“This is the first government which has actually played politics with the correctional system — and so far they’re getting away with it.”

Michael Jackson
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Prisoners’ rights advocates fought a long, hard battle to modernize correctional law. Is the pendulum swinging back from rehabilitation to punishment?

By Leo Singer

Back in the early 1970s, at a time when prison riots dominated the news in Canada, the watchtower guards would train their gun sights on Michael Jackson as he walked through the front gates up to the segregation unit to visit inmates at B.C. Penitentiary. As the UBC law professor was signing out to leave the prison, corrections staff would return to him his photo ID with scorch marks from cigarette burns. To them, Jackson was an outsider, a do-gooder overcome by some foolish notion that prisoners have rights.

Much of the culture inside correctional services has changed since Jackson began advocating for prisoners’ rights four decades ago. Today, disciplinary hearings are conducted more transparently; there is a grievance process available to inmates; and though the rates of incarceration are higher for Aboriginals, there are support programs in place for First Nations prisoners.

But backed by an enduring lack of sympathy among the public for offenders, the federal government has decided it’s time for a new round of correctional reforms inspired by its tough-on-crime ethos. As the ideological pendulum swings back, Jackson worries that the same old battles are being re-fought.

The 1970s riots and their aftermath
Jackson’s advocacy for prisoners’ rights began in 1970 when, shortly after securing a position as assistant professor of law at UBC, he was handed a dusty bundle of handwritten letters by the faculty administrator. The letters were from Canadian prison inmates, written to nobody in particular — they were all addressed simply to the Faculty of Law — mailed into an academic black hole. The administrator suggested that since no one else was interested, the new recruit might like to read them.

The eloquence of one letter in particular struck Jackson. The author, an inmate of the B.C. Penitentiary, described his solitary confinement for over two years in a small concrete cell, with little or no human contact, save an occasional word exchanged with a sympathetic prison guard. The young British-born lawyer had planned on a career like any other in criminal law, but the letters inspired a change of direction. He wondered whether the man truly deserved this fate, and whether one inmate’s story was typical of the Canadian prison experience.

And so Jackson began his own research, exploring the reality of life behind the walls of Canadian prisons — with dedication.
and doggedness he would spend the next 40 years devoted to the cause of promoting justice and human rights within the correctional system.

As Jackson charted this new course for himself, a series of riots and hostage-takings shattered any remaining illusions he had once held about Canada’s penal institutions.

In April 1971, most famously, 500 prisoners at Kingston Penitentiary took over the central six-storey dome, viciously tortured 14 inmates considered to be ‘undesirables’ — informants and sex offenders — and unfurled large banners that demanded human rights and better living conditions. During the four-day siege, prisoners took five staff hostage and wreaked havoc on their cell blocks. Two inmates were left dead.

Over the next few years, inmate unrest spread to other institutions. In 1976, a standoff at B.C. Penitentiary ended

Continued on page 29
Continued from page 28

with an armed assault by the police, and one dead hostage. Jackson himself was there to negotiate the release of hostages. “I saw the explosive power of 500 men who were brutalized by their experience. They destroyed a 100-year-old prison,” he recalls. “They broke through the interior walls... They didn’t have weapons; they had the power of rage.”

Another disturbance erupted at Laval Institution in Quebec, and then another riot at Millhaven Institution, in Bath, ON., the following week. This period would go down in history as the most violent in Canadian prison history, with 69 major incidents.

In 1974, Jackson had finished his first major study, *Justice Behind the Walls*, the first serious empirical analysis of prison conditions in Canada. He found that the prison disciplinary hearings, chaired by the prison wardens and their deputies, were highly dysfunctional. Hearsay was presented as hard evidence, and the prisoner was generally presumed guilty from the start. In the eyes of the inmates, the hearings were nothing more than a kangaroo court — and they had no respect for the findings, or the penalties that were meted out.

Jackson came to believe that the riots were the inevitable result of an unjust system, in which inmates were subjected to the arbitrary whims of their jailors. “The rule of law was absent in Canadian prisons”, he says. “Wardens were the modern equivalent of Lords of the Manor, governing their own fiefdoms, in which they were the law.” Courts rarely intervened in correctional issues; back in the early 1970s, there was just one reported decision in which a court had reviewed an administrative prison decision. Otherwise the rules and regulations of prison discipline flew below the radar, considered to be an administrative matter rather than a legal one. Thus inmates were stripped of any meaningful legal status, and turned into “slaves of the state”, to use a term coined in the U.S. The system was ripe for abuse.

