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The Legalization of Prison Discipline in Canada

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Introduction

As recently as 1968, a prominent Canadian court could write with complete confidence and unanimity that:

> the passing of a sentence upon a convicted criminal extinguishes, for the period of his lawful confinement, all his rights to liberty and to the personal possession of property within the institution in which he is confined, save to the extent, if any, that those rights are expressly preserved by the *Penitentiary Act* (*R. v. Institutional Head of Beaver Creek Correctional Camp, ex parte McCaud* [1969], 1 C.C.C. 371, 377, Ontario Court of Appeal).

By the end of the next decade, an even more prominent court would subscribe with equal confidence and unanimity to the precise opposite proposition that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law" (*Solosky v. The Queen* [1979], 50 C.C.C. [2d] 495, per Dickson, J., now C.J.C., for the Supreme Court of Canada).

The intervening 11 years witnessed first a gradual and then precipitous overthrow of a firm judicial principle — the non-justifiability of complaints from prisoners of abuse of power by prison and parole authorities — that had been inherited from England and is as old as the penitentiary system itself. The brief period since 1979 has seen, with the entrenchment of a constitutional *Charter of Rights and Freedoms*, such an acceleration in the judicial willingness to adjudicate prisoners' claims that even the "express or implied taking away of rights by law" is no longer any bar. In fact, the legal status of prisoners has undergone a radical transformation.

Canada lagged some 15 years behind U.S. developments dating from the abandonment of the "hands off" doctrine in the mid-1960s, first with respect

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to civil rights issues (*Cooper v. Pate* 378 U.S. 546 [1964]; *Lee v. Washington* 390 U.S. 333 [1968]); then jail house lawyers (*Johnson v. Avery* 393 U.S. 483 [1969]); limited due process in parole (*Morrisey v. Brewer* 408 U.S. 471 [1972]), and disciplinary hearings (*Wolff v. McDonnell* 418 U.S. 539 [1974]) to the massive intervention of the cruel and unusual punishment cases, such as *Holt v. Sarver* 309 F. Supp. 360 (1970), *Hutto v. Finney* 437 U.S. 678, *Pugh v. Locke* 406 F. Supp. 318; *Graddick v. Newman* 102 S.Ct. 4 (1981).

By the mid-1970s, the limitations on the willingness of U.S. courts to involve themselves in prison administration were, however, becoming apparent, with such decisions as *Pell v. Procunier* 94 S.C. 2800 (1974) and *Saxbe v. Washington Post* 94 S.Ct. 281 (1974), upholding limitations on visiting rights; *Baxter v. Palmigiano* (California) 425 U.S. 308 (1974) refusing to apply right to counsel, full cross-examination rights, and self-incrimination protections to disciplinary proceedings; *Meachum v. Fano* (Massachusetts) 427 U.S. 215 (1976) and *Montanye v. Haymes* (New York) 427 U.S. 236 (1976), refusing to apply due process requirements to disciplinary transfers; *Jones v. North Carolina Prisoners' Labor Union* 433 U.S. 119 (1977) upholding regulations forbidding unions; *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex* 442 U.S. 1 (1979) and *Connecticut Board of Pardons v. Dumschat* 101 S.Ct. 2460 (1981) No. 2, holding due process in parole granting conditional on a statutory right to parole; *Bell v. Wolfish* 99 S.Ct. 1861 (1979), limiting applicability of cruel and unusual punishment to prison conditions as they were on due process indiscipline; *Hewitt v. Helms* 103 S. Ct. 864 (1983) and *Hudson v. Palmer* 104 S.Ct. 2194 (1984), doing the same for due process, indiscipline, and search and seizure in prison respectively.

