

# The Origins of Unlawful Prison Policies

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*Prison administrators are granted discretionary powers to enable them to manage institutions and pursue legal and policy mandates. The use of delegated power is essential to prison management, but there can be a tenuous relationship between the exercise of penal administrative power and the rules and principles of the wider legal order. In 2003, the Correctional Service of Canada used its power to design the Management Protocol, a penal program specifically for women which served to deprive a small number of mostly Aboriginal women of ordinary prisoner rights and privileges. The Protocol emerged with no legislative attention or public scrutiny. Over time, external critique and advocacy eroded the legitimacy of the Protocol and subjected it to legal challenge. The Protocol was cancelled following the filing of a 2011 lawsuit, confirming a widely held view that the program violated its legislative mandate as well as broader constitutional principles. The history of the creation, implementation, and cancellation of the Protocol allows us to examine the relationship between formal legal boundaries and the rules and discretionary judgments emanating from within the prison bureaucracy, along with the social and legal processes by which boundaries are finally enforced.*

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*Les administrateurs pénitentiaires disposent de pouvoirs discrétionnaires qui leur permettent de gérer leurs établissements et d'accomplir leurs mandats légaux et politiques. Le recours au pouvoir délégué est essentiel à la gestion pénitentiaire, mais il peut y avoir un lien ténu entre l'exercice du pouvoir administratif pénal et les règles et principes de l'ordre juridique en général. En 2003, le Service correctionnel du Canada a utilisé son pouvoir pour concevoir un programme pénal spécifiquement pour les femmes, connu sous le nom de Protocole de gestion, qui servait à priver un petit nombre de femmes, surtout autochtones, de droits et de privilèges ordinaires des prisonniers. Le Protocole est apparu sans recevoir l'attention du législateur ni faire l'objet d'un examen public. Avec le temps, les critiques externes et les mobilisations ont érodé la légitimité du Protocole, ce qui a donné lieu à sa contestation judiciaire. Le Protocole a été à la suite d'une poursuite judiciaire en 2011, ce qui a confirmé l'opinion répandue selon laquelle le programme transgressait son mandat législatif et des principes constitutionnels plus généraux. L'histoire de la création, de la mise en œuvre et de l'annulation du Protocole nous permet d'examiner la relation entre les limites légales et les règles et jugements discrétionnaires émanant des administrations des prisons, ainsi que les processus sociaux et juridiques par lesquels ces limites sont finalement appliquées.*

## I. Introduction

Delegated power is a significant tool for contemporary prison management. The terms of prison administrators' governing legislation allow them to make decisions and develop guidelines to meet the daily challenges and changing needs of complex institutions. Delegated authority is a classic feature of the modern administrative state, wherein the traditional understanding holds that decisions and internal rules will be made so as to operationalize legal and policy mandates and ensure consistency by providing detailed guidance to staff. In the case of prisons, however, the risk of delegated authority is that important features of incarceration will be designed and delivered far from the public and even the political eye. Regimes that determine the character and quality of incarceration are often designed and implemented in a setting that can be characteristically unconstrained by the larger legal framework.

In 2003, the Correctional Service of Canada (CSC) designed a new program for the long-term solitary confinement of female prisoners. Legislation to govern the use of long-term solitary on both male and female prisoners was already in place.<sup>2</sup> This additional policy program, however, was only for women. Women held under the Management Protocol (the Protocol) were locked in their cells for up to 23 hours per day, denied ordinary prison programming and subjected to enhanced security and isolation for years at a time. In several respects, administration of the Protocol defied the principles and purposes of Canadian prison law as well as applicable human rights norms and sentencing rationales. The Protocol thus serves as an example of a policy that was developed within and by the prison service and whose terms departed from the governing law.

Given the significance of delegated power to the character and quality of state punishment and the difficulty of subjecting such powers to judicial review, this example in legal deviation and excess merits careful examination. The text of the Protocol stipulated that it was created pursuant to "existing authorities provided in the law", namely the *Corrections and Conditional Release Act (CCRA)*.<sup>3</sup> The CCRA was enacted in 1992 for the very purpose of ensuring that formal legislation, rather than discretionary policies, governs the powers exercised within Canadian prisons.<sup>4</sup> Yet while the Protocol may have alluded to its formal

<sup>2</sup> *Corrections and Conditional Release Act*, RSC 1992, c 20 [CCRA].

<sup>3</sup> Office of the Deputy Minister for Women, *Secure Unit Operational Plan* (Ottawa: Correctional Service of Canada, September 2003) at Part 8, "Management Protocol" [*Secure Unit Plan*].

<sup>4</sup> Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (British Columbia: Douglas & McIntyre, 2002). Jackson describes how, in the pre-1992 regime, the provisions in the *Penitentiary Act* and the *Penitentiary Service Regulations* "represented only a small part of the labyrinth of rules governing the lives of prisoners." The rest of the rules were set out in policy. The policies were created by the prison service, and the problem was that, while the policies governed everyday operations and decisions, they

legislative framework, the terms and character of the Protocol amounted to a substantial revision of the solitary confinement regime as it applied in women's prisons. The arrival of the Management Protocol thus marks a return to administrative power as a mode of prison governance in Canada, although now in the context of legislation that already occupies the field. This departure from the rule of law was made possible by inadequacies in the legislation itself, which enabled the administration of this deviant program for several years.

The history of the creation and implementation of the Protocol invites examination of the relationship between formal legislative or constitutional boundaries and the rules and discretionary judgments developed and exercised within the prison bureaucracy. At first glance, the Protocol formally complied with its legislative framework and could be seen as an ordinary exercise of the discretion delegated to prison managers to pursue their various mandates. On closer examination it is clear that the Protocol added significant procedural layers to the administration of prisoner segregation. These procedural layers were very difficult for inmates to navigate and thus prevented them from being released from punitive conditions of segregation. The Protocol articulated new and exacting behavioural standards used to assess the conduct of segregated women and adjudicate their entitlement to basic liberties. These standards explicitly contradicted standards set out in the governing legislation which stipulated that segregated housing should only be used as a last resort. Deficiencies in the governing legislation, including a lack of time limits on solitary confinement and no external oversight, made it possible for policies on the ground to defy the legislative and constitutional boundaries that were already in place.

The prison service created and implemented the Protocol with little public knowledge and without the democratic process or political attention that might be expected for a coercive governmental regime. One implication of this history is that explanation and justification for the quietly developed policy cannot rest on a theory of political expediency nor popular demand for tough-on-crime policies. Rather than affirming an emerging thesis that a punitive public has captured Canadian crime policy, the survival of the Management Protocol actually depended on a dearth of publicity.<sup>5</sup> As soon as the Protocol was brought to light and subjected to external critique the

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could not be contested or enforced by prisoners because they lacked the status of "law." For example, while it was a disciplinary offence for a prisoner to contravene a directive set out in policy, there was no legal duty for prison staff to adhere to the directives, see 48-9.

<sup>5</sup> For discussion of shifts in the politics of criminal law and penal policy in recent years in Canada see Anthony Doob and Cheryl Webster, "Maintaining our Balance: Trends in Imprisonment Policies in Canada" in Karim Ismaili, Jane Sprott, and Kim Varma eds, *Canadian Criminal Justice Policy: Contemporary Perspectives* (Toronto: Oxford University Press, 2012) 79 at 79-104; Kent Roach, "The Charter versus the Government's Crime Agenda" (2012) 58 Sup Ct L Rev (2d) 211; Edward Greenspan and Anthony Doob, "The Harper Doctrine: Once a Criminal, Always a Criminal" *The Walrus* (September 2012), online: <[thewalrus.ca/the-harper-doctrine/](http://thewalrus.ca/the-harper-doctrine/)>

CSC began to see that it could not survive scrutiny and moved towards its cancellation. When a lawsuit was filed challenging its constitutionality, the CSC formally terminated the Protocol rather than defend its merits in court proceedings.

As scholars attempt to describe and explain trends in state punishment, the Protocol case study reveals the need for attention to the distinct dynamics of the penal policymaking power exercised in a hidden administrative realm, without public knowledge or input. In an important American article on this subject, Giovanna Shay emphasizes the significance of correctional regulations to critical topics concerning prison quality, such as medical and mental health care, visitation, telephone usage and programming.<sup>6</sup> Notwithstanding the significance of correctional policies to the quality of life and the exercise of authority within prisons, both judges and legal scholars pay little attention to these issues. Shay writes:

Despite its importance, the area of corrections regulation is a kind of “no-man’s land.” In many jurisdictions, and in many subject areas, prison and jail regulations are formulated outside of public view. Because of the deference afforded prison and jail officials under prevailing constitutional standards, such regulations are not given extensive judicial attention. Nor do they receive much focus in the scholarly literature.<sup>7</sup>

Administrative law scholarship has also pointed more generally to the murky domain of administrative discretion and the difficulty of subjecting such discretion to systematic legal scrutiny.<sup>8</sup> Despite the importance of policy guidelines, rules, codes, training materials and technical manuals in discretionary fields of government decision-making, Lorne Sossin highlights how part of the problem is that these soft law instruments are policy, not law, and consequently are “developed, modified and applied according to no uniform standards or criteria.”<sup>9</sup> Notwithstanding these potentially undisciplined origins, these soft law instruments can evade judicial attention.<sup>10</sup> In the Canadian federal prison system, written policy instruments apply to most of the significant decisions that correctional officers make. For that reason, the quality of operational policies and their adherence to the demands of the wider legal order are substantial determinants for prison quality and legality.

This article focuses on how the Management Protocol policy was designed in 2002–2003 and on the consultations and debates that occurred at that time.

<sup>6</sup> Giovanna Shay, “Ad Law Incarcerated” (2009) 14:2 Berkeley J Crim L 329.

<sup>7</sup> *Ibid* at 332.

