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Citation Details

Debra Parkes, "Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement" (2015) 4:1 Canadian Journal of Human Rights vii.

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Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement

*Debra Parkes*¹

The box. The hole. The block. Therapeutic quiet. Administrative segregation. The widespread practice of incarcerating people in solitary confinement goes by many names, some evocative and descriptive, others euphemistic and Orwellian. Whatever the term used, the damaging effects of solitary confinement are increasingly well known and include the development of clinical depression, anxiety, perceptual distortions, paranoia and psychosis. Solitary confinement exacerbates pre-existing medical conditions and creates new ones, such as insomnia, anorexia and palpitations. The use of solitary confinement is harmful and counter-productive to public safety, contributing to self-injury, assaults on correctional staff and other prisoners, and giving rise to an inability to manage in society upon release.

Based on this mounting evidence, the United Nations Special Rapporteur on the Convention Against Torture recently called for a global ban on the use of solitary for youth and prisoners with mental disabilities, and a limit of fifteen days in solitary for anyone else.² In 2014, the *Canadian Medical Association Journal* published an editorial calling for the abolition of solitary confinement in Canada due to its well-documented profoundly damaging impact.³ Mainstream media outlets such as *The New Yorker*⁴ and the *Globe and Mail*⁵ have published feature stories on the harms of solitary confinement and

¹ Associate Dean (Research & Graduate Studies), Faculty of Law, University of Manitoba. The author is grateful for the support of the Social Sciences and Humanities Research Council of Canada and the University of Manitoba's Social Justice and Human Rights Research Project which funded the 2013 Ending the Isolation conference where most of the papers in this volume were presented. Thanks are also owed to the editorial team of the *Canadian Journal of Human Rights* for shepherding this collection to publication. This volume is dedicated to the many people who have endured solitary confinement and other inhumane treatment in places of detention around the world.

² *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011).

³ Diane Kelsall, "Cruel and unusual punishment: solitary confinement in Canadian prisons" (2014) 186:18 CMAJ 1345. See, for example, Stuart Grassian, "Psychiatric Effects of Solitary Confinement" (2006) 22 Wash UJL & Pol'y 325.

⁴ Atul Gawande, "Hellhole", *The New Yorker* (30 March 2009), online: <www.newyorker.com>

⁵ Twenty-four news items on solitary confinement from 2014-2015, including feature stories and editorials, can be found on the *Globe and Mail* website, online: <www.globeandmail.com/topic/Solitary-Confinement>

editorials calling for reform or abolition of the practice.

While awareness of the human rights crisis of solitary confinement is growing, there remain serious gaps in our knowledge, particularly in Canada when it comes to the thirteen provincial and territorial correctional systems that are responsible for youth custody and for adults in custody awaiting trial or serving sentences of less than two years. What little we do know is troubling. Documents obtained through access to information requests made to Manitoba correctional authorities in 2010 concerning segregation placements at the old Portage Correctional Center for Women revealed that only nineteen percent of the 176 total placements were for disciplinary reasons (such as disobeying an order or threatening another prisoner). Of the non-disciplinary placements, thirty-two percent were made for no documented reason, twenty-seven percent were for “overflow” (not a ground authorized by law), and fifteen percent were for medical observation, including concerns about suicide or self-harm.⁶ Greater transparency and accountability is required as a first step in bringing correctional practices in line with human rights.