These developments were well known to Canadian lawyers and legal academics who had been advocating them for Canada since the beginning of the decade (Judson and Laidlaw, 1971; Bowie, 1971; Kaiser, 1971; Solicitor General of Canada, 1972: 53; Price, 1974; Jackson, 1974). The influential dissent of Chief Justice Laskin in the parole case *Mitchell v. The Queen* ([1975], 24 C.C.C. [2d] 241) cited U.S. authority, as did the most recent in a 130 year-long series of official investigations of abuses in the penal system, which mainly distinguished itself from other exercises by coming out squarely in favor of judicial review as an all-purpose remedy (Canada, House of Commons, 1977: Chapter VII).

Canadian lawyers generally paid much attention to the activity of American courts from the late 1940s on. The movement for a constitutionally entrenched Charter of Rights was inspired by it (O'Halloran, 1948; Glasbeek and Mandel, 1984) and this movement's first fruit, the *Canadian Bill of Rights* introduced in 1960, was expressly modeled on the *American Bill of Rights*. Furthermore, the postwar period saw the ever increasing influence on the

world of American culture and institutions. This was especially so in Canada with the explosion of U.S. direct investment (as opposed to portfolio investment and to direct investment from any other source, including the U.K.), which led to the establishment of U.S. branch plants as the dominant forces in Canadian manufacturing and resource extraction (Clement, 1975: 112–116). The influence of television, mostly American and entirely a post-war phenomenon, should also not be discounted. Any attempt to understand developments in Canadian prison law must consequently start by trying to understand developments in the United States.

Most U.S. students of the prisoners' rights revolution attribute great explanatory significance to the political and social ferment of the 1960s. According to Ronald Berkman (1979: 40), "the changing political mood of the sixties, including the Civil Rights Movement, the Vietnam War, and the emergence of ethnic and national movements played a decisive role." The prison was caught up in this ferment and politicized, not in the sense of being a political issue, which it had always been, but in the sense that crime and punishment in general and prisons in particular were seen as the products of conflicts of power, as coextensive with other political issues, especially the issue of racism. This was largely the result of an influx of highly politicized prisoners, including draft resisters, civil rights workers, and Black Muslims, who regarded their imprisonment in political terms and who, as a consequence, not only brought their own struggles into the prison but who were also highly motivated and equipped to struggle against the authoritarianism of the prison itself. For example, Berkman notes a change in the demands issuing out of prison riots in the 1950s, which were mostly concerned with basic living conditions and those of the 1960s, which were political and even class based.

Black Muslims were especially effective in bringing their religious form of resistance to racism into the prison and ininitiating a "new morality" of "group time" (Jacobs, 1980: 435). Naturally, this brought the Muslims into conflict with prison authorities; since they were able to articulate their demands in terms of the civil rights movement, already accepted as legitimate by the courts, and of the well-accepted precepts of religious freedom, they achieved the first prisoner litigation successes. This had a distinct influence on other prisoners. Also influential were the Warren court reforms of criminal procedure which resulted in prisoners being released from prison for defects in their trial procedures which prompted many prisoners to review their own trials and litigate procedural defects in them.

Organizations and individuals outside prisons also came to regard prisons in a different light:

> The eroding legitimacy of the state and the politicizing of many segments of the population that were previously powerless and apolitical (college students, the poor, and racial or cultural minorities)...had a huge impact upon the prisons. These groups influence[d] each other in a spiral of increasing politicization of areas of life previously thought to be beyond the realm of political analysis and action (Bowker, quoted in Huff, 1980: 56–57).

The American Left "saw prisoners as victims of capitalist and racial oppression" (Berkman, 1979: 57):

> The Left's interest in the prisoners' movement gave impetus to the struggle inside. Outside groups engaged in propaganda and support activities in the form of defense committees for prisoners facing legal action and direct political protest activity at the prison and Department of Corrections. The movement inside felt less isolated. Prisoners felt that their political activity had strong links to the struggles of other groups in the community. These perceived links gave politically active prisoners new inspiration to close the divisions in the inmate body.

