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Litigating the Carceral Soundscape

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Litigating the Carceral Soundscape

Abstract

Sound has always been a material issue in prisons, whether it be in connection with sonic surveillance, the “silent cell,” or the insistence of sound (excessive noise, counter-carceral music making). This article asks: How and when does the carceral soundscape become a litigable issue? Our article opens with a discussion of the challenges involved in attempting to study the sonic ambiance of the penitentiary through the medium of written documents and proposes a methodology of “sensing between the lines” by way of a solution. It goes on to analyze the “moral architecture” at the foundation of the modern prison in an effort to excavate the sonic dimensions of incarceration in the context of a system that was designed with silence at its core. Solitude and silence were presumed to have an “emancipatory effect” on the prisoner by attuning the carceral subject to “the inner voice of conscience” through forced withdrawal from the distractions of the senses. The next part considers the ways that, despite attempts to manage sound, its insistence has resisted these forms of control. It presents solitary confinement as a crucial site to explore the ways in which enforced silence, as an organizing principle, has undergone several contortions that gave rise to alternative rationales such as “structured intervention,” yet has persisted. The article then explores how this enduring silence has figured in the contemporary case law, alongside other forms of acoustic violence, such as excessive noise and sonic resistance to the conditions of incarceration on the part of prison inmates (e.g., rapping to beat the rap). While some cases describe the experience of the prison as one of unbearable silence, others describe it as noise without respite. This research highlights the ways that sound in prison has remained an important site of discipline and contestation that reverberates through the case law, yet without being appreciated adequately by the courts. The article concludes with observations about the ways that probing the role of sound in the logic of incarceration can complement litigation efforts that question carceral logics.

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Litigating the Carceral Soundscape

DAVID HOWES AND SIMCHA WALFISH*

Sound has always been a material issue in prisons, whether it be in connection with sonic surveillance, the “silent cell,” or the insistence of sound (excessive noise, counter-carceral music making). This article asks: How and when does the carceral soundscape become a litigable issue? Our article opens with a discussion of the challenges involved in attempting to study the sonic ambiance of the penitentiary through the medium of written documents and proposes a methodology of “sensing between the lines” by way of a solution. It goes on to analyze the “moral architecture” at the foundation of the modern prison in an effort to excavate the sonic dimensions of incarceration in the context of a system that was designed with silence at its core. Solitude and silence were presumed to have an “emancipatory effect” on the prisoner by attuning the carceral subject to “the inner voice of conscience” through forced withdrawal from the distractions of the senses. The next part considers the ways that, despite attempts to manage sound, its insistence has resisted these forms of control. It presents solitary confinement as a crucial site to explore the ways in which enforced silence, as an organizing principle, has undergone several contortions that gave rise to alternative rationales such as “structured intervention,” yet has persisted. The article then explores

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how this enduring silence has figured in the contemporary case law, alongside other forms of acoustic violence, such as excessive noise and sonic resistance to the conditions of incarceration on the part of prison inmates (e.g., rapping to beat the rap). While some cases describe the experience of the prison as one of unbearable silence, others describe it as noise without respite. This research highlights the ways that sound in prison has remained an important site of discipline and contestation that reverberates through the case law, yet without being appreciated adequately by the courts. The article concludes with observations about the ways that probing the role of sound in the logic of incarceration can complement litigation efforts that question carceral logics.

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THE PANOPTICON HAS OFTEN been theorized as the “paradigmatic architectural model of modern disciplinary power.”¹ Its form is described in primarily visual terms. In Michel Foucault’s telling, the effect of the panopticon is to “induce in the inmate a state of conscious and permanent visibility that assures the

1. Gary Gutting & Johanna Oksala, “Michel Foucault” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2019), online: <plato.stanford.edu/archives/spr2019/entries/foucault/> [perma.cc/M5T4-2J2R].

automatic functioning of power.”² Due to the opacity of the windows of the central observation tower (guards can look out but inmates cannot see in) and the way each individual cell is backlit (rendering the prisoner subject to continuous surveillance), each inmate is presumed to internalize the disciplinary authority of the guards and warden: the “Eye of Power.”³ Michael Bull and Les Back remind us, however, that this vision of the panopticon presents only part of the picture: “Bentham’s prison was also a listening prison in which, through a series of tubes, the inmates could be heard at all times.”⁴

Sound has always been at issue in the modern prison, therefore, and “the history of surveillance is as much a sound history as a history of vision.”⁵ In accounts and portrayals of the prison, we hear about the clanging of doors, rattling of keys, screams, music, loudspeakers, hidden microphones, and contraband cellphones.⁶ These sounds are not accidental. “In fact,” writes Bill Kirkpatrick, “the manipulation of the sonic environment behind bars is part of

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2. *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Vintage, 1995) at 201 [Foucault, *Discipline and Punish*].
 3. Michel Foucault, “The Eye of Power” in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon Books, 1980) 146.
 4. “Introduction: Into Sound...Once More with Feeling” in Michael Bull & Les Back, eds, *The Auditory Culture Reader* (Berg, 2003) 1 at 5. Gillian Furlong writes:

It was not just the architectural design that exercised Bentham. He also designed an internal communication system of ‘conversation tubes’ for his panopticon prison. At first the device was to run between the inspection lodge and each cell, enabling the governor to instruct and admonish each inmate; in later proposed plans the system was expanded to connect the lodge and the inspection galleries. Bentham delighted in the novel technique of these tubes – tools for constantly enforcing a clockwork regularity on the administration of the prison. Such was Bentham’s blind faith in his tubes’ efficacy over long distances that he suggested to the Home Office that his prison could be the nerve-centre of a far greater network, stretching for hundreds of miles underground and forming a national system of intelligence and defence.

