has instead altered judicial vocabulary and inspired new techniques of deference. Under new language and governing concepts, courts often still avoid close scrutiny of the task being performed by prison administrators, preferring to tread lightly near the rough work of punishment.<sup>20</sup>

Perhaps courts would rather not scrutinize the grim project of the management and control of deprived bodies. Perhaps they are swayed by the risks of interference alluded to by those charged with administering state custody. As the psychoanalyst Adam Phillips puts it in the text cited in the epigraph to this article: “The expert constructs the terror, and then the terror makes the expert.”<sup>21</sup> Whatever the cause, the powers exercised by prison officers demand careful oversight. The prison is a punitive context where key decisions are made not by elected public figures or legal advisors but by low-level officials who are not well-positioned to interpret and honour constitutional norms. These standard facts of imprisonment should inform the task of judicial review.<sup>22</sup> Review of prisoner claims must be ratcheted up to ordinary constitutional standards.

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<sup>18</sup> McLennan, *supra* note 6 at 194.

<sup>19</sup> Michael Mandel, “The Legalization of Prison Discipline in Canada” (1986) 26 *Crim & Soc Just* 79 at 79.

<sup>20</sup> For discussion of how this dynamic also appears in the private law of prisoner claims, see Adelina Iftene, Lynne Hanson & Allan Manson, “Tort Claims and Canadian Prisoners” (2014) 39:2 *Queen’s LJ* 655.

<sup>21</sup> *Supra* note 1 at 14.

<sup>22</sup> See Richard H Fallon, Jr, *Implementing the Constitution* (Cambridge, Mass: Harvard University Press, 2001) at 41 (pointing out that pragmatic considerations regularly affect judicial interpretation of constitutional standards). In the context of prison cases, courts might consider that while the decisions of prison officials are “in principle subject to democratic control and correction,” that this is the type of setting where “the actual prospect of democratic intervention is often small” (*ibid* at 9). Courts might consider these institutional realities as they approach the task of adjudicating the rare prisoner claims that arrive at trial.



The second aim of this article is connected to the first but is more practical, and it is to emphasize the necessity and particular function of expert evidence for the prisoner plaintiff, so as to mediate instinctive judicial deference. Specific strategies can assist plaintiffs' counsel to reduce the interpretive lenience and relaxed scrutiny that courts tend to offer (whether properly or not) to the claims of prison administrators. The task is important but not easy. In defending a claim, the institutional defendant can rely on extensive evidence, often gathered over the course of many years, from institutional psychologists and correctional staff, as to the basis and justification of its actions with respect to the plaintiff prisoner and with respect to its policies more generally. Plaintiff's counsel, by contrast, will rarely have the benefit of an independent, reliable evidentiary record over the time period most relevant to the case, and the individual plaintiff will not be able to speak personally to the legitimacy of penological techniques as a general matter.<sup>23</sup> At this relatively young moment in prisoners' rights litigation under the *Charter*, it is a key moment to emphasize how the issue of expertise affects judicial deference to the prison, and to examine the range of sources of expert evidence on issues important to the development of penal law.

The plan for the article is as follows. Part I sets out some background on the emergence of rights-based prison law in the United States and Canada, which helps to contextualize the current state of the jurisprudence. Part II describes patterns of judicial deference to prison administrators in Canada, both before and after the *Charter*, showing that penal law, particularly as it is understood in lower courts, has been slow to adapt to modes of legal analysis established under the *Charter*. Part III turns to the trajectory of American prisoner litigation, and illustrates how expertise and deference have been at the core of both the expansion and contraction of prison jurisprudence. This is an important history for a Canadian audience, given how the politics and implications of that process may be relevant to legal development in Canada—we can decide to either copy or avoid—and given structural similarities in rights litigation in each country.<sup>24</sup> In the final section, Part IV, this article considers the current

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<sup>23</sup> In addition, as Debra Parkes notes in her comprehensive study of prisoner claims brought under the *Charter*, there are often barriers to retaining experts specializing in the conditions or effects of imprisonment. As Parkes observes, psychologists and psychiatrists regularly refuse to testify against the Correctional Service of Canada, for fear that they will jeopardize service delivery contracts or research access to institutions. See Debra Parkes, "A Prisoners' *Charter*? Reflections on Prisoner Litigation under the *Canadian Charter of Rights and Freedoms*" (2007) 40:2 UBC L Rev 629 at 668, n 161.

<sup>24</sup> In terms of textual similarities, the Eighth Amendment of the *Bill of Rights* (US Const amend VIII) ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted") bears a strong resemblance to section 12 of the *Charter* ("[e]veryone has the right not to be subjected to any cruel and unusual

prospects of prisoner litigation under the *Charter*. This part considers three cases that serve as indicators of new paths in prisoner jurisprudence, marked by the penetration of social scientific and medical knowledge into legal analysis and judicial approaches that treat the prison as an ordinary domain of government action.

## I. Early Signs of Prisoner Rights

Evidentiary issues were legally irrelevant for much of the history of modern prison law, as courts simply excluded the internal conditions of penal institutions from the scope of judicial review. A blanket judicial refusal to intervene in matters of prison administration persisted into the mid-twentieth century in both the United States and Canada. As a result of the “hands off” doctrine, United States prisoners who complained about the quality of prison conditions or administration, or who requested that the constitutional rights of community members be granted to them as well, were denied legal standing to pursue a claim.<sup>25</sup> In Canada, courts guided by British doctrine<sup>26</sup> similarly reasoned that they had little authority to intervene in matters of prison administration.<sup>27</sup>

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treatment or punishment”). The *Charter* has distinct equality protections under section 15, and distinct residual “liberty” and “security of the person” protections under section 7, each of which has some counterpart under the Fourteenth Amendment. While there are many differences between the two systems, the structure of litigation is similar in both countries in the contemporary period: prisoners are thought to possess ordinary constitutional rights with which the government cannot interfere, but the prison context bears on the question of finding an infringement and the question of whether the infringement might be justified.

<sup>25</sup> In the United States, this notion of civil death for prisoners was captured with the peculiar language that prisoners were “slaves of the state”—phrasing born of the Reconstruction Period and the turn to criminal law for ongoing domination of former slaves. See the 1871 Virginia case *Ruffin v Commonwealth*, 35 Va App 79 where a convicted felon claimed a constitutional right with respect to a jury trial for a murder charge he was facing. Given that the charge was for a murder committed while the accused was already incarcerated, the case was summarily dismissed on the grounds that an incarcerated person could not request ordinary constitutional rights. This principle applied all the way through to *Atterbury v Ragen*, 237 F (2d) 953 (7th Cir 1956), which held that prisoners cannot bring a complaint to federal court even in a case alleging severe beatings, starvation, and the abuse of solitary confinement by prison staff, and notwithstanding the plain language of the *Civil Rights Act of 1871*, Pub L No 113-142, 17 Stat 13 (codified as amended at 18 USCA § 241, 42 USCA §§ 1983, 1985(3), and 1988) bestowing a federal cause of action in such circumstances.

<sup>26</sup> For illustration of the original British reasoning, the Court of King’s Bench refused in 1822 to make an order with respect to matters of prison administration on the following grounds: “[W]e have no authority whatever to interfere with the regulations of the prison, the legislature having provided for those regulations in another manner. I am not aware of any instance in which this Court has granted an attachment under circumstances like the present” (Bayard Marin, *Inside Justice: A Comparative Analysis of*

The notion that prisoners retain some constitutional rights, and that the judiciary should properly enforce those rights, emerged in both the United States and Canada in the second half of the twentieth century. A period of intense constitutional litigation, from approximately 1965 to 1975, served to dismantle some of the worst excesses and deficiencies in American prisons. During this period, courts developed techniques to gain information and assess the quality of prison conditions. Central to the thesis of this article is the fact that the accrual of operational expertise proved essential to reform, as American courts could not intervene until they had expanded their institutional capacity. Judges acquired staffs and appointed qualified special masters who could oversee the implementation of court orders and report back to the overseeing judge.<sup>28</sup> Since the 1980s, however, the scope and impact of prisoner litigation has significantly diminished in the United States, due partly to a legislative backlash and accompanied by the return of hands-off judicial deference to the preferences of prison administrators.

In Canada, the landscape of prisoners' rights was altered first by the extension of administrative law concepts and then by the arrival of the *Charter*. Relatively few prisoner *Charter* cases have been litigated, due to the *Charter's* young age, a relatively small prisoner population, and the structural impediments that prevent individuals who live in inaccessible facilities and who are largely poor from accessing the courts. The *Charter* did, however, bring about a legal and culture shift that served to generate the passage of the *Corrections and Conditional Release Act*.<sup>29</sup> The CCRA is Canada's first comprehensive penal code, designed to specify *Charter*

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*Practices and Procedures for the Determination of Offenses against Discipline in Prisons of Britain and the United States* (Cranbury, NJ: Associated University Presses, 1983) at 252, quoting *R v Carlile* (1822), 1 Dow & Ry KB at 536–37). Another example, from 1843, is the Court of Queen's Bench which, in rejecting a prisoner request to pursue his literary interests in prison, said the court “could not interfere with the regulations of the prison” (*ibid* at 252–53, quoting *R v Cooper* (1843), 1 LTOS 143). But there was some variation: in 1848, a court ordered that a remand prisoner ought to be allowed to have books, at least while preparing for trial (see *ibid* at 253, citing *R v Bryson* (1848), 12 JP 585).

<sup>27</sup> In *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983), quotes the writings of the warden of Kingston penitentiary in 1867 as follows: “[S]o long as a convict is confined here I regard him as dead to all transactions of the outer world” (*ibid* at 82). A historical trajectory wherein Canadian prisoners were considered civilly dead until the 1970s is confirmed in Mandel, *supra* note 19 at 79.

<sup>28</sup> See Malcolm M Feeley & Van Swearingen, “The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications” (2004) 24:2 Pace L Rev 433 at 440.

<sup>29</sup> RSC 1992, c 20 [CCRA].

equality and process rights in the penal context.<sup>30</sup> The paucity of prisoners' rights litigation under the *Charter* is partly due to the fact that the CCRA has been considered largely *Charter*-compliant. By contrast, in many American states, there is little formal legislation governing prisons, as prison administrators are simply assigned a large swath of discretionary power to operate their institutions. In Canada, under the CCRA, advocacy for prisoners has tended to mean insisting on adherence to the existing legal regime, rather than pushing for the articulation of new rights. For this reason, much prisoner litigation has been highly individualized and limited in scope.

The key *Charter* issues have been about what the CCRA failed to include, such as the voting rights case.<sup>31</sup> While the adequacy of the CCRA itself is less often challenged, notable exceptions arise; for example, the prisoner grievance system.<sup>32</sup> Litigation that challenges CCRA-compliant practices, like administrative segregation and lack of access to safe injection equipment, discussed in Part IV of this article, are thus novel, emerging sites of contestation to the CCRA itself. There are also important *Charter*-based challenges emanating from the provincial jails, no doubt due to the fact that provincial penal codes have never been properly updated in the *Charter* age, and due to poor conditions in provincial facilities. Like the American litigation that began to demand constitutional reform in the 1970s, provincial claims, along with challenges to the CCRA itself, seek a novel remedial scope, and promise to rely on a wide range of expert material in order to make out both the constitutional violation and the basis for expansive relief.

Building on these stages in the development of prison law, this article argues that constitutional analysis of prisoner claims must be brought into more consistent alignment with ordinary *Charter* standards. There are no automatic rules of deference in a *Charter*-based review of government

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<sup>30</sup> The pre-*Charter* history is set out in Jackson, *Prisoners of Isolation*, *supra* note 27. Jackson has noted that the *Charter*'s principal benefit for prisoners is not necessarily "to be found in the litigation it spawns, but rather in the climate and culture of respect it creates amongst both governments and citizens for fundamental human rights and freedoms" (*Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 62).

<sup>31</sup> See *Sauvé*, *supra* note 9.

<sup>32</sup> In *May v Ferndale*, 2005 SCC 82, [2005] 3 SCR 809 [*May*] the court unanimously held that the prisoner grievance system is marked by inadequacies, and that prisoners must retain the right to file *habeas corpus* in provincial superior courts in order to challenge correctional decisions that impair residual liberty interests. The court in *May* rejected the argument from the federal government that prisoners must first exhaust the prisoner grievance process and then seek judicial review in Federal Court, with its slower timelines and hurdles.

law or conduct, and the United States jurisprudential tendency in that regard, explored further below, should be rejected. Under *Charter* analysis, the right is presumed to prevail, unless infringement is justified under section 1.<sup>33</sup> Jacob Weinrib argues that the section 1 framework is normative, in that it represents a “doctrinal solution to a moral problem that arises in modern constitutional states.”<sup>34</sup> The idea is that once constitutional rights are conceived of and interpreted as incidents of the “over-arching duty of government to respect, protect, and fulfill human dignity,” then a doctrinal test is required so as to resolve moments when incidents of this duty might come into conflict.<sup>35</sup> Prisoners must have access to this same moral mechanism of modern constitutionalism, rather than being subject to judicial deference that preempts or negates the standard. The questions that animate section 1 point to the salience of certain empirical factors. Canadian courts now regularly require robust evidence—typically expert evidence—to assess whether the infringement is “demonstrably justified in a free and democratic society.”<sup>36</sup> To fully deploy this reality in the field of prisoner rights would entail a full break from a notion of civil death for prisoners, and a rejection of United States-style reticence to sustain access to constitutional review for prisoners.

As just one introductory example of how prevailing forms of Canadian constitutional review have not always been applied in the context of prisoner claims, Debra Parkes has observed a judicial tendency to “consider issues of government justification for limiting rights at the stage of deciding whether there has been an infringement of the right itself, rather than at the subsequent section 1 stage.”<sup>37</sup> Parkes cites *Fieldhouse v. Canada*,<sup>38</sup> where the British Columbia Court of Appeal held that a random urinalysis policy did not breach sections 7 or 8 of the *Charter*. Both the trial and appellate courts considered the government’s justifications and

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<sup>33</sup> Section 1 of the *Charter* contemplates that the government may justify a law that infringes a right, but the law must survive the rigorous test established in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*]. The government must demonstrate that the impugned law pursues a purpose that is pressing and substantial in a free and democratic society, and that it satisfies the proportionality analysis set out in *Oakes*.

<sup>34</sup> “Proportionality in its Strict Sense” (2014) at 2 [unpublished].