Perspectives on Prisoners' Rights

The question remains, however, why this politicization of prisons should issue in a legal revolution, why prisoners' political claims came to be interpreted and accepted in legal terms. Legal remedies did become more and more available and the attitudes of judges and lawyers changed, but these changes themselves need explanation. One explanation has been to locate the prisoners' rights movement in the "dynamics of mass society," a developmental theory which argues that "the predominant social and institutional norms and values in a mass society tend to be extended to include previously marginal groups" (Huff, 1980: 51). A leading U.S. proponent of this view is James B. Jacobs, who argues that it is "fundamental to the realization of mass society" that "rights of citizenship" be extended to "heretofore marginal groups like racial minorities, the poor, and the incarcerated" (Jacobs, 1977: 6):

> The prisoners' rights movement must be understood in the context of a "fundamental democratization" which has transformed American society since World War II, and particularly since 1960. Starting with the black civil rights movement in the mid-1950s, one marginal group after another — blacks, poor people, welfare mothers, mental patients, women, children, aliens, gays, and the handicapped — has

> pressed for admission into the societal mainstream. While each group has its own history and a special character, the general trend has been to extend citizenship rights to a greater proportion of the total population by recognizing the existence and legitimacy of group grievances.
>
> Prisoners, a majority of whom are now black and poor, have identified themselves and their struggle with other "victimized minorities," and pressed their claims with vigor and not a little moral indignation. Various segments of the free society linked the prisoners' cause to the plight of other powerless groups. To a considerable extent the legal system, especially the federal district courts, accepted the legitimacy of prisoners' claims (Jacobs, 1980: 429–470; 432).

Jacobs argues that judicial intervention has had a "great impact" and has wrought "enormous changes" in the American prison system (1980: 452–453). In opening up a public forum for grievances, says Jacobs, the courts at once destroyed the absolute power of the custodians and the isolation of the prisoners. Each decision in favor of the prisoners had great symbolic importance due to the "psychological impact" of court rhetoric in publicly vindicating prisoners and repudiating the administration, which gave power to the movement and demoralized its opposition. State legislatures have not only complied with, but gone beyond court mandated changes (*Ibid.*: 446). Even the recent reverses in the Supreme Court have not greatly affected the gains made through earlier litigation because lower courts remain active in the mostly routine enforcement of well-established rights and even oppose the conservative trends recently emanating from the higher courts.

Overall, Jacobs hypothesizes that the prisoners' rights movement has transformed the prison into an institution which must document, rationalize, and explain its actions, and this, in turn, has produced a new generation of administrators who are better educated and less arbitrary. Although litigation has had some concrete effects, such as in procedural protections, Jacobs attributes primary significance to the heightened public awareness of prison conditions, given that litigation is reported in the mass media ("the peaceful equivalent of a riot"), and the courts are used by progressive administrators as a scapegoat for having to improve correctional programs. Prison welfare benefits such as therapists, schooling, medical services, religious materials, books, grievance mechanisms, reduced censorship, less brutal punishment, more healthful conditions and less boredom are legitimized by litigation.[1] To the extent that they also result from the politicization of prisoners and the heightening of their expectations, this too can be attributed to court victory, as can the demoralization of prison staff who become more insecure both legally and morally in their dealings with inmates. Indeed, Jacobs cites the opposition

of administrators to court involvement as evidence of its effectiveness. Jacobs concludes that though prisoners are far from being established as "citizens behind bars," nevertheless litigation has gone a long way in "liberating prisoners from being slaves of the state" (*Ibid.*: 444).

Jim Thomas (1984) gives a more Marxist interpretation of the mass society theory by locating litigation by marginal groups in a trend in the monopoly phase of late capitalism towards the proliferation of legal rights through their extension to corporations and the increasing activity of the state through law. Thomas' rather idealistic view is that this litigation came about because these increased rights of corporations and the state "implied obligations in that [these] legal subjects became potential targets for litigation, thus creating a new avenue for resolving social conflict" (*Ibid.*: 150). On the question of the effect of litigation, Thomas is even more sanguine than Jacobs, arguing that in addition to the concrete effects of successful litigation in which "the repressive power of the state is directly subverted" (*Ibid.*: 161) there are even more important ideological "desubordination" effects as court actions "challenge the power, authority, and even legitimacy of the control system. Even when a particular judicial decision is unsuccessful, the act of resistance itself may have an impact on state power-apparatus" (*Ibid.*: 164).