- Gillian Furlong, “Designs for a panopticon prison by Jeremy Bentham” in *Treasures from UCL*, 1st ed (UCL Press, 2015) 136 at 136, 139.
5. Bull & Back, *supra* note 4 at 5; Katie Hemsworth, “Carceral Acoustemologies: Historical Geographies of Sound in a Canadian Prison” in *Historical Geographies of Prisons: Unlocking the Usable Carceral Past* (Routledge, 2015) at 20 [Hemsworth, “Carceral Acoustemologies”].
 6. Tom Rice, “Sounds Inside: Prison, Prisoners and Acoustical Agency” (2016) 2 *Sound Studies* 6 at 10, 13; Hemsworth, “Carceral Acoustemologies,” *supra* note 5 at 18; Dave Seglins & Laura MacNaughton, “Cellphones Pour Into Prisons” (8 June 2010), online: *CBC News* <cbc.ca/news/canada/cellphones-pour-into-prisons-1.881948> [perma.cc/3Y7B-FM6L].

the punishment mechanism itself, imposing or withholding different kinds of sound from different kinds of prisoners.”⁷

This article seeks to add a new perspective to the growing literature on the acoustic violence of the prison, or “carceral acoustemology.” It begins, in Part I, with a discussion of methodologies, followed by an examination of the role of sound in the originating philosophies of the prison in order to trace its reverberations throughout the history of the institution. The article then turns to consider contemporary Canadian case law in Part II. It will attempt to show that, although judges rarely theorize the sound of the prison, judicial writing reveals ways in which the founding philosophies of the prison have endured through the logics and architecture of the prison. The article will end with some reflections on the use of the case law in the context of what Debra Parkes calls an “abolitionist lawyering ethic” that may force a deeper reflection on the logics of incarceration.⁸

I. ACOUSTIC ARCHAEOLOGY OF THE PRISON

A. METHODOLOGICAL ISSUES

The emergent interdisciplinary field of investigation known as “carceral acoustemology” seeks to theorize the “soundscape” of the prison.⁹ This literature grew out of the sensory turn in contemporary scholarship, which gave rise to the interdisciplinary field of sensory studies, including sensori-legal studies.¹⁰

7. “Regulating the Carceral Soundscape: Media Policy in Prison” (3 June 2013), online: *Sounding Out!* <soundstudiesblog.com/2013/06/03/regulating-the-carceral-soundscape-media-policy-in-prison> [perma.cc/6SH3-VZCJ].
8. “Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic” (2017) 32 CJLS 165 [Parkes, “Prisoner Litigation”].
9. Hemsworth, “Carceral Acoustemologies,” *supra* note 5 at 17. The concept of acoustemology was coined by the anthropologist Steven Feld. See “Acoustemology” in David Novak & Matt Sakakeeny, eds, *Keywords in Sound* (Duke University Press, 2015) 12 at 12. The notion of soundscape derives from the work of the late R Murray Schafer, acoustic ecologist and composer extraordinaire. See *The Tuning of the World* (Knopf, 1977).
10. Sensori-legal studies emerged out of the crossing of sensory studies with socio-legal studies. Socio-legal studies introduced a shift in legal scholarship from a focus on rules to a focus on meaning, with law coming to be seen as a “frame of signification,” following the work of Clifford Geertz. See *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983). See also Austin Sarat & Thomas R Kearns, *Law in the Domains of Culture* (University of Michigan Press, 1998); Roderick Alexander Macdonald, *Lessons of Everyday Law* (McGill-Queen’s University Press for the Law Commission of Canada and the School of Policy Studies, 2002). Sensori-legal studies shifts the onus again, from a focus on law as meaning-making (Macdonald) to law as *sense-making* activity. See David Howes & Constance Classen, “The feel of justice: Law and the regulation of sensation” in *Ways of*

Thus, in her research on the history of sound in Canadian prisons, Katie Hemsworth urges fellow geographers to “take up cultural histories of sound in their explorations of usable carceral pasts.”¹¹ For Hemsworth, paying attention to the sound of prison can show how the aural has been used in “the production of docile, incarcerated bodies” and how “at the same time, sonic tactics have been used by inmates to break through these restrictive walls and alleviate the tightness” of incarceration.¹² Further, sonic methods “may offer a critical re-evaluation of prisons from beyond their bounded structures.”¹³