<sup>35</sup> *Ibid.*

<sup>36</sup> As the Ontario Court of Appeal first put it in 1983, section 1 requires evidence as to the “economic, social and political background” of a rights-limiting law, with the analysis assisted by “references to comparable legislation of other acknowledged free and democratic societies” (*R v Southam Inc* (1983), 146 DLR (3d) 408 at para 30, 41 OR (2d) 113 (ONCA)). This empirical approach was affirmed and deepened under the test set out in *Oakes*, *supra* note 33, and in subsequent cases, discussed below in Part II.

<sup>37</sup> Parkes, “A Prisoners’ *Charter*?”, *supra* note 23 at 670.

<sup>38</sup> (1995), 40 CR (4th) 263, 98 CCC (3d) 207 (BCCA).

objectives at the front end of deciding whether a right had been infringed. With this approach, the courts avoid the section 1 analysis, which, as Parkes points out, “requires more than a good objective; it requires, among other things, that the measure chosen to achieve the objective only minimally impair *Charter* rights.”<sup>39</sup> This article explores additional examples and considers possibilities for ensuring ordinary levels of *Charter* scrutiny for prisoners.

The question of whether rights are Dworkin’s “trumps”<sup>40</sup> or whether they are subject to judicial balancing and contextual interpretation is often considered to be the main difference between United States and Canadian constitutional law. The conventional story is that the United States is marked by a stronger conception of individual rights.<sup>41</sup> In the Canadian context, so the story goes, rights are not trumps. The structure of *Charter* adjudication means that rights are significant protections to be interpreted in context, a context that includes the text of the *Charter* and the separation of powers central to Canadian political design. These debates are newly relevant for prisoners—a right has been the furthest thing from a trump in the traditional forms of law accessible to prisoners. For much of the history of the modern prison, nuanced questions about the priority and interpretation of rights were not pursued, as courts simply refused judicial review on matters related to the internal conditions of penal institutions. It is critical to observe that we still find traces of the old ways, from a time when prisoners’ rights was a strange and unenforceable legal category. That traces remain is not surprising: there is a deep structure to judicial deference to penal institutions. A shift to a *Charter*-based penal law is not yet complete, but the mechanisms by which it could happen are becoming increasingly clear.

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<sup>39</sup> Parkes, “A Prisoners’ *Charter*?”, *supra* note 23 at 671.

<sup>40</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap, 1986) at 223.

<sup>41</sup> This conventional account has been questioned by Richard H Pildes, “Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism” (1998) 27:2 *J Legal Stud* 725 (1998). Pildes argues that, with respect to the United States, rights function not as atomistic individual entitlements or trumps, but rather work to police the kinds of justifications that government can offer when acting in various spheres. Indeed, while there is no explicit limitation clause for constitutional rights in the United States constitution, the United States Supreme Court often allows for restriction of individual rights, and utilizes various levels of judicial scrutiny of legislative ends in ways that resemble section 1 analysis under the *Charter*. See also Stephen Gardbaum, “The Myth and the Reality of American Constitutional Exceptionalism” (2008) 107:3 *Michigan L Rev* 391. Gardbaum points out that while the United States Constitution suggests a textual basis for categorical rights, this is not the case in practice. The United States Supreme Court has “long implied limits on most textually unlimited rights, so that only a small subset of constitutional rights has been held to be absolute” (*ibid* at 417).

## II. Canadian Judicial “Hands Off”: Persistence into the Charter Age

In prison law, as in any other area of law, the question of reviewability precedes the question of evidentiary standards. The notion that the powers of prison administrators should be subject to judicial scrutiny arrived in advance of the *Charter*, in a 1980 administrative law decision where Justice Dickson held that “the rule of law must run within penitentiary walls” and that prison disciplinary boards must abide by a common law duty to act fairly.<sup>42</sup> Four years later, the Federal Court of Appeal in *Howard v. Stony Mountain Institution*<sup>43</sup> interpreted section 7 of the *Charter*, which protects a right not to be deprived of the right to liberty “except in accordance with the principles of fundamental justice,”<sup>44</sup> to hold that where prison disciplinary proceedings could result in loss of earned remission days, prisoners are, in most cases, entitled to access to legal counsel.<sup>45</sup>

The facts in *Howard* reveal the tensions in the air as the Canadian legal system shifted to the *Charter* age. The case arose after an officer presiding over a prison disciplinary court denied a request for legal counsel, retained by the prisoner, to be present at a hearing. The officer remarked that section 7 does not create “a new wave of rights” and that the officer was entitled to exercise his discretion and conclude that a fair hearing was possible without counsel.<sup>46</sup> The prisoner was found guilty of various disciplinary offences and sanctioned with a loss of seventy days of earned remission. The three-judge panel in *Howard* did not find that section 7 protects an absolute right to counsel in all prison disciplinary proceedings, but did decide that the loss of remission days triggered section 7 rights in this case. Most significantly, all three judges affirmed that the presiding officer did not have final authority to adjudicate the right. In separate concurring reasons, Justice MacGuigan observed:

What s. 7 requires is that an inmate be allowed counsel when to deny his request would infringe his right to fundamental justice. The existence of the right admittedly depends on the facts. But the right, when it exists, is not discretionary, in the sense that the presiding officer has a discretion to disallow it. The presiding officer’s authori-

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<sup>42</sup> *Martineau v Matsqui Institution Disciplinary Board* (1979), [1980] 1 SCR 602 at 622, 106 DLR (3d) 385 [*Martineau*].

<sup>43</sup> [1984] 2 FC 642, 19 DLR (4th) 502, appeal quashed as moot [1987] 2 SCR 687, 41 CCC (3d) 287 [*Howard*].

<sup>44</sup> The full text of section 7 is 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.”

<sup>45</sup> See *Howard*, *supra* note 43 at para 25.

<sup>46</sup> *Ibid* at para 4.

ty cannot, in my view, prevent a reviewing court from looking at the facts and substituting its own view.<sup>47</sup>

This passage from Justice MacGuigan affirms that discretionary penal decisions are subject to *Charter* review, along with the principles of administrative fairness articulated in the 1980 *Martineau* decision. By articulating these legal concepts, the courts affirmed the notion of access to judicial review and *Charter* rights in Canadian prison law.

Notably for the thesis of this article, the *Howard* court's treatment of penal expertise was central to its decision, but here the fact of inherent state expertise did not end the analysis. Justice MacGuigan admitted that it would be an "ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order," but he continued the analysis, reasoning that "not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes."<sup>48</sup> While on-the-spot segregation might be justified in an emergency situation, disciplinary court and revocation of earned remission lacks such a temporal imperative. In sum, a promise to hold prison officials to legal standards requires testing their assertions as to what is necessary and thus legitimate in the prison context. Justice MacGuigan found that the refusal to allow counsel at disciplinary court was a matter of "mere convenience" rather than necessity.<sup>49</sup>

The introduction of legality and judicial review into penal decisions provoked more resistance in other cases. There are several instances of under-reasoned judicial deference to prison administrators in the case law—particularly at the trial court level—even after the advent of the *Charter*. Such cases reveal a historic and lingering habit of offering substantial deference to the taken-for-granted expertise of prison administrators. In the 1982 case of *Maltby v. Saskatchewan (AG)*,<sup>50</sup> a trial judge struggled to articulate the standards that would apply to a claim of "cruel and unusual punishment" under section 12 of the *Charter*. The court admitted, at the outset, that "[t]he duty to confront and resolve constitutional questions regardless of their complexity and magnitude is the very essence of judicial responsibility."<sup>51</sup> The judge noted that courts "cannot simply abdicate their function out of misplaced deference to some sort of hands off doctrine."<sup>52</sup> However, unaided by higher court interpretations of

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<sup>47</sup> *Ibid* at para 93.

<sup>48</sup> *Ibid* at paras 81–82.

<sup>49</sup> *Ibid* at para 82.

<sup>50</sup> (1982), 143 DLR (3d) 649, 2 CCC (3d) 153 (Sask QB) [*Maltby*].

<sup>51</sup> *Ibid* at para 4.

<sup>52</sup> *Ibid*.



the *Charter*'s section 1 at this time, the court suggested that the purpose of section 1 is to justify *all* rights infringements in the detention context. The claim was that incarceration entails “reasonable limitations” on rights previously enjoyed, and thus any infringement of the rights of prisoners would be justified under section 1.<sup>53</sup> As discussed below, later cases make clear that section 1 contains a much more rigorous standard, for both prisoners and other categories of claimants.

The court in *Maltby* also took the peculiar step of looking to American doctrine to buttress a deferential approach to prison administrators defending against prisoner claims. The judge cited a leading 1974 California case that set out the following propositions:

Prison officials and administrators should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. ... The unguided substitution of judicial judgment for that of the expert prison administrators ... would to my mind be inappropriate.<sup>54</sup>

There are several strange features to this formula of deference to “professional expertise.” First, this Saskatchewan trial judge cites, with little explanation or justification, American cases for propositions of Canadian law. The unexplained extra-jurisdictional citation suggests a struggle to thoughtfully interrogate what Canadian legal order—particularly the new *Charter* order, distinct in many ways from the United States *Bill of Rights*—requires for judicial review of Canadian prison conditions. In addition, the review formula that is transported from American law implies

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<sup>53</sup> The Court wrote:

The lawful incarceration of the applicants as remand inmates bears with it necessarily reasonable limitations on their rights previously enjoyed in a free and democratic society. These restrictions are no doubt the sort of reasonable restrictions that the framers of the *Canadian Charter of Rights and Freedoms* envisioned when they included in section 1 the words ... “guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law ...*” ... The institution may and certainly must place restrictions and limitations on the rights of the applicants so that sufficient security will ensure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff (*ibid* at para 5 [emphasis in original]).

<sup>54</sup> *Ibid* at para 20, citing *Pell v Procunier*, 417 US 817, 94 S Ct 2800 at 2806 (1974) [*Pell* cited to S Ct].

that judges cannot analyze the facts of prison cases while keeping in mind the challenges of prison administration. Yet judges are constantly asked to review the conduct and policies of government actors with appropriate attention to operational context. Moreover, the judge does not have to impose “unguided substitution” but could, rather, form a view based on evidence. The doctrine articulated in *Maltby* reveals both a classic judicial instinct to avoid adjudicating prisoner claims, and shows the corresponding presumption that the decisions of prison officials are invariably driven by legitimate professional judgments, rather than, say, indifference or stereotypes. The approach also confirms the necessity of introducing external sources of knowledge that could enable the court to be properly guided in its assessment.

This standard from *Maltby* continues to be cited and utilized in order to justify extreme standards of judicial deference, notwithstanding its dubious status as a *Charter* authority. In the 2011 Ontario case of *R. v. Farrell*,<sup>55</sup> a pretrial detainee brought a broad complaint about conditions of confinement, founded on section 12 of the *Charter*, as a *habeas corpus* application. In its opinion, the court cited the above paragraph from *Maltby*, adding the general notion that “[a] person in custody simply does not possess the full range of freedoms of an un-incarcerated individual” and that the “problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions.”<sup>56</sup> There is little reference in *Farrell* to the evidence or authorities behind these assertions. One of the complaints at the heart of the application in *Farrell* was the lack of winter clothing provided to prisoners for outdoor exercise in Ottawa. On this issue, the court simply concludes:

In connection with having to exercise in a yard without warm clothing in the winter, I agree that it is not feasible for hygiene and logistics to equip inmates with hats, mitts and boots to meet winter’s harshest conditions.<sup>57</sup>

Yet there is no evidence cited in the decision, nor additional reasoning, to explain how “hygiene and logistics” serve, exactly, to make the provision of winter clothing “not feasible.”

In its startling conclusion, the *Farrell* court asserts that *habeas corpus* and the standards for punishment under section 12 of the *Charter* are not available for complaints relating to “fresh air, medical treatment, meals, the right to call and receive calls from a lawyer, and available counsel-

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<sup>55</sup> 2011 ONSC 2160, 85 CR (6th) 247 [*Farrell*].

<sup>56</sup> *Ibid* at para 47.

<sup>57</sup> *Ibid* at para 61.

ing.”<sup>58</sup> The court refers to these items as “trivial issues” that should instead be addressed through grievance procedures in the institution.<sup>59</sup> The court also seems to think that these matters could *never* violate the section 12 protection against “cruel and unusual punishment.”<sup>60</sup> While there is little doubt that the logic behind this judgment would not be sustained if competently appealed, it serves as an illustration of a judicial attitude that continues to pervade at least some contemporary prisoner cases, and how that attitude can presume that prisoner deprivations are generally justified. Moreover, given the barriers of both bringing prisoner complaints and pursuing appeals, this lower court denial of the constitutional relevance of prison conditions merits attention and critique.

Another peculiar conception of rights in the prison context appeared in a recent Ontario decision concerning a prisoner complaint about harsh conditions in long-term segregation. The reviewing court in *R. v. Aziga*<sup>61</sup> made several general statements that are unsupported by the text and structure of the *Charter*. The trial judge noted that the application lacked a sufficient evidentiary basis for adjudication of a *Charter* claim<sup>62</sup>—which was fair enough—but the court went on to make exaggerated assertions about the standards of review to be applied to the decisions and practices of prison administrators. The judge stated that courts must be “extremely careful not to unnecessarily interfere with the administration of detention facilities.”<sup>63</sup> He asserted further that prisoners must show a “*manifest violation* of a constitutionally guaranteed right,” or else “it is not generally

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<sup>58</sup> *Ibid* at para 55.

<sup>59</sup> *Ibid*. The court’s suggestion that the prisoner grievance system is an adequate replacement for access to judicial review is strikingly underinformed. Since 1987, the Office of the Correctional Investigator has raised in its annual reports significant concerns with the effectiveness of the CSC’s internal grievance process. See Ivan Zinger, “Human Rights Compliance and the Role of External Prison Oversight” (2006) 48:2 *Can J Criminology & Criminal Justice* 127. In addition, the Supreme Court of Canada has found the prisoner grievance system to be characterized by delay, lack of independence, and lack of remedial power (see *May*, *supra* note 32).

<sup>60</sup> The court cites three other trial level decisions for the proposition that “lighting, yard access, telephone access, programs and education, clothing and blankets, meals, library, toiletries, air quality, exercise facilities, bedding and medical treatment” are all “unfounded or too trivial” to amount to cruel and unusual treatment in violation of the *Charter* (*Farrell*, *supra* note 55 at para 68, citing *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6205, CRR (2d) 91 (Alta QB); *R v CAV-F*, 2005 NSSC 71, 233 NSR (2d) 69).

