

PRISON DISCIPLINE IN FOUR MAXIMUM SECURITY JAILS: A RIFT IN THE  
VEIL OF SECRECY

by

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Prison Discipline in Four Maximum-Security Jails:

A Rift in the Veil of Secrecy

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## ABSTRACT

Prison disciplinary hearings are shrouded in secrecy. The rationales and interactive techniques for imputing deviancy to some inmates have scarcely been addressed in the Canadian academic literature. Through the use of both quantitative and qualitative data obtained from four provincial prisons, this thesis will describe and analyze prison disciplinary hearings as they conform to (or deviate from) written statutes (Correctional Centre Rules and Regulations), policy directives and the general duty of administrative hearings to reach decisions fairly.

Law can be viewed as an enabling resource for decision-makers, one that legitimizes the work of control agents as they impose order on prison populations. It is also constraining for officers chairing these hearings in that they must operate within certain legal parameters before they can invoke disciplinary mechanisms (usually terms in segregation or forfeiture of lost remission). Regardless of legal constraints, preferred outcomes (findings of guilt) are engineered by the holders of carceral power through their ability to make discretionary judgements and their overall structural advantage.

The legal reformist position, one that argues for procedural controls on administrative discretion (via enforceable judicial mechanisms) suffers from theoretical and empirical deficiencies, making it difficult to support the view that due process contributes to the reformation of the offender. Respect for

authority cannot be inculcated in offenders on the basis of a model that is operationalized within bureaucratic imperatives.

Any reforms directed at creating substantial fairness within these hearings must address the symbolic importance of disciplinary outcomes for line-staff. A macrosociological analysis of the prison's ideological function in society reveals parallels that can be used to view the disciplinary hearing as a device to maintain intra-class divisions and sustain a particular definition of "crime" and "criminality". Reform can be justified on the basis of preferred social values, values which can be articulated and promoted by criminologists who would like to see the rhetoric of fairness more closely approximate the reality.

**DEDICATION**

*To Cynthia*

## QUOTATION

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. It is the keenest spur to exertion and the sheerest of all guards against improbity. It keeps the judge himself while trying under trial. The security of securities is publicity.

- Jeremy Bentham

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John Lowman's knowledge and guidance have contributed immensely to the perspectives developed in this thesis. Bob Menzies gave me advice on research techniques and helped to refine and balance some of my outlooks on theoretical issues. Margaret Jackson has updated me on recent contributions to the literature and never seemed too busy to provide direction and moral support. Aileen Sams should be credited for her ceaseless care and empathy for graduate students generally, and the assistance she rendered in the final draft of this thesis.



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## INTRODUCTION

Provincial prison disciplinary hearings are veiled in secrecy. The means by which prison staff impose terms of segregation or extend the length of sentences through a forfeiture of remission are familiar only to those within the prison system. This thesis will shed light on the procedural law (contained in the Correctional Centre Rules and Regulations or C.C.R.R.), internal policies and day-to-day practices of control agents as they impose order on a conscript clientele (Freidenberg, 1975). In essence, the formal, declared purposes and operations of prison disciplinary procedures will be compared with what actually transpires in these hearings. Or, to state the research question somewhat differently, "Are disciplinary hearings conducted within the regulations pursuant to the C.C.R.R., or are they little more than 'Kangaroo Courts'?"

Chapter One describes the methods used for collecting the data that form the basis of this research. Four secure prisons will provide varying physical plant structures and order-maintenance practices to delineate the contours of prison discipline in the way it is conceived and enforced. Much of the data are employed to make inter-prison comparisons of responses to misconduct, therefore, the obvious architectural differences need to be addressed with regard to how they account for the quantitative variations in offence-rates between prisons.

Chapter Two begins by providing a background to a discussion of some wider theoretical issues pertaining to law and the exercise of discretion. Factors are then identified that affect the discretionary judgements when line-officers lay a formal charge against an inmate for violating provisions of the C.C.R.R. or other specific institutional rules. A "correctional perspective" has also been included which argues for the necessity of discretionary judgements to maintain prison order. From this point, attention is directed toward the specifics of correctional law (C.C.R.R., Sections 29 - 34) as it pertains to disciplinary hearings and appellate avenues for reviewing these determinations.

The most illuminating section *vis-a-vis* "what goes on" to adjudicate guilt or (occasionally) innocence for prison rule-infractions is contained in Chapter Three. Excerpts from transcripts of hearings conducted in all four prisons will indicate the degree of conformity to the requirements (in the "spirit" and letter) of due process provisions. A typology of procedural features is advanced and some explanations for the differences between the prisons are offered.

Based on the findings in Chapters Two and Three, the argument will be made in Chapter Four that litigation against correctional authorities is largely ineffective for securing the prisoner's right to a fair and impartial hearing in provincial disciplinary transactions. This argument will be supported by recent literature on the American experience with litigation and

the transient and deferential nature of judicial opinions pertaining to inmates' rights. In the four prisons studied, the impact of judicial decisions to encroach on the reality of practices in these hearings has been critically limited. Furthermore, the theoretical weakness in parts of the legal reformist position which seeks to extend procedural protections to inmates via litigation will be exposed.

The last chapter identifies three ideologies which offer various prescriptions for prison reform. This endeavor was considered essential in light of recent criticisms levied at efforts to alter the experience of imprisonment; this exercise will help to locate my own recommendations for fairness in prison hearings within contemporary debate.

I have drawn from a broad range of sociological literature concerning the ideology of law, discretionary decision-making and correctional reform. There is no exhaustive review of any particular body of writing on the subjects considered. My intentions have been to offer alternative perspectives gleaned from the literature to illuminate issues bearing on a relatively neglected topic.

### *Context*

A fundamental starting point to a study of disciplinary hearings in provincial prisons is to locate these forums within the declared goals of the Corrections Branch. Simply put, what is to be accomplished when people are sent to prison? If light



can be shed on this question, a further and equally important issue is to address the day-to-day reality of imprisonment. The identification of disjunctures between goals and results might necessitate one of two reactions: a restatement of the declared goals in line with reality or an alteration of the reality in line with the declared goals.

I have chosen the Branch's *Goals, Strategies and Beliefs* (revised edition, May, 1984) to document the wider intentions of corrections. According to this document, imprisonment is for retribution (punishment). It can simultaneously be for rehabilitation ("within constraints imposed by operational considerations, resource limitations, and the protection of the public") as long as the programs "do not provide opportunities to offenders which exceed those generally available to citizens in the community at large". A built-in "least-eligibility" clause along with the other qualifications concerning the declared purposes of imprisonment makes the Branch's commitment to measurable output somewhat nebulous. And so the policy talk continues.

Under the heading of "Statement of Values and Beliefs" we are told that "staff of the Corrections Branch are guided by the following set of values and beliefs which serve its fundamental principles in determining program, policy, procedures and the quality of services rendered". Notably, the statement "all persons using Branch services must have their rights respected and treated with dignity" leads us to wonder if the authors knew

they were writing about *jail*. The remaining 33 beliefs and values cover, among other things, individual accountability for crime, social defense, using the least restrictive form of intervention, society's responsibility for criminogenic conditions, offenders' rights to self-determination and personal decision-making, "elective" rehabilitation and community participation in corrections.

What these declared beliefs have to do with the line-level of custodial tasks, including disciplinary hearings, invites inquiries. Perhaps a more realistic version of what imprisonment is intended to accomplish is contained in the following letter sent to me from a senior Branch administrator:

I think it highly unrealistic to expect that any serious rehabilitation can or will occur in a prison setting. In my view, the majority of offenders are people who know the rules of society, assess the risks, decide to take a chance, get caught, go through the lock-step process of the justice system and know that the consequence is a period of "paying their dues". Generally, they are not sick and in need of medical treatment. They are not socially maladapted and in need of rehabilitation. They are, to use an analogy, much like the hockey player who skating down the ice jabs someone and spends two minutes in the penalty box. While in the penalty box he is not beaten about the head and shoulders with a cat-of-nine-tails. He is not treated by a doctor nor psychiatrist. He is not counselled by a social worker. He "does his time" and rejoins the game. This analogy fits the majority of offenders and because the time in the "penalty box" is significantly greater than two minutes, opportunities for positive and constructive activity are provided, food, clothing and medical/dental attention are provided and some emphasis is placed on effecting a restoration of balance between offender and offended or some compensation for damage done.

Here is a description of imprisonment that renders the experience a fairly benign one, initiated mainly by the

offender's clear choice to break the law and take what penalty may come. This purpose of imprisonment as "time out" is one that I heard repeatedly from correctional staff at all levels while conducting research.

Cullen and Gilbert (1982) may be closer to the real mandate of corrections when they quote the authors of *Institutions, Etc.*:

"It is an unspoken axiom in correctional administration that in order to gain tenure there are three principles that must be followed: 1) keep within your budget, 2) keep your staff happy, and 3) keep your institutions free from incidents." Significantly, "none of these need relate to the more mundane goals of your agency - for example, whether one is lowering recidivism rates or treating inmates decently" (Cullen and Gilbert, 1982: 268).

Unspoken axioms, opinions from senior to line-level officers and formal policy comprise a mass of values about what imprisonment is to "accomplish". Formal policy declarations are different from the other sub-sets of values because they are the ones on which coercive practices are legitimated in free society. Thus, if there is a divergence between words and deeds (as there always is), eventually a point is reached where the substantial reality of "criminal justice" must be altered in order to maintain legitimacy in the eyes of the public. But given the "something for everybody" values that undergird policy statements and emerging "realities" on the purpose of imprisonment (i.e., the "opportunities model", prison as "time out in the penalty box") it could be argued that the entrenched interpersonal dynamics of imprisonment are left to shape the

implementation of policy.

The following chapters challenge the declared goals of correctional decision-making with specific reference to the practices that are used to maintain prison order. My intent is to examine the authority vested in prison custodians and the rhetoric which justifies some of the state's most intrusive powers.

## CHAPTER I

### A JAIL BY ANY OTHER NAME...

#### Introduction

This chapter will furnish the reader with a descriptive and analytical overview of the nature and extent of prison rule infractions in four provincial prisons on the basis of hearings held over a two year period (1984-85). Additionally I hope to demonstrate how prison administrations respond to rule-breakers within the framework of "due process" or "natural justice",<sup>1</sup> the formal rights offered to prisoners in disciplinary proceedings.<sup>2</sup> These rights are contained in Sections 30 to 32 in the Correctional Centre Rules and Regulations (C.C.R.R.),<sup>3</sup>

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<sup>1</sup> "Due process", "natural justice" and the "standard of procedural fairness" will be used interchangeably. In essence, the commonality to any of the terms centers on the process through which a person is deemed responsible for an act or omission punishable by (administrative) law. It is not the findings of administrative bodies that are at issue but the methods used to arrive at determinations.

<sup>2</sup> These hearings are also referred to as "Warden's Court" or "Director's Court".

<sup>3</sup> Recently the regulations, drafted in 1978, have been replaced by a revised version (amended in December, 1985). For the purposes of this study, the new regulations are unchanged in that Section 28 remains unchanged (i.e, "Certain Rules of Inmate Conduct"). However, the new edition provides for administrative segregation or "separate custody", a provision not available in the 1978 version. Section 38.1 (1) of the new C.C.R.R. (1986) reads:

(1) Where, in the opinion of the director, it is necessary or desirable for the security and order of a correctional centre or the safety of the inmate that an inmate be kept in custody separate from other inmates, the director may order that the inmate be kept separate

pursuant to the Prisons and Reformatories Act and the Corrections Act. Specifically, the rights of inmates at disciplinary hearings include a written notification of the infraction for which they are accused of violating, to be present at a hearing before an impartial fact-finding party, to question witnesses<sup>4</sup> and present evidence. How those rights are operationalized within the constraints of due process will be the subject of this thesis.

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<sup>3</sup>(cont'd) from other inmates.

(2) Where an inmate is kept in separate custody under subsection (1),

(a) the director shall review the reasons for the separate custody at least once every 7 days and decide whether or not the circumstances giving rise to the separate custody have changed sufficiently to permit the inmate to be kept in custody with other inmates; and

(b) the regional director shall review a decision made under paragraph (a) within 30 days after the decision is made.

(3) An inmate kept in separate custody under subsection (1) shall not for that reason only be deprived of any privilege granted to other inmates at the correctional centre unless the privilege cannot reasonably be granted to the inmate having regard to the limitations of the area in which he is kept separate and the necessity for the effective operation of that area of the correctional centre.

How these provisions will be used to control inmates cannot be assessed at this point. They may simply reflect the existence of a "protective custody" class of offenders and the unique conditions under which these inmates must be housed. Moreover, the new regulations can be construed to permit lengthy periods of segregated confinement under conditions of limited freedom, justified by the "limitations of the area" in which inmates are housed. For a discussion of the prison conditions engendered by permitting wardens to use similar provisions in the United States, see Anderson (1983).

<sup>4</sup> The right to question witnesses is allowed at the discretion of the presiding disciplinary hearing chairperson.

Perhaps the obvious starting point for a discussion of this nature would be to assess the *need* for inquiry into prison disciplinary hearings. On one level, these forums have profound effects on prison management, both for prisoners and custodial staff alike:

The internal legal system of the prison is a critical and usually infallible yardstick by which to measure the extent of prisoners' rights. The natural justice argument applies, since without proper and fair procedures, justice is inclined to miscarry; and the system of dealing with disciplinary infractions will go far in determining whether inmates feel they are being treated justly, *which will in turn affect the whole ethos of the institution* (Zellick, 1978:111; emphasis added).

For prisoners, the impact of these decisions can have far-reaching consequences on their lives. Landau (1984) notes that inmates are convicted for offences which are considered deviant only in the prison context.<sup>5</sup> Internal punishments may result in consequences ranging from the loss of remission or denial of parole leading to longer periods of incarceration than if the offence were tried and sentence passed in an outside court (Landau, 1984:152). Not only may parole eligibility be jeopardized by the recorded outcome of these decisions, but other sanctions may also be applied: visiting privileges may be withdrawn or suspended, property seized, reading material

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<sup>5</sup> Some of these include possession of any medication not issued by the prison physician (whether restricted or not), insulting a peace officer, wearing torn or altered clothing, etc.

confiscated,<sup>6</sup> lockdowns ordered, internal transfers initiated, segregation-time awarded and/or earned remission forfeited to

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<sup>6</sup> The rationalizations that are used to justify intrusive disciplinary practices at one prison in the study are illustrated in the legitimization of controls on reading material. Officers routinely confiscated any literature depicting nudity or sexual behavior. The authority for this control was claimed under Section A3 (10.01 to 10.03) in the Branch's Manual of Operations:

10.02 Under s. 2(b) of the *Canadian Charter of Rights and Freedoms* contained in the *Constitution Act*, everyone has the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication", subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Immediately after this statement, under the heading of "Restrictions", the Manual offers this leap in logic:

10.03 Inmates, by *virtue of having been placed in custody*, are restricted in their freedom of access to reading and viewing material.

Furthermore, *since there may be a connection between the content of reading and viewing material and the reader's and viewer's subsequent behavior*, it is the responsibility of the director of the correctional centre to ensure that reading and viewing material made available to inmates does not contain subject matter considered likely to encourage *harmful or criminal behavior* (emphasis added).

The criteria by which the centre director is to judge reading and viewing material include, among other things:

1. explicitly depicted sexual acts where the content of the reading or viewing material is entirely or primarily concerned with sex;

Therefore, inmates are deprived of a constitutionally guaranteed right *because they are in custody* and there is a supposed link between reading material and subsequent behavior. How this translates into seizing *Penthouse*, *Playboy* and *Hustler* from prisoners defies common sense and social science research showing that the connection between non-violent pornography and "harmful or criminal behavior" is tenuous at best (see McKay, and Dolff, 1984:93).



extend the original sentence.<sup>7</sup>

The secret proceedings behind prison walls leave us with very little knowledge about the prison's "courtroom". Only a few previous studies conducted mostly in the United States (Barak-Glantz, 1982; Dauber and Schicor, 1979; Flanagan, 1982; Gifis, 1974; Harvard Center for Criminal Justice, 1972) have examined them in any detail. There is a paucity of empirical Canadian data except for Jackson's (1974) study of Matsqui Prison, and more recently, Williams' (1985) thesis concerning disciplinary responses in a provincial prison in British Columbia.

At a macrosociological level of analysis, the prison is often considered a microcosm of society *vis-a-vis* the state's legitimation and exercise of force (Dreyfuss and Knapp, 1979). The prison epitomizes wider forms of social control and cannot be separated from the society which it serves (Ratner, 1986:151). In many respects the disciplinary hearing mirrors the outside arrangement of justice by defining the limits of acceptable behavior, designating procedures for persons suspected of violating those limits and prescribing sanctions for those convicted of violations (Jackson, 1974:2). Moreover,

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<sup>6</sup>(cont'd) Moreover, to the best of my knowledge, no inmates were ever charged for having "obscene" material in their cells, perhaps because administrations regard the offence as too trivial to formally sanction or because of a desire not to have the issue presented in a context where it would be subject to external legal challenge by inmates.

<sup>7</sup> The original sentence refers to the disposition imposed by the court less any earned remission ("good time").

in prison, the power of the state is baldly pitted against the individual but without many of the cushioning counter-forces that the latter enjoys in the outside world. Prisoners are subject to intensive surveillance by control agents; imprecise rules govern every aspect of behavior; they lack legal counsel and appear before adjudicators whose occupational mandates demand allegiance to the control of deviance *and* impartial fact-finding. Also absent in the prison context are effective appellate avenues to challenge the process by which inmates are punished for rule infractions.

### Methods

In order to study the nature of prison offences, control and the parameters of substantive justice, four provincial maximum security prisons<sup>8</sup> within British Columbia were selected for sources of documentary evidence pertaining to inmate discipline.<sup>9</sup> Alpha Prison,<sup>10</sup> opened in 1983, is an ultra-modern remand centre located in the downtown core of a large Canadian city. This facility holds men awaiting trial and a smaller

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<sup>8</sup> The Corrections Branch refers to their classification levels as: "secure", "open" and "community". The difference between "secure" institutions and those classified as "maximum" security is a moot distinction.

<sup>9</sup> Provincial prisons generally contain inmates sentenced to less than two years imprisonment. One exception is the women's prison examined in this study which has some federal prisoners serving longer sentences.

<sup>10</sup> The names of all these units have been changed to pseudonyms. To eliminate repetition of the word, "prison", they may be referred to simply as Alpha, Beta, Delta or Gamma.

proportion of those who have been sentenced previously (to federal or provincial terms) and are awaiting trial on outstanding charges. The other prisons employed in this study are concentrated in one large compound. Two of them, Beta and Delta Prisons, are men's units and Gamma Prison is an institution for women. Both men's units in this complex are similar in purpose except that Delta Prison (constructed in 1954) generally houses only sentenced inmates while Beta Prison (built in 1912) contains sentenced prisoners, some awaiting trial and others waiting for transfer to outside camps or institutions.

One issue that came to my attention early in the research phase of this undertaking was the comparability of the four different prisons. For example, one administration claimed that they had all the "rejects", "troublemakers" and recidivists from other correctional institutions and camps. Thus, their approach to problems of discipline would not be the same as an institution that contained unsentenced prisoners awaiting trial, reasoning that men held in custody before sentencing are "better behaved" or "have more to lose" than sentenced inmates. Several points must be borne in mind with the concerns outlined above. First, some previous studies (A.R.A. Consultants, 1977; Dy, 1974) suggest that remand populations are under greater stress because they are uncertain about their future, leading to an increase in anti-social behaviors (Dy, 1974). Second, it would be difficult (and highly contentious) to empirically establish

what institution had the "bad" inmates. Staff at two of the four prisons used in this research claimed that they had the "worst" inmate populations to manage. Third, this study is primarily concerned with the dynamics of *control*, that is, the responses made by prison administrations to threats to institutional order within the constraints imposed by administrative law. The (perceived) proclivity of one prison's population to violate institutional rules is simply not an issue.

### *Quantitative Sources*

All of the documentary evidence pertaining to charges laid for violations of Section 28 ("Certain Rules of Inmate Conduct") of the Correctional Centre Rules and Regulations came from two sources. The original charge sheets (for calendar year 1984) were made available to me from two prisons: Alpha and Gamma. These documents are the better of two sources of information because they contain a wealth of contextual data regarding the circumstances of the offence, witnesses, information gathered from investigations conducted and the reasons for the disposition imposed (See Appendix A [i] to [iv]).

A second and less detailed record of institutional infractions came from Beta and Delta Prisons. They did not keep a copy of the original charge sheets in a separate file. Instead, these administrations retained a "Statement of Punishment Awards" which recorded some useful quantitative information (name, Correctional Service Number, age of offender,

time served prior to the institutional offence and time to be served, a legal description of the offence, where the offence occurred and the number of previous institutional offences. In order to compare inter-prison administrative responses to rulebreaking, it was decided to randomly select a 25% sample (n=54 and 50, respectively) of Correctional Service Numbers from these two prisons, trace those files and record the variables (from the original charge sheets) which were not available from the information contained in the Statement of Punishment Awards. The end result was 899 separate records, 585 (65%) of which contained the following data:

1. the institution at which the infraction was recorded,
2. the Correctional Service Number of the prisoner,
3. the date when the offence occurred,
4. which subsection (1 through 12) of Section 28 of the C.C.R.R. was violated,
5. if witnesses were identified by the charging officer and if so, whether identified as inmate or staff,
6. the plea entered by the inmate,
7. the finding of the disciplinary hearing,
8. the number of recorded institutional offences incurred by the inmate during his/her current sentence,
9. the disposition of the disciplinary hearing, that is:
  - a. found not guilty or dismissed,
  - b. a warning or reprimand,
  - c. confinement to cell for a specified period,
  - d. extra work assignments,

- e. a segregation award,
  - f. loss of remission,
  - g. a suspended sentence,
  - h. loss of privileges or fine.
10. the number of days awarded when segregation was ordered,
11. the number of days of lost remission ordered,
12. the number of days of cell confinement ordered,
13. the reasons for the disposition, coded by the most common entries under "Reasons for dispositions" section (includes both aggravating and mitigating reasons):
- a. number of previous offences or behavior recorded in a progress log,
  - b. the seriousness of the offence,
  - c. deterrence (general or specific),
  - d. inmate's poor attitude,
  - e. inmate "knows rules",
  - f. inmate's version of offence is partially or totally believed,
  - g. a lack of evidence or procedural technicality,
  - h. protection of staff,
  - i. conduct "cannot be tolerated",
  - j. the inmate has "no respect" for staff, other inmates or authority in general,
  - k. the perceived therapeutic value of the disposition,
  - l. the prisoner was mentally unstable or other emotional consideration,
  - m. the reason for disposition was not stated or the

explanation offered had nothing to do with the rationale behind the sentence;<sup>11</sup>

14. the circumstances of the offence:<sup>12</sup>

- a. violence towards staff or visitors,
- b. threatened violence towards staff,
- c. violence towards inmates (including fights),
- d. threatened violence towards inmates,
- e. damage as a result of vandalism,
- f. damage as a result of a collective disturbance,
- g. contraband (weapon or instrument deemed to be capable of being fashioned into a weapon),
- h. contraband (pills or prescription drugs),
- i. contraband (drugs restricted under the *Narcotics Control Act*,
- j. contraband ("miscellaneous"; including cash, "brews", extra food in cell, altered clothing, etc.),
- k. under the influence of an unknown drug or alcohol,
- l. create disturbance by noise,<sup>13</sup>
- m. a verbal altercation with staff (almost always with the inmate swearing at the officer),

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<sup>11</sup> Usually the comments included some evidentiary reasons for finding the inmate guilty, not a reason for the disposition.

<sup>12</sup> The circumstances of the offence are limited to the correctional officer's brief, written account of the behavior that invoked the charge. Because the circumstances of each charge were so diverse, the categories represented here are best described as the most common set of events written by officers. I also acknowledge the "indexical" nature (Pfohl, 1981) of incidents which have different meanings and outcomes for control agents and prisoners.

<sup>13</sup> This includes activating a fire alarm.

- n. "wandering" or unauthorized movement,
  - o. late for serving an indeterminate sentence on weekends,
  - p. theft from other inmates,
  - q. as stated in charge, a residual category where the legal description of the charge reflects the circumstances, e.g., refusing an order,
  - r. the circumstances were unknown or unstated;
15. a dichotomy to ascertain whether the discovery of the offending behavior was proactive or reactive. This simple dichotomy is designed to indicate if the misbehavior was processed due to proactive measures of maintaining security (i.e., skin frisks, cell searches, monitoring communications, etc.) or reactive (action taken in response to perceived and real conditions of disorder including fights, threats to staff, an odor of burning cannabis, vandalism, etc.),<sup>14</sup>
16. what additional charges were laid where there were multiple charges laid from a single event,
17. if a reduction in sentence was ordered in response to an

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<sup>14</sup> This is only meant to represent a crude dichotomy to roughly estimate the amount of effort exerted in each prison to maintain control. A jail whose staff frisk the living quarters of inmates relatively often provides more opportunities for deviance processing. There were situations where it was difficult to know who had initiated the interaction that culminated in a charge: staff or inmates. For example, if a correctional officer initiates a cell search on a "hunch" about contraband, generated by an inmate's "suspicious behavior", and the search confirms the existence of contraband, it is difficult to classify the discovery as "proactive" or "reactive". In cases where it was impossible to know from the information contained in the "Inmate Offence Report" whether the written allegation was initiated proactively or reactively, it was classified as "reactive".



- inmate's application under Section 33 [6] of the C.C.R.R.  
(including applications made but denied),
18. the length of the suspension period (in days),
  19. the type of suspension (suspended segregation term or loss of remission) and,
  20. the length the suspension period (similar to probation) was to last.

The remaining 35% of the 899 cases did not include the following variables: gender of charging officer, whether witnesses (staff or prisoner) were mentioned by the reporting officer, plea to charge, reasons for dispositions, circumstances of offence or information to categorize in a proactive/reactive dichotomy. To make up for these deficiencies, a 25% sample of files was traced from the Correctional Service numbers of those inmates who were charged for offences in Delta and Beta Prisons during the study period. Compensation could then be made for the lack of qualitative information in the "Statement of Punishment Awards".

Other sources of documentary information include all forms entitled "Report of Inmate/Youth Injury" (see Appendix B) for each prison during 1984. Only those forms were collated where the injury was reported as being caused by assault, attempted suicide, selfmutilation or "horseplay". The objective in using these data was to quantify the number of prisoner injuries sustained in any one institution where an assault occurred but no assailant(s) were formally charged. A "dark figure" of

assaultive behavior in each jail could thus be crudely estimated, acknowledging that the dynamics of prison life frequently conceal this type of activity from sanctions and therefore would not appear in official statistics.

In one institution (V.P.S.C.) I was able to conduct a quasi-experiment to measure the impact of a memorandum recommending to senior officers who chaired disciplinary hearings that they employ alternative dispositions other than segregation awards. Data were extracted from charges laid in several months of 1985 to ascertain the impact of these directions in sentencing dispositions (discussed in Chapter Two). Otherwise, all documentary information was gathered in calendar year 1984.

An additional note is required with regard to the site of one of the prisons where institutional infractions were recorded. All of the offences recorded under the heading "Beta Prison" did not in fact occur there. On November 11, 1984, all inmates of the Beta Prison Wing were transferred to another wing in the same complex for the balance of the year. All records of rule violations for this population have nevertheless been amalgamated under the "Beta Prison" location. This should not present serious analytic problems because the population (both prisoners and staff) remained constant and, architecturally, the wing to which the inmates were moved is a *doppelganger* of Beta Prison. For continuity, the Beta Prison Wing designation is adopted when transcripts of disciplinary hearings are analyzed

in Chapter Three. Here again, the offences and hearings actually took place in the West Wing (or were processed against the West Wing population, regardless of where the offence took place (e.g., yard, kitchen)).

#### *What the Data Do Not Include*

The data analyzed within this study do not cover incidents where a prison administration decided to press formal proceedings under the *Criminal Code*. Generally, a decision to proceed in outside court would eliminate the need for internal disciplinary action. However, internal disciplinary action would still be available through the C.C.R.R. which, under certain conditions, permits an inmate to be held in a segregation cell almost indefinitely (e.g, pending the disposition of a criminal charge as in Section 35 1 [a]):

35. (1) Where, in the opinion of the director, an inmate

[a] exhibits behavior likely to endanger himself or other persons; or

[b] obstructs or impedes the proper management, order, or discipline of the correctional centre, the director may order that the inmate be confined in a segregation cell.

(2) An inmate confined under subsection (1) shall be released from the segregation cell to his regular program within 24 hours of the beginning of the confinement *unless*

[a] the inmate is, arising out of the circumstances giving rise to the confinement, charged with an offence under an enactment of the Province or Canada; or

[b] the director, in consultation with the medical officer, is collecting evidence for the purposes of

- (i) section 546 of the *Criminal Code*
- (ii) granting a temporary absence for medical reasons.

Therefore, the data set for all four prisons considered here may not include serious allegations against prisoners (e.g., assault causing bodily harm, escape, trafficking or possession of a narcotic, etc.) because they were dealt with externally. The range of incidents where internal disciplinary actions were undertaken include everything from possession of orange juice ("contraband") to hostage-taking and assaulting staff. Laying outside charges was a rare event; less than a dozen were undertaken in 1984 at any of the prisons considered in this study.

#### *Qualitative Sources*

The original research design would have included an analysis of 25 disciplinary hearings from each prison for a total of 100 transcripts. All disciplinary hearings are supposed to be recorded on audio tape and held for 60 days, pending a possible appeal by the inmate to Inspection and Standards (also referred to as "I and S");<sup>15</sup> the latter may request the tape or a transcription of the proceedings. Only one prison afforded the

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<sup>15</sup> Inspection and Standards (also referred to as *Inspections* and Standards or "I and S") is an agency within the Corrections Branch that ensures, among other duties, that physical plant requirements are met. They also conduct investigations into allegations made by prisoners against correctional staff and handle appeals made by inmates regarding convictions or sentences reached in disciplinary hearings, pursuant to Section 34 of the C.C.R.R..

opportunity to reach this figure within the constraints imposed by the study design (all recorded hearings must be complete, audible and been conducted prior to 1986). The other three prisons could not furnish a total of 25 tapes prior to 1986 for one or a combination of the following reasons:

1. the quality of the recordings on hand was so poor as to make them undecipherable,
2. the number of incidents that came to official attention and warranted a disciplinary hearing were so few that the mandatory 60 day requirement to hold the tape simply did not cover 25 hearings,
3. I was informed, one week prior to initiating this phase of the research plan, that several of the tapes had been erased earlier. Two senior officers in two different jails offered virtually the same apology: that the 60 day requirement to hold the tapes had expired, they needed blank tapes to record new hearings and the old ones were erased. Both officers (who presided over many of the disciplinary hearings sampled in this study) also advised that "we don't always go by the book", or "not everything is there" meaning strict adherence to procedural rules was not to be expected.

As a result, only 64 transcribed hearings could be obtained. In some respects this sampling technique is limited; only one officer presided over all of the hearings obtained from Beta Prison. However, the final analysis encompasses 64 hearings chaired by 11 officers across four prisons. This limited

incursion into the interpersonal dynamics of prison discipline, although constrained by the unpredictability of human agency, nevertheless presents a realistic illustration of how discipline is enforced within (and outside) legal requirements.

This study has two other less structured sources of informational bias which need to be declared. My experience as a correctional officer (at one of the sites used for data collection) allows me an insight into particular practices that otherwise might not be available to outside observers. I am also biased to expose the lubricating interpretations of procedural law in the prison disciplinary hearing, not out of any specific commitment *vis-a-vis* "prisoners' rights" per se, but as part of a desire to see government decision-making accountable, visible and fair. At best, this study may further the case for an entrenchment of clear and enforceable procedural law in disciplinary hearings. As social science, it primarily describes the activities of control agents and their adaptation to (or cooptation of) law and policy guidelines to suit their personal values and occupational contingencies.

### The Impact of Physical Structure on Misconduct Rates

Architecture is a predominant ingredient in the recipe for controlling inmate populations although newer prisons are not immune to the problems that plague older ones.<sup>16</sup> Beta Prison is

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<sup>16</sup> Millhaven and Kent are new federal maximum security prisons that were rocked by disturbances within one year of their

the oldest structure and typifies the aging, stereotypical fortress prison, wrought by seasonal overcrowding and the scene of recurring riots and other disturbances. There are five levels of tiers on both sides of the wing, each tier capable of housing a maximum of 20 inmates (a total of 200 cells). From one end of a tier, a guard can survey the walkway stretching past the length of 20 cells but is unable to see into the cells without walking down the catwalk. All locking systems on the tiers are manually operated.

Delta Prison is a newer one-story building, with its tiers emanating from a wide central corridor with a guard locked on the unit with the prisoners, who number not more than 18 to a tier. Another officer patrols the corridor for "back-up" in case of an emergency.

Alpha Prison contrasts markedly with the other jails, featuring some of the latest technology for controlling inmate populations. A pamphlet extolling the virtues of the prison's design is reproduced below:<sup>17</sup>

#### The Living Unit Concept

Description: The living unit design is based upon the idea that the most effective custodial environment is one which minimizes anxiety, stress and other negative effects of incarceration. Generally, the living unit and its individual rooms create a "soft" and "normal" environment. Some of the features that contribute to this overall effect are:

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<sup>16</sup>(cont'd) opening date. Alpha Prison had a riot occur in one living unit 13 months after it opened.

<sup>17</sup> From a pamphlet issued by the Corrections Branch, 1982.

- \* The quietness of the environment through the use of:
  - \* carpeting and acoustically treated surfaces in the open rooms
  - \* volume limited radios and TVs
- \* The provision of separate rooms allowing a prisoner to retreat to the privacy of his own room
- \* The rooms and open areas designed to be aesthetically pleasing without sacrificing security
- \* Shower facilities that give privacy without a sacrifice in security or safety (this design satisfies "human decency" requirements and allows for co-ed staffing)
- \* Each room provides amenities such as:
  - \* built-in furniture (bed, desk, and clothes locker)
  - \* toilet and sink
  - \* natural and artificial ventilation and lighting, built-in, centrally-controlled, entertainment systems

The pamphlet goes on to praise the advantages of a "soft" or "normal" environment, based on a "good deal of evidence" that such environments:

- \* are subject to fewer incidents of theft and vandalism
- \* are easier places in which to manage prisoners (specifically, there tend to be far fewer incidents of hostility, violence and tension)
- \* are more pleasant work environments for staff (the physical surroundings, the easier management of prisoners and the availability of staff services tend to make the [Alpha] Officer's job far less stressful.

Additionally, the jail complex offers open and secure visits, chaplain's services, a library with general and law



collections, a gymnasium, outdoor recreation area and central commissary. Units contain 11 to 18 prisoners. Prepared meals can be heated in the unit's microwave oven, access to telephones is virtually unlimited and open visits are allowed daily. Staff are equipped with pagers in case of an emergency, high traffic areas are subject to camera surveillance and all access points are under centralized control. Unlike the older prisons, officers at Alpha do not carry firearms for any duties- the latter's architecture and surveillance capabilities anachronize this need.

The motivation for scrutinizing prison design as a contributing source of disciplinary intervention arose from a subjective perception that something was very much amiss at Alpha Prison when it opened and became fully operational in August, 1983. The initial training courses for officers assigned to work in the living units were accompanied by an array of "horror stories" about the "type" of men who would soon inhabit the freshly painted corridors and carpeted, spacious cells - some true, some hyperbole. Many accounts were based on the experiences of seasoned correctional staff who had dealt with inmates at the older prisons mentioned earlier. As the building became populated to its capacity, some inmates' files appeared with alarming entries: "Don't ever turn your back on this man" or "Extremely dangerous...handle with caution." Some of the predictions made by experienced officers as to the vulnerability of the new center, especially to drug-related rule violations,

proved to be warranted.<sup>18</sup> Conversely, many of the "incorrigible" prisoners presented few, if any, behavioral problems.

A second and related perception, shared by more officers than the previous observations, was the relative lack of violence in the new jail. Inmates rarely fought. Staff generally felt safe in the building and those who had worked at Beta or Delta Prisons before coming to the Alpha centre noticed a remarkable change in atmosphere. Certainly there were occasions when officers were threatened or assaulted by inmates, but generally, these assaults were minor and very infrequent.

Given Alpha Prison's "state of the art" features in prison management and inmate control, one might expect to see significantly lower rates of institutional offences at this centre for two reasons. First, the prospect of detection through increased surveillance would deter would-be violators from breaking prison rules. Secondly, if we accept what the protagonists of the "soft environment" have to say about reducing the motivation behind institutional misbehavior (by anxiety reduction), the data might show dramatic differences in officially-processed deviance. A preliminary note on how those differences can be measured is necessary.

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<sup>18</sup> Living units all have adjoining patios covered with translucent plexiglass and narrowly spaced steel beams overhead. It was easy for contraband to be passed from the busy downtown streets below the patios, a condition which has since been partially rectified by installing thin wire mesh over the steel beams. The open visiting program also was seen, with some justification, as an invitation for passing contraband.

## *How Control Contributes to the Amount of Rule Breaking*

The documentary evidence presented in the following discussion reveals a dynamic that shows the impact of idiosyncratic definitions of "misconduct" specific to each prison. What constitutes rule-breaking depends less on the nature of the behavior than *where* it occurs. Some control agent audiences are more rigorous (if not innovative) than others when it comes to defining offences. Records of prison-rule violations must be viewed as the selective use of official sanctions to repress behavior seen as threatening to particularistic definitions of "institutional order". Control activity may be initiated without visible evidence of rule-breaking (as in unit or tier frisks where contraband is suspected) or it may be responsive to visible disruptions in social order (as in breaking up fights). Ditton underscores the distinction between levels of crime and levels of control:

...control rather than 'crime' is the vital element...explanations of the rise and fall in crime rates have to be sought elsewhere than in the motives and intentions of those eventually called 'criminal'. Naturally this transforms the question of whether or not control 'works' or 'fails' into an inherently tautological one: one where the outcome of control activity can be traced to the nature of that control activity (Ditton, 1979: 100).

Although Ditton's "controlological" explanations for crime-rates have received criticism from other commentators (Rodger, 1981; Thomas, 1981; Webb, 1981), he succeeds in directing our attention towards the role of control agents in generating crime statistics. Thus, the official statistics

employed below should be seen as specific, adaptive responses to perceived threats to institutional order. Records of rule-infractions are best understood as an end rather than a means of study. They have their own existential integrity and are neither unreliable or wrong (Black, 1980: 66).

Table I shows the average yearly populations for each centre, the number of institutional offences processed in 1984 and the average yearly offence rate per 100 inmates per month. Totals for each month were taken from each prison's "warm body" count because the official counts were usually 8 to 25% higher than actual counts.<sup>19</sup>

The data in Table I suggest that rates of control activity are very different between Alpha and Beta Prisons despite their similar yearly average counts. Perhaps the most obvious explanation for the differences can be found in the architectural variations between the two prisons. Alpha Prison has all of the latest features conducive to controlling prisoners. However, a superficial reading of these figures

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<sup>19</sup> "Official" and "actual" counts vary because the former represents the number of inmates for which the administration is responsible, even though the inmates may not be physically present (e.g., because they are attending court, in hospital or temporarily placed in another unit of the jail). Complete figures for Beta Prison's 1984 "actual count" were not available. To approximate what the count would have been on any one day in 1984, the actual counts from 6 randomly selected months in 1985 were compared with official counts. The difference between the actual and official count for those six months averaged 17.8%. Each daily official count in 1984 was therefore reduced by this percentage. This method assumes no overall major differences in counts for Beta Prison between 1984 and 1985, confirmed by their Records Administration.

TABLE I  
 AVERAGE COUNTS, NUMBER OF RULE INFRACTIONS AND RATES (1984)

| Prison | Average Count | Institutional Offenses | Rate** |
|--------|---------------|------------------------|--------|
| Alpha  | 153           | 430                    | 23.4   |
| Beta*  | 159           | 201                    | 10.5   |
| Delta  | 106           | 217                    | 17.0   |
| Gamma  | 55            | 51                     | 7.8    |

\* Adjusted (Official count - 17.8% = actual count)

\*\* Rate = 
$$\frac{\text{Offenses divided by months in study (12)}}{\text{Average yearly population}} \times 100$$

suggests that the newer Alpha Prison is the scene of far more rule violations than the other two older centres. These raw figures support some elements of Ditton's controlological perspective: when the capacity for control increases (numbers of police or enthusiasm on their part), so will the measurement of that increased capacity (reflected in crime-rates) as "more of those acts originally committed are *discovered* (FANTASY Crime-rise)" (Ditton, 1979: 11; emphasis in original). In other words, Alpha Prison's comparatively high rate of institutional infractions is more an artifact of the surveillance capability facilitated by the architecture, rather than real differences in levels of prisoner rule-infractions that might be found in other prisons.<sup>20</sup> Rates *appear higher* because more acts are *discovered*

<sup>20</sup> Prisoners at the newer facility who have also served time at one or both of the other two wings have frequently commented that "you guys bust us for anything here, mickey-mouse charges"

(or defined into existence) in the modern prison. Later we will see that discovery alone is not the only variable contributing to high rates of officially processed rule-breaking.