<sup>8</sup> See e.g. Sujit Choudhry and Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Democratic Accountability and Constitutional Remedies” (2003) 41:1 Osgoode Hall LJ 1; Lorne Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law” (2002) 45:4 Can Pub Adm 465.

<sup>9</sup> Sossin, *supra* note 8 at 467.

<sup>10</sup> For discussion, see Sossin, *supra* note 8 at 474–479.

A focus on the moment of creation reveals how the aims of high-level prison administrators get translated into rules and practices and the limited extent to which formal law constrains the creation of such regimes. Also significant is the process that led to the cancellation of the Protocol within a decade of its implementation. At the outset, the Management Protocol received scant public or political attention. Over time, external criticism began to mount from both the media and prison watchdogs. Years of critique by the Office of the Correctional Investigator and key legal advocates informed and mobilized external attention, generated knowledge and expertise, and catalyzed the filing of a legal claim under the *Charter of Rights and Freedoms*.<sup>11</sup> The trajectory of the Protocol thus reveals how adversarial rights litigation and mechanisms for external expert critique of the prison service can accumulate so as to eventually give effect to clear terms in the formal law. While the broader legal framework made little difference to the development of the program, it did motivate public scrutiny, a prisoner lawsuit and, finally, cancellation of the program.

The article also explores a comparison with the history of the California supermax prison system. Supermax scholar Keramet Reiter has unveiled the lack of democratic process at the outset of this controversial experiment in California prison history.<sup>12</sup> The decision to first build a supermax prison capable of imposing comprehensive and long-term isolation on prisoners came from within corrections rather than from the state legislature. Reiter shows how the most severe facility in the California prison system emerged from a process that occurred far from the public gaze, shielded from serious political debate and absent from legislative attention. Only once Pelican Bay State Prison was built and made known to the larger community did litigation and limited judicial intervention generate minimal constitutional controls.

The California comparison suggests that the story of the Management Protocol may not be unusual. The structure of the contemporary prison is that key powers are lodged with correctional administrators who operate in a context that tends to resist external access and oversight. In this setting, the larger legal framework is not likely to be seen as a comprehensive normative system to which the policy-making function must strictly adhere. At best, formal constraints and adjacent constitutional principles are likely to be viewed, in the language of Kelly Hannah-Moffat, as “managerial risks” to be navigated.<sup>13</sup> The Management Protocol is emblematic of a strategic approach

<sup>11</sup> *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.

<sup>12</sup> Keramet Reiter, *The Most Restrictive Alternative: The Origins, Functions, Control and Ethical Implications of the Supermax Prison, 1976–2010* (PhD Dissertation, University of California, Berkeley, 2012).

<sup>13</sup> Kelly Hannah-Moffat, *Moving targets: Risk and Accountable penal justice: organizational risk management, human rights and prison inquiries* (2013) [unpublished]; see also Kelly Hannah-Moffat and Amy Klassen, *The Exceptional State of Solitary Confinement* (2013) [unpublished].

to law where rights are not the “trumps” of ideal legal theory, but are pliable interests that can be overridden or circumvented by managerial preferences.<sup>14</sup> The need for rigorous judicial review and external oversight is plain in this light, along with the need for legislation that effectively constrains coercive possibilities.

The article will first discuss the legal framework that governs administrative segregation in Canada. Then, drawing upon CSC documents from the time of drafting the Management Protocol, the article describes the design process of the 2003 policy to show how CSC officials reacted to early stakeholder objections about the legality of the program. Notably, the final critique and cancellation of the Protocol mirrored many of the same concerns and objections voiced at the outset. Perhaps under the influence of the *Union of Correctional Officers*, the CSC was unable or unwilling to make a proper *a priori* assessment of the excesses of the program. The article then explores the California comparison, namely Reiter’s work showing how Pelican Bay State Prison received little attention from California legislators and how it was designed and opened with little analysis of the legality of unprecedented levels of prisoner control, surveillance and isolation. External critique and adversarial litigation were essential to inducing more careful attention to the legal shortcomings and punitive severity of both Pelican Bay and the Management Protocol.

## II. The Management Protocol: Background and Emergence

### A. The Legal Framework

Canadian federal prisons are governed by a single piece of legislation: the *Corrections and Conditional Release Act*. Parliament passed the CCRA in 1992 to replace the *Penitentiary Act* and the *Parole Act*, and to implement penal laws that reflect the requirements of the *Charter*.<sup>15</sup> The CCRA scheme added important protections for prisoners, including a grievance system and independent adjudication of prison discipline. Under this new system disciplinary modes of segregation can only be imposed for a breach of specific prison rules, and sanctions are limited to a 30-day period of segregation following adjudication before an independent decision-maker.<sup>16</sup> The drafters of the CCRA refused to impose parallel protections – concrete time limits and independent external

<sup>14</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 184–205.

<sup>15</sup> *Penitentiary Act*, RSC 1985, c P-5, as repealed by CCRA, *supra* note 2; *Parole Act*, RSC 1985, c P-2, as repealed by CCRA, *supra* note 2.

<sup>16</sup> *Corrections and Conditional Release Regulations*, SOR/92-620 s 44(1)(f) [*Regulations*].

oversight – for the use of administrative segregation.<sup>17</sup> The anomalous scheme means that while administrative segregation is a more severe and indefinite mode of confinement than disciplinary segregation, it is also a practice that is subject to fewer procedural constraints.

The 1992 legislative package does implement internal administrative segregation review boards, which were not in place in the pre-1992 regime. However, the *CCRA* does not set time limits for the administrative segregation context, nor does it require independent adjudication. Administrative segregation can be imposed for very general reasons, rather than for a breach of a specific prison rule known in advance by prisoners through the prison disciplinary code. For these reasons, the administrative segregation provisions have generated significant critique and nonpartisan calls for reform.<sup>18</sup>

The *CCRA* does contain substantive restrictions on administrative segregation, but the standards are minimal and difficult to enforce. The *CCRA* sets out that the purpose of administrative segregation is the “safety and security” of the institution.<sup>19</sup> Segregated prisoners can be locked in a cell for up to 23 hours per day with no access to ordinary prison programming.<sup>20</sup> The authority to impose administrative segregation is lodged with the Warden or “institutional head,” who may order it only if “there is no reasonable alternative to administrative segregation.” The Warden must believe on “reasonable grounds” that either: (1) the inmate is a jeopardy to the security of the penitentiary

<sup>17</sup> For the legislative history of the *CCRA* and the compromises made with respect to administrative segregation, see Michael Jackson, “The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation” (2006) 48:2 *Can J Crim & Crim Jus* 157.

<sup>18</sup> *Ibid.* As Jackson chronicles, there have been several independent commissions, government reports, or expert investigations into the law and practice of administrative segregation under the *CCRA*. They all call for some mode of reform. See e.g. The Hon. Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996) [*Arbour Report*]; CSC Task Force on Administrative Segregation, *Commitment to Legal Compliance, Fair Decisions and Effective Results* (Ottawa: CSC, 1996 - 1997); CSC Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* (Ottawa: CSC Working Group on Human Rights, 1997); House of Commons, Standing Committee on Justice and Human Rights, *A Work in Progress: the Corrections and Conditional Release Act* (2000); and the Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (Ottawa: Canadian Human Rights Commission, 2004). Also see the recommendations of the Chief Coroner of Ontario (2013), *Inquest: Touching the Death of Ashley Smith: Jury Verdict and Recommendations*. The federal government and the CSC have consistently refused to implement nonpartisan recommended limits on segregation, including most recently in “Response to the Coroner’s Inquest Touching the Death of Ashley Smith” (Ottawa, December 2014, Correctional Service of Canada).

<sup>19</sup> *CCRA*, *supra* note 2, s 31(1).

<sup>20</sup> Prison officials often deny that Canada makes use of “solitary confinement.” They argue that “administrative segregation” does not entail comprehensive sensory deprivation and lacks other harsh features of “solitary.” Regardless of terminology, the key issues are the separation of prisoners from peer contact, the extensive curtailment of physical liberty and denial of access to regular programming, along with stigmatization and limits on access to meaningful healthcare. These are all standard components of the Canadian practice. Most significantly, administrative segregation under the *CCRA* currently allows cellular lockdown of up to 23 hours per day, indefinitely. As such, administrative segregation entails some degree of sensory, social and occupational deprivation, and is a profound limit on the ordinary liberties of the prison context.

or the safety of any person; (2) that allowing the inmate to associate with other inmates could interfere with an investigation; or (3) that the inmate's own safety is in jeopardy.<sup>21</sup> Section 4 of the Act is also relevant: before amendments in 2012, that section made clear that the CSC was to use the "least restrictive measures" on prisoners at all times. That amended language still requires prison measures to be "necessary and proportionate".<sup>22</sup>

The *Correctional and Conditional Release Regulations (Regulations)* establish additional procedural protections that apply to involuntary placements into administrative segregation.<sup>23</sup> The prisoner must be given notice and a chance to respond to the decision to segregate and is also entitled to regular, periodic reviews by both the institutional head and a segregation review board composed of prison staff. There is also a provision for a regional level review after 60 days. The *Regulations* make clear that the purpose of the reviews is to check whether segregation is still justified. The *Regulations* echo the standard from section 31 of the CCRA, that segregation is to be imposed only where there is no reasonable alternative.

In addition to the procedural requirements of the CCRA and the overarching standard of "least restrictive measures" or "necessary and proportionate", the legal rule that Aboriginal people are entitled to particular consideration in the criminal justice system is also relevant to the use of solitary confinement. The Supreme Court of Canada has, on several occasions, recognized the systemic discrimination experienced by Aboriginal people in Canadian society.<sup>24</sup> The Court has found that widespread racism against Aboriginal people translates into the criminal justice system, which is "more inclined to refuse bail" and more likely to "impose more and longer prison terms for aboriginal offenders."<sup>25</sup> In *R v Gladue* and subsequent cases the court concluded that high rates of Aboriginal incarceration should be ameliorated through sentencing policies that require trial judges to consider options other than incarceration.