Jackson found administrative segregation — or solitary confinement — to be usually excessive and unjust. Guards would beat prisoners for minor infractions of the prison rules. Inmates suffered arbitrary searches, unsanitary conditions, and countless other small humiliations and petty cruelties. Rehabilitation programs and opportunities for education were lacunae or non-existent. Some prisons survived in a perpetual state of tension and fear, with inmates and staff locked into a cycle of violence and recrimination; it was no surprise to Jackson that the inmates were tearing apart their cell blocks.

In 1977, after riots, hostage-takings and murders had became routine, the all-party non-partisan Parliamentary Subcommittee on the Penitentiary System in Canada was formed. A chorus of progressive voices — lawyers, NGOs, and prisoners’ rights advocates such as the John Howard and Elizabeth Fry Societies — argued for reform. In the stark conclusion of the subcommittee’s seminal report, the chairman, Mark MacGuigan, stated: “A crisis exists in the Canadian penitentiary system. It can be met only by the immediate implementation of large-scale reforms.”

What followed was a determined effort to modernize correctional law. New legislation would articulate the rights and responsibilities of prisoners and the limits of the powers of prison wardens and staff.

The courts also took an interest. In 1979, the Supreme Court of Canada ruled in *Martineau v. Matsqui Institution Inmate Disciplinary Bd.* on the unlawful mistreatment of inmates by accepting that citizen’s rights also apply to inmates behind bars. The courts later affirmed this principle under the Canadian Charter of Rights and Freedoms, which guarantees that prisoners do not lose the protection of basic human rights. Inmates are protected — like all citizens — from unreasonable search and seizure, and the state may not subject them to cruel and unusual punishment. The result, Jackson says, is far from perfect — but it’s “a contemporary system of corrections that really embodies the spirit of the Charter.”

Howard Sapers, the current Correctional Investigator of Canada and ombudsman for federal offenders, welcomes the fact that human rights are now central to a more humane prison system. “Rights that are afforded all Canadians don’t stop at the prison gate,” he says. “The Supreme Court of Canada has referred to inmates as citizens, and as citizens they retain rights.”

Finally, 15 years after MacGuigan’s report to Parliament, the 1992 *Corrections and Conditional Release Act* (CCRA) was signed into law, under Brian Mulroney’s Conservative government. The legislation had support across the political spectrum, even though prison reform has never been a vote-winner. A consensus was built that embraced a culture of respect and human rights within the correctional system. But that was then. Now, Jackson says, “for the first time, the basic contours of that [consensus] are being challenged.”

**Haven’t we been here before?**

In 2007, the Harper government appointed a task force to review corrections operations and the law. In its report, *A Roadmap to Strengthening Public Safety*, it concluded that prison culture was heading in the wrong direction, having elevated the rights of offenders over those of the victims. And, according to the report, there wasn’t enough emphasis placed on public safety. Time to put on the brakes, the task force recommended, and go back to basics.

Jackson’s first reaction on reading the report was disbelief. “I thought it was a joke. I assumed anyone who read it who has any sort of memory of what we’ve been through in the past 30 years would look at it and say this is a parody of reform,” he says. “And it was to my astonishment that within months of it coming out, it was adopted and funded as if it was the Holy Grail.”

According to Jackson, the present Conservative government is throwing away several decades of thoughtful, hard-won reform. The CCRA was based on the premise that the prison
Crime et châtiment

Des décennies après des réformes sur les services correctionnels canadiens, certains s’inquiètent de voir le pendule osciller de nouveau de la réhabilitation vers la peine.

Dans les années 70, à une époque où des émeutes secouaient les prisons canadiennes, les gardiens postés sur leurs tours pointaient leur arme sur Michael Jackson, alors qu’il entrail au pénitencier. En quittant les lieux, le professeur de droit de l’Université de Colombie-Britannique retrouvait sa carte d’identité trouée par des cigarettes. Pour le personnel carcéral, Jackson était un étranger, un idéaliste habité de la lubie absurde que les prisonniers ont des droits.

Depuis, la culture à l’intérieur des murs a changé. Les audiences disciplinaires sont menées de manière plus transparente; un système de plaintes est en place pour les détenus; et bien que les taux de détention soient plus élevés pour les Autochtones, des programmes de soutien sont en place pour tenter de leur venir en aide.

