Arbitrary or Administrative:

The Consequences of Unregulated Segregation

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**Abstract**

This paper explores the consequences of the Canadian practice of administrative segregation (solitary confinement) as it currently exists with few mechanisms of oversight and few regulations guiding its use. The consequences are examined from three perspectives: that of ethics, that of reintegration and, finally, that of its uneven application. These consequences are evaluated and compared to the benefits of this practice in order to provide a more objective analysis. This paper concludes by arguing that, instead of abolishing the practice of solitary confinement in its entirety, the Correctional Service of Canada should instead create more comprehensive restrictions regarding its use so as to reduce the inevitable harms produced by this practice and in turn contribute to public safety.

**Introduction**

Imagine spending weeks alone without any substantial human contact. Now imagine those weeks are spent within four windowless walls bordering a room just big enough for a twin sized bed. While this sounds like a practice that certainly has no place in the modern Canadian context, this is the reality faced by Canadian prisoners subjected to administrative segregation. Though this practice remains in place to protect the prison population, it continues to adversely impact the thousands of prisoners subjected to this kind of punishment and in turn, creates problems for the criminal justice system as a whole. In this paper, I will argue that the Canadian criminal justice system should limit the specific confinement practice of administrative segregation to those circumstances in which it is absolutely necessary and provide specific judicial guidelines regarding its administration. I will assess the practice of administrative segregation from an ethical perspective, in terms of its general incompetence in achieving the justice system’s explicit purpose of reintegration and, finally, in terms of its unequal administration as a consequence of the broad discretionary powers granted to prison officials.

**The Ethics: Cruel and Unusual**

It is first necessary to evaluate this practice in terms of the basic ethical considerations that should underlie the Canadian criminal justice system. According to those who defend this practice, Canadian administrative segregation is by definition not a practice of solitary confinement and is thus arguably exempt from the ethical criticisms that it attracts. As such, Correctional Service Canada [CSC], which operates the federal prison system, is not required to abide by the specific guidelines governing the use of solitary confinement as established by the United Nation’s Mandela Rules (2015). This document defines solitary confinement as “the confinement of prisoners for 22 hours or more a day without meaningful human contact” (United Nations General Assembly, 2015, p. 17). Recently, however, the federal government of Canada has made amendments to the rules governing administrative segregation such that inmates admitted are provided with “the opportunity to be out of their cell for a minimum of two hours daily” (CSC, 2017). Technically, then, the Canadian practice of administrative segregation does not qualify as solitary confinement (Parkes, 2017, p. 167). Further, CSC defends administrative segregation on the grounds that it is administered for security purposes rather than as a disciplinary response. As such, it is not a practice of solitary confinement in the punitive sense and is therefore arguably exempt from the criticism regarding its inhumanity.

However, given that both the conditions and consequences of administrative segregation are virtually indistinguishable from those of solitary confinement, this argument is fundamentally flawed (Parkes, 2017, p. 167). From an ethical perspective, administrative segregation should be assessed not in terms of its purpose, but rather in terms of its specific outcomes. Further, though it is legally not to be administered as a punishment for inappropriate behavior, “it is often imposed in a punitive fashion on those considered to be a general security risk” (Kerr, 2015a, p. 503). Therefore, while in theory, this justification does arguably appeal to the concern that punitive measures are inconsistent with basic ethical standards, in practice, the distinction between the punitive and protective functions is necessarily obscure.

Further, these arguments fail to justify the adverse psychological impact on those subjected to this practice when understood from an ethical perspective. According to Dr. Kelsall (2014), prisoners in administrative segregation experience both mental and physical health effects resulting from “the profound lack of stimulation…combined with the lack of control over daily life inherent in incarceration” (p. 1). The literature indicates that, while some of these effects may subside after reintegration, others may, in fact, be long-term, including impaired memory, clinical depression, and personality changes (Kelsall, 2014, p. 1). This is particularly troubling in the Canadian context given that prisoners with pre-existing mental and abuse disorders are more likely to be subjected to this practice (Kelsall, 2014). Those who have the authority to determine the appropriateness of administrative segregation likely do not have adequate mental health training and thus are unable to assess the consequences of subjecting any given offender to this practice.