<sup>61</sup> (2008), 78 WCB (2d) 410, 2008 CanLII 39222 (ONSC) [*Aziga*].

<sup>62</sup> *Ibid* at para 36, citing *MacKay v Manitoba*, [1989] 2 SCR 357 at 361, 61 DLR (4th) 385, (holding that *Charter* decisions should not be made in a factual vacuum, to avoid the risk of ill-considered opinions).

<sup>63</sup> *Ibid* at para 34.

open to the courts to question or second guess the judgment of institutional officials.”<sup>64</sup> The court suggested that judges have been “very reluctant to intervene” when “conditions of detention are challenged under the *Charter*.”<sup>65</sup>

The complaint in *Aziga* may have been properly dismissed on the basis of the minimal evidence filed in that particular case. However, the doctrinal assertions in the opinion are not a principled or accurate reading of *Charter* requirements. The idea that courts cannot “question” the judgment of institutional officials does not accord with *Charter*-era ideals of government constrained by entrenched rights. Further, there is no good authority for a unique standard of “manifest violation” required to vindicate prisoner claims. The notion that the *Charter* only protects prisoners from a “manifest violation” of guaranteed rights is unsupported by the plain language of the *Charter* and the principles articulated by the Supreme Court in *Sauvé*. If the conditions of long-term segregation violate, for example, sections 7 and 12 of the *Charter*, the only remaining question is whether the violation can be “saved” under section 1. Finally, to “question” prison administrators does not mean that their difficult working context will not be properly weighed and considered, as section 1 doctrine invariably entails.

Where prisoners can show that rights have been infringed, Canadian courts must simply proceed to analysis of whether the government can justify the infringement under section 1. The *Oakes* test affirms the presumptive importance of rights, and makes clear that limitations are acceptable only where government meets a demanding test of justification. Sujit Choudhry explains that the proportionality principle at the heart of section 1 has come to entail careful evidentiary assessment.<sup>66</sup> As Choudhry argues, the *Oakes* doctrine “made *empirics* central to every stage” of the analysis, with the result that the “central debate in many section 1 cases is the quality of the evidentiary record.”<sup>67</sup> Courts regularly require social science evidence to assess whether the infringement is “demonstrably justified in a free and democratic society.”<sup>68</sup> There is no prin-

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<sup>64</sup> *Ibid* [emphasis added].

<sup>65</sup> *Ibid* at para 35.

<sup>66</sup> See “So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*’s Section 1” (2006) 34 Sup Ct L Rev (2d) 501.

<sup>67</sup> *Ibid* at 522, 504 [emphasis in original].

<sup>68</sup> A recent example is *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*] where the court struck down a prohibition on private health insurance aimed at protecting the quality of the public system. The majority in *Chaoulli* cited evidence from other OECD countries indicating that a private option could coexist with a viable public system, given certain protective legislative measures (see *ibid* at paras 77–84).

ciplered reason why prisoner claims should not be similarly treated, with the burden on the state to justify any infringement.

Moving up to the Supreme Court of Canada level, a different judicial move appeared in a 1990 opinion where serious aspects of prison administration were excluded from *Charter* coverage. In *R. v. Shubley*,<sup>69</sup> a majority of the Court held that penalties such as solitary confinement, with a restricted diet and loss of earned remission days, are not a “true penal consequence” so as to attract *Charter* criminal procedure protections.<sup>70</sup> The effect of the holding was that a prisoner could be punished twice for the same conduct: once by prison administrators, and again by an ordinary criminal court. The premise of the majority holding is that internal prison discipline is not a system designed to punish, but to “maintain order in the prison.”<sup>71</sup> In the following passage, Justice McLachlin (as she then was) seems to think that because the prison treats these events informally, this determines the question of impact on the prisoner:

The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public, criminal offence. Their purpose is not to mete out criminal punishment, but to maintain order in the prison. In keeping with that purpose, the proceedings are conducted informally, swiftly and in private. No courts are involved.<sup>72</sup>

The deference in *Shubley* serves to exempt punitive aspects of prison administration from *Charter* protection, by characterizing such punitive techniques as simply part and parcel of benign administrative processes. According to this peculiar logic, the more casual the treatment of the right by the prison regime, the less duty there will be on courts to intervene. Justice McLachlin approached the issue not as a matter of a right held by a prisoner, but by acceding to the framing of the case advanced by the prison administrator. The prison argued that the formal purpose of internal discipline is simply administrative. Justice McLachlin accepted that the consequences imposed on the prisoner are “confined” to the “manner in which the inmate serves his time,” rather than “redressing wrongs done to society at large.”<sup>73</sup> Justice McLachlin even suggests that the pro-

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<sup>69</sup> [1990] 1 SCR 3, 74 CR (3d) 1 [*Shubley*].

<sup>70</sup> *Ibid* at 21. Section 11(h) of the *Charter* provides that a person found guilty and punished for an offence cannot be punished for it again. In *R v Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235, the Court held that a proceeding is only barred by section 11(h) if they are either criminal proceedings or result in punishment which involves the imposition of true penal consequences (see *ibid* at para 21).

<sup>71</sup> *Shubley*, *supra* note 69 at 20.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* at 23.

ceedings occur “in private”—a strange and telling way of describing decisions made inside coercive public institutions. Justice Cory, in dissent with Justice Wilson, warns that the holding ultimately means that “once convicted an inmate has forfeited all rights” and can “no longer question the validity of any supplementary form of punishment.”<sup>74</sup> The dissenting opinion emphasizes that time in solitary confinement has substantial effects, and is not simply an alternative mode in which a prisoner may serve his sentence. The reasoning of the majority restores a dimension of civil death following incarceration. The majority judgment seems to reveal a wish for the prison to be akin to a “private” place, beyond the reach of law, where the interests of prisoners can be easily subordinated to managerial preferences.

Debra Parkes has criticized the court in *Shubley* for failing to understand how additional prison time and the deprivations of solitary confinement raise serious prisoner interests. Parkes explains the outcome by noting that “[t]he *Shubley* majority shows a substantial degree of deference to the Ontario government’s characterization of the internal discipline process as informal, summary, and therefore, non-criminal.”<sup>75</sup> Along similar lines, Allan Manson notes that the majority’s decision “not to inquire more carefully into the factors of imprisonment does not do justice to the expanded function of the judiciary in the post-Charter era.”<sup>76</sup> *Shubley* is a rare instance of reluctance at the level of the Supreme Court of Canada to apply the *Charter* to the penal context.<sup>77</sup>

The cases briefly canvassed in this section reveal that, in some respects, the *Charter*’s arrival did not create a sharp moment of rupture in the development of penal law. First, enhancements to prison law arrived before the *Charter*, in the *Martineau* administrative law decision and through various Parliamentary endeavours.<sup>78</sup> Second, post-*Charter* cases, typically in lower-level courts, have articulated standards of deference to prison administrators that do not accord with *Charter* principles and which are rarely offered to other government actors. This is a peculiar

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<sup>74</sup> *Ibid* at 9.

<sup>75</sup> Parkes, “A Prisoners’ *Charter*?”, *supra* note 23 at 658.

<sup>76</sup> “Solitary Confinement, Remission and Prison Discipline”, Case Comment on *R v Shubley*, (1990) 75 CR (3d) 356 at 357.

<sup>77</sup> More recent cases than *Shubley* have sent very different signals. See *May*, *supra* note 32; *Sauvé*, *supra* note 9; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*].

<sup>78</sup> See House of Commons, Sub-Committee on the Penitentiary System in Canada, *Report to Parliament* (1977) (Chair: Mark MacGuigan), which sparked a major re-examination of prison law and resulted in the implementation of legally-trained independent chairpersons to preside over disciplinary proceedings.

impulse, given that the prison context may be the least likely place for constitutional compliance to occur, since it is an isolated and difficult environment where authority is exercised on a politically powerless population, amid limited resources and government actors who receive less training than police officers. Part III traces the treatment of these issues in American law, which provides further support for a claim that prisoner rights have not simply expanded in the modern age of human rights and constitutionalism. In the United States, deference to the presumed expertise of prison administrators has been at the heart of recent decades marked by judicial withdrawal from prison oversight.

### III. American Judicial Review: Intervention and Retreat

In the middle of the twentieth century, United States federal courts began to articulate and apply constitutional standards to both federal and state prison systems. Particularly in the 1960s, American courts began to disavow a historical “hands off” doctrine, which held that matters of prison conditions and administration were exempt from judicial review and constitutional law. Over the subsequent twenty years, the federal judiciary decided many cases that recognized individual prisoner rights, and, at times, granted extraordinary remedies that subjected entire state prison systems to oversight and intervention on matters of infrastructure, conditions, and basic policies.<sup>79</sup>

While there was no official constitutional change to explain these developments, the emergence of prisoner law in the United States was connected to the Civil Rights Movement and the reforms initiated by the Warren Court. Prisoners were able to latch on to the radical extensions of citizenship rights and democratization that characterized legal change in that period.<sup>80</sup> The prisoners’ rights movement had roots in a long history of efforts to reform the prison, but, as James Jacobs points out, after the

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<sup>79</sup> See generally Malcolm M Feeley & Edward L Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* (New York: Cambridge University Press, 1998). This important book contains case studies of the Arkansas, Texas, and Colorado prison reform litigation. See also Margo Schlanger, “Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders” (2006) 81:2 NYUL Rev 550.

<sup>80</sup> See generally James B Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977). Jacobs explains that the prisoner rights movement was part of the new dynamics of mass society: where it was fundamental that “rights of citizenship” be extended to “heretofore marginal groups like racial minorities, the poor, and the incarcerated” (*ibid* at 6). See also See James B Jacobs, “The Prisoners’ Rights Movement and Its Impacts, 1960–80” in Norval Morris & Michael Tonry, eds, *Crime and Justice: A Review of Research*, vol 2 (Chicago: University of Chicago Press, 1991) 429 at 432.

1960s the arguments for reform began to be sourced in the Constitution, rather than in the language of religious or utilitarian values.<sup>81</sup> Once the reform period arrived, it operated intensely. In their detailed study of this period, Malcolm Feeley and Edward Rubin remark that “the entire conditions-of-confinement doctrine was articulated in little more than a decade, after 175 years of judicial silence on its subject matter.”<sup>82</sup>

The accrual of judicial expertise regarding prison conditions proved essential to the reform process, so as to mediate the structural imbalance in both knowledge and authority between the prisoner plaintiff and the institutional defendant. The early cases gave rise to evidence about the qualitative features and actual effects of imprisonment, heard in United States federal courts for the first time. Neutral experts emerged in the form of court-appointed receivers and special masters, who would collect data, oversee the implementation of court orders, and report back to federal judges as to progress made and the need for specific further reforms.<sup>83</sup> These mechanisms for providing expert advice to courts about the adequacy of particular prison systems are still in use in the United States today, and affirm the deep connection this article points to between judicial enforcement of rights and mechanisms for judicial education regarding penal institutions.<sup>84</sup>

The first intensive wave of reform did not last long. There was soon a sense that the courts had gone far enough. In 1980, James Jacobs ob-

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<sup>81</sup> See *ibid.*

<sup>82</sup> Feeley & Rubin, *supra* note 79 at 14.

<sup>83</sup> Court-appointed experts have been particularly crucial so as to avoid the “war of experts” that traditional adversarial suits entail. For discussion of one such federal rule of procedure, see Herbert A Eastman, “Rule 706 Experts: A Greater Engine for Discovering the Truth in Prison Reform Cases” (1994) 14:1 Saint Louis U Pub L Rev 51. See also Feeley & Swearingen, *supra* note 28.

<sup>84</sup> A notable recent example is the prisoner class actions in California, where court-appointed Receivers and Special Masters monitored the implementation of multiple court orders aimed at improving health care services and other Eighth Amendment matters in the state prison system over the course of many years. These court-appointed agents, along with additional experts, advised the California court of ongoing constitutional breaches, and eventually advised that it would be impossible to render California prisons constitutionally compliant absent a significant reduction in the prisoner population. This expert-driven process eventually resulted in the granting of a mandatory prisoner release order, which the United States Supreme Court upheld in *Brown v Plata*, 131 S Ct 1910, 179 L Ed 2d 969 (2011). As Jonathan Simon observes: “[T]he *Brown* majority broke with the posture of extreme deference toward imprisonment choices and unleashed a potential sea change in penal policy” (*Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014) at 152). Notably, Simon cites an insistence on empirical evidence and expert assessment as central to the reasoning of the majority decision at the Supreme Court (see *ibid* at 153).



served that “the luster of the prisoners’ right movement seems to be fading.”<sup>85</sup> The larger society had shifted to the “culture of control” caused by high levels of crime, and had experienced the social and political transformations associated with the policies of mass incarceration.<sup>86</sup> Whatever the causes, a shift in judicial attitude and political atmosphere began to constrain prisoner litigation in the United States. Feeley and Rubin point to cases decided between 1979 and 1991 as the key indicators of change.<sup>87</sup> At the legislative level, the 1996 Prison Litigation Reform Act, aimed at curtailing prisoner litigation and limiting the scope of judicial intervention in prison administration even for constitutional claims, was the culmination of the new atmosphere.<sup>88</sup> Prisoner litigation remains a useful tool for knowledge production, negotiation, and, at times, judicial remedies.<sup>89</sup> But the benefits and drawbacks of litigation must be unpacked one

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<sup>85</sup> Jacobs, “The Prisoners’ Rights Movement”, *supra* note 80 at 439.

<sup>86</sup> See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); David Garland, *Mass Imprisonment: Social Causes and Consequences* (London: Sage, 2001) at 1–3.

<sup>87</sup> See Feeley & Rubin, *supra* note 79 at 56–57: “Since the late 1980s, the decline of momentum in prison conditions litigation has been abundantly evident.” Feeley and Rubin consider an early indicator to be the decision in *Bell v Wolfish*, 441 US 520, 99 S Ct 1861 (1979) [*Bell* cited to S Ct], where the Supreme Court reversed a lower-court decision holding the federal jail in New York City unconstitutional on a wide variety of grounds. By 1991, the case of *Wilson v Seiter*, 501 US 294, 111 S Ct 2321 (1991) [*Wilson*] is, to Feeley & Rubin, the signal of a “true retrenchment”. *Wilson* holds that conditions must be specifically imposed as punishment in order to be covered by the Eighth Amendment, or must be the result of wanton behavior by correctional officials. As Feeley and Rubin conclude, the *Wilson* reasoning could preclude conditions of confinement suits on the ground that the conditions are “the result of an insufficiently trained staff, an insufficiently funded operational budget, an insufficiently large physical plant, or any of the other insufficiencies that genuinely bedevil state prison systems” (Feeley & Rubin, *supra* note 79 at 49).