The CSC concedes that the *Gladue* principles apply not just to sentencing, but also to the administration of sentences in prison. In an annual report, the Office of the Correctional Investigator commends the prison service for drafting policy that reflects expansive interpretation of *Gladue* factors to be considered in dealing with Aboriginal prisoners, including effects of the residential school system, impacts of community fragmentation, dislocation, and dispossession, family histories of suicide, alcohol abuse and

<sup>21</sup> CCRA, *supra* note 2, s 31(3).

<sup>22</sup> *Safe Streets and Communities Act*, SC 2012, c 1, s 54, amending CCRA, *supra* note 2 at s 4.

<sup>23</sup> *Regulations*, *supra* note 16, ss 19 – 23.

<sup>24</sup> *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue* cited to SCR]. See also *R v Ipeelee*, 2012 SCC 13 at para 87, [2012] 1 SCR 433, where the court made clear that "application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO [long term supervision order], and a failure to do so constitutes an error justifying appellate intervention."

<sup>25</sup> *Gladue*, *supra* note 24 at para 65.

victimization and loss of cultural/spiritual identity.<sup>26</sup> However, in a recent report, the Correctional Investigator also observes that, notwithstanding this commitment at the policy level within CSC, disparity between Aboriginal and non-Aboriginal prisoners persists in “nearly every indicator of correctional performance.”<sup>27</sup> Aboriginal prisoners still face disparities when it comes to security classification, segregation placements, involuntary transfers, access to programming, penitentiary placements, and access to community and conditional release planning.<sup>28</sup>

These systemic concerns about the impact of incarceration on Aboriginal people were on clear display in the administration of the Management Protocol. Five of the seven women placed on the Protocol were Aboriginal. As a matter of law, these women were entitled to a prison sentence that would attempt to ameliorate the effects of historic and present-day discrimination. Although the CSC agrees with that entitlement in theory, it nonetheless drafted an administrative segregation policy for women that contained no *Gladue* analysis. Moreover, the Protocol stipulated that only women classified as maximum security could be eligible, and made no distinction between women who were exhibiting psychological as opposed to behavioural problems. Given that Aboriginal women are disproportionately classified as maximum security, and often struggle with mental health problems in the prison context, it was no surprise that Aboriginal women were disproportionately subjected to the scheme.

## B. The Policy Terms

The *CCRA* and associated *Regulations* are the principal legislation governing the operations of the Correctional Service of Canada. As noted at the outset, the context for enactment of the *CCRA* was a move toward formal law rather than discretionary policies as the mode of governance in Canadian prisons.<sup>29</sup> Even with the *CCRA*, however, there is also a detailed set of policies in place that are necessary for directing the daily management of the Service and the carrying out of the Act. Pursuant to the *CCRA*, the Commissioner of the Correctional Service is authorized to establish Commissioner’s Directives (CDs), which lack the status of law but, according to the CSC, have a higher status than other policy and rules. At the very least the CDs constitute a set of standards of fairness to which the Service must adhere. Additional policy documents are issued in the form of Standing Orders, Post Orders and

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<sup>26</sup> The Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2010 - 2011* (Ottawa: Office of the Correctional Investigator, 2011) at section 5 “Aboriginal Issues.”

<sup>27</sup> Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* (Ottawa: Office of the Correctional Investigator, 2012) at para xiii.

<sup>28</sup> *Ibid.*

<sup>29</sup> Jackson, *supra* note 4.

Regional Instructions. Finally, there are memoranda and more specific policy manuals, which further elaborate on the CSC's written policy. It was in this final, lower-level policy format that, in 2003, directions for the administration of the Management Protocol first appeared.

Both the form and content of the Protocol raise doubt about the legality of the policy. Notwithstanding its significance to the character of the prison experience for women placed under it, the Protocol did not come from an amendment to the CCRA or the *Regulations*, nor was it even formalized in a CD. Rather, this new method for managing "high risk" women was buried in a CSC document that applied generally to governance of maximum security facilities (the Secure Unit Plan).<sup>30</sup> The Secure Unit Plan stated that the Management Protocol could be used on the basis of an overall assessment of the "level of risk" posed by a prisoner, as determined by reference to convicted offences, institutional conduct, and psychological assessments. It could be used on a woman who is classified as maximum security that "commits an act causing serious harm or seriously jeopardizes the safety of others."<sup>31</sup> Once placed on the Protocol, a woman faced three "steps" of graduated restrictions, through which she had to transition in order to be returned to maximum security and released from the Protocol.

The terms of the Protocol presented a maze of demanding behavioural standards for women to navigate. Multiple discretionary "tripwires" could return a woman to lower steps of progress. There was no fixed time frame for the program; the only mention of time was that it would take a "minimum of 6 months" to "successfully complete the steps of the Protocol to ensure she no longer jeopardizes the safety and security of the institution."<sup>32</sup> A woman could be transitioned off Step Three only once she "maintained positive participation for a period of 3 months" and when "her risk is considered assumable".<sup>33</sup> While on the Protocol, a woman faced a standard of "zero tolerance for any aggressive behaviour (physical or emotional)."<sup>34</sup> If "behaviour deteriorates" at any time "to the extent that administrative segregation is justified", the woman could be returned to Step One.<sup>35</sup> The Warden was required to review the case only at "no longer than 6 month intervals".<sup>36</sup>

Vague language allowed penal officials to control the process at all times. There were no specific or achievable criteria required for release. Rather, the policy refers to "assumable risk" and "zero tolerance", ensuring that decisions would be made on a purely discretionary and *ad hoc* basis. Under

<sup>30</sup> *Secure Unit Plan*, *supra* note 3. The relevant part of the Secure Unit Plan that was once posted to the CSC website has now been removed.

<sup>31</sup> *Ibid* at 66.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at 71.

<sup>34</sup> *Ibid* at 70.

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

<sup>36</sup> *Ibid* at 71.

these conditions, women typically had no idea what was required to graduate to the next Step or to be released.<sup>37</sup> They had to abide by strict standards of behaviour, unusual even for the prison context, and particularly difficult with the mounting mental health effects of segregation.<sup>38</sup> Even a bout of perceived depression could negatively affect an individual's capacity to graduate to the next Step of the Protocol.<sup>39</sup>

The Management Protocol resembles an American technique of imposing layers or "boxes" of segregation, with prisoners in the "innermost box ideally required to traverse each enclosing one on the way to relative freedom."<sup>40</sup> It has often proved difficult for prisoners to emerge from layered segregation, which is now a standard technique in special housing units across the United States.<sup>41</sup> Indeed, the graduated scheme and strict standards were largely impossible for women on the Protocol to navigate.<sup>42</sup> Several women spent years on the program, spending the vast majority of their time in lockdown in their cells, with no peer contact or regular programs, often unable to make any movements within the prison without three guards in attendance and the use of handcuffs and shackles. In some cases, the women would struggle against their conditions and accumulate institutional disciplinary charges and, at

<sup>37</sup> For example, journalist Marion Botsford Fraser documents the case of Renée Acoby, who was held on the Management Protocol from its inception in 2003 until its cancellation in 2011. Fraser reports that Acoby was often rewarded for good behavior not with release from segregation, but with the provision of basic rights. For example, Acoby once received a "reward" of more than ten squares of toilet paper and, on another occasion, the privilege of a mop, broom and cleaning fluids for cleaning her cell. Moreover, the standards required for her to achieve release would constantly shift. Acoby was told at one point that she had to cease using swear words for thirty days. On another occasion she was rewarded for continuous good behavior with the right to order a shirt to wear for a court appearance, which prisoners are regularly already able to do. See Marion Botsford Fraser, "Life on the Instalment Plan: Is Canada's penal system for women making or breaking Renée Acoby" *The Walrus* 7:2 (March 2010) online: <thewalrus.ca/life-on-the-instalment-plan/>.

<sup>38</sup> There is a large literature indicating that long-term segregation can aggravate or cause mental health problems. See e.g. Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement" (2003) 49:1 *Crime & Delinquency* 124, reviewing 46 studies indicating significant negative psychological effects including hypertension, hallucinations and uncontrollable anger from any period of isolation that extends beyond 10 days and not terminable at option of the prisoner.

<sup>39</sup> Fraser, *supra* note 37.

<sup>40</sup> Sheldon Messinger, *Strategies of Control* (Berkeley: Center for the Study of Law and Society, University of California, Berkeley, 1969), cited in Stanley Cohen and Laurie Taylor, *Psychological Survival: The Experience of Long-Term Imprisonment*, 2d ed (New York: Penguin Books, 1981) at 201.

<sup>41</sup> See e.g. the layered scheme implemented by the Pennsylvania Department of Corrections, under review in *Beard v Banks*, 548 US 521, (2006). David Fathi, Director of the National Prison Project of the ACLU Foundation, observes that many supermax facilities employ a "level" or "phase" system in which a prisoner begins at the most restrictive level, and through good behavior can earn his way to a less restrictive level and, ostensibly, out of supermax altogether. Fathi observes that "these systems have been criticized for the arbitrary and standardless nature of staff decisions to promote or demote a prisoner." See David Fathi, "The Common Law of Supermax Litigation" (2004) 24:2 *Pace L Rev* 675 at 688.