As a number of articles in this volume highlight, prisoners and their advocates have been calling attention to the harms and impact of solitary confinement for some time. What is significant about the current moment is that these calls seem to be achieving some traction, even as the use of solitary confinement grows across jurisdictions. In the United States, constitutional arguments against the use of solitary confinement are being made in courts, while at the same time, some state legislatures introduce reform.⁷ As this volume was being prepared for publication, a lawsuit was launched in Vancouver, British Columbia, alleging that the widespread practice and legislation governing solitary confinement (or segregation as it is known in Canadian law) in federal prisons violates the *Canadian Charter of Rights and Freedoms*⁸ at a systemic level.⁹

In this special volume, human rights advocates and scholars from a range of disciplines (criminology, law, philosophy) bring a variety of perspectives and methodologies to bear on the opaque correctional systems that hold human beings in isolation for prolonged periods of time. They examine experiences of solitary and prisoner resistance. Attending to points of continuity, as well as specificity of this practice across jurisdictions, the contributors to this volume discuss and critique the persistence of solitary confinement in the face

⁶ Documents on file with author. Other documented justifications included gang affiliation, assaults, fighting, and prisoner requests for protection.

⁷ See David Fathi, “United States: Turning the Corner on Solitary Confinement?” (2015) 4:1 Can J Hum Rts 167 [Fathi].

⁸ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁹ Information about the litigation can be found on the British Columbia Civil Liberties Association website, online: <bccla.org/our-work/solitary-confinement/>.

of reform efforts. In considering the potential for change through litigation, law reform, social movements, and acts of resistance, they envision a future without solitary confinement.

An international conference held at the University of Manitoba, in March 2013, spawned many of the papers in this collection. That conference began – as does this special volume – with the lived experience of solitary confinement. The first conference speaker was Tona Mills, a woman from Atlantic Canada who spent years in segregation in federal women’s prisons. She described the experience in the following way:

It was very, very lonely. Segregation was very, very lonely. The time went by really slow. I was handcuffed and shackled when I left my cell and on several occasions I was maced. I had a lot of anger and resentment from the way I was treated. I frequently hurt myself. Every sixty days at my seg review they would say “maintain in seg.” It was very discouraging. A few times the emergency response team was brought in. Overkill. They would leave me naked with nothing, not even a blanket. I went a whole month one time with nothing but a security gown and a blanket, no mattress or pillows, sleeping on a steel bed, no sense of comfort. I had to write letters with crayons. It was pure insanity.¹⁰

Ms. Mills went on to speak of some of the remarkable ways she coped with the world-destroying violence that is solitary: “When I was in segregation ... I used my mind to keep from going nuts. I put words in alphabetical orders for hours. I was hurting myself at least three times a week, slashing myself and burning myself with cigarettes.”¹¹ Finally, she spoke about the way that human rights advocacy and resistance had led a judge to break the cycle of her repeated, prolonged periods in solitary by ordering that she be placed in a community mental health facility because prison itself was a risk factor for her. Prison created the negative behavior that landed her in solitary, and kept her there, for prolonged periods.

Ms. Mills’ account illustrates three major themes found in the writing on solitary collected in this special volume: the profound harms and effects of solitary confinement on human beings; avenues of resistance to those harms, including human rights-based efforts to limit or abolish the practice; and finally, the relationship of solitary confinement to the harms of incarceration more generally.

The first two articles open a window on the extent of the harm done by solitary, drawing on the words of those who have experienced it. The collection begins with a piece by Justin Piché and Karine Major: “Prisoner Writing in/on Solitary Confinement: Contributions from the *Journal of Prisoners on Prisons*,

¹⁰ Tona Mills, “Experiencing Solitary” (Conversation with Kim Pate, held at Ending the Isolation: An International Conference on Human Rights and Solitary Confinement, Faculty of Law, University of Manitoba, 22 March 2013), on file with author.

¹¹ *Ibid.*

1988-2013” draws on first-person prisoner accounts of solitary confinement.¹² The authors describe the profound impact of solitary, captured in the prisoner accounts, as sanctioned violence, noting that most prisoners experience solitary as a form of torture which is imposed (and ended) arbitrarily.¹³