Some authors treat prisoner "misconducts" as though they were simply straightforward violations of correctional rules devoid of contributions from the forces which identify and sanction disobedience (e.g., Bonta and Kiem, 1978; Gendreau, Ross and Izzo, 1985). An administrator at one of the prisons considered in this study stated in an unpublished Interim Report<sup>21</sup> that

An indirect measure of the institutional environment that would suggest that the environment has not been successful in reducing prisoner hostility and anxiety is the amount of internal disciplinary actions, in proportion to the population.

Although the author admits that the high number of offences are due in part to "a rigid enforcement of rule breaches related to attempts to damage institutional property", the unproblematic integrity of "misconducts" is sustained.

It would be impossible to report on the universe of prison rule-breaking, given the ambiguity of the rules and problems with reporting. Inmates are much more extensively involved in rule-breaking than is usually presumed from official institutional records. Guards report very few of the violations that they observe (Hewitt et. al., 1984: 437). Moreover, it may

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<sup>20</sup>(cont'd) or "if you tried that at [Beta or Delta], there'd be a riot".

<sup>21</sup> From an internal Interim Evaluation, at Alpha Prison dated January 31, 1984.

be in the guard's interest not to report every infraction s/he witnesses as part of a trade-off with inmates to keep things quiet (McCorkle in Johnston and Savitz, 1978: 509).

The loose, informal and reciprocal social arrangements between inmates and guards have been reported consistently in the literature and generally pertain to older prisons (Clemmer, 1940; McCorkle, 1956; Miller, et. al, 1974; Sykes, 1958; Wheeler, 1958). Discussions centering on the interactional dynamics of institutional control where guards are dependent to a great degree on the cooperation of inmates for running the prison must now be modified to accommodate the emerging role of technologically sophisticated means to monitor *all* people in prison, inmate and staff alike. "Control by tradeoffs" is being replaced by "control by behaviorism". Thus, one of the explanations for Alpha Prison's high offence rate must incorporate the notion that guards in this environment have fewer negotiating tools to maintain order than do staff in the older prisons. "Trade-offs" offered to prisoners are more likely to come to the attention of institutional supervisory staff in the former context. Not only is surveillance maintained over inmates, control staff are (or can be) monitored and disciplined on an ongoing basis with or without their direct knowledge.<sup>22</sup>

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<sup>22</sup> There are closed-circuit television cameras monitoring the landings of each of six floors at Alpha Prison. From the central control room, supervisory staff can monitor whether the line-officer is in the unit with prisoners. By reading a computer printout, the supervisor can also know how frequently the door accessing the living unit has been used. The total effect of these measures is to ensure that correctional officers do not "homestead" in their stations and are in the unit to

Foucault (1977) described "the marvellous machine" of Bentham's *Panopticon* and its implications for economizing the manifestation of disciplinary power. What we see at Alpha Prison is an embodiment of a refined panoptic enterprise, one which is ever-present and economical:

The Panopticon may even provide an apparatus for supervising its own mechanisms. In this central tower, the director may spy on all the employees that he has under his orders: nurses, doctors, foremen, teachers, warders; he will be able to judge them continuously, alter their behavior, impose upon them the methods he thinks best; and it will even be possible to observe the director himself (Foucault, 1977: 204).

Sixteenth century punishments such as those described by Foucault (1977: 3-5) during the *amende honorable*, where *Dami en* was publicly and painfully tortured, have been replaced by a more economical and less visible power: surveillance. In this medium, the exercise of power is perfected

because it can reduce the number of those who exercise it, while increasing the number on whom it is exercised. Because it is possible to intervene at any moment and because the constant pressure acts even before the offences, mistakes or crimes have been committed. Because, in these conditions, its strength is that it never intervenes, it is exercised spontaneously and without noise, it constitutes a mechanism whose effects follow from one another. Because, without any physical instrument other than architecture and geometry, it acts directly on individuals; it gives 'power of mind over mind'. The panoptic schema makes any apparatus of power more intense: it assures its economy (in material, in personnel, in time); it assures its efficacy by its preventative character, its continuous functioning and its automatic mechanisms (Foucault, 1977: 206).

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<sup>22</sup>(cont'd) supervise inmates. Deals to the effect of "I'll make myself scarce if you guys keep it clean and quiet" are hard to strike given these conditions. Sudden, unannounced "visits" from supervisors from various entry points on the unit also make it incumbent upon the line-officer to ensure his/her charges are orderly.



Data pertaining to charges laid must be interpreted with these structural imperatives in mind. Where line-officers are more likely to be observed and held accountable for fulfilling their occupational duties, we should see evidence that panoptic surveillance affects their job performance in the form of higher charge-rates. Furthermore, there will be some instances where high visibility offences (e.g., fighting, being under the influence of a drug) suggest real differences in the types of inmate behavior in each prison. Thus the data will not be said to be exclusively an indicator of rates reflecting control activity.

In order to make sense out of Table II, I have outlined Section 28 of the Correctional Centre Rules and Regulations (C.C.R.R.) which spells out the rules under which an inmate may be charged for misconduct. They are:

1. An inmate shall comply with a lawful order on direction of an officer.
2. Unless authorized by the director or an officer, no inmate shall leave his cell, place of work, or other place to which he has been assigned.
3. No inmate shall wilfully disfigure, attempt to disfigure, damage or attempt to damage, a part of a correctional centre or the property of another person.
4. Unless the owner of the property consents, no inmate shall take or convert property of another person to his own use or that of a third person.
5. No inmate shall have, attempt to obtain or give or knowingly receive a drug, weapon, or other object which may threaten the management, operation, discipline, or security of the correctional centre.
6. An inmate shall keep his person, clothing, and

sleeping area clean and orderly.

7. No inmate shall assault or threaten or attempt to assault another person.

8. No inmate shall escape or attempt to escape lawful custody, or be unlawful custody, or be unlawfully at large, or aid and abet anyone to escape lawful custody or to be unlawfully at large from a correctional centre.

9. Unless unreasonably provoked by that person, no inmate shall use abusive or insulting language or gesture to a person, and where an inmate alleges he was unreasonably provoked, the onus of proof lies with him.

10. No inmate shall use indecent language or gesture or participate in an indecent act.

11. No inmate shall conspire to create a disturbance, create a disturbance, or incite others to create a disturbance at a correctional centre.

12. No inmate shall, without lawful excuse, breach a rule or regulation that applies to a correctional centre.

The ideological dimension of these rules will be the subject of Chapter 2. For now, suffice to say that the charges outlined in Table II generally reflect the favored legislation chosen by correctional line staff to officially process deviance, rather than an accurate indicator of "what goes on" in any one prison. The ambiguity of many of the regulations (e.g., subsections 1 and 12) permits the full gamut of prison misbehavior to be processed under twelve simple rules. What constitutes "contraband", "damage" or "abusive language" at each of these prisons is shaped by individual judgments and an idiosyncratic organizational "ethos" of tolerance to observed rule-breaking.

TABLE II  
 RULE INFRACTIONS, SECTION 28, C.C.R.R., 1984

|                    | Alpha |      | Beta |      | Delta |      | Gamma |      |
|--------------------|-------|------|------|------|-------|------|-------|------|
|                    | N     | (%)  | N    | (%)  | N     | %    | N     | (%)  |
| Refuse order       | 49    | 11.4 | 54   | 26.9 | 41    | 18.9 | 7     | 14   |
| Unauthorized move  | 2     | .5   | 11   | 5.5  | 12    | 5.5  | --    | --   |
| Damage to centre   | 53    | 12.3 | 10   | 5.0  | 4     | 1.8  | 1     | 2    |
| Theft              | 2     | .5   | 3    | 1.5  | 3     | 1.4  | --    | --   |
| Contraband         | 106   | 24.7 | 26   | 12.9 | 21    | 9.7  | 12    | 23   |
| Hygiene            | 10    | 2.3  | 5    | 2.5  | 2     | .9   | --    | --   |
| Threats, assault   | 57    | 13.3 | 36   | 17.9 | 54    | 24.9 | 17    | 34   |
| Escape or attempt  | --    | --   | 2    | 1.0  | 9     | 4.1  | --    | --   |
| Abusive, insulting | 47    | 10.9 | 9    | 4.5  | 22    | 10.1 | 2     | 4    |
| Indecency          | 17    | 4.0  | 10   | 5.5  | 8     | 3.7  | 3     | 6    |
| Create disturbance | 40    | 9.3  | 6    | 3.0  | 7     | 3.2  | 1     | 2    |
| Breach rule        | 47    | 10.9 | 28   | 13.9 | 34    | 15.7 | 8     | 16   |
| Total              | 430   | 100% | 201  | 100% | 217   | 100% | 51    | 100% |

There appears to be some evidence that there are real variations in levels of recorded assaultive and threatening behavior among the four prisons which cannot be said to only reflect levels of control. These behaviors are ones which line-staff and prison administrations uniformly seek to officially sanction in order to promote an atmosphere of safety. Additionally, assaultive or threatening incidents are perceived to have more to say about what *type of prisoner* the offender is

to a greater extent than any other offence. That typification (usually entered in the progress log)<sup>23</sup> sends a message to other correctional staff about how that individual should be handled, communicated to, housed, classified or punished for an offence.

Gamma Prison, the centre for women, appears to be the setting where the proportion of all officially processed deviance involving violence is the highest (33%). Officers in Delta Prison charged inmates under Section 28 (7) in one quarter of all charges laid. From Table II, Beta Prison *appears* to have less of a problem with violence<sup>24</sup> (18% of all charges) while Alpha emerges as having more incidents (n=57) of this nature but less as a proportion (13.3%) of all charges laid.

What the official statistics do not reveal are those assaults which took place but where an assailant(s) was/were not identified and charged (Table III). In these instances staff are required to complete a "Report of Inmate/Youth Injury" (Appendix B) form whenever an incident occurs where injuries have been

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<sup>23</sup> A progress log is kept on all prisoners at the four prisons. The information includes police records and court appearance data, medical alerts, observations made by guards, recommendations for "handling", opinions about attitudes held by the inmate and "routine" information (e.g., clothing sizes, etc).

<sup>24</sup> Officers who have worked in Beta Prison and to whom I have spoken to in regard to these findings offer a different reality than the statistics portray. While the combatants involved in a fight are easily identified and charged under section 28 (7), the party(ies) to inmate assaults is/are frequently unknown or only suspected. As one officer remarked about Beta Prison during the study period, "For a while, they [staff] were packing them [victims of assault] out of there every week". Inmates who become victims of assault are unlikely to report their aggressors to staff.

TABLE III  
INCIDENTS INVOLVING INJURIES

SITE OF INJURY\*

| CAUSE           | Alpha |     | Beta |     | Delta |     |
|-----------------|-------|-----|------|-----|-------|-----|
|                 | N     | %   | N    | %   | N     | %   |
| Assault         | 3     | 34  | 27   | 79  | 7     | 70  |
| Self-mutilation | 4     | 50  | 3    | 9   | 3     | 30  |
| Others**        | 1     | 13  | 4    | 12  | 0     | 0   |
| Total           | 8     | 100 | 34   | 100 | 10    | 100 |

\* Data for Gamma Prison was not available

\*\* Includes fighting and horseplay

sustained (whether assaults, self-inflicted or the result of an accident). Table III portrays the number of reports completed in 1984, where the injury occurred and its cause.

The data from the Incident Reports show that relatively few intra-inmate assaults occurred at Alpha Prison where an assailant was not (or could not) be identified. Given that these reports are the most reliable indicator of a "hidden figure" of violent confrontations, it would be safe to conclude that Alpha Prison's official figures more accurately reflect a notion of "what goes on" (regarding violence) in the prison subculture. Conversely, the initial description of the Beta Prison's proportion of violence (Table 1.2) is misleading. The high ratio of violent incidents where no charge could be laid indicate that there is a relatively higher amount of this behavior occurring in the older jail.

## Circumstances of Selected Offences

### *Violence*

All Inmate Offence Reports were coded to reflect whether or not the circumstances of the offence included violence<sup>25</sup> or threatening<sup>26</sup> behavior (as reported by the charging officer) and at whom it was directed (inmates or staff). Coding in this manner allows a more detailed inspection of the situational characteristics leading to the decision to lay a charge than have previous studies (e.g., Flanagan, 1982; Harvard Study for Criminal Justice, 1972).

The lack of precision in the language contained in Section 28 (7) ("No inmate shall assault or threaten or attempt to assault another person) renders an analysis of violence based on the legal description meaningless. Additional contextual information would help to differentiate between threats and physical assaults. Table IV breaks down the recorded occurrences of violence regardless of the rule employed to process the behavior. Each prison is delineated by the circumstances giving rise to the charge in numbers and percentage of all violent incidents. Where the original charge sheets were available only by sampling 25% of prisoners' files who were charged for

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<sup>25</sup> "Violence" includes any physical contact made by an inmate towards staff or other inmate, regardless of the degree of injury.

<sup>26</sup> "Threats" include innuendos, physical posturing or direct statements made by an inmate to do harm to staff or other inmates.

TABLE IV  
DISTRIBUTION AND TYPE OF VIOLENT BEHAVIOR

| BEHAVIOR            | PRISON |     |       |     |       |     |       |     |
|---------------------|--------|-----|-------|-----|-------|-----|-------|-----|
|                     | Alpha  |     | Beta  |     | Delta |     | Gamma |     |
|                     | N      | %   | N     | %   | N     | %   | N     | %   |
|                     | -----  |     | ----- |     | ----- |     | ----- |     |
| Violence to staff   | 11     | 15  | 4     | 11  | 2     | 4   | 5     | 30  |
| Threats to staff    | 17     | 23  | 2     | 6   | 2     | 4   | 1     | 6   |
| Violence to inmates | 38     | 52  | 30    | 83  | 48    | 92  | 11    | 64  |
| Threats to inmates  | 7      | 10  | 0     | 0   | 0     | 0   | 0     | 0   |
| Total               | 73     | 100 | 36    | 100 | 52    | 100 | 17    | 100 |

disciplinary offences, data from the "Statement of Penalties Imposed" were used. The latter generally describe the nature of the offence if violence was involved.<sup>27</sup>

From the total of number of incidents where Delta officers indicated violence was involved, they reported the lowest proportion of assaults directed at staff. Gamma Prison officers reported proportionately more incidents of violence where staff were the target of violence from inmates, a finding that would challenge stereotypical notions that women in prison are "easier to handle" or "less violent" than their male counterparts. The remaining prisons, Alpha and Beta, are quantitatively similar *vis-a-vis* violence directed at staff. However, it would be erroneous to assume that both these latter prisons are

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<sup>27</sup> The "Statement of Punishment Awards" included a notation pertaining to the circumstances of the offence for violent or other serious infractions. Generally this notation included little more than "assaulted officer" or "fighting", offering few clues as to the context.

qualitatively similar along this dimension. The "threshold level" where an officer decides to charge an inmate for violence or threatening behavior is much lower at Alpha Prison. This contention can be supported from two sources: i) the generally higher rate of overall control activity (rates of 10.5 and 23.4 for Beta and Alpha Prisons, respectively) despite similar yearly population levels and ii) Alpha Prison's definition of what constitutes "violence" includes verbal threats made by prisoners directed at other prisoners, a feature conspicuously absent from all three other jails. Inmates threatening each other may be dealt with informally or ignored at the remaining three prisons. But it would be highly improbable that threats between inmates never come to official attention in these contexts.

### *Contraband*

Table V represents the distribution of offences where contraband was involved. As with other offences, the definition of "contraband" is much more stringently conceptualized at Alpha Prison. There is some evidence to suggest that Alpha Prison's "busts" are largely attributable to proactive enforcement of contraband regulations. For example, from 106 charges laid under Section 28 [5] ("No inmate shall have in his possession...any contraband") at Alpha Prison 68 (64.2%) arose from proactive discoveries (skin frisks, patdowns, unit searches, etc.). At Gamma Prison, only 5 (42%) out of 12 similar charges arose from proactive discoveries. The other men's units were proportionately identical: Delta Prison officers laid two



contraband charges (33%) out of six as a result of proactive enforcement; Beta Prison officers are split evenly on the number of contraband charges laid through proactive enforcement (4 out of 8 or 50%). Figures for the latter two units were derived from a 25% random sample of inmates charged with disciplinary offences during 1984.

### *Damage*

Table II indicated that the Alpha Prison line staff file charges under Section 28 (3) at more than twice the rate of the other prisons. Given the relative lustre of the new facility, this desire to maintain control over the physical space might be anticipated, especially when the environment is expected to have positive effects on inmates' behavior. An unpublished interim report<sup>28</sup> written six months after the new prison opened stated:

Incidents of intentional damage to property are almost non-existent. In a survey of the Centre, only 4 or 5 cells out of 150 show even the slightest vandalism. Likewise, the furniture, appliances and fabric finishes in the Living Unit common areas show little or no damage, intentional or otherwise (Interim Report, 1984: 45).

These observations are credited, at least in part, to the attempts of line-staff to monitor and discipline inmates for behavior related to damaging the environment:

...there is a rigid enforcement of rule breaches related to attempts to damage institutional property because of the critical importance of establishing the centre's intent to maintain the quality of the environment (Interim Report, 1984: 46).

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<sup>28</sup>See footnote 21, *supra*.

TABLE V  
DISTRIBUTION AND TYPE OF CONTRABAND CHARGES

| CONTRABAND<br>ITEM | PRISON |      |      |     |       |     |       |     |
|--------------------|--------|------|------|-----|-------|-----|-------|-----|
|                    | Alpha  |      | Beta |     | Delta |     | Gamma |     |
|                    | N      | %    | N    | %   | N     | %   | N     | %   |
| Weapons*           | 7      | 6.3  | 2    | 8   | 3     | 27  | 0     | 0   |
| Drugs (Rx)**       | 33     | 28.9 | 2    | 8   | 6     | 55  | 1     | 7   |
| Drugs (N.C.A.)***  | 37     | 32.4 | 1    | 4   | 0     | 0   | 4     | 29  |
| Other ****         | 37     | 32.4 | 21   | 80  | 2     | 18  | 9     | 64  |
| Total              | 114    | 100  | 26   | 100 | 11    | 100 | 14    | 100 |

\* Includes any item identified by staff as being part of or having the potential for becoming a weapon (e.g., unsheathed razor blades, quantities of tin foil rolled into heavy, tight balls, mop handles, needles melted into combs, etc.).

\*\* Drugs given by the prison doctor are "stockpiled" for later use. Valium was the usual prescription drug in this category.

\*\*\* Drugs restricted under the Narcotic Control Act. Although "white powdery substances" were sometimes found, cannabis was the most frequently discovered psychoactive substance.

\*\*\*\* In the older men's jails, this category usually referred to a homemade "brew". It could also include items such as currency, drug paraphrenalia, excess food or clothing in cells, personal property (jewelry, etc.).

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The source of the "rigid enforcement" is from supervisors in Alpha Prison. Their interests in keeping the building looking new translate into directions to line-staff to charge inmates for (minor) damage (e.g., cigarette burns in furniture, tearing up a towel, etc.).

## Conclusions

An initial reading of the distribution of charges in Table II might lead us to accept a reality about institutional infractions, prison violence and staff safety that cannot be sustained. The object of this argument is to focus on the role of control agents in shaping the "order" they wish to enforce.<sup>29</sup>

One idea to be considered from this pattern of charging activity involves the relationship between the capacity to control prison rule-breaking and the levels of officially-generated statistics. The more efficiently the physical space is designed for surveillance, the higher the level of measurement of control activity in terms of "charges laid". This should not be surprising. To some extent, it explains the apparent dissonance between *recorded* levels of violence (or for that matter, all recorded incidents of rule-breaking) and the *perceptions* of line-staff who have worked in Beta Prison (see footnote 26). The comparatively few assaults occurring at Alpha Prison speak strongly for the beneficial aspects of environmental design. In a real sense, the experience

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<sup>29</sup> The most flagrant examples of where an administration "shaped" the discipline it wished to enforce came from instances in one prison where supervisors notified line-staff that the count in their segregation unit was low. If the count was not increased (within a specified period of time), auxiliary staff will have to be laid off. The implicit remedy was to charge prisoners for violations of the C.C.R.R. so that the population increase would warrant the full-time positions.

of imprisonment for most inmates in the new jail is characterized by safe and humane treatment.

Enthusiasm to build all future prisons in the image of Alpha Prison must be tempered by the fact that, in this facility, many first-time violators of institutional rules experience the most restrictive form of carceral punishment available: segregation. An inmate may be less likely to be the victim of assault in the technologically modern jail but his chances of encountering what can amount to unreviewable and arbitrary authority in a secret hearing are greatly enhanced.

Control, therefore, has a price. The payoff is safer and more comfortable living conditions with access to friends and family on a daily basis. The tariff is having one's body orifices checked for contraband after such visits or during surprise unit searches, restrictions on reading material (see footnote 6), mail read by line-staff or limited access to hobby materials.<sup>30</sup> or occasionally of individuals being punished for breaches of rules in which they were not involved.<sup>31</sup>

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<sup>30</sup> Almost all prisons restrict materials that can be brought in for hobbies or crafts. Anything that can be used as drug paraphernalia, tattooing equipment or to fashion a weapon is considered contraband. Some prisons have hobby-craft programs where certain areas of the prison are designated for the use of tools; inmates are searched thoroughly when leaving these areas.

<sup>31</sup> Correctional staff refer to punishing a whole unit for a breach of rules where no single perpetrator can be identified as "peer pressure". The hope is that the rule-breaker will confess to his infraction to save the whole unit from being punished or that the unit will conduct its own "investigation" and identify the guilty party.

The four units all have the same mandate in the broadest terms. A director of a correctional centre "is responsible to the commissioner for the management, operation, discipline, security and program of that correctional centre" (C.C.R.R., Section 2). What makes them unique is how "discipline" and "security" are embodied in their available "hardware" of control, including architectural design, emergency response teams, weapons, gas, locking devices, pagers, cameras, listening and recording equipment, and manpower levels. That hardware, in turn, provides the administration with the tools to fulfill their mandate, a mandate that comes to be more stringently defined and implemented as the technology for controlling inmates increases. Behavior that might have been overlooked or not perceived to threaten the discipline or security of a correctional centre with technologically *unsophisticated* hardware will be interpreted as worthy of intervention and processing in another prison with technologically *sophisticated* hardware. In short, the task of maintaining discipline is redefined towards repressing rule-breaking as the physical space is altered to allow surveillance. If this observation can be extrapolated to emerging systems for surveying larger domains of public space (in banks, banking machines, transit systems, shopping mall promenades, gas stations and stores), we may be heading towards an Orwellian climate of intolerance to behavior that was not previously regarded as worthy of intervention. Writing on the emergence of just such a future, one author observes that

Foucault's (1979) perspective on the prison-like features "diffusing" into outside society will truly be an apt perspective. But other conceivable measures may move fully away from individualism, and focus on *control of whole groups and categories* - through planned manipulation (with good intentions of establishing "brakes on crime") of the everyday life conditions of these groups and categories. TV cameras on subway stations and in supermarkets, the development of advanced computer techniques in intelligence and surveillance, a general strengthening of the police, a general strengthening of the large privately run security companies, as well as a whole range of other types of surveillance of whole categories of people - all of this something that we have begun to get, and have begun to get used to...The new genuinely societal forms of control - where whole groups and categories are controlled - may be woven together with the prison-like offshoots into a total control system (Mathiesen, 1980:157-158; emphasis in original).

Maintaining prison discipline, regardless of hardware, is circumscribed by law. The following chapter will examine this legislation, Branch policy, some of the informal control mechanisms and how management adapts to the constraints of "due process".

## CHAPTER II

### THE DIVERGENCE OF LAW AND ACTION

#### Law and Discretion

Legislation empowering provincial prisons to hold disciplinary hearings and impose sanctions is contained in Sections 31-34 of the Correctional Centre Rules and Regulations. Although there are other formal social control mechanisms (e.g., classification, transfer decisions, progress reports, etc.) that provide some degree of leverage over prisoners, the disciplinary hearing is of great concern to prison-staff and has far-reaching effects on staff-inmate relationships (Glaser, 1964). In a similar vein, Emery (1970) refers to the hearing as "the core of the relation between officers and inmates...A reported disciplinary incident represents a particular instance of power exercised by an officer over an inmate with, in most cases, some resulting punishment for the inmate" (cited in Barak-Glantz, 1982: 22).

The keystone to the way in which power is employed in coercive organizations is "discretion", *the power or ability to act according to one's own judgement* (Random House Dictionary). Discretion is legitimated through (and, hence, inextricable from) the sanctive power of law, requiring the holder of legal authority to conform to written statutes, directives, administrative law, common-law principles, "natural law" or the

"duty to act fairly". The act of exercising one's judgement is right and fair if done so within the imprimatur of law: in this instance judging guilt and prescribing sanctions in disciplinary hearings are circumscribed by procedural rules.

In contrast, law can also be seen as a "symbolic canopy" where a framework is provided to enable legal agents to justify their actions through legally constituted discretion. "Justice" becomes a strategy of "justifications" allowing the reproduction of order along established lines of legal inequality (Ericson, 1983: 28). This critical view of law changes the textbook definition of law from "the vehicle by which our legal system operates ...to promote the best interests of the people as a whole" (Gall, 1977: 3) to an agency somewhat less neutral. Assumptions that law is solely a disinterested arbiter of conflict between individuals or individuals and the state should not be taken at face value. McBarnet challenges this view, distinguishing between written law and substantive law:

The vague notion of 'due process' or 'law in the books' in fact collapses two quite distinct aspects of law into one: the general principles around which the law is discussed - the rhetoric of justice - and the actual procedures and rules by which justice or legality are operationalised. The rhetoric used when justice is discussed resounds with high-sounding principles but does the law incorporate the rhetoric? This cannot simply be assumed; the law itself, not just the people who operate it, must be put under the microscope for analysis (1981: 6).

Finding previous discussions in the symbolic-interactionist studies of substantive law incomplete, she advocates an analysis to reveal how justice is compromised *in the law*: "Police and



court officials need not abuse the law to subvert the principles of justice; they need only use it. Deviation is institutionalized in the law itself" (McBarnet, 1981: 155-156).

Thus, law becomes more than what is discussed in the public domain with its often attending perspectives highlighting the immorality of a system that "lets crooks off" because of "technicalities", the suffering of victims, and the sentencing leniency of judges who send criminals to "country-club" prisons. Although individual examples exist where the state agents "paid" for their deviation from procedural law with an acquittal or finding of not guilty, in the aggregate, *due process is for crime control* (McBarnet, 1981: 156).

Discretion, therefore, can be seen as a subjective interpretation not only of events and "facts" over which the syntax of written law is superimposed, but also as an *ex-post facto* rationalization for the actions of control agents. Beyond these issues, commentators on the substantive nature of law reveal that discretion in the criminal justice system frequently operates to the detriment of lower socio-economic groups (Blumberg, 1967; Brannigan, 1984: 100-109; Klein, 1976; Reasons and Perdue, 1981: Chapter 6; Reiman, 1979). A differential enforcement of law, institutionalized in social arrangements that contribute to or encourage discretionary decision-making (e.g., securing convictions by plea bargaining), becomes a mechanism whereby social inequality becomes translated into legal inequality (Greenberg and Humphries, 1980: 208).

## The Correctional Perspective

The question of how individual discretion can be legitimately exercised in correctional institutions was the subject of a conference held by the National Parole Board in 1981 (Solicitor General, 1983). Participants included practitioners, academics and lawyers. The main theme to emerge, with little variation among the speakers, was that discretion is an indispensable, if not occasionally lamentable feature, of a justice system that individualizes treatment, care and management. What conflict there was among conference participants centred around how discretionary decision-making might be *legitimated* in a perceived crisis of legitimacy:

[T]he crisis in confidence may be the result not only of dissatisfaction with the capricious use of discretion but also with the values and premises that inform the use of discretion...rules and regulations based on these values may not be an adequate response to the problems that have generated the current controversy (The National Parole Board Report on the Conference on Discretion in the Correctional System, 1983: 65).

Holding those who make crucial decisions to reveal their "values and premises" simultaneously requires that the background assumptions on which those decisions are made be brought to light.

The warden at Joyceville Institution summarized what might be termed the "correctional perspective" on discretionary decision-making in the following way:

One personal observation I have made is that, as a consequence of the expansion of individual rights, a lot

of inmates are actually losing certain rights, for example: the right to do their time as they see fit; the right not to have someone muscle them for their canteen - I know of many cases in which an inmate has gone for months without cigarettes, chocolate bars or shampoo, because someone on the range who was bigger, stronger and smarter than he is simply told him to turn it over. The warden cannot prove anything in such cases any more than he can prove, for example, that one inmate is raping another inmate every second night. Now how do you deal with that kind of problem? You cannot arbitrarily move the inmate who is creating trouble. You cannot do it capriciously, nor do I think that we should be able to. But, at the same time, when we do know that an inmate is harming others in the prison population, I think it is incumbent on us to move that person to another institution. And we do know when and how much harm is being done, not from courtroom-like evidence but from the experience of working in institutions and from a knowledge of the prison population. The type of action that is required has been referred to over the years as "Greyhound therapy". You back the bus up, you throw five or six inmates in the bus, you drive them forty miles down the road to increased security, and the whole tone of Joyceville, the medium security institution I work in, mellows. Those inmates who were stealing cookies and chocolate bars are now gone. It might be six months before somebody else starts stealing cookies and chocolate bars (Payne in The National Parole Board Report on the Conference on Discretion in the Correctional System, 1983: 2).

From Payne's vantage point, discretionary decision-making is necessary for the safety of prisoners. It is only the *capricious* employment of discretion that leads to abuse. What is perceived to be capricious depends on which side of the bars one inhabits; inmates mistakenly transferred on the basis of the warden's "false-positives" will likely view the process as capricious. In the warden's perspective, any harm incurred through a misjudgement in discretionary power is a small cost in return for the benefits gained by the larger intent:

[G]iven the reality of penitentiary life, we have to be given the opportunity to err on the side of caution. Is

it better to move five or six people, four of whom you are certain are doing nasty things in your institution, and a couple of whom you suspect might be, to another institution, than to gamble and leave a couple of inmates behind, and perhaps later pay the price of small riots or another assault...Without the power to act on experience and "gut" intuition, you might end up knowing who is responsible for a stabbing or beating but be unable to do anything about it. Because you lack solid proof the responsible inmate will be cleared in a hearing and, the next thing you know he is out in the institution, smiling and grinning at the staff (Payne in The National Parole Board Report on the Conference on Discretion in the Correctional System, 1983: 4).

Erring on the "side of caution", where the innocent are punished, is precisely what due process procedures are designed to prevent. However, in the warden's opinion, it is only (more) blatant abuses of discretion that lead to litigation or, worse, incidents similar to the hostage-taking incident that occurred at the B.C. Penitentiary in June, 1975.<sup>1</sup>

Wardens generally complain that it is the *lack* of discretionary power (constrained by accountability requirements) that leads to prison disorder while advocates for prison reform blame *excesses* of discretion for riots and hostage-takings (Conroy, 1982: 72-75). A common ground that both wardens and prisoners' rights activists share is their acknowledgement that unfairly exercised discretion can lead to undesirable outcomes; their main point of departure is the parameters of what constitutes "fairness". The task is to sort out legitimate

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<sup>1</sup> Three prisoners held 15 hostages for 41 hours culminating in the death of one of the hostages, Mary Steinhauser (shot by a member of the tactical team). One version for this desperate action was that the prisoners feared a return to the segregation unit and had no mechanism for addressing the warden's decision (Conroy, 1982).

institutional interests as they intersect with equally legitimate interests of inmates. Without wishing to trivialize the point, the essence is to find the right mix of discretion and rules (Davis, 1975).

Throughout the remainder of this chapter, the correctional viewpoint on the need for discretion will surface in the way the law is written, interpreted and applied. The most revealing method for this analysis is to read through the relevant passages of the Correctional Centre Rules and Regulations as they apply to the process of identifying and punishing rule-breakers.

### Formal Charges

#### *Factors Affecting Discretion*

The decision to initiate formal proceedings against inmates in prisons is shaped by a multiplicity of factors beyond a simple observation of rule-breaking. Like the police, guards make decisions to charge<sup>2</sup> according to organizational and ideological values, personal moral standards and stereotypical conceptions of criminals (Box, 1971). This "recipe" knowledge (of when to proceed with what type of intervention) has been documented in studies of police discretion:

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<sup>2</sup>Davis points out that the decision to charge "is exercised not merely in the final dispositions of cases or problems but in each interim step...discretion is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary forms" (1969: 4).

What typically happens is that officers discover, upon graduating from their recruit training and taking their first assignments, that they are constantly being called upon to make decisions; that relatively little of what they were taught seems to apply to the situations they confront; and that they are often without guidance in deciding what to do in a given situation. They gradually learn, from their association with more experienced personnel and from their supervisors, that there is a mass of "know-how" upon which they must draw. Practices, they find, vary a great deal. Some seem so well established that they take on the quality of a standard departmental operating procedure utilized uniformly by all personnel (Goldstein, 1977: 101).

Although some of the literature on police decisions to arrest may have applicability *vis-a-vis* prison guards' similar discretionary practices, there are major departures between the two occupations. In the context of the provincial prisons, there is little need to maintain a pretense of full enforcement (Davis, 1975: Chapter 3), charging decisions are generally unaffected by race, intimacy of the parties involved (where they exist), or socioeconomic status (Black, 1980: 90-108). However, Williams (1985) found that guards' decisions to proceed with formal charges were influenced by (in their perceived order of importance): *the attitude of the inmate*, the previous record of the prisoner and the visibility of the incident (171-73).

Not only are correctional line-staff subject to the explicit demands inherent in their occupational roles to maintain order and control inmates, they are pressured by a sub rosa matrix of informal criteria sustained by peers. An officer can become ostracized from his/her co-workers if s/he violates the recipe rules for managing a unit or tier. There are strong incentives

not to become a "heat bag" by enforcing too many of the rules or those regarded as petty. Gifis noted that new officers are told "that a good officer only rarely resorts to official sanctions" and that strict formal enforcement was reserved for more serious offences (1974: 318). Simultaneously, not enough assertiveness or focus on inmate behavior considered by other staff to be "threatening", or an unwillingness to invoke formal mechanisms of control, may lead to negative feedback from others. An officer must strike a balance between appearing too concerned with control and yet maintaining an upper hand on his/her unit.

Informal lessons in prisoner management may surface in conversations at shift-change, during coffee-breaks or over a few drinks at the local tavern. These encounters often become sites for discussing (or inculcating) the "right" values necessary for performing the job. This is where discretion becomes shaped by the occupational ideology of what crime and criminals are all about. Many of the personal philosophies exchanged in these conversations have common themes, *us* and *them*: *their* inability to learn from experience; the necessity for *our* superior resources of control; *their* proclivity for mind-altering substances at any personal cost; the need for *our* vigilance in preventing disturbances; the requirement to sanction some minor offences before they escalate into major ones, and so on.

Somewhere between the formal authority of the legislated guidelines for official conduct in processing deviant behavior

and casual social interchange where control values are shared, there exists a middle ground. One medium is Corrections Branch policy, contained in the Manual of Operations for Adult Institutional Services which appears to set a tone for how disciplinary hearings should be properly conducted. For example, the introduction to a section headed "Disciplinary Panel Guidelines" states:

Though some of an inmate's normal rights have been suspended or restricted by incarceration, it is nevertheless important to recognize and accept the premise that the principles of administrative and procedural fairness apply at these hearings. An inmate is, in other words, entitled to a fair hearing, to hear and be heard, while undergoing this internal disciplinary process. A disciplinary hearing is not a criminal trial with all its trappings; it is rather an administrative hearing with procedural rules to ensure a fair presentation of evidence, hearing for both sides, and a just determination on the facts (Section A3, p.5, para 5.01, emphasis in original).

Furthermore, the Corrections Branch has recently started training middle management officers to understand and follow procedural guidelines in disciplinary hearings.<sup>3</sup> Formal training influences the manner in which discretionary judgments are reached *and legitimated*, both in this instance and during initial training for correctional officers.

The totality of the informal and formal value structures that guide the exercise of discretion for line-staff can be

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<sup>3</sup> During one of these sessions in 1986, a senior Corrections Branch officer prefaced the course by stating that training for procedures in disciplinary hearings *could* be taught in such a way as to make them impervious to external review ("bullet-proof"). This was not a desirable attitude. Rather, he indicated, officers should make an attempt to conduct a fair hearing for the sake of fairness alone.



succinctly referred to as an "ethos" of control. Despite overarching commonalities with regard to how prisoners are viewed and treated, each prison remains unique. Guards are socialized with institutionally-specific value systems which define what inmate behaviors will not be allowed in their particular jail, and what coercive powers can be summoned in response to threats to prison order. Senior correctional staff are typically credited or blamed for the degree of control that staff feel they exercise over prisoners. Line officers have frequently reflected on times when a particular warden or director was not firm enough with disciplinary incidents and staff subsequently reported feeling unsafe. In Chapter Three, recordings of disciplinary hearings will reflect management's continual efforts to set the parameters of unacceptable behavior.

### *Laying a Formal Charge*

As mentioned earlier, line officers have a wide range of discretion to interpret behavior as violating one of the rules and regulations. In fact, almost any behavior can be interpreted as infringing one of the 12 rules (listed in Chapter One) or the many regulations peculiar to a particular provincial prison. Charges are seldom laid by line-staff without consultation with a Principal Officer.<sup>4</sup> S/he may suggest alternative methods for

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<sup>4</sup> The hierarchy of command in provincial correctional centres is as follows, from lowest to highest:

Security Officer  
Correctional Officer

dealing with the infraction or approve laying a charge. From a control perspective, the best law is one that is sufficiently elastic to cover the many incidents that can arise in prison. It would be enormously cumbersome to envision all of the instances of rule-breaking and develop encompassing legislation to deal with the various means by which inmates will violate these regulations. Principles for proscribing conduct have been developed by Zellick (1980) and others (American Bar Association, 1978 s.31 [a]; Jablonski, 1973: 343-44; Standard Minimum Rules for the Treatment of Prisoners, 1973, r.30 [1]). These generally include requirements that punishable conduct must be defined in clear terms which are made available in writing to all prisoners.

Section 29 of the C.C.R.R. describes the duty of an officer to resolve observed breaches of regulations by *not* laying a formal charge. This section is entitled, "Duty of Officer to Attempt to Resolve Breach by Inmate of Rules and Regulations":

29. Where an officer has reasonable and probable grounds to believe an inmate has committed or is committing a breach of the rules or regulations of the correctional centre, the officer shall,

(a) where circumstances allow, stop the breach and explain to the inmate the nature of the breach; and

(b) where the person aggrieved by the alleged breach consents, allow the inmate to correct the breach, where possible, and make amends to the person aggrieved.

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\*(cont'd) Principal Officer  
Senior Correctional Officer  
Local Director  
Director ("Warden")

This is a legal duty s/he must perform prior to filing an allegation in writing to the director of the institution that an offence has taken place. However, the Manual of Operations does not phrase this requirement in such a way to make it incumbent upon the observing officer to fulfill this duty:

When an inmate breaches a rule under section 28, and the circumstances are such that the breach can be settled informally, the officer *should* attempt to do so. If that avenue is not available, the officer shall deal with the incident formally and in writing (Section A#, page 5a, para. 5.02, emphasis added).

There is no systematic check on whether the officer laying the charge has sought to resolve the alleged infraction through a "negotiated" settlement. Few officers chairing disciplinary hearings ask whether or not the charging officer sought to settle the breach of rules according to Section 29.<sup>5</sup>

To further enlarge the discretion connected to this duty, the individual line officer's judgement in the matter is invoked again in Section 30:

30. Where, in the opinion of an officer acting under Section 29, the alleged breach has not been satisfactorily resolved by actions described by that section, the officer shall forthwith

(a) file with the director an allegation in writing outlining the facts of the alleged breach and citing the specific rule or regulation allegedly breached;  
and

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<sup>5</sup> An explanation for this can be found in the escalating nature of the behavioral and attitudinal problems presented by some inmates. Generally speaking, a charge is often supported by a history of non-compliance and/or earlier, less restrictive sanctions to achieve conformity. Therefore, the hearing officer would not feel bound to reach a negotiated solution if opportunities for an informal resolution had been previously attempted.