<sup>42</sup> Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies, said this about the Protocol, "[w]omen are supposed to earn their way through the phases largely by avoiding aggressive language and behavior. Most fail to do so." Kim Pate, "Habeas corpus review of the placement of Kinew James on Management Protocol", draft affidavit, March 2, 2010 [unused]. The application was not, in the end, pursued.

times, additional criminal convictions for institutional conduct. Some would see the length of their prison sentence extended far beyond the original term.<sup>43</sup> As Marion Botsford Fraser aptly described the system created by the Protocol, there were “too many snakes and not enough ladders”.<sup>44</sup>

### C. The Consultation Process

A year before the Protocol appeared in the Secure Unit Plan, consultations about the proposed program took place.<sup>45</sup> The terms were discussed with various correctional representatives, and external stakeholders like the Office of the Correctional Investigator (OCI) and the Canadian Association of Elizabeth Fry Societies (CAEFS) were invited to contribute. A number of concerns and objections about the Protocol were lodged. Under the heading “Main Conclusions”, the document identifies a need for “assessments” in order to “ensure the approach is not discriminatory or ‘illegal’”.<sup>46</sup> While concern about the legality of the program is reflected in the conclusions and throughout the document, the Protocol appeared largely unchanged in its final form.

The representatives from both the OCI and CAEFS registered concerns that the draft program was potentially unlawful, in the sense that it did not even comply with the minimal standards governing administrative segregation in the *CCRA*. In particular, Kim Pate, the influential longtime director of CAEFS, observed that the program was “punitive, illegal and discriminatory”.<sup>47</sup> CAEFS argued that the Protocol would “force staff to not comply with the law and policy with respect to use of force, disciplinary practices, the use and review of segregation and the use of transfers.”<sup>48</sup> The OCI pointed out that the policy appeared to violate the “least restrictive measures” standard in the *CCRA*, by treating all women on the Protocol status exactly the same.<sup>49</sup> In its various responses, CSC asserted that the program was not meant to be punitive – as if that claimed intention resolved concerns about how the Protocol would actually work. On several occasions, CSC

<sup>43</sup> In the case of Renée Acoby for example, the accrual of offences while on Management Protocol resulted in several years of time being added to her original sentence. Ms. Acoby, an Aboriginal woman, began her first federal prison term in 2000 on a 30-month sentence. Initially, she had access to a mother-baby program where she was able to care for her newborn child. After a failed drug test, her child was immediately removed and Ms. Acoby committed several serious institutional offences and hostage-takings. She remained in prison continuously until March 16, 2011, when she was declared a dangerous offender and given an indeterminate sentence. Ms. Acoby is the first person in Canada to be declared a dangerous offender on the basis of conduct committed while incarcerated: *R v Acoby*, (Ruling on Dangerous Offender Application, Taylor J (March 16, 2011) C-54146), currently under review at the Ontario Court of Appeal.

<sup>44</sup> Fraser, *supra* note 37.

<sup>45</sup> Correctional Service Canada, *Management Protocol: Consultation Comments and Responses – 2002*, (Ottawa: Correctional Service Canada, 2002), obtained through Access to Information on August 26<sup>th</sup>, 2014.

<sup>46</sup> *Ibid* at 1.

<sup>47</sup> *Ibid* at 2-3.

<sup>48</sup> *Ibid* at 7.

<sup>49</sup> *Ibid* at 10.

narrated its agreement that existing law and policy must be respected, but in the end failed to effect amendments that would resolve tensions between the policy plan and the legislative framework.

The OCI registered a further concern with how “women with serious mental health” problems would be treated and assessed under the Protocol.<sup>50</sup> CAEFS registered a similar objection, noting that the policy made “no distinction between a woman with full mental and cognitive faculties” and those without full faculties, and that women may experience a “deleterious effect” from rigid and restrictive conditions of confinement in segregation units.<sup>51</sup> In addition, representatives from various correctional facilities questioned the duration of the program. The CSC made a notation, never executed, that it would consider removing the minimum 6-month timeframe.<sup>52</sup> The OCI also offered the prescient critique that the resource-intensive Protocol would have the effect of worsening the conditions of confinement for all maximum-security women, who were already living in segregated conditions. All of these criticisms – made by CAEFS, the OCI, but also by various institutional representatives – would appear again in subsequent internal and external program reviews.

Despite these concerns, and despite a failure to mention the effect the Protocol would have on Aboriginal women and whether it complied with *Gladue*, the program was implemented without significant revision. In the years that followed, the Protocol was criticized by prisoners, psychologists, the Correctional Investigator, CAEFS, and journalists.<sup>53</sup> Eventually, prison lawyers like Kim Pate, Michael Jackson and organizations such as Prisoners’ Legal Services began pressing and mobilizing for abolition. In March 2011, the BC Civil Liberties Association (BCCLA) filed a *Charter* suit. These events coincided with mounting criticisms of the Protocol emanating from within the CSC. The lawsuit built upon and catalyzed the reform process. The CSC quickly cancelled the program, and all women held on the Protocol were formally removed.<sup>54</sup>

### III. The Management Protocol: Rescission

#### A. An Unlawful Policy

<sup>50</sup> *Ibid* at 3.

<sup>51</sup> *Ibid* at 7 - 8.

<sup>52</sup> *Ibid* at 6.

<sup>53</sup> Fraser, *supra* note 37. See also the criticism of experts and the court in *R v SLN*, 2010 BCSC 405, [2010] BCWLD 4535 [SLN], including the testimony of forensic psychologist Dr. Robert Ley (all discussed in more detail below).

<sup>54</sup> This does not mean, however, that the women were removed from segregation. Rather, the women were formally discharged from the Protocol status, but remained segregated. See Martha Troian, “Warehousing Indigenous Women” *CBC* (June 2013), online: [CBC Manitoba <www.cbc.ca/manitoba/features/warehousing/>](http://www.cbc.ca/manitoba/features/warehousing/)

The Protocol policy asserted that it was generally authorized by federal legislation that permits administrative segregation. As well, at several places in the text of the Protocol the document asserts that all law and policy must be adhered to. The Protocol cites section 4(d) of the CCRA – the standard of “least restrictive measures” – as a fundamental governing principle.<sup>55</sup> These provisions purport compliance with the legislation, but there are clear operational conflicts between the Protocol and the CCRA. Despite the bald claims to lawfulness, there are at least three ways that the Protocol countered the letter and spirit of the CCRA, and, more broadly, the principles of the *Charter* and relevant constitutional jurisprudence.

First, the Protocol established elaborate requirements for “graduation” from segregation, through a series of steps that are not found in the legislation. Absent the Protocol, admission and removal from segregation is likely to track the current behaviour condition of the prisoner. By contrast, women under the Protocol could achieve several months of progress before advancing to Step 2, and then find themselves returned to Step 1 because of a single behavioural lapse. Second, and relatedly, while the CCRA states that administrative segregation should only be used as a last resort, the Protocol stipulates that women could not be released until they satisfied a “zero tolerance” behavioural standard for an extended, unspecified period. The policy explicitly states that completion would take a minimum of six months, whereas the CCRA states that segregation reviews must be conducted regularly in order to check whether, at that moment, there remains an absence of alternatives to segregation. Under the Protocol, the Warden reviewed the Protocol placement at six-month intervals, meaning that segregation could extend for months beyond the moment in which it might have been considered justified.

Third, the Protocol defeats the purpose of the segregation review boards established by the CCRA and the *Regulations*, given that the decision to discharge a woman from the Protocol was lodged with the Warden alone. While the Protocol promised that it “does not change management and staff’s accountabilities” under the Act, a woman held on the Protocol would never be ordered to be released by the mandated segregation review boards. The latter continued to be conducted as per the legislation, but they were a pure formality for women on the Protocol. Protocol status would bind the discretion of the segregation review board, rendering null that legislatively required process. Similarly, the Protocol defeats the purpose of the prisoner grievance system established by the CCRA. While the Protocol states that a placement decision is directly grievable to the third level – the highest level of the grievance process – no real remedy could be granted by the grievance decision-maker, rendering null that legislatively required process as well.

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<sup>55</sup> *Secure Unit Plan*, *supra* note 3 at 71.

From the perspective of the principle of equality protected in Canada's constitutional arrangements, it is also significant that these deviations from the legislation were articulated only for women. Male conduct and male segregation continued to be governed by the scheme for administrative segregation set out in the CCRA. The Protocol can be seen as an attempt to avoid centralized federal standards for female segregation by delegating control to institutional heads at the local level. While male discipline could be handled through the applicable legislative scheme, the behavioural difficulties of women elicited an exceptional response; CSC apparently considered the ordinary legal regime to be inadequate when it came to women. This perceived inadequacy was not navigated by legislative amendment – which would undoubtedly have been a contested measure given its discriminatory dimensions. Rather, the preference for specialized female policies was achieved by assigning the discretion for enhanced punitive responses to female conduct to local authorities, notwithstanding the supremacy of federal law, the origins of the CCRA as reflecting *Charter* requirements and the fact that disciplinary problems in female prisons are fewer rather than greater than in male prisons.

Case law also casts doubt on the legality of the Protocol. Efrat Arbel points out that the Management Protocol not only strays from the terms of the CCRA, but is hard to square with the holding of the Supreme Court of Canada in *Sauvé v Canada (Chief Electoral Officer)*.<sup>56</sup> In *Sauvé*, the court struck down a law that stripped prisoners of voting rights, reasoning that “the right to punish and to denounce, however important, is constitutionally constrained” and “must serve the constitutionally recognized goals of sentencing” such as rehabilitation.<sup>57</sup> Arbel observes that *Sauvé* articulates two broad normative principles: that punishment will not be constitutionally permissible if it treats prisoners as temporary outcasts, and that punishment should not be imposed to adversely impact Aboriginal people. Arbel argues that the failure of Management Protocol to comply with these normative principles points to a troubling gap between the progressive stance on prisoner rights outlined in Canadian law, and the subordination of these rights in the daily administration of corrections.<sup>58</sup> Rights in the prison context function more like pliable interests – a perspective that must be brought to bear on legislative drafting and the design of oversight mechanisms.