There are several methodological options available to study the prison soundscape. Foremost among these is the practice of sensory ethnography, or “participant sensation,” which involves interviewing people with lived experience in prison and seeking to sense along with them the ambiance of the prison. This is done while also exploring how they make sense of their experience, to the extent possible, and resist (or fail to resist) the strictures of imprisonment.¹⁴

sensing: Understanding the senses in society (Routledge, 2014) [Howes & Classen, *Ways of sensing*]; Sheryl Hamilton et al, eds, *SENSING LAW*, 1st ed (Routledge, 2018); David Howes, “Prologue: Introduction to Sensori-Legal Studies” (2019) 34 *CJLS* 173; Sheryl Hamilton, “Introduction: Sensuous governance” (2020) 15 *Senses & Society* 1. The latter shift is consonant with the multiple meanings of the term “sense”: It includes both sensation and signification, feeling and meaning (as in the “sense” of a word) in its spectrum of referents, and sensori-legal studies embraces them all. It treats law as grounded in the body and senses, as evidenced by such representations as “the right hand,” the iconography of justice (a female figure holding scales and blindfolded but with ears unfettered in accordance with the maxim *audi alteram partem*), the rules of evidence, the atmosphere of the courtroom (including the insistence on decorum), the roving police officer with their “eyes on the street,” and the sensory design of the prison. For an overview of breaking research in sensori-legal studies, see “Probes,” online: *Law and the Senses: Explorations in Sensori-Legal Studies* <lawandthesenses.org/probes> [perma.cc/7FC4-57KC]. Regarding sensory studies generally, see David Howes, *The Sensory Studies Manifesto: Tracking the Sensorial Revolution in the Arts and Human Sciences* (University of Toronto Press, forthcoming 2022).

11. “Carceral Acoustemologies,” *supra* note 5 at 29.
12. *Ibid* at 26, 20.
13. *Ibid* at 20.
14. “The experience of [ethnographic] fieldwork is an experience of sharing in the sensible [*le partage du sensible*]. We observe, we listen, we speak with others, we partake of their cuisine. We try to feel along with them what they experience.” François Laplantine, *The Life of the Senses: Introduction to a Modal Anthropology* (Routledge, 2015) at 2. See further David Howes, “Multisensory Anthropology” (2019) 48 *Annual Rev Anthropology* 17 (on the methodology of participant sensation); Erin Lynch, David Howes & Martin French, “A Touch of Luck and a ‘Real Taste of Vegas’: A Sensory Ethnography of the Montreal Casino” (2020) 15 *Senses & Society* 192.

Notable studies include the work of Kate Herry and Irene Marti.¹⁵ Marti, in her sensory ethnography, engages in “walking interviews” with prisoners, allowing her “to [explore] systematically, in situ and *in the now*, prisoners’ perceptions of the various everyday prison contexts as well as their sensory memories and imaginations.”¹⁶ Marti provides a sensory account of the prisoner’s experience of the cell—“often described by prisoners as either too loud or too quiet”—and of the courtyard, in which prisoners can “gain sensory impressions of the outside community, especially its sounds.”¹⁷ Such is an experience that, for some, provides a “little piece of freedom,” and for others, triggers a feeling of deep unfreedom.¹⁸

Other methods for studying the soundscape of the prison are text-based rather than dependent on in-person ethnographic interviews. They include prison writing (*i.e.*, the memoirs of inmates), archival research, government reports, and the written opinions of judges.¹⁹ The anthropologist Tom Rice, for example, explores the prison soundscape by reading narrative accounts by prisoners. Rice explains this choice: “[O]ne way to investigate the soundscapes of the past is to select a document and note the references to sounds it contains.”²⁰

This article adds to this interdisciplinary work by using legal decisions as the “document,” noting the references to sound they contain, and subjecting these representations to critical socio-legal and sensori-legal analysis. Scholars have argued that legal processes allow legal actors to distance themselves from their role as punitive agents, allowing the “pain of imprisonment” to “remain invisible

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15. See Kate Herry, “Hearing Behind the Door: The Cell as a Portal to Prison Life” in Jennifer Turner & Victoria Knight, eds, *The Prison Cell: Embodied and Everyday Spaces of Incarceration* (Springer, 2020) 239; Kate Herry, Bethany E Schmidt & Jason Warr, eds, *Sensory Penalties: Exploring the Senses in Spaces of Punishment and Social Control* (Emerald Group, 2021) [*Sensory Penalties*]. In particular, see Kate Herry, “Hearing Order in Flesh and Blood: Sensemaking and Attunement in the Pub and the Prison” in *ibid.*, 3 at 3-18; Irene Marti, “Sensing Freedom: Insights Into Long-Term Prisoners’ Perceptions of the Outside World” (2021) 2 *Incarceration* 1 [Marti, “Sensing Freedom”].
 16. “Sensing Freedom,” *supra* note 15 at 5 [emphasis in original].
 17. *Ibid.* at 5, 10.
 18. Irene Marti, *Living the Prison: An Ethnographic Study of Indefinite Incarceration in Switzerland* (PhD Thesis, Université de Neuchâtel, 2020) [unpublished] at 186, 239-40; Marti, “Sensing Freedom,” *supra* note 15 at 11.
 19. Hemsworth, “Carceral Acoustemologies,” *supra* note 5 at 18; Emma K Russell & Bree Carlton, “Counter-Carceral Acoustemologies: Sound, Permeability and Feminist Protest at the Prison Boundary” (2020) *Theoretical Criminology* 296 at 300-301 [Russell & Carlton, “Counter-Carceral Acoustemologies”]; Nigel Poor, Earlonne Woods & Antwan Williams, online (podcast): *Ear Hustle* <earhustlesq.com> [perma.cc/V8XL-NPB7].
 20. *Supra* note 6 at 8, citing R Murray Schafer, *A Sound Education: 100 Exercises in Listening and Sound-Making* (Arcana Editions, 1992).

to public policy.”²¹ “Sensing between the lines” of the case law (as opposed to simply “reading” it), this article goes on to ask whether the pain of imprisonment has not also remained, in certain fundamental respects, inaudible to judges.²² As we shall see, while sound is rarely theorized in the case law, it comes up repeatedly, in numerous contexts, including solitary confinement, excessive noise, music, and the use of personal sound devices.