This rather wild enthusiasm for court-initiated prison reform is not universally shared by commentators. Some testify to how difficult it is to obtain compliance with court-mandated reform (Bronstein, 1980: 40–41). Not everyone agrees with this, however, and many observers seem to think that there has been general, if grudging and slow, compliance with the letter, if not the spirit, of court-mandated reforms (Jacobs, 1977; Smith and Fried, 1974: 87–101).

The deeper issue is the meaning and effect of these reforms, even when they are implemented. With respect to the disciplinary process, it has frequently been observed that despite procedural, due process-type reforms, the actual rate and level of punishment has remained unchanged (Smith and Fried, 1974: 90; Berkman, 1979: 149). This is not surprising. It is highly implausible that the courts intended by their procedural reforms a transformation in the power structure of the prison. Motivation aside, decision-making power, after the fair procedures have been put in place, always remains with the administration. Even to the extent that procedural reforms tend to rationalize the actual decisions themselves, this only means that the administration is restricted to express the legitimate interests of state (as opposed to purely personal interests), and these interests are always to exclude the independent interests of prisoners. That deterrence, security, and even rehabilitation are always seen from the state's point of view has in any event been ensured by the "wide-ranging deference" which the courts have

consistently afforded administrators with respect to substantive, if not procedural, decisions.

One Canadian commentator has questioned the whole premise of the legal due process revolution in prisons, which was based on the idea, most ambitiously formulated — and consistently refused by the courts — as affording prisoners in disciplinary proceedings the same rights as those that are available to accused persons in the "ordinary criminal process." Tammy Landau, drawing on the work of Ericson and Baranek (1982), has noted that introducing due process into the prison on the ordinary court model could only reproduce the dependency and oppression of the ordinary criminal process where:

> the accused is...better construed as a dependent rather than a defendant...with few rights or opportunities to influence the chain of events leading to a verdict of guilt in the vast majority of cases (Landau,1984: 159).

Landau (1984: 151) also argues that:

> Bringing the "rule of law" into prisons through a complex system of laws and procedural due process can only contribute to the problem that purports to address: a system of rules and regulations which permits the unbridled yet legitimate discretionary powers of a third party.

On the other hand, when we contemplate the prelitigation prison system, it is hard to then belittle the reforms which have been more or less secured or to deny that they came about primarily through the impetus of the courts. Exposing the prison to outside scrutiny deters the worst excesses of brutality and arbitrary action, bringing the prison nearly into conformity with juridical norms of due process and equality before the law irrespective of race, sex, geographical location, etc. Other things being equal, the legalized prison should be a better prison. But are other things equal? What, in other words, is the relationship between law and discipline in this context?

Huff (1980: 51) noted the limited nature of "mass society"-type advances ("there is no claim that prisoners, the poor, and racial minorities are becoming middle class in a social economic sense"), but this did not seem to seriously diminish his enthusiasm for such developments. Berkman's analysis suggests that the quest for "mass society" rights has really diverted claimants from their more fundamental claims. He argues that the early successes of the Civil Rights Movement in attracting prisoners to its banner were partly owing to the misleading promises of legality:

> The central demand of the Civil Rights Movement was the demand to extend constitutional rights to afford blacks the same constitutional status afforded whites. Certainly the charismatic leadership of the movement and the abundance of media attention that it drew enhanced its appeal. The Civil Rights Movement tended to draw a close correlation among rights, freedom, and justice. Freedom and justice were seen as almost mechanical outputs of a system of citizenship rights. This tendency to see the accumulation and protection of democratic rights as springboards to freedom and justice had profound effects on black consciousness (Berkman, 1979: 100–101).