A number of the papers explore avenues of resistance to the harmful experience of solitary confinement. Prisoner coping mechanisms and practices of resistance figure prominently in Piché and Major’s study of prisoner writing on solitary. Some prisoners turn their anger outward, using their words and bodies to lash out at other prisoners and correctional staff. Others turn the pain inward, engaging in self-harm or suicide.¹⁴ Lisa Guenther’s examination of prisoners’ political action in the California Prison Hunger Strikes of 2013 considers another form of prisoner resistance.¹⁵ She attends to the ways in which men isolated in prolonged solitary confinement at the Pelican Bay supermax prison, where all prisoners are held in solitary confinement for years at a time, were able to connect and unite across racial lines that were enforced by the prison itself. In so doing, these prisoners articulated a set of basic demands as part of a broader human rights agenda and non-violent resistance movement.¹⁶ Guenther, a philosopher, sees solitary confinement as a form of violence against the human rights of prisoners but also, more fundamentally, as violence against the relational structure of “being-in-the-world”.¹⁷ Prisoner resistance to solitary confinement is as much a struggle for meaning and a claim to humanity as it is a struggle for rights.

Guenther taps into another theme, namely the relationship of solitary confinement to broader punitive trends and harmful aspects of incarceration as social policy. In addition to Guenther, Lisa Kerr and David Fathi point to the creation and expansion of supermax prisons in the United States as manifestations of a counter-productive overreliance on prison to address social problems. Piché and Major take the view that the “sanctioned violence integral to incarceration” itself is most damaging when prisoners are held in isolation.¹⁸

This collection considers the relationships between human rights and solitary confinement in comparative perspective, examining the varied practices of solitary confinement in Europe as well as the more well-known excesses of the world leader in incarceration, the United States. However, the

¹² Justin Piché and Karine Major, “Prisoner Writing in/on Solitary Confinement: Contributions from the *Journal of Prisoners on Prisons*, 1988-2013” (2015) 4:1 Can J Hum Rts 1 at 3.

¹³ *Ibid* at 24.

¹⁴ *Ibid* at 26-28.

¹⁵ Lisa Guenther, “Political Action at the End of the World: Hannah Arendt and the California Prison Hunger Strikes” (2015) 4:1 Can J Hum Rts 33.

¹⁶ *Ibid* at 36.

¹⁷ *Ibid* at 35.

¹⁸ Piché & Major, *supra* note 13 at 3.

greatest degree of attention is paid to Canada, a jurisdiction often assumed to practice a “kindler, gentler” form of imprisonment, but where the use of solitary confinement has been growing, largely unchecked by law or reform efforts. The articles by Michael Jackson, Lisa Kerr, and Efrat Arbel document the ways in which Canada’s federal correctional system has resisted attempts to reform, limit, or bring independent oversight to the use of solitary confinement.

The focus on Canada begins with Michael Jackson’s thoughtful examination of more than forty years of his own research and human rights advocacy seeking to limit solitary confinement. In 1983, Jackson published *Prisoners of Isolation: Solitary Confinement in Canada*, a ground-breaking study documenting the lawlessness of Canadian federal corrections and the lack of any accountability or oversight of the use of administrative segregation.¹⁹ Since that time, Jackson has contributed to this field as both an academic and as a lawyer arguing some of the leading prisoners’ rights cases. His article, “Reflections on 40 Years of Advocacy”, documents his deep disappointment in the lack of meaningful change on this front, particularly given the many independent reports recommending the very limits and independent oversight for which he has long advocated.²⁰ He identifies a strong resistance within the current government to seeing prisoners as rights holders and argues that human rights advocates must be tenacious and creative in seeking justice for those subjected to solitary confinement.

Lisa Kerr’s “The Origins of Unlawful Prison Policies” complements Jackson’s reflections by honing in on the problem of delegated decision-making and lack of legal accountability in the prison context.²¹ She examines the Management Protocol, a program designed by the Correctional Service of Canada to effectively subject a small group of “difficult to manage”, mostly Indigenous women prisoners, to a prolonged regime of solitary confinement that denied them access to prison programs and some basic legislative protections.²² Kerr attends to the ways in which harmful and unlawful prison policies may have internal, administrative origins, not necessarily flowing directly from a legislative process that panders to punitive public attitudes. The Protocol was developed and implemented from within the prison bureaucracy in a manner similar to the development of the supermax model of imprisonment in California. External critiques and human rights litigation ultimately led to the cancellation of the Protocol.²³ Kerr’s study points to the importance of prisoner litigation in providing an avenue that subjects prison practices and policies to careful scrutiny for their compliance (or not) with

¹⁹ Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983).