(b) give the inmate a copy of the allegation in writing.

At every step of the process, correctional line staff are empowered with an enormous latitude in decision-making: the officer has the discretion to define behavior as worthy of intervention, spell out the terms whereby the inmate can "correct the breach", judge the quality of the act that "corrects" this breach of the rules and if, in his/her estimation, the officer is not satisfied with the corrective action, s/he may initiate a formal allegation. Once charged with an offence, the inmate now faces a secret prison "courtroom".

### *The Hearing*

The composition of the disciplinary panel is to be decided by the director:

31. (1) On receipt of an allegation in writing under section 30, the director shall determine whether the allegation shall be heard by the officer in charge of the unit where the breach is alleged to have taken place or by a disciplinary panel.

Despite the provisions for a tribunal, inmates were rarely afforded this option in the three men's units during 1984.<sup>6</sup>

A second element of formal due process emerges at this

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<sup>6</sup> Only Gamma Prison's disciplinary hearings were conducted before tribunals in every case. At Alpha Prison, tribunals were only rarely used in the event of a serious offence or, a complex fact pattern or allegation of wrong-doing against staff members. The records available from Beta and Delta Prisons indicated that tribunals were never conducted during the study period.

point: a provision for the inmate to face a "disinterested party":

31. (2) An officer who filed the allegation in writing or investigated the allegation shall not be the officer or a member of the disciplinary panel hearing the allegation.

The practice occasionally erodes this "protection". It is not uncommon for a Senior Correctional Officer to observe a breach of the regulations and inform line staff directly (or through a Principal Officer) that s/he wants certain inmates charged for a particular infraction.<sup>7</sup> That senior officer may later sit on a disciplinary hearing to adjudicate an allegation s/he might have witnessed or initiated disciplinary action. These more flagrant examples aside, Cohen reflects on the more subtle coloring of a disciplinary hearing chaired by correctional staff: "It is obviously necessary to disqualify the individual who reports the infraction, but how much is gained by allowing his fellow officer or immediate supervisor to sit in his stead?" (1972: 877). Several of the disciplinary hearings analyzed in Chapter Three are chaired by senior officers who make little or no effort to conceal their lack of objectivity.

Having senior officers chair inmate disciplinary courts underscores the gap between rhetoric and reality. A person whose very occupation it is to promote order in prison will find it

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<sup>7</sup> This practice is something I occasionally witnessed while employed at one of the prisons considered in this research. Either an S.C.O. actually saw prisoners break a particular rule and made it known that he wanted *specific* inmates disciplined or he became aware that certain violations of the C.C.R.R. were not being processed by line-staff and subsequently made it clear that he *generally* wanted violators of those rules charged with disciplinary offences.

exceedingly difficult to be impartial towards those who are accused of violating institutional rules. The hearing chairperson is expected to adjudicate a conflict between two parties - the inmate and the charging officer. His/her allegiances can hardly be expected to fall towards the former. The adjudicative function of the disciplinary hearing becomes little more than a "dispositional hearing" that is less concerned with impartial fact-finding than it is with a speedy "resolution" for the alleged misdemeanor. That is not to say that procedural and substantive fairness are *not* possible from someone obliged by occupational pressures to meet requirements of institutional order and due process. But it demands a saint-like degree of internal fortitude to tell an inmate s/he is dismissed from the hearing because of a technicality or lack of evidence and at the same time make it clear to the reporting officer that s/he should continue to maintain order. Such an unpleasant scenario can be avoided altogether because there are many convenient loopholes and techniques for the administration to find the prisoner guilty (discussed in Chapter 3).

Section 31 (3) (a), (b) and (c) specify who may sit on a disciplinary hearing. Tribunals benefit from collective judgements on disciplinary issues whereas a single adjudicator may have a fixed opinion on a particular individual or issue (Jablonski, 1973).<sup>8</sup>

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<sup>8</sup> The "collective benefit" from having three members judge guilt and impose sanctions is dubious. From the few hearings where the panel members (accidentally, it seems) left the microphone on when they deliberated guilt/innocence or the appropriate

There is also an opportunity for an independent chairperson to sit on the panel and judge the guilt or innocence of the inmate:

31. (3) In a correctional centre or unit specified in writing by the commissioner, the disciplinary panel shall be one or more of the following:

(a) The director who shall be the chairman, a person, not an officer, appointed by the minister and an officer, selected from time to time by the director;

(b) The director, a person, not an officer, appointed by the minister who shall be chairman, and an officer selected from time to time by the director; or

(c) A person, not an officer, appointed by the minister.

With the exception of Lakeside, tribunals are virtually non-existent. Usually the local director of the unit or a Senior Correctional Officer hears the allegation alone (under the authority of Section 31 (1) where the director has determined that the allegation will be heard before the officer in charge where the breach of the rules took place).

#### *Procedural Rules*

Each inmate charged with a disciplinary offence must have his/her case heard within certain time constraints according to Section 32 (1) and (2):

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<sup>8</sup>(cont'd) disposition, it appeared that the secondary members "rubberstamped" decisions and rationales offered by the senior member chairing the tribunal. Typically, there was no doubt as to guilt. Discussion about the punishment was initiated by the chairperson and the other members simply confirmed his/her opinion.

(1) The hearing of an allegation filed under section 30 (a) shall, subject to subsection (2), be held within 24 hours, excluding a Saturday, Sunday or holiday.

(2) Where an extension of time is required, the director may postpone the hearing for a period not exceeding 72 hours.

In almost all of the cases investigated in this study period, the rules concerning the lapse of time between the alleged offence and subsequent hearing were observed. In fact, several charges laid at Alpha Prison were dismissed by the chairperson due to violations of this section. Punishment was normally swift and certain. The exclusion of days during the weekend and holidays where hearings must be held within 24 hours has the potential for abuse<sup>9</sup> by keeping an inmate either locked up in his/her cell or in the segregation unit (a type of "pre-hearing detention") over a long-weekend.

The legislation in Section 32 continues to specify that:

(3) The inmate shall be present at the hearing, shall be advised of the nature of the allegation, and may admit or deny the allegation.

(4) When an inmate denies the allegation, the hearing shall consider the report of the officer who investigated the allegation and shall hear oral evidence

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<sup>9</sup> Commentators citing a *potential* for abuse and *actual* occasions of abuse are substantially different realities, a distinction not always delineated in the literature on prison discipline. The former alleges that it can happen and we are left to assume it does while the latter shows verifiable incidents to support the claim. For example, Landau censures penitentiary regulations for containing rules proscribing assault which "can include anything from an overt physical attack to a menacing grin" (1984: 158). While her point about vague rules is accepted, she does not provide evidence where rules are applied to cover the minutiae (a "menacing grin") of prisoner rule-breaking. Minor infractions are dealt with in less formal ways, formal disciplinary mechanisms need not be invoked.



of the officer who investigated the allegation.

(5) The officer or chairman of the disciplinary panel hearing the allegation may call such further witnesses as he deems necessary, including those requested by the inmate.

(6) An inmate may give oral evidence and question witnesses.

Few investigations were conducted into the events surrounding an offence unless the circumstances were serious or involved allegations of wrongdoing on the part of the reporting officer. Inmates are not legally entitled to an investigation. If the administration pursued a course of investigation for every charge laid, or even if it did so only for those where the inmate pleaded not guilty to the charge (in about half the recorded cases), the manpower to fulfill this obligation would require additional staff. Additionally, the inmate may have to undergo further pre-hearing detainment (usually in the Segregation Unit) while his/her case was being investigated. Therefore, it is in the prisoner's interest to go along with the "order of things" and not present challenges that might warrant investigations.

Despite provisions for allowing an inmate to call witnesses, there was only one recorded instance (at VPSC) of an inmate asking the hearing officer to hear testimony from a witness he wished to call. The request was denied. The entry made on the record in response to the prisoner's desire for corroboration was as follows:

Prisoner requested witnesses, i.e., other prisoners. Denied - my opinion is that no useful purpose would be served in having prisoner witnesses attend this hearing.

No further explanation was offered *or required*; the right to cross-examine witnesses is a discretionary one. One commentator on administrative law allows, however, that "generally the right to call witnesses and to cross-examine them is part of the procedure protected by the rules of natural justice" (Jones and de Villars, 1985: 214).

The data collected from the four prisons allowed some insights into the relevance given to witnesses of disciplinary infractions. Line-staff rarely record witnesses; in fact, Part II of the Inmate Offence Report (Appendix A [ii]) is usually not filled out or is omitted entirely. Two prisons (Alpha and Gamma) mentioned other staff witnesses on their records in 30% of the total number of violations. Both Beta and Delta Prisons rarely included a record of witnesses (see Table VI).

One explanation for the paucity of recorded witnesses is that many infractions occur where there are no witnesses to the event. But that explanation alone could not account for the high number of cases where no witnesses are recorded. Instead, officers may perceive the outcome for the prisoner as a *fait accompli* from the instant the rule infraction is observed. A record of witnesses is simply not necessary; the "facts" are contained in his/her brief description of the offence under the heading "Circumstances of Offence" (Appendix A [i]). If witnesses are recorded, it is generally only with those who share a common occupation with the reporting officer. Prisoner

TABLE VI  
WITNESSES IDENTIFIED BY CHARGING OFFICER

| WITNESS      | PRISON |      |       |     |        |     |       |     |
|--------------|--------|------|-------|-----|--------|-----|-------|-----|
|              | Alpha  |      | Beta* |     | Delta* |     | Gamma |     |
|              | N      | %    | N     | %   | N      | %   | N     | %   |
| Inmate       | 5      | 1.2  | 0     | 0   | 1      | 2   | 2     | 4   |
| Staff        | 130    | 30.2 | 2     | 4   | 1      | 2   | 15    | 29  |
| Not Recorded | 295    | 68.6 | 48    | 96  | 52     | 96  | 34    | 67  |
| Total        | 430    | 100  | 50    | 100 | 54     | 100 | 51    | 100 |

\* Data for Beta and Delta Prisons were obtained from a random sampling (25%) of inmates charged in 1984.

witnesses are virtually absent from the record. Although inmates are generally excluded as reliable witnesses because of their perceived support for anti-administrative feelings, staff witnesses are never excluded as witnesses because of perceived anti-inmate feelings.

The very fact that prisoners virtually never ask for witnesses to support their version of events may be because they see themselves as powerless dependants in a quasi-judicial system. It is this process that they fail to understand fully, or view as a "no-win" situation. Ericson and Baranek's description of the accused *as a dependant* in the outside system of justice draws parallels in the prison:

In the context of structured dependency, we find the accused forced into a passive, indeed submissive state. At each stage of the process the accused not only fails to take what externally appear as his formal decisions, but he also does not take advantage of his formal rights because the costs of doing so are structured so that

they usually exceed the benefits (Feeley, 1979 in Ericson and Baranek, 1982: 218).

For inmates facing a disciplinary hearing, there are at least two reasons why the cost of asking for prisoner witnesses can be high enough to outweigh the anticipated benefits. First, if the witness s/he calls testifies in a manner that supports the charging officer's version of the offending behavior, that inmate *may* be labelled an informant or "rat" (with dire consequences). Secondly, if the (prisoner) witness confirms a version of events that exonerates the prisoner charged with an infraction, s/he leaves open the possibility of future intimidation (or worse) from the officer who initially laid the charge. The former reason was raised by a disciplinary hearing chairman as a rationale for persuading an inmate not to call a witness (discussed in more detail in Chapter 3). The dynamics of the prison subculture can be used as a defense against inmates summoning witnesses and presenting an alternative version of reality.

The Manual of Operations presents a mixed message when providing directions for chairperson's responses to an inmate who pleads "not guilty". Here we see ample measures of discretionary leeway to prevent inmate witnesses from being present at the hearing:

(a) Consider (read aloud) the report of the officer who initiated the charge, and where an investigating officer was appointed, that officer shall be called to give oral evidence.

(b) Ensure those officers named as witnesses are

available to testify either in person or through their reports.

(c) Call any other witnesses who, in the opinion of the panel, may offer relevant facts to assist in the panel's deliberations. Witnesses may be called to testify both on behalf of the administration or the accused. Those witnesses may be questioned by the panel and the inmate. [section 32(6)].

(d) Witnesses should only be called if they have relevant, direct, first hand knowledge of the circumstances of the charge. Frivolous, vexatious and hearsay evidence should not be admitted into the hearing.

(e) The accused may wish to give evidence or offer an explanation respecting the circumstances and charge. He should be afforded every reasonable opportunity to present his case and be heard. If the accused gives evidence, he may be questioned by the panel (Section A3, page 5 e-f, para. 5.06.2; emphasis in original).

A close reading of these directions for responding to those prisoners pleading not guilty reveals some odd connections in logic. For example, how can officers named as witnesses be "available to testify either in person or through their reports" (para. [b])? Either the charging officer is to be present at the hearing or his/her written summary of the offence is all that is necessary. Additionally, if witnesses are called to "testify on behalf of the administration" (i.e., the disciplinary panel), what is the point of legislating a disinterested party to hear the case (Section 31 [5])? These directions are tantamount to having witnesses testify on behalf of the magistrate in outside courts. And again, if witnesses are only to be summoned if they have direct, first-hand knowledge of the charge that is not vexatious or hearsay (para. [d]), how will the quality of their evidence be determined if they are not called to testify? These

provisions allow the hearing officer to question an inmate as to why s/he wants a specific witness, amounting to "screening out" potentially disruptive individuals or *any* witnesses for that matter.

What may be offensive to the prison power structure vis-a-vis prisoner witnesses is the acknowledgement that inmates have a conflicting and verifiable account of the behavior in question. To allow them a supported voice in disciplinary proceedings is to afford them *legitimacy*. Should a prisoner's version of the offending behavior be supported by the testimony of witnesses, there is a concomitant risk that the charging officer's interpretation of events is open to refute. It is better not to provide this possibility at all. Indeed, the regulations (Section 32 [5], C.C.R.R.) permit the hearing officer to foreclose the issue of prisoner witnesses without explanation. Prisons must have one group of men in undisputed control over another group; giving legitimacy to inmates erodes the guard's dominant control position.

Sykes (1958) raised this point in The Society of Captives when he described the pitfalls of custodial staff providing prisoners with explanations for their actions:

Imprisoned criminals are individuals who are being punished by society and they must be brought to their knees. If the inmate population maintains the right to argue with its captors, it takes on the appearance of an enemy nation with its own sovereignty, and in so doing it raises disturbing questions about the nature of the offender's deviance. The criminal is no longer a man who has broken the law; he has become a part of a group with an alternative viewpoint and thus attacks the validity

of the law itself. The custodians' refusal to give reasons for many aspects of their regime can be seen in part as an attempt to avoid such an intolerable situation (1958: 75).

Chapter Three will provide examples graphically illustrating the point that the presence of prisoner witnesses in the disciplinary hearing is discouraged so that "alternative viewpoints" will not challenge the legitimacy of the rules or those charged with enforcing them.

Section 32 continues as follows:

(7) A written record of the hearing shall be compiled, including the report of the officer who filed the allegation in writing, an outline of the oral evidence presented, and a statement of the determination and disposition made.

In practice, the "written record" is very sketchy in most cases. Many charge forms do not include any entries under the heading "Disposition and reasons" (Appendix A [iii]). Based on a 25% random sample of all charges laid in 1984 at Delta (n=217) and Beta Prisons (n=201), officers wrote reasons for the disposition in only 10% of the cases and 16% of the hearings, respectively. Gamma Prison officers completed this section in 9.8% of all hearings conducted during the same period. Notably, Alpha Prison officers provided written reasons for their decisions in 60.7% of their determinations. Where entries were made on the record, there was a wide range of reasons ventured for the punishment such as (in rank order): "behavior cannot be tolerated", seriousness of the offence, poor attitude, deterrence (general or specific), staff protection, and finally,

an explanation to the effect that the prisoner's attitude militated against a harsher sanction.

Subsection (8) goes on to read that "majority rules" if hearing members cannot be unanimous in their findings at the hearing:

(8) Where the hearing is before a disciplinary panel and its members are not unanimous in their decision on the determination, disposition, or any other matter in the proceeding, the decision of the majority of members shall be the decision of the disciplinary panel.

As mentioned earlier, the probability of a male inmate having his case heard before a panel (as opposed to the officer in charge alone) is rare.

Subsection (9) empowers the panel or officer in charge to determine guilt or innocence:

(9) After considering the evidence presented, the disciplinary panel or officer, as the case may be, shall determine whether or not the inmate committed the alleged breach.

That "determination" is usually a guilty finding. Table VII shows the pleas entered to charges laid against prisoners for rule infractions. Regardless of the plea entered, inmates were determined to be guilty in more than 90% of all disciplinary hearings (except Gamma Prison) including inmates who pleaded guilty to the charges as they were read to them. Only at Gamma Prison did inmates contest the charges against them in more than half the hearings. This observation replicates the findings of other studies that prison disciplinary hearings are primarily dispositional (Harvard Study, 1972; Jackson, 1984). Once a line



TABLE VII  
PLEAS ENTERED TO CHARGES AND FINDINGS BY HEARING\*

| PRISON | PLEA       |    |        |       | FINDING    |       |        |    |
|--------|------------|----|--------|-------|------------|-------|--------|----|
|        | Not Guilty |    | Guilty |       | Not Guilty |       | Guilty |    |
|        | N          | %  | N      | %     | N          | %     | N      | %  |
|        | -----      |    | -----  | ----- | -----      | ----- | -----  |    |
| Alpha  | 214        | 50 | 202    | 47    | 31         | 7     | 393    | 91 |
| Beta   | 20         | 40 | 28     | 56    | 2          | 4     | 47     | 94 |
| Delta  | 20         | 37 | 32     | 59    | 1          | 2     | 52     | 96 |
| Gamma  | 32         | 63 | 16     | 31    | 13         | 26    | 38     | 75 |

\* Totals do not add up to 100% because some pleas and findings were not recorded or the prisoner refused to plead.

officer has initiated formal charges against a prisoner, the outcome of the hearing is virtually sealed: guilty as charged.

Flanagan (1982) offers three reasons why disciplinary hearing adjudicators in the United States are reluctant to find an inmate not guilty or to dismiss the charge:

...officers are highly selective in their charging decisions, choosing only the "best" cases for formal treatment. An alternative explanation may be that institutional courts are reluctant to dismiss charges because of the belief that the inmate "must have done something" to warrant the officer's intervention. Finally, the reluctance to dismiss charges may reflect a perception that dismissal will have adverse effects on prison discipline...the dismissal of a disciplinary charge "implies that the reporting staff was wrong. For the morale of the rank and file corrections officers, such inferences cannot be permitted" (Kassebaum et al, 1971: 53 cited in Flanagan, 1983: 217).

Accused persons facing charges in outside courts have been noted to enter a plea of guilty fearing that to plead otherwise (and subsequently to be found guilty) is to invite the

sentencing wrath of the judge (Klein, 1976). The tariff for throwing roadblocks in the path of speedy justice appears to operate in prison disciplinary hearings as well. To test this assumption, one might expect to see more severe sentences handed to those who choose to plead not guilty. (Stated differently, those who show remorse for their misdeeds by pleading guilty will be shown leniency in sentencing). Table VIII shows the average sentence, in days, for those who received a segregation or loss of remission disposition.

In all but one prison (for one rarely employed disposition), the average sentence given to those who pled guilty was less than that given to inmates who pled not guilty, measured in days spent in segregation or lost remission. (Only in Beta Prison was the difference statistically significant at the .05 level). The data might also be interpreted to indicate that inmates who plead not guilty are doing so because they face more serious charges and subsequently receive more days in segregation or lose more remission as a result of the nature of the infraction, not as an indicator of how they plead to the charge. However, if the explanation for the differences in sentencing outcomes was to be found in the seriousness of the offence alone, we might logically expect inmates to plead not guilty more frequently in those prisons where there are proportionately more charges laid for serious misconducts (e.g., assault and threatening). Table II indicates that there are proportionately more misconducts processed that are of a serious nature (i.e., assault,

TABLE VIII  
 MEAN SENTENCES FOR SEGREGATION AND LOSS OF REMISSION BY  
 PLEAS OF PRISONERS

| PLEA              | PRISON |     |      |       |       |     |       |     |
|-------------------|--------|-----|------|-------|-------|-----|-------|-----|
|                   | Alpha  |     | Beta |       | Delta |     | Gamma |     |
|                   | NG     | G   | NG   | G     | NG    | G   | NG    | G   |
| Segregation       | 9.1    | 8.6 | 12.8 | 10.5* | 6.3   | 5.2 | 8.3   | 6.2 |
| Loss of Remission | 4.0    | 5.0 | 15.0 | 10.4  | 4.8   | 4.0 | 3.0   | 2.0 |

\*  $t = 2.12$ ,  $df = 29.76$ ,  $P$  (two-tailed) = .04

threatening) at Delta and the Beta Prisons yet inmates in these settings plead guilty more often. Therefore, the relationship between pleading not guilty as a result of the seriousness of the charge laid is tenuous.

### Dispositions

Section 33 of the C.C.R.R. provides a flexible range of dispositions available to the hearing officer. An inmate may be dismissed from the hearing after having been reprimanded or apologizing to the offended party. At the other end of the sentencing continuum, s/he could face a term in segregation "not exceeding 15 days" or a loss of good-time credits. There are other dispositions available that fall between these polarities and they are shown below:

33. (1) Where it is determined under section 32 that the inmate committed the alleged breach, the disciplinary panel or officer conducting the hearing may impose one or more of the following dispositions:

- (a) A reprimand;
- (b) A temporary or permanent loss of one or more privileges enjoyed by the inmate within the correctional centre;
- (c) That the inmate be confined in a cell at the correctional centre for a period not exceeding 192 hours to be served on week-ends, holidays, or evenings during the term of the inmate's confinement at the correctional centre;
- (d) That the inmate's earned remission that stands to his credit and that accrued to him to the time of the breach be forfeited in the amount
  - (i) up to 30 days, or
  - (ii) up to 60 days with the consent in writing of the regional director of corrections;
- (e) That the inmate's remission to the time of the breach be forfeited in the amount
  - (i) up to 30 days, or
  - (ii) up to 60 days with the consent in writing of the regional director of corrections;
- (f) That the inmate be confined in a segregation cell for a period not exceeding 15 days;
- (g) Assignment to employment, work service, or training for a period up to four evenings, week-ends, or holidays in addition to matters referred to in sections 45 and 46; or
- (h) That any pay which has accrued for the inmate for a period up to 30 days be withheld.

The regulations go on to qualify some of the dispositions available to the Officer-in-Charge. For example, visiting privileges can only be restricted or revoked where "it is found that the inmate committed a breach as a direct result of a visit" (Section 33 [2]). Where statutory remission has been revoked, the director may later "remit in whole or in part" the

remission if he is satisfied "that it is in the interest of the rehabilitation of the prisoner" (Subsection [3]).<sup>10</sup>

Although there seems to be a wide range of alternatives available to enforce rule compliance within the prison, the typical reaction is to segregate the prisoner. Table IX shows the distribution of dispositions for the study period (1984) at the four provincial prisons. Segregation was the outcome for prisoners charged with misconduct in over 70% of the hearings at Alpha Prison, 61% in Beta, 48% in Delta and 41% at Gamma. The chairpersons at Delta Prison used loss of remission as a punishment at more than twice the rate of the other prisons.

#### *Impact of Previous Record on Sentencing*

Officers chairing disciplinary hearings are required to indicate whether the inmate had a prior record of misconducts which have occurred during the present sentence. Where there is any comment under this heading (Appendix A [iii]), it frequently has only a numerical entry. Some chairpersons record the dates, infractions and sentence imposed for all previous rule violations. These aggregate records allow some measure of association to be drawn between the number of previous offences and the severity of punishment (measured by length of segregation sentence or days of lost remission). Inquiries could

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<sup>10</sup> The new Correctional Centre Rules and Regulations (1986) has dropped this clause. Removing it allows some of the wide discretionary powers given to directors and removes the word "rehabilitation", a phrase not currently supported by wider correctional philosophy.

TABLE IX  
DISPOSITIONS GIVEN BY DISCIPLINARY HEARINGS

| DISPOSITION          | PRISON |      |       |      |       |      |       |     |
|----------------------|--------|------|-------|------|-------|------|-------|-----|
|                      | Alpha  |      | Beta  |      | Delta |      | Gamma |     |
|                      | N      | %    | N     | %    | N     | %    | N     | %   |
|                      | -----  |      | ----- |      | ----- |      | ----- |     |
| Not guilty,          | 35     | 8.1  | 1     | .5   | 4     | 1.8  | 10    | 20  |
| Warning, reprimand   | 34     | 7.9  | 32    | 15.9 | 18    | 18.3 | 3     | 6   |
| Cell confinement     | 33     | 7.7  | 5     | 2.5  | 26    | 12.0 | 4     | 8   |
| Extra Work           | 1      | .2   | 9     | 4.5  | 1     | .5   | --    | --  |
| Segregation          | 312    | 72.5 | 122   | 60.7 | 104   | 47.9 | 21    | 41  |
| Loss of remission    | 5      | 1.2  | 24    | 11.9 | 62    | 28.6 | 3     | 6   |
| Suspended sentence   | 9      | 2.1  | 5     | 2.5  | 2     | .9   | 10    | 20  |
| Lose privilege, fine | 1      | .2   | 1     | .5   | --    | --   | --    | --  |
|                      | -----  |      | ----- |      | ----- |      | ----- |     |
| Total                | 430    | 100  | 201   | 100  | 217   | 100  | 51    | 100 |

thus be made as to whether recidivists receive harsher sentences than first time offenders.

The data pertaining to previous prison-rule infractions were dicotomized into two groups: those having no record of misconducts and those with one or more. Means of the two groups could therefore be compared for significant differences in segregation day awards or days of lost remission. Because some sentences included both days in segregation and a loss of remission, records of the two sentences were combined to produce a "total of punitive days" ("T.P.D.") awarded. A T-test reveals that only Alpha Prison reflected statistically significant

TABLE X  
SENTENCING OUTCOMES IN TOTAL PUNITIVE DAYS ("TPD")

| PRISON | FIRST TIME OFFENDERS |      |       | RECIDIVISTS |      |       |
|--------|----------------------|------|-------|-------------|------|-------|
|        | N                    | %    | "TPD" | N           | %    | "TPD" |
| Alpha  | 280                  | 65.1 | 5.7   | 150         | 34.9 | 8.5*  |
| Beta   | 99                   | 49.3 | 8.6   | 102         | 50.7 | 9.4   |
| Delta  | 109                  | 50.0 | 4.5   | 108         | 50.0 | 6.3   |
| Gamma  | 41                   | 80.0 | 2.8   | 10          | 20.0 | 5.4   |

\*  $t = -4.56$ ,  $df = 428$ ,  $P = (\text{two tailed}) = 0.000$

differences ( $P > .01$ ) in the means of the dichotomized groups measured in days awarded in segregation (plus days loss of remission where applicable).<sup>11</sup>

*Segregation: The Entrenched Response*

It is difficult to assess the merits of segregating prisoners for rule infractions. The conditions of the segregation units at these four prisons are a far cry from the horrible and dehumanizing conditions described by Jackson (1983) or their (even worse) American counterparts in Alabama or Arkansas (Cohen, 1972). At Alpha Prison (the newest facility), the segregation cells are spacious, well-lit with both artificial and natural light (some have panoramic views), each cell has a radio with five different stations, prisoners are

<sup>11</sup> Delta Prison's data was very close to having statistically significant differences in time given to first offenders compared to recidivists. The result of the T-test was a two-tailed probability of .055.

given tobacco and reading material<sup>12</sup> and are fed a regular diet. Many inmates leave the impression that segregation punishments are not viewed as particularly severe. The relative solitude in these quarters (compared to a regular unit) are often a welcome alternative.

Section 33 (4) and (5) provide for an internal review of the prisoner's case if s/he is given a segregation award.

(4) Where an inmate is confined in a segregation cell under subsection [1] (f) for more than three days, the director shall review the circumstances of the inmate immediately on the completion of three days of the confinement and determine whether these circumstances warrant release from segregation.

(5) Where the director determines under subsection (4) to allow continued confinement of the inmate in a segregation cell beyond three days, the director shall review the case each day the confinement continues thereafter and determine whether the inmate's health warrants release from segregation.

It would appear that these two subsections are designed to prevent inmates from becoming forgotten in the segregation unit and to ensure good health. However, there is a touch of illusory benevolence in the above regulations. Subsections (4) and (5) seem to herald a new, altruistic approach to the miscreant where s/he is encouraged and given the opportunity to apologize and return to the general population. To their credit, the regulations recognize that segregation is a "last resort" which should be used sparingly. But it is not. Although the C.C.R.R. contains clauses to limit the use of segregation with review

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<sup>12</sup> Tobacco and reading material may be taken away if the prisoner abuses either (e.g., lighting fires, tearing up books).



mechanisms and provides the inmate with opportunities to make applications for release, the data indicate a preference for this exclusionary punishment (Table IX).

One director, recognizing the over-use of segregation dispositions took preliminary steps to encourage alternative punishments. In March, 1985, an internal memorandum was circulated at one prison employed in this study asking senior officers (who sit on disciplinary hearings) to consider alternatives to segregating prisoners who are found guilty of breaching the institution's regulations. The memorandum began as follows:

To: S.C.O.'s

Re: Segregation Dispositions

In reviewing the dispositions for disciplinary panels that have been held in the last year I note that a large percentage are segregation awards. While segregation is often the only reasonable disposition to select in many discipline cases in a remanded population, there are others that should at least be considered.

The memo went on to detail some of the alternative dispositions available to the hearing officers and was signed by one of the directors.

To compare whether these internal recommendations would have an impact on sentencing choices, data were selected on disciplinary panel outcomes for six months *prior* to the memorandum and six months *after* its circulation (see Table XI). In the time period before the memo, there were 115 decisions of which 58% were terms of segregation. After the memorandum was

TABLE XI  
NUMBER AND PERCENTAGE OF DISCIPLINARY DISPOSITIONS, OCTOBER  
1984 TO SEPTEMBER, 1985

| DISPOSITION             | BEFORE MEMO |      | AFTER MEMO |      |
|-------------------------|-------------|------|------------|------|
|                         | N           | %    | N          | %    |
| Not guilty, dismissed   | 10          | 8.7  | 6          | 5.7  |
| Reprimand, warning      | 7           | 6.1  | 6          | 5.7  |
| Cell confinement        | 17          | 14.8 | 10         | 9.4  |
| Extra Work              | 1           | .9   | 2          | 1.9  |
| Segregation             | 67          | 58.3 | 74         | 69.8 |
| Suspended sentence      | 5           | 4.3  | 2          | 1.9  |
| Loss of privilege, fine | 2           | 1.7  | 4          | 3.8  |
| Total                   | 115         | 100  | 106        | 100  |

circulated, the ratio of segregation awards *increased* to almost 70% of 106 dispositions. The average time awarded during the first period was 9.2 days, in the second period the average award dropped slightly to 8.1 days.

Variations in the nature and type of officially-processed misconduct between the six month intervals were minimal. The suggestions made by management for hearing officers to contemplate alternative forms of punishment were generally ineffective. Admittedly, the memorandum was only an admonition to "at least consider" non-exclusionary dispositions and therefore did not carry the weight of a policy amendment or similar (more) authoritative directive. Conversely, there should not be a need for a higher level of authority than that provided

within corrections to motivate officers to use less restrictive dispositions. Prison administrations *should* be able to promulgate their own standards of fairness without having to rely on external authority. Whether they *will* is another matter.

## Appeals

### *Appeal Against Sentence*

There are two types of appeal available to an inmate found guilty of a disciplinary infraction. The first avenue, an appeal against the disposition imposed, is outlined below:

33. (6) Where a disposition under subsection (1) has been made against an inmate and the inmate applies to the disciplinary panel or officer that made the disposition, the disciplinary panel or officer may, on the undertaking of the inmate to comply with all rules and regulations of the correctional centre in future, reduce or suspend the disposition and, where they consider it appropriate, direct that, as a condition of the reduction or suspension, the inmate report to and be under the supervision of a specified officer for a period of not more than three months during the term of confinement at the correctional centre.

Once the disposition has been made, the inmate is generally read portions of this section verbatim and asked if s/he would like to apply for a reduction or suspension of sentence. For example, an inmate sentenced to 15 days in segregation may ask for a reduction and receive that reduction or have the entire sentence suspended on the condition that s/he be under the supervision of a particular officer for up to three months. This "appeal" against sentence length or type of disposition may alter the nature of the sentence to one which is *more stringent* than the original.

Furthermore, the appeal itself is available only to those inmates who agree to an "undertaking...to comply with the rules and regulations of the correctional centre in the future", an appeal that reinforces their subservient position in the distribution of prison power. Reporting to, or being under the supervision of, an officer may be interpreted by the inmate as less desirable than time in segregation or loss of remission. In any case, where an inmate fails to adhere to the conditions imposed under subsection (6) in whole or in part for the duration of the suspension, s/he could face another hearing and penalty:

33. (7) An inmate who fails to comply with a condition imposed pursuant to subsection (6) shall appear before the officer or disciplinary panel and another disposition may be imposed.

From the data presented in Table IX, it is apparent that suspended sentences are generally not popular with disciplinary hearings. One is left with the impression that a heavy reliance on segregation dispositions indicates that inmates *need* to be excluded and contained, regardless of their rule-infraction.

#### *Appeal to Inspection and Standards*

The second avenue of appeal is contained in Section 34 (1):

(1) Where a determination is made under section 32 or a disposition is made under section 33, the officer who filed under section 30 or the inmate may, within seven days of the determination or disposition in question, appeal to the Director of Inspection and Standards by mailing a written request for review addressed to that director.

(2) On receipt of a request for review as provided under subsection (1), the Director of Inspection and Standards shall forthwith obtain a copy of the record of the hearing under review and may require the chairman of the disciplinary panel or officer who presided, as the case may be, to submit to him within seven days written reasons in support of the determination or disposition under review.

(3) The Director of Inspections and Standards may stay any disposition made under section 33 pending a review under this section.

In fiscal years 1983/84 and 1984/85, only 1.5% and 2.7% of disciplinary transactions were appealed, respectively (see Table XII). Inspections and Standards interprets these data to suggest "that the handling of disciplinary actions in general is fair and just" conceding that in "some instances, however, a fair review of an appeal has been hindered by the absence of a tape recording of a hearing...the quality of some related written reports (handwriting, detail) and partially filled out disciplinary forms do not help the matter."<sup>13</sup>

There are several reasons why the paucity of inmate appeals on disciplinary actions should not be interpreted as meaning that hearings are "fair and just". First, some inmates simply may not comprehend their rights, having neither the access to the Correctional Centre Rules and Regulations nor the skills to decipher the legalese if a copy has been provided to them.<sup>14</sup>

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<sup>13</sup> From a memorandum to the Commissioner of Corrections dated September 3, 1985 from the Director of Inspections and Standards.

<sup>14</sup> Copies of the Correctional Centre Rules and Regulations were either in short supply or unavailable to prisoners during 1984, according to one of the directors employed at Alpha Prison.

TABLE XII

## DISCIPLINARY PANEL ACTIONS APPEALED TO INSPECTION AND STANDARDS BY INMATES, FISCAL YEARS 1983-84 AND 1984-85

| YEAR  | TOTAL HEARINGS<br>N | APPEALS         |               | APPEALS UPHELD  |      |               |     |
|-------|---------------------|-----------------|---------------|-----------------|------|---------------|-----|
|       |                     | Conviction<br>N | Sentence<br>N | Conviction<br>N | %    | Sentence<br>N | %   |
| 83-84 | 2546                | 40*             | 39            | 13              | 32.5 | 2             | 5.1 |
| 84-85 | 2251                | 62*             | 33            | 8               | 12.9 | 1             | 3.0 |

\* 10 Appeals arising from the same incident.

Second, prisoners are instructed that they must submit their appeal in writing, a further handicap to those not endowed with basic literary skills.<sup>15</sup> The requirement that appeals must be filed within seven days excludes those prisoners wishing to appeal the record of an institutional infraction if they later learn they have grounds for an appeal (e.g., when they get out of segregation or somehow later acquire a more thorough understanding of the grounds for appeal). A fourth reason why

<sup>14</sup> (cont'd) Photocopies of the same were eventually posted in every living unit.

<sup>15</sup> Interestingly, the C.C.R.R. states that

41 (2). An officer or director shall, on request, *provide assistance* to an inmate making a complaint under subsection 1 [that is, concerning a complaint or grievance concerning the operation of a correctional centre] and shall, on receipt of a sealed envelope from the inmate addressed to the Director of Inspections and Standards forthwith forward the envelope to him (emphasis added).

One would assume that this assistance is also legally available to inmates appealing a disciplinary decision. Not surprisingly, prisoners rarely solicit help from correctional staff to appeal disciplinary actions.

the appellate avenue is not maximized may have something to do with less tangible (and, thus, less measurable) considerations. If a prisoner does decide to initiate an appeal, the ensuing relief may occur after the sentence of the disciplinary court has expired as the following case illustrates.

Two weeks before Christmas, 1983, an escape attempt was discovered on a living unit at Alpha Prison. The perpetrators of the breach could not be identified. All sixteen prisoners on that unit were charged under Section 28 (8) ("No inmate shall escape or attempt to escape lawful custody...") and sentenced to 15 days segregation. After 10 days, the inmates in this area were released from segregation on the decision of the Officer-in-Charge. Several prisoners had used this appeal process and received, with the others, a letter from the Director of Inspection and Standards *three months later* that stated, *inter alia*, the following:

I believe it is essential to acknowledge that, given the security risk which existed at the particular moment, the Centre would have been obliged to impose a lock-down until the area was secured. Clearly, that would not have been 10 days in the making, but some day or days would have been required in that regard.

Be that as it may, it is not possible to return to you the time lost "in segregation"...

In my review of the evidence and reports, there was not sufficient evidence to conclude that all inmates in [the unit where the escape attempt was discovered] "aided and abetted" in the attempt to escape...I am therefore quashing all the convictions and requesting reference to this disciplinary award be removed from each file. Your record shall be so expunged.

The sense of bitterness and frustration on the part of inmates who had nothing to do with this escape attempt could hardly have been assuaged three months after the fact. And yet, "due process" was afforded them in every respect. The important point of this illustration is to show how enabling the relevant legislation is to allow this particular exercise of authority (locking down a whole unit for two weeks) and the *ex-post facto* (and hence, impotent) character of the appeal process. Moreover, the *average* length of time between an appeal to Inspection and Standards and their subsequent response is 14 days (the maximum term in segregation is 15 days). As in some cases dealt with by outside appellate courts, the relief granted may be too late.

Some less tangible explanations for the under-use of Inspection and Standards might be ventured. Prisoners may perceive time spent in segregation as a "badge of honor", credentials to be flaunted before peers in a social milieu that is short on positive psychic and emotional rewards. There is also the chance that prisoners may be given the opportunity to ask for the return of their lost remission before their sentence release date.<sup>16</sup> For the fiscal years shown in Table XII, appeals of convictions and sentences were rarely upheld. Appeals in general were infrequent; the outcome of the few that have been initiated may be communicated throughout the prison population.

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<sup>16</sup> The methods employed in this study did not permit quantification of the amount of lost remission returned to inmates who applied for it. However, there were two cases in 104 randomly selected files where memoranda from local directors instructed Records personnel to credit sentences with lost remission days.



Just how much awareness inmates have concerning the viability of the appeal process via Inspection and Standards remains unknown.<sup>17</sup>

It is unfortunate that the legislation describing the mandate of Inspection and Standards does not require it to make a more proactive attempt to review "unreasonable" dispositions, "substantial wrongs" or "miscarriages of justice" (C.C.R.R., Section 34 [4] {a}, {b} and {c}). Rather, they are only required to make inquiries on the basis of inmate appeals. These provisions for review of procedures and sentencing might only catch the worst abuses of power appealed by a few literate inmates.

One could easily be left with the impression that deviations from fair procedure are infrequent occurrences, given the data in Table XII. Additionally, if conceptions of legal rights are to be gathered from a cursory reading of the pertinent sections of the C.C.R.R., we might also believe that inmates have identical due process protections afforded to persons in the outside system of justice. Contrary to the impressions left with us by the law and Inspection and Standard's interpretation of prisoner appeals, the next chapter will argue that violations of

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<sup>17</sup> The effect it has on staff may be somewhat more visible. In my role as a correctional officer, I often heard co-workers comment that certain procedures had to be conducted properly or inmates (especially the more articulate ones) would be writing Inspection and Standards.

administrative law, disparate sentencing and more subtle violations of a duty to act fairly are widespread practices across all four prisons.