As we have seen, Landau's critique went even further in arguing that legal rights "legitimate" oppression, that is, enhance its acceptability and thereby guarantee its continued or even expanded reproduction.

Legalization of Politics

But this still leaves a lot to be explained. Why does legitimation, which must always exist in one form or another, now take this legal form? What are the specific implications of it doing so? To answer these questions, we must put the developments in prisoners' legal rights in a wider context, namely what Harry Glasbeek and I have called the "legalization of politics." We use this term to designate a trend, of which the enactment of the *Canadian Charter of Rights and Freedoms* is part, toward the increasing prominence of courts in the resolution of political controversy of all sorts.

We have tried to explain and evaluate this trend by reference to the specific accumulation and legitimation problems, noted by several authors (e.g., O'Connor, 1973; Habermas, 1975; Wood, 1981), which confront advanced capitalist countries in our epoch. These stem from the increasing politicization of the accumulation process ("the economy") through increasing state intervention. The "public" and "private" spheres become "re-coupled." This occurs at the same time as capitalist relations of production become increasingly dysfunctional, that is, as they increasingly stand between people and their production and consumption needs and capabilities. This is no coincidence; it is precisely to solve these dysfunctions that the state becomes more and more involved in the economy. This means that increasing recourse must be made to forms of legitimation (i.e., in ways of defending a status quo of grossly unequal social power) that are abstract in the sense that they do not depend on meeting people's concrete needs (unlike the old efficiency legitimations), and that avoid genuine participatory democracy, even in the public sphere, which in the context of state involvement in the economy might endanger the freedom to accumulate.

It is here that the legal system comes in, not only because of the reliability of the courts as protectors of the social status quo, which makes litigation a safe alternative to genuine democracy, but also because of the form of legal discourse by which the legal profession justifies both the status quo and its role in defending it. We argue that legalized (juridical) discourse even in late capitalism is legitimation of a characteristically abstract type which suppresses the historical and material (class) aspects of the conflicts of interest with which it deals, by transforming them into questions of "principle" concerning the rights of free-willing legal subjects. As contrasted with other political institutions, courts are structurally constrained to prefer arguments of a deontological sort to utilitarian arguments, rights to goods, principles to policies, etc. Their increasing prominence in the resolution of political controversy signifies a corresponding advance for their particular form of political argument.

Legalized politics is *simulated* politics, intended — like other forms of capitalist politics — to domesticate class struggle, but in a way better suited to the problems of late capitalism than other forms of politics. Thus, more and more political power struggles find their way into the courts to be scrutinized according to their conformity with judicial ideals, which, being based on equal legal subjecthood, leave class relations untouched. This does not mean that they are irrelevant. Equal legal citizenship can be a matter of great importance to those excluded from it. On the other hand, by ignoring class-based social power, equal legal citizenship not only reinforces the social status quo, but may also even aggravate it as, for example, when corporations are treated as if they were simply individuals and given rights (*Hunter v. Southam* [1984], 11 D.L.R. [4th] 641, Supreme Court of Canada). In any event, political development under legalized politics tends to be characterized by these juridical values and limited by its conformity with these values, because nothing that fails to conform to them can be legitimate, and this is so whether the development occurs through the courts or outside of them. The legalization of various realms of life tends thus to become at once a substitute for fundamental change and an independent reinforcement of the status quo.

In Canada there were specific local and immediate goals which were pre-eminent in the whole process of setting this mechanism in place. This includes the protection of minority language rights (especially English rights in Québec), to prevent the centrifugal forces working against the Canadian union. The general trend to legalized politics is of unquestionable importance as the means to this difficult specific end. Furthermore, though the economic and cultural domination exercised by the United States over Canada since the war has obviously determined the form and pacing of the legalization of Canadian politics, it is apparently a postwar phenomenon to be found throughout the capitalist world in common and civil law jurisdictions alike. Thus, instead of a

straightforward adoption of U.S. prison law, Canadian prison law developments, though no doubt influenced by the U.S. courts, is part of a general political-legal trend, most pronounced in the U.S., but meeting local Canadian needs and shaped by local legitimation exigencies. This can explain, for example, why in adopting the general approach of the U.S. courts, Canadian courts feel not only free, but also often compelled, to go their own way on specific matters.