The Protocol resulted in longer periods of isolation than previously imagined or experienced under the governing legislation – in some cases for years at a time. The fact that it applied almost exclusively to Aboriginal

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<sup>56</sup> Efrat Arbel, “Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment” (2015) 4:1 Can J Hum Rts 121; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519.

<sup>57</sup> *Ibid* at para 52.

<sup>58</sup> Arbel, *supra* note 56.

women represents a striking departure from the *Gladue* line of case law and the substantive equality and liberty protections inhering in the *Charter*. There is little reason to believe that Protocol segregation was a non-discriminatory and proportionate regime throughout the tenure of a Protocol application. For these and additional reasons, concern and criticism soon extended to within the correctional authority itself.

## B. External Critique, Internal Critique, Lawsuit

An important reform from the 1992 CCRA was the legislative entrenchment of the Office of the Correctional Investigator of Canada (OCI) as an ombudsman office for federal prisoners. First established in 1973 under the *Inquiries Act*, the primary function of the OCI, who is appointed for a term by the federal government yet serves independently, is to investigate and resolve individual prisoner complaints. In addition, the OCI reviews and makes recommendations on CSC policies and procedures to ensure that areas of systemic concern are identified and appropriately addressed. The OCI is able to inspect federal institutions and request the production of CSC information and documents. The CSC is legislatively required to respond to OCI recommendations, although the OCI lacks a direct remedial mechanism.

In 2008, the OCI recommended in its Annual Report that the Management Protocol be immediately rescinded, pending further review by an external expert in women's corrections.<sup>59</sup> At that time, seven women had been placed on the Protocol. The OCI Report described the Protocol as a security-driven approach that resembled, in purpose, Canada's supermax institution for men:

Strikingly familiar in purpose to the ultra-secure Special Handling Unit (SHU) for men, the Protocol is in fact meant to address concerns regarding a handful of challenging and distressed women offenders at regional women's facilities. The Management Protocol is a security-driven approach to managing these difficult women offenders. It is not a formal placement per se (as with male offenders placed in the SHU) but rather a "status." There are specific phases and steps involved in applying the Protocol, but in all cases movement and association are extremely structured and regulated—more so than in any of the men's facilities. For example, movement outside the secure unit requires the presence of three staff members and typically includes application of physical restraints—handcuffs and leg irons, or both. Women in the initial phases of the Protocol have no contact with other women offenders, for months at a time.<sup>60</sup>

The report emphasized that the "sliding scales" of assessment applied to women on the Protocol are almost always "security focused, and extremely difficult to assess or meet". There were few correctional programs or leisure

<sup>59</sup> Correctional Investigator of Canada, *Annual Report of the Correctional Investigator 2008 - 2009* (Ottawa: Office of the Correctional Investigator, 2009) at Section 7, "Federally Sentenced Women".

<sup>60</sup> *Ibid* at 31-32.

activities available, which the report called “counterproductive”, given that these women require “intensive assistance and support”. The OCI also noted that it was “particularly troubling” that since March 31, 2009, four out of the five women on the Protocol were Aboriginal, and the other woman was a member of a visible minority. Since 2003, only one woman had been able to work herself off the Protocol. The OCI report concluded:

Time on the Protocol is measured in months, not days. I have very serious concerns about the impact of this form of harsh and punitive confinement on the mental health and emotional well-being of these women. They need intervention and treatment, not deprivation. I think most Canadians would agree that in the 21<sup>st</sup> century there must be safer and more humane ways for our correctional system to assist a handful of high-needs women offenders.<sup>61</sup>

At that time, the CSC gave a largely defensive response. The CSC emphasized that women placed on the Protocol represent just one percent of federally incarcerated women and asserted that, “the decision to place a woman on the Management Protocol is not one that is taken lightly or without just cause.”<sup>62</sup> But the response also indicated that the CSC agreed with some of the critique. While the CSC refused the OCI’s direction to rescind the program pending an expert review, it admitted to be “currently reviewing its strategy for managing higher risk women with a view to moving away from the Management Protocol.”<sup>63</sup> The CSC promised that consultations with management, stakeholders, and experts in the area of women’s corrections would occur in the fall of 2009. This was the first formal acknowledgement from within the CSC of the problems in the administration of the Protocol.

In May 2010, the CSC released its report chronicling serious deficiencies in the Management Protocol.<sup>64</sup> The report, compiled after input from prisoners and correctional and community stakeholders, stated that the review was prompted partly by the OCI recommendation, but also “by a recognition from the field and from staff at Regional and National Headquarters that the use of Management Protocol had not eliminated hostage takings or serious assaults, and that the women on Management Protocol were not reintegrating to the Secure Units as quickly as had been hoped.” Not surprisingly, the promised consultations resulted in the articulation of many of the same concerns that the first consultation in 2003 produced.

The concerns noted in the report were extensive and serious. To summarize, the following problems were observed regarding the administration of the Protocol: disproportionate application to Aboriginal women; arbitrary and

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<sup>61</sup> *Ibid* at 32.

<sup>62</sup> *Ibid* at 75.

<sup>63</sup> *Ibid*.

<sup>64</sup> Women Offender Sector, *Management of Higher-Risk Women: Results of Consultation on an Alternative to Management Protocol* (Ottawa: Correctional Service of Canada, 2010).

rigid application to women who varied greatly in terms of violent behaviours and intervention needs; unrealistic improvement required to “graduate”; excessive timeframes for release; reliance on behaviours unrelated to risk in decision-making; difficulty delivering interventions in light of security protocols; inappropriate application to women with mental health and/or cognitive capacity issues; lack of meaningful incentives, and; self-sabotage due to fear exacerbated by isolation.<sup>65</sup> All respondents agreed that the current incarnation of the Protocol was inadequate, both for responding to the needs of women and for managing security risks. Many respondents thought that, with sufficient interventions, Protocol women could be managed in the regular maximum-security environment.

These findings from within the CSC reveal an illegal, excessive and dysfunctional program. And yet, despite affirming the difficulty of triggering reform in this institutional context, the Service still refused to consider serious change. The solutions proposed at that time were limited to, first, changing the name of Management Protocol to a name that would have less public recognition and stigma, and, second, building a dedicated facility for prisoners subject to the program. The latter suggestion was, in effect, to build a supermax prison for women. The CSC advanced the suggestion as a way to address the resource intensive challenge of delivering extreme isolation within an ordinary maximum-security facility. In sum, the CSC report reveals an increasing appreciation for the dysfunctionality of the Management Protocol, while still marking a clear resistance to moving away from the main features of the program.

The judiciary also furnished critique of the Management Protocol in 2010 but stopped short of ordering its abolition. In *R v SLN*, a woman was sentenced for a prison assault committed on another prisoner after being held on Management Protocol for an extended period of time.<sup>66</sup> The trial judge, Justice Williams, accepted expert evidence that the program harms the few women held on it. He remarked upon the importance of the debate on solitary confinement, while finding that his sentencing jurisdiction limited his ability to intervene. In reasons that seemed to implore the legal community to bring a constitutional challenge, Justice Williams called the Protocol “intensely repressive and difficult”, and noted that its underlying principle “is evidently to remove all manner of comfort and convenience and essentially to permit the inmate to ‘earn’ their way back to a more normal condition through compliance with institutional rules.”<sup>67</sup> He observed that the written policy “suggests that inmates will be subject to this program for limited periods of time”, and that there will be “checks and balances and means whereby statuses can be reviewed and monitored”, but he

<sup>65</sup> *Ibid.*

<sup>66</sup> *SLN*, *supra* note 53.

<sup>67</sup> *Ibid* at para 42.

expressed doubt that these rules were actually followed.<sup>68</sup>

At several places in his reasons for judgment, Justice Williams seems keenly aware of the potential difference between the formal goals and assertions of the terms of the Protocol and its actual application. He concludes:

On the basis of the material filed and the submissions made in this proceeding, it is obvious that there are some very fundamental concerns with the Canadian penal model, particularly as it has application to this offender and others like her. The realities of the correctional system in Canada today are far from ideal. Many able, knowledgeable people have conducted careful studies and have offered compelling opinions on the system, its failings and its shortcomings. Prominent among those topics is the matter of isolation, solitary confinement, and the effect it has upon inmates, particularly when it is applied on any prolonged basis. There are powerful arguments contending that such treatment is enormously damaging.

The Management Protocol is a mechanism whose principal element is just that: extensive, prolonged isolation. While it is intended as an effective means of managing the most dangerous and disruptive of inmates, there seems little doubt that it is entirely capable of inflicting great damage on those to whom it is applied. Common sense and decency would support the view that it must be administered in a careful, cautious and responsible way. The articulated policy directives clearly stipulate that great care must be taken in administering such treatment, implying, to my mind, a recognition of the powerfully destructive effect it can have.<sup>69</sup>

Justice Williams determined that his sentencing jurisdiction did not allow him to address a concern with the legitimacy of penal methods. While the evidence was clear that the defendant would be returned to this mode of state custody, Justice Williams made no formal findings with respect to the Protocol, apparently due to his sense of the limits of his authority to enter the fray of regulating this practice in the context of a sentencing decision. Notwithstanding these limits in his opinion, Justice Williams' *obiter* remarks served as a clear call to the legal community: to bring an application that could more squarely address the constitutionality of the Protocol.<sup>70</sup>

That call was answered on March 4, 2011, when Bobby Lee Worm filed a *Charter* lawsuit after being held on the Management Protocol for four years. Worm challenged both the policy and the *CCRA* enabling legislation on the grounds that both violated rights protected in the *Charter*. Her pleadings describe a personal history of poverty and abuse resulting in a diagnosis of post-traumatic

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<sup>68</sup> *Ibid* at para 43.

<sup>69</sup> *Ibid* at para 62-3.