1. EAR-OPENINGS: TOWARDS A MICRO-POLITICS OF LISTENING

Understanding the role that sound has played in imprisonment is not an easy task because, as Katie Hemsworth et al. argue, “the ephemeral, slippery qualities of sound provide unique challenges especially for hearing the past.”²³ But, it is precisely this slipperiness that makes sound so essential to the history of the prison because of the ways it has been used to not only enact power, but also to resist it. As Hemsworth writes, Bentham’s “panaudicon” was “abandoned partly because it failed to reproduce the dissymmetry of the panopticon tower, which allowed authorities to watch without being seen by inmates.”²⁴

In *The Sonic Color Line: Race and the Cultural Politics of Listening*, Jennifer Lynn Stoeber argues that the task of sound studies is to extend Foucault’s insights on discipline and training, “to flesh out a ‘history of listening’ that is theoretical, embodied, and sensitive to power, particularly the processes of subjection, racialization, and nationalism.”²⁵ This is because “listening has greatly impacted how bodies are categorized according to racial hierarchies and how raced subjects have imagined themselves and tried to negotiate a thoroughly racialized society.”²⁶

21. Hugh J Haley, “Does the Law Need to Know the Effects of Imprisonment?” (1984) 26 Can J Crim 479 at 488.

22. “Sensing between the Lines” is the key to writing sensory history just as “feeling along with others” is the key to doing sensory ethnography. Laplantine, *supra* note 14; Howes, *supra* note 14. This method was pioneered in a book by the cultural historian Constance Classen where she pierced the veil of the Spanish Chronicles (which were pervaded by a literate mindset and laced with racist stereotypes and other derogatory representations) and exposed the social life of the senses and fundamentally oral-aural ideology and practices of the Inca state. See *Inca Cosmology and the Human Body* (University of Utah Press, 1993). See also Constance Classen, ed, *A Cultural History of the Senses* (Bloomsbury Academic, 2014) vol 6; Howes & Classen, *Ways of Sensing*, *supra* note 10.

23. “Earwitnessing: Critical reflections on sonic historical geographies” (2017) 45 Historical Geography 147 at 148 [Hemsworth et al, “Earwitnessing”].

24. “Carceral Acoustemologies,” *supra* note 5 at 21.

25. (NYU Press, 2016) at 14.

26. *Ibid.*

This focus on the sound of prison is a deeply political task, producing what Emma K. Russell and Bree Carlton term “counter-carceral acoustemologies,” or ways of knowing and sharing knowledge about carceral existence and resistance that challenge the dehumanization and normalization of the former.²⁷ A counter-carceral acoustemology is attentive to the place prison holds in society and to the related fact that those incarcerated in prisons are disproportionately likely to be racialized or Indigenous, survivors or descendants of survivors of residential schools or foster care, living with substance disorders and mental illness, and with traumas both personal and communal.²⁸ The project is not to produce an “objective” account of what prison *really sounds like*. Rather, it is to engage in what Nina Sun Eidsheim, in *The Race of Sound: Listening, Timbre, and Vocality in African American Music*, calls a “micropolitics of listening,” which recognizes that

[b]ecause listening is never neutral, but rather always actively produces meaning, it is a political act. Through listening, we name and define. We get to say, “This is the voice of a black man.” We get to say, “That singer doesn’t sound sincere.” And we get to say, “This singer doesn’t sound like herself.” As I hope I have made clear...not only do we, as listeners, get to label the vocalizer; we also manifest the symbolic in the material. Because voices are communal technologies attuned to cultural values, what the community hears, and the meanings it assigns, are accordingly aligned. In other words, through listening we enact and activate...It is both the curse and the beauty of the collective process that, through listening, we can either reinforce or refuse to engage naturalized notions and values. Listening is not a neutral assessment of degrees of fidelity but instead is always already a critical performance—that is, a political act.²⁹

This political listening will be crucial to understanding the carceral soundscape’s place in our collective understanding of punishment and the systems that prop it up and are propped up by it. As Ruth Wilson Gilmore writes in *The Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, the prison does not “sit on the edge—at the margins of social spaces, economic regions, political territories, and fights for rights. This apparent marginality is a trick of perspective, because, as every geographer knows, edges are also interfaces.”³⁰

27. “Counter-Carceral Acoustemologies,” *supra* note 19 at 298.

28. See e.g. Sheila Wildeman, “Disabling Solitary: An Anti-Carceral Critique of Canada’s Solitary Confinement Litigation” in Claire Spivakovsky, Linda Steele & Penelope Weller, eds, *The Legacies of Institutionalisation: Disability, Law and Policy in the ‘Deinstitutionalised’ Community* (Bloomsbury, 2020) 87 at 89-90.

29. (Duke University Press, 2018) at 24-25.

30. (University of California Press, 2007) at 11.