<sup>88</sup> Pub L No 104-134, 110 Stat 1321-66 (1996) (codified as amended at 42 USCA § 1997e) [PLRA]. The PLRA contains extraordinary limits on prisoner litigation in federal courts, which is the only viable constitutional venue for prison law. The PLRA requires administrative exhaustion, limits actions to those with showings of physical injury, caps attorney’s fees, and discourages repeat filings by jailhouse lawyers. The PLRA has been very effective in vastly reducing the number of prisoner claims. For discussion of the legislative history and impact of the law, see Margo Schlanger & Giovanni Shay, “Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act” (2008) 11:1 U Pa J Const L 139.

<sup>89</sup> For more detailed treatment on whether the litigation and mobilization around prisoners’ rights and other penal issues in the 1960s and 1970s actually resulted in more humane, liveable prisons, see Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006) at 167–69.

case study at a time, with attention to the entire litigation context and actual effects within penal institutions.<sup>90</sup>

At the doctrinal level, the cases reveal how the notion of rights articulated by the United States Supreme Court in the 1970s is different in tone and substance from that applied today. One example is the line of decisions concerning the First Amendment right to free expression, which shows how patterns of judicial deference and notions of correctional expertise shaped the progression from *Procunier v. Martinez*,<sup>91</sup> decided in 1974, to *Beard v. Banks*,<sup>92</sup> decided in 2006.

In *Martinez*, the United States Supreme Court invalidated California Department of Corrections regulations that permitted extensive censorship of prisoner mail. The impugned regulations included a ban on any prisoner letters that “unduly complain[ed]”, “magnify[ied] grievances”, or “express[ed] inflammatory political, racial, religious or other views or beliefs.”<sup>93</sup> While United States courts had previously deferred entirely to the decisions and rules of prison officials, in this case the court affirmed that when a prison regulation or practice offends a fundamental constitutional guarantee, “federal courts will discharge their duty to protect constitutional rights.”<sup>94</sup> Along with articulating this fundamental principle of constitutional jurisdiction over prisons, the *Martinez* Court found that the California regulations on prisoner correspondence impaired expression rights protected under the First Amendment. The Court reasoned that corrections officials had to show a “substantial governmental interest” in order to validate the regulation.<sup>95</sup> The specific regulation then had to be shown to be “necessary or essential to the protection” of the government

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<sup>90</sup> Margo Schlanger calls for scholarship that attends to the multi-player politics of institutional reform litigation, rather than a focus on the doctrine-creating activity of judges alone: see “Beyond the Hero Judge: Institutional Reform Litigation as Litigation”, Book Review of *Judicial Policy Making and the Modern State: How the Courts Reform America’s Prisons* by Malcolm M Feeley & Edward L Rubin, (1999) 97:6 Mich L Rev 1994 at 2009–36. As an example of this approach, Schlanger gives a complex account of how California litigation has delivered substantial civil rights achievements while also generating new risks of unconstitutional conditions of jail confinement. See Margo Schlanger, “*Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics” (2013) 48:1 Harv CR-CLL Rev 165 at 177–78.

<sup>91</sup> 416 US 396, 94 S Ct 1800 (1974) [*Martinez* cited to S Ct].

<sup>92</sup> 548 US 521, 126 S Ct 2572 (2006) [*Beard* cited to S Ct].

<sup>93</sup> *Martinez*, supra note 91 at 1803 [internal quotations omitted].

<sup>94</sup> *Ibid* at 1807–08.

<sup>95</sup> *Ibid* at 1811.

interest.<sup>96</sup> The California regulations, with their broad and ambiguous constraints on prisoner speech, failed the test.

Within a few years, however, doctrinal ambiguity about the standard of review was seized upon by the 1987 decision in *Turner v. Safley*,<sup>97</sup> which indicated that prisoners are to receive a very low level of judicial scrutiny for a constitutional claim, even one implicating a fundamental right. To survive review, the regulation needed only to satisfy four factors, the main one of which is whether the regulation is “reasonably related to legitimate penological objectives.”<sup>98</sup> Sharon Dolovich has a sharp critique of the *Turner* test, arguing that it allows prison officials to violate constitutional rights “if they can show that doing so facilitates the running of the prison.”<sup>99</sup> Part of the problem is that the “penological objective”—a purpose that can justify infringement of a right—is often simply asserted by the prison authority, and accepted on little evidentiary proof. Consequently, ensuring the security of the institution has been regularly asserted, to great success and with little empirical testing, by institutional defendants in the years following *Turner*.<sup>100</sup>

The 2003 case of *Overton v. Bazetta*<sup>101</sup> exemplifies how application of the *Turner* standard fosters heightened judicial deference in a later generation of cases, where deference is deployed so as to defeat prisoner claims regardless of whether evidentiary standards are satisfied by the state. In *Overton*, a majority of the United States Supreme Court upheld extensive limits on the ability of prisoners to receive visits from outside the prison. The regulations included a ban on parents receiving visits from natural-born children where parental rights had been terminated for any reason, and a complete ban on visits for prisoners with a substance abuse violation in the previous two years. Given the importance of visiting to prisoners, and the fact that the parental rights of prisoners can be comparatively easily terminated under American law, these were severe

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<sup>96</sup> *Ibid.*

<sup>97</sup> 482 US 78, 107 S Ct 2254 (1987) [*Turner* cited to S Ct].

<sup>98</sup> The court in *Turner* struck down a prohibition on prisoner marriages, because the prohibition was stunningly broad and not connected to any legitimate objective. The other factors under the *Turner* test are: whether an alternative means is open to exercise the right, what impact an accommodation of the right would have on guards, other inmates and prison resources, and whether there are “ready alternatives” to the regulations (see *ibid* at 2262). Each of these factors have tended to provide prison officials with opportunities to avoid protection of the right.

<sup>99</sup> Dolovich, *supra* note 2 at 246.

<sup>100</sup> See generally Cheryl Dunn Giles, “*Turner v. Safley* and Its Progeny: A Gradual Retreat to the ‘Hands-Off’ Doctrine?” (1993) 35:1 Ariz L Rev 219.

<sup>101</sup> 539 US 126, 123 S Ct 2162 (2003) [*Overton* cited to S Ct].

limits. In upholding the restrictions, the majority simply asserted that the regulations “promote internal security, perhaps the most legitimate penological goal.”<sup>102</sup> The majority also found that the regulations protect children, by reducing the number of children at visits and allowing guards to better supervise them. With respect to the withdrawal of visitation from inmates with two substance abuse violations, the majority concluded: “Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose.”<sup>103</sup>

Despite the empirical issues at the heart of this holding, such as whether it was too difficult for guards to safely supervise a larger number of visiting children, the majority in *Overton* did not cite or elaborate on any evidentiary sources for its claims, and did not cite the findings of the courts below, each of which found the regulations to be invalid. The majority justified its approach in the name of granting due deference to prison administrators.<sup>104</sup> *Overton* suggests that prison administrators are to receive deference regardless of the content or the quality of their professional judgment, which echoes the doctrine asserted by some Canadian judges discussed above. This standard of adjudication has led many United States commentators to cite the return of the “slaves of the state” approach or of keeping judicial hands off the field of prison administration.<sup>105</sup>

Judicial deference to the unquestioned expertise of administrators reached new rhetorical heights in the 2006 plurality opinion of Justice Breyer in *Beard*. This case involved prisoners housed in highly restrictive conditions at Pennsylvania’s Long Term Segregation Unit (LTSU). At the LTSU, all prisoners were confined to cells for twenty-three hours a day, with no access to commissary goods or phone calls, and a single immediate family visitor once per month. Confined almost constantly to cells, they nevertheless had no access to television or radio. The basis of the le-

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<sup>102</sup> *Ibid* at 2165.

<sup>103</sup> *Ibid* at 2168–69.

<sup>104</sup> “We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them” (*ibid* at 2167, citing *Pell*, *supra* note 54 at 826–27).

<sup>105</sup> See e.g. Susan N Herman, “Slashing and Burning Prisoners’ Rights: Congress and the Supreme Court in Dialogue” (1998) 77:4 *Or L Rev* 1229. For further commentary as to judicial hands being “on” or “off,” see Owen J Rarric, “*Kirsch v. Wisconsin Department of Corrections*: Will the Supreme Court Say ‘Hands Off’ Again?” (2002) 35:2 *Akron L Rev* 305; Patricia Yak, “*Hudson v. Palmer*: Return to the ‘Hands-Off’ Approach to Prisoners’ Rights?” (1985) 5:4 *Pace L Rev* 781.

gal complaint was quite restrained given the circumstances. Prisoners assigned to Level 2 (the most restrictive level of LTSU) had no access to newspapers, magazines, or personal photographs. The Level 2 prisoners were held in total isolation, often for months at a time, and were denied access to the most basic forms of human communication. The constitutional claim was that the restriction violated the First Amendment's protection of free expression, and that it was not justified because the restriction bore no relation to a legitimate penological objective.

At issue before the Supreme Court was whether the complaint could be dismissed by way of summary judgment; that is, whether the case raised a triable issue. At such an early stage of litigation, the record consisted only of the deposition of a deputy superintendent at the prison, and various prison policy manuals and related documents. Despite the early stage of the case and the very low threshold required to show a triable issue, Justice Breyer, in a 6-2 plurality opinion, directed the summary dismissal of the complaint on the basis that "the prison officials have set forth adequate legal support for the policy."<sup>106</sup> While the court noted that it must draw all inferences in favour of the claimant at the pretrial stage, it held (citing *Overton* and *Turner*) that it must "distinguish between evidence of disputed facts and disputed matters of professional judgment."<sup>107</sup> In the latter circumstance, Justice Breyer reasoned, courts are to accord deference to the views of prison authorities.

The deference Justice Breyer offered did not turn on any evidentiary support for the claims of the prison authorities. In the pretrial proceedings in *Beard*, the prison authority asserted in its materials that it was depriving LTSU Level 2 inmates of newspapers, magazines, and personal photographs mainly in order to motivate better behaviour, and also to minimize property in cells and ensure prison safety. The prison stated that deprivation, especially for those who have already been deprived of almost all privileges, was a legitimate technique as an "[incentive] for inmate growth."<sup>108</sup> The only evidence adduced to justify these techniques consisted of the statements of the prison administrator. The Third Circuit Court of Appeals (the court below) noted that there was no other evidence to suggest the necessity of the measures, nor was there any evidence to confirm the state's theory of behavioural incentives. The Third Circuit found that the Department of Corrections' deprivation theory of behaviour modification had no basis in real human psychology, and that it had not been shown that the restrictions were implemented in a way that could ef-

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<sup>106</sup> *Beard*, *supra* note 92 at 2576.

<sup>107</sup> *Ibid* at 2578.

<sup>108</sup> *Ibid* at 2579.

fectively modify behaviour, given the deleterious effects on prisoners living with such deprivations.

Justice Breyer rejected the evidentiary concerns of the Third Circuit as follows:

The court's statements and conclusions ... offer too little deference to the judgment of prison officials about such matters. The court [below] offered no apparent deference to the deputy prison superintendent's professional judgment that the Policy deprived "particularly difficult" inmates of a last remaining privilege and that doing so created a significant behavioral incentive.<sup>109</sup>

Justice Breyer's opinion in *Beard* is remarkable for its articulation of a legal rule: So long as the subject matter of a case concerns the judgment of prison administrators, then in almost no circumstance will the prisoner succeed. The case indicates that, so long as the factual dispute in a case concerns how the prison should operate, dismissal even in advance of trial is justified. It follows that the case substantially effaces the notions that, first, constitutional rights survive imprisonment, and second, that courts must interpret and balance rights infringements in the prison context, such as by analyzing whether a rights infringement is "necessary or essential" (from *Martinez*) or "proportionate" (from *Oakes*) to a governmental interest. Justice Breyer purports to use a standard of "reasonable relation" to a "legitimate penological objective", but his application of that standard suggests the barest minimum of judicial review.<sup>110</sup>

Like the Third Circuit below, the dissenting justices in *Beard* pointed to the lack of evidentiary support to justify the prison's policy. Justice Stevens, in dissent, chronicled the lack of evidence to suggest that the state's theory of behaviour modification had any basis in human psychology, or the notion that the rule had a rehabilitative effect specifically in the LTSU. Justice Stevens noted further that this concept of rehabilitation has no limiting principle:

[I]f sufficient, it would provide a "rational basis" for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.<sup>111</sup>

In addition, Justice Stevens found that there were multiple other reasons why an inmate would be motivated to rehabilitate out of LTSU, and that the lack of access to a single newspaper was an invasion of the

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<sup>109</sup> *Ibid* at 2581.

<sup>110</sup> *Ibid* at 2577.

<sup>111</sup> *Ibid* at 2588, Stevens J, dissenting.

“sphere of intellect and spirit” which the First Amendment protects.<sup>112</sup> Justice Stevens concluded that a full trial was necessary in order to form a definitive judgment as to whether the challenged regulation was “reasonably related” to the prison’s valid interest in security and rehabilitation, in accordance with the *Turner* standard.

Justice Ginsburg echoed these concerns in a separate dissent, noting that the defendant relied entirely on the deposition of the prison’s own deputy superintendent, whose evidence was simply:

[O]bviously we are attempting to do the best we can to modify the inmate’s behavior so that eventually he can become a more productive citizen. ... [Newspapers and photographs] are some of the items that we feel are legitimate as incentives for inmate growth.<sup>113</sup>

Justice Ginsburg concluded that these statements are not sufficient to show that the challenged regulation is reasonably related to inmate rehabilitation.<sup>114</sup> Justice Ginsburg concluded that the plurality’s reasoning means that it is sufficient for a prison defendant to say “in our professional judgment the restriction is warranted” in order to avoid even the burden of a trial.<sup>115</sup> Justice Ginsburg’s analysis reveals the structural similarity between the plurality’s approach and the era of civil death for prisoners, the only difference being that prisoners can now access the courts and, at least briefly, assert a right in a language cognizable to the courts. But so long as the prison points to its own professional judgment, then the scope of the right is diminished so significantly that it does little good to bear it.