The idea of the legalization of politics seems more adequate than that of "mass society" to the task of explaining and evaluating the increasing willingness of courts to adjudicate prisoner claims. The attitude of Canadian courts to prison issues has certainly undergone enormous changes in the past decade. In this sense, there has been something of a legal revolution. Prison administrators and parole boards are increasingly called upon to justify to the courts what they do to prisoners. And even the existence of statutory authorization is no longer an adequate justification with the advent of the *Canadian Charter of Rights and Freedoms.* Statutes themselves and the actions and policies of administrators must now pass muster with legal values. However, the precise nature of these legal values has great implications. Because they are entirely formal, having to do either with the requirements of administrative rationality, such as procedural requirements quite rigorously insisted upon by Canadian Courts, or with matters of abstract citizenship such as the right to vote (on which there are many contradictory judicial pronouncements, but consistent governmental expansion of the right), they leave the substance of power relations untouched. At most, they affect the "personal" aspect of power by requiring it to be shared between administrators and courts. At most, they interfere with the abuse of power but not with its exercise or existence as an objective or structural relation between prisoners and the state. Consequently, they cannot entail an enhancement of status for prisoners as a class, even though individuals may benefit from time to time from jurisdictional disputes between the power-sharers. Although claims to procedural due process in the form of fair hearings (including the right to counsel, and no double jeopardy), have met with general success in realms such as parole, temporary absence, prison discipline, transfer, and administrative dissociation, all claims to substantive limitations on the exercise of the same powers have failed.

So little, in fact, do legal values entail limitations on substantive power, that the legalization of prison discipline has occurred at the same time as a great expansion in the substantive disciplinary power of "the system." This includes, of course, an explosion in the sheer number of persons under control in prison, on parole or mandatory supervision;[2] the increasing length of individual prison sentences, the expansion in the powers and activities of parole boards since the late 1950s, the proliferation of types of institutions

from maximum to minimum security, and the easy transfer between institutions across the country and across jurisdictional boundaries; the proliferation of different forms of imprisonment, such as the finely calibrated Special Handling Unit system, the various temporary absence systems, and the many other "privileges" which can make prison very much like life outside for some prisoners and very much like life in hell for others. Thus, the system has simultaneously experienced legalization and a great expansion in its flexibility to discipline an ever larger population. This naturally raises the question of whether the relation of court intervention to the expansion of power is more than merely coincidental.

In his masterful description of 18th century English criminal law, Douglas Hay (1975) has shown how solicitude of absurd proportions to the formal procedural rights of accused persons helped to legitimate a system of brutal class-based repression. This is not to argue that procedural guarantees should be dismissed as a sham. However, it is a grave error to celebrate them in abstraction from the system of power in which they are situated. If this error is nevertheless easy to make — it has arguably been made by Hay's colleague E.P. Thompson — it is because the democratic ideals, which appeal to us in the notion of the "rule of law," are apt to be confused with a juridical "rule of law" in which procedural guarantees are undermined by a discretionary system wholly in the hands of the legal profession (Thompson, 1975; Mandel, 1985).

The appeal of the "rule of law" resides in the real limitations on official power implied by it, whether this power is administrative or judicial. By contrast, courts administering the Canadian prison system operate almost completely without popular restraint. The *Charter of Rights* hardly pretends to guide their power in matters other than language rights, and the only sense in which the legislative standards governing prisons could be said to do so is in the wide powers they grant to prison administrators. The standards governing parole, mandatory supervision, earned remission, temporary absences, transfers between institutions, administrative segregation, visiting rights, and correspondence are all inscribed in legislation in unlimited discretionary terms.