2. LIMITATIONS

Every scholarly approach to hearing the carceral soundscape has advantages as well as challenges and limitations. They are each restricted by a political climate that seeks to keep prisons out of sight and out of earshot, impeding access, recordings, and interviews.³¹ Other methods of engaging with the sound of prisons can turn into deeply problematic “carceral tours.”³² Any methodological choices must be justified in light of what Hemsworth et al. argue is the responsibility “to think critically about how sonic methods might (unintentionally) reproduce auditory violence and related effects of settler colonialism.”³³

An approach that uses case law needs to be aware that it deals with a body of writing that is inherently limited. Cases that make it to trial are not necessarily reflective of conditions for all prisoners, far from it.³⁴ Any references to sound are filtered by the prisoners—and their lawyer, if they have one—and in choosing which claims to bring and how to frame them. These choices are made in the context of the available applications and causes of action, the prohibitive costs and barriers to justice, and the unlikelihood of success in a system that affords

31. Hemsworth, “Carceral Acoustemologies,” *supra* note 5 at 28.

32. *Ibid* at 28-29; Erin E Lynch, “‘Guilty of Having a Fantastic Time in Jail!’: On the Touristification of Prison Experiences” (15 April 2020), online: *Law and the Senses* <lawandthesenses.org/probes/guilty-of-having-a-fantastic-time-in-jail-on-the-touristification-of-prison-experiences> [perma.cc/2PRM-ZX2R].

33. “Earwitnessing,” *supra* note 23 at 150.

34. Most come out of federal institutions, where conditions are often somewhat better. Those incarcerated in provincial institutions and remand centres are there for only short periods of time and have fewer avenues for recourse when their rights are violated. See Justin Ling, “Canada’s Prisons are Failing” (12 August 2019), online: *CBA National* <nationalmagazine.ca/en-ca/articles/law/in-depth/2019/canada-s-prisons-are-failing> [perma.cc/TA4C-JJDP]. By the time an issue does reach trial, it is often moot. See Debra Parkes, “A Prisoners’ Charter?: Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*” (2007) 40 UBC L Rev 629 at 668 [Parkes, “A Prisoners’ Charter”]. The majority of reported cases involve male prisoners, who represent 94 per cent of federal inmates. See Correctional Service of Canada, “Statistics and Research on Women Offenders” (16 May 2019), online: <www.csc-scc.gc.ca/women/002002-0008-en.shtml> [perma.cc/Z5ZD-P7ES]. They give less insight into the gendered experience of prison and the unique disadvantages for women and transgender inmates (*ibid* at 662). In addition, they do not give significant insight into what Giovanna Shay calls the “racialized law-making” of corrections regulation. See “Ad Law Incarcerated” (2009) 14 Berkeley J Crim L 329 at 331.

significant deference to the choices of prison officials.³⁵ They are finally filtered through the words of a judge, operating within a system based on the same logics that govern imprisonment, that presumes the legitimacy of an individual's incarceration and its associated pains.³⁶ It is precisely on account of this filtering

35. See Shay, *supra* note 34. Shay notes that

[d]espite its importance, the area of corrections regulation is a kind of “no-man’s land.” In many jurisdictions, and in many subject areas, prison and jail regulations are formulated outside of public view. Because of the deference afforded prison and jail officials under prevailing constitutional standards, such regulations are not given extensive judicial attention. Nor do they receive much focus in the scholarly literature (*ibid* at 321).

See also Parkes, “A Prisoners’ Charter,” *supra* note 34 at 670 (by way of example: When a grievance reaches a judge for judicial review, the decision that comes out of that system is reviewed on a deferential standard of review). Regarding Charter claims: The Charter did not radically change the legal position of prisoners because, “[o]f the prisoners’ Charter claims that do make it to court, many continue to be met with a deferential, ‘hands off’ approach at various stages of the Charter analysis” (*ibid*). Courts characterize prison rules and decisions as “administrative” and subject them to a deferential standard of review. This is particularly so when it is “alleged that ‘safety’ or ‘security’ is at stake” (*ibid*). Each cause of action or application presents its own challenges. Regarding grievances: The internal grievance system has been described as “persistently dysfunctional.” See Adelina Iftene, Lynne Hanson & Allan Manson, “Tort Claims and Canadian Prisoners” (2013) 39 Queen’s LJ 655 at 656. Regarding tort claims: Tort claims are difficult to pursue without counsel and great cost. When they do reach trial, judges hold correction staff and institutions to “a lower standard of care than defendants in the general community” (*ibid* at 681).

Judges apply rigorous standards of causation. They refuse to recognize novel duties of care to hold government actors to account for the conditions in prisons, “particularly where there are conflicting duties at stake or where there are resource implications. For this reason, general conditions of confinement are unlikely to ground successful private claims even though we often see infringements of the legal provisions” (*ibid*). Regarding *habeas corpus*: nor does *habeas corpus* provide a ready avenue for redress. While the Supreme Court of Canada took care in *Khela* to resist government attempts to narrow prisoners’ access to *habeas corpus*, it also introduced new problems for prisoners by holding for the first time that the standard of review for the substance of decisions of prison officials is reasonableness. See *Mission Institution v Khela*, 2014 SCC 24; Lisa Kerr, “Easy Prisoner Cases” (2015) 71 SCLR (2d) 235 at 235, 237. This imports the logics of administrative law into constitutional analysis, opening the door to “submissive judicial deference” to the decisions of prison officials (*ibid* at 262).

36. See *e.g.* *Weatherall v Canada (Attorney General)*, [1993] 2 SCR 872 at 877 [*Weatherall*] (“imprisonment necessarily entails surveillance, searching and scrutiny”).

that in this article we abjure “discourse analysis”³⁷ and rely on sensory analysis instead. Sensory analysis, when applied to judicial documents, involves “sensing between the lines” of the written sources and attempting to reconstruct the totality of the soundscape, some elements of which would otherwise go unheard.