Cases like *Overton* and *Beard* have led Sharon Dolovich to argue that United States prison law wholly lacks principled and consistent doctrines of judicial deference.<sup>116</sup> Dolovich has mapped three particular forms of deference that have been deployed in recent years at the Supreme Court

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<sup>112</sup> *Ibid* at 2591, Stevens J, dissenting.

<sup>113</sup> *Ibid* at 2592, Ginsburg J, dissenting [internal quotation omitted].

<sup>114</sup> *Ibid*, citing *Shimer v Washington*, 100 F (3d) 506 at 510 (7th Cir 1996), holding that prison officials “cannot avoid court scrutiny by reflexive, rote assertions” [internal quotations omitted].

<sup>115</sup> *Ibid* at 2593, Ginsburg J, dissenting. That Justice Ginsburg’s fears are well-founded is illustrated in the 7th Circuit decision in *Singer v Raemisch*, 593 F (3d) 529 (7th Cir 2010) at 534, which upheld summary judgment dismissing a First Amendment challenge to a prison ban on a role-playing game known as “Dungeons and Dragons.” The prison asserted that the game was somehow connected to gang activity. The court held that substantial deference must be offered to the professional judgment of prison administrators. In the result, the claim of the prisoner plaintiff who cherished the game could not survive even a summary application to dismiss, even after filing evidence that suggested the benefits of the game and its lack of connection to gang activity.

<sup>116</sup> See generally Dolovich, *supra* note 2.

level, each of which works in important ways to deny prisoner claims, all while maintaining a narrative of judicial oversight. The first form is *doctrine-constructing*, where deference is written right in to constitutional standards, such as standards that require high levels of proof in order to make out a violation.<sup>117</sup> The second predominant form of deference is *procedural rule-revising*, where decisions are made in ways that transform ordinary matters of legal process into rules that are more defendant-friendly, such as by adjusting evidentiary burdens in favour of the state.<sup>118</sup> The third form of deference is *situation-reframing*, where the court recasts a procedural or factual history in a way that enhances the state's position and disregards the lived experiences of prisoners.<sup>119</sup> Dolovich admits that, in the cases she considers, difficult practical consequences would have followed the granting of relief to prisoners. But the point is that the Court does not acknowledge that side of things. Rather, the reasoning simply pretends that the stipulated outcome is required, "reasoning in ways that not only favor defendants but also seem willfully to deny the lived experi-

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<sup>117</sup> See *ibid* at 246. The first example of *doctrine-constructing* deference is *Turner*, *supra* note 97, where the court held that prison regulations that infringe rights may be upheld if they are "reasonably related to legitimate penological interests" (*ibid* at 2261). Another case where Dolovich says deference is written into the standards is *Whitley v Albers*, 475 US 312, 106 S Ct 1079 (1986) [cited to S Ct], where the court held that use of force violates the Eighth Amendment only where prison officials exhibit "deliberate indifference" or where force is applied "maliciously and sadistically for the purpose of causing harm" (*ibid* at 1084, 1081 [internal quotations omitted]). Finally, deference is written into the standard articulated in *Farmer v Brennan*, 511 US 825, 114 S Ct 1970 (1994) [*Farmer* cited to S Ct], which held that deliberate indifference is the equivalent of criminal recklessness, protecting prison officials from liability for even egregious conditions (see *ibid* at 1980).

<sup>118</sup> See Dolovich, *supra* note 2 at 246–47. One example of *procedural rule-revising* is *Jones v North Carolina Prisoners' Labor Union, Inc.*, 433 US 119, 97 S Ct 2532 (1977) [cited to S Ct] where the lower court had found no evidence to support security concerns regarding the activities of a prisoner labour union. On review, the Supreme Court overturned on the basis that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response," courts should not intervene (*ibid* at 2539). This was an example of revising familiar aspects of the legal process into defendant-friendly procedures: defendants receive substantial deference, even where extensive expert evidence is adduced on the side of the plaintiff.

<sup>119</sup> See Dolovich, *supra* note 2 at 246–48. One example of *situation-reframing*, or recasting history in ways that assist the state and disregard prisoner experiences, is *Rhodes v Chapman*, 452 US 337, 101 S Ct 2392 (1981) [cited to S Ct]. In this case, the court rejects a challenge to double-celling, on the basis that it does not violate the Eighth Amendment since double-celling did not "create other conditions intolerable for prison confinement" (*ibid* at 2400). This was despite the weight of evidence at trial indicating that the space was fell far short of that required to prevent serious mental, emotional, and physical deterioration.



ence of prisoners—even when the nature of that experience is the gravamen of the legal complaint.”<sup>120</sup>

The plea for a transparent deference doctrine has not yet inspired change in United States courts. For now, courts tend to yield to the unchallenged expertise of prison administrators. There are many possible explanations, including, perhaps, a reluctance to encounter the complex and distressing reality of life inside penal institutions. The point here is to see that modern United States courts—rather than using the ancient tools of denying legal standing or flatly rejecting the idea of law-governed prisons—deploy notions of expertise and deference as a means of bypassing prisoner claims. The United States cases demonstrate that judicial protection of prisoners’ constitutional rights is unfeasible unless courts require professional penal judgments and objectives to be supported by evidence. For Canadian law to complete the shift to the *Charter* era, courts must shift the burden to prisons to prove their empirical assertions about the purposes, necessity, and effects of penal techniques that impair rights.

#### IV. Transitioning to a Rights-Based Paradigm

Transition to a *Charter*-based penal law requires that judges appreciate the structural imbalance in expertise at the outset of a case, and not aggravate that imbalance by relaxing scrutiny of the penal context. Plaintiffs’ counsel can foster a better balance by adducing evidence that contextualizes the assertions of prison defendants. Prisons do not need to be viewed as mysterious places by courts, nor as places where necessarily amateur outside intervention could trigger unknown dangers. Former prison administrators, and administrators from other jurisdictions, can give testimony to illuminate internal dynamics. Psychologists can conduct individual assessments and speak to the impacts of particular penal regimes. The independent reports of prison monitors can inform awareness of systemic issues.<sup>121</sup> Prison sociologists and ethnographers can illuminate the internal prison world and the variable modes of prison administration.<sup>122</sup>

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<sup>120</sup> Dolovich, *supra* note 2 at 249.

<sup>121</sup> In Canada, the reports of the Office of the Correctional Investigator are an invaluable resource both for setting strategic litigation agendas and informing judges of systemic issues. Section 189 of the CCRA, *supra* note 29 sets out that the Correctional Investigator is not a competent or compellable witness in legal proceedings, but this does not prevent the use of the reports as evidence.

<sup>122</sup> The focus of prison studies has shifted over the years, from the workings of prisoner society (see Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security*

As one illustration, the work of British criminologist Alison Liebling is grounded on a thesis that the quality of imprisonment can be reliably measured and analyzed. Liebling uses diagnostic tools to capture what she calls the “moral quality” of a given institution, along the dimensions of relationships, regimes, social structures, meaning and overall quality of life.<sup>123</sup> Liebling is able to measure and elaborate on important factors that are difficult to quantify, such as “how material goods are *delivered*, how staff *approach* prisoners, how managers treat *staff*, and how life is *lived*, through talk, encounter, or transaction.”<sup>124</sup> While Liebling’s concept of “moral quality” speaks to aspects of prison life that likely extend beyond that which should or can be regulated by law, we can see within her work a number of legally relevant dimensions. Lawyers must now learn how to translate problems in the complex world of prisons into cognizable legal claims. For instance, the “prison effects” literature<sup>125</sup> identifies the factors relevant to rates of prisoner suicide,<sup>126</sup> the impact of imprisonment on the elderly,<sup>127</sup> and the multiple negative effects of overcrowding on safety, health, and psychological integrity.<sup>128</sup> Viable *Charter* claims could be organized around each of these empirical sites.

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*Prison* (Princeton: Princeton University Press, 1958)), to models of prison management (see John J DiIulio, Jr, *Governing Prisons: A Comparative Study of Correctional Management* (New York: Free Press, 1987)), to the effects of modern forms of law on prison administration (see Jacobs, “The Prisoners’ Rights Movement,” *supra* note 80). For a Canadian study that tracks the progression of penal law and prison administration in recent years, see Jackson, *Justice Behind the Walls*, *supra* note 30.

<sup>123</sup> See Alison Liebling & Helen Arnold, *Prisons and their Moral Performance: A Study of Values, Quality, and Prison Life* (New York: Oxford University Press, 2004).

<sup>124</sup> *Ibid* at 50 [emphasis in original].

<sup>125</sup> Prison effects research is helpfully compiled in Alison Liebling & Shadd Maruna, “Introduction” in Alison Liebling & Shadd Maruna, eds, *The Effects of Imprisonment* (Portland, Or: Willan, 2005) 1.

<sup>126</sup> Alison Liebling’s research on prison suicide reveals how custodial life takes place on a continuum of distress, and how particular social and institutional arrangements can enhance vulnerability to self-harm and suicide. See generally *Suicides in Prison* (New York: Routledge, 1992). See also Alison Liebling, “Moral Performance, Inhuman and Degrading Treatment and Prison Pain” (2011) 13:5 *Punishment & Society* 530. For a report on the rates of suicide in Canadian prisons, which are seven times higher than the national average, see Howard Sapers, “Deaths in Custody” in *Annual Report 2011-2012* (Ottawa: Office of the Correctional Investigator, 2012) 18. See also Howard Sapers, “A Three Year Review of Federal Inmate Suicides (2011–2014)” (Ottawa: Office of the Correctional Investigator, 2014).

<sup>127</sup> See Elaine Crawley & Richard Sparks, “Older Men in Prison: Survival, Coping and Identity” in Alison Liebling & Shadd Maruna, eds, *The Effects of Imprisonment* (Portland, Or: Willan, 2005) 343.

<sup>128</sup> Empirical studies indicate that prison overcrowding is related to rule infractions and assaultive behaviour, and to the rate of communicable disease, illness complaints, psy-

Other marginalized litigants have successfully deployed empirical research to support their litigation efforts in the *Charter* era. The question of evidence has, in fact, been the critical dimension for claimants who experience chronic marginalization and popular resentment. This is at least partially because the evidentiary record is the means by which counsel can insist that constitutional adjudication not mirror conjecture and stereotyping from the wider culture. In response to these strategies, Canadian judges have extended the privilege of adjudication on the basis of *facts* rather than *stereotypes*, to groups such as sex workers<sup>129</sup> and injection drug users.<sup>130</sup> Each of these cases involved a voluminous trial record, with experts testifying from the fields of epidemiology, medicine, sociology, and criminology. The analysis undertaken by the Supreme Court in *Sauvé* is an indication of the extension of that privilege of sound evidentiary standards to prisoners as well. Counsel for prisoner claimants should continue to focus on the issue of expert evidence, notwithstanding the difficulties of doing so, and should be aware that there is an extraordinary range of expertise and literature that could bear upon future *Charter* claims.

The following three case studies illuminate how that might be done on contemporary topics that are of vital importance to prisoners. The first example stems from a decided case that deals with the use of long-term segregation on prisoners. In that case, success depended on the ability of the plaintiff to adduce an evidentiary record that contextualized the effects and necessity of the prison's specific style of segregation or solitary confinement.<sup>131</sup> The second example is also a decided case, dealing with

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chiatric commitments, stress, hypertension, and death. A study supported by the United States National Institute of Corrections concludes: “[S]tudies whose results do not conform to this pattern are few in number and do not seriously challenge the conclusion that prison overcrowding can have pronounced negative consequences on the lives of individual inmates” (Terence P Thornberry & Jack E Call, “Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects” (1984) 35:2 *Hastings LJ* 313 at 351). For discussion of how recent crime legislation may increase the prison population and impact the quality of prison healthcare in Canada, see Adelina Iftene & Allan Manson, “Recent Crime Legislation and the Challenge for Prison Health Care” (2013) 185:10 *Can Medical Assoc J* 886.

<sup>129</sup> See e.g. *Bedford v Canada (AG)*, 2013 SCC 72, [2013] 3 SCR 1101; *Canada (AG) v Downtown Eastside Sex Workers*, 2012 SCC 45, [2012] 2 SCR 524.

<sup>130</sup> See e.g. *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [PHS].

<sup>131</sup> Solitary confinement is a widespread prison practice used to manage prisoners who are perceived to be disruptive or vulnerable. In Canada, indefinite solitary is permitted under both federal and provincial legislation, where it is called “administrative segregation.” Evidence has now emerged that the lack of peer contact and minimal time out of a cell can have severe impacts on health. The practice presents the most significant risks to prisoners with preexisting mental health issues, which is particularly concerning

the abrupt cancellation of a program that enabled mothers to keep their babies with them in prison. The plaintiffs' resounding victory—resulting in the reinstatement of the program and a decision that was not appealed by the government—rested on voluminous evidence on the benefits of the program, for both mother and child, and a dearth of evidence on potential downsides. Finally, the third example concerns the ability of prisoners to access harm-reducing measures that are available to injection drug users outside of prison. A case on this issue has been filed but not yet adjudicated. Early indications suggest the record will be rich with epidemiological evidence on disease transmission in the prison context, along with comparative evidence from prison systems that have safely implemented harm reduction programs.

#### A. *Solitary Confinement: Bacon v. Surrey Pretrial Services Centre*

There is a pre-*Charter* history of judicial intervention into solitary confinement which arose out of the extreme conditions and prisoner isolation found in the British Columbia Penitentiary in the 1970s.<sup>132</sup> In *R. v. McCann*,<sup>133</sup> after a trial rich with expert testimony, the Federal Court declared these conditions to be cruel and unusual punishment within the meaning of section 2(b) of the *Bill of Rights*. The *McCann* litigation was part of an early wave of prison legality in Canada. The case was a formal

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given that mentally ill prisoners are at high risk of being segregated and are often least able to meet the behavioural standards required to merit release from segregation. There is now a large literature on these issues. For just two examples, see Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement" (2003) 49 *Crime & Delin'cy* 124; Stuart Grassian, "Psychiatric Effects of Solitary Confinement" (2006) 22 *Wash UJL & Pol'y* 325. For many years in his annual report, the CI has called for "an end to the unsafe practice that allows for prolonged segregation of mentally disordered inmates in Canadian penitentiaries" (Sapers, "Deaths in Custody," *supra* note 126 at 19). In May 2012, Canada was criticized for its use of "solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness" (Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention*, UNCAT, 48th Sess, UN Doc CAT/C/CAN/CO/6 (2012) at 6). The refusal of the federal government and the Correctional Service of Canada to reform its practices, notwithstanding multiple independent recommendations for reform, is chronicled in Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48:2 *Can J Criminology and Criminal Justice* 157. For more on the history of the legal regulation of solitary in comparative perspective, see Lisa Kerr, "The Chronic Failure of US and Canadian Law to Control Prisoner Isolation", *Queen's LJ* [forthcoming in 2015].