<sup>70</sup> Whether Williams J was correct about the limits of his authority is a complex issue – one that raises deep and important questions about sentencing jurisprudence and the scope of judicial authority. For the purposes of this article, the important point is that Williams J was clearly distressed by evidence on the use of segregation by the CSC. His sentencing opinion did not direct the prison service to cease the practice generally or with respect to the defendant who was before the court, but it did affirm the shortcomings of the practice and alert the legal community as to the potential viability of a more comprehensive legal challenge.

stress disorder. Many of Worm's Aboriginal family members had been sent to residential schools, and the resulting cycle of addiction and dysfunction was present in her childhood home. When she arrived in prison, residual gang affiliations, health problems and the violence of Edmonton Institution meant that she faced tension and conflict, which impacted her behaviour. Although Worm was never violent towards staff or contractors – the problem that the Protocol was originally designed to address – she was placed on the Protocol.

In her pleadings, Worm conceded that she had received some programming while on the Protocol, but that it was inadequate and delayed. An extensive psychological assessment conducted by a psychologist retained by CSC recommended vocational training and trauma counselling for Worm.<sup>71</sup> These recommendations were never delivered; even a simple suggestion that a particular therapeutic book be provided to Worm was ignored. After nearly two years of delay, and with the persistent assistance from the legal aid office of Prisoners' Legal Services, Worm obtained a limited period of access to a counsellor.<sup>72</sup> She received no vocational training. She was given limited access to spiritual activities with the Institutional Elder, but her Aboriginal status and the *Gladue* principles were otherwise never mentioned nor addressed by the CSC. On average, Worm spent approximately twenty hours per day locked in her cell.

Informal advocacy on Worm's behalf did not succeed in securing her release from isolation. During this time, however, community-advocates and other actors deployed multiple auxiliary efforts aimed at abolishing the Protocol. These efforts, along with the plea for mobilization contained in the opinion of Justice Williams, created the confidence and generated the expertise to ground a legal challenge. The BC Civil Liberties Association (BCCLA) filed a constitutional challenge on March 5, 2011, alleging that the Protocol violates sections 7 and 12 of the *Charter*, and that Worm had been unlawfully imprisoned under it and was entitled to damages. The BCCLA also began a

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<sup>71</sup> That psychologist, Dr. Robert Ley, had been regularly employed by CSC to conduct program reviews. In 2008 Dr. Ley was hired to conduct psychological assessments of a large group of maximum-security women. The second assessment that he conducted was of Worm, who had recently been placed on the Protocol at that time. Dr. Ley was extremely critical of the Protocol, and he recommended extensive programming to counteract the effects of isolation on Worm. While Dr. Ley was initially hired to conduct multiple assessments, CSC terminated his contract after the critical report he submitted as his assessment of Worm.

<sup>72</sup> For the final two years that she was held on the Protocol, Worm had a level of access to counsel that is unusual for Canadian prisoners. Prisoners' Legal Services, the only dedicated legal aid office for prisoners in Canada, lent substantial assistance. PLS employs approximately two lawyers and five advocates, and has little capacity for systemic litigation. PLS worked to ensure that Worm's basic entitlements were honoured, and argued repeatedly through grievances and other submissions that Worm should be released from segregation, that her *Charter* rights were being violated, and that the Protocol was unlawful according to both the *CCRA* and the *Charter*. These informal advocacy strategies did not succeed; only with the filing of a lawsuit did CSC finally respond by cancelling the Protocol policy.

media campaign.<sup>73</sup> CSC reacted in the press immediately, promising to revise the policy.<sup>74</sup> On May 1, 2011, within weeks of the court filing, all of these processes culminated with the prison service stating that it had cancelled the Protocol.

In 2013, the media reported that a confidential agreement vindicated the claim of Worm, and the lawsuit settled.<sup>75</sup> CSC was able to avoid a trial and the judicial censure that such a trial appeared increasingly likely to invoke. The Protocol remains rescinded, but it is important to note that the case did not result in a formal legal remedy to ensure the practice does not arise again. Moreover, after the cancellation, the CSC stated that it would revert to governing segregation through Commissioner's Directive 709. This CD states that administrative segregation is not a punitive tool; that prisoners with special needs will be respected; and that release will be affected at the earliest possible date. Segregated prisoners are said to be entitled to one hour outside their cells per day, and a shower every second day. They are supposed to maintain access to correctional programs, case management, spiritual opportunities, and psychological counseling. But these entitlements in CD 709 – which were on the books throughout the tenure of the Management Protocol – mean little in practice, as the Protocol case itself makes clear. While the worst effects of having the Protocol on the books as operational policy may be alleviated, a remedy to ensure the properly restrained use of solitary confinement in Canada is still urgently required.

The Management Protocol is one illustration of how initiatives developed in the administrative penal context can increase the severity of a sentence. And while it is not unusual that prison authorities find new ways to observe and respond to notions of risk with mechanisms of power, it is notable that a penal technique can be permitted to change, expand and deepen without formal legal oversight. The women on the Protocol were not sentenced to that level of deprivation, nor did their experience even flow directly from a legislative enactment. The judges who carefully measured a term of incarceration based on their adjudication of culpability likely had little idea of the potential extent of deprivation that would occur, nor the mental and physical effects

<sup>73</sup> See e.g. The Canadian Press, "Sask. woman sues over solitary confinement" *CBC* (March 8, 2011), online: [www.cbc.ca/news/canada/saskatchewan/sask-woman-sues-over-solitary-confinement-1.1119790](http://www.cbc.ca/news/canada/saskatchewan/sask-woman-sues-over-solitary-confinement-1.1119790); Danielle Pope, "Severe Isolation 'Crushes the Human Spirit,' says Civil Liberties Group" *Canadian University Press* (March 11, 2011), online: [CanadianUniversityPressNewsWire.com/cupwire.ca/2011/03/11/severe-isolation-crushes-the-human-spirit-says-civil-liberties-group/](http://CanadianUniversityPressNewsWire.com/cupwire.ca/2011/03/11/severe-isolation-crushes-the-human-spirit-says-civil-liberties-group/).

<sup>74</sup> See e.g. Robert Matas, "Ottawa to Alter Solitary Confinement Protocol for Women" *The Globe and Mail* (March 15, 2011), online: [www.theglobeandmail.com/news/british-columbia/ottawa-to-alter-solitary-confinement-protocol-for-women/article571833/](http://www.theglobeandmail.com/news/british-columbia/ottawa-to-alter-solitary-confinement-protocol-for-women/article571833/).

<sup>75</sup> For media coverage, see John Colebourn, "Prisoner who spent three-and-a-half years in solitary confinement wins settlement from federal government" *British Columbia Civil Liberties Association* (May 22, 2013), online: [bccla.org/2013/05/media-province-solitaryconfinement/](http://bccla.org/2013/05/media-province-solitaryconfinement/). As a general matter, the CSC tends to settle viable claims brought by prisoners in advance of trial, and invariably insists on confidential terms. The result is that there are few legal precedents in the area.

that would follow. Even the elected officials in charge of the prison system did not attend to the details of this penal program, which arrived through an operational policy rather than legislation.

#### IV. California Comparison

This section explores a comparison to the policymaking context of a very different prison system. Like administrative segregation in Canada, supermax confinement is the most severe mode of incarceration available in the American system. Supermax prisons are dedicated facilities that are specifically designed to hold all of their prisoners in long-term solitary or administrative segregation. These prisons make use of cutting-edge technology which enables constant surveillance and physical separation of prisoners and drastically reduces contact between staff and prisoners.<sup>76</sup>

Over a short period of time in the 1980s and 90s, many US states built supermax facilities.<sup>77</sup> While facilities differ, the vast majority of American states now have some type of supermax facility, where prisoners are assigned to a lengthy and comprehensive period of segregation, often for months and years at a time. A range of factors explains the proliferation of supermax confinement in the United States. This section focuses on California, where the 1989 arrival of the first supermax prison, Pelican Bay, was driven by pressure from correctional administrators seeking techniques to house a rapidly expanding and complex prison population.<sup>78</sup> While there was popular support for punitive policies and prison building at that time as a general matter, the work of Keramet Reiter reveals that there was little political or public attention paid specifically to the design of Pelican Bay. The California story is illuminating as it illustrates how decisions that seriously affect the rights and liberties of prisoners can develop in isolation from legal norms and oversight. At the time Pelican Bay was built, only Arizona had a prison that relied upon such extreme physical structures and lengthy terms of isolation. Within the next decade dozens of other states would follow suit, and would eventually be challenged in the courts.

The decision to build Pelican Bay emerged from a process that was distinct in many ways from the development of the Management Protocol. The Protocol affected the housing of a small number of women, and did not require such extraordinary levels of physical prison construction. Modern prison building requires a multiplicity of decisions and a level of funding that

<sup>76</sup> Sharon Shalev, *Supermax: Controlling Risk Through Solitary Confinement* (Portland: Willan Publishing, 2009) at 23.

<sup>77</sup> US, Department of Justice, National Institute of Corrections, Morris L Thigpen & Susan M Hunter, *Supermax Housing: A Survey of Current Practice* (1997) at 2-6, reporting that fifteen supermax facilities or units were opened from 1989 through 1993, than five more were opened from 1994.

<sup>78</sup> Reiter, *supra* note 12 at 23.

the design of the Management Protocol certainly did not require on the same scale. But the comparison is instructive in that it suggests a larger pattern of what is a standard governance problem in prison law. The legal shortcomings of the Management Protocol may not be an isolated failure or deviation, but the natural result of the power of administration assigned to correctional facilities and their stakeholders.