Mais encouragé par une absence de sympathie durable de la part du public à l’égard des délinquants, le gouvernement fédéral a décidé qu’il était temps de mettre en place une nouvelle ronde de réformes, inspirées de sa philosophie de la « loi et d’ordre ». Et tandis que le pendule idéologique oscille à nouveau vers plus de sévérité, le professeur Jackson désespère de voir que les mêmes combats sont à nouveau à mener.

La rage des années 70
En avril 1971, 500 prisonniers du pénitencier de Kingston ont pris le contrôle du dôme central de 60 étages. Ils ont vicieusement torturé 14 prisonniers « indésirables » — des informateurs et des délinquants sexuels — et ils ont déroulé de larges bannières réclamant des droits de la personne et de meilleures conditions de vie.

Durant les années qui ont suivi, les turbulences se sont propagées à d’autres institutions. En 1976, un affrontement au pénitencier de la Colombie-Britannique a culminé par un assaut armé de policiers et par la mort d’un otage.

Simultanément, des perturbations sont survenues à l’institution de Laval, au Québec, de même que des émeutes à celle de Millhaven, à Bath en Ontario.

Entre-temps, en 1974, le professeur Jackson terminait sa première étude majeure, la première analyse empirique sérieuse des conditions de détention dans les prisons canadiennes. Il a entre autres constaté que les audiences disciplinaires, présidées par des gardiens de prison et leurs adjoints, étaient hautement dysfonctionnelles. Le oui-dire était présenté comme une preuve fiable et le prisonnier était généralement présomptivement coupable dès le départ.

Le professeur Jackson en est arrivé à croire que les émeutes étaient les conséquences inévitables d’un système injuste, dans lequel les détenus étaient assujettis à la volonté arbitraire de leurs geôliers. « La règle de droit était absente des prisons canadiennes », souligne le juriste d’origine britannique.

Les cours intervenaient rarement dans les questions correctionnelles. Il a conclu que la ségrégation administrative — ou la détention solitaire — était généralement utilisée de manière excessive et injuste. Les gardiens battaient des prisonniers pour des infractions mineures aux règlements. Les détenues subissaient de fouilles arbitraires, de conditions sanitaires douteuses déficientes et d’un nombre incalculable de petites humiliations et petits actes de cruauté.

En 1977, un sous-comité parlementaire a été formé à Ottawa pour étudier la question. Dans un rapport, le président Mark MacGuigan a conclu qu’il existait « une crise dans le système pénitentiaire canadien. On ne peut y répondre que par la mise en œuvre immédiate de réformes à grande échelle ».

Un effort pour moderniser la loi s’en est suivi. Les cours se sont aussi intéressées au dossier. La Cour suprême du Canada s’est prononcée sur les mauvais traitements de prisonniers, argumentant que la protection de la personne et de la vie privée de chaque individu est un droit fondamental et non contredisant les obligations du législateur. Le principe de proportionnalité est également reconnu, exigeant que la mesure mise en place soit nécessaire et proportionnée à l’atteinte de l’objectif poursuivie.

Le parlement a ensuite adopté la Loi sur les conditions de détention dans les prisons, qui a établi un système de rapports indépendants et a instauré des mécanismes de recours contre les décisions des gardiens.

Cependant, les réformes ne se sont pas arrêtées là. Les années 80 ont vu l’introduction de la loi de sécurité publique, qui a permis aux pouvoirs publics de prendre des actions d’urgence pour protéger la sécurité du public. Les gouvernements ont également tenté de réduire le nombre de prisonniers en s’efforçant de mieux intégrer les détenus dans la société et de réduire les taux de récidive.

En fin de compte, les années 70 ont été marquées par des émeutes massives, des conditions de détention inhumaines et des infractions aux droits des prisonniers. Cependant, ces événements ont également conduit à une série de réformes importantes qui ont visé à améliorer les conditions de détention et à protéger les droits des détenus. Les années 80 et 90 ont vu le développement de politiques plus centrées sur la réhabilitation et la prévention de la criminalité, mais les défis persistent et continuent de faire l’objet de discussions et de travaux de recherche.

Sentence itself is the punishment, not for punishment. Rather, it is the job of the correctional system to rehabilitate offenders in a safe environment and turn them into functional, law-abiding members of society. “Commissioners and ministers understood that it was always going to be difficult and they had to maintain focus,” he says. “And it wasn’t a question of winning political points. This is the first government which has actually played politics with the correctional system — and so far they’re getting away with it.”