<sup>132</sup> See Jackson, *Prisoners of Isolation*, *supra* note 27.

<sup>133</sup> [1976] 1 FC 570, 29 CCC (2d) 337 [*McCann*].

victory, but Michael Jackson—who was counsel on the case—has detailed the difficulties of seeing the judgment implemented.<sup>134</sup>

In the *Charter* age, an early challenge to solitary confinement came from notorious serial killer Clifford Olson, who brought the case *pro se* and filed no expert opinion material. In its 1987 decision, the Supreme Court of Canada upheld the Ontario Court of Appeal’s finding that “segregation to a prison within a prison is not *per se* cruel and unusual treatment.”<sup>135</sup> The opinion of Justice Brooke confirmed the test for section 12 of the *Charter* from *R. v. Smith*:<sup>136</sup> “[W]hether the punishment prescribed is so excessive as to outrage standards of decency,” such that “the effect of that punishment [is] grossly disproportionate to what would have been appropriate.”<sup>137</sup> Justice Brooke concluded that, on the facts of the case, segregation was required to protect Olson, given that the prison community despised him. The court accepted that segregation could, theoretically, become so excessive that it would outrage standards of decency. In Olson’s case, however: “He is continually observed and his health is protected. There does not appear to be any adequate alternative.”<sup>138</sup> Olson did not adduce any evidence on the effects of segregation nor any evidence as to alternatives to long-term isolation.<sup>139</sup>

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<sup>134</sup> See Jackson, *Prisoners of Isolation*, *supra* note 27 at 134–203 (noting, for example, that one governmental report conducted in response to *McCann* “was content to leave the authority to segregate untrammelled by any substantive criteria, with the result that their recommendations left the basis for the decision as vague and unprincipled as it had always been” at 139). In the weeks following the *McCann* judgment, the segregated prisoners at the British Columbia Penitentiary were moved out of the contested cellblock, but after a security incident prisoners were returned with few changes having been made (see *ibid* at 140–41).

<sup>135</sup> *R v Olson* (1987), 62 OR (2d) 321 at para 40, 38 CCC (3d) 534 (ON CA), *aff’d R v Olson*, [1989] 1 SCR 296, 47 CCC (3d) 491 [*Olson*].

<sup>136</sup> [1987] 1 SCR 1045, 40 DLR (4th) 435.

<sup>137</sup> *Olson*, *supra* note 135 at para 35.

<sup>138</sup> *Ibid* at para 40.

<sup>139</sup> The reality is that both Clifford Olson’s crimes and his prison circumstances were extremely rare. On the occasion of his death, one reporter said this about the impact that Olson had on Canadian law: “His crimes gave rise to the victims of violence movement, their representation at trials and parole hearings, and the establishment of a missing children’s registry; his incessant demands for parole led to an amendment of the Criminal Code barring multiple murders from applying for early parole under the faint-hope clause; and his ability to collect pension and old age income supplements resulted in the passage of Bill C-31 denying such payments to prisoners while they are incarcerated” (Sandra Martin, “The life and death of Clifford Olson”, *The Globe and Mail* (30 September 2011), online: <[www.theglobeandmail.com/news/national/the-life-and-death-of-clifford-olson/article4197011/](http://www.theglobeandmail.com/news/national/the-life-and-death-of-clifford-olson/article4197011/)>). In terms of his challenge to solitary confinement, while this is the only post-*Charter* case about administrative segregation that has reached the Supreme Court, the brief opinion it elicited is of little precedential value. The case was

In 2010, the Supreme Court of British Columbia considered a very different record in a *Charter*-based challenge to prisoner segregation in *Bacon*. A pretrial detainee 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. As in *Olson*, the jail justified the segregation on the basis of the prisoner's need for protection: Bacon faced multiple gang-related homicide charges. The jail argued that release to general population could result in the prisoner's assault or murder due to the nature of his crimes and his criminal associations, and further that separation was required to protect the integrity of the criminal prosecution being brought against Bacon. The justifications offered by the jail merited serious consideration—on the facts presented from the perspective of the jail and its central concerns, it seemed sensible to keep Bacon isolated, for both his own protection and to prevent any interference in the trial of the charges against him.

In a move that compelled the court to examine a further set of issues, Bacon's counsel filed an expert opinion from psychologist Craig Haney, a leading expert on prison conditions and the mental health effects of segregation. The trial judge, Justice McEwan, found Haney to be a qualified expert, given his thirty-five years of experience studying the psychological effects of living and working in institutional environments:

He has toured prisons in the United States, Canada, Cuba, England, Hungary and Russia and has performed a study of prison conditions in Mexico. He has written extensively in the field of crime and punishment and has published numerous articles on prison life, including solitary confinement. ... I certainly accept that Professor Haney is qualified, by virtue of his experience, to offer opinion evidence on prison conditions, and to assist the Court in placing the treatment the petitioner has received in context.<sup>140</sup>

Justice McEwan cited large portions of Haney's affidavit, which described how Bacon had often been housed in "very harsh and truly severe" conditions, equivalent to those imposed in "supermax" facilities in the United States.<sup>141</sup> Bacon's unit housed mentally ill prisoners, and staff advised that these distressed prisoners regularly threw feces and bodily fluids. Bacon ate all of his meals in an eighty-square-foot cell, within a few feet of his toilet. He had no access to programs or organized activities. He remained in his cell nearly every hour of every day. Contact with anyone

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litigated, poorly, by Olson himself. In addition, Olson was not held in twenty-three hour per day cellular confinement, but was kept in a separate area of the prison under the control of designated correctional officers.

<sup>140</sup> *Bacon*, *supra* note 17 at paras 168–69.

<sup>141</sup> *Ibid* at para 170.

other than his parents was reduced to mail correspondence, which Haney noted as more restrictive than most American policies. Bacon's mandatory one hour outside of his cell came, quite unnecessarily, at random times, without warning or ability to plan for it. His outdoor time entailed time spent in a different concrete courtyard with no exercise equipment or other people. Haney observed that the structural and procedural modifications required for long-term housing of isolated prisoners had not been built into the facility, and, finally, that staff lacked training with respect to the psychological effects of long-term isolation, with "no procedure in place whereby the mental health status of each prisoner is checked routinely, frequently, and carefully."<sup>142</sup>

The jail argued that Haney's evidence described an American practice rather than the conditions in which he found Bacon. Justice McEwan rejected the argument, and accepted Haney's evidence that the "physical conditions under which the petitioner has been held compare ... to some of the worst conditions in the United States and elsewhere. Such conditions have been condemned by the international community."<sup>143</sup> Justice McEwan further found:

The petitioner is kept in physical circumstances that have been condemned internationally. He is locked down 23 hours per day and kept in the conditions Professor Haney described as "horrendous". These conditions would be deplorable in any civilized society, and are certainly unworthy of ours. They reflect a distressing level of neglect. On top of this, the petitioner is only allowed out at random times. He is denied almost all human contact. His treatment by the administration and the guards is highly arbitrary and further accentuates his powerlessness.<sup>144</sup>

In his conclusion that these dimensions of Bacon's treatment violated section 12 of the *Charter*, Justice McEwan acknowledged the holding in *Olson* to the effect that segregation is not, per se, cruel and unusual treatment.<sup>145</sup> However, Justice McEwan also referred to the 2001 holding in *United States v. Burns*,<sup>146</sup> where the Supreme Court of Canada insisted that the government obtain assurances, before granting extradition, that the death penalty will not be sought. The *Burns* court noted that the contemporary American death penalty involves over a decade of post-conviction legal review, during which time the condemned person is held

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid* at para 303.

<sup>144</sup> *Ibid* at para 292.

<sup>145</sup> See *ibid* at para 302.

<sup>146</sup> *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

in the most restrictive conditions known in the prison system.<sup>147</sup> These dynamics generate a form of mental suffering known as “death row phenomenon”, which the court found violates the *Charter*.<sup>148</sup> The *Burns* opinion thus makes psychological pain a relevant harm to be considered in a section 12 analysis. Justice McEwan used the *Burns* decision to find that the test of whether punishment is “so excessive as to outrage standards of decency” now includes the perspective of psychological expertise as to the actual effects of an impugned punishment regime.<sup>149</sup>

This subtle shift moves section 12 from a purely moral and abstract concept to a more grounded, empirical approach. The prison’s justifications for the segregation—sensible at first look—must then be considered in the light of the specific qualitative features of the confinement, and the effects of those features on the individual prisoner. Haney’s evidence described a range of qualitative conditions and factors that can combine in the prison setting to create a certain pitch of severity; even if separation were justified, the evidence raised serious doubt about whether this particular mode of separation was necessary. Due to this record, Justice McEwan was able to think comparatively and to locate the conditions at Surrey Pretrial in a larger context. While Haney’s evidence did not prove the existence of “cruel and unusual punishment” in any strict causal sense, the evidence assisted Justice McEwan in interpreting the social meaning of the solitary range at Surrey Pretrial and to consider that meaning in light of a general constitutional standard.<sup>150</sup>

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<sup>147</sup> See *ibid* at para 119.

<sup>148</sup> *Ibid* at para 94.

<sup>149</sup> *Ibid* at paras 301–03.

<sup>150</sup> This is precisely the approach envisioned in Ronald Dworkin, “Social Sciences and Constitutional Rights—the Consequences of Uncertainty” (1977) 6:1 *JL & Educ* 3. Dworkin considers a problem that arose from the United States school desegregation cases. A concern had emerged that desegregation decisions in the federal courts, including the Supreme Court in the decision of *Brown v Board of Education*, 347 US 483, 74 S Ct 686 (1954) [*Brown*], had been decided on the basis of propositions that could be either confirmed or disconfirmed by the “social sciences.” A worry emerged as to whether constitutional rights should rest upon evidence that could contain arbitrary or transitory elements: see Edmond Cahn, “Jurisprudence” (1955) 30 *NYUL Rev* 150 at 157–68; Kenneth B Clark, “The Desegregation Cases: Criticism and the Social Scientist’s Role” (1960) 5 *Vill L Rev* 224. To respond to this worry, Dworkin distinguishes between “causal” and “interpretive” judgments flowing from social evidence, and notes that the latter entails analyzing a phenomenon by “specifying its meaning within the society in which it occurs” (Dworkin, *supra* note 150 at 4). Dworkin agreed that there would be “ample reason to deplore any general dependence of adjudication upon complex judgments of causal social science” (*ibid* at 6). But these same objections do not apply to interpretive judgments, which must be framed in the critical vocabulary of the community in question, which serves as a check on meaning and gives “refuge from the arbitrary” (*ibid*). Dworkin notes that interpretive judgments are not foreign to the judge,



The court stopped short of striking down the enabling legislation, noting that the formal law had been so “seriously misinterpreted, misapplied or ignored” that the question of its constitutionality could not be meaningfully addressed.<sup>151</sup> Justice McEwan did not interfere unduly in the jail administration: he refused the petitioner’s request for a transfer and to be placed in general population, saying that the court could not “take responsibility for the assessment of the risks actually posed by and to the petitioner, or for the specific allocation of resources available to the administration of the institution.”<sup>152</sup> The Court noted, however, that there were multiple constitutional breaches, and that the jail officials had “seriously lost sight of their responsibility to the judicial branch of government.”<sup>153</sup> The Court found that the prisoner could remain segregated, but held that he must not be kept in “separate confinement” without being offered “privileges” equivalent to a general population prisoner.<sup>154</sup>

In sum, Justice McEwan’s finding was that the physical separation of the prisoner might be justified, but that the particular features of segregation at Surrey Pretrial extended far beyond what was necessary to achieve separation. Justice McEwan directed immediate compliance with law, policy, and the court order, and he retained jurisdiction for purposes of ongoing supervision. The remedial aspects of the decision make clear that it is possible for a court to analyze and appreciate the correctional context, and to grant orders that reconcile individual rights with penal realities and the limits of the judicial role.<sup>155</sup>

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and do not draw on arcane technology. Rather, such judgments are central to constitutional adjudication. It seems to me that Justice McEwan used the expert evidence before him in order to make an interpretive judgment about the mode of confinement delivered in the Surrey Pretrial segregation unit.

<sup>151</sup> *Bacon*, *supra* note 17 at para 338.

<sup>152</sup> *Ibid* at para 333. A subsequent petition was decided in *Bacon v Surrey Pretrial Services Centre*, 2012 BCSC 1453, 292 CCC (3d) 413 concerning, *inter alia*, the surreptitious recording of Mr. Bacon’s telephone calls with his lawyer and interference with his legal mail.

<sup>153</sup> *Bacon*, *supra* note 17 at para 334.

<sup>154</sup> *Ibid* at para 336 [internal quotations omitted]. Justice McEwan concluded further that Bacon is entitled to equal treatment to general population prisoners in all material respects, including the same amount of time out of cell, and being informed of what he may expect in terms of things like time at the gym, with no “unreasonable and petty deprivations” simply because of the fact that he is in separate confinement (*ibid*). The court emphasized that Mr. Bacon is a pretrial defendant and presumed innocent.

<sup>155</sup> One further implication of this decision is that Mr. Bacon may be in a position to request a stay of the prosecution brought against him. Under Canadian law, a stay may be granted for an abuse of process only “in the clearest of cases” (*R v O’Connor*, [1995] 4 SCR 411 at para 53, 130 DLR (4th) 235 [internal quotations omitted] [*O’Connor*]). There are two categories where the court may be moved to grant a stay: (a) where the

In *obiter* remarks, Justice McEwan noted that there is a growing sense internationally, as well as in Canada, that locking a person down for twenty-three hours per day is an inappropriate way to treat any human being. He pointed to *Sauvé* to argue that judicial reluctance to condemn solitary confinement outright is “not entirely characteristic of the approach taken by the courts to inmates’ rights in other contexts.”<sup>156</sup> When it came to the voting ban, the Supreme Court struck down a practice that it found was “more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them.”<sup>157</sup> Justice McEwan found administrative segregation to be indistinguishable from the voting analysis on these grounds: like the prisoner voting ban, segregation is likely to erode respect for the rule of law and be counterproductive to the goals of deterrence and rehabilitation. That perspective becomes clear once the details of the conditions and the psychological effects of the stigma and social deprivation of penal segregation are described.