## A. The Origins of Supermax in California

In her California case study, Keramet Reiter's starting point is the early 1980s. At this time, changes in sentencing policy, such as the proliferation of mandatory sentences and recidivist statutes, resulted in dramatic increases in the California prison population.<sup>79</sup> Elected officials were keen to build more prisons, at least partly to address overcrowding but also to sustain the sentencing policies that had come to mobilize majorities in state politics. Between 1984 and 2000, California added 23 prisons to its existing 16. As of 1985, however, there was no discussion about building Pelican Bay, which would become the state's first supermax. As Reiter explains:

Although California had already allocated millions of dollars to prison building by 1985, and had even opened the first few of its 23 new prisons, neither the California state legislature nor the California Department of Corrections (CDC) had imagined Pelican Bay State Prison, let alone purchased any land in Del Norte County, where the prison would ultimately be built.<sup>80</sup>

During this period, Reiter chronicles the widespread brainstorming and debate regarding policy solutions to prison overcrowding. Research institutes received funding, reports were commissioned, and there were numerous legislative hearings. In the end, however, "the legislature simply allocated money to the CDC, and the CDC decided exactly what kinds of prisons to build with this money."<sup>81</sup> In 1989, with minimal legislative debate about the specifics of the facility, California opened Pelican Bay – a technologically oriented supermax designed to hold the so-called "worst of the worst" – in an isolated rural setting.<sup>82</sup> As Reiter explains, the political silence around Pelican Bay was made possible by a new structure for the public financing of prison building, implemented in this period by elected officials seeking to ensure capacity for rapid prison expansion with minimal public resistance.<sup>83</sup>

These new financing mechanisms meant that the decision to build Pelican

<sup>79</sup> For discussion of California sentencing policy of this period and beyond, see e.g. Frank Zimring, Gordon Hawkins & Sam Kamin, *Punishment and democracy: three strikes and you're out in California* (Oxford: Oxford University Press, 2001).

<sup>80</sup> Reiter, *supra* note 12 at 1.

<sup>81</sup> *Ibid* at 2.

<sup>82</sup> *Madrid v Gomez*, 889 F Supp 1146 (ND Cal 1995) [*Madrid*].

<sup>83</sup> Reiter, *supra* note 12 at 14 – 18.

Bay was largely “initiated and led by prison administrators and accompanied by very little debate outside the prison system”.<sup>84</sup> While a bill was passed indicating that it would be built, the legislative record does not reveal “whether the legislature knew what kind of institution would be built in Del Norte County, let alone how novel the institution would be in the extremity of the isolation it would impose.”<sup>85</sup> The design and construction of Pelican Bay was left entirely to the correctional authority. The combination of “design discretion and punishment discretion” exerted by correctional administrators allowed the institution to develop “initially out of sight and un-noticed, nestled in the redwoods of a tiny coastal town in the northernmost county in California.”<sup>86</sup>

Years later, a systemic legal challenge was brought regarding conditions at Pelican Bay. In 1995, a California federal district court handed down its opinion in *Madrid v Gomez*, finding multiple and often gruesome violations in the use of force against prisoners, a lack of basic health care, and inadequate due process for placement decisions and reviews.<sup>87</sup> A former federal warden testified at trial, describing the conditions as “virtual total deprivation, including, insofar as possible, deprivation of human contact.”<sup>88</sup> The court found multiple violations of Eighth Amendment protections against cruel and unusual punishment, chronicling instances of physical abuse and a profound failure to meet the “serious medical needs” of severely mentally ill prisoners.<sup>89</sup> The court noted that for seriously mentally ill prisoners, placement at Pelican Bay was “the mental equivalent of putting an asthmatic in a place with little air to breathe.”<sup>90</sup> The court ordered that the seriously mentally ill be removed from the facility, but stopped short of ordering that the facility be closed or declaring that supermax isolation is generally unconstitutional.<sup>91</sup>

## B. Implications of the California Case

### i. *Mechanics of Penal Decisions*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid* at 42.

<sup>86</sup> Keramet Reiter, “The Origins of and Need to Control Supermax Prisons” (2013) 5:2 Cal J Pol & Pol’y 146 at 150.

<sup>87</sup> As Reiter documents, California prison lawyer Steve Fama litigated the *Madrid* case and reported that by the time he had even heard about the facility, it was already built and prisoners were already living there. Reiter argues that the genesis of the litigation is further evidence that even legal advocates and rights-minded judges in California were not aware of the unusual conditions at the prison for the first several years of its operation. See Reiter, *supra* note 12 at 44.

<sup>88</sup> *Madrid*, *supra* note 82 at 1230.

<sup>89</sup> The legal standard that the court drew upon is that the prison must not be deliberately indifferent to the serious medical needs of prisoners: *Estelle v Gamble*, 429 US 97 (USSC 1976).

<sup>90</sup> *Madrid*, *supra* note 82 at 1265.

<sup>91</sup> Serious mental illness was defined by the court in *Madrid* to include “overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness.” Despite recognizing legal constraints at

Reiter makes two claims that are relevant for analysis of the Canadian case. First, the decision to build Pelican Bay was not the result of an explicit, public, policy agenda. Even in closed-door legislative committee meetings, the prison building and design decisions that were essential to actually creating Pelican Bay were hardly even mentioned, let alone debated, and were not subject to public scrutiny, official costing, legal analysis, or approval. Throughout the 1980s, “California legislators gradually ceded planning and operational authority to California Department of Corrections administrators.”<sup>92</sup> Apart from a general budget allocation, Reiter demonstrates that the state legislature in California had little to do with the decision to add a supermax facility, with its extreme mechanisms for prisoner isolation, to the state prison system.

It follows that the decision to bring supermax confinement to California was not a straightforward matter of tough-on-crime politics. Reiter uses this empirical insight to point out that socio-legal accounts of penalty have under-emphasized this hidden dimension of penal decision-making. As she notes, American scholars have attempted to explain increases in the severity of punishment in the late 20<sup>th</sup> century with various accounts, including “a historical identity as a convict nation, neo-liberal economic policies, a pervasive culture of politicized fear, and federal and state government dependence on anti-crime policies to establish legitimacy.”<sup>93</sup> While these explanations provide good macro-level accounts of the dynamics that caused and sustained rapid growth in the prison system, along with the use of harsh penal methods in many states, they shed less light on decisions that “did not happen in the public sphere”.<sup>94</sup>

The California supermax case may not be the story across the board. Elsewhere, politicians campaigned on a promise to build a supermax for their respective states.<sup>95</sup> In one case, wardens in Wisconsin wanted to add 25 segregation cells to the four major adult male institutions in order to deal with the most “dangerous and recalcitrant inmates”.<sup>96</sup> Instead of granting

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the margins, which were regularly violated at Pelican Bay, the court ultimately condoned a practice that it found “may well hover on the edge of what is humanly tolerable for those with normal resilience.” *Madrid*, *supra* note 82 at 1146.

<sup>92</sup> Reiter, *supra* note 12 at 4.

<sup>93</sup> *Ibid* at 3, citing Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2006); Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Malden, MA: Polity Press, 2008); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

<sup>94</sup> Reiter, *supra* note 12 at 3. For a more general account of this scholarly field, and the articulation of new research approaches that could complement the American tendency toward historical and cultural accounts, see David Garland, “Penalty and the Penal State” (2013) 51:3 *Criminology* 475.

<sup>95</sup> US, Department of Justice, National Institute of Corrections, Chase Riveland, *Supermax Prisons: Overview and General Considerations* (1999) at 5.

<sup>96</sup> *Jones v El v Berge*, 164 F Supp 2d 1096 at 1102 [*El v Berge*].

this request for a modest extension of existing facilities, the governor and legislature chose to build a 500-bed supermax, presumably for political gain.<sup>97</sup> Notwithstanding this variation across states, it remains notable that in California the supermax prison was not an institution for which the public clamoured. Indeed, the public was unaware of the program, and it cannot be explained – nor justified – with resort to populist theories. This was a program developed and implemented by prison bureaucrats.

Similarly, the Management Protocol was a program developed without public knowledge or support. It was developed by officials – likely under pressure emanating from the Canadian Union of Correctional Officers for prison officer power to segregate troublesome inmates. It follows that, as Canadian scholars begin to grapple with an apparent shift in the politics of state punishment in recent years, it may be that theories based on popular sentiment or explicit political punitiveness will not reveal the entire picture.<sup>98</sup> Scholars must attend to the dynamics of bureaucratic penal powers, developed and exercised in a hidden administrative realm, on a largely silenced population.

## **ii. Few Legal Checks**

Second, the California case shows how correctional experts and bureaucrats play key roles in the development of penal policy. And, naturally enough, officials who are embedded within the prison system have little legal training and rarely share the concerns or focus of constitutional lawyers or even legislators. Reiter shows that in the process of developing major policies that changed the face of California corrections, few questions were asked about human rights and constitutional standards. She observes:

[C]orrectional experts, at least in California, were intimately engaged with shaping the terms of punishment in California, choosing to place prisoners in conditions condemned by some experts as cruel, in violation of the US Constitution, and as torture, in violation of international legal treaties. In designing and implementing prison conditions at this boundary line between constitutional and unconstitutional punishment, California correctional administrators overstepped the bounds of planning authority, and entered the realm of moral authority, making decisions about punishment, which the constitution generally leaves to policy makers [meaning the state legislature], with oversight from the judiciary.<sup>99</sup>

The ceding of planning and operational authority to the CDC during the 1980s had the following outcome in terms of the lack of legal checks over the features of punishment at Pelican Bay:

...a novel punitive institution (Pelican Bay State Prison) was designed and built without a single, substantive legislative comment on the record about that

<sup>97</sup> Riveland, *supra* note 95.

<sup>98</sup> See the materials cited at *supra* note 5.