## CHAPTER III

### EXPLORING THE REALITY OF DISCIPLINARY HEARINGS

#### Introduction

Few accounts exist where the encounter with authority through the prison disciplinary hearing is as graphically illustrated as that given by one provincial court judge (Kimmerly, 1980). Assuming the identity of an inmate, Kimmerly and another magistrate were incarcerated at Oakalla (Lower Mainland Regional Correctional Centre in British Columbia) for 24 hours as an "educational experiment". He intentionally refused to work, and received ten days in segregation so he could "see the digger" (segregation unit). His retrospective thoughts are quoted below:

Upon reflection, I think that the process of treating me like a robot and giving me orders only at the last minute and telling me exactly what to do was the psychological reason for my guilty plea. I have had several conversations with other inmates, before and after this experience. No one could tell me of any memory or story of a person being found not guilty. I suppose it has happened from time to time. One thing, though, is certain: the inmates do not perceive the warden's court as a fair hearing.

One of the most ludicrous things of all, I now think, was being told I was being leniently treated. I never believed that and it didn't endear the man [chairing the hearing] to me. I never felt he was doing me any favor. I realized later that as a judge I used to say that often.

I suggest we stop calling the warden's court a court at all - simply sentence people after charge and provide an appeal procedure to a court that has the appearance of justice. *I shudder to think how much of an analogy can be drawn to our criminal courts.* Given an unsophisticated

accused; *probably more than we would like to think* (Kimmerly, 1980: 28; emphasis added).

As Kimmerly's brief sojourn into the interactional dynamics of the warden's court may have indicated, being there is the optimal way to fully witness its proceedings. The overt words and metacommunication<sup>1</sup> revealing beliefs, ideologies, frames of reference and values held by the actors in this social transaction are exposed. Falling short of participant-observation, the next best medium is to review the proceedings on video or audio recording tape. The latter method of analysis was chosen because disciplinary hearings are recorded subject to Section 32 (7) of the Correctional Centre Rules and Regulations. These recordings are an abundant source of qualitative information showing how prison administrations define and impute deviant behavior and subsequently react to threats of disorder.

The transcripts reproduced below portray examples of dominant mandates, interpretations of law, declarations, deliberations, comments, practices, rationalizations,

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<sup>1</sup> "Metacommunication" is a term used by communication theorists to describe body language, verbal utterances (e.g., "uh-huh", "umm", "eh?" "hmm") and even the use of silence to communicate with another person or persons. Non-verbal communication cannot be extracted from verbal communication, the two are inextricably linked in a dynamic process, "one in which an indefinitely large number of particulars interact in a reciprocal and continuous manner" (Mortenson, 1972: 14). Metacommunication may comprise *the* message sent to the "other" in a transaction while the verbal language carries a lesser portion of what is really being communicated. For example, a phonetic utterance of "umm" could mean satisfaction, surprise, skepticism, interest or approval depending on variations in voice inflection.

determinations and statements reflecting recurring features of substantive "justice" in the disciplinary hearing. The actions of those in the disciplinary transaction shed light on their motives, beliefs and values that guide their actions and prompt reactions. Admittedly, transcripts of recorded events are imperfect representations of reality in that much of the metacommunication cannot be accurately recreated in print. Moreover, there are attitudes (e.g., warm-cold, friendly-unfriendly, believing-disbelieving, open-defensive) evident in conversations that are obfuscated by indexicality<sup>2</sup> inherent to researching social phenomena. Despite some methodological limitations in relaying a real event from tape to print, the knowledge gleaned from recorded disciplinary hearings is available only at this premium. Such qualifications are necessary because an insensitive foray into this type of information-gathering can lead to a series of "illustrations" that paint a caricature of what individual social actors are attempting to accomplish in the disciplinary transaction.

According to ethnomethodological critiques of criminological inquiry, objectivity in social science is partial at best

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<sup>2</sup> Researchers are bound by the context in which their interpretive work is conducted when studying social interaction. As Pfohl illustrates, the "reality of the same potentially deviant act will be conceived very differently, depending on whether it is viewed from the patrol car of a police department under pressure to make arrests or from the backseat of a fast-moving vehicle full of partying teenagers" (1981: 27). In this study, when the Officer-in-Charge utters "hmm" while an inmate is giving his version of events in a disciplinary hearing, the meaning the officer attaches to this morpheme, what the inmate believes it to signify and how I interpret it may be three different "realities".

(Pfohl, 1981: 30-31). My purpose in this chapter is to provide the reader with a detailed account of social interactions with contextual information to display the phenomena being analyzed:

This allows the audience to join the researcher, at least partially, in interpreting the scene being studied. It furthers the quest for objectivity by providing the audience with data by which to reject or modify as well as to accept the researcher's description and analysis (Pfohl, 1981: 31).

The following analysis is based on 64 transcribed hearings chaired by 11 senior correctional officers or local directors or directors (not including panel members who were part of a tribunal) in four prisons. Table XIII shows the distribution of hearings by institution in number and percentage. For example, 25 transcripts of hearings were obtained from Alpha Prison representing 39% of the total sample. They were chaired by five different Officers-in-Charge presiding over a range between two and eight separate hearings. Beta and Delta Prison samples were chaired by one and two people, respectively; one Beta Prison officer presided over all nine hearings; one of two Delta Prison's Officers-in-Charge presided over 15 hearings; the other chaired only one. A table showing the offences, pleas entered and dispositions made by the disciplinary court is available in Appendix D.

TABLE XIII  
DISTRIBUTION OF HEARING TRANSCRIPTS AND CHAIRPERSONS

| PRISON | HEARINGS |     | CHAIRPERSONS |        |
|--------|----------|-----|--------------|--------|
|        | N        | %   | N            | Range  |
|        | -----    |     | -----        |        |
| Alpha  | 25       | 39  | 5            | 2 - 8  |
| Beta   | 9        | 14  | 1            | 9      |
| Delta  | 16       | 25  | 2            | 1 - 15 |
| Gamma  | 14       | 22  | 3            | 2 - 9  |
|        | -----    |     | --           |        |
| Total  | 64       | 100 | 11           |        |

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Techniques for Reaching Preferred Outcomes

No two prison administrations perceive and react to rule-breaking in the same manner. The definition and sanctioning of "contraband" in the ultra-modern remand centre and the older institutions are very different. However, the present analysis reveals a common thread across all four institutions, regardless of architectural variations, rates of violence, staffing levels, control technologies and idiosyncratic perceptions of what behaviors threaten order. This one recurring theme surfaces in an exercise of authority that is engineered to find the prisoner guilty and to have that guilty determination "stick". Even when the prisoner pleads guilty to the allegation (in 41 of 82 charges or 50% of the time), the dispositional process is frequently accompanied by didactic or paternalistic admonitions. Officers may entreat their charges to conform and/or hold contempt for the inmates' definition of the situation or

self-esteem. There are several methods through which this imputational work is accomplished. Some of the more visible social strategies inherent in this ascriptive task are summarized below:

1. Interpreting the empowering legislation as strictly as possible, not allowing any room for flexibility, doubt, or defenses based on extenuating circumstances, unknown or vague rules and explanations offered by the prisoner or witnesses;
2. alternatively, interpreting the empowering legislation loosely, allowing room for flexibility of application, extenuating circumstances, factual ambiguity and explanations offered by the prisoner or witnesses;
3. excluding the prisoner from information and dialogue which leads to a finding of guilt or determinations about the type of disposition. Challenges to the manner, logic and facts culminating in a disposition are not available to the inmate;
4. glossing over "technicalities" such as not having the charging officer present, not providing written notification (or it was illegible) of the charges prior to the hearing, or proceeding on "stale-dated" allegations. These "minor technicalities" are trivialized, usually with the consent of the accused prisoner;
5. the possibility of appealing the hearing decision is foreclosed by not advising the inmate of the appeal procedures or describing in such a way as to make it



unimportant, incomprehensible, or inadvisable.

Each "case" in the following analysis represents a single disciplinary transaction, although inmates were sometimes answering to more than one allegation. It became obvious that the recording device was shut off at certain points in many of the transactions. These interruptions were made by the chairperson if s/he remanded the case, deliberated on issues of guilt or punishment, or conducted some form of investigation while the inmate waited outside the room.

The criteria for selecting the following transcribed cases were not strict. Each recording had to be audible from where the inmate was identified at the very beginning of the hearing to the point where s/he was dismissed from the room (after being sentenced). Hearings were selected in no particular order and none were excluded as long as they were complete. The research design would have included an analysis of 25 tapes from each prison but that number of recorded transactions was only attainable at Alpha Prison. In the other units where that figure was unattainable (for reasons already discussed), the analysis covers those hearings that were made available by the administrations. The recordings were transcribed verbatim; the written version coincides phonetically (contractions, slang, verbal utterances, etc.) to what was heard from the tape.

Once the hearings were transcribed on paper, it was then possible to read each case, noting recurring themes common

across all four prisons. Several characteristics unique to each administration's "style" of handling disciplinary offences also became evident during this analysis. The features of each institution's disciplinary style will be presented in a typology at the end of this chapter.

Disciplinary hearings are usually chaired by a director (referred to in the transcripts as the "Officer-in-Charge" or "O.I.C.") under the authority of the Correctional Centre Rules and Regulations (Section 31). The officer who filed the charge (known as the reporting or charging officer) is usually in attendance, often accompanied by one other guard. Standing, the prisoner faces the hearing chairperson who is seated behind a desk in a room reserved for this occasion<sup>3</sup> or in the director's office located in the wing where the offence took place.

As a preliminary indication of the lengths to which some hearing officers will go to "prove" an inmate is guilty, the following examples represent what might be considered the more extreme cases. In Case 1, a razor-blade was discovered in a prisoner's cell after he had been charged for assaulting (i.e., pushing) a correctional officer. The prisoner has pleaded guilty to the assault charge (Section 28 [7]) but contests responsibility for the contraband found (later) in his room. The hearing officer responds:

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<sup>3</sup> One director confided that the reason why disciplinary hearings were conducted in a separate room away from the unit was to generate a particular psychological effect (i.e., "dignity and decorum"). The trip from the unit to the disciplinary hearing room gave the inmate time to contemplate his fate.

O.I.C.: "You are responsible for all objects that are in your room. *You are to check your room when you move into a room* and you sign a cell condition report stating that you're aware of any damage *or what's in your room*. Are you aware of that?"

A copy of the cell condition sheet that prisoners are asked to sign is reproduced in Appendix "C". The form is meant to serve as an inventory for the condition of the cell so that vandalism and defacement can be monitored. Nowhere on the form is there any stipulation that prisoners are to know "what's in their room" (as the chairperson claims). This is not a case of "stretching the rules" or "strict liability"; rather, the hearing officer has falsely stated that the form covers contraband. Whether this faulty interpretation was deliberate is not the issue. What is important for the present analysis is that it was done, the hearing officer got away with it and the prisoner was found guilty as charged.

The dialogue continues:

Prisoner: "Yeah and we did that but he didn't-"

O.I.C. (interrupting): "Are you aware that this is against the Correctional Centre Rules and Regulations to be in possession of this?"

Prisoner: "No, because you're allowed razor blades anyway-"

O.I.C. (interrupting): "You're not allowed to take apart the blade, as soon as you dismantle that it becomes a weapon."

Prisoner: "Am I going to get to say my piece or is this just going to be-"

O.I.C. (interrupting): "Go ahead."

The inmate then asks if the officer who originally had him sign the cell condition sheet noticed the razor blade. Rather than produce the officer who signed the cell condition sheet, the O.I.C. asks the charging officer to enter the hearing (who was not the staff member who originally had the prisoner sign the cell condition sheet) to give evidence.

O.I.C.: "Mr. P----, could you, ah, give us an explanation of where you found this razor blade, when, et cetera?"

This line of inquiry does not respond to the inmate's legitimate question of a) whether the cell was searched thoroughly and b) whether it was noticed by the officer responsible for that search.

The reporting officer explained that after charging the inmate with another offence (assault, Section 28 [7]) and moving the inmate to segregation, he (the officer) went back into the inmate's cell to look for something else. He found the razor between a piece of peg-board and metal stripping. The prisoner questions him, asks about the visibility of the razor next to the metal stripping and notes that at his height (6' 4"), it would be very difficult for him to see the contraband. The cross-examination is cut off in mid-sentence by the hearing chairman, rendering the question of guilt a predetermined issue.

O.I.C.: "You did, you did find it in his room, Mr. P----?"

Charging Officer: "Oh yes, sir."

O.I.C.: "Then Mr. T----, *you are responsible for it.*

Prisoner: Audible sigh.

O.I.C.: "Anything else you wish to say before sentencing?"

Prisoner: "Let's just get - guilty on both - let's go!"

Strictly interpreting the contraband rule is entirely proper within the wording of Section 28 [5]: "No inmate *shall have*, attempt to obtain or give or *knowingly* receive a drug, weapon or other object which may threaten the management, operation, discipline or security...". "Knowingly" is inserted after "shall have", making the act of "having" contraband an offence regardless of whether the prisoner *knew* it was in his/her cell. The prisoner was lawfully found guilty on both charges, given a verbal warning for the contraband and sentenced to 15 days segregation on the assault charge.

Case 39 is instructive to further document how some prison staff will use innovative methods to "determine" an inmate guilty. One Officer-in-Charge tried to induce a guilty plea from a prisoner (charged with fighting) by telling the inmate that a guilty plea was entered earlier by a co-accused (Case 38). The prisoner maintained he was not fighting:<sup>4</sup>

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<sup>4</sup> This strategy is not uncommon in police interrogation techniques. One manual used in training detectives states:

With the facts, events, and incidents of the crime known with certitude, a hypothetical story is attributed an eye-witness, and the story allegedly told by the eye-witness may be repeated to the subject for his information so that subject will not know that the story has been manufactured by the interrogator. If the subject being interrogated is guilty, he will

O.I.C.: "You weren't fighting at all, is that what you're saying?"

Prisoner: "No, there was no fighting involved."

O.I.C.: "What is your defense on this? Your partner in crime here, is, ah, this C---- [co-accused] *he pleaded guilty* so how can you have one guy fightin' and the other one not?"

However, a reading of Case 38 indicates that the co-accused pleaded not guilty to the same charge:

O.I.C.: "Now during [unit] program, ah, yourself and inmate G---- ah, were fighting and had to be broken up when staff came on [the unit]. Do you understand the charge?"

Prisoner: "Ah, yeah."

O.I.C.: "And how do you plead?"

Prisoner: "Well, we never really mixed it up so *I'm pleading not guilty.*"

O.I.C.: "Plead not guilty? What do you mean you never really mixed it up?"

Prisoner: "Well, it was just sorta like I was here and he was there and it was, you know, just startin' to, you know, like c'mon, c'mon sorta thing (unintelligible) guys come up to [the unit], before everything was started it was over. No punches were laid."

Despite his stand that no assault occurred, the inmate was found guilty on the hearing chairman's belief in what *could* have happened, not what *did* happen. These examples demonstrate the more extreme measures (telling the prisoner s/he has signed a document that binds them to a "contraband-free" cell and

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"(cont'd) immediately recognize the truth of the story when he hears it, and this may motivate him to the point of making the confession" (Thomas, in Johnson and Savitz, 1978: 109).

misinforming a prisoner about the plea entered by a co-accused) employed by some hearing chairpersons to find an inmate guilty. Later in this chapter, we will see that the process through which guilt is ascribed need not be so blatant.

Contraband is a relentless problem for correctional staff in a milieu where even the most benign objects assume an exchange value or become threatening objects in an underground economy policed by wary security staff. The onus for controlling traffic in underground goods appears to have shifted, in one prison, from security personnel to the prisoner (Case 19):

O.I.C.: "You are responsible for everything that's in that cell when you enter it, correct? You realize that?"

Prisoner: "Well, when I went in there it was bare, you know, it [the contraband] supposedly was underneath my, I couldn't see it, you know, there was no way I could see it-"

O.I.C. (interrupting): "If you're placed in other cells, [meaning transferred to another cell] I suggest that you look underneath the table."

The hearing officer continued with another charge laid by a different guard. It, too, involved contraband, where a condom was found in the air vent of the inmate's cell. Again the prisoner pleaded not guilty and the hearing chairman responded, apparently surprised at the plea:

O.I.C.: "Not guilty?!"

Prisoner: "There wasn't a search conducted before, ah, you know, before I moved in there."

O.I.C.: "You did sign the cell condition sheet?"

Prisoner: "Yes, I signed the cell condition sheet but, ah-

O.I.C. (interrupting): "Well that means the room has been looked at by staff and that they have now turned it over to you. Correct? And then you-"

Prisoner (interrupting): "But, is the, air vents aren't on that sheet, I don't believe or would have looked 'cause when I'm signing that thing I look around, I count the burn holes and stuff like that."

O.I.C.: "The implications of a condom are, ah, is a little bit more serious than-"

Prisoner (interrupting): Yes, I know that, and another thing, too, I'm not a faggot and I don't see any reason why I would need a condom, its, ah - I just couldn't believe it when [the reporting officer told me that (unintelligible) joking but I guess he did find it."

O.I.C.: "*The fact that it was found in your room, I'll find you guilty* but I have a tendency to believe your story of not being a homosexual. Ah, but at the same time, I still want to say to you that, you've got to take perhaps a little bit more care about your cell and it makes, with all this stuff in your cell, and this as well doesn't make good light."

Prisoner: "See, but when I move into a cell-"

O.I.C. (interrupting): "You'd better check it out."

Prisoner: "It's not just that but the cleaners are supposed to clean it out, right, and I figure that when I go in there, it, its a clean cell, there's nothing wrong with it and, you know, its my responsibility from then on but ah-"

O.I.C. (interrupting): "Well I suggest to you very strongly, Mr.----, you've been before me before, and, ah, we've gone through some other hiccups, and, ah, you know the rule of the game around here, eh? I'll go another two nights lock-up, you can be really thankful you're not getting segregation time. Ok?."

This dialogue illustrates the all inclusive interpretation of the contraband clause (Section 28 [5]) and the hearing



officer's conclusion that signing a cell condition sheet means the prisoner has searched the cell and signed a declaration to that effect.

Bentham's (1791) "panoptic" vision of ultimate, all seeing prison surveillance does not approach a scenario where the imprisoned survey themselves. Not only are prisoners responsible for the contraband found in their cells, they are expected to search them. (Similar strict interpretations of the C.C.R.R. were found in cases 3 and 24). Indeed, if this line of reasoning is applied towards all prisoners found with contraband, we may expect to see captives and jailers confide in how to control this (and other) forms of institutional deviance.

#### *Ambiguous Rules and Events*

Rules that are vague, unknown, or do not literally cover the behavior for which an inmate has been charged do not detract from their sanctioning power. (However, in Case 34, the non-enforcement of a rule by several officers over a one month period mitigated the sentence for an inmate). Case 2 provides us with an example where a prisoner claimed he did not know a particular rule about booking visits. The Officer-in-Charge read the offense report, asked the inmate if he understood it and if he had received a copy. After the inmate pled guilty, the officer asked if he wanted to explain the circumstances behind the plea.

Prisoner: "Uh, yeah, I phoned in and booked a visit. I wasn't aware of the rule."

O.I.C.: "Did the staff member point out the rule to you in the visits instructions?"

Prisoner: "Yes."

O.I.C.: "So you are *now aware* of the fact that prisoners do not book visits, your visitors book visits?"

Prisoner: "Yeah."

(One wonders why formal charges were even considered necessary in this case). The Officer-in-Charge cited his past good behavior from entries in the progress log and sentenced him to a three night lock-down in his cell. The curious aspect of this case is that the chairman found him guilty but did not challenge his statement that he was not aware of the rule. We are left with the impression that whether a person knew his/her conduct was unlawful or not was irrelevant. The very existence of rules means they can be invoked to punish, as "ignorance of the law is no excuse". Case 18 shows that it was incumbent upon the prisoner to obey the rules even if they were poorly communicated to the population. An inmate had been charged for keeping two cartons of orange juice ("contraband") under his cell bed. Pleading guilty, his defence was as follows:

Prisoner: "Ah, I admit that I had, I had them in my room but I think I, ah, gave a good enough excuse on why."

O.I.C.: "Ok, so you're pleading guilty."

Prisoner: "Yes."

O.I.C.: "All right, I've read the circumstances to you, if you'd like to give your explanation..."

Prisoner: "Ok, in our kitchen we have two cupboards and one drawer that are, ah, that aren't broken so we cannot lock anything that we want to save in them drawers. The

other ones are kept the dishes, the cutlery, the food, the jam, the cereals, see we have no place to lock anything, juice or whatever we want to keep. So we - I bring it into my room - I've been doing this, oh, for about the last month and everyone on our tier knew about it, it wasn't as if I was hiding it from any of the other people."

O.I.C.: "Why would it be hidden under the bed?"

Prisoner: "Because - underneath the bed? People do go in your rooms even though it states that people are not allowed in your rooms, and from some of the guards that I've talked to, they don't seem to believe it. And-"

O.I.C. (interrupting): "Why would you keep a refrigerated item out of a refrigerator?"

Prisoner: "It would all get drank before, ah, we don't like our juice to go just like that, right?"

O.I.C.: "Are you the cleaner on the unit?"

Prisoner: "Yes."

O.I.C.: "Well, who's 'we' because it seems-"

Prisoner (interrupting): "The whole unit."

O.I.C.: "Well then, wouldn't you think that the whole unit would be able to control itself?"

Prisoner: "Well, there's some people that don't really care, right, like there's some people that aren't really all together there, right? They just drink-"

O.I.C. (interrupting): "You know - have you read the living unit rules and regulations?"

Prisoner: "Yes."

O.I.C.: "And you know food isn't allowed in there."

Prisoner: "Ah, nowhere in the rules and regulations books that we have in our units was it stated that food is not allowed in the unit."

O.I.C.: "It's on the notice board, the living unit rules."

Prisoner: "We just - we've got a book of rules and regulations-"

O.I.C. (interrupting): "That's, that's the Correctional Centre Rules and Regulations, ah, living units rules, the one that are posted on the notice board, are the one specifically and that, those are rules that aren't defined for each correctional centre, they're pertinent to this centre alone, ok. Ok, I'm going to find you guilty because of the officer's statement and of course, yours."

To underscore the theme of this analytical narrative, the issue here is not solely whether the inmate knew or did not know the rules. The presiding chairperson assumes that the rules are posted and in good reading condition on the unit in question, that inmates can and do read the notice board, and the behavior in question was a *wilful* violation of these rules. The posted regulations in this prison do stipulate that storing food is against institutional rules. However, these ordinances are posted near an off-limits staff phone where an inmate's presence could easily invite suspicion. Furthermore, a quick survey of the rules on four of the units during the study year revealed that they were missing, partial, torn, faded or had phone numbers and messages scrawled on them. Collectively, the hearing chairperson's assumptions facilitate an uncomplicated *modus operandi* to reaching the inevitable conclusion: guilty as charged. Without testing these assumptions, "ignorance is no excuse" is a convenient (and conventional) mechanism to reach a finding of guilty.

Similarly in Case 24, the hearing officer cited what he believed were the procedures followed when inmates were admitted

into the prison. He used the "fact" of "established procedures" to reach a finding of guilty. The prisoner had been charged for three offences, one of which was for pressing a button inside his cell intended only for emergencies and labelled "call button". (He also called two staff members "assholes" for not letting him out of the cell when they responded to the call and later spit on the floor. These two other incidents, the chronological order of which is difficult to establish from the transcript, probably have some bearing of the view taken on the credibility of his testimony):

O.I.C.: "So you plead guilty on both."

Prisoner: "No, I, on the first one I pressed the emergency button, didn't say emergency, said 'call button' and I pressed it and I never, then he said to me, 'That's the emergency button, you're not supposed to press it, unless it's an emergency' and I didn't say nothing at all, just sat on my bed, reading the paper, didn't swear or" (unintelligible) "indecent gesture".

O.I.C.: "Ah, the indecent gesture is, is spitting on the floor...each prisoner, when he is brought on to the unit ah, is given an orientation to the unit and to his cell and he is told all about that call button and what its use is for."

Prisoner: "I didn't know that, I didn't, ah, I wasn't told about that button."

O.I.C.: "How long have you been in this centre? Ah, well over a week, correct?"

Prisoner: "Yeah but I been to court nearly, ah, every second day."

O.I.C.: "You've been here about 10 days. And in that time you're telling me that you have not, ah, heard or been told the living unit rules? I find that very hard to accept."

Prisoner: "That's right, I never, ah, nobody ever told me, I never asked nobody about that call button 'cause I

never thought that I'd use it and I was locked up and lunch must been in the unit for about ten minutes."

O.I.C.: "In this case Mr. O-----, I can't accept your explanation, ah, as *we have procedures laid down here which is a proven fact* and I'm going to find you guilty on the officer's statement and your own admission and the spitting in the elevator, you're gonna receive 5 days in segregation. The illegal use of the emergency call button is extremely serious because when you're pushing that button, for, ah, ah, an unfounded reason, somebody else could have been in trouble somewhere else in the building."

Prisoner: "Yeah, but how come they don't put a notice, like, I even was looking at the notice board last night, the night before, and I, ah, I never seen nothing about the, the emergency call button. It doesn't say 'emergency button', it says 'call'".

O.I.C.: "Yes it does but I can't accept the fact that you weren't told that that emergency button was not told for its--"

Prisoner (interrupting): "Who told me then?"

O.I.C.: "When you were brought on the living unit, when you were told, when you signed your cell condition sheet, those things were discussed."

Prisoner: "Who's the 'somebody' that told me? (unintelligible)".

O.I.C.: "Ah, cell condition sheet, who was the officer, it should be separate - they're up in the unit. It, ah, *it's a matter of procedure* [directs attention to the attending officer who is phoning the unit, in an attempt to find out what officer filled out the cell condition sheet: "It's no problem, it's no problem"] "and, ah, I'm going to give you an additional three days segregation for that for a total of 8 days segregation. I must point out to ya, states on your, right on your progress log, ah, dated 9 October, 'received -----, placed in cell 14, knows rules and regulations, ah, has been here before, signed by officer A----. So I can't accept your story."

In this case, it was more expedient to cite "established facts" of procedure than to provide an opportunity for the accused to cross-examine a witness alluded to by the hearing

chairperson. The assumption that "staff have done their jobs" is a tenuous one. While some line-staff may brief the prisoner on routines, rules and expectations, others find that there simply may not be time or the opportunity (e.g., if a prisoner was admitted to the unit near shift-change). Shortcutting the requirements of fair procedure sponsors predictability (findings of guilt) and vindicates the allegations made by the reporting officer. Additionally, there is no defense in claiming ignorance to the rules when the chance to verify that argument is arbitrarily excluded.

Another tactic for securing a guilty finding is to employ Section 28 of the C.C.R.R. in a flexible manner, limited only by the imagination of those enforcing the rules. This method can be referred to as the "you must be guilty of something" approach to ambiguous events. Case 37 shows how an inmate can be found guilty of some rule violation despite an alternative explanation of facts that could easily have been verified or refuted by the (staff) witness he mentioned. The Officer-in-Charge read the written report submitted by the line officer:

O.I.C.: "Circumstances were that you decided to return to, ah, your own [tier] from [the recreation area] five minutes after tier change was called and the gates of these tiers were again being secured. 'He began swearing and continued swearing until after continuous warnings by myself and finally being ordered to stop swearing at which time he stopped swearing at Mr. K---- but swearing at I. Therefore I charged ya.' Do you understand the charge?"

Prisoner: "Yes, sir."

O.I.C.: "And how do you plead?"

Prisoner: "Not guilty, sir."

When asked by the hearing chairperson for his version of the events leading up to the charge and why he maintains he did not swear at the officer, the prisoner responds:

Prisoner: "'Cause it's the guard last night, I asked him if I swear at him and he says he didn't hear me swear. That was Mr. K----."

O.I.C.: "Ah, Mr. C---- was the one that was speaking to you."

Prisoner: "I know, he says that charge was on me 'cause he says I swore at Mr. K-----."

O.I.C.: "But you, he was hearing you and he, apparently he warned you several times. His statement - do you want me to read it again?"

Prisoner: "I've already read it - last night - "

O.I.C. (interrupting): "Were you swearing or were you not swearing?"

Prisoner: "I was swearing but I wasn't puttin' it towards the guards, I was -"

O.I.C. (interrupting): "You were creating a disturbance by standing at the gate swearing. Is that right?"

Prisoner: "Yes, sir."

O.I.C.: "Ok, well, why did you plead not guilty if that's what you did?"

Prisoner: "'Cause it says in there that I swore at Mr. K---- and that's what Mr. C---- said I was being charged with -"

O.I.C. (interrupting): "It says swearing about Mr. K----, and staff, you weren't -"

Prisoner (interrupting): "I wasn't swearing at Mr. K-----"

O.I.C. (interrupting): "But the thing is that *you were creating a disturbance by swearing and carrying on at*



*the gate, now whether you're talkin' to the wall or whatever, you still made a hell of a racket and created a fuss, right?"*

Prisoner: "Yes, sir."

O.I.C.: "Ok, that's what you're charged with...."

A few moments later, one of the guards attending the hearing attempted to speak on behalf of the prisoner:

Unidentified voice: "Do you mind me speakin' in defense of P---- sir? He's tryin' to keep his act together, he's been very polite, I've never heard him swear at staff before."

O.I.C.: "While you stepped out, Mr. B----, he admitted that he did stand at that gate and swore and carried on and created a disturbance. Mr. P---- is a very nice man but he tends to go crazy once in a while, don't ya, and get yourself into trouble. Well, P----, I'm going to find you guilty on here, on your own admission."

Undaunted, the hearing officer did not have to find him guilty under Section 28 (9), "no inmate shall use abusive or insulting language or gesture *to a person*" but could find him responsible for creating a disturbance even though there is no language prohibiting disturbances in that subsection. When asked if he had anything to say before sentencing, the prisoner responded:

"Well, I just think you should hear the report from Mr. K----."

O.I.C.: "Why would I do that, I've already got the, we're not necessarily dealing with Mr. K----, we're (unintelligible) you sittin' there swearing all the time so his testimony doesn't matter..."

A similar example of interpreting Section 28 to fit the circumstances of any disorder is found in Case 48. A prisoner was charged under Section 28 (9) for saying to a guard, "Yeah,

well why don't you jump in the lake, asshole?" After pleading guilty and asked if he had anything to say, the prisoner admitted telling him to jump in the lake but disputed mentioning "asshole".

Prisoner: "Yeah, but I didn't swear at him or nothin' like that, there was two or three guys standin' there and I didn't say 'asshole'."

O.I.C.: "Ok, we'll strike 'asshole' and we'll go with, 'Oh well, why don't you go jump in the lake?', how's that? That makes it nice and neat."

In other words, even if you can verify you didn't swear at the guard, it doesn't matter because you must have done something ("buggin' the man" as the chairperson termed it). Regardless of the real events that transpired, the provisions of Section 28 [9] are applied to the case, with no attention given to any uncertainty that might be introduced as to what the inmate said or did not say.

#### *In Camera Deliberations*

The Correctional Centre Rules and Regulations stipulate that an inmate "shall be present at the hearing" (Section 32 [3]) and that requirement is echoed in the Manual of Operations (Section A3, para 5.05 [2]). Of the 64 cases considered, the inmate was excluded for part of the deliberations in 18 cases (28%) while decisions were made about conviction or sentencing. In two cases (3 and 11), the Officer-in-Charge excused the inmate from the hearing while s/he further investigated the events surrounding the charge or gathered evidence (i.e., through a phone call).

Generally, the prisoner was asked to leave so that a conversation could ensue with members in attendance, often including the officer who laid the charge, to deliberate on the issue of guilt or type of disposition (Cases 8, 9, 13, 14, 17, 24, 54, 55, 56, 57, 58, 59, 60, 61, 64).

In Case 26, the inmate was excluded from the hearing while the Officer-in-Charge interrogated a witness requested by the inmate. The prisoner was not allowed to question the very witness he needed to verify his version of events. Furthermore, the tape recorder was shut off in all but two of the above cases, making a review of the deliberations made while the prisoner was outside impossible. Outside review agencies (Inspection and Standards, the Ombudsman or the courts) are not privy to the criteria by which guilt is determined or punishments chosen whenever *in-camera* conversations take place. The secrecy imposed by the hearing chairpersons during these conversations do nothing to remove the disciplinary hearing from the penumbra of the Star Chamber.

#### *Reporting Officer Not Present*

The Manual of Operations (Section A3; 5.02 [4]) requires that where an inmate pleads not guilty to an allegation made by the reporting officer and an investigating officer has not been appointed, the officer who filed the allegation must be present.<sup>5</sup> In at least 12 (19%) of the hearings transcribed, the

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<sup>5</sup> Although the Manual of Operations requires the reporting officer to be present, the C.C.R.R. is less definitive. It

charging officer was not present<sup>6</sup> (Cases 11, 12, 38, 39, 54, 55, 56, 57, 58, 59, 60, 64) and in one case (63), the officer who requested the charge to be laid sat as a member on the disciplinary tribunal. A person who lays an allegation and later sits on a disciplinary panel to hear that same charge violates the empowering legislation (C.C.R.R., Section 31 [2]).

By conducting the hearing without the reporting officer, the procedure for allowing an inmate to answer to a charge becomes further lubricated with "crime control" values (Packer, 1966). Reading "facts" from a written report can scarcely be refuted or challenged. What semblance there is between "what really happened" and the officer's written version of the offence is edited, interpreted and expressed as facts with vested interests in mind. Similar to McBarnet's (1981) criticisms of the testimony offered by witnesses (including the police who laid the charge) in outside courts, the case against the inmate becomes a biased construct, "manipulating and editing the raw material of the witnesses' perceptions of an incident into not so much an exhaustively accurate version of what happened as one which is advantageous to one side" (McBarnet, 1981: 17). However, the process is tilted to an even greater degree than what one might find in criminal and civil courts: the

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<sup>5</sup>(cont'd) states only that "Where an inmate denies the allegation, the hearing shall *consider the report* of the officer who made the allegation...". This leaves it open to the Officer-in-Charge to decide whether he calls the reporting officer or only considers the written report.

<sup>6</sup> In fewer than six hearings, it was impossible to tell from the taped proceeding if the reporting officer was present or not.

administration's definition of the situation cannot be refuted when the inmate does not have the luxury of cross-examining an adverse witness or doing so with counsel.

### *Information Monopoly*

There is yet another feature related to the inability of the accused to question information used against him/her to arrive at a disposition. Progress log entries, made by correctional line-staff<sup>7</sup> are not available for review by inmates. Entries in -----

<sup>7</sup> Some entries made in prisoners' progress logs are vague, editorialized or typify a mentality devoted to exposing (if not manufacturing) deviance. Here are some examples:

"Tries to manipulate staff in trying to get things his own way, gets along well with this writer, but I wouldn't trust this prisoner for one second."

"I/M [inmate] submitted the attached special request. He was warned to be more respectful and less familiar with staff. Female staff, be aware of his sheenaneegans!"

The attached Special Request Form referred to in the above entry said, "To have O---- and L----'s [female staff] phone numbers for when I get out."

### Attitudes:

"Although he still seems to be slow in locking down, proceeding to activity, etc., he not (sic) as 'cocky' as he used to be."

"I asked Mr. V---- to do up his buttons when responding to nurses call for medi. V---- gave me an *irritated look*, however, complied with my request. *Presented no further problems*" (emphasis added).

On the same file, only days apart were the following two entries:

1. "The more I get to know prisoner the more I watch my back. Get feeling (a covert heavy) doesn't do anything to get caught, but always near when something suspicious happens. Kepts [sic] self and room clean. Gets along with peers."

these logs are often employed by chairpersons as justifying rationales for proscribing misconduct. It should be noted that using formal procedures to resolve problems with control may be the last step in an incrementally restrictive series of sanctions: warnings, withdrawn privileges and lockdowns may have preceded the officer's decision to lay a charge. These disciplinary steps are usually documented in the individual prisoner's progress log. What may be disadvantageous from an inmate's perspective regarding this monopoly on information is that s/he has no way of knowing, repudiating, embellishing or otherwise telling his/her side of the story regarding these earlier steps. Also, it is sometimes the case that a problem prisoner for a few staff is portrayed, via daily log entries, as respectful and conforming to other officers. However, consensus of opinion is generally the rule.

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'(cont'd)

2. "This prisoner is always polite and cooperative with this staff. Gets along will with peers on unit."

It may not be a good idea to be too silent in prison, either:

"No problems to this date, from this writer but tends to try to play the hard nose type with me, doesn't say anything, and if asked anything he tries to say as little as possible. Do not feel comfortable with this inmate."

These examples also expose the individual, interactive work that goes into imputing deviancy on prison inmates.

## *Glossing over "Technicalities"*

If this argument was concerned only with exposing the practice of illegal diversions from the Correctional Centre Rules and Regulations or policy directive violations in the Manual of Operations made by disciplinary chairpersons, virtually any one of the 64 cases considered in this chapter could be shown to demonstrate some broken rule, directive or element of "natural justice". To restate a previous position, the focus here is on the various rationalizations, exceptions, processes and practices by control agents that impute deviancy on a socially marginal group.

What happens when an inmate raises challenges to chairpersons that they are not being afforded their procedural rights? How does this glitch become rectified so that the business of ordering the prison can continue? Challenging procedural rules could very well drag the process of ordering the prison to a cumbersome halt, as would be the case if every accused person in the outside arrangement of criminal justice requested a jury trial. Some noteworthy examples where the hearing officer violates procedure are provided below.

### *Copy of Charge Not Received or Illegible*

An inmate has a right to be informed of the case against him/her and to be given sufficient time to prepare a defense. Because the charge form is a four part copy, the last of which goes to the prisoner, the writing on the last copy may be barely

legible. As the following cases illustrate, it does not seem to matter at all if the accused received a legible copy of the charge or any notification of the charge whatsoever. Case 5 is typical:

O.I.C.: "Did you receive a copy of this charge?"

Prisoner: "Not legible."

O.I.C.: "You received a yellow copy, signed by Mr. B---, he's the one who presented you a copy at, ah, 18:09 last night."

Prisoner: "Uh-huh."

O.I.C.: "How do you plead to the charge?"

The hearing chairperson relies on the *record* of the inmate having received a copy of the charge to deal with this problem. (As it turned out, this was an "open and shut" case of possessing contraband with the inmate not disputing the allegations against him). There is no query as to whether the prisoner understood the charge as set out in the written description of the offence. Similarly, Case 11 exemplifies the response to the "technicality":

O.I.C.: "Did you receive a copy of the, ah, offence?"

Prisoner: "Yes sir I did sir. I have trouble reading, ah, I can't read it clearly."

O.I.C.: "Ok, I'll be reading it to you anyhow."

Case 39:

O.I.C.: "Did you receive a copy of your charge?"

Prisoner: "Yeah, but I can't read what it says so I threw it away."

O.I.C.: "Ok, I will - you threw it away? Ok, I'll read



out the charge that we have here. [Reads charge] Do you understand that charge?"

Prisoner: "Yeah, I understand it."

Case 44:

O.I.C.: "Did you receive a copy of your charge?"

Prisoner: "Yeah, I couldn't read it though."

O.I.C.: "You couldn't read it, ok, ah, would you mind if I just read it out to ya? And give you a copy of it if it's required?"

Prisoner: "Go ahead."

Case 16:

O.I.C.: "Did you receive a copy of these charges?"

Prisoner: "No."

O.I.C.: "How do you plead to these charges?"

Prisoner: "Not guilty."

The objective of informing the inmate of the offence in writing is to provide him/her with sufficient details of the allegation to answer the charge. Although most situations probably do not require an adjournment while a prisoner contemplates the details of the facts against him/her if s/he could not read the charge sheet, the opportunity to do so is never advanced. It is only relevant to the hearing chairperson that the inmate understands the offence, as read, to which s/he is alleged to have committed. Some American courts have declared that a prisoner should have not only written notice of the charge but shall be given 48 hours in which to prepare a defense to the charge, if so required (Cohen, 1973: 871).

Cases 16, 39 and 44 show the ease with which prisoners acquiesce to procedural violations. However, Case 59 is especially instructive because it initially appears that the prisoner is going to challenge the legality of the hearing on the basis that the charge was not served to her. Notice how the chairperson deflects this challenge:

O.I.C.: "And you have received a copy of this allegation, have you?"