Finally, the *Corrections and Conditional Release Act [CCRA]* of 1992 establishes that inmates are to retain all those rights and freedoms enjoyed by any other Canadian citizen except those necessarily limited in the process of incarceration (Arbel, 2015, p. 134). Given the conditions under which confinement practices are administered, this principle is more ideal than real. Kerr (2015a) maintains that the legislation governing administrative segregation is not Charter compliant and is thus likely to provoke challenges regarding its Constitutionality (p. 501). Section 12, for example, prohibits cruel punishment. However, according to the courts, prolonged confinement without mitigating efforts on behalf of correctional authorities qualifies as cruel and unusual (Arbel, 2015, p. 135). Likewise, inmates placed in solitary confinement have little to no access to structures of due process that underlie the Canadian criminal justice system (Parkes, 2017, p. 173). For example, have little access to any meaningful grievance procedures when they feel they have been wronged in the segregation process (Kerr, 2015b, p. 103). All in all, basic Constitutional rights are largely unavailable to the segregated population. Clearly, then, these practices do not abide by the basic principles that are to govern the Canadian criminal justice system, nor are they consistent with the explicit purpose of incarceration

**Reintegration: A Failure to Satisfy**

The practice of administrative segregation does not continue to exist simply because it has not yet been revoked; rather, there are calculated and arguably reasonable objectives that it aims to fulfill. According to the *CCRA*, the federal legislation governing the operation of Canadian correctional facilities, the purpose of such measures is to “maintain the security of the penitentiary or the safety of any person” (1992). Given that it serves an explicitly protective function when used appropriately, administrative segregation arguably has the capacity to uphold the basic human rights of those subject to this practice. In this sense, administrative segregation actually fulfills the *CCRA*’s mandate of protecting both the dignity and the safety of federal inmates. Further, this legislation requires that solitary confinement not be used except in exceptional circumstances, defined as “an immediate situation which endangers the life, safety or health of inmates, staff, visitors, or the security of the institution” (CSC, 2017). According to this definition, then, the use of solitary confinement is clearly within the interest of all parties involved. It can thus be reasoned that placing an inmate in solitary confinement is actually conducive towards their own safety and is thus in alignment with the broader purpose of the practice itself.

In order to further evaluate this practice, however, it is necessary to develop a more comprehensive understanding of what it is that the Canadian criminal justice system in general aims to accomplish. According to CSC, prisoners are incarcerated for the purpose of both maintaining the safety and security of the public with the “gradual and structured return of offenders to the community” (2015). Given that most offenders are eventually released from custody, it is certainly in the public interest to provide inmates with the necessary resources and treatment to rehabilitate and reintegrate them back into the community as productive and law-abiding citizens. The literature consistently indicates that the most effective means of doing so is to treat them in a way that both respects and upholds their dignity (CSC, 2008). Clearly, then, subjecting inmates to a practice that further degrades and isolates them is an inappropriate response in the context of rehabilitation and reintegration.

Hannah-Moffat and Klassen (2015) argue that, though segregation is administered with the laudable objective of maintaining order, this perspective overlooks that fact that this practice itself may, in fact, be criminogenic and in turn produce disorder (p. 147). Placing people within such an environment and depriving them of their social and emotional needs is in no way conducive to the explicit purpose of rehabilitation that governs Canadian corrections. Instead, this practice only serves to exacerbate the pre-existing issues responsible for their criminal behavior. Further, when placed in administrative segregation, offenders lose access to the treatment or programs necessary for their rehabilitation (Parkes, 2017, p. 170). As such, if preserving public safety is truly the priority of the Canadian correctional system, the practice of administrative segregation should be abandoned except when absolutely necessary. Given how the existing structure operates with considerable discretion and little external oversight, however, these rehabilitative efforts directed towards segregated inmates are unlikely to succeed.