The above-mentioned barriers to justice mean that often only the most egregious violations make it to court. As Lisa Guenther argues, it does a disservice to all prisoners “to focus on incidents of exceptional violence at the expense of the everyday forms of structural violence that support these exceptions and make them possible.”³⁸ To quote Colin Dayan, “the intact person imprisoned [in the Special Handling Unit]—who is not stripped naked, driven out of his mind, caged, mutilated, scalded, or beaten—disappears from these pages....[O]nly the visible signs of stigma are recognized.”³⁹

With these caveats in mind, looking at the ways sound is modulated through the case law can provide key insights into the day-to-day regulation of sound and the sonic violence of the prison. Given the challenges involved in bringing a case to judgment, these decisions are also a testament to one form of refusal to accept the conditions of incarceration. Following Rice’s reasoning, these decisions “do not necessarily give access to a definite or objective ‘truth’ about the sound environments of the institutions they describe.”⁴⁰ It is possible, however, to “identify interesting points of convergence and, at certain points, divergence” in the ways that judges write about sound in prison.⁴¹ This can contribute to the project of producing what Hemsworth calls a “usable” history of the carceral soundscape that starts with the proposition that “always reflexively, incarcerated populations may be engaged in facilitated listening and sound-making exercises, in which they create their own narratives of carceral space, becoming more active in constructing a history that might otherwise be silenced simply because of their incarceration.”⁴² The purpose of the present study is to try to hear not just the exceptional auditory violence of the prison but also its ordinary violence; not just

37. Michel Foucault, *The Archaeology of Knowledge and the Discourse on Language*, translated by AM Sheridan Smith (Pantheon Books, 1972). Foucauldian “discourse analysis” is well-suited to the analysis of cultures already conceived of as “discursive formations” or “texts,” but sensory studies (including sensori-legal studies) questions the verbocentrism of such an approach.

38. *Solitary Confinement: Social Death and Its Afterlives* (University of Minnesota Press, 2013) at 137.

39. “Legal Slaves and Civil Bodies” (2001) 2 *Nepantla* 3, cited in Guenther, *supra* note 38 at 137.

40. *Supra* note 6 at 8.

41. *Ibid* at 9.

42. “Carceral Acoustemologies,” *supra* note 5 at 29.

the exceptional acts of resistance to it but also the day-to-day acts of acoustical agency and insurrection. As such, while case law presents a history of the prison “from above,” this paper strives to present, from within this judicial account, a “history from below” that complicates the “automatic functioning of power.”⁴³

B. SOUND AND ENFORCED SILENCE AT THE ORIGIN OF THE MODERN PRISON

In his 1983 book, *Prisoners of Isolation: Solitary Confinement in Canada*, Michael Jackson describes the continuities between the founding of the prison and life in prison today. Prisons in Canada today, he notes, were either established in the nineteenth century or constructed on the architectural model of the Kingston Penitentiary, built in Kingston, Ontario in 1835.⁴⁴ Jackson further notes:

Within their austere and forbidding walls, men no longer cry out from the lash as it falls on their bared backs; but, the screams that were heard in Cherry Hill and in Pentonville (two of the more notorious prisons) of 150 years ago are still heard in Canada’s maximum-security penitentiaries today. These screams are not those of the ghosts of the past; they are the screams of the living, of men who still endure the experience of solitary confinement.⁴⁵

To understand the role that sound plays in the prison today, it will, therefore, be useful to recall the role it played at the origin of the penitentiary, in developing the “fundamental carceral logic of punishing and caging”⁴⁶ that has persisted throughout numerous adjustments in policy and practice.

1. FORCED WITHDRAWAL

In his 1792 treatise, *On the Prevention of Crimes, and on the Advantages of Solitary Imprisonment*, the English author and clergyman John Brewster describes all the harms and inconveniences of exile and capital punishment and the miserable conditions in the “dark and noisome dungeons” where, away from the public eye, in the words of Samuel Johnson, the “lewd inflame the lewd, the audacious harden the audacious.”⁴⁷ Another method would be more effective, Brewster argued:

43. Foucault, *Discipline and Punish*, *supra* note 2 at 201.

44. Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (University of Toronto Press, 1983) at 42-43. Since Jackson’s book was published, the penitentiaries in Laval and Kingston were closed in 1989 and 2013, respectively. The penitentiaries in Stony Mountain, Manitoba (1877) and Dorchester, New Brunswick (1880) remain open.

45. *Ibid.*

46. Parkes, “Prisoner Litigation,” *supra* note 8 at 179.

47. (W Clarke, 1792) at 6, 33.

Places for the *separate* confinement of criminals are the prisons where reformation of manners is most likely to be found. To be abstracted from a world where he has endeavoured to confound the order of society, to be buried in a solitude where he has no companion but reflection, no counsellor but thought, the offender will find to be the severest punishment he can receive. The sudden change of scene that he experiences, the window which admits but a few faint rays of light, the midnight silence which surrounds him, all inspire him with a degree of horror, which he never felt before. This impression is greatly heightened by his being *obliged to think*. No intoxicating cup benumbs his senses. No tumultuous revel dissipates his mind. Left alone and feelingly alive to the stirrings of remorse, he resolves on his present situation and connects it with that train of events which has banished him from society and placed him there.⁴⁸

Until the late eighteenth century, imprisonment was not the default punishment for most felonies in England.⁴⁹ In 1779, Parliament passed the *Penitentiary Act* which, as Jackson shows, came at a crucial moment in English penal history. Concern for a punishment more “rational and humane” than capital and corporal punishment appeared at almost the same time that the American Revolutionary War put a sudden stop to the transportation of convicts to penal colonies in Australia and elsewhere.⁵⁰ Imprisonment was transformed from a rare punishment to a sentence of first resort. The philosophy that inspired the Act was the result of both a purported concern for the wellbeing of criminals and a panic about a “crime wave” sweeping England with a religious current that interpreted the situation “in apocalyptic terms as evidence of a breakdown in the moral discipline among the poor.”⁵¹ In the models of imprisonment that ensued from this, the reformation of the prisoner became the goal. A monastic silence was supposedly crucial to achieve that end.