Prisoner: "No I have not, no papers have been served on me, no investigation has been done, no matron (unintelligible) since last night and today and she has not even attempted to approach me to give me my charge sheets, I've never received charge sheets, I don't know what the charges are, nothing as of yet, so like this is all illegal-"

O.I.C. (interrupting): "So you didn't receive, what happened last night, this is in fact a remand."

Prisoner (speaking simultaneously with above): "No I did not receive the charge sheets, nobody talked to me or investigated, nothing."

Unidentified voice: "The papers were given to, ah, Correctional Officer B---- on the 29th of ---- and she, she did make an attempt to serve them at that time."

Prisoner: "When did she make an attempt to serve them, when was that? I would like her called to say that she tried to serve papers on me and I avoided it. I've been there since last night and all day today and nothin' is said to me, nobody said to me, 'S----, I've got these papers for ya. No, she locked me last night, she could have done it right then in my room. And nobody made no attempt to lay any charges on me at all."

Same unidentified voice (speaking simultaneously with above): "I wasn't present at the time..."

O.I.C.: "Well I think-"

Prisoner (interrupting): "And, ah, I even went and took this so far as to phone my own lawyer and he said any courts of any kind, whether they be internal, external whatever, like there's rules, right?"

O.I.C.: "Yeah."

Prisoner: "And like and I told him, nobody's given me papers yet, what do I do, he says shut your mouth and we'll just see--"

O.I.C. (interrupting): "Ok, well, I've got, I've got it, I have it written here that at 5:20 p.m. on the 30th on the ---- month of the 85th year that was served on you by R---- V----, Correctional Officer, now, if you choose to dispute that, then I think, and you choose to appeal, if you are in fact found guilty of this allegation, then that would form a grounds for an appeal."

Prisoner: "Yeah but the court is illegal since I haven't--"

O.I.C. (interrupting): "Now I'm saying, I'm making an, ah, *I'm making a judicial decision* that in fact that those--"

Prisoner (interrupting): "Ok, ok, that's all I was sayin' (unintelligible) I'm not in my unit, how can she say that I wasn't around for two days? You know, I had to be on my unit, right? With her. So like there's no reason why she didn't"

O.I.C.: "Well, you're saying she didn't serve them and she's alleging, or she's signing--"

Prisoner: "She didn't do her job, Mrs. M----, so like I'm just lettin' you know."

O.I.C.: "Well, that's your opinion, ok, I'm not here to discuss that, I'd like to deal with this allegation, you know what it is, ok?"

The inmate alleges she was not informed of the case against her. This objection is deflected with comments to the effect that an appeal to Inspection and Standards can be made, after a disposition has been given on the basis of a procedurally flawed hearing. (Later in the hearing, the accused appears not to be fully informed of the administration's case when she has trouble

understanding three charges laid against her in response to one incident). A "judicial decision" to nevertheless proceed trivializes (or ignores) the intent of underlying common law of the right to know and respond to allegations made by state agents. Streamlining the disciplinary process is accomplished by relying on entries on the charge form, rather than calling into account the actions of officers with a duty to notify prisoners of the allegations made against them. Other questions posed by inmates as to the procedural regularity of these hearings are successfully defused as the following example demonstrates.

### *Stale-Dated Charges*

In Case 61, a prisoner had been charged on two separate occasions, once on the 17th of the month and once on the 19th. She alludes to the time it has taken for the former charge to reach the hearing stage (now the 21st of the month or 96 hours since the offence occurred).

Prisoner (interrupting): "Can I also question something?"

O.I.C.: "Yeah."

Prisoner: "This occurred on the 17th."

O.I.C.: "Yes."

Prisoner: "Ok, according to the C.C.R.R., I had to be tried on this within 72 hours, am I correct?"

O.I.C.: "On the date it was filed and it was filed on the 19th of February."

Prisoner: "Oh I thought-"

O.I.C.: (interrupting): "No."

Prisoner: "-it is not from the time of the occurrence?"

O.I.C.: "No, no, it's from the 19th."

Prisoner: "All right."

Unidentified voice: "Are you satisfied with that?"

Prisoner: "Yes, I am."

What the disciplinary tribunal members neglected to tell the inmate is that the reporting officer was supposed to have filed the charge forthwith<sup>8</sup> according to Section 30 (a): "...the officer shall *forthwith* file with the director an allegation in writing outlining the facts of the alleged breach..." According to the chairperson of the tribunal, it was not filed until two days after the alleged breach. This questionable interpretation of the C.C.R.R. represents one more technique for manipulating expedient and predictable outcomes in disciplinary hearings.

### *Sentencing Disparity*

While qualitative methods are unsuitable to fully assess the extent of sentencing disparity, two examples arose in the present sample that warrant comment. Cases 11 and 12 arose from the same incident where two inmates were charged for fighting. The prisoner in Case 11 received a five day suspension (of days in segregation) for the infraction whereas the co-accused in Case 12 was given four days in segregation. During their

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<sup>8</sup> According to Black's Law Dictionary "forthwith" means "immediately; without delay; directly; within a reasonable time under the circumstances of the case...the first opportunity offered".

separate testimony, each accused the other of initiating the fight. The officer who charged the inmates was a witness to the altercation but was not present at the hearing to verify either version. Rather than postpone the hearing until the only staff witness can be called, the hearing officer interrupts the proceedings while dealing with the first inmate who received the lighter sentence "to use the phone". He asks the prisoner to wait outside and turns off the audio tape while he makes a call. When the tape is turned on again, the inmate re-enters and the O.I.C. says he spoke to another officer who was "familiar with him" and received "favorable reports":

O.I.C.: "So what I'm gonna do is I'm gonna put, ah, 5 days over your head. What that means is that if your ever come before me again, you'll be doing that 5 days."

Prisoner: "Five days in the hole--"

O.I.C. (interrupting): "Five days over your head though, which means that it's a suspended sentence, ok? We don't want altercations to be settled by fisticuffs, guys getting hurt and this sort of stuff, eh? But I'm believing your story now, that, you know, you were reasonably provoked into a situation and that, ah, I had preferred to have Mr. L---- [the charging officer and only staff witness] here. I'll be talking to Mr. L---- but he's going to be off a few days from now."

Immediately following the dismissal of this prisoner, the co-accused enters and testifies that the other inmate struck the first blow and he was only defending himself:

Prisoner: "I was doing nothing but defending myself, sir."

O.I.C.: "Well, the director takes a very dim view of fighting as I said before and, ah, as a result of that, I'm going to sentence you, I'm going to find you guilty of being involved in a fight, ok? Takes two to fight, right?"

Prisoner: "Sir."

O.I.C.: "And I'm going to sentence you to four days in segregation counting today, ok, so you can get out Sunday night. If you want to appeal this, you can write to Inspections and Standards, ok?"

While the inmate in Case 11 was entitled to a separate investigation performed by the hearing chairperson, the other prisoner was given a harsher disposition based on unknown criteria. Obviously a judgement was made about which inmate was telling the truth but the secrecy of the fact-finding process and lack of articulated sentencing rationale created disparity based on mysterious information. Regardless of these observations, officers presiding at disciplinary hearings need not worry too much about variations in their dispositional decisions. They can always be rationalized by citing individual discretion.

#### *Individual Discretion*

Having been found guilty of swearing at an officer, the prisoner in this situation (Case 45) was perplexed by the severity of the sentence he received for his first institutional offence (10 days loss of remission) in light of the sentence just given for his second offence (five days loss of remission).

Prisoner: "Ok, can I ask another question?"

O.I.C.: "Certainly."

Prisoner: "Ok, on the first charge, when you first charged me, I never, I never, ah, been charged, I never been, ah, nobody ever suggested getting charged to me

before and how come I lost 10 days [remission]? Just--"

O.I.C. (interrupting): "Cause I judge each individual one on its own merits and if I suggested 10 days sentence here, you refused an order which I don't go for at all, and I suggested that you get 10 days loss of remission, *that's my privilege* to operate within my bounds. Now this time I have you 5 days loss of remission *as a break* 'cause I hope you're gonna smarten up and get with it. Ok? Each individual charge is separate. If you are not satisfied with the outcome of this or the proceedings here that we've had, you can appeal to Inspections and Standards. Ok, within 7 days. So I think you've been dealt with reasonably, if you don't think so you can go that route. Way you go."

It would appear that the inmate was trying to raise the issue of sentencing consistency, looking for a reason why the sentence to his first offence was so severe. He is told that it is the privilege of the O.I.C. to sentence as he pleases as long as it is within "bounds", that the second sentence is an act of mercy, that he can appeal the disposition if he doesn't like it and in the presiding officer's opinion, he has been dealt with fairly. Individual discretion (based on invisible criteria) is invoked as an explanation for the disparity. Assuming that it is true that the presiding officer wants to afford the inmate a second chance out of mercy or other altruistic sentiments, why was that "break" not offered the first time he was charged? It would seem more consistent to impose sanctions on an incrementally restrictive scale than to punish punitively one day and be merciful the next.



## *No Challenges to Procedure*

Prisoners rarely challenge disciplinary hearings on procedural errors. Their passive submission to the process of blame and punishment is subject to at least three possible explanations. First, they may simply be guilty of the allegations made by the reporting officer, and accept the sanctions of the hearing as the "cost" of their misbehavior. Alternatively, they may have more to lose by maximizing their right to due process, fearing longer remands in segregation-like custody. They may also wish to avoid "heat" from custodial staff. For example, in one of the prisons studied, when two prisoners attempted to invoke procedural rights (i.e., to solicit witnesses supporting their defense), they were faced with subtle, denigrating remarks from the officer chairing the hearing (Cases 26 and 34). Although the accompanying metacommunication is lost in a print medium, a message concerning the inmate's moral status nevertheless emerges in the posture taken by the chairperson. In Case 26, the officer who filed the allegation was testifying as to the precarious nature of mass inmate movements, a time when order is particularly important (the inmate has been charged with being on the wrong tier during this time):

Reporting Officer: "...The inmates were in the process of coming back to their tiers with the meal. At that time it's a very vulnerable situation where assaults can happen, thefts go on, it's a dangerous time."

Prisoner: "I'm not a thief."

O.I.C.: "What are you in jail for?"

Prisoner: "B and E [break and enter]. But I don't steal from other inmates."

O.I.C.: "*A thief is a thief is a thief*. Anyway, that's not what you're here for."

Prisoner: "No, it isn't."

In this case, the Officer-in-Charge made innuendos as to the inmate's inevitable guilt early in the hearing, told him his (inmate) witness "is fucked" if he didn't tell a version of the event in question favorable to the accused and refused to allow the prisoner to question a witness who might support his side of the story (or at least introduce some compelling doubt as to the reporting officer's allegations). The reporting officer joined in the interrogation and when it appeared that the inmate's version of the events in question might be plausible, he was told by the former: "Get your hands out of your pockets!"

A further illustration typifying subtle yet negative feedback to inmates requesting procedural rights is evident in Case 34. An inmate asked for a guard to be present and verify his contention that a prohibition against posters on cell walls had not been enforced by custodial staff for the previous month. Near the end of the hearing, the Officer-in-Charge told the inmate, "...you could have avoided all this shit and the paperwork if you had done it, you know, right off the bat, instead of, you know, trying to play Philadelphia lawyer here..." Thus, trying to defend one's rights is reinterpreted to "shit and paperwork" since passive submission is the key to

getting along in prison. In this case, sporadic enforcement of certain rules may indicate that many of the line-staff view them as unimportant: it should not surprise anyone that inmates feel the same way and act accordingly.

The verbal humiliation characterizing some hearings, especially where an inmate challenges the reporting officer's particulars, indicates reasons why inmates may be reluctant to mobilize their rights to a fair hearing. Prisoners can hardly view as impartial an authority that so blatantly chastises any attempt at a defense. Some hearing officers are so visibly biased (or antagonistic) in their role of adjudicator that they render the hearing a mere declaratory instrument.

There is a remaining feature to many prison disciplinary hearings that depict them as caricatures of fairness. If an agency is to be successful in its primary goal of maintaining order and punishing transgressors, the definitions it attaches to behavior (with punishment to consolidate the definition) must be final. There is no room for argument, alternative explanations, or objections. To secure the judgement of the hearing in irrefutable terms, appeal to a higher authority cannot be represented as a viable alternative. And the most expedient means to accomplish this end is to omit any reference to appeal procedures.

## Making the Disciplinary Decision "Stick"

Correctional staff refer to Section 33 (6) of the Correctional Centre Rules and Regulations as an appeal procedure. But on closer inspection, it is more accurately depicted as a contractual obligation. Mercy is available but dependant upon the inmate's promise to obey the rules. Discretion is given to the chairperson to "reduce or suspend the disposition" but only "on the undertaking of the inmate to comply with all rules and regulations of the correctional centre in future" (C.C.R.R., Section 33 [6], [7]). A clause also allows for a type of probationary supervision under a "specified officer" for a period of up to three months. Limited as these provisions are, they may be seen as a welcome alternative to the boredom of segregation or days of increased imprisonment as a result of lost remission time.

Sections A3 5.10 and 5.11 of the Manual of Operations read: .

5.10 The panel shall advise the inmate of the provisions of Section 33(6). If the inmate applies for reduction or suspension of a disposition that it has made in relation to the offence heard, the panel should review and consider the inmate's progress file and any other pertinent records to ascertain the inmate's previous conduct. If the panel is satisfied the case warrants a reduction or suspension, the panel should discuss the conditions of Section 33(6) with the inmate. If the inmate indicates that he is prepared to comply with the terms of the undertaking, the panel should then consider the reduction or suspension of the disposition.

5.11 The panel shall respond to the inmate's request for a reduction or suspension of the disposition and then confirm or adjust the sentence. A record of the disposition as well as the reasons for that disposition is then entered on the Inmate Offence Report.

Should the prisoner not wish to apply for a sentence reduction, s/he may appeal the conviction or sentence by writing to the Director of Inspection and Standards within seven days. Here too, there is an obligation on the Officer-in-Charge to notify the prisoner about this avenue of appeal (Section A3 [5.11] in the Manual of Operations). As the following cases show, the intent of the directives<sup>9</sup> and the practice are two different realities.

Appeal provisions according to the C.C.R.R. (Section 33 [6]) for sentence leniency were not described to the prisoner in 33 (51%) of the sampled cases. Inmates were not told about appealing to Inspection and Standards in 23 cases (36%). Both explanations of the appellate routes were often so brief, paraphrased or adulterated that they were either incomprehensible or partial. In one institution, the degree to which the appellate procedures were clearly explained seemed dependent on the inmate's deference to the chairperson. Generally, detailed explanations were offered if the inmate was obsequious. Inmates who showed less deferential attitudes were given only cursory descriptions of the appellate avenues or were

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<sup>9</sup> The intention of the hearing is described in Section A3 [5.01] in the Manual of Operations:

Though some of an inmate's normal rights have been suspended or restricted by incarceration, it is nevertheless important to recognize and accept the premise that the principles of administrative and procedural fairness apply at these hearings. An inmate is, in other words, entitled to a fair hearing, to hear and be heard, while undergoing this internal disciplinary process.

given none at all. Case 13 shows how the Officer-in-Charge describes appeals to an inmate who, in his opinion, was a "victim of circumstance" (possession of cannabis), has shown a "sense of remorse", and "whose file is "very good as far as...behavior":

O.I.C.: "I must point out to you right now, ah, that there are two sections on which you can appeal this sentence, this sentence, if you feel that you, the process has been unjust or the decision of this court has been unjust, first one being Section 31 (6) of the Correctional Centre Rules and Regulations where you may apply to this panel for reduction or suspension of the sentence, ah, on the promise of good behavior and Section 34 where you may apply to Inspections and Standards within seven days, ah, from this hearing. You understand?"

In Case 8, where the accused prisoner was old, respectful and appeared not to be "jail-wise", a different Officer-in-Charge details one of the appellate avenue slowly, stating that staff will assist him by providing "paper and pencil" and the address to Inspection and Standards should he wish to appeal.

Case 22 is qualitatively at variance with the normal rendition of the sentence-reduction provisions of Section 33 (6). Here, a prisoner had been charged with using abusive or insulting language (Section 28 [9]) towards an officer during an incident where the latter had been threatened. The prisoner pleaded not guilty. The presiding Officer-in-Charge appointed an investigating officer to interview the prisoners on the unit who witnessed the altercation. Finding him guilty from this report, he later states:

"I want to point out to your Section 33 (6), that you have the right to request a reduction or suspension in that sentence. Are you interested in requesting a reduction or suspension in that sentence?"

Prisoner: (after a pause): "Reduction."

O.I.C.: "OK, the court is hearing your request for a reduction and your, ah, your, your willingness to comply with the rules and not use bad language directed at officers. As a condition of reducing that sentence to time served in segregation [one day], I'm placing you under the supervision of ah, the officer ----, the gentleman behind you who escorted you down [not the reporting officer]. That is to say, if, ah, I, he, has any reason to bring you back before me, then I will review or pass a new disposition. Will I read that to you so you understand what I've done? Ok, 33 (6) reads...[reads entire section in full].

O.I.C. (continuing): "...a period of two weeks [supervision] would be sufficient. Do you think you and Mr. N---- can make sure that nothing further happens between that period of time, he doesn't have to bring you before me?"

Prisoner: "Yes."

O.I.C.: "All right, we'll do that."

What is striking about this case is that even though the prisoner constantly maintained that he did not swear at the officer (despite the contradictory evidence obtained from the reporting officer and other inmates) and was not deferential to the hearing chairperson, he was still offered and given relief in the provisions of the sentence-reduction clause. This was the only case where the inmate's attitude was independent of the quality of explanation provided concerning an appeal avenue.

Prisoners not displaying the necessary deference to authority were treated somewhat differently. Cases 1, 4, 40 and 42 are typical of the appeal descriptions offered them:

Case 1:

O.I.C.: "You may appeal this by writing to the director of Inspections and Standards within seven days."

Case 4:

O.I.C.: "You have a right to appeal this under Section 35 [sic] of the Correctional Centre Rules and Regulations by writing to the Director of Inspections and Standards within 7 days. Understand?"

Case 40:

O.I.C.: "Well, right now you just earned yourself 15 days in segregation. And if you're ordered to work with a PC [protective custody] gang, you'll work with 'em."

Unidentified voice: "Fifteen days segregation, get out of here."

O.I.C.: "Now just a minute here. Before you go, do you, have you got any reason why I should reduce or suspend this sentence?"

Prisoner: "I don't think it will make much difference, I don't..."

O.I.C.: "Ok, the sentence will stand. Now, if you are not satisfied with the outcome of this hearing or the proceedings that went on, you are at liberty to appeal to Inspections and Standards. Ok? Way you go."

Case 42:

O.I.C.: "And by the way, if you find some fault of this hearing here, you can apply to Inspections and Standards, ok, within seven days."

This afterthought about appellate choices is downplayed in comparison to the other procedural features. Asking the prisoner if s/he has any reason why the sentence should be altered does little justice to the intent of the sentence-reduction provisions outlined in Section 33 (6) of the C.C.R.R..



The sentence-reduction clause can also be phrased in such a way as to make an appeal very unappealing. Case 51 demonstrates that not only is a verbatim reading of the section difficult to comprehend, in many situations the "relief" offered in the C.C.R.R. *exceeds* the original sentence:

O.I.C.: "Ok, I'm going to give you four days early lock-up and that is under, the disposition is under Section 33, ah, so that's what we're gonna do. Ok, now you, there is Section 33 [6], I, I have to advise you about Section 33 [6], do you know about Section 33 [6]? 'Where a disposition under the subsection 1 has been made against an inmate and the inmate applies to the disciplinary panel or the officer that made the disposition', ah, I can't even see properly, ok, 'that made the disposition where the panel, the officer may, on the undertaking of the inmate, comply with all the rules and regulations of the correctional centre, can be reduced or suspended, ah, the disposition and where they consider it appropriate, direct that, as a condition of the reduction or suspension, the inmate report to and be under the supervision of a specific officer, period of not more than 3 months during a term of confinement'. Now you can apply for the reduction or suspension of your sentence under that section, would you like to do that? *And then we can put you under the supervision of an officer for not more than three months.*"

Prisoner: "So what do you want me to do?"

O.I.C.: "No, you have the, the right to say no, you do not want to or yes you do want to apply for the suspension."

Prisoner: "No, no, no."

Hearing chairpersons may find it awkward to sentence an inmate and in the next breath ask him/her if they wish to apply for a reduction or suspension of that sentence. While the intent of the legislation is undoubtedly noble, it may place the adjudicator in the uncomfortable position of reneging on an earlier declaration and/or having to justify to the prisoner why

s/he will not consider alleviating the penalty. Another Officer-in-Charge told an inmate these statutory provisions were "a dumb thing but I got to ask you" (Case 30). One senior officer tried to elicit the right response so that the sentence-reduction provisions would be available to the prisoner (Case 23):

O.I.C.: "I'm going to give you 10 days segregation. I must tell you that, ah, under Section 33 [6] this can be reviewed if you have, ah, *some remorse...and some ability to abide by the rules*, you can ask that I review it later on..."

An argument can be made that the correctional staff are fulfilling their statutory duties by reading the appellate provisions framed in the legalese in which they were drafted. However, if the stated intent of the disciplinary hearing is to provide a prisoner with a "fair hearing, to hear and be heard" (Manual of Operations; A3: 5.01), why is there not an accompanying practice to ensure that prisoners fully comprehend the relief available? (Some prisoners had difficulty understanding the oral description of procedures involved in the hearing and needed clarification on terms like "disposition" and "suspension").

One explanation for the inattention surrounding appeal procedures in disciplinary hearings is that hearing officers see the issue of guilt or innocence as foreclosed, the prisoner admits complicity in the offence and appeals are nothing more than cumbersome trappings to an otherwise simple forum. When

asked, prisoners in the hearings generally responded that they did understand their appeal choices.<sup>10</sup>

Why should there be elaborations on appeals if prisoners say they understand what is available to them? Phrasing the question in this manner assumes prisoners have a sophisticated understanding of the appeal process (or the C.C.R.R. in general) and fails to consider the amount of training afforded to both correctional line staff and officers chairing disciplinary hearings to ensure that *they* adequately comprehend the provisions of the C.C.R.R.. Inmates, who lack such training and are often illiterate, are at a structural disadvantage to know *when* procedural violations have occurred and *what* recourse is available to redress possible grievances. Without the party whose procedural guarantees are outlined in the Correctional Centre Rules and Regulations to adequately appreciate their obligations and rights (the former being known only too well), the legislation becomes little more than an empty showcase, serving to rationalize selectively applied clauses.

#### Silent or Didactic Retribution

The discussion to this point has not considered a feature independent of whether the inmate pleads guilty or not guilty: the verbal explanation offered for the punishment imposed. This

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<sup>10</sup> The fear may be that to admit that s/he does not understand the appeal provisions as they have just been explained provides an opportunity for the hearing chairperson to further intimidate him/her. Some prisoners also expressed a desire just to get the whole thing over with (Cases 1, 17, 61).

is an important element of adjudicatory tribunals with the power to impose sanctions. By offering reasons for the disposition, an effort is made to articulate what actions are being taken in response to the inmate's misbehavior, to accomplish these goals in whole or in part:

1. To make a review of those reasons possible under Section 34 [2] where the Director of Inspections and Standards "may require the chairman of the disciplinary panel or officer who presided...to submit to him within seven days *written reasons in support of the determination or disposition under review.*"
2. To fulfill disciplinary panel guidelines (Manual of Operations Section A3: 5.11): "A record of the disposition as well as the reasons for that disposition is then entered on the Inmate Offence Report". From quantitative data in Chapter One, we know that reasons for dispositions are rarely entered in Part III of the Inmate Offence Report. Could this inattention to paperwork be because the reasons for the disposition are made verbally at the hearing? This question will be addressed below.
3. To provide the prisoner with a statement about what kind of punishment might be expected for further (detected) violations of the same (or other) rules. In other words, correctional officials are encouraged to at least *state* their intended objectives through punishment but are under little or no pressure to *justify* their actions.

Reactions to misbehavior were characterized by a retributive approach by presiding officers common to all four prisons in various degrees. This *unstated but understood* relationship between what prisoners did and what they deserve is part of an unquestioned authority manifest in an attitude that pervades every interpersonal aspect between the keeper and the kept and that is most explicit during the disciplinary hearings. That attitude is what Hawkins describes as the *pater-familial* concept of authority where prisoners with an inferior and dependent status "are seen as being in a state of pupillage and are expected to accept a dominance-submission pattern of relationships" where "their access to rewards ... and ... necessities is subject to their total obedience to the rules of the institution" (Hawkins, 1976: 143). Simultaneously, the stated motives for a particular disposition frequently can be altruistic ("It's for your own good") and/or paternalistic.<sup>11</sup>

The silent retributive function of the hearing can be observed in at least 24 (37%) of the hearings. It is silent because no reasons are advanced for the punishment imposed (none have to be) and retributive because the only rationale for the punishment appears to be a *repayment* for a perceived harm to

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<sup>11</sup> One of the most detailed descriptions of paternalistic metacommunication is found in Harris's *I'm O.K.-You're O.K.* and include "furrowed brow, pursed lips, the pointing index finger, headwagging, the "horrified look", hands on hips, arms folded across chest, wringing hands, tongue-clucking, sighing, patting another on the head". Verbal clues include "I am going to put a stop to this *once and for all*; I can't for the life of me...; Now always remember; How many times have I told you? If I were you..." (Harris, 1973: 90; italics in original).

prison order. It is understood by both parties that the inmate did *something wrong* and that he/she will suffer some deprivation (typically segregation or loss of remission) for the infraction.

Case 29 is typical:

O.I.C.: "Circumstances were: the inmate was found to be creating a disturbance on five landing while the inmate was locked up in his cell... he proceeded to curse and swear at staff and throw his furniture about the cell. How do you plead?"

Prisoner (in heavy French-Canadian accent): "I don't know"

O.I.C.: "You don't know how to plead? Guilty or not guilty?"

Prisoner: "I didn't throw it over the place, I just kicked it once."

O.I.C.: "Once or twice, it doesn't really matter."

Prisoner: "I just kicked it once."

O.I.C.: "Are you guilty or not guilty?"

Prisoner: "Guilty."

O.I.C.: "Why?"

Prisoner: "Eh?"

O.I.C.: "Why?"

Prisoner: "I keep asking them to move me-"

O.I.C. (interrupting): "Where do you want to move, Quebec?"

Prisoner: "To another cell."

O.I.C.: "To another cell, why?"

Prisoner: "My door never wants to open."

O.I.C.: "Your door never wants to open?"

Prisoner: "It's screwed up. In the morning, I missed breakfast twice. I just wanted to move. I asked them four times."

O.I.C.: "And your door doesn't open? That's strange, everybody else's door opens, what's the matter with your door?"

Prisoner: "It don't open, it stays locked. Ask anybody on the tier, man, they know."

O.I.C.: "Is that what happened, does his door stick or anything?"

Two voices, simultaneously:

Voice #1: "It does stick, sir."

Voice #2 "I don't know, that's the first I've heard about it."

Voice #1: "I told him we couldn't do it now, that we were in the process of putting the yard out and that we would see about it later this afternoon but that wasn't good enough for him."

Voice #2: "Just before he came in, sir, he was screaming and shouting, hurling abuse."

O.I.C.: "Just came in here, eh? Ok. Gonna give you a cell where the door don't stick. Ten days segregation."

By not articulating why a prisoner is being punished, correctional staff avoid having to elucidate what they are attempting to accomplish with sanctions and assess whether those objectives are being met. Short-term objectives are possible where the goals are strictly incapacitative ("segregation will get you out of our hair for awhile"), retributive ("you got what you deserve"), or to reward the order-maintenance duties of staff by showing that transgressors are punished ("keep up the good work, boys").

A further 15 (23%) of the hearings incorporate a more salient retributive expression. They are accompanied by what military personnel refer to as a "dressing down", a didactic form of admonition with messages ranging from "You don't *ever* do that again" to "You're incorrigible". These following cases reflect examples of the pater-familial relationship to authority:

Case 1:

O.I.C.: "Mr. R---, *you don't intimidate, push, threaten or do anything to the staff in this centre-*

Prisoner (interrupting): "Hey, the guy stood there, solid"

O.I.C.: "Excuse me, I was talking."

Prisoner: "Hey, I was talking, too."

O.I.C.: "Shut up - while I'm talking, I'll give you a chance."

Prisoner: "Oh, you can tell me to shut up, right?"

O.I.C.: "*We will not put up with this kind of antics from you, ok? You will not threaten any of the staff in the centre, you will not push anybody...*"

Case 32:

O.I.C.: "...Ok. You plead guilty with an explanation, of course I find you guilty, you were warned several times not to wander around. We're gonna give you seven days in segregation. Not gonna take any remission off you, I think you're desperate. *You're gonna be around here for, forever. I don't know if we could stand you that long.*"

Case 40:

O.I.C.: "...I don't give a damn whether you want to work or you don't want to work, *when you're ordered to do so, and I don't care where it is or how it is, you will comply with that order. Do you understand that?*"



Seven (11%) hearings were markedly paternalistic, usually featuring the "I'll give you a break this time" clause as in Case 37:

O.I.C.: "What did I do the last time you were in front of me?"

Prisoner: "Five days, sir, loss of remission, sir."

O.I.C.: "*Are you going to get into trouble again?*"

Prisoner: "No, sir."

O.I.C.: "*Are you sure of that?*"

Prisoner: "Yes, sir."

O.I.C.: "Ok, I'll give you another five days, *I'll go easy on ya*. Five days loss of remission, ok? *If you're tryin' to get yourself together, you're going about it the wrong way.*"

Prisoner: "Yes, sir."

The message appears to be that prisoners at disciplinary hearings should be grateful that the Officer-in-Charge is as lenient as s/he has chosen to be. Inmates were also admonished as to the worst possible scenario presented by their offending conduct and appeared to be punished for what might have happened, not what did occur in a further five (8%) cases. To an inmate who saved three valium (for later use) administered by the prison nurse, the hearing officer states in Case 7:

O.I.C.: "...it's a serious offence in that if a person was to save medi and then perhaps do harm, do harm to himself, then we'd be in jeopardy."

Deterrence was mentioned as a sentencing rationale in seven (11%) of the cases under consideration. Only a few hearing chairpersons provided reasons for punishment as detailed as the

following illustration. An inmate with a history of violent offences (including confrontations with correctional staff) had been charged for refusing an order to go to his cell and for attempting to spit at the reporting officer. After the inmate had been found guilty and sentenced to five days segregation for refusing a direct order, the chairperson continues:

Case 9:

O.I.C.: "Mr. W----, as I've said before, the discipline of this centre is extremely important...with the inmate population here, we have to ensure that the discipline of our staff, and the discipline of the inmates are kept for the safety of everybody. You were in a situation that I can easily foresee that could have escalated to people being hurt, ah, and that something like spitting to me is one of the most disgusting things that a person can do, or attempt to do. I'm going to give you 15 days segregation, consecutive, consecutive to the five days, in hopes that, *this heavy penalty is something that will reflect on your mind to say, that this kind of action cannot be tolerated, cannot be tolerated here.*"

Conclusions

To summarize the features that pervade the prison disciplinary hearings analyzed above, a loose typology can be advanced that describes many of the attributes contained in each prison administration's formalized response to rule-breaking.<sup>12</sup>

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<sup>12</sup> This typology is a subjective assessment of the 64 transcribed hearings; other observers may not agree with how these clusters of features are used to describe the transactions. Responses to disciplinary infractions are germane to particular institutions or represent what might loosely be referred to as disciplinary "styles". The process of identifying these various responses began with identifying key steps in the disciplinary hearing and noting how each hearing chairperson conformed to (or deviated from) the required procedure. From that point, it became apparent that there were some overarching

No single hearing had all of the features assumed under each of the following headings but rather incorporated a preponderance of some features, and omitted others. Below are three clusters of characteristics under the headings of professional, paternalistic and antagonistic<sup>13</sup> disciplinary responses.

#### Professional

1. Multiple charges<sup>14</sup> laid in response to one incident,
2. Tribunals used in all cases,
3. Reporting officer present,
4. Procedural rules attended to in spirit and form,
5. Inmate's version of precipitating events heard,
6. Inmate treated with respect,<sup>15</sup>
7. Entire hearing recorded, including deliberations by panel,
8. Witnesses requested by inmate allowed,
9. Investigating officer appointed in some instances,

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<sup>12</sup>(cont'd) commonalities between disciplinary styles. Those similarities make up each "type" of disciplinary response.

<sup>13</sup> "Antagonistic" was chosen as the most descriptive word because the disciplinary transaction appears hostile, disbelieving and the inmate is the target of various "put-downs" throughout the discourse.

<sup>14</sup> Multiple charges may be prevalent in prisons with a preponderance of professionally conducted disciplinary hearings because of an administrative emphasis on proper form. If a prisoner was observed breaking more than one rule in the course of a single incident, s/he should be so charged. It could also mean that line staff, aware that procedurally correct hearings may determine an inmate not guilty due to "technical" errors, decide to "throw the book" at an inmate, ensuring a conviction on at least one of several charges laid.

<sup>15</sup> Showing an inmate respect may mean simply calling him/her "Mister"/"Ms." as opposed to the surname only. More often it implies hearing what s/he has to say in response to an allegation, presuming innocence and generally affording the prisoner a modicum of dignity.

10. Findings of not guilty,
11. Dispositions reasoned and impartial,
12. Wide array of punishments imposed,
13. Appeal procedures detailed.

Paternalistic

1. Single charges laid in response to one incident,<sup>16</sup>
2. Tribunals used sparingly,
3. Reporting officer sometimes present, procedural rules attended to in form but not in spirit,
4. Inmate's version of precipitating events discredited,
5. Inmate treated like errant child,
6. Entire hearing recorded except where deliberations occur between panel members,
7. Witnesses screened by hearing chairperson,
8. Chairperson investigates case,
9. No findings of "not guilty",
10. Disposition accompanied by "dressing down" inmate,
11. Punishment (loss of remission) provides greatest coercive potential through discretion,<sup>17</sup>
12. Appeal procedures cursory or phrased in such a way as to invite prisoner's declaration of remorse or appear as exceeding the benefits to be gained.

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<sup>16</sup> If line-staff never have to worry about an inmate being found not guilty, there is no reason to lay more than one charge.

<sup>17</sup> Loss of remission does not start until the inmate's present sentence expires. In the meantime, s/he can "earn back" the days lost through good behavior, judged by the unit director.

### Antagonistic

1. Single charges laid in response to one incident,<sup>18</sup>
2. Tribunals never used (single officer presides),
3. Reporting officer interrogates prisoner,
4. Procedural rules violated,
5. Inmate's version of precipitating events discredited or ridiculed,
6. Inmate treated as though guilt is a foregone conclusion,
7. Entire hearing recorded but may be "edited",<sup>19</sup>
8. Witnesses refused or cross-examined by hearing chairperson,
9. No investigations conducted,
10. No findings of "not guilty",
11. No reasons offered for disposition,
12. Retributive punishments favored (segregation awards),
13. Descriptions of appeal avenues nonexistent.

Not only can every hearing be described as predominantly committed to some of the preceding values, the various prisons in this study can be categorized to one of the following "types" based on the degree to which a prevalence of the features appear in the sample of hearings obtained.

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<sup>18</sup> See footnote 14, *supra*.

<sup>19</sup> In Case 26, the hearing officer edited the tape in such a manner to imply that the inmate who requested a prisoner witness was actually present during the cross-examination conducted by the O.I.C.. He states, after there is a gap in the recording tape (indicating it has been turned off), "So you've heard your witness, what do you have to say?" The prisoner, I strongly suspect, was not present to hear his witness in person but was played back the recording of the witness's testimony.

| SITE<br>----- | TYPE<br>-----              |
|---------------|----------------------------|
| Alpha         | Professional-Paternalistic |
| Beta          | Antagonistic-Paternalistic |
| Delta         | Paternalistic-Professional |
| Gamma         | Professional-Paternalistic |

There are several possible explanations as to *why* some disciplinary hearings are characterized with the features identified so far in this chapter. Hearings where the procedural requirements were tended to in form and spirit are generally conducted by staff who are influenced by senior correctional officials committed to professionalism in prison administration. This professionalism encompasses rational decision-making according to written and reviewable criteria. It goes beyond the bureaucratic imperative to "cover one's ass" and includes what appears to be a real desire to see fairness exercised (and be shown to be exercised) to both inmates and correctional line-staff. Inherent in this perspective is more emphasis on an objective assessment of the harm done by each institutional rule violation rather than dispositions based on tradition ("everybody gets a standard punishment for that offence"). Some effort is also extended to understand the inmate's version of the offence, casting challenges to singular descriptions of rule-breaking. Most importantly, a professional approach to maintaining order in prison will involve an attempt to find

alternative occupational rewards for line-staff than solely applauding efforts to identify and process order-threatening behavior ("thanks for keeping things quiet").

Paternalism in corrections is as least as old as the penitentiary. Based on the assumed, superior moral position of those in charge and the perceived infantile, dependent status of their charges, discipline is viewed as a means of correcting individual pathology as a father would correct a child. Similar to parental care, paternalism has nothing but the best of motives to coerce obedience and the right attitudes (e.g., deference, industriousness, asceticism). Respect for authority is not only expected of inmates, but it is given deference by those in charge. Thus, procedural requirements will be adhered to *because they come from a higher authority*. Since it is easier to conform to the letter rather than the spirit of the directives, violations of inmates' rights to fair and impartial decision-making will still occur. The "old guard" mentality is very much around to verse new officers in "reality therapy" so that the ways and means of relating to convicted persons changes very little. Prisoners are there to serve a sentence, if they take advantage of what resources are available and that helps them, fine and well. New disciplinary procedures are something that must be adhered to (at least, in form) so hearings generally follow the little colored card<sup>20</sup> provided to every

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<sup>20</sup> Hearing chairpersons are provided with a "procedures checklist" to ensure they have covered all the steps. A copy is reproduced below:

chairperson. Discretion is absolutely essential so that fine gradations of punishment can be dispensed according to the degree of conformity and deference shown by the inmate. Preferred punishments include loss of remission so that the management has enough leverage to extract continued conformity. There is little tolerance for audacious youngsters who break the rules ("it doesn't matter *which* rule you broke, you broke the rules") or for their explanations, because the officer is never wrong.

Hostile or antagonistic forms of disciplinary proceedings will be conducted by administrations that claim their

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20(cont'd)

PROCEDURES - DISCIPLINARY PANEL - STEPS

1. IDENTIFY PANEL MEMBERS
2. IDENTIFY ACCUSED BY NAME AND NUMBER
3. ASK ACCUSED IF HE RECEIVED A COPY OF OFFENCE REPORT.
4. READ CHARGE TO HIM.
5. ENSURE HE UNDERSTANDS THE CHARGE.
6. ASK HOW HE PLEADS TO CHARGE;
  - a. a. GUILTY, OR
  - b. b. NOT GUILTY
7. RECORD PLEA
8. IF PLEA OF NOT GUILTY, READ OUT REPORTS AND CALL WITNESSES.
9. IF INVESTIGATING OFFICER APPOINTED, HE SHALL BE CALLED TO PRESENT EVIDENCE.
10. HEAR INMATE ACCOUNT.
11. DETERMINE GUILT OR INNOCENCE.
12. ADVISE INMATE OF FINDING.
13. ASK THE ACCUSED IF HE HAS ANYTHING TO SAY BEFORE SENTENCE IS PASSED.
14. IMPOSE THE APPROPRIATE SENTENCE.
15. ADVISE INMATE OF SECTION 33(6).
16. RESPOND TO INMATE'S REQUEST FOR SUSPENSION OR REDUCTION OF SENTENCE - SECTION 33 (6).
17. CONFIRM OR ADJUST FINAL SENTENCE; RECORD THE DISPOSITION AS WELL AS THE REASON FOR THAT DISPOSITION.
18. ADVISE THE INMATE OF APPEAL PROCEDURE - SECTION 34 (1).
19. SIGN OFF DISCIPLINARY FORMS.



populations are so incorrigible that reliance on force, incapacitative dispositions and rough and speedy justice are essential for them to make through to the next shift. Their resources don't allow for rehabilitation, due process or even much in the way of programmed activity. Most staff believe that prisons were far better off before social workers and lawyers got in the way of punishing criminals, which is what incarceration is really for. Inmates, according to this orientation, *are in jail* so if a few of their rights are ignored, so what? "What about the rights of their victims?" or "They should have thought about the consequences of going to jail before they committed their crime" are often-heard responses to a suggestion of prisoners' entitlements when they are before administrative hearings. Staff are more often assessed on their ability "to keep the lid on the joint" and show machismo in the face of hostile charges than to employ elements of fairness when rules are broken.