²⁰ Michael Jackson, “Reflections on 40 Years of Advocacy” (2015) 4:1 Can J Hum Rts 57.

²¹ Lisa Coleen Kerr, “The Origins of Unlawful Prison Policies” (2015) 4:1 Can J Hum Rts 89.

²² *Ibid* at 102.

²³ *Ibid* at 94.

constitutional rights.

“Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment” by Efrat Arbel is similarly concerned with the challenges inherent in enforcing prisoners’ rights in the courts.²⁴ She juxtaposes the strong normative statements about prisoners as rights holders made by the Supreme Court of Canada in *Sauvé*,²⁵ a decision declaring a ban on prisoner voting to be constitutionally invalid, with the reality of rights violations in the daily administration of correctional policies in Canada. Pointing to the Management Protocol as an example of an unmodulated deprivation of rights, Arbel reads *Sauvé* as establishing broad normative principles that should guide judicial consideration of prisoners’ rights cases, including those challenging the imposition of solitary confinement. One notable principle is that correctional practices must not further marginalize Indigenous prisoners who are, as part of the ongoing legacy of colonization and systemic discrimination, vastly overrepresented in prison populations generally as well as in segregation populations.²⁶

The final two contributions to this special volume assess the practices and prospects for reform in Europe and the United States. Sharon Shalev, who has previously studied US supermax imprisonment, brings her considerable comparative insights to bear on the use of solitary confinement in a number of European countries.²⁷ Solitary confinement is used throughout Europe albeit on a much smaller scale than in the United States. The practices and material conditions are quite diverse across European nations. For example, Scandinavian countries such as Norway, which are known for their egalitarian social policies, regularly place pre-trial detainees in solitary confinement. Some jurisdictions lack in-cell sanitation and therefore “slopping out” remains a degrading reality.²⁸ Shalev outlines the approach taken by the European Court of Human Rights to solitary confinement – which requires that its use be proportionate, lawful, accountable, necessary, and non-discriminatory. She suggests that, in the main, the worst excesses of solitary confinement are avoided by this approach.

David Fathi concludes the volume on a hopeful note. In “The United States: Turning a Corner on Solitary Confinement?” Fathi acknowledges that the U.S. is an “egregious global outlier” in its world-leading rate of imprisonment and its pervasive use of prolonged solitary confinement.²⁹ However, his focus on the influence of human rights advocacy and reform initiatives that have

²⁴ Efrat Arbel, “Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment” (2015) 4:1 Can J Hum Rts 123.

²⁵ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519.

²⁶ Arbel, *supra* note 24 at 139.

²⁷ Sharon Shalev, “Solitary Confinement: A View from Europe” (2015) 4:1 Can J Hum Rts 143.

²⁸ *Ibid* at 159.

²⁹ Fathi, *supra* note 7 at 168.

taken hold at the state and federal level in recent years confirms that states such as Maine, Mississippi, and Colorado have reduced dramatically their populations of prisoners in solitary; while others have engaged in more modest reforms.³⁰ Agents of change can be found in legislatures, in courtrooms and in civil society. Notably, the jurisdictions that have reduced their reliance on solitary tend to report safer institutions and lower rates of recidivism, putting the lie to suggestions that solitary is necessary for public safety. Indeed, one can only hope that, in the United States and beyond, the increased awareness of the human and fiscal costs of solitary confinement, not to mention its ineffectiveness in making our communities safer, will mark a turning point in this human rights struggle.

³⁰ *Ibid* at 174.