2. COMPETING MODELS

Two competing models emerged for the construction of the prison. In the Auburn system, prisoners were kept in solitude at night but made to work together during the day, always in silence.⁵² In the Pennsylvania or Cherry Hill model, prisoners both worked and slept in solitude.⁵³ The difference was put starkly by Foucault: “Auburn was society itself reduced to its bare essentials. Cherry Hill was life

48. *Ibid* at 27-28; Jackson, *supra* note 44 at 13 [emphasis in original].

49. Jackson, *supra* note 44 at 6.

50. *Ibid* at 13-14.

51. *Ibid* at 14.

52. CJ Taylor, “The Kingston, Ontario Penitentiary and Moral Architecture” (1979) 12 *Social History* 385 at 387.

53. *Ibid*.

annihilated and begun again.”⁵⁴ But, as Angela Y. Davis argues, while Auburn became the dominant model because of its more efficient labour practices, “the philosophical basis of the two models did not differ substantively.”⁵⁵ They both assumed the “emancipatory effect” of solitude and silence.⁵⁶

The horror of silence and solitude was thought of as essential to instill or open up the possibility of repentance. Having offended the order of society, the convict must be forced to think without sensory distraction. Early proponent of solitary confinement Jonas Hanway argued that teaching repentance was simply impossible in the raucous prison of the day: “And *where* is a clergyman to communicate any serious sentiment which is not liable to be effaced in a minute, by the noise, the tumult, the ebriety, found in our prisons, on their present establishment.”⁵⁷

3. SELF-CONFRONTATION

Silence and solitude were painful because they meant a confrontation with the evils within. “We have a plan,” Hanway writes:

the most humane, yet the most terrible and rigid, yet smiling with mercy; calculated to seminate piety, and restore That order and peace, which the world cannot otherwise bestow. The most wicked may turn from the evil of their ways; but we must use the means, perhaps the only means, to cover them under the lenient wings of benignity, and screen the most distressed of the human species, from the shafts of the sorest affliction, even *temporal* and *eternal death*.⁵⁸

As Michael Ignatieff shows, for reformers like Hanway, solitary confinement also operated as a moral quarantine: It prevented the spread of crime, which Hanway viewed in epidemiological terms, as “arising from the same source as disease, from the squalid, riotous and undisciplined quarters of the poor.”⁵⁹ For Hanway, “[i]n the fetid and riotous wards of Newgate, the ‘contagion’ of criminal values

54. *Discipline and Punish*, *supra* note 2 at 239; Jackson, *supra* note 44 at 21.

55. *Are Prisons Obsolete?* (Seven Stories Press, 2003) at 47.

56. *Ibid* at 48.

57. *Solitude in Imprisonment, with Proper Profitable Labour and a Spare Diet, the Most Humane and Effectual Means of Bringing Malefactors, Who Have Forfeited Their Lives, or Are Subject to Transportation, to a Right Sense of Their Condition; with Proposals for Salutary Prevention: and how to Qualify Offenders and Criminals for Happiness in both Worlds, and to Preserve the People, in the Enjoyment of the Genuine Fruits of Liberty, and Freedom from Violence* (F Bew, 1776) at 42-43 [emphasis in original].

58. *Ibid* at 143 [emphasis in original].

59. *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (Pantheon Books, 1978) at 61-62. See also Jackson, *supra* note 44 at 11.

was passed from hardened offender to novice, just as typhus spread from the ‘old lags’ to the recent arrivals.”⁶⁰

Ignatieff writes that this confinement “forced withdrawal from the distractions of the senses into silent and solitary confrontation with the self.”⁶¹ John Howard was attracted to this idea of silence as the key to reformation because he believed that “[f]rom out of the silence of an ascetic vigil, the convict and believer alike would begin to hear the inner voice of conscience and feel the transforming power of God’s love.”⁶²

As Bender argues, this focus on silence was not just religious idealism. Rather, it worked in conjunction with the rise of capitalist production—in which prison reformers were directly implicated—and the rationality of the Age of Reason. The “new penitentiaries,” he writes, “supplanting both the old prisons and houses of correction, explicitly reached towards all three goals: maintenance of order within a largely urban labor force, salvation of the soul, and the rationalization of personality.”⁶³ The economic, rational, and religious cannot be separated in a system that conceived of reform as a process in which, “in the silence of their cells, superintended by authority too systematic to be evaded, too rational to be resisted, prisoners would surrender to the lash of remorse.”⁶⁴

4. PORTABLE CONFINEMENTS OF THE SENSES

These developments in England and the United States have an interesting parallel in the work of German doctor Ludwig Friedrich Friep, who developed a portable device to prevent communication by cutting prisoners off from speech,

60. Ignatieff, *supra* note 59 at 61.

61. *Ibid* at 58.