It is this system of power, with at most token popular supervision (through Citizens' Advisory Committees, grievance procedures, Correctional Investigators, ombudspersons, etc., none of whom have any powers of restraint), which Canadian courts have been legitimating even as they have been vindicating legal values. They have done this implicitly in denying all challenges to substantive power, but they have also gone out of their way to explicitly defend and justify these arrangements, combining exaggerated security claims fed by an intense anti-prisoner rhetoric (as in *Re Howard and Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution* [1985], 19 C.C.C. [3d] 195) with a romanticization of the expertise

and devotion to duty of administrators (*Ibid.*, *Martineau No. 2* [1979], 50 C.C.C. [2d] 353 and *Re Maltby et al. and A-G Saskatchewan et al.* [1982], 2 C.C.C. [2d] 153, for example) which belies a century and a half of experience.

There has been a noticeable decline in the use of rehabilitation rhetoric to justify ignoring the conflicting claims of prisoners (contrast *Solosky v. The Queen* [1979], 50 C.C.C. [2d] 495, where it is still used, with *Howard*). Rehabilitation is probably best regarded as the ideology of absolute nonintervention (see *Mitchell*, for example). The new form of selective nonintervention relies on a variety of abstract justifications, either in the old form of blaming the punishment on the prisoner (e.g., *Maxie v. National Parole Board*, Federal Court Trial Division, June 4, 1985, unreported; and *Piche et al. v. Solicitor General of Canada et al.* [1984], 17 C.C.C.1), or in the newer form, which reasons from the given privations of prison to the justification of completely gratuitous ones (e.g., *Piche*: double bunking justified on general lack of privacy in prison; and *Re Jolivet and Barker* [1983], 1 D.L.R. [4th] 604: denial of vote justified on general lack of freedom in prison). This latter form of reasoning seems ideally suited to carving substantive prison issues out of the ambit of the *Charter* without diminishing its prestige in which the courts, and the Canadian establishment in general, have considerable stake (see *Howard* and *Morin v. National SHU Committee et al.*, Federal Court of Appeal, May 15, 1985 unreported, for recent judicial paeans to the *Charter*).

The relation of the prestige of the *Charter* to the prestige of the courts may also explain the low profile of U.S. decisions in the Canadian cases, where they act as facilitators to decisions not to intervene in substantive issues (*Maltby*, *Collin v. Kaplan et al.* [1982], 1 C.C.C. [3d] 309, and *Piche* citing the latest restrictive U.S. Supreme Court decisions on "cruel and unusual punishment"), but no obstacles to the enforcement of legal values (*Howard* on the right to counsel; *Morin* on the applicability of double jeopardy principles to administrative dissociation — both going substantially beyond U.S. constitutional law in the rights recognized).

It is worth noting, finally, that the legal values enforced by the courts (the right to counsel, procedural rules, and judicial review in general) directly promote the guild interests of lawyers. In this light, it might be possible to answer Jacobs' paradox of "both sides [namely prisoners and administrators] claiming defeat" (Jacobs, 1980: 431) in prison litigation by conceding that both sides may be right, with only the lawyers winning. But this would be too narrow a view, ignoring as it does that lawyers are first and foremost *representatives*. It is probably most helpful in this context to think of judges as lawyers whose clients are the status quo. To carry this just one step further, judges in general should not be expected to attack the status quo by turning the prison into a democratic institution serving popular needs any more than lawyers in general should be expected to attack their clients.

If legalization represents an expansion rather than a threat to the status quo of social disciplinary power, we are still left with a prison which has substantial differences from that described by such theorists as Foucault and Melossi and Pavarini. In Foucault's penitentiary, punishment is "hidden" (Foucault, 1977: 9); "justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself" which has become "non-juridical" or "extra-juridical" (*Ibid.*: 10). The prison "is not subordinated to the court...it is the court that is external and subordinate to the prison" (*Ibid.*: 308). Penal discipline for Foucault is "a sort of counter-law" which "undermines" the "universal juridicism of modern society" which "define[s] juridical subjects according to universal norms" (*Ibid.*: 223).