Some of the government’s changes are partly born out of a desire to save money, for example inmates will no longer receive incentives for the jobs taken at Corcan, a CSC prison-based company that produces office furniture for government bureaucrats. A mentoring program for recently released offenders, LifeLine, is being cut completely. And prisoners will have to pay more for their phone calls, and pay more for ‘room and board’ out of their earnings — a move that Public Safety Minister Vic Toews says will save the taxpayer $10 million a year out of a $3-billion budget.

Other legislative revisions are more fundamental. Hidden deep in the omnibus bill C-38 is a provision that allows parole officers to suspend parole if an offender has breached an abstention clause, or is late for a curfew, and send him back to prison — adding a year or more onto his time in prison — without the right to attend a post-suspension hearing. “There are cases that clearly say that under the Charter you have a right to a hearing,” says Jackson. “I don’t think they even realize that’s what they’ve done.”

Some of the changes are semantic, but may reflect an underlying policy shift. Under the CCCR, prison wardens and their officers are directed to use the “least restrictive measure consistent with the protection of the public, staff members and offenders” in their correctional practices: “It’s a well regarded legal test,” says Sapers. The recently adopted Safe Streets and Communities Act changes the wording to “limited only to what is necessary and proportionate.” A subtle change, says Sapers, but “Parliament has chosen to change the tone of the legislation — with an eye to changing the way corrections is conducted.”

So is Canada returning to a colder and harsher correctional regime?
prisonniers en acceptant que les droits des citoyens s’appliquent aussi aux détenus — un principe réaffirmé par la suite dans la Charte canadienne des droits et libertés. Puis, 15 ans après le rapport MacGuigan, la Loi sur le système correctionnel et la mise en liberté sous condition a été adoptée, en 1992. Un consensus s’est formé autour de la question du respect des droits de la personne dans le système correctionnel.

Sentiment de déjà-vu
En 2007, le gouvernement Harper a nommé un groupe de travail pour passer en revue les opérations et les lois régissant le milieu correctionnel. Le rapport a conclu que la culture carcérale se dirigeait dans la mauvaise direction, ayant élevé les droits des délinquants au-dessus de ceux des victimes.

Certains des changements adoptés par Ottawa dans la foulée de ce rapport sont en partie nés du désir d’économiser: par exemple, les détenus ne recevront plus d’incitatifs pour accepter un emploi à CORCAN, un organisme carcéral qui fabrique du matériel de bureau pour les fonctionnaires. Un programme de mentorat, Option vie, a été complètement coupé. Et les prisonniers devront payer davantage pour leurs appels téléphoniques, les frais d’hébergement et leurs frais de nourriture.

Certaines révisions législatives sont plus fondamentales. Enterrée dans le projet de loi omnibus C-38, une disposition permettra aux agents de libération conditionnelle de suspendre la libération si un délinquant a violé une clause d’abstinence, ou est en retard pour son couvre-feu, et de le renvoyer en prison — ajoutant une année ou plus à sa peine — sans avoir droit d’assister à son audience post-suspension.

Autre changement: la Loi sur le système correctionnel prévoyait que « les mesures nécessaires à la protection du public, des agents et des délinquants doivent être les moins restrictives possible ». Mais cette formulation a été modifiée par la Loi sur la sécurité des rues et des communautés, par: de la Sécurité publique eu Canada, affirme quant à elle que cela pas le mandat du Service correctionnel du Canada de réhabiliter les délinquants. « L’objectif fondamental du système correctionnel et de la libération sous condition reste le même », dit-elle.

Entre les murs
Pendant ce temps, les agents correctionnels font face à un certain nombre de problèmes pratiques, dont le nombre croissant de détenus affectés par des maladies mentales. La consommation de drogue est aussi endémique, et en pleine croissance, malgré les tentatives d’en réduire l’approvisionnement.