A future legal challenge to the federal administrative segregation regime will likely take precisely this approach.<sup>158</sup> In a sense, what is needed is a return to the past, but with new constitutional remedies. In the *McCann* case, extensive evidence was called from multiple psychological experts, who made clear that the effects of extreme isolation did not serve legitimate penological purposes, and that other means of separating prisoners from the general prison society would be less destructive. Prior to *Bacon*, the *McCann* case was the only case in Canadian history in which the conditions of segregation were found to constitute cruel and unusual punishment or treatment. It seems that a return to the *McCann* mode of litigation will be essential so as to challenge contemporary solitary con-

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abuse of process deprives the accused of a fair trial (trial fairness concerns); or (b) where the affront to the administration of justice by the abuse of process is such that the prosecution should be terminated (institutional concerns). See e.g. *ibid*; *R v Regan*, 2002 SCC 12, [2002] 1 SCR 297. While the standard for obtaining a stay is difficult to meet, and may be unlikely in the context of Mr. Bacon’s very serious case, mistreatment in a remand facility may raise trial fairness concerns as a general matter. Institutional concerns are certainly raised by unconstitutional treatment of prisoners. The final question is whether the trial would serve to perpetuate the abuse, and whether another remedy is capable of removing that prejudice. The point is that there might be real consequences to this decision, even though Justice McEwan did not grant the request that Mr. Bacon be placed in the general population.

<sup>156</sup> *Bacon*, *supra* note 17 at para 314. However, echoing the suggestion that I made at the outset of this paper that *Sauvé* may have been an “easy” case, Justice McEwan noted that *Sauvé* concerned issues “unmediated by the sort of operational and resource considerations that go into the analysis of a particular standard of treatment” (*ibid*).

<sup>157</sup> *Sauvé*, *supra* note 9 at para 58.

<sup>158</sup> For more on the prospects of a federal challenge, see Kerr, *supra* note 131.

finement. But the goal now is a *Charter* remedy that will strike the provisions of the CCRA that allow indefinite isolation but lack proper controls. The evidentiary foundations of a legal challenge will also be enriched by advances in medical knowledge, and the development of international norms regarding the effects of isolation.

***B. Mother-Baby Programs: Inglis v. British Columbia (Minister of Public Safety)***

The 2013 case of *Inglis v. British Columbia (Minister of Public Safety)* stands as one of the most significant prisoner rights cases in Canadian history. The case involved multiple *Charter* provisions, multiple expert witnesses, interveners at the trial level, and a decision that effectively requires all provincial jails in the province to facilitate an option for infants to remain with their incarcerated mothers. The plaintiffs in *Inglis* were former inmates of Alouette Correctional Centre for Women and their children. The litigation arose from a decision to cancel a program, in place since 1973, which permitted mothers to have their babies with them while they served sentences of provincial incarceration.<sup>159</sup> The Supreme Court of British Columbia ruled that the provincial government's decision to close the program was unconstitutional and violated the plaintiffs' equality rights, as well as their rights to security of the person. The trial judge, Justice Ross, found that the decision to end the program was not made with due consideration of the best interests of children or the constitutional rights of mothers, nor was the cancellation due to any legitimate fears about potential harm. In fact, the evidence showed that the program was beneficial to mothers, babies, and the prison environment as a whole.

The *Inglis* case turned partly on the question of why Alouette cancelled the program in 2007. The provincial defendant asserted, in its pleadings and through multiple witnesses and the arguments of counsel, that the program was cancelled because of a concern about the safety of the infants.<sup>160</sup> But central to the ruling was the fact that the prison conducted no evaluation of the risks and benefits of the program before can-

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<sup>159</sup> Access to the program was contingent upon approvals by the Ministry of Children and Family Development (MCFD), acting pursuant to the provisions of the *Child, Family and Community Service Act*, RSBC 1996, c 46, which assessed whether it would be in the best interests of the child.

<sup>160</sup> For example, Brent Merchant, the key decision maker who was Provincial Director of Corrections, testified that his decision to cancel the program was based on the fact that "he believed he could not guarantee the safety of infants in a custody setting. He stated that was a risk that he was not prepared to take" (*Inglis*, *supra* note 17 at para 183).

cellation.<sup>161</sup> Indeed, there was in fact a record of successful operation of the program and others like it.<sup>162</sup> So while the structure of the case was a classic setting for judicial deference to be offered to prison administrators—in that it concerned risk assessment, resource allocation, and daily penal operations—the lack of evidence supporting risk could not counter the extensive evidence indicating the benefits of the program.

In terms of benefits, a considerable body of expert evidence was placed before the court, which enlarged the scope of the analysis. Most notably, research in developmental psychology was brought to bear upon the jail's proffered justification that it was better for infants to be kept out of the prison context and thus away from their birth mothers. The opinion noted the following themes in the evidence:

- (a) rooming in is considered best practice for mothers and babies in the post-partum period and is associated with health and social benefits for both mothers and babies;
- (b) breastfeeding is associated with important health and psychosocial benefits for both infants and mothers;
- (c) one of the most important developmental tasks of infancy is the formation of attachment by the infant to a primary caregiver, usually but not necessarily the mother. Secure attachment is important to the infant's psychological and social functioning. Interference with attachment puts the infant at risk for developmental deficits and future psychological and social difficulties; and

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<sup>161</sup> The Warden of Alouette testified that, when she started as Warden in 2007, “there was a lot of work being done to assess the best way to phase out the Program and to communicate the decision to the general population” (*ibid* at para 170). The Warden agreed that “she was never asked to assess the Mother Baby Program and she did not conduct such an assessment. She did not undertake any study of any other mother baby programs” (*ibid* at para 171). Merchant testified that the decision to cancel was made not because of a specific problem or review but because he arrived at the opinion that “the mandate of Corrections does not include babies” (*ibid* at para 182).

<sup>162</sup> In his testimony, Merchant agreed that he was aware of no instance in British Columbia or elsewhere of an infant being exposed to any prison contraband such as drugs. See *ibid* at para 184. The Warden testified that she was “not aware of any safety incidents while she was warden involving mothers and babies and that she was not aware of any actual safety incidents from before she became warden” (*ibid* at para 171). Another government witness, Dr. Elterman, testified that “he had found no report of any death of an infant in a mother baby program anywhere in the world,” and that in a literature review he had found no instance of any literature recommending against having a mother-baby program (*ibid* at paras 292, 294). But see the work of Lynn Haney for a feminist caution against mother-baby programs, which was not canvassed in the *Inglis* trial: “Motherhood as Punishment: The Case of Parenting in Prison” (2013) 39:1 *Signs: J of Women in Culture & Society* 105.

- (d) the importance of individualized decision-making with respect to the best interests of the child.<sup>163</sup>

Witnesses who recommended the program included a nurse within federal corrections;<sup>164</sup> a PhD in sociology and health education with relevant research;<sup>165</sup> and a physician with a background in obstetrics and addiction.<sup>166</sup> Expert testimony came from a psychologist with extensive experience in corrections;<sup>167</sup> the prison physician at Alouette during the pendency of the program;<sup>168</sup> and a law professor who advised that similar programs were available in modern prisons across the world, including the United States, Europe, Australia, and New Zealand.<sup>169</sup> Even experts retained by the government agreed on the central proposition of the plaintiff's case: that it benefits an infant to be breastfed and to form a secure attachment with the parent. One government witness, clinical and forensic psychologist Dr. Elterman, did not recommend against the program but said only that the question of whether these benefits outweigh risks must be assessed on a case-by-case basis.<sup>170</sup> Other government witnesses were criticized for lacking prison experience,<sup>171</sup> and for presuming that Alouette had no separate unit for the program, which was not in fact true.<sup>172</sup> Finally, while one expert for the government reviewed prison logs and concluded that Alouette was a “stressful household,” Justice Ross noted that stressful factors—“a baby crying, a pregnant mother feeling stressed, a mother who is tired because her baby has been crying, or a colicky baby”—are not uncommon outside of the prison context.<sup>173</sup>

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<sup>163</sup> *Inglis*, *supra* note 17 at para 6.

<sup>164</sup> Alison Granger-Brown. See *ibid* at paras 84–88.

<sup>165</sup> Dr. Amy Salmon. See *ibid* at paras 89–92.

<sup>166</sup> Dr. Ronald Abrahams. See *ibid* at paras 93–94.

<sup>167</sup> Dr. Peggy Koopman. See *ibid* at para 255.

<sup>168</sup> Dr. Ruth Martin. See *ibid* at para 262.

<sup>169</sup> Professor Michael Jackson. See *ibid* at para 274.

<sup>170</sup> And this was in fact how the program had been conducted, given the involvement of the MCFD in placement decisions. See *ibid* at paras 289–92.

<sup>171</sup> Dr. Richelle Mychasiuk, for example, had no experience with prisons, never visited Alouette, and drew from literature on “high risk environments” that were not prison studies (*ibid* at para 303). Justice Ross was critical of this category of evidence. See *ibid* at paras 300–306.

<sup>172</sup> For example, “Dr. Elterman was of the opinion that any mother baby program at [Alouette] should be housed in a separate unit. He had not been told by the defendants in his instructions that there is a separate unit at [Alouette], Monarch House, that is currently standing empty. Indeed he was instructed by the defendants to assume that there was no separate unit” (*ibid* at para 293).

<sup>173</sup> *Ibid* at para 321.

Even the key decision maker who cancelled the program, Brent Merchant, did not disagree with evidence he had reviewed about the benefits to those in the program and the broader community:

Mr. Merchant agreed that ... there are both social and medical benefits to keeping mothers and babies together, for both the parent and the child. He agreed that there is scientific and medical evidence supporting the importance of forming attachment by the child to the primary caregiver, normally the mother, relating to the development of the infant's brain and the infant's ability to relate to the world. He agreed that inadequate attachment has been identified to be at the root of many psychosocial problems that contribute to criminal behaviour. He agreed that there are psychological benefits for the mother and that a mother baby program could help the mother develop parenting skills.<sup>174</sup>

In terms of the legal analysis of this highly consistent evidence, the *Inglis* court said that the “starting point” is the principle that an incarcerated person retains all of her civil rights, other than those expressly or impliedly taken from her by law.<sup>175</sup> The citation for that principle predates the *Charter*, though Justice Ross properly brings it to bear in her section 7 analysis. The early authority is the 1980 decision of *R. v. Solosky*,<sup>176</sup> which concerned the right of prisoners to correspond, freely and in confidence, with their lawyers. In *Solosky*, Justice Dickson introduced important principles for the review of decisions taken in the prison context. He noted that courts have a balancing role to play in ensuring that any interference with the rights of prisoners by institutional authorities is for a valid correctional goal, and that such interference must be the least restrictive means available, “no greater than is essential to the maintenance of security and the rehabilitation of the inmate.”<sup>177</sup> These principles are now captured by section 7's protection of liberty and security of the person, as well as in the principles of fundamental justice and section 1 doctrine. The principle of retained rights requires asking an empirical question, namely what rights are compatible with incarceration, and delivering upon their protection. Justice Ross, informed by a significant evidentiary record, found that the program was clearly compatible, given that it had been working for decades in both the province and the federal system.<sup>178</sup>

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<sup>174</sup> *Ibid* at para 186.

<sup>175</sup> *Ibid* at para 379.

<sup>176</sup> [1980] 1 SCR 821, 105 DLR (3d) 745 [*Solosky*]. See *ibid* at 839 for an articulation of the retained rights principle.

<sup>177</sup> *Ibid* at 840.

<sup>178</sup> See *Inglis*, *supra* note 17 at para 410.

Justice Ross concludes that, in deciding to cancel the program, “the state acted on the basis not of reasonable apprehension of harm but from the imposition of an impossible standard—a guarantee of safety.”<sup>179</sup> Merchant adopted this standard notwithstanding that he acknowledged that such a guarantee could never be met within Corrections, and that it was not a standard they applied in any other situation.<sup>180</sup> The court accepted that Corrections is entitled to be proactive in responding to a reasonable apprehension of harm, but found that “no investigation was undertaken at the time to determine whether there was such an apprehension.”<sup>181</sup> Given the lack of internal evaluation, the jail lacked internally sourced expertise sufficient to defeat the forms of expertise advanced by the plaintiffs. The serious effects of the cancellation engaged both the equality and the security of the prison rights of the plaintiffs, and could not be justified under section 1 due to any legitimate state objective such as fears about potential risks of continuing the program.

Justice Ross noted that the evidence did indicate some possibility of harm to infants, but she contextualized that possibility by noting that there was a risk of harm to infants in virtually any environment, including foster care as well as with relatives in the community. In this sense, Justice Ross did not allow the prison to be an entity sealed off from ordinary society, but considered it as just one institutional space on the spectrum of environments that a child, and particularly a child of an incarcerated person, may come to experience. By broadening the spectrum of risk to consider facts beyond prison walls, the prison defendant lost its most reliable litigation trump card. Justice Ross applied family law concepts, spurred by evidence in developmental psychology on the benefits of mother-infant attachment. The defendant argued that family law is not applicable to the jail context and that it was not obliged to consider or to attempt to maximize the best interests of the children.<sup>182</sup> Justice Ross rejected the notion that the jail was responsible only for the positive content of corrections law. Rather, Corrections was responsible for applying the multiple sources of domestic and international law, all of which make clear that the best interests of the child apply to state actions.<sup>183</sup> Justice

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<sup>179</sup> *Ibid* at para 460.

<sup>180</sup> See *ibid* at para 455.

<sup>181</sup> *Ibid* at para 459.

<sup>182</sup> See *ibid* at paras 369, 434.

<sup>183</sup> See *ibid* at para 370. See also *ibid* at para 371: “The defendants submit that Corrections is entitled to make decisions that will inevitably result in children being seized by the state without any consideration of the best interests of the children affected. In my view the state cannot be permitted, through such compartmentalization, to avoid its obligations.”

Ross rejected the compartmentalization of the punishment context and the law that applies there.