Similarly, for Melossi and Pavarini the discontinuity between the juridical and penal spheres is absolutely central because this is what most assimilates the prison to the factory:

> The central contradiction of the bourgeois universe is reflected in the microcosm of the prison: the general juridical form which ensures a system of egalitarian rights is neutralized by a close-knit web of inegalitarian power-structures which reproduce those politico-socio-economic disjunctures which negate the relations formally cemented by the (contractual) nature of right. We thus witness the simultaneous existence of a *right* and a *non-* or *counter-right*, or indeed of *contractual reason* and of *disciplinary necessity*. The contradiction at this level...reflects the insoluble problem inherent in the capitalist mode of production itself between the sphere of distribution or circulation and the sphere of production or extraction of surplus value.... If the contract of labor formally presupposes employer and employee, as free subjects on equal terms, the actual work relationship necessitates the subordination of the worker to the employer. Similarly with the punitive relationship: "punishment as retribution" presupposes a free man; prison commands a "slave" (Melossi and Pavarini, 1981: 186).

In the legalized prison, however, discipline can no longer be regarded as a "counter-law," and the autonomy and secrecy of its functioning is at least compromised by the courts' granting of increasing juridical status to prisoners. The distinction between the accused person in court and the convict in prison is without doubt being eroded by the court's involvement in the administration of the penalty.

Conclusion

The prison, then, has changed. But so have the institutions of capitalism to which the prison has been assimilated by these theorists and by which they have sought to explain it. Look, for example, at the factory. Whatever practical similarity it bears to the factory of classical capitalism, its juridical status has fundamentally changed. Its internal workings are no longer the "private criminal code" of the individual capitalist, but are hemmed in by judicially recognized legality, either in the form of legislative standards for health, safety, minimum wages, and hours of work, or in the form of collective agreements governing all aspects of the relationship and enforceable in the courts (Marx, "The Struggle for a Normal Working Day," Vol. I, 1976: 375–416; Kinsey, 1979; Tucker, 1984). In other words, the distinction between public and private spheres in general has been breaking down in late capitalism, a result of the centralization and concentration of capital, the pressures of the working class and the consequent involvement of the state in the economy. If this has resulted, as I argued earlier, in a general legalization of politics, we should not be surprised that this phenomenon has penetrated the prison or that it has no more democratized the prison than it has the factory or society in general.

So, the analogy of the prison and the factory is still of great importance. Though the legalization of prison discipline has not changed the status quo of the basic power relations either for prisoners and the state (i.e., it has not changed the superstructural nature of the prison), or for class relations in general, it is probably symptomatic of changes in its precise role. It cannot be divorced, for example, from the whole "decarceration" phenomenon in Canada. This is a phenomenon of rising *per capita* prison populations, whose changing composition reflects a decreasing proportion of property offenses and an increasing proportion of violent offenses, which is also being greatly outstripped by the population under control outside the prison. This diminishing relative importance of the prison and the change in its precise function also bears striking resemblances to late capitalist developments in the role of the factory.

All this suggests that Jacobs (1980: 432) is quite wrong to argue that the legalization of prison discipline represents a "fundamental democratization" of society. On the contrary, it looks a lot more like the latest in the series of weapons used by class society in its relentless war *against* democracy.

NOTES

1. A similar point was made by Alison MacPhail, Senior Coordinator Legal Component in charge of the Solicitor-General of Canada's *Correctional Law Review* in a speech at the Workshop on Legal Values and Correctional Practice, Faculty of Law, Queen's University, Kingston, November 9, 1985. She argued that although the direct effect of the *Charter* on prison life might be minimal, the indirect effect of granting legal rights to prisoners was to make us think of them "as people," which paved the way for larger changes.

2. From 1978–79 to 1982–83, the official average daily adult prison population in Canada increased 22%, from 21,963 to 26,924, and the population on probation and parole increased 31%, from 61,738 to 80,912 (*Juristat* 4,5 [August, 1984]).

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