À une conférence à l’Université McGill en mars dernier, au sujet de l’avenir du droit criminel, le professeur Jackson s’est souvenu d’une autre histoire datant d’il y a quelques années. Alors qu’il faisait la recherche pour l’un de ses livres, un jeune agent correctionnel lui a confié que, selon un collègue plus âgé, Jackson avait changé depuis les années 70. « Vous étiez radical et maintenant vous êtes plutôt modéré et raisonnable. »

« J’ai réalisé que plusieurs choses pour lesquelles je militais à l’époque ont été acceptées, a indiqué le professeur. Le respect pour les droits de la personne était la politique officielle du gouvernement. »

Il craint maintenant que ça change. Et on peut s’attendre à ce que les batailles du fessseur-activiste ne soient pas terminées. N

Jessica Slack, spokesperson for Public Safety Canada, says that C-10 does not affect CSC’s mandate to rehabilitate offenders. “While the principle of ‘least restrictive measures’ is being modernized in the bill, the fundamental objective of the corrections and conditional release system remains the same.”

The Canadian Bar Association, however, has argued forcefully against the government’s proposed changes. Their submission on Bill C-10 emphasizes that correctional agencies represent the most coercive arm of the state. “They administer the most severe sanction known to Canadian society — the deprivation of liberty. The unfortunate reality is that this exercise is situated in the context of a documented history of abuse of human rights in prisons, and the judicially recognized resistance of CSC to incorporate a culture of respect for rights.”

Dealing with reality
Meanwhile, correctional officers face a number of practical, intractable problems — all of which have a powerful effect on the daily routine within prisons. To begin with, there are growing numbers of mentally ill inmates, and the correctional system simply cannot cope. (An estimated 25 per cent of all federal inmates show signs of mental health problems — and one in ten have an acute psychiatric condition.)

Drug use is endemic, and on the rise, despite attempts to curb the influx of drugs into prisons. Gang activity is also increasing, especially amongst the Aboriginal prison population — a group that is chronically over-represented in Canadian penitentiaries. We are also seeing increased levels of general prison violence; Sapers points out that there is “more use of force than ever before — an explosion in the use of pepper spray, for example; more lockdowns, and more exceptional searches.”

But the greatest threat to human rights in prisons is overcrowding. And federal penitentiaries are bursting at the seams. Double-bunking rates are rising fast. Around 20 per cent of inmates share a cell. Sapers warns that over the next few years that figure could reach 30 per cent. “International standards are based on single cell accommodation,” he says.
“Canada’s federal policy is based on single cell accommodation. Yet we are seeing the Correctional Service grant blanket exemptions to wardens across the country to not comply with that policy — and double-bunk in increasing numbers.” Wardens are even seeking exemptions for double-bunking in segregation — two men in a cell that’s less than five square metres.

What’s more, says Sapers, double-bunking places pressure on all of the other programs and services within an institution — “health services, recreation services, chaplaincy services, dietary services, therapeutic services, program services, parole services.” Even prison staff say double-bunking is an intrinsically dangerous practice.

“There’s no question that it increases inmate-on-inmate violence, but it also increases the risk when correctional officers open the cell door,” says Lyle Stewart of the Union of Canadian Correctional Officers. “Often times that’s when an inmate will choose to attack an officer, but now you’ve got two inmates in there.”

A large-scale building program is under way that will expand the number of cells by 1,700, when prison closures are taken into account, which ought to ease the pressure to some degree. According to Public Safety Canada, the increase in the federal offender population has not materialized as originally projected, after the recent introduction of sentencing changes such as increased numbers of mandatory minimum sentences and the reduction of credit for time served pre-trial. Slack adds: “CSC is implementing a multi-faceted approach, ensuring full use of all available beds across the country, the use of temporary accommodation measures such as double-bunking where appropriate, and expanding the delivery of correctional, education and work programs and supervision in the community. At the same time, CSC is working diligently to ensure offenders participate in their correctional plans and are well prepared for safe, gradual and supervised return to communities.”

We have yet to see the full impact of the new law, says Sapers: “It will begin to play out as provincial court systems develop their capacity,” he says, adding that, as new convicts come into the system, double-bunking — and occasionally, even triple-bunking — may become the norm rather than the exception.

At a McGill University conference in March on the future of criminal law, Professor Jackson recalled another story dating back some 10 years, when he met with some young correctional officers to research one of his books. One of them told him that, according to the older head guards, Jackson had changed since the 1970s, “How so?” asked Jackson. The young officer answered, “Well you used to be a real radical and now they say you’re pretty moderate and reasonable.” Says Jackson: “I realized then that a lot of what I was advocating in those days had become accepted as the appropriate way to run prisons. Respect for human rights was the official government line.”

He now fears all that is changing with the government line hardening. And while it might be a stretch to say that Jackson’s reputation has come full circle, recent events certainly suggest that the professor’s activist days are far from over.