The administrators of the former two types of disciplinary practices should not be held out as anachronistic blemishes on the face of an emerging "professionalized" corrections. Generally, they may be reflecting widely held public sentiments when they discipline prisoners. Max Weber remarked,

"Equality" before the law and the demand for legal guarantees against arbitrariness demand a formal and rational "objectivity" of administration, as opposed to the personally free discretion flowing from the grace of the patrimonial domination. If, however, an "ethos" - not to speak of instincts - takes hold of the masses on some individual question, it postulates substantive justice oriented toward some concrete instance and

person; and such an "ethos" will unavoidably collide with the formalism and the rule-bound and the cool "matter of factness" of bureaucratic administration (cited in Jacobs, 1977: 200).

The very system of values on which the professionalized approach to deviance is premised (whether in prison or not) often conflicts with sentiments held by the public.<sup>21</sup> Just deserts, incapacitation, behaviorism and rationales highlighting the safety of staff (or public) will invite greater support than a *Verstehen* approach. Correctional staff, recruited from the masses that generally embrace retributive values, can hardly be expected to reflect a commitment to a dispassionate understanding of why, for example, prisoners will riot over poor food ("they're lucky they're getting fed"). Ceremonies of degradation, the pains of imprisonment, structured inequality, differential opportunity structures and other explanations for deviance are the province of academics. It is far easier to put up with minimal trappings of due process in prison disciplinary hearings and sanction a prisoner for what s/he *deserves* rather than to share some power with him/her in defining the (deviant)

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<sup>21</sup> In Reaffirming Rehabilitation, Cullen and Gilbert (1983) argue that there is wide public support for rehabilitation as a goal of corrections in the United States:

While the average citizen clearly wants criminals to be severely sanctioned - in particular, sent to prison for longer stays - survey research consistently reveals that the American public also believes that offenders should be rehabilitated (p. 257).

Whether these findings can be generalized to Canada is not known. The authors do not state whether the survey research they cite made it clear to the respondents if they knew what rehabilitation meant. Rehabilitation can mean anything from early release from prison to a frontal lobotomy.

act.

The implications for the way in which each administration conducts its disciplinary hearings are difficult to assess. They may range from perceptions of fairness on the part of inmates who are subject to these controls (plausible in professionally conducted hearings) to litigation initiated by inmates in response to "antagonistic" forums where the issue of guilt is foreclosed from the beginning. But even where an administration's disciplinary actions are reviewed by an outside court, that alone does not spell particularly compelling restrictions for disciplinary chairpersons. The next chapter will consider the impact of litigation on the substantive justice rendered in disciplinary hearings.

## CHAPTER IV

### RE-EVALUATING LEGALISM IN PRISON DISCIPLINARY HEARINGS

#### Introduction

From the preceding chapters, we have seen that the overt formal requirements to provide prisoners with an impartial hearing are easily subverted by a number of structural conditions and interactive strategies. The legislation (Correctional Centre Rules and Regulations) contains enough ambiguity to allow correctional staff to override, downplay or simply ignore legal mandates through their use of discretion. A presumption of guilt permeates the disciplinary transaction in virtually every case. With the exception of the women's prison, prisoners were found guilty in over 90% of the allegations made by line-staff. Inmates are routinely sentenced to terms in segregation for offences that would not invite exclusionary penalties (or any penalty) from the judiciary in outside society for equivalent behavior. Furthermore, the appellate procedures are almost never invoked by inmates for reasons already discussed; if they do, they are unlikely to receive much in the way of substantial relief.

Two main issues will be addressed in this chapter concerning the methods and ideological rationale for requiring prison officials to conform to procedures ensuring that inmates receive fair hearings. The first concerns using litigation as a vehicle

to enforce fairness in prison disciplinary hearings. If adherence to procedural law will not be fulfilled voluntarily, one avenue of recourse is through judicial intervention in the form of *certiorari*, *mandamus*, prohibition, declarations, injunctions, *habeus corpus* (from provincial courts), and to a lesser extent, *quo warranto*.<sup>1</sup> Have decisions from the Canadian courts to applications by prisoners for judicial relief had an impact on the realities of the disciplinary hearing and the nature of the punishment imposed? Is there any hope that fairness might be rendered behind prison walls if the Bar and judiciary maintain a vigil on abuses of administrative law?

Two types of judicial review will be considered in this chapter, although the conclusions as to the efficacy of each approach are often identical. The first type is characteristic of extensive American efforts to implement widescale reform through the federal courts. Attempts at prison reform in the United States have included declarations that entire state penal systems are unconstitutional. Special masters have been appointed to oversee and report their observations to judges concerning the implementation of system-wide changes. The impact of those decisions, in toto, have been assessed by a number of authors (Cohen, 1971; Dick, 1977: 128-138; Harris and Spiller, 1977; Harvard Center for Criminal Justice, 1972; Hawkins, 1976: Chapter 6; Jacobs, 1983: 47-59). Many of their comments are instructive vis-a-vis what might be realistically expected in

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<sup>1</sup> For a discussion on the use and success of these types of judicial relief, see Conroy (1982).

the Canadian context through similar recourse to judicial remedies.

A further avenue through which reforms in prison have been attempted is individual litigation, whereby prisoners take specific (procedural) issues to higher courts for a ruling. These judgements on various aspects of parole applications, revocations, transfer decisions, rights during disciplinary hearings or virtually any aspect of correctional decision-making comprise a body of common-law. Higher court rulings bind administrative tribunals in future similar-fact cases. This latter method is generally the only way in which Canadian prisoners can effect changes in prison decision-making. Both avenues, whether in the form of wide-scale decrees or common-law appeals, can be assessed according to a question about their mutual objectives: Can a higher authority, the judiciary, attain substantive changes in the way in which carceral authority is exercised?

A second and perhaps more fundamental issue deserving attention concerns a theoretical assessment of the due process model and whether it is an obtainable goal in prison disciplinary hearings. The discussion of prisoners' rights has also been the object of criticism from those who challenge the model that proponents of judicial intervention seek to place in prison disciplinary hearings. Basing their arguments on studies showing the general lack of substantive justice rendered while processing defendants in outside courts (Bottoms and McClean,

1976; Ericson and Baranek, 1982; Ericson, 1983; Feeley, 1979; McBarnet, 1981), where due process ostensibly prevails, leaves open the desirability of having that same largely rhetorical model transplanted into the prison (Landau, 1984). If due process is really only an ideological subterfuge for a "crime control" oriented approach to adjudicating guilt, what hope is there that a few "rights" are going to alter the power of prison officials to unilaterally define "rule-breaking" and impose sanctions?

### Judicial Intervention

It is not within the scope of this thesis to present a detailed historical overview of correctional case law in Canada. This has been done by others to structure arguments for proliferating judicial intervention behind prison walls or, to a lesser extent, assessing the impact of the case law on correctional decision-making (Conroy, 1982; Jackson, 1974, 1983; Millard, 1982; Price, 1974, 1977; Williams, 1985). More importantly from the perspective of those to whom the relief is directed, the question is whether jurisprudence has had the intended effect of checking the keeper's exercise of discretionary power.

## *System-wide Reform*

One of the most frequently cited studies assessing the impact of judicial intervention on prison disciplinary proceedings was conducted by the Harvard Center for Criminal Justice (1972). In March, 1970, Federal Judge Raymond J. Pettine issued a consent decree (*Morris v. Trivisono* 310 F. Supp. 857 [D.R.I. 1970]) which established comprehensive procedural regulations for handling disciplinary matters at the Rhode Island Adult Correctional Institution (ACI). Later that summer, the Center for Criminal Justice at Harvard Law School agreed to study the impact of the *Morris* decree. Their research design included an analysis of disciplinary documents, monitoring classification and disciplinary hearings and conducting private interviews with both inmates and staff. Summarizing the effects of the consent decree and commenting on the limits of the procedural due process approach, the authors concluded that judicial expectations were not met. But cautious not to be overly pessimistic, they did report "some objective manifestations of institutional change", i.e., cases were dismissed on technical violations of the regulations, inmate witnesses were allowed in some cases, delays between charges and final hearings were minimized and extreme forms of punishment were largely eliminated. Ultimately, however, the authors concede that "the effectiveness of the procedural due process model was critically limited" (Harvard Study, 1972: 222). Their assessment of judicial intervention uncovers rationales for



resistance or non-compliance that are germane to prison administrations in Canada at both federal and provincial levels.

To account for the failure of this widesweeping judicial decree, they cite numerous reasons why due process failed to "fit" in prison disciplinary hearings. What makes this study relevant to the present discussion is that many of their observations are ones cited by Canadian correctional authorities who are leery of seeing the expansion of prisoner's access to formal due process in disciplinary transactions. A summary of their explanations (or those offered by the correctional staff interviewed) for the limited effectiveness of judicial intervention is provided below.

1. The hearings the authors observed were primarily *dispositional* in nature; a model designed to ensure fairness of fact-finding interfered with the other multiple (if not contradictory) purposes of the disciplinary transaction. The predominant function of the hearing was to *preserve staff morale* by sanctioning prisoners not only for breaches of security but also for undermining the guards' position of authority. Over one third of the misconduct incidents in their study were for conflicts between inmates and correctional staff.<sup>2</sup>

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<sup>2</sup> The authors report that these conflicts were not situations in which large scale uprisings or escapes were likely to occur but rather where

the reporting staff member felt that his authority or that of the institution may have been threatened. The inmate may have refused to do a certain job, talked back, or in some other way affronted authority. While a

2. The pragmatic requirements for a high standard of control over the prison environment necessitated a forum whereby speedy discipline would contribute to deterring others from disruptive behavior. The requirements of "tight control" and "due process" in a maximum security institution seemed to be almost mutually exclusive goals. Sometimes the latter requirement involved delays while facts are gathered, investigations conducted or an inmate was allowed to prepare his/her case - any or all of which may very well slow down an otherwise swift "resolution" of conflict.
3. Some staff members at ACI complained that the "court decree worked against the inmate" by dehumanizing the prison. A treatment model was cited by correctional staff whereby steps were being taken to humanize the prison (e.g., by doing away with prison numbers). This view that requirements of due process unduly mechanize an otherwise informal disciplinary process was one reported in other assessments of judicial intervention (Hawkins, 1976: 154).
4. The regulations imposed by the judicial decree applied to all disciplinary infractions, no matter how trivial or serious. Later, Judge Pettine allowed for a more informal "two night lock-up" for minor disciplinary infractions. Unauthorized discipline in the form of lockdowns, although

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<sup>2</sup>(cont'd) single incident would not usually have any major repercussions, institutional administrators generally feel that repeated incidents of this type could eventually mushroom into an outbreak of major proportions (Harvard Center for Criminal Justice, 1972: 223 note 138).

difficult to quantify, was reported by 23 (38%) of the inmates interviewed.

Similarly in the present context, there is a fear among a few senior correctional staff that formal requirements for processing prison rule-breaking will lead to an increased dependence on alternative, informal "justice". Guards may more often employ non-adjudicatory measures (nightly lockups extending over a period of days) rather than "go through the hassle" of meeting procedural requirements. Worse yet, should line-staff feel that due process requirements are subverting their attempts (and, hence, incentives) to control inmate populations, it is conceivable that they may resort to more brutal avenues to secure a sense of control or retributive justice.

5. The closed and intimate nature of the prison was cited as raising unparalleled differences between it and the outside arrangement of criminal justice. The personal information that disciplining authorities have concerning inmates may have some dispositional value.<sup>3</sup> Therefore, some disciplinary responses that appear harsh or inappropriate on the surface may be especially suited to a particular individual, based on the extensive experience that staff have had with the inmate.

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<sup>3</sup> I assume the authors mean that knowing the prisoner means knowing what disciplinary response best suits the needs of the individual transgressor and institutional harmony in general. They also concede that this knowledge often taints the proceedings with unfair prejudice (Harvard Center for Criminal Justice, 1972: 225).

6. Although the consent decree was an agreement between counsel for the Department of Social Welfare and the Acting Warden, very little staff involvement was solicited in framing the provisions therein. As a result, they were generally bitter, resenting the intervention of Judge Pettine's decree. Furthermore, line-staff, more than anybody else, were in the strategic position of being able to substantially undermine the impact of due process provisions.

For example, a guard may simply ignore observed violations; he may arbitrarily or discriminatorily report some inmates and not others; he may exaggerate infractions in his "booking"; or he may substitute unwarranted informal discipline and harassment for the established procedures...a staff member may negate, or at least undermine, the whole process by failing to comply with one or more of the established procedures. Moreover, correctional officer cooperation is essential because of the crucial effect that the conduct of custodial personnel has on the inmates' view of the prison system (Harvard Study, 1972: 226).

7. One of the most penetrating of all observations deemed to hinder the implementation of the consent decree was the correctional staff's reluctant recognition of inmate rights in general. Some of the guards attributed a loss of discipline to the easing of penalties, and therefore perceived the punishments to lack any deterrent value. Inmates threatened to take every complaint to the judge. Increased paperwork and demands for accountability associated with processing disciplinary infractions were a further source of contention which led some officers to feel less inclined to lay charges.

8. Finally, if not somewhat predictably, the authors of the Harvard Study cite as the most pervasive limitation a lack of (financial) resources that might help ameliorate disciplinary problems. Lumping prisoners together who have diverse criminal backgrounds was seen to create problems, the solution to which might reside in having separate facilities and programs (Harvard Study, 1972: 227).

Their assessment concluded that the court's role to introduce changes on disciplinary procedures was not "particularly well-suited for such a task" for the following reasons:

1. The judiciary is ill suited for resolving managerial and administrative problems (i.e., how to control inmates) which involve multiple and complex purposes. Effective intervention would necessitate extensive consultation with staff, training and supervision.
2. Courts lack the required expertise to comprehend "the unique problems of discipline within the prison context". This expertise was viewed as essential in order to fashion a broader base of developing policies and regulations as opposed to piecemeal intervention in specific cases.
3. Courts do not have the effective means of supervision to enforce day-to-day compliance with judicial orders (Harvard Study, 1972: 227-228).

Ending on a hopeful note, the authors state that courts must continue to intervene on behalf of inmates' rights *because no viable alternative exists*. Judicial intervention may eliminate

extreme abuses of power and furthermore establish a model for eventual internal reform by prison managers themselves (Harvard Study, 1972: 228).

The essential constituent of making any attempt at bringing fairness into disciplinary hearings, or for that matter, humane treatment towards prisoners in general, must address the *attitudes of correctional staff*. The authors of the Harvard Study made only brief reference to attitudes (a reflection of values) when they commented:

In the final analysis, the success or failure of any new correctional program depends upon the underlying attitudes of the custodial as well as the administrative staff towards the change. Where there is antagonism, no amount of care in drafting meticulous provisions and structuring intricate processes will achieve the objective of a fair and impartially administered disciplinary system (Harvard Study, 1972: 227).

Jacobs, in his assessment of the controversial literature on the prisoners' rights movement, found that both proponents and critics of judicial intervention agree that litigation is tortuously slow, piecemeal, costly both to prisoners and prison administrators and only makes token gains because compliance with decrees is difficult to obtain (1983: 49). Judges are wedded to the *status quo* of their day, defer to prison authorities and lack the resources to oversee judicial relief. However, he concludes that "it would be hard for anyone who studies America's prisons and jails not to conclude that enormous changes have occurred in the last two decades". Corrections are generally heading towards a legal due process

model, leaving behind the days of unquestioned penal authority (Jacobs, 1983: 50). As a comparative indicator of what gains may now be claimed for prisoners through judicial action, two authors commented in 1972 on the situation of their day:

Most agencies of government, no matter how abusive, how oppressive, are ultimately accountable, reviewable, finally responsive in definable way, to the processes of "law" - that is, some body of limiting rules, regulations, restraint - whether flowing from the Constitution, public opinion, as expressed through representatives, court decision, or through other processes which are understood and enforceable, at least to some extent, by those whom the agency affects. *The prison system is almost totally non-responsive to "due process of law" or "law" itself* (Greenberg and Stender, 1972: 808, emphasis added).

Now 14 years later, it would be difficult to find commentators who have not recognized the inroads the courts *and* enlightened prison administrators have made on the conditions under which offenders are imprisoned or disciplined for institutional rule-breaking.

Often overlooked in the literature evaluating the impact of intervention are the many indirect effects of judicial action. As a reference point for continuing research, Jacobs (1983) hypothesizes that the prisoners' movement has contributed to the increased bureaucratization of the prison (simultaneously producing a new generation of better educated administrators), expanded procedural protections, heightened public awareness of prison conditions, politicized prisoners and increased their expectations, helped establish national standards for running prisons, and ultimately, demoralized prison staff by

contributing to problems of maintaining control over inmate populations<sup>4</sup> Due process reforms are a two-edged sword.

*Returning to a "Hands-off" Doctrine*

Whatever gains may be said to have been made during the expansion of prisoners rights in the 1970's (and by inference, fair treatment during incarceration), the current decade heralds a return to the "hands off" approach by the Supreme Court in the United States to issues raised by prisoners. The highest court in the country has chosen to defer (once again) to prison administrators. The Reagan appointees of the Burger-Rehnquist court are directing judges towards a position of non-intervention in prison affairs. The arguments supporting this position range from constitutional issues, states' rights, separation of federal and state powers, judicial subversion of the democratic process and a message to which almost everybody can send to convicted felons: "we didn't promise them a rose garden" (Justice Rehnquist in *Atiyeh v. Capps*, 449 U.S. 1312, 1315 [1981] cited from Nagel, 1985: ii). The "peaceful riot" of prison litigation has been extinguished in a series of cases beginning in 1976 with reference to "a wide spectrum of

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<sup>4</sup> Jacobs (1983) attributes the insecurity of guards to their resentment of inmates having access to the courts, believing that courts "favor them" over the guards. Additionally, the courts have abolished the extreme punishments used against prisoners (e.g., starvation, whipping, standing at attention, exposure to freezing temperatures). These punishments have been replaced by the proactive discipline of less physically intrusive control devices: closed circuit surveillance, sophisticated locking systems, classification schemes to isolate violent individuals, architectural changes to prisons and physiological control with pharmaceuticals (Jacobs, 1983:54-57).



discretionary actions that traditionally have been the business of prison administrators rather than Federal courts" (*Meachum v. Fano*, 427 U.S. 215 228-229 [1976]). In *Rhodes v. Chapman* (452 U.S. 337, 347 [1981]), the court alludes to the deference that should be given to prison administrators by stating, "to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offences against society" (cited in Bronstein, 1985: 4). The *Rhodes* perspective has been further echoed in *Ramos v. Lamm* (713 F.2d 546 [10th Cir. 1983][J. Barrett, dissenting] where the federal court of appeals judge concluded that "the *Rhodes* opinion, in my view, is a clear signal that the federal judiciary should, absent inaction by state courts, legislatures and executive officials where dire conditions exist in a state penal system, practice a hands-off policy."<sup>5</sup>

What are the implications of this reversal in judicial opinion? Schwartz contends that "the Supreme Court's deference and policy of abstention...will be to leave prisoners unprotected and at the mercy of arbitrary administrative decisions" (1984: 436). A prisoner can no longer count on a right to due process if administrators have such unfettered discretion. What progress was made during the "due process revolution" in prisons now seems to be in a very real danger of retrenchment. Those rights that prisoners now have will be

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<sup>5</sup> For a more complete discussion of the recent case law where the Supreme and federal courts have taken a "hands-off" approach to prisoners' litigation against their keepers, see Schwartz (1984).

decided by state legislatures; it is conceivable that prisoners will once again be relegated to their previous slave-like status (Schwartz, 1984: 456). The recent shift in attitudes also shows that something as ostensibly impregnable as "rights" are subject to cyclical fluctuations in judicial perspectives on the parameters of what those rights mean in the context of penal institutions. Rights are not chipped in stone. Rather they are subject to temporal upheavals generated by wider political agendae.

How the American courts' return to a hands-off doctrine of nonintervention into prisoner's rights issues will affect Canadian jurisprudence cannot yet be assessed. Much of the evaluative work done in the United States on the impact of judicial decisions has not been replicated in Canada. What writing does exist appears to be the product of a few interested lawyers who prefer to advocate judicial intervention based predominantly on moral persuasion (Conroy, 1982; Jackson, 1983). One American author (Cohen, 1971) rightly suggests that "enthusiasm for doctrinal enlargement should be tempered by an effort to assess actual results" and comments that the advances made in the Warren court during the "due process revolution" more often created the possibility and appearance of rights than actual rights (p. 863-67, cited in Hawkins, 1976: 150).

Should access to the courts for relief from harsh prison conditions and unfair practices be removed from the inmates' repertoire of peaceful protest, the fault for the predicted

resulting prison disorder can be squarely placed on the shoulders of the judiciary (Hawkins, 1976: 150). Indeed, one Canadian author has suggested that violence during riots and hostage-takings is not only predictable but *legally defensible* if peaceful avenues of redressing grievances are foreclosed to inmates (Conroy, 1982: 72-75).

### Judicial Relief in Common Law

The evolution of prison law comes at a time when the proliferation of bureaucratic decision-making in a rapidly changing society has never been greater. By delegating decision-making to government agencies, the intent is to provide fast, efficient procedures in a manner accessible to the lay person. Modern governments

regulate housing, employment, planning, social security, and a host of other activities. The philosophy of the day is socialism or collectivism...The problem of the courts in the twentieth century has been: In an age of increasing power, how is the law able to cope with the use or abuse of it? (Lord Denning, 1978: 61).

The warden's court, which only a decade ago was virtually beyond the ambit of judicial intervention, is now under increasing pressure from the judiciary to adhere to a duty of fairness.

There are several ways of describing judicial pronouncements as they constrain prison decision-making. I have selected a body of cases (including recent challenges under the *Charter of Rights and Freedoms*) which embody wider principles inherent in a duty to act fairly in making decisions within the prison

context. Importantly, the ideals described in the following common law comprise most of the same principles that are imparted to senior correctional staff as part of their training<sup>6</sup> to properly adjudicate these hearings.

As a starting point for documenting the development of what is now called the "duty to act fairly" in reaching administrative decisions, reference must be made to earlier case law which reflected a division of cases into "judicial", "quasi-judicial" and "executive" or "administrative" types. The principles of natural justice,<sup>7</sup> it was held, could not be applied to hearings classified as solely executive or administrative in nature. *Certiorari* and prohibition were thus not available as forms of judicial relief because procedural errors in these hearings were not amenable to review. This reasoning was epitomized in *Calgary Power v. Copithorne* ([1959] S.C.R. 24) where the Supreme Court decided that ministerial powers were executive and hence, not reviewable by higher courts. Copithorne lost his land to the Crown without the benefit of an opportunity to state his case.

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<sup>6</sup> The Corrections Branch offers training in disciplinary panel procedures for six hours every two years. All of the senior officers quoted in Chapter Three had attended at least one of these training sessions *prior* to conducting the transcribed hearings. Therefore, they had an opportunity to know both the correct procedure and the underlying case law on which those principles are founded.

<sup>7</sup> These two principles are *audi alteram partem* ("hear the other side") and *nemo iudex in sua causa debet esse* ("no man can be a judge in his own cause").

Canadian courts took a further 20 years to reinstate the principles of natural justice into administrative decision-making. Meanwhile, their British counterparts pursued a course of jurisprudence that affirmed the place of natural justice in administrative decisions (*Ridge v. Baldwin* ([1963] 2 All E.R. [H.L.] and *R v. Board of Visitors of Hull Prison, ex parte St. Germain* [1979] 1 All E.R. 701). As it turned out, the new "duty to be fair" concept was much more robust because it opened up the possibility for judicial review, independent of whether the decision was classified into quasi-judicial or administrative forums. This development in Britain was significant for those subject to the exercise of administrative powers. Government agents could no longer hide behind the triology of judicial forums to provide them with a *carte blanche* to adopt any procedure, no matter how unfair (Jones and de Villars, 1985: 161-162).

Parallel decisions were not developed in Canada until *Nicholson v. Haldimand-Norfolk Police Commissioner Board* ([1979] 1 S.C.R. 311) and four other cases<sup>8</sup> The courts, in *Martineau v. Matsqui Institutional Disciplinary Board* [No. 2] ([1980] 1 S.C.R. 602), recognized the supervisory role of the British courts in prison disciplinary hearings. Thus, *Martineau No. 2* now stands for a common law principle that "in the

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<sup>8</sup> *Campeau Corporation v. Calgary (No. 1)* (1979) 8 A.R. 77, *Harvie v. Calgary Regional Planning Commission* (1978) 8 Alta L.R. {2d} 166 (C.A.), *McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District No. 1* (1979) 4 W.W.R. 725 (Alta. T.D.), and *Martineau v. Matsqui Institutional Disciplinary Board (No. 2)* (1980) 1 S.C.R. 602).

administrative or executive field there is a general duty of fairness" (Pigeon, J., writing for the majority). Summarizing how the impact of these cases diverge from previous prerequisites for review (based on where the body making the decision fit within a triad of judicial forums), Jones and de Villars note that

the courts must now concentrate squarely on the real question which has always been before them: Was the procedure used in this case fair in all the circumstances? While different judges may answer this question differently, and it will be difficult therefore to advise either clients or administrators of the answer, this approach is totally consistent with the policy underlying the historical judicial power to review procedures for breaches of natural justice - to ensure that justice is not only done, but manifestly and undoubtedly be perceived to be done. The courts recognition of the duty to be fair should be welcomed by everyone concerned with Administrative Law (1985: 177).

The Supreme Court extended the remedies of *certiorari* and prohibition to cover prison disciplinary hearings with the qualification that "...the remedy be granted only in cases of serious injustice and that proper care be taken to prevent such (disciplinary) proceedings from being used to delay deserved punishment so long that it is made ineffective..." (Pigeon, J. in *Martineau* [No. 2]). In a similar vein, Dickson J. rejected the existence of 'disciplinary exception' in cases where members of the armed forces, police or prisoners were subject to private (and unreviewable) rules of procedure, but nevertheless concedes that:

The very nature of a prison institution requires officers to make 'on the spot' disciplinary decisions and *the power of judicial review must be exercised with restraint*. Interference will not be justified in the

case of trivial or merely technical incidents. The question is not whether there has been a breach of the prison rules, but whether there has been a breach of the duty to act fairly in all the circumstances. The rules are of some importance in determining this latter question, as an indication of the views of the prison authorities as to the degree of procedural protection to be extended to inmates (*Martineau (No. 2)*, p. 630; emphasis added).

Since *Martineau (No. 2)*, the courts have decided on a number of issues with respect to the rights available to inmates, simultaneously effecting how correctional decision-making can be reached (or how correctional practices can be defended). The room for arbitrariness still exists in the rationale of new legal arguments. For example, the decision of the Director of B.C. Corrections to bar Claire Culhane<sup>9</sup> from entering the Lower Mainland Regional Correctional Centre (Oakalla) for volunteer work was upheld by the B.C. Court of Appeal (*Culhane v. Attorney General of B.C.*, ([1980] 108 D.L.R. [3rd] 648). Culhane was not given reasons for the Director's decision (Culhane, 1985: 34-35). The court reasoned that the "duty to act fairly" was tempered by the relationship between the parties; the status of "volunteer" did not form a basis for interference with the administrative process. In effect, prison administrations are free to restrict public access to prisons without having to offer reasons.

In *Wilson v. National Parole Board* ([1985] 3 W.W.R. Federal Court [T.D.]), the court held that it was permissible for prison

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<sup>9</sup> Culhane is an outspoken critic of carceral practices and advocates the abolition of prisons except for dangerous offenders.

authorities to withhold information from a prisoner that comprised part of the Board's case against a decision to grant day parole. The Board had a duty to act fairly and to ensure to the greatest possible extent (consistent with the "public interest") that an applicant should know the case against him/her. Information that might disclose the identity of a unknown informant was not required to be given to the inmate. Unfortunately for the inmates affected by this decision, secret informants cannot be cross-examined.

To indicate how far the courts would penetrate into the procedure of disciplinary hearings, the Federal Court ruled that the tribunal breached a duty of fairness by not providing a prisoner the opportunity to make submissions before sentencing in *Re Blaquiere et al and the Director of Matsqui* ([1983] 6 C.C.C. (3d) 293 F.C.T.D.):

There was, in my opinion, a breach of the duty to act fairly in respect of sentence. The applicants should have been given an opportunity to make submissions as to punishment. The *Penitentiary Act*, R.S.C. 1970, c. P-6, and the *Penitentiary Service Regulations* C.R.C. 1978, c. 1251, are silent on this particular point. But when the statutes and the regulations are read as a whole, particularly in respect of disciplinary proceedings, a right to make submissions before sentence is passed can, as I see it, be found in the scheme of the legislation. Moreover, the right to make submissions before the imposition of punishment or penalties seems to be a basic procedural entitlement in our system of law and legal procedure. I see no reason, in principle, why it should not apply to penitentiary disciplinary hearings (Collier, J., at p. 295).

In *Dubeau v. National Parole Board* ([1980] 54 C.C.C. [2d] 553), the court quashed a parole revocation because the Board



had refused to allow a prisoner to have counsel present at the hearing. Departing from an earlier British decision which denied a right to legal counsel in prison (*Fraser v. Mudge et al*, [1975] 3 All E.R. 78), the court ruled that

in matters of prison discipline an inmate has no general right to be represented by counsel at a hearing before a prison authority. In my view this does not mean that there are no circumstances in which the courts should find that, under the principle of fairness, he should be permitted to have counsel with him (Smith, D.J. at p.554).

The courts' reluctance to extend the right to legal counsel in disciplinary hearings was evident in *Re. Howard and the Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution* ([1983] 8 C.C.C. [3d] 557). It ruled that a disciplinary matter was not an "offence" within the definition of the *Charter of Rights and Freedoms* (Section 11 [d]). Therefore, the prisoner was not entitled to counsel at the hearing. However, a later decision by the Appeal Division of the Federal Court (*Howard* [No. 2] [1985] 19 C.C.C. [3d] 195) overturned this decision in 1985, quashing the disciplinary panel's finding and stating that the prisoner was entitled to counsel.<sup>10</sup> In his reasons for judgement, MacGuigan, J. posed the question, "What is there in the right to counsel which should make it required by fundamental justice?" and cited two earlier judgements on this point, the first of which is particularly relevant for the present discussion:

It is not every man who has the ability to defend himself, on his own. He cannot bring out the points in

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<sup>10</sup> At the time of this writing, *Howard* (No. 2) was before the Supreme Court of Canada.

his own favor or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses...I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak by counsel or solicitor (Lord Denning M.R. in *Pett v. Greyhound Racing Association, Ltd.* [1968] 2 All E.R. 545 at p. 459).

The right to counsel [is] "the most important safeguard in the legal process...justice and fairness cannot tolerate a procedure where a layman is expected to deal with concepts which are strange to him, and at the same time advise himself objectively (McEachren C.J.S.C. in *Joplin v. Chief Constable of City of Vancouver et al* [1982], 2 C.C.C. (3d) 396 at p. 410).

MacGuigan, J. acknowledges the implications of a judgement that would allow prisoners to have lawyers with them during disciplinary proceedings:

It may be that a recognition of the right to counsel would lead inevitably to the introduction of a prosecuting officer, *the complete disappearance of any inquisitorial aspect to the process and the full acceptance of an adversarial system.* I accept this as an accurate estimate of the likely consequences, but not as an argument *in terrorem*. If that is what fundamental justice requires, it is a step forward rather than a limitation (MacGuigan, J. in *Howard [No. 2]*: 227-228; emphasis added).

Given the apparent willingness of the judiciary to envision disciplinary hearings (for serious violations) as having full adversarial proceedings to meet *Charter* guarantees, we may see future judgements further support a confirmation of natural justice in disciplinary hearings.

If lawyers will be permitted to represent inmates, the latter being indigent in many cases, one might wonder how they would pay for such services. Recently an inmate appealed an

earlier court decision (*Landry v. The Legal Services Society* [1985] 5 W.W.R. 417) which dismissed his request for legal representation (before a penitentiary disciplinary board) from the British Columbia Legal Services Society (*Landry v. The Legal Services Society*, unreported, May 12, 1986, B.C.C.A.). The court dismissed the appeal. They reasoned that a Disciplinary Court (as it is now called) is not a court; it discharges an administrative task. "Disciplinary proceedings" are not the same as "criminal proceedings" and therefore the legislation (Legal Services Society Act, R.S.B.C. 1979 c.227) did not apply. However, this reasoning seems to diverge from an earlier decision (*Re Peltari and Director of the Lower Mainland Regional Correctional Centre et al* [1984] 15 C.C.C. [3d] 223), where a prisoner was found not guilty in provincial court for escaping lawfully custody but later sentenced to 30 days loss of remission for the same allegation (under Section 28 [8], Correctional Centre Rules and Regulations) when he was returned to L.M.R.C.C.. In this instance, the court found that the word "offence" was "conduct prohibited by law on pain of punishment" and therefore subject to guarantees by s. 11 (h) of the *Charter* which provides that any person has the right "if finally acquitted of the offence, not to be tried for it again...". Thus, the court found room to interpret "disciplinary offences" as analogous to criminal offences and subject to *Charter* protections in one case but ruled that "disciplinary proceedings" were not "criminal proceedings" in another.

There remains a measure of judicial ambivalence with regard to introducing both procedural and substantive fairness in prison disciplinary hearings. The impact of the *Charter of Rights and Freedoms* on judicial response has been positive. However, the approach now taken by the Solicitor-General's Department to counter recent judicial developments is proactive, rather than reactive. Their fear seems to be that if the Canadian Correctional Service does not make rules for itself, the courts will be invited to do so for them (Ryan, 1983: 120).<sup>11</sup>

Two American authors (Kimball and Newman, 1968) predicted that the judiciary would intervene in prison decision-making if administrations did not establish and enforce standards of fairness within their own ranks. They encouraged prison administrators to pay strict attention to both substantive and procedural fairness in their determinations and promote standards of "internal due process" (Kimball and Newman, 1968: 9). In Canada, their message went unheeded (or unknown). The administrations mentioned in this study appear to *react* to litigation by prisoners rather than enforce internal measures to ensure disciplinary chairpersons adhere to a duty of fairness. Despite the training offered to chairpersons that outlines common law duties to conducting fair disciplinary hearings, there remains a good deal of reluctance to conform to emerging

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<sup>11</sup> For example, the Penitentiary Branch seems to be planning to minimize the effect of the *Charter* by converting internal directives into statutory instruments (Ryan, 1983: 165).

standards of procedural law. It must be borne in mind that officers chairing the disciplinary hearings that were analyzed in Chapter Three had previously been instructed to follow the principles of the duty to act fairly with reference to most of the case law presented here.

### Summarizing the Principles of Fairness

Exactly what constitutes the procedural requirements for a fair and impartial hearing cannot be determined with any precision without first considering the case to which those principles might be relevant. Addy, J., however, outlined the general principles of natural justice as they apply to administrative hearings in *Re Blanchard and Disciplinary Board of Millhaven* ([1983] 1 F.C. 309 [T.D.]):

(a) the tribunal is not required to conform to any particular procedure, not to abide by rules of evidence generally applicable to judicial proceedings, except where the empowering statute requires otherwise;

(b) there is an overall duty to act fairly in administrative matters, that is, the inquiry must be carried out in a fair manner and with due regard for natural justice;

(c) the duty to act fairly requires that the person who is being examined and who may be subject to some penalty:

(i) be aware of what the allegations are;

(ii) be aware of the evidence and the nature of the evidence against him;

(iii) be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter;

(iv) be afforded the opportunity of cross-examining witnesses or questioning any witness where evidence is being given orally in order to achieve points (i), (ii) and (iii). However, there may be exceptional circumstances which would render such a hearing practically impossible or very difficult to conduct, such as deliberately obstructive conduct on the part of the party concerned;

(d) the hearing is to be conducted in an inquisitorial, not adversarial, fashion but there is no duty on the tribunal to explore every conceivable defense or to suggest possible defenses;

(e) nevertheless, the tribunal must conduct a full and fair inquiry which may oblige it to ask questions of the person concerned or of the witnesses, the answers to which may prove exculpatory insofar as the person is concerned. This is the way in which the tribunal examines both sides of the question;

(f) there is no general right to counsel. Whether counsel may represent the person is in the discretion of the tribunal, although matters may be so complicated legally that to act fairly may require the presence of counsel;

(g) the person must be mentally and physically capable of understanding the proceedings and the nature of the accusations and generally of presenting his case and replying to the evidence against him. The tribunal must satisfy itself on this point before embarking on the hearing.

### Litigation's Unanticipated Results

One of the more incisive criticisms to be levied at legalism is that the unanticipated results of litigation frequently work to the detriment of prisoners' rights (Landau, 1984). A good illustration of such an example can be found in a recent court decision that motivated the Corrections Branch to revise the Correctional Centre Rules and Regulations (1978).

The case motivating the provincial government to rewrite the rules in the C.C.R.R. was partially a result of the decision in *Duhamel et. al. v. Bjarnason* (unreported, March, 1985). The litigants sought relief from the Supreme Court of British Columbia under the Judicial Review Procedure Act by *certiorari* to quash the decisions made in disciplinary courts by two local directors at the Lower Mainland Regional Correctional Centre (Oakalla). The court decided in favor of the plaintiffs, stating, *inter alia*, that neither presiding officer could be defined as a "director" (Section 1, C.C.R.R.). Wallace, J., stated in his reasons for judgement that

Mr. B---- was in charge of the Lower Mainland Regional Correctional Centre. There was no one else who satisfied the definition of director. Mr. N---- was an "officer" in charge of the east "unit" of the Correctional Centre where the incident in question took place. Mr H---- was an officer in charge of the west "unit" of the Correctional Centre. Neither were authorized by any one to act in the place of the director (Wallace, J. at p. 14).

Not having the status of director meant that the Officers-in-Charge of the units had no authority to determine whether the allegations against the inmates should be heard by an "officer in charge of the unit...or by a disciplinary panel" (Section 31 [1], C.C.R.R. [1978]). The response to this litigation has meant a slight bureaucratic alteration in the delegation of powers to officers in charge: a form from the director now authorizes senior officers to make decisions concerning what type of panel inmates will face.

More onerously, the new C.C.R.R. (1986) has repealed the clause exempting directors from sitting on tribunals "where the director has *direct personal knowledge* concerning the facts giving rise to the allegation" (C.C.R.R. [1976] Section 31 [5]; emphasis added) to read, somewhat less restrictively, that the exemption applies only to "[a]n officer who *filed* the allegation in writing, *witnessed* the alleged breach or *investigated* the allegation" (C.C.R.R. [1986] Section 31 [2]; emphasis added). These further changes were required because it might be difficult for officers in charge of units *not* to have "direct personal knowledge concerning facts giving rise to the allegation". In effect, the new C.C.R.R. require a lesser standard of impartiality by officers presiding over these hearings than the rules required before the litigation. What we see is a classic example of how litigation by prisoners has returned to produce unanticipated consequences detrimental to the requirements of fairness in disciplinary hearings.

Does this mean that litigation is futile or counter-productive and therefore should be abandoned? No. But the philosophical rationale for advocating fair administrative procedures need not be attired in rhetoric for public consumption. Correctional administrations *should* not have to be threatened with cataclysmic visions where consequences (riots, hostage-takings, costly litigation) are the motivation to institute fairness in decision-making.



Feltman (1981), drawing ideas from the work of Foucault (1977), offers a perspective that helps to capture the dialectical nature of law and "counter-law" in the penitentiary. He describes the internal law of the prison (Penitentiary Service Regulations, Commissioner's directives, Directors's Instructions, Standing Orders by the Institutional Head and other delegated powers) as counter-law and "parasitical in that it borrows phrases and forms from the law" (Feltman, 1981: 3):

Unlike rules of law, the rules of counter-law therefore presume that the inmate loses all rights when he enters prison; the prisoner has no rights at all unless they are granted specifically. The reason for this blanket denial of rights - and, conversely, the reason why certain rights are given - is to correct and train the prisoner. This is how he is made into a passive object of knowledge capable of the manipulation necessary to make a "new man" of him (Feltman, 1981: 4).

Attempts to bring the rule of law into prison may alter some of the material conditions of imprisonment but would do nothing to alter the processes of "correctional training". In fact, "increased clarity of rules and and the introduction of new disciplinary procedures would only increase the efficacy of the disciplinary techniques; the order of the prison world would be more perfect" (Feltman, 1981: 6). However, the introduction of judicially enforced natural justice in common law decisions supercedes and imposes upon "the veil of administrative decency", not for correctional purposes but for the rule of law (Feltman, 1981: 8). One might not wish to embrace the author's conclusion that the requirements of natural justice will bring about a "revolution in the conditions of imprisonment" (Feltman, 1981: 10), but recent judicial pronouncements with regard to

correctional decision-making certainly raise new challenges to the previously untrammelled autonomy of prison authorities.