The court's approach in *Inglis* contains many indicators of a shift to a *Charter*-based penal law. The promise of the holding is enhanced by the fact that, unlike *Sauvé*, the case involved matters central to daily penal operations and questions of risk management. Notably, the provincial government elected not to appeal the decisions in either *Bacon* or *Inglis*, which serves as some indication of the soundness of the evidence and reasoning along with the educative function of the trial process. Both cases, along with the pre-*Charter* *McCann* case, are emblematic of litigation that illuminates the qualitative experiences of punishment, and specifies the range of alternatives to a rights infringement. The result has been to wrestle prisoner law away from deferential modes that conceive of the task of penal administration as an expert realm with which judges ought not interfere.

### C. *Harm Reduction*

A final example of a new mode of prisoner litigation has not yet been adjudicated. On September 25, 2012, the Canadian HIV/AIDS Legal Network and four co-applicants filed a lawsuit arguing that the failure to make sterile injection equipment available in federal penitentiaries violates sections 7 and 15 of the *Charter*.<sup>184</sup> The individual plaintiff, Steven Simons, had been incarcerated at Warkworth Institution from 1998 to 2010. His pleadings state that he acquired hepatitis C virus (HCV) when a fellow prisoner borrowed his drug injection equipment without his knowledge. The pleadings seek an order “directing the Correctional Service of Canada, and its Commissioner and the Minister of Public Safety, to ensure the implementation of sterile needle and syringe programs in all federal penitentiaries, in accordance with professionally accepted standards.”<sup>185</sup>

The case emanates from a voluminous literature indicating that the rate of HCV in Canadian prisons is over twenty times higher than the rate in the community,<sup>186</sup> and that injection drug use is prevalent in pris-

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<sup>184</sup> See *Simons v Canada* (25 September 2012), Toronto (Ont Sup Ct) (Notice of Application). Plaintiffs include Steven Simons, Canadian HIV/AIDS Legal Network, Prisoners with HIV/AIDS Support Action Network, Canadian Aboriginal AIDS Network, and CATIE.

<sup>185</sup> *Ibid* at 4.

<sup>186</sup> See S Skoretz, G Zaniewski & NJ Goedhuis, “Hepatitis C virus transmission in the prison/inmate population” (2004) 30:16 *Can Communicable Disease Report* 141 at 142.



on.<sup>187</sup> Prisoners who tattoo or inject drugs face a scarcity of sterile syringes, and may resort to using non-sterile injecting equipment.<sup>188</sup> The Canadian prison system has made a modest acknowledgement of the risk of HIV and HCV transmission in prison by making bleach available to prisoners,<sup>189</sup> though there are difficulties associated with correct use, particularly where injection is likely to be clandestine and rushed.<sup>190</sup> The lawsuit is likely to turn on the record established by expert evidence. Epidemiologists will establish medical literature indicating how disease is transmitted in the prison context; penologists will speak to the viability of providing clean needles in prison, drawing on comparative evidence from other jurisdictions.<sup>191</sup>

The law is on the side of the plaintiffs. Prison law and policy indicates that prisoners are entitled to “essential health care” equivalent to that in the community.<sup>192</sup> As of 2001, there were over 200 needle and syringe programs in the country, which enjoy support across levels of government.<sup>193</sup> In addition, in *PHS*, the Supreme Court held that harm-reducing measures, such as supervised injection, can be characterized as medical treatment, and that a governmental decision to prohibit access to such measures violates section 7 of the *Charter*.<sup>194</sup> It follows that both the legislation and the relevant jurisprudence support an argument that prisoners ought to be able to access these measures.<sup>195</sup> The determinative analysis should take place under section 1, and should be shaped by whether penological experts can explain to the court how such measures could be ac-

<sup>187</sup> See Correctional Service Canada, *1995 National Inmate Survey: Final Report*, by Price Waterhouse, 1996 No SR-02 (Ottawa: Correctional Services of Canada, 1996) at 144–46.

<sup>188</sup> See Will Small et al, “Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison” (2005) 40 *Substance Use & Misuse* 831 at 839.

<sup>189</sup> See Correctional Services of Canada, Commissioner’s Directive No 821-2, “Bleach Distribution” (4 November 2004).

<sup>190</sup> See World Health Organization Europe, *Status Paper on Prisons, Drugs and Harm Reduction* (Copenhagen: WHO Europe, 2005), noting that bleach can “create a false sense of security between prisoners sharing paraphernalia” (*ibid* at 12).

<sup>191</sup> For a treatment of the expert material likely to be adduced at trial, see Sandra Ka Hon Chu & Richard Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2009) at 2–8.

<sup>192</sup> CCRA, *supra* note 29, s 86. See also Correctional Services of Canada, Commissioner’s Directive No 800, “Health Services” (18 April 2011).

<sup>193</sup> See Alan C Osborne, *Harm Reduction and Injection Drug Use: An International Comparative Study of Contextual Factors Influencing the Development and Implementation of Relevant Policies and Programs* (Ottawa: Health Canada, 2001) at 13.

<sup>194</sup> See *PHS*, *supra* note 130 at para 136.

<sup>195</sup> The legal argument is outlined in detail in Ka Hon Chu & Elliott, *supra* note 191 at 13–38.

cessed safely, in a fashion sufficient to rebut deference that the court will offer to the strong preference of prison administrators to refuse access to equipment that entails the use of prison contraband.<sup>196</sup>

Again, this is the thorny context where the rights claim is adjacent to central concerns of prison administration. Bound to follow *Sauvé*, a Canadian court is unlikely to dismiss the claim on the basis of a vague theory of penological legitimacy, or an unsubstantiated notion of rehabilitative ideals: the peculiar standards of deference articulated in older Canadian case law from lower courts, as well as in current American case law, are unlikely to pervade a contemporary opinion. Further, if the court follows the reasoning in *Bacon*, the claim will not be dismissed purely on the basis of the prison having limited resources.<sup>197</sup> But these points aside, the plaintiffs' final success will hinge on their ability to explain to the court how prisons can be safely run in the midst of easily available hygienic injection equipment for drug users. The plaintiffs' experts are likely to specify how such measures could be accessed while ensuring the safety—and perhaps even improving the safety—of correctional staff and other prisoners. The institutional defendant will have to somehow counter that evidence to meet its burden under section 1.

## Conclusion

A 1956 essay by *Brown v. Board of Education* lawyer Jack Greenberg contains a simple statement that raises many practical difficulties. Pointing out that “moral judgments are generated by awareness of facts,” Greenberg argues that constitutional interpretation should consider “all relevant knowledge.”<sup>198</sup> In the case of prisoner litigation, the category of relevant knowledge must encompass the many complex dimensions associated with administering what Erving Goffman called the “total institu-

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<sup>196</sup> At least one study concludes that needle and syringe programs have not led to increased violence, and have not resulted in equipment being used as weapons against staff or other prisoners, in Germany, Spain, and Switzerland. See Scott Rutter et al, *Prison-Based Syringe Exchanges Programs: A Review of International Research and Program Development*, NDARC Technical Report No 112 (Sydney: National Drug and Alcohol Research Centre, 2001).

<sup>197</sup> “[R]esource issues can never justify a sub-constitutional level of treatment” (*Bacon*, *supra* note 17 at para 336).

<sup>198</sup> “Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation” (1956) 54:7 Mich L Rev 953 at 969. For further discussion of the debate ignited by the Supreme Court’s reliance on expert evidence in its decision to declare school segregation unconstitutional, see *supra* note 150. For contemporary treatment of the legacy of *Brown* and the challenges of relying on social science in rights litigation, see Rachel F Moran, “What Counts As Knowledge? A Reflection on Race, Social Science, and the Law” (2010) 44:3/4 Law & Soc’y Rev 536.

tion.”<sup>199</sup> A place where insiders live, work, sleep, and play with a large number of similarly situated people, the total institution gives rise to a profoundly broad regulatory task and the need for vast zones of flexible discretion. The project of bringing prison empirics to bear upon the interpretation of relevant legal standards is monumental and has scarcely begun.<sup>200</sup> But this is what it means to have a *Charter*-based law for prisoners, and to finally implement the basic principle of modern prison law from *Solosky*: that prisoners are to retain all rights except those that are incompatible with incarceration.

As Dolovich admits for the American context, some measure of judicial deference is appropriate in the prison law context, as courts are far removed from the “hothouse of a carceral environment.”<sup>201</sup> Prisoner claims might be properly interpreted in light of the endemic administrative difficulties of operating resource-limited facilities filled with individuals who often bring complex personal histories to the facility and who are coping with significant deprivations. Yet, just as due deference is called for, there is also a clear imperative for careful external review and putting government to the burden of justification, given the pervasive risk of hidden abuse and neglect exercised on a powerless population. For much of prison history, prisoners were subject to the unreviewable preferences of guards and administrators. Even after the *Charter*, Canadian courts have occasionally articulated doctrinal standards that fall short of jurisprudential approaches developed in other areas of constitutional law.

Canada’s practices of state punishment are distinct in many ways from the American model, as is the character of Canadian judicial review. But the case law discussed in Part II indicates that Canadian courts are not immune to overly deferential instincts when it comes to dealing with

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<sup>199</sup> Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine, 1961) at xiii, 1ff.

<sup>200</sup> I am grateful to Emma Cunliffe for pressing me to consider how a shift to a more empirical mode of analysis may generate new problems, particularly in light of disparate levels of access to expertise as between plaintiffs and defendants in prison litigation, and given the ability of governments to control and impede certain research agendas. Such concerns are only partially alleviated by the fact that the burden of proof under section 1 is on the government. These are important worries, even if we might all agree that an evidence-based approach to prisoner rights is still preferable to modes of constitutional review that grant automatic deference to prison officials. Notably, in both *Inglis* and the upcoming Ontario litigation discussed above, much of the evidence emerges not from prison studies but from the fields of developmental psychology and epidemiology, extended to issues arising in the penal context. Evidence may be more easily secured, and claims more easily advanced, in these kinds of cases. This returns me to my original claim that issues connected to the core of prison management will be the most difficult for prisoners to litigate.

<sup>201</sup> Dolovich, *supra* note 2 at 245.

the administration of complex and punitive institutions with which judges may have little knowledge or expertise, and when it comes to interpreting and protecting the rights of little-favoured citizens. To borrow from Dolovich's deference map, the decision in *Shubley* could be considered an example of *situation-reframing*: where severe modes of confinement are re-characterized as benign administrative techniques. The *Farrell* court might make use of *procedural rule-revising*: suggesting that the appropriate place for constitutional claims is the internal grievance system, rather than the courts. *Aziga* might be an example of *doctrine-constructing* deference: where the court writes deference right into a standard of "manifest violation" that applies in no other area of constitutional law.

Rights are not trumps for prisoners under the *Charter*, but neither should they be fully compromised by these excessively deferential judicial moves, or by the mere fact of countervailing administrative preferences. Judicial attention to the prison must be informed by the best knowledge available as to how prisons can and should work. The 2010 Supreme Court of British Columbia decision in *Bacon* shows that courts can contextualize prisoner *Charter* claims by assessing expert evidence as to the bodily and psychological effects of particular modes of imprisonment, and weighing those effects against the strategies and claims of prison administrators. By contrast, the United States Supreme Court in *Beard* held that where a case centres around the "professional judgment" of prison managers, a plaintiff held in conditions of extraordinary deprivation cannot even advance a claim sufficient to survive a summary motion to strike. There are complex and multifaceted explanations for the differences in these cases, decided in two distinct nations.<sup>202</sup> The cases from both countries make clear that deference and expertise are intertwined in a fashion that determines the scope and viability of prison law.

A *Charter* challenge to administrative segregation or lack of access to harm reduction services for drug users asks a potentially tougher set of questions than those present in *Sauvé*, where the right to vote in federal elections required, only, access to a polling station every few years, and did not interfere with the core and daily practices of prison security. Administrative segregation, for example, is a practice far more integral to the daily administration of prisons, which explains in part why it has

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<sup>202</sup> Ironically, in the 1970s *McCann* litigation, counsel for the plaintiffs, Michael Jackson, was inspired by expanding levels of judicial intervention in American prisons. Jackson wanted to convince Canadian courts to follow suit. See Jackson, *Prisoners of Isolation*, *supra* note 27 at 82–84. Given the virtual revival of the hands-off doctrine in the US, there is now little likelihood that plaintiffs' counsel would point to United States law.

been retained despite decades of serious criticism.<sup>203</sup> Similarly, access to hygienic injection equipment is a policy that is robustly supported from a public health perspective, but that threatens the control ethos that defines prison management. *Charter* challenges to these practices will ask courts to strike down legislation or enjoin the delivery of a significant new program, rather than granting a narrow, individualized remedy. The evidence required to justify such remedies must be suitably robust and systemic. The *Inglis* case presents the best model to date, both in terms of the approaches taken by counsel and the court's level of rigor in conceptualizing the right and adjudicating its infringement.

In *Sauvé*, the Supreme Court of Canada indicated that it would not simply defer to “[v]ague and symbolic objectives” advanced but not proven by the prison authority.<sup>204</sup> In this way, the Court refused the approach taken by Justice Breyer in *Beard* where, as Justice Ginsburg lamented, it sufficed for the prison to say, “in our professional judgment the restriction is warranted.”<sup>205</sup> The new wave of Canadian cases is pressing courts to consider whether prison authorities must deliver state punishment in accordance with a world of expert knowledge as to the effects of particular practices and the range of alternatives. Both judges and counsel must recognize that there is a structural imbalance in expertise at the outset of a prison case. Courts must be shown that while a prison is charged with the difficult task of confining deprived adults, this is a reason to address rights claims carefully and expansively, rather than a reason to retreat.

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<sup>203</sup> For a fuller explanation of the reasons why efforts to reform segregation have failed, see Jackson, “The Litmus Test of Legitimacy”, *supra* note 131.

<sup>204</sup> *Sauvé*, *supra* note 9 at para 22. The Supreme Court of Canada also recently affirmed the importance of access to judicial review for prisoners. See *Khela*, *supra* note 77. The Court stated that prisoners should have unfettered access to legal forums and remedies “given their vulnerability and the realities of confinement in prisons” (*ibid* at para 44). The Court affirmed its holding from *May*, *supra* note 32, which held that the availability of an internal prison grievance system was not a “complete, comprehensive and expert procedure” that could justify a superior court declining jurisdiction to hear *habeas corpus* applications (*ibid* at paras 50–51).

<sup>205</sup> *Beard*, *supra* note 92 at 2593, Ginsburg J, dissenting.