<sup>99</sup> Reiter, *supra* note 12 at 101.

institution's unusual purpose or design. The absence of any legislative comment about the specifics of institutional design is important, in particular in the case of prisons, because prison design fundamentally implicates normative policy questions about the purposes of punishment. Certain prison designs, for instance, preclude rehabilitative programming, or institute restrictions on prisoners' rights that rise to the level of constitutional deprivations. As such, these prison designs shape not just the everyday conditions of confinement, but the state's overall punishment policy.<sup>100</sup>

Similarly, the correctional administrators who designed and implemented the novel Management Protocol made decisions about the terms of state punishment at the boundary line between constitutional and unconstitutional punishment. Moreover, in Canada, unlike California, federal legislation already stipulated the rules and principles by which administrative segregation could be used. The California prisons, and indeed most American prisons, are not governed by the central, detailed and comprehensive prison legislation that applies to federal imprisonment in Canada. There may have been reason to expect greater adherence to the formal legislative terms – and the boundaries of constitutionality that the *CCRA* is thought to reflect – in Canada. Yet the problematic aspects of the delegated policymaking power appeared in Canada as well.

Both cases reveal why prison access, external oversight, and adversarial litigation are often critical to the quality of prison governance and the enforceability of formal legal rules and constitutional standards. This becomes particularly true when policies are not derived from public processes of negotiation among elected officials. No elected official turned her mind to the wisdom or necessity of the Management Protocol, but critique from the Correctional Investigator and experienced prison advocates, followed by the filing of litigation, instigated more careful official and public attention to the program. In California, only through litigation were the basic questions about the adequacy of healthcare and the impact of supermax on the mentally ill get asked. When “key decisions” are made in the “bureaucratic sphere”, there is a risk of poor legal quality in the outcome.<sup>101</sup> When prison bureaucrats play critical contentious roles in controlling the meaning of state punishment, legal review takes on an especially significant role.

## V. Conclusion

Official discretion and the use of the delegated policymaking power are central to contemporary prison management. The policy power is properly used in order to specify workable rules for ever-changing institutional dynamics. It also provides much-needed direction and control for the daily activities

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<sup>100</sup> *Ibid* at 87-88.

<sup>101</sup> *Ibid* at 45.

and decisions of prison staff, and in this sense can be seen as an evolution from the days of idiosyncratic domination at the hands of individual prison officers. Along with these legitimate functions, this article has emphasized some of the pernicious side-effects of the policymaking function: how it can evade public attention, political debate, and legislative process, and how that evasion can mean that important dimensions of state punishment lack the controls that ordinarily apply to coercive governmental programs. In the case of the Management Protocol, prison administrators, in a quasi-legal mode, designed and implemented a severe penal program with little oversight. CSC allowed stakeholders to be at the table for a consultation, but the concerns that were raised were ultimately not addressed.<sup>102</sup> The Canadian legal order eventually furnished the tools that led to rescission, confirming that outside actors utilizing external levers are essential to the prison law project. A decade of serious rights infringements occurred in the meantime.

There are three more specific implications that follow from the material covered in this article. The first is specific to the context of administrative segregation and the terms of the formal law. For many years, reformers have critiqued the inadequacies of the *CCRA* and advocated for time limits to administrative segregation placements, along with a system of independent oversight and controls.<sup>103</sup> The disciplinary segregation regime in Canada functions relatively well with both of these constraints. While perfect control of penal administrative power is unlikely to ever be achieved, both the legislature and the judiciary should recognize that the current legislative arrangement for administrative segregation under the *CCRA* is inadequate. Controls are needed to better constrain decisions made and policies developed in the thorny and reactive context of prison management.

The second implication is about the legitimacy of programs like the Management Protocol from the perspective of democratic preferences. In recent years, there has been a groundswell of public opinion questioning the humanity of programs like the Management Protocol and supermax confinement. A social movement has formed in opposition to long-term penal isolation which has been expressed in United Nations reports, the production of medical evidence, media attention, and filmmaking.<sup>104</sup> It is a critical moment

<sup>102</sup> The consultation that occurred between CSC and community stakeholders was likely a reflection of the strength and legitimacy of the role played by both CAEFS and the OCI in women's prisons. Sound objections were lodged, but to no effect. Notably, Kim Pate reports that CSC no longer conducts consultations about policy development. The practice shifted first to "briefings" where stakeholders were simply advised of changes. Currently, however, Pate reports that external parties are no longer adequately or reliably advised of CSC policy development or changes. This makes the critique of the hidden penal policymaking power at the heart of this article even more serious.

<sup>103</sup> Jackson, *supra* note 17; *Arbour Report* and other sources, *supra* note 18.

<sup>104</sup> See e.g. Atul Gawande, "Is Solitary Confinement Torture", *The New Yorker* (30 March 2009), online: <[www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande)>; see also Erica Goode, "Prisons Rethink Isolation, Saving Money, Lives, Sanity", *The New York Times* (10 March 2012), online: <[www.nytimes.com](http://www.nytimes.com)>.

to recognize that, in many cases, there may not have been any public demand at the outset. This means that, rather than being underwritten by a popular call for “tough on crime” policies, it may be that the only public expression regarding the practice of placing individuals in single cells for 23 hours a day has been one of humanitarian concern and opposition.

The final implication is that the judiciary should not offer undue deference to practices of isolation or to policies developed in the penal context. As Michael Jackson has suggested, this means that the *Charter's* cruel and unusual punishment clause should be interpreted so as to ensure that prison conditions and practices are subject to careful scrutiny, given that, “typically such practices and conditions are not specifically prescribed by Parliament but are rather applied through the interpretations of very broadly drafted legislative provisions which are made specific through administrative policy-making.”<sup>105</sup> Policies often reflect the preferences of prison administrators and correctional unions, who are unlikely to have the training or inclination towards the proportionality and equality concerns at the heart of modern constitutional law. In sum, the origins of prison policies are relevant to the standard of review that courts ought to apply when reviewing prisoner complaints. There are few reasons to believe that prison policies reflect the reasoned preferences of either the public or elected officials. Standard arguments in favor of deference to legislative preference or administrative expertise ought not apply.<sup>106</sup>

A final thought on the Protocol case is to point out how it affirms that the current challenge for prison governance in Canada extends beyond simply passing a good legislative regime. Unlike many American states, where prisoner rights are articulated in a piecemeal fashion through adversarial litigation, since 1992 Canada has had comprehensive and detailed penal law that largely reflects and mirrors constitutional standards.<sup>107</sup> A large part of the current Canadian

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com/2012/03/11/us/rethinking-solitary-confinement.html?pagewanted=all&\_r=0>; see also the United Nations Special Rapporteur on Torture, Juan Méndez, News Release, “UN Special Rapporteur on torture calls for the prohibition of solitary confinement” (October 18, 2011), online: UN Human Rights, Office of the High Commissioner for Human Rights <[www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11506&](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11506&)>. In recent years, the Arthur Liman Public Interest Program at Yale Law School has focused intently on studying and reforming long-term isolation and supermax confinement across the United States, including through documentary filmmaking. For medical literature, the work of Stuart Grassian and Craig Haney had established a field of research on the effects of isolation that is the core feature of segregation. In 2012 and 2014, the US Senate Judiciary Subcommittee held historic hearings into the fact that the US holds 80,000 prisoners in long-term solitary confinement. In Canada, awareness of the use of solitary confinement or administrative segregation has expanded in recent years through the case of Ashley Smith, whose death in prison after extensive periods in administrative segregation has attracted national attention and investigation.

<sup>105</sup> Michael Jackson, “Cruel and Unusual Treatment or Punishment?” (1982) *Charter Edition UBC L Rev* 189 at 211.

<sup>106</sup> Giovanna Shay’s argument in the US context has relevance for Canada. Shay illustrates how judicial deference is offered to prison administrators without attending to the typically inferior quality of their policymaking function, including an exemption from the protections in state administrative procedure acts. Shay, *supra* note 6 at 339–344.

<sup>107</sup> The CCRA is considered gold-standard legislation on the world stage. The problem has always been

challenge is to entrench a culture of legality within penal institutions and ensure access to external review. Proper written policies are a critical dimension of this challenge. In her seminal Commission of Inquiry report examining abuses at the Kingston Prison for Women in 1996, Louise Arbour explains how law gets lost in the process of setting operational policies:

The events examined by this Commission indicate some significant discrepancies between CSC's operational policy, its written policy, and the law. Indeed, it is evident that some very important, yet essentially simple, legal principles which govern crucial aspects of the operation of the Correctional Service have become lost in a myriad of elaborate policy and regulatory provisions. It is apparent that it is not well understood within the Correctional Service that the decision to follow the law (as opposed to policy) is not a matter of discretion.<sup>108</sup>

Arbour also describes the standard problem of prison law: how many of the legal protections that do exist are defeated by how regimes are administered. Privileges for segregated prisoners are always limited by staffing, resources and security routines. Plans to alleviate segregated status develop and are executed very slowly; even voluntary placements may extend far beyond the withdrawal of agreement to segregation. There are also more explicit evasions of the formal law. For example, the *Regulations* provide for 60-day regional review entitlements, but transfer to a different prison can re-set the clock. Before Ashley Smith died in a segregation cell under the watch of correctional officers, she had been transferred 17 times in one year. The OCI concluded that the vast majority of these transfers were done for institutional reasons, rather than in consideration of Ashley Smith's needs. Moreover, regional reviews of her segregation placement were never conducted and her grievances often received no response.<sup>109</sup> The prison is prone to deviation and excess – a standard idea that affirms the need for policies made under law to be cleanly devoted to legality.

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seeing its terms enforced. See Allan Manson, "Canada" in Dirk van Zyl Smit and Frieder Dunkel, eds, *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' rights and Prison Conditions* (Netherlands: Kluwer Law International, 2001).

<sup>108</sup> *Arbour Report*, *supra* note 18 at 4.

<sup>109</sup> Correctional Investigator of Canada, *A Preventable Death* (Ottawa: Office of the Correctional Investigator, 2008), online: <[www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620-eng.aspx](http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620-eng.aspx)>.