McBarnet (1981) presents a different interpretation concerning the function of common law. She sees it as a tool for managing the gap between the ideology of due process and crime control outcomes. Aside from the mystique and inaccessibility of law to the general public and judicial reasoning which simultaneously reiterates the rhetoric while denying that same rhetoric in individual cases, a legal system based on case law allows "the justification of excepting the specific case from the application of the general rule without destroying the general rule *per se* (McBarnet, 1981: 159-161). The lofty rhetoric of law is rarely denied, "it is simply whittled away by exceptions, provisos, [and] qualifications" (McBarnet, 1981: 161). She compares common law to a Russian doll:

You begin with the rhetoric and a single, apparently definite, condition which on closer inspection turns out to contain another less clear condition which on closer inspection opens up to reveal even more ifs and buts and vaguenesses, reducing so often to the unpredictability of 'it all depends on the circumstances' - what criteria we use in your case depends on your case. This form provides an extremely potent way of maintaining the civil rights ideology - the first doll - while in fact allowing extensive *legal* police powers. Cases can readily accomodate both statements of general principle and the exceptions of particular circumstances...The conflicting rhetoric of due process and practical demands for crime control are thus both simultaneously maintained and the gap between rhetoric and practice is managed out of existence (McBarnet, 1981: 161, emphasis in original).

Without meaning to over-simplify McBarnet's interpretation of how the common law sustains both due process rhetoric and

crime control practice, we might infer that judges have the resources in case law to make up their minds any way they want to concerning a particular set of facts and thereafter select an appropriate cluster of earlier judicial decisions on which to support their determinations. This ability, in part, explains why American Supreme Court decisions made in the early seventies with regard to prisoners' rights are now being reversed in a "hands-off" approach to prison decision-making. Conservative judges interpret the application of law to specific cases conservatively with deference to prison authorities. Case law does not produce inviolate procedures but rather ones which are highly particular to the circumstances (or favor the ideological inclination of the decision-makers).

### Excessive Accountability

Many of the concerns contained in the Harvard Study (1972) were echoed in a Canadian report that examined, among other things, the apparent breakdown of control in several eastern federal penitentiaries (Report of the Study Group on Murders and Assaults in the Ontario Region, 1984). This was not an evaluation of judicial attempts to secure due process in inmate disciplinary proceedings. Instead, they have made some comments about the accountability requirements placed on line-staff stemming from a more general proliferation of inmate rights. As the title might suggest, the authors of this report sought an explanation for the high number of inmate murders during a 13

month period.<sup>12</sup> Under the general heading "Sources of Tension" (Chapter 4), they identify extreme "requirements for accountability" as a "pathology", the implications of which have meant the decline of local autonomy, usurpation of the Warden's authority, a preoccupation with administrative detail leaving little time for management, a breakdown of communication between line-staff and senior officials, and ultimately, an erosion of discipline:

The relationship between local management, staff and inmates has become increasingly formalized - more contractual in nature. Inmate acceptance of rules is lessened as they now have higher expectations of their rights through the presence of "watchdogs". Any activity by a supervisor of staff or of inmates leads to "hassles" - grievances, appeals, and objections. This creates a defensive posture - a "Who needs it?" attitude. The result is a lack of sound supervision by staff at the line level and, ultimately, poor supervision or intervention in inmate activities. Indeed, many correctional officers expressed the view that "it is easier to turn your head from an inmate infraction than to get caught up in the bureaucracy if the infraction is reported (Study Group on Murders and Assaults, 1984:33-34).

Perceiving themselves to be almost powerless to enforce the rules, prison staff take on a "fortress mentality" and refuse to supervise certain high risk areas, allowing inmates to police themselves. This "laissezfaire"<sup>13</sup> approach to controlling

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<sup>12</sup> Eleven murders and 21 serious assaults between January 1, 1983 and January 31, 1984 took place in four prisons: Millhaven (n=5, 18, respectively), Collins Bay (n=3, 5), Frontenac (1 murder) and 2 murders in the Special Handling Unit at Millhaven (where 7 of the 18 serious assaults occurred).

<sup>13</sup> They cite Ernest van den Haag's definition to underscore their point:

Laissez-faire has come to mean that prisons are effectively run by the prisoners. "Correctional

inmates was, in the author's opinion, a major ingredient in a recipe contributing to the numerous incidents of prison violence. The stronger, manipulative inmates victimized the weaker ones.

Their significant finding for the present discussion is the relationship between extreme accountability requirements and the breakdown of prison discipline. Although few wardens would deny that they must be accountable to the public or some external agency for their decisions, the authors of the Study Group present a defensible argument cautioning against extreme measures of accountability. At the risk of sounding glib, a desirable policy would be one in which a balance is struck between concerns for prison discipline and fair treatment for inmates. The complexity of the issues for such a policy cannot be understated. On one hand, discretionary power is essential to protect both inmates and staff from excesses of the former; on the other hand, accountability requirements are necessary to prevent excesses of the latter. The prison, it would seem, is a veritable bastion of diametrically opposed interests with no easy solutions to reconcile the parties involved.

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<sup>13</sup>(cont'd) officers" are content to enforce self-protective regulations without effectively protecting prisoners from one another (Report of the Study Group on Murders and Assaults in the Ontario Region, 1984: 36).

## Theoretical Challenges to the Legal Reform Argument

Reformists who would like to see prison decision-making subject to many or all of the due process controls articulated by Packer (1968) advocate a process assumed to carry an implicit end result: *fair procedures will promote respect for authority and facilitate the offender's reintegration into society.* For example, some of the writings by lawyers in the early seventies predicted the following outcome if the rule of law were implemented in Canadian penitentiaries:

Reform, of course, most immediately affects the inmate who must exist within the institution. Yet, there must be a nexus between the condition of confinement and the prospects for rehabilitation. This is the basic presumption of incarceration. Lawlessness and arbitrary treatment within the institution can only impede the attainment of this goal. Canada's experience in this regard, in light of the 80 percent rate of recidivism in federal institutions is not overly attractive...The introduction of the rule of law into the correctional institution not only raises the status of the inmate in an important psychological sense, but it also curtails the possibility of arbitrary treatment within the institution. *The improvement of conditions of confinement in this fashion may well render the inmate better prepared to lead a rehabilitated life. In the end, the beneficiaries of a sound correctional policy are all citizens.* (Kaiser, 1971: 275; emphasis added).

The idea that carceral power must be exercised legitimately is not new. The Progressive reformers insisted that there be systems of accountability to which those entrusted with the care and control of lawbreakers must adhere (Rothman, 1980). The early proposals included a sequence of custodial tasks, inspection tours, roll calls and night patrols designed to wrest control from the corrupt keepers. By circumscribing discretion,

the rules were intended to rescue the prisoners from the cruelty of their keepers and the inmate subculture (Jackson, 1983: 12).

After two hundred years of shifting philosophy with regard to the control and treatment of prisoners, the correctional enterprise is still criticized for its operation outside the rule of law. The *Report of the Sub-Committee on the Penitentiary System in Canada* (1977, known as the *MacGuigan Report*) portrayed federal corrections as a lawless agency, failing its public mandate because it did not adhere to the rule of law:

We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rationale for ordering a community - including a prison community - according to decent standards and rules that cannot be avoided at will; a system of justice to which all are subject without fear or favor. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree - a situation which is hardly consistent with any understandable or coherent concept of justice (*MacGuigan Report*, 1977: 85).

The authors of the report go on to imply that the failure of correctional practice can be tied, at least in part, to the exercise of "administrative authority" rather than an adherence to the rule of law:

The rule of law establishes rights and interests under law and protects them against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process. The administrative process, however, may or may not protect these things, or may itself interfere with them, depending on the discretion of those who are given statutory administrative power. In penitentiaries, almost all elements of the life and experience of inmates are governed by administrative authority rather than law. *We have concluded that such a situation is*

*neither necessary for, nor has it resulted in, the protection of society through sound correctional practice.* It is essential that the rule of law prevail in Canadian penitentiaries (*MacGuigan Report*, 1977: 86; emphasis added).

The rationale for implementing the Rule of Law is underscored again in the report, indicating the beliefs of the authors regarding the prerequisites for personal reform:

Justice for inmates is a personal right *and also an essential condition of their socialization and personal reformation.* It implies both respect for the persons and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates (*MacGuigan Report*, 1977: 87; emphasis added).

Like most reform efforts since John Howard's era, the authors of the *MacGuigan Report* decry similar conditions, advocate similar reforms, and predict similar end results for noncompliance. Unfortunately, the legacy of the correctional enterprise is one which has largely failed to deliver the anticipated results from the recommended reforms. This is probably the result of both faulty implementation and theoretical shortcomings.

The legal-reformist position predicts dire consequences for a society that permits the arbitrary exercise of carceral power without judicial relief. Some authors (Conroy, 1982: 72; Jobson, 1978: 164) predict that those within prisons will resort (or already have resorted to) violence as a remedy for grievances not addressed by the courts. They encourage an independent Bar



and judiciary to "ensure that the remedy of violence is unnecessary for the the resolution of disputes between citizens and themselves and the citizens and their government" (Conroy, 1982: 750).

The American courts have captured the essence of what they believed to be the danger of allowing the relatively closed prison to function without external intervention. Early in the last decade, the rationale for allowing judicial supervision included some of the following constructs:

Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling amongst those whom it contains that they are being treated unfairly...Most decision making of correctional personnel 'is less visible to the public than is the decision making of other public officials, and therefore less likely to benefit from the inherent constraints of public discussion and scrutiny...because prisoners are under the constant care and supervision of correctional personnel within 'total institutions', which regulate every aspect of their lives, there exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways may be made arbitrarily or based upon mistakes of fact. Finally, it is coming to be realized that almost all of the...individuals who are at any one time subject to correctional authority will eventually rejoin the rest of our citizens outside the prison walls; *if they are to learn to respect public authority and to participate in the democratic control of that authority as normal citizens, they need to be able to challenge what appears to be arbitrary assertions of power by correctional officials during the course of their confinement* (*Palmigiano v. Baxter* 487 F. [2d] 1280 [1st Cir. 1973]; emphasis added).

We are left with the impression that prisons *will run better* if administrators adhere to the rule of law. From a critical perspective, the rule of law becomes one more insidious tool to manipulate an image of legitimacy as prisons go about their business of containing and punishing while offering visible evidence to the public that it is best to "reform" inmates. The end result is virtually identical for reformists and those who would prefer an emphasis on retributive punishment subject only to the discretion of prison administrations: managing unconventional populations (Gamberg and Thomson, 1984).

Generally, the arguments offered by the legal reformists suggest that people in prison can be influenced towards socially desirable goals if they are afforded a system of procedures that mirrors the outside arrangement of justice. In at least one respect, they are not too dissimilar from the protagonists of rehabilitation: the common ground they share is a changed human being after imprisonment. This assumption holds that "correctional practitioners are able to change or modify the personality of the offender" (Task Force on the Creation of an Integrated Canadian Corrections Service; 1977: 25-26). The tools of "therapy and treatment" for the legal reformist position are the implementation of, and strict adherence to, the rule of law.

Arguments that predicate individual rehabilitation on the compliance of prison staff to follow the rule of law can be found in much of the legalreformist literature:

[T]he modern prison...exists not just to protect the security of the country, but also to make prisoners better citizens when they leave the prison. Prison rules and procedures cannot therefore be based simply on what is the most efficient way of regulating prison life and maintaining security, *But must take into account the need to legitimate authority so that inmates, when they once again become free citizens, have a greater respect for authority in the larger society* (Jackson, 1974: 9; emphasis added).

This aspect of the legal-reformist position appears to suffer from a paucity of empirical evidence on which to advance a claim that fair procedures in prison cause people to "have a greater respect for authority". The transparency of their claims is one that will not gather the support of prison administrators who see through an argument for the proliferation of prisoners' rights based on its "rehabilitative" value. In fact, the very opposite may be occurring (Landau, 1984; Millard, 1982: 11). An argument for fair treatment of inmates (while) serving a sentence imposed by the state should not have to be justified by reference to speculated ends. Fairness is a laudable goal in social policy regardless of outcome.

#### *Unpacking the Legal-Reformist Logic*

Earlier reference was made to the theoretical position of the legal-reformists who believe that personal reform, rehabilitation or treatment is only possible in a context of decision-making that adheres to the same procedural protections that extend to an accused person in free society. This train of thought is worth a second consideration. The logic of it may appear to be axiomatic at first glance, but on closer

inspection, we may be confronted with theoretical deficiencies for such claims.

The first claim inherent to the legal-reformist position is that authority *can* be represented as legitimate to imprisoned people. This belief underplays the myriad attitudes, experiences and lifestyles that men and women carry with them into the prison milieu. No matter how odious their encounters with authority were in the past, we are led to expect that people can be convinced to accept carceral authority as legitimate. The effects of earlier encounters in life with authority in the carceral continuum (teachers, social workers, psychologists and psychiatrists, and law enforcement personnel) are issues left unaddressed.

The second obtuse element of this argument is that the display of legitimately exercised authority in prison will create a respect for law which will be carried over into the lawbreakers' lifestyles once they are released. This position presupposes that an encounter with one type of *fair* authority somehow engenders respect for *all* authority.

The third implicit feature of this position carries us further along a causal sequence that eventually conjures up the dream of many criminologists: reduced recidivism rates. It neatly suggests that crime is simply a failure of authority to be displayed legitimately. Once authority can be demonstrated in its most pristine form, the imprisoned will be convinced that

their needs can be met in open society by adhering to the rule of law. If law can be used to resolve conflict in the prison setting, can it also be used to cure the motives that impel men and women to steal, assault, murder or use illicit drugs? The simplistic equation suggested by the legal-reformists can be summarized as this: legitimately exercised authority will be *perceived* as such by those imprisoned; that perception will create *respect* for authority in general; respect for authority will lead people to *live* within the confines of law. Extending this reasoning further, if people continue to break the law in the face of it being shown to them as legitimate and fair, the inescapable conclusion must be that *there must be something wrong with them.*

The baggage of assumptions that is rarely, if ever, explicit in any of the arguments for due process in prison disciplinary hearings embraces an even greater supposition than those already outlined. Most of the proponents for this legalistic position never question the reality of the paradigm they espouse. They simply link "what's needed in prison disciplinary hearings" with "what we have in outside courts", never scrutinizing the reality of "due process" in the real world. Procedural rules can be manipulated to enable agents of control to go about the business of ordering deviant populations:

The legal rules of due process are also enabling for crime control because of the nature and the use of rules within organizational contexts. It is a common feature of bureaucratic organizations that rules intended to influence the actions of agents are routinely absorbed by the agents to conform with their existing

practices...Procedural rules are for the use of law enforcement agents in their efforts at criminal control. All procedural rules must be understood in the organizational context of their use. Doing so allows us to appreciate how rules of procedure are designed and/or implemented on behalf of the forces of 'law and order', and how the accused will inevitably experience the process as punishment (Ericson and Baranek, 1982: 224)

In Chapter Three, numerous examples were offered where the legislation covering procedure in disciplinary hearings rationalized bureaucratic reactions (i.e, discretionary power) to misbehavior. It rarely protected prisoners from arbitrary decision-making or *guaranteed* natural justice.

The point to be stressed at this juncture is that the *values* enshrined by the rule of law are not under criticism. Rather, it is the way in which those values are imposed upon an organization of men charged with suppressing the conduct of other men that is at issue. Due process values are laudable enough and enjoy a heritage of struggle and victory in the face of capricious authority. The prison may be one of the most visible bastions maintaining some semblance of the very power from which our forefathers sought to escape in Europe and elsewhere. This less constrained version of Leviathan remains virtually intact after a decade and one half of judicial decree, reformist pronouncement and inmate litigation.

The faith in due process controls to accomplish worthwhile ends is strongly reminiscent of Jacksonian-era reforms which sought to quarantine the offender from the evils of a rapidly changing industrial world. In the sterile milieu of the

Pennsylvania penitentiary, inmates were exhorted to maintain a life of contemplation and prayer. The hope was that, upon release, these men and women would live law-abiding lives because they had been exposed to an ideal model of what society *should be*. Today, some legal-reformists advocate a "pure" model of justice behind prison walls, one that will eventually herald the same end result as Jacksonian reforms in the eighteenth century. As the inmates of the Auburn penitentiary were discharged into worlds where the the artificial prison conditions did not exist, so too will today's prisoners be released into a society where wealth and social position dictate the quality of the due process they receive.

### Accountability

There is a dimension to the due process argument that needs to be considered separately from the general notion of the instrumental gains that might be realized by the exercise of legitimately-perceived decisionmaking. Due process embraces the view that state authority should be subject to accountability, whether in the form of independant agency review or public visibility.<sup>14</sup>

Regardless of whether fair practices in prison decision-making actually contribute to the inmate's perceptions

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<sup>14</sup> Some might argue that due process *is* accountability (of state activities as they intrude on the freedom of individuals) and that a separation of the former from the latter is a contentious distinction.

of legitimacy, the form and outcome of these decisions must be open to examination. If nothing else, the visibility of authority will invite criticism from interested parties. The actors in disciplinary decisions will be forced to provide rationales for their actions that otherwise may not be sustained. In fact, some authors contend that it is the very lack of accountability that comprises the "central evil" of prison:

Prisoners often have their privileges revoked, are denied right of access to counsel, sit in solitary or maximum security or lose accrued 'good time' on the basis of a single, unreviewed report of a guard. When the courts defer to administrative discretion, it is this guard to whom they delegate the final word on reasonable prison practices. This is the central evil in prison. It is not homosexuality, nor inadequate salaries, nor the cruelty and physical brutality of some of the guards. *The central evil is unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners...* Prison becomes a closed society in which the cruelest inhumanities exist unexposed (Hirshkop and Millemann 1969: 811-12, emphasis added).

According to this perspective, the impact of due process controls on the behavior of people during and after imprisonment is not what is at stake; *unchecked decision-making power should be the primary issue and object of reform.*

Examples in recent history abound on both sides of the 49th parallel to show what happens when prison officials are not accountable for their actions (Culhane, 1985: Chapter 2; Jackson, 1983; Goldfarb and Singer, 1973). One only has to read about the conditions that ran rampant throughout the Arkansas prison system that set the context for judicial intervention



contained in *Holt v. Sarver* (309 F. Supp. 362 [E.D. Ark. 1970]):

The cases arose from vicious and brutal staff behavior, literal torture of inmates, overcrowded, dark, vermin-infested facilities and other deprivations of fundamental freedoms...the Arkansas prison system was described as a "dark and evil world completely alien to the free world"...in which inmates fell asleep at night fearing that their throats would be cut before morning. Inmates averaged 40 to 60 pounds underweight as a result of harsh labor in the fields and inadequate and extremely unappetizing food (Harris and Spiller, 1977: 22).

Conditions in Canada have in previous times approached the inhumanity of American southern prisons (Gosselin, 1982). The torture need not be as flagrant as the "Tucker telephone"<sup>15</sup> used at the Tucker Prison Farm in Arkansas. There is the whole modern technology of discipline, designed to make inroads on the soul by coercing inmates to internalize proper values via behavior modification, reinforcement schedules, and operant conditioning in an effort to accomplish something that wardens have been trying to do for decades: control inmate populations (Ross and McKay in Cohen, 1985: 144). Special Handling Units (S.H.U.s) built by the federal government for "particularly dangerous" inmates are based on behavior modification regimes. The totality

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<sup>15</sup> The Tucker telephone

consisted of an electric generator taken from a ring type telephone, placed in sequence with two dry cell batteries and attached to an undressed inmate strapped to the treatment table at the Tucker hospital by means of one electrode to a toe and a second electrode to the penis, at which time a crank was turned sending an electric charge into the body of the inmate...[s]everal charges were introduced into the inmate of a duration designed to stop just short of the inmate 'passing out'...Case Report, Criminal Investigations Division, Arkansas State Police, p. 11 cited in Harris; 1977: 36).

of the physical conditions, the lack of any meaningful opportunities to demonstrate an affirmation of individual change and arbitrary, secret review criteria have resulted in an intensification of punishment (Jackson, 1984: 173). The substitution of the whip for solitary confinement cannot be automatically considered a reform (Rothman, 1980: 152).

It would not be fair to the men and women who work in both federal and provincial prisons to imply that their decision-making power is now the unqualified evil as the one that Hirshkop and Millemann (1969) suggest. They wrote for a different era and country (the United States). Prisoners now retain access to a wide range (albeit limited in many instances) of review mechanisms including relief from the Correctional Investigator, the provincial ombudsman, Inspections and Standards, inmate grievance procedures and judicial decisions since their writing in 1969. Perhaps more importantly, the recruitment of correctional staff now draws men and women with higher educational levels (not that higher education is a panacea to curb unfettered discretion). What yet remains intact is the legally protected decision-making power of correctional staff to restrict the freedom of their charges, generally without external review.

Parenthetically, for the first time in history prisoners have been allowed to vote in a provincial election. A right that was once considered to be totally outside the reach of convicts may soon be extended to cover all federal and provincial

prisoners (*Vancouver Sun*, November 29, 1985). It would be premature to suggest that granting suffrage to inmates will be the vehicle for creating mechanisms to curb administrative discretion. However, it may act as a catalyst to the legitimacy of their claims to be afforded procedural protections whenever decisions are made that affect the nature, place and conditions of their confinement.

A *possible* outcome of prison disciplinary procedures, characterized by carefully reasoned findings and dispositions, is an appreciation by some prisoners that these hearings are fair. Whether that appreciation will then be transformed into respect for carceral or other types of state authority is yet another question. Intuitively appealing as it may seem, we simply cannot assume that procedural fairness alone, modeled after due process in outside courts, will change attitudes and behavior.

CHAPTER V  
PROSPECTS FOR REFORM

Introduction

This chapter will set out to broadly address the prevailing ideologies of prison reform within the parameters of current discussions on institutional change. Any proposal to do something about policies and procedures within the criminal justice system is subject to implicit and usually unexamined ideological assumptions about crime and criminality (Miller, 1973:17). Social scientists are not value-free, especially when they are being called upon to perform research which contributes to the solution of social problems (Weinberg in Reasons and Perdue, 1981: 20). Additionally, and with some overlap, I will then set out to address some broader social issues raised in this thesis followed by specific recommendations to increase the visibility of decision-making in provincial prison disciplinary hearings.

Three general ideological positions, each with its own prescription for changing the methods in which social problems are conceived and resolved, can be identified in the literature. From right to left, there are conservative, liberal and radical solutions to what is generally referred to as "crime" (although for some authors, the label "crime" itself is problematic). As with any typology that sets out to simplify complex sets of

ideas or phenomena under general headings, there will be exceptions, overlap and commonalities. Additionally, there are few academics or criminal justice professionals who would solely subscribe to these politics without wanting to include other values. These restrictions should not limit the utility of this typology as a reference point for discussing identifiable value-structures in the literature and practices of criminal justice agents.

### *Conservative*

Conservative discussions regarding reform of the criminal justice system are usually couched in terms of "undoing" what the past two decades of liberal reforms have done. This typically means replacing progressive reforms and programs (e.g., indeterminate sentencing, parole, probation and early release contingent upon participation in rehabilitative programs) with fixed sentencing. Generally, a classical image of man with the free will to direct his/her destiny undergirds this position. Criminal behavior is a *wilful* violation of legal norms for which there is a wide consensus. The solution to deterring criminals lies in locking them up for longer periods of time; certainty of apprehension and fixed sentencing will reduce the crime-rate. Prospects for change in discretionary prison practices cannot realistically be expected within this retributive stance. The function of the prison is to be a "warehouse" until the sentence has expired; what the prisons lack in human rights protections from arbitrary power is just part of the tariff for people who break the law.

These sentiments were solidified by the Supreme Court in the United States when Chief Justice Warren Burger voiced his opinion to the American Bar Association in 1981 that "too much concern for the rights of criminal defendants may be nourishing America's crime rate". Later that year the court mobilized right-wing values when they decided that housing two inmates in a cell measuring 6.5 by 10.5 feet was not unconstitutional. "The Constitution does not mandate comfortable prisons...discomfort is justly deserved" (Justice Lewis A. Powell in Cullen and Gilbert, 1983: 251). By the logic in this reasoning, it would seem that prisoners may now be sent to prison *for* punishment rather than *as* punishment.

Contributions to the academic literature from neo-conservatives or "new realists" are gaining popularity. These views, represented in the writings of Banfield (1968), Conrad (1981), the Rand Corporation (1982), van den Haag (1975), and Wilson (1975, 1983), to mention a few, believe rehabilitation is futile or impossible. Generally, their solution is to identify and quarantine dangerous offenders through mandatory prison terms. The Neo-conservative voice in approaches to crime control have gained momentum from a number of socio-economic forces:

The last ten years have seen the movement of Neo-conservative ideology from a peripheral position in American intellectual life to its very centre. This expansion is an expression of the crisis of capitalism at a global level, in the U.S. economy, and the decline

of U.S. hegemony in the world. It is also a crisis in ideology. The collapse of both New Deal liberalism and social democratic liberalism has created ideological confusion and a vacuum. In the absence of strong working class movements and organizations, this vacuum is being filled by various strands of right-wing and "friendly fascist" ideologies (Ray, 1983: 80).

Former American president Gerald Ford's address to Yale Law School graduates summarizes the conservative position on crime and, by extension, the prospects for reform:

1. Lawlessness is rising and poses a fundamental threat to social order.
2. Street crimes committed by the lower class (not crimes committed by wealthy and influential elites) are the most grave and hence worthy of intervention.
3. Greater concern must be shown for victims of crime.
4. Crime flourishes because the criminal justice system is too lenient with offenders.
5. More punishment, not less, will bolster the deterrent and incapacitative powers of our legal apparatus and cause crime to decrease.
6. Strict, legislatively-fixed, determinate sentencing is the solution to the nation's crime problem (Cullen and Gilbert, 1983: 102)

The American experience with legislatively-fixed sentencing criteria (a demand made by justice-model liberals) has shown that such reforms have been coopted by conservative politicians in "get tough on crime" campaigns. Several states are now seeing prison populations swell because judges are required to impose

minimum jail sentences where probation or other non-prison sentences might have been given before the "reforms" (Greenberg and Humphries, 1980; Cullen and Gilbert, 1983). Rather than curb the discretionary sentencing practices that filled American prisons with the poor and non-white, fixed sentencing has simply shifted the locus of discretionary power to the police and prosecutor. Justice model liberals may have inadvertently provided the conservatives with the rationales, arguments and raw data for strengthening their right-wing position. What began as a liberal cry for the end of wide disparity in sentencing practices by legislating shorter terms of incarceration to be applied uniformly has resulted in longer sentences which discriminate along the same class lines that existed before the "reforms".

The real force of the conservative argument comes from its emotional seduction. Virtually every member of society can find some comfort in the values of retributive punishment; getting even with the "bad guys" makes even the most miserable lives somewhat more tolerable.<sup>1</sup> Thus, it should not be surprising that

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<sup>1</sup> Ian Taylor writes that the ultimate retributive penalty, capital punishment, is used as a metaphor for something quite different:

Moreover, the sense of uncertainty and insecurity that is excited by the calls for capital punishment appears to be most prevalent and inbuilt amongst the sectors of the population that are most insecure *economically* and *socially*: in particular amongst the working class and unemployed populations...who are most affected by the cycles of boom and slump. [T]he demand for capital punishment is used as a *metaphor*, acting for the demand for a social and existential sense of personal security that is impossible to satisfy under existing social



police and prison guards are ideologically conservative. Their frequent contact with criminals and their lower-rung position within the system necessitates a greater payoff of emotionally satisfying justice. The following statements, reflecting an emotional demand for compensating the harms of criminal injury by inflicting pain on criminals, are frequently presented to advocates of prisoners' rights or those critical of certain police practices:

Criminals are evil people who have done mean things to good innocent citizens. If conditions are miserable in prison that's just too bad; they should have thought about that before they went around hurting people...they deserve to rot in jail for a long time...Why should we treat criminals kindly? How would you feel if it were your brother or sister who had been mugged or killed? I bet you wouldn't be such a liberal then! (Cullen and Gilbert, 1983:282).

It would be safe to conclude that the conservative agenda for criminal justice reform prevails in popular discussions of "what to do about crime" and it largely supports the status quo.

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'(cont'd) arrangements (Taylor, 1983: 88; emphasis in original).

Friedenberg (1975) describes Nietzsche's concept where members of society derive emotional satisfaction from the suffering of lawbreakers as *ressentiment* (not to be confused with resentment):

Ressentiment is a free-floating disposition to visit upon others the bitterness that accumulates from one's own subordination and existential guilt at allowing oneself to be used by other people for their own purposes, while one's own life rusts away unnoticed. Rebellion, which directs the rancor at the people or institutions that actually aroused it, reduces resentment sharply, though at the cost of invoking further sanctions if the rebellion is unsuccessful. Acquiescence makes it worse...[It] is the unescapable consequence of exploitation (Friedenberg, 1975:xi).

Where changes are advocated, they are usually in the direction of further repression of criminal conduct with little focus on the social correlates of crime.

### *Liberals*

Most liberals have varying degrees of commitment to the values held by Cullen and Gilbert (1983). A fundamental premise is a positivist conception of humankind in relation to the social world; society, as a whole, must bear some degree of responsibility for the activities (and reformation) of criminals. Definitions of crime are unproblematic because liberals generally accept the state's legalistic conception and the contours of "social problems" that focus on individual behavior. Furthermore, liberals believe that it is possible to create a stable and humanitarian system of criminal justice under the existing economic and political arrangements through varying degrees of institutional reform (Antony, 1980: 235). In essence, the liberal position with regard to prison reform encompasses at least these tenets:<sup>2</sup>

1. Liberal reforms should endeavor to bind the state to provide a therapeutic response to offenders *and victims*.
2. Inequalities in power and wealth should not influence the quality of justice administered to those charged with crimes.

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<sup>2</sup> Cullen and Gilbert (1983) differentiate between "justice model liberals" and "traditional liberals", a dichotomy more applicable to the United States where sentencing reforms have been the subject of far more debate. The liberal values described here have been selected because they are more representative of Canadian discussions.

3. Imprisonment should be used parsimoniously; only the most incorrigible should be subject to institutional control. All criminals should be given the opportunity to become productive citizens with a true stake in the social order.
4. Offenders should be treated justly and humanely to prevent society from degrading itself by imposing harsh penalties (Cullen and Gilbert, 1983: 284-85).

Later in this chapter, the current mood of liberals will be identified *vis-a-vis* the prospects of reform through legal changes to existing discretionary practices within the prison.

Although the differences between liberal and conservative positions may seem clear-cut, they share some commonalities. Both approaches to prison reform share two inter-related philosophical assumptions on which the theoretical basis for those reforms is founded. The first notion regards criminality as a cancer on an otherwise healthy social organism, a pathological condition that must be be quarantined, reformed or rehabilitated. The second shared assumption holds that only *externally imposed* authority can operate the instruments of correction. Whether that control takes shape in the guise of a custodian or therapeutic clinician, both conservatives and liberals agree that inmates are incapable of prescribing their own treatment. For liberals, even if adverse *social* conditions have resulted in a proclivity for crime amongst lower socio-economic groups, the locus for cure remains in

*individualized* responses to deviancy. The net result is that the convergence of liberal and conservative ideas transforms all reformist attempts into just another tool for the control of prisoners (Gamberg and Thomson, 1984:141-144).

### *Radicals*

Various terms (e.g., "radical", "conflict", "critical" or "new" criminology) are used to describe newer perspectives towards society and crime but should not be treated synonymously.<sup>3</sup> For the purposes of this study, the words "conflict" and "radical" approaches will demarcate critiques of traditional epistemological approaches in criminology, a stance that is critical toward the economic and political arrangements that currently exist in society (Antony, 1980, Michalowski, 1976). To different degrees (but more often in "radical" versions), each of the foregoing terms may include ideas from a Marxist analysis of social class and power.<sup>4</sup> Seldom do persons embracing liberal or conservative ideologies relate crime to the distribution of social and economic power in capitalist society. Yet it is through this distribution of social power that the concepts of crime and criminality are formulated, largely through the media, of what is criminal, worthy of exclusionary penalty and what might be "realistically" expected of attempts

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<sup>3</sup> For a discussion on the differences between these terms, see Antony (1980: pp. 234235).

<sup>4</sup> For an overview regarding the theoretical departures between functionalist and conflict paradigms, see Chambliss and Mankoff (1976: pp. 1-28)

to "do something" about crime. Reasons and Perdue (1981: 69-70) warn not only of the dangers of the marketplace concentration of material goods and the elimination of competition as a threat to democracy but also warn of *ideological hegemony* (a concept derived from the writing of Gramsci [1971]). Dominant corporate interests now influence the media with a communications technology so advanced that "public dialogue, qualification and alternative viewpoints have largely vanished" (Reasons and Perdue, 1981:53).<sup>5</sup> Prime-time network television (and recently, a flood of Hollywood box-office urban "Rambos") have done much to show the public that criminals are an identifiable sub-human species that must be eliminated at all costs, even if the means to this end are outside the law.

One version of the radical view on reform begins with a realization that the roots of criminal behavior are far too diverse and complex to be addressed through isolated reform in

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<sup>5</sup> The authors are not insinuating that the media does not contain features of dialogue and alternative viewpoints. Rather, the media is subject to an ideology focusing on a set of *structural imperatives* (arrangements and properties central to the continuation of existing master economic and political institutions). General and specific ideologies are transmitted by organized means of influence. An example of media reporting where structural imperatives and dominant ideology are left unquestioned would be the expose reporting style of CBS's *Sixty Minutes*. Although irregularities in corporate activities are frequently revealed (e.g., bribery, "kick-backs", influence peddling, manufacturing unsafe consumer products), the dominant corporate ideology (accumulating wealth through the labor of others, elitism, the unquestioned acceptance of wealth distributed through inheritance laws, private versus public interests, the power in "the triumph of the will", property relations maintained by legitimized violence, etc.) are not subject to the same exposure. Thus it is possible to isolate *practices* in capitalist society without threatening the legitimacy of the dominant ideology.

one (correctional) context. Rather than conceiving due process as following the inmate from the courtroom to the door of the prison whereafter it is abandoned, their analysis includes system-wide encounters with state authority throughout the "carceral continuum" (a phrase introduced by Foucault, 1977). If the whole system of criminal justice is heavily weighted in favor of crime control where ends justify means, it seems futile to advocate due process reform without wider egalitarian social reform.

To reduce the number of violent acts, some of which culminate in murder, requires a restructuring of social relationships as they exist in this country: the reduction of economic, social, and sexual competition, a changing consciousness about what "success" in these areas is, and the construction of political institutions that genuinely strive to create a fair and decent place for people to live in. No small order, to be sure; and one probably impossible without a total transformation of the political, economic and cultural life of Americans (Chambliss and Mankoff, 1976: 188).

A critical approach to prison reform casts doubt on the morality of the (declared) standards of conduct and value systems to which practitioners within the system are attempting to inculcate in prisoners:

Prison reform, indeed, seems to me to be an almost meaningless concept, because the actual function of imprisonment is contradictory to its expressed purpose. The actual function is vindictive and moralistic; and if - as seems clearly the case - the expressed purpose of the prison to rehabilitate the offender and reduce crime can be achieved by treating prisoners with the same respect and openness accorded to other people, the expressed purpose will be sacrificed for the popular demand for moralistic vindictiveness (Friedenberg, 1975: 11-12).

Additionally, if prison is the final step in a whole armory of

"normalization" techniques to produce a compliant and productive citizenry, questions must be addressed to the visions of the desired social order. That order typically maintains current economic arrangements where a few elites control vast resources and shape decisions that have global consequences for all humankind.

### *Symbolic Purpose*

Radical or critical theorists often maintain that we must look beyond the declared purposes of the criminal justice system to appreciate the *symbolic* purposes of institutionalized decision-making. For example, Reiman (1980:33-34) argues a position modified from Durkheim (1964) and Erickson's (1966) writings that the existence of an identifiable criminal group is essential to maintain visible boundaries between acceptable and unacceptable behavior. Those boundaries are best outlined in "dramatic confrontations":

Whether those confrontations take the form of criminal trials, excommunication hearings, courts-martial, or even case conferences, they act as boundary-maintaining devices in the sense that they demonstrate to whatever audience is concerned where the line is drawn between behavior that belongs in the special universe of the group and behavior that does not (Erikson, 1966:11).

Reiman's reason for drawing on this functionalist perspective is to underscore a point that the "failure of criminal justice works to create and reinforce a very particular set of beliefs about the world, about what is dangerous and what is not, who is a threat and who is not" (1984: 33). It should

not strain the imagination to extrapolate these same observations of symbolic purpose to prison disciplinary hearings. A steady supply of inmates processed through disciplinary rituals show the relevant audience that inmates are *different* from correctional staff. To contain and control these deviants, proactive security must be maintained to detect them. The inter-relationship between security maintenance and the identification of deviants becomes a tautology, if not a selffulfilling prophecy. The contraband enforcement patterns in Chapter One (Table V) suggest that where prison administrations look for deviance, they will find it.

Maintaining intra-class divisions is a crucial function of the prison disciplinary hearing; the prison could not function without the keepers believing that they have nothing in common with the kept:

The basic concepts to understand the Canadian penitentiary are social, economic and of course, political rather than psychological...Marxian theorists, in turn, would point out that this is just what the prison system must prevent at all costs - that one of the most important functions of the criminal stigma and incarceration is to prevent guards and convicts from discovering that they share a common immiseration as members of the same low social class and might evolve a common political purpose... (Friedenberg, 1980:67).

Cast in this perspective, disciplinary hearings take on a symbolic function to deeply contrast assumed moral differences between inmates and guards. Prisoners are always guilty because the officer's report is *the* definition of reality. A guilty finding vindicates the submissive and dependant status of the



prisoner while simultaneously elevating the integrity of the reporting officer. "Order" and "discipline" are uni-dimensional constructs<sup>6</sup> directed towards a powerless group. Seldom are officers called into question for their handling of occupational tasks in a hearing similar to the prison disciplinary hearing.<sup>7</sup> The reaction to an ambiguously defined prisoner "misconduct" is much more visible, immediate and severe than the same process of reaction to line-staff for relatively similar behavior. For example, a loud and arrogant prisoner who swears at a guard will face consequences drastically at odds with a loud and arrogant guard who swears at a prisoner.

Prison disciplinary hearings are but one technique that artificially contrast inmates and guards. Moral differences are sustained not only by the "us and them" mentality, but are supported by visual and linguistic cues. "Prisoners" or "inmates" wear "greens" while "officers" wear "uniforms". The latter group is required to keep their shoes shined, uniforms kept spotless and pressed, their hair trimmed and faces clean-shaven. Although meticulous dress standards may have been

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<sup>6</sup> If there were real differences in the morality of inmates and prison guards, the latter would have no need to put locks on their lockers at work. In one prison in this study, the Business Manager estimated that costs associated with employee theft amounted to about \$2000.00 a year. It seems that the discipline required of inmates is not practiced by some (or many) of those charged with enforcing the discipline.

<sup>7</sup> Staff misconducts are generally handled informally. Other forums for disciplining the keepers include arbitration hearings where serious or repetitive violations occur, meetings held by senior staff with the errant employee (accompanied by union representation) and on occasion, charges laid in outside courts for theft or assaulting an inmate.

required of inmates in the past, today the clothing issued to prisoners frequently makes them look ridiculous.<sup>8</sup> Furthermore, the core of the correctional mandate where guards enforce a litany of order-based rules on prisoners strikes deep resentment between the two groups. It gives correctional staff something to do during the long hours of shift-work, and provides them with the experience of power (e.g., unit/tier frisks, managing tiers/units by allocating duties and supervising tasks) and its attendant occupational rewards. Given that today's prisons are run on paramilitary models of management, the perception of an *enemy* is a prerequisite to breathe life and purpose into the rituals of tactical team training, *esprit de corps*, handcuffing, "subduing techniques" and posturing to maximize surveillance.

The class homogeneity of inmates and guards was underscored by Ellis (1979). With data collected for a study in the southern United States, he describes the common features of guards and inmates:

1. Both often come to prison as a consequence of unemployment,
2. Both tend to feel they are viewed as failures for whom the penitentiary is a last resort,
3. The [Vietnam] war experience leads them to believe they are much more likely than are members of higher social groups to die or get hurt as a result of this experience,

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<sup>8</sup> Clothing may be altered by prisoners themselves and returned to a common laundry whereafter it may be reallocated to someone who does not fit the "alterations". Seldom, if ever, do shirts look as if they have been pressed, institutional footwear consists of cheap running shoes and the clothes generally look ill fitting.