**Discretion: Arbitrary Confinement**

The rules governing administrative segregation are specifically designed to be exceptionally vague and thus subject to considerable interpretation. According to those who defend this practice, “the staff’s understanding of the dynamics of an institution… [are] integral to making the right decision” (Jackson, 2015, p. 72). Thus, they provide the prison staff with the autonomy to adapt to the specific needs of their own institutions and make decisions accordingly. In this sense, establishing more comprehensive and rigid guidelines for placing prisoners in solitary confinement would only serve to restrict the ability to adapt to the particular demands of any given institution (Kerr, 2015b, p. 91). Likewise, the significant powers of discretion provided to those who administer solitary confinement allows them to respond to dangerous situations without the delay of having to consult external mandates. From this perspective, a degree of independence from external agents of oversight is required to allow prison officials to act in the best interest of their institution (Kerr, 2015b, p. 116). Given that these agents of oversight are far removed from the day to day operations of the institution and arguably do not understand the interests of any specific institution, such interference is arguably inappropriate and represents a threat to the safety of all parties involved.

While this type of organization provides prison staff with the necessary autonomy to adapt to the specific needs of its own institutions, it removes these decision-making processes from political oversight and accountability (Kerr, 2015a, p. 497). Thus, despite some effort on the part of Canadian criminal justice agencies to regulate its administration, the practice of segregation continues to be used largely on the basis of the discretion of prison officials who can “effectively modulate the severity of the prison sentence by isolating prisoners for indefinite and prolonged periods of time” (Kerr, 2015a, p. 485). As a result, this practice is applied unevenly in profoundly racialized ways. The degree of discrimination is particularly severe in the case of federally incarcerated Indigenous women. The statistics reveal that Indigenous are both more likely to be placed in solitary confinement and more likely to be segregated for a longer period of time (McGill, 2008, p. 98). Violence against Indigenous women has become normalized in the broader context of ongoing colonial structures of power, including that of the prison system. As women within Western patriarchal structures, they experience multiple systems of oppression that combine to create an experience that is both racialized and gendered (McGill, 2008, p. 92). As such, the practice of solitary confinement when applied to this specific population seems an implicit but natural extension of the social space they occupy outside of the prison system.

Because this practice remains largely unregulated and involves a considerable degree of discretion, it is certainly informed by pre-existing stereotypes among those with the decision-making authority. It is important to note that, upon admission, security classifications are assigned to inmates based on a risk-assessment conducted by CSC. This evaluation process is organized such that, “put crudely, a low level of education or employment training combined with past experiences of violence…are likely to classify a woman as having ‘high needs’” (McGill, 2008, p. 98). As such, Indigenous women are more likely to be classified as a security risk and are therefore subject to greater scrutiny in the decision to administer segregation. Indigenous women continue to be grossly overrepresented in the general prison population, attesting to social exclusion they experience within the colonial structure. The fact that so many of them are further socially isolated within the prison itself certainly makes matters worse.

**In Conclusion: A Regulated Practice**

 Though it is not formally named as such, the Canadian practice of administrative segregation is one of solitary confinement. While rooted in very legitimate purposes, administrative segregation and its accompanied discretion are certainly not justified when evaluated from an ethical perspective and when considering the broader objective of the Canadian practice of incarceration. As such, administrative segregation should be reserved for the most severe cases and be governed by strict guidelines that reduce the opportunity for discretion. Efforts to regulate solitary confinement do not simply emerge out of a commitment to the ethical treatment of inmates, but also as a response to the failure to rehabilitate those subject to this practice. In this sense, establishing a more regulated practice that is truly only administered when absolutely necessary both protects the rights of the inmates placed in confinement and enhances public safety – and the importance of public safety is certainly something that we can all agree upon.