4. Both feel to an almost equal degree that they are members of closely supervised groups,
5. Both feel to an almost equal degree they are denied their legal rights,
6. In their speech, leisure and musical preferences, tatoos, nicknames, they are substitutable (Ellis, 1979: 45-46).<sup>9</sup>

Using the reforms contained in the Report of the Sub-Committee on the Penitentiary in Canada (1977; the "MacGuigan Report") as a frame of reference, Ellis argues that inmates are more likely to identify with professionals working in prisons than with custodial staff. Professionals, unlike guards, do not have the immediate occupational task of applying coercive techniques to maintain order in the prison. Inmates are thus viewed by correctional line-staff as being responsible for the former's erosion of status, preventing both groups from realizing their common class base in capitalist society.

The class of people (inmates) that populate Canadian prisons is integral to an understanding of reform or an argument about the functional purpose of imprisonment. The identification of deviants drawn from poor and usually illiterate groups fuels the notion that crime is exclusively an individual rational choice with no defensible intervening or contributing structural contributions:

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<sup>9</sup> One might add to this list that both groups feel to an equal degree that they are not receiving adequate remuneration for the work they do.

[There] are serious ramifications for the class from which prisoners are primarily drawn and thereby, for society at large. To the extent that deprivations materially enhance the prisoners' isolation from the rest of society and are supported by or themselves engender the notion that prisoners deserve less than other members of their class because they are fundamentally different, lesser human beings, these deprivations will serve to obscure the relationship of the sub-class to the class from which it is drawn. *This carries the danger that, in so far as imprisonment can be viewed as an added dimension of class inequality, this function will be disguised.* Put another way, in so far as criminality stems from social and not individual pathology, this fact may be obscured by the stigmatizing, isolating and power-draining deprivations which are inflicted on prisoners (Mathieson, in Mandel (1977: 24).

### Where Do We Go From Here?

Several perspectives have been presented in this paper suggesting that the obstacles to introducing fairness in prison disciplinary hearings must be initiated at a level different than that where litigation is absorbed by the prison administration's tactics (in the form of "re-writing the rules" or circumventing statutes, policy directives and common law). Litigation followed by legislative amendments often produce an endless spiral of "paper battles" with each side laying claim to (partial) victories. The struggle for fairness in administrative decisions continues even though a reading of the Correctional Centre Rules and Regulations *seems* to promote a substantial degree of opportunity for the inmate to hear and be heard, to question the allegations and offer his/her version of the events in question. So far, it would appear that the entreaties made by

legal-reformists for fair decision-making in prisons has fallen on deaf ears. Their arguments are lost in a din of counter-arguments focusing on the increasingly popular image of criminals as free-willed deviants who have selected a path of unrighteousness with calculated abandon. "Administrative efficiency" drowns out pleas for careful decision-making and the parsimonious use of dispositional power. Correctional shibboleths ("security", "order" and "discipline") can become rationalizations for a range of coercive practices. To address issues at this level is to speak to entrenched attitudes, awareness, preconceptions and "common sense".

As a reference point for addressing the domain of attitudes that shape the day-to-day implementation of fairness in prison decision-making, academics and practitioners would do well to appreciate the unintended (and functional) consequences of how the prison is used to demarcate boundaries of "good" and "evil". Current definitions of crime and criminality create "an image that crime is almost exclusively the work of the poor, an image that serves the interests of the powerful" (Reiman, 1984:7). Attention to predatory street crimes, while remaining an object of legitimate concern, also diverts attention from behaviors that are far more harmful yet remain *undefined* as constituting a social harm, *undetected* through lack of enforcement, and thus go *unpunished*. The economic costs of corporate crime (often with government complicity) to the consumer and taxpayer are astronomical compared to what is incurred through armed

robberies, muggings and burglaries. One Judiciary Subcommittee in the United States estimated that faulty goods, monopolistic practices and other violations cost consumers between \$174 and \$231 billion dollars *annually* (Clinard and Yeager, 1980: 8). Estimates for Canada are proportionately similar (Goff and Reasons, 1978: 1115).

Canadians, despite their claims that they will not tolerate property crimes and violence to individuals, *do* tolerate these harms in the form of preventable highway accidents and industrial pollution: "[All] the potential Hillside stranglers and .44 calibre killers who might be at large in Canada could not hope, collectively, to win even a bronze medal in competition with INCO and its fellow industrial giants" (Friedenberg, 1980: 78-79). Violent crime is not restricted to the streets:

Corporate violence...includes losses due to sickness and even death resulting from air and water pollution and the sale of unsafe foods and drugs, defective autos, tires and appliances, and hazardous clothing and other products. It also includes the numerous disabilities that result from injuries to plant workers, including contamination by chemicals that could have been used with adequate safeguards and the potentially dangerous effects of other work related exposures. Far more persons are killed through corporate criminal activities than by individual criminal homicides: even if death is an indirect result, the person has died (Clinard and Yeager, 1980:9).

Similarly, Reasons, Goff and Patterson (1981) conceptualize corporate indifference to the health and safety of workers as constituting violence. The authors cite numerous examples in Canada where the desire for profit exceeded concern for

hazardous working conditions, resulting in the sickness, maiming and death of thousands of employees each year (Reasons, Goff and Paterson, 1981: Chapter 2).

The absolute nature of current definitions of "deviance" begins to crumble with the realization that there is a universe of socially harmful behaviors that do not come within the triad of law, crime and punishment. This expanded consciousness will be anterior to any thinking about social policy that will address individual and collective behaviors that fall outside contemporary, narrow definitions of "crime" and "criminals". Whether this precondition will promote wider egalitarian social change will remain a moot point for some time. Regardless of anticipated instrumental outcomes of an expanded conception of social harm, one thing should be certain: attitudes and therefore practices directed towards what we now assume to be "crime" and hence "dangerous" will not change without the praxis of challenging the forces that delineate what crime is.

Fears of street crime *are* legitimate public concerns. There *are* dangerous people in society whose individual actions have shown that they must be contained and controlled for the collective interest. The institutions where they are held *are* entitled to swift mechanisms to deal with violent individuals.

In addition to whatever research and instruction that might accompany the foregoing issues, criminologists must work at theoretical and practical levels to reduce the corporate state's

stranglehold on definitions of crime, criminality and dangerousness.<sup>10</sup>

*Absolutism versus Value Preferences*

Although my academic training is of an interdisciplinary nature, this thesis has taken a decidedly sociological perspective on the substance of prison disciplinary hearings. I have tried to challenge the authority, rationales and methods through which penalty is levied on a conscript clientele (Friedenberg, 1975). Asking questions about institutional monoliths such as the prison "presupposes that one is looking some distance beyond the commonly accepted or officially defined goals of human actions" (Berger, 1979: 4). Such inquiry may be a somewhat precarious exercise (in terms of its audience's reception) because "sociological understanding is always potentially dangerous to the minds of...guardians of public order, since it will always tend to relativize the claim to absolute rightness upon which such minds like to rest" (Berger, 1979: 15).

Those issues aside, it is one task to debunk existing practices in provincial corrections for heuristic purposes, it is quite a different matter to suggest reforms. Directing attention to the gap between rhetoric and reality is a relatively safe academic pursuit; proposing change leaves one

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<sup>10</sup>See Michalowski (1976) for a theoretical discussion that conceptualizes social problems based on "harms" rather than state-defined criteria.



open to having suggested reforms later dissected and labelled "rhetorical", "superficial" or "liberal tinkering". Worse, one's arguments for some laudable social goal might be transformed by human agency into something at odds with the original vision.

### *Pessimism*

We have seen that prison administrations possess the chameleon-like capability of adhering to the letter of the law (when convenient) while proliferating manifestly unfair practices. The arguments in Chapter Two and the qualitative evidence presented in Chapter Three should have made it apparent that procedural law alone cannot prevent the exercise of arbitrary decisionmaking. What is particularly disheartening regarding the conclusions that *can be made* with my own findings and those of other commentators on prison reform is a prevailing sense of pessimism concerning the prospects for change through legalism:

The growth of legalism is linked with wider societal processes, including professionalization and bureaucratization and the atomized division of labour and hierarchy this entails. Beyond this, it is linked to macro-economic, political, cultural and social forces in ways we have difficulty comprehending, *let alone doing anything about...* The grand concerns of equality and justice are themselves ultimately a matter of ideals and evaluation which cannot be precisely specified nor agreed upon, and whenever these concerns are put into practice one can anticipate that *the obdurate nature of human organizations will transform them...* one key sign that equality and justice are being approached is the degree to which law does not enter human relations. Obviously, given my interpretation of the current state, *one cannot be optimistic* (Ericson, 1983: 57, my emphasis).

Ericson urges those who seek equality in social structure to look to means other than law because statutes, legislators, law enforcers and law reformers sustain and perpetuate inequality (1983: 2). His prescription for alternatives to securing social equality is brief, making only passing reference to "avenues of public protest and complaint" through the media and the expansion of "systems which foster human growth and give the opportunity to make intelligent decisions" (Ericson, 1983:57). Similarly, Ratner decries the woeful impotence of correctional law to confront abuses of carceral power, concluding that the "vectors of change are not apparent; worse, the abuses of power are left to its proprietors for remediation" (1986: 151).

This reasoning permeates much of recent Canadian academic literature on the prospects for prison reform or wider egalitarian social change. Commenting on the authoritarian climate of the times, Millard (1982) believes we are witnessing a general drift into demands for law and order and popular feelings that criminals should not be entitled to material gains or rights not also afforded to the least eligible members of society. It is a climate which

strengthens the hand of those who oppose reform, and the highly bureaucratic nature of the prison system makes it relatively easy for either a prison administration as a whole, or individual guards to subvert attempts to introduce the rule of law (Millard, 1982: 18).

Millard, too, holds little promise for common law intervention into the machinery of prison discipline. Questioning prison reform in general, he asks, "Are the incessant cycles of reform

rhetoric and failed programs merely an indication that history teaches us nothing, or are they elements in a more subtle and insidious process of mystification (Millard, 1982: 20)? He does not address his own query but directs lawyers to "espouse a legal realism which recognizes the philosophical, political and practical pitfalls of the task in hand". The solution, if there is one, remains elusive. In The Illusion of Prison Reform, Gamberg and Thomson (1984) conduct a critical and well-documented overview of reform efforts in Canadian federal penitentiaries, concluding "only a change in socio-economic circumstances, a change which may see inmates as part of wide political movement, will ultimately affect the ideology and organization of corrections" (1984: 4). Is this change something that *will* evolve, *is* evolving or *cannot* evolve? On this score, the authors leave us in the dark.

Reform, it seems, only serves middle-class professional interests, placates rebellious prisoners and shows the public that Something Has Been Done (Ellis, 1979; Foucault, 1977; Friedenberq, 1980:74). Reform generally will not be implemented if in any way it upsets administrative and enforcement powers (Ericson and Baranek, 1982: 223).

The pat solution to the problems of adjudication - to expand "due process" in the adversary system - might produce negligible results or even be counterproductive. Expanding due process might give the illusion of improvement even if there were none, and also contribute to a set of standards and controls so remote from the existing system that they would be inapplicable and meaningless in all but occasional cases (Feeley, 1979: 277).

Similarly, Cohen identifies a similar pessimistic view of the world where

[a]ll reforms, how ever liberal and well-intentioned (indeed particularly when liberal and well-intentioned) must lead to more repression and coercion. Contradictions increase and the system disintegrates, ultimately sowing the seeds of its own destruction. In a recent liberal world view...the very basis of liberal reformism is open to similar doubt, benevolence itself is a highly suspect motive and its consequences invariably disastrous (1985: 239).

He refers to current intellectual developments as reflecting 'analytical despair' and 'adversarial nihilism'; no change is possible because friends of the system [conservatives] do not want to change it and opponents [liberals and radicals] cannot change it (Gouldner in Cohen, 1985:240).

In  *toto* , the emergence of a collective pessimism among academics speaks of a deeper *crie de coeur* when liberals are faced with the contradiction between ideals and a capitalist society standing in the way of realizing those ideals (Greenberg and Humphries, 1980: 218). An outlook where reform is viewed as contributing to the very social problems that its architects sought to address has serious ramifications for the prospects of future reform efforts. Pessimism may lead to an apathetic "reform paralysis" where research may not attempt the lesser task of identifying social ills, let alone prescriptive statements for their solution.

One strategy available to reformists lies in using the formal declarations made by the holders of state power to live up to the rhetoric that sustains the carceral regime. In terms of the present analysis, the motivation behind suggesting reforms in disciplinary hearings can be justified (assuming justification is required) on a number of fundamental premises that undergird western democracies. At the most basic level, demands for accountability in decision-making can be supported in formal declarations that I generally share with the legal-reformist position:

1. In a decent society, it is unthinkable that government, or any officer of government, possesses arbitrary power over the person or interests of the individual;
2. All members of society, private persons and government officials alike, must be equally responsible before the law; and,
3. Effective judicial remedies are more important than abstract constitutional declarations in securing the rights of the individual against encroachment by the state (Jones, 1958: 149).

As I have implied earlier, the most contentious of these principles is the third. We have seen that the content of "effective judicial remedies" may do little to alter an institutional power imbalance where correctional authorities are free to define reality in their terms. If one couples these observations concerning the impact of legal reform on the maintenance of prison discipline with the critical analysis levied at outside legislation and law enforcement, prosecutorial

discretion and emerging jurisprudence (McBarnet, 1981), the prospects for reform may appear to be critically limited. The ability of written statutes and common law to provide relief to prisoners who are subject to capricious decision-making appears to be seriously undermined in light of the findings in this thesis. Reform will easily be absorbed by state agents without producing much in the way of substantive change in disciplinary hearings. The vehicle for ensuring protections to accused persons, procedural law, is socially and institutionally structured or restructured in application to produce preferred outcomes (Ellis, 1979; Ericson and Baranek, 1982: 217). For some, law becomes little more than a clever device to maintain class-bound economic and legal arrangements while simultaneously declaring the lofty tenets of formal equality.

Earlier instrumentalist perspectives discussed in this chapter notwithstanding, to abandon the rule of law as an agent for change surrenders a viable resource towards challenging the power of governments in their class-bound identification of socially harmful behaviors. But there is a difference in blindly advocating legalism in the prison on the spurious assumption that it will lead to rehabilitative outcomes (the government's preference) and advocacy of legal forms to address the state's monopoly on the elements of "crime" and "deviance" (which could be redefined in society's interest). The latter intention is not one generally espoused by legal-reformists for they appear to accept existing definitions of socially harmful behavior; their

quarrel is more with the *mode* of corrections than with *what* is being corrected.

The more encompassing, and certainly more optimistic approach to prison reform is to accept the formal declarations of government agencies (e.g., of the type mentioned in the Introduction). These statements can be used as a device to contrast what is *said* is being done with what *is* being done. Law becomes a means of addressing the lack of correspondance between the words that legitimate practices and the practices themselves. Furthermore, history offers examples where the rule of law has been used to gain power from the ruling class (Chambliss and Seidman, 1982). We would do well to acknowledge the dialectical nature of law: the rule of law has been used to secure some measure of formal legal equality.

...there is a difference between arbitrary power and the rule of law...the rule of law itself, the impoing of effective inhibitions upon power's all intrusive claims, seems to me to be and unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about law*, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger (Thompson, 1975: 266; emphasis in orginal).

Officers chairing prison disciplinary hearings are bound by law: those that regulate the length of time a prisoner can be subjected to any punishment; the conditions of solitary confinement do meet some minimum standards set by law; the

treatment of prisoners by correctional staff are shaped by the anticipation of what action might be taken against them by the courts and legally constituted agencies such as Inspection and Standards and the ombudsman; the legally mandated organizational authority vested in correctional supervisors is employed to enforce standards of humane treatment in the handling of prisoners. Law inhibits the power of correctional authorities and does afford protection to inmates.

The tension between desired outcomes and failed realizations (e.g., successful "rehabilitation", fairness, and humane treatment) in prison reform efforts should not prevent us from cogently arguing a position for the proliferation of specific social values. Absolutist renditions of means to acquire such ends invariably lead to swings in instrumental tactics: rehabilitation to the justice-model and back to reaffirming rehabilitation. What now is perceived as a general failure of most (or all) reform efforts to secure social, economic and political rights for prisoners has deeply affected current writings on the prospects for change in the prison.

Social policy need not be defended on pragmatic anticipations of crime control alone. Cohen (1985) believes that value preferences can be an end in themselves, regardless of whether they have a statistically significant impact on recidivism rates. Those values (and caveats to their implementation) include:



1. Humane and just alternatives to prison. This value must be balanced by legitimate collective interests rather than naive individualism. Any destructuring and non-interventionist programs must be cautious of a tendency towards a *laissez faire* state where benign neglect is concealed behind benevolent rhetoric;
2. Mutual aid, fraternity and good neighborliness are preferable to dependence on bureaucracy and professionalism ('community' represents a response to genuine psychic and emotional needs). Caution: the break-up of centralized decision-making power often leads to a dispersal of social control professions and new forms of exclusion; and
3. There must be a halt to the endless process of classification, control and exclusion of more and more groups according to age, sex, race, behavior, moral status, ability or psychic state (cities should be places tolerant of deviance rather than sanitized zones). The caveat here is that people are different in more ways than the labels attached to them; exclusionary social reactions may be preferable to alternatives in the wider community (Cohen, 1985: 267-68).

Offering up the same instrumentalist goals (reformation of the offender) under a new guise (due process) creates misleading expectations and invites scepticism and resistance. (This is why I have spent as much time as I have to extricate the "due-process-equals-reformed-individuals" construct from the wider legal-reformist argument. It simply cannot be

theoretically or empirically justified). We have to move beyond the censoriousness of a handful of violent federal prisoners to situate a defence for fairness in prisons. Showing that prisoners learn to hate capricious authority and from this observation surmising that fair authority will produce positive end results are very distinct issues. The criticism I have leveled at the legal-reformist position touches its utilitarian prescriptions for "making criminals better people". My position, vis-a-vis reform in prison decision-making procedures, is that outcomes are beside the point. Exhaustive arguments hypothesizing a link between fairness and future (noninstitutional) behavior really are not necessary to the principle of fairness as an end in itself.

The value of the legal reformist position comes from its emphasis on enforcement of legally protected rights:

When we say that a person has a legal right to some thing or to engage in some activity, we generally mean to signify by this that the legal system provides some reasonably effective protection for the rightholder from interference with his/her exercise of that right. The means by which it does this are various. The criminal law protects rights by threatening with punishment those who would interfere, and by carrying out threats when they are culpably ignored...Whatever the means, *the issue of enforcement is obviously crucial, for it is only through the provision of an enforcement mechanism that the recognition of a right acquires practical significance* (Mandel, 1977: 1-2, my emphasis).

I would rather see the "enforcement mechanism" manifest in requirements for visible decision-making as (initially) preferable to the imposition of civil or judicial penalties. However, if internal directives (of the nature described in

Chapter Two where senior officers were encouraged to use alternatives to segregation) are ignored, procedures in the Correctional Centre Rules and Regulations or Manual of Operations are circumvented, one enforcement mechanism available is to fine the offending administrators. The American courts have occasionally fined wardens as much as \$25.00 for every day that an inmate was held unlawfully in segregation.

Based on the data presented in this thesis, if I were to return to a question I posed in the Introduction, namely, "Are prison disciplinary hearings Kangaroo Courts?", I would have to answer in the affirmative: yes, they can be. But several officers have shown me, and I suppose, have shown the inmates before their proceedings, that *they do not have to be*. Simply put, it depends on *who* is chairing the hearing. This does not mean that I wish to reduce the issue of fairness in disciplinary hearings to a microcosmic analysis of the social-psychological dynamics and traits of their participants. The typologies presented in Chapter Three describing the "antagonistic-professional" continuum of fair practices exercised in disciplinary hearings reveal that the presence of due process features can hardly be attributed to the actors alone. Architecture, training, and the recruitment of senior staff committed to an ideology of "professionalism" (part of which is dispassionate decisionmaking) *all contribute to substantial changes in the reality of imprisonment*. Procedural law is only one aspect of what motivates administrations to

conduct fair decisionmaking. In fact, the law may lead to a reconsideration and liberalization of institutional policies even if not constitutionally compelled (Jacobs, 1983: 46). Liberal wardens in the United States frequently used the prospect of judicial intervention as a "higher authority" to implement humanitarian reforms (Jacobs, 1977).

The task for those concerned with seeing fairness exercised in correctional decision-making, regardless of their academic discipline, is to identify the larger social-structural variables conducive to fair decisionmaking. Legalism alone cannot legislate fair attitudes. We might begin by asking: What external influences beyond legal canons lead some correctional staff to adhere to the spirit of procedural law, even when they can circumvent the procedure? Under what structural conditions do prison administrations practice fairness? Jacobs correctly directs our attention to the political, social, economic and moral attributes of society as reflected in its treatment of "the most peripheral members of society" (1983: 17). Citing Biderman's (1968) studies of prisoner-of-war camps, he urges that

[the] more general significance for all prison studies is Biderman's observation that the degree of control exerted over prisoners of war has fateful implications for the type of social system which will develop among the prisoners. The more unlimited (by law, public opinion, and so forth) the captors' recourse to coercive sanctions and the more repressive the organizational regime, the more likely it is that predatory relations will develop among prisoners. Where administrators are constrained by national or international law, it is more likely that the captives will be able to maintain the structure of military or criminal organization imported from the outside (Jacobs, 1983: 20).

Social scientists are in an advantageous position in which to espouse values that not only challenge current definitions of social harm, but can assist in creating a climate where governments are held accountable for their decisions, rationalizations and practices. In short, they can assess the gap between the rhetoric and the reality.

### *Visibility*

One measure of how requirements for visible decision-making in corrections might impact on the way prison discipline is dispensed could be hypothesized from the reluctance of prison administrators to permit research into these proceedings. It was only because of my occupational position and support from a few enlightened senior staff that I was allowed as deep a foray into these hearings as Chapter Three describes. Other researchers wishing to examine the same proceedings but not having similar strategic advantages have been diverted or given a flat "no" to their study proposals.<sup>11</sup> If there is nothing untoward about the

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<sup>11</sup> Correctional staff in senior capacities have told me personally (or alluded to the fact) that certain liberals were not welcome to research prison disciplinary hearings, either because of their previous writings (Culhane, 1984; Jackson; 1983, 1974) or based on what they *anticipated* might be written. (Williams (1985) wrote a thesis on disciplinary hearings using data from the Victoria Island Regional Correctional Centre after having been denied access to information held at the Lower Mainland Regional Correctional Center).

The fear seems to be that undue requirements of accountability in decision-making, spawned by criticism of existing practices, will prevent staff from effectively managing a prison. Given the findings in the Report of the Study Group on

manner in which administrative justice is delivered behind the concertina wire of provincial institutional facilities, one wonders why the resistance to studying these disciplinary procedures is so firm.

Requirements for higher visibility in closed hearings would allow those who care (professional, academic or otherwise) to see and judge the process as to whether it constitutes a justifiable exercise of power. When the Correctional Centre Rules and Regulations were revised in 1978, provisions were made for the public not only to observe but to *participate*. Section 31 (3) [a] and [c] allows for "a person, not an officer, appointed by the minister" to sit on a disciplinary tribunal or to do so alone. Although the authors of the C.C.R.R. (1978) were sensitive to the perceived illegitimacy of having prison offences judged by prison staff, the decision for public participation ultimately rested within the discretion of each institution because "the similar structure had only recently been implemented in the Canadian Penitentiary Service" (Williams, 1985: 101-02). Now, eight years later and having had ample opportunity to assess the viability of outside chairpersons in the federal system, provisions for independent chairpersons remain rhetorical (at least within the four prisons considered in this paper).

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11(cont'd) Murders and Assaults in the Ontario Region (1984; discussed in Chapter 4), there may be some merit to their reluctant posture. However, their side of the story could be represented in the same ways (i.e, academic journals) that psychologists Gendreau and Bonta (1984) have responded to Jackson's (1983) censure of solitary confinement practices.

Discrepancies among the formal declarations, legal language, policy statements and the practices in prisons are useful starting points for pressuring high-level administrators to ensure that the rhetoric more closely approximates the reality. The rhetoric legitimates the practice; if the two diverge, public interest demands that one of the two has to change. If response to this divergence in words and deeds is to simply alter the wording, the government's legitimacy may be further eroded.

The recommendations contained in Appendix E are based on the over-riding value preference of *visible decision making*. People will not be rehabilitated, reformed or "legalized" into law-abiding citizens as a result of these proposals. These ideas, if implemented, can expose the power which the state uses to further restrict the freedom of a socially marginal group. They might (but that is not their intent) induce a measure of conformity to procedural rules and dissipate the need for inmates to initiate litigation against their keepers. As Jeremy Bentham rightly warned us, "where there is no publicity there is no justice".

APPENDICES





Appendix A (ii)



Province of  
British Columbia

Ministry of  
Attorney General  
CORRECTIONS BRANCH

INMATE OFFENCE REPORT

PART II

Name:

Initials:

No.:

Date:

Ref. No.:

WITNESSES AND EVIDENCE

Witnesses (indicate staff or inmate):

- 1. \_\_\_\_\_ 5. \_\_\_\_\_
- 2. \_\_\_\_\_ 6. \_\_\_\_\_
- 3. \_\_\_\_\_ 7. \_\_\_\_\_
- 4. \_\_\_\_\_ 8. \_\_\_\_\_

Physical evidence (description, location): \_\_\_\_\_

INVESTIGATION

Investigating Officer: Name: \_\_\_\_\_

Date Assigned: \_\_\_\_\_

Witnesses' account: \_\_\_\_\_

Inmate's account: \_\_\_\_\_

Signature of Investigating Officer: \_\_\_\_\_

Date: \_\_\_\_\_



# Correctional Centre Rules and Regulations

## *Rules to Apply at Hearing*

32. (1) The hearing of an allegation filed under section 30 (a) shall, subject to subsection (2), be held within 24 hours, excluding a Saturday, Sunday, or holiday.

(2) Where an extension of time is required, the director may postpone the hearing for a period not exceeding 72 hours.

(3) The inmate shall be present at the hearing, shall be advised of the nature of the allegation, and may admit or deny the allegation.

(4) When an inmate denies the allegation, the hearing shall consider the report of the officer who made the allegation and shall hear oral evidence of the officer who investigated the allegation.

(5) The officer or the chairman of the disciplinary panel hearing the allegation may call such further witnesses as he deems necessary, including witnesses requested by the inmate.

(6) An inmate may give oral evidence and question witnesses.

(7) A written record of the hearing shall be compiled, including the report of the officer who filed the allegation in writing, an outline of the oral evidence presented, and a statement of the determination and disposition made.

(8) Where the hearing is before a disciplinary panel and its members are not unanimous in their decision on the determination, disposition, or any other matter in the proceeding, the decision of the majority of members shall be the decision of the disciplinary panel.

(9) After considering the evidence presented, the disciplinary panel or officer, as the case may be, shall determine whether or not the inmate committed the alleged breach.

## *Disposition*

33. (6) Where a disposition under subsection (1) has been made against an inmate and the inmate applies to the disciplinary panel or officer that made the disposition, the disciplinary panel or officer may, on the undertaking of the inmate to comply with all rules and regulations of the correctional centre in future, reduce or suspend the disposition and, where they consider it appropriate, direct that, as a condition of the reduction or suspension, the inmate report to and be under the supervision of a specified officer for a period of not more than three months during the term of confinement at the correctional centre.

## *Review*

34. (1) Where a determination is made under section 32 or a disposition is made under section 33, the officer who filed under section 30 or the inmate may, within seven days of the determination or disposition in question, appeal to the Director of Inspection and Standards by mailing a written request for review addressed to that director.

## Appendix B

### CELL CONDITION SHEET

PRISONER NAME: \_\_\_\_\_

UNIT/CELL: \_\_\_\_\_

|                             | CLEAN | DAMAGED | REMARKS | PRISONER'S INITIALS |
|-----------------------------|-------|---------|---------|---------------------|
| MIRROR                      |       |         |         |                     |
| SINK                        |       |         |         |                     |
| TOILET                      |       |         |         |                     |
| CLOSET                      |       |         |         |                     |
| DESK                        |       |         |         |                     |
| CHAIR                       |       |         |         |                     |
| PEG BOARD                   |       |         |         |                     |
| WINDOW                      |       |         |         |                     |
| CARPET                      |       |         |         |                     |
| FLOOR                       |       |         |         |                     |
| BED FRAME                   |       |         |         |                     |
| MATTRESS                    |       |         |         |                     |
| WALLS                       |       |         |         |                     |
| CEILING                     |       |         |         |                     |
| SMOKE DETECTOR              |       |         |         |                     |
| RADIO and ELECTRICAL OUTLET |       |         |         |                     |

DATE OCCUPIED: \_\_\_\_\_

L.U. OFFICER: \_\_\_\_\_

DATE/TIME: \_\_\_\_\_

This sheet to be completed by the Living Unit Officer in the presence of the prisoner that is being assigned to the cell.


When filled in and signed, this form is to be placed on the prisoner's progress log.

W-522

# Appendix C

O.P. 50400



 Province of British Columbia  
Ministry of Attorney General  
CORRECTIONS BRANCH

## REPORT OF INMATE/YOUTH INJURY

Inmate/Youth Name: \_\_\_\_\_ Age: \_\_\_\_\_ Number: \_\_\_\_\_  
(SURNAME) (GIVEN NAMES)

Date of Report: \_\_\_\_\_ Unit: \_\_\_\_\_

Site of Injury: \_\_\_\_\_

Time of Injury: \_\_\_\_\_ Time Reported: \_\_\_\_\_

Date of Injury: \_\_\_\_\_ Date Reported: \_\_\_\_\_

If delay in reporting, give reasons: \_\_\_\_\_

Injury occurred while inmate/youth: Working \_\_\_\_\_ Sports/Leisure \_\_\_\_\_

Describe nature of injury (parts affected and how it happened): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(ATTACH ADDITIONAL PAGE IF NECESSARY)

Was injury caused by:

- |                   |                          |           |                          |
|-------------------|--------------------------|-----------|--------------------------|
| Assault           | <input type="checkbox"/> | Fighting  | <input type="checkbox"/> |
| Attempted Suicide | <input type="checkbox"/> | Horseplay | <input type="checkbox"/> |
| Self Mutilation   | <input type="checkbox"/> | Accident  | <input type="checkbox"/> |

Was injury fatal? Yes  No

If so, indicate nature of cause:

- |         |                          |            |                          |
|---------|--------------------------|------------|--------------------------|
| Murder  | <input type="checkbox"/> | Accidental | <input type="checkbox"/> |
| Suicide | <input type="checkbox"/> | Natural    | <input type="checkbox"/> |

Was first aid rendered? (if yes, by whom?) \_\_\_\_\_

Disposition of injured person (hospital, returned to quarters, etc.): \_\_\_\_\_

Was safety equipment provided? Yes  No  Utilized? Yes  No

Were safety regulations known to injured person? (if applicable) Yes  No

Was inmate/youth instructed in use of equipment? Yes  No

Recommendations to prevent further occurrence \_\_\_\_\_

Reporting Officer: \_\_\_\_\_ Date: \_\_\_\_\_

Inmate's/Youth's Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Senior Officer's Comments: \_\_\_\_\_

\_\_\_\_\_

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Is it likely the injury will result in permanent disability? Yes  No

Medical Attendant's Comments: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Director's Comments: \_\_\_\_\_

\_\_\_\_\_

Board of Inquiry Recommended: Yes  No

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

UNIT DIRECTOR COPY

Appendix D

| Case | Plea | Offence                         | Sentence           |
|------|------|---------------------------------|--------------------|
| 1A   | NG   | [5] contraband (razor)          | warning            |
| 1B   | G    | [7] assault staff (push)        | 15 days seg        |
| 2    | G    | [12] breach rule (phone)        | 3 nights lockdown  |
| 3    | NG   | [5] saved medi (valium)         | 10 days seg        |
| 4A   | NG   | [7] threaten assault            | not guilty         |
| 4B   | G    | [9] insult officer              | 3 days seg         |
| 5    | NG   | [5] contraband (100 valium)     | 15 days seg        |
| 6    | G    | [5] contrand (unknown drug)     | 10 days seg        |
| 7    | G    | [5] saved medi (valium)         | 3 days seg         |
| 8    | G    | [5] saved medi (various pills)  | 1 day seg          |
| 9A   | NG   | [1] refused to go to cell       | 5 days seg         |
| 9B   | NG   | [7] spitting gesture to officer | 15 days seg        |
| 10   | N/A  | [1] under influence             | plea not accepted  |
| 11   | G    | [7] fighting                    | 5 days seg (susp.) |
| 12   | NG   | [7] fighting                    | 4 days seg         |
| 13   | G    | [5] contraband (cannabis)       | 3 nights lock-up   |
| 14   | G    | [5] contraband (razors)         | 5 days seg         |
| 15A  | G    | [3] broke chair                 | 15 days seg        |
| 15B  | G    | [5] contraband (cannabis)       | 15 days seg        |
| 16A  | NG   | [1] refused to clean cell       | 5 days seg         |
| 16B  | NG   | [6] dirty cell                  | 5 days seg         |
| 17   | NG   | [9] swore at officer, threats   | 15 days seg        |

|     |    |                                    |                  |
|-----|----|------------------------------------|------------------|
| 18  | G  | [12] orange juice in cell          | 2 nights lock-up |
| 19A | G  | [5] contraband (razor)             | not guilty       |
| 19B | G  | [12] excessive food,<br>clothing   | 3 nights lock-up |
| 19C | NG | [5] contraband (condom)            | 2 nights lock-up |
| 20  | NG | [1] refused to clean cell          | 7 days seg       |
| 21  | G  | [5] contraband (cannabis)          | 7 days seg       |
| 22  | NG | [9] swore at officer               | 1 day seg        |
| 23  | NG | [7] spat at officer                | 10 days seg      |
| 24A | NG | [3] tore sleeves of shirt          | not guilty       |
| 24B | NG | [12] pressed call button           | 3 days seg       |
| 24C | -- | [10] spit in elevator              | 5 days seg       |
| 25  | G  | [7] fighting                       | 3 days seg       |
| 26  | NG | [2] wandering on tier              | 5 days seg       |
| 27  | G  | [5] contraband (Tylenol)           | reprimand        |
| 28  | G  | [5] under influence                | 10 days seg      |
| 29  | G  | [11] shouting, breaks<br>furniture | 10 days seg      |
| 30  | NG | [12] jammed locking system         | 10 days seg      |
| 31  | G  | [5] brew in cell                   | 7 days seg       |
| 32  | G  | [2] wandering on tier              | 7 days seg       |
| 33  | G  | [5] contraband (drugs,<br>syringe) | 15 days seg      |
| 34  | NG | [6] pictures on cell wall          | reprimand        |
| 35  | NG | [7] fighting                       | reprimand        |
| 36  | NG | [1] not in cell at count           | reprimand        |



|     |    |                                    |                          |
|-----|----|------------------------------------|--------------------------|
| 37  | NG | [9] swore at officer               | 5 days remission         |
| 38  | NG | [7] fighting                       | 3 days seg               |
| 39  | NG | [7] fighting                       | 4 days seg               |
| 40  | NG | [1] refused to work                | 15 days seg              |
| 41  | -- | [11] shouting, breaks<br>furniture | 10 days seg              |
| 42  | G  | [11] threw pots around             | 10 days remission        |
| 43  | G  | [7] assault P.C. inmate            | 15 days seg              |
| 44  | NG | [1] hung towels on bars            | reprimand                |
| 45  | G  | [9] swore at officer               | 5 days remission         |
| 46  | NG | [3] lit fire                       | 15 days seg              |
| 47  | G  | [8] intermittent (late)            | reprimand, extra work    |
| 48  | G  | [9] swore at officer               | 5 days remission (susp.) |
| 49  | G  | [12] used phone                    | reprimand                |
| 50  | NG | [5] contraband (knife)             | 15 days seg              |
| 51  | G  | [11] threw food                    | 4 nights lock-up         |
| 52  | G  | [11] threw food                    | 4 nights lock-up         |
| 53  | G  | [11] threw food                    | 4 nights lock-up         |
| 54A | G  | [3] broke mirror                   | 2 days seg               |
| 54B | NG | [7] kicked staff                   | with above               |
| 55  | NG | [1] refused lock-up                | 3 days remission         |
| 56  | NG | [12] under influence               | 10 nights lock-up        |
| 57  | NG | [3] broke dishes                   | 7 nights lock-up         |
| 58  | G  | [12] under influence               | 5 days seg               |
| 59A | G  | [7] assault staff                  | 12 days seg              |
| 59B | G  | [3] threw objects                  | with above               |

|     |    |                                 |             |
|-----|----|---------------------------------|-------------|
| 59C | G  | [9] swore at staff              | with above  |
| 60A | G  | [7] unstated circumstances      | 8 days seg  |
| 60B | G  | [11] unstated circumstances     | with above  |
| 60C | G  | [1] unstated circumstances      | with above  |
| 61A | NG | [7] assault inmate              | remanded    |
| 61B | NG | [11] loud argument with inmate  | 8 days seg  |
| 61C | NG | [1] refused to stop fighting    | with above  |
| 61D | NG | [9] swore at staff              | with above  |
| 62A | G  | [7] took staff hostage, assault | 15 days seg |
| 62B | G  | [11] create disturbance         | with above  |
| 63  | NG | [8] climbed fence, picked lock  | 12 days seg |
| 64  | NG | [7] fighting                    | not guilty  |

## Appendix E

### RECOMMENDED CHANGES

#### Recommendation 1

*That the mandate of Inspection and Standards include a review of a random sample of disciplinary hearings from every correctional centre, camp and community facility on an ongoing basis.*

#### Rationale

As it is presently structured, the Inspection and Standards Division of the Correctional Branch only becomes aware of violations of procedure and rights *when they are appealed* by inmates or (less frequently) by staff. If correctional decisionmaking is to become visible and subject to independent assessments of "fairness", it is essential that all provincial disciplinary hearings are monitored on a random basis. The present study has indicated that there are a volume of hearings that are not subject to any outside visibility and, hence, pressure to act fairly.

Although Inspection and Standards is part of the Branch that is responsible for the custody and control of inmates, there is currently no evidence to suggest that this organizational position precludes them from impartially assessing prison disciplinary hearings. However, to maintain the perception of independence and objectivity, (initial) evaluations regarding the degree of fairness applied in disciplinary hearings across

the province should be contracted to outside researchers or agencies. Their findings will be made accesible to the public.

## Recommendation 2

*That all prison disciplinary hearings be recorded with high quality recording equipment, an accurate written file be kept on hand of each transaction (name, Correctional Service Number, date of hearing, offence, sentence), that the appeal period be extended from 7 days to 30 days and that the holding period for the tapes to be retained be increased from 60 days to 6 months.*

## Rationale

In order to allow a review of the proceedings (Recommendation 1), it is necessary that accurate and complete records be maintained. Seven days is not an adequate appeal period because segregation punishments are frequently longer; an inmate may learn about grounds for appeal after the expiration of the disposition. Extending the period for retaining records of these hearings to six months will facilitate a review of practices and decision-making. The Correctional Investigator, with a mandate similar to Inspection and Standards, asked the Solicitor General in 1982 to increase the time of retaining past tapes of disciplinary hearings from six months to two years. That request was granted (Annual Report of the Correctional Investigator, 1982/83:30,38).

### Recommendation 3

*Based on a qualitative and quantitative analysis of the audio-recordings sampled from provincial correctional centres, that officers presiding over prison disciplinary hearings be given written and specific direction in regard to their handling of rule infractions from Inspection and Standards.*

#### Rationale

It is preferable to provide senior officers with feedback with regard to the manner in which they administer procedural rules (Section 32 and 33, C.C.R.R.) than to have the courts do it for them. The requirement to conduct fair disciplinary hearings should not be treated differently than any other occupational responsibility required of senior correctional positions. Overseeing these responsibilities requires intra-Branch supervision from Inspection and Standards.

### Recommendation 4

*That the Corrections Branch undertake a project to disseminate information to prisoners about disciplinary hearings, inmate rights to a fair hearing and the appellate and investigative role of Inspections and Standards in easy-to-understand language.*

#### Rationale

Given that many prisoners cannot comprehend the legal language contained in the Correctional Centre Rules and Regulations, the Corrections Branch should make the relief

available to inmates easier to access. This could be done in the form of a brochure given to every inmate admitted to provincial prisons, not dissimilar from the Canadian Penitentiary Service publication, "Inmate Rights and Responsibilities" (Solicitor General, 1985). If fairness is to be more than lip-service, inmates must be provided with the knowledge to challenge abuses of administrative power when they occur.

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