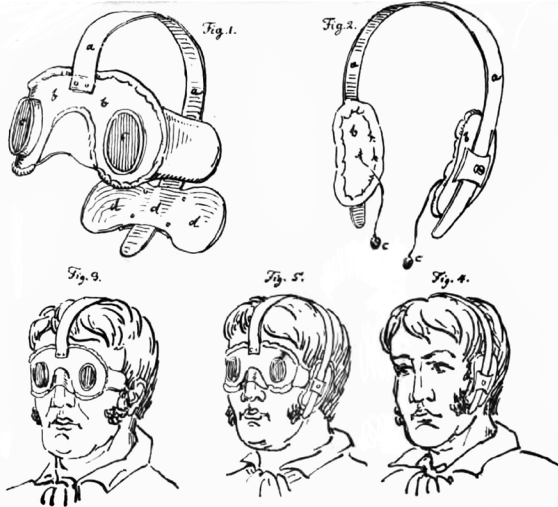
62. *Ibid*. Robert Allan Cooper argues that Howard never accepted the idea of solitary confinement except for especially incorrigible inmates, for short periods of times. However, this idea seems to have been associated with Howard from its early days. Cooper cites an 1804 letter from Howard’s close friend John Coakley Lettsom, who asserts that the “practice of solitary confinement has been said to have originated from his [Howard’s] recommendation; which, however, is not to be traced in his writings, and, I am persuaded, could not have been derived from his conversation.” See “Ideas and Their Execution: English Prison Reform” (1976) 10 *Eighteenth-Century Studies* 73 at 80.

63. John Bender, *Imagining the Penitentiary: Fiction and the Architecture of Mind in Eighteenth-Century England* (University of Chicago Press, 1987) at 31; AY Davis, *supra* note 55 at 54.

64. Ignatieff, *supra* note 59 at 78. See also Jackson, *supra* note 44 at 13.

hearing, and sight (Figure 1, below).⁶⁵ This, too, was meant to be a more humane form of punishment, even more humane than solitary confinement.⁶⁶

FIGURE 1: THE ISOLATION OF VISION AND HEARING ACCORDING TO L.F. FRORIEP.



Die erste Einrichtung des neuen Isolirungsapparats zu vervollkommenen
 fast hundertprocentiger Beschaffenheit zu klären gelangt:
 a. offne Gehöringen; das heißt die zu Isolirenden soll aufpassen zu müssen, sondern sich damit
 begnügen zu können, daß für ihn die Welt nicht aufhört zu leben, sondern nur durch
 einen Vorhang
 b. offne Augen zur Abblendung vorwärts und rückwärts; Körperliche ganz leicht;
 c. offne Nase zur Abblendung vorwärts; abgedichtete Gehöröffnung; Mithin eine neue ganz kleine offne
 einmündige Pfeife eine Pfeife ohne offne Pfeife, aber gelochte.
 Der Apparat besteht aus:
 Fig. 1. aus dem Gehörapparat, nämlich aus dem, mittelst eines gebogenen Rohrs mit über dem Kopf gehende
 dem selbst a) aufpassen zu können, welche b) mit mehr gestrichelten Pfeilen c) aufpassen zu können
 aufpassen; die in der Gehöröffnung und im Gehörapparat die in der Gehöröffnung und im Gehörapparat
 der Gehörapparat der Gehörapparat.
 Fig. 2. aus dem Gehörapparat, mit einem neuen über dem Kopf angebrachten Gehörapparat a), an welcher die
 Gehörapparat b) nach dem Gehörapparat der Gehörapparat und Gehörapparat c) aufpassen zu können
 der Gehörapparat der Gehörapparat Gehörapparat a) aufpassen zu können
 Fig. 3. zeigt den Gehörapparat der Gehörapparat.
 Fig. 4. den Gehörapparat der Gehörapparat.
 Fig. 5. die Gehörapparat der Gehörapparat.

N.D. . . . 1846

SOURCE: Robert Jütte, *A History of the Senses*.⁶⁷

65. Robert Jütte, *A History of the Senses: From Antiquity to Cyberspace*, translated by James Lynne (Polity Press, 2005) at 162.

66. *Ibid.*

67. Ludwig Friedrich v Froriep, *Ueber die Isolierung der Sinne, als Basis Eines Neuen Systems der Isolirung der Strafgefangenen* (Land-Industrie-Comptoir, 1846) at 38, online: <<https://archive.org/details/ueberdieisolier00frorgoog/page/n37/mode/2up>> [<https://perma.cc/B44G-6QQP>]; see Jütte, *supra* note 65 at 163.

Froriep's device was cheaper than solitary confinement and also had the advantage of allowing prisoners to continue working in silence. His idea did not catch on in Germany, but a similar system was developed in the Pentonville Prison in London.⁶⁸ As Robert Jütte writes, "However inhumane such proposals may appear today, they represent the crux of an infiltration of the penal system by the pedagogic, psychological, and medical practices that had been under way since the beginning of the nineteenth century."⁶⁹

The institution of solitary confinement represents a key turn in the mission of incarceration, from a means to hold people until punishment to a system in which incarceration itself is the punishment and rehabilitation the stated goal. It is also, as Jackson argues, "a correctional strategy designed to ensure the legitimacy of state authority."⁷⁰

C. A SENSORY HISTORY OF IMPRISONMENT IN THE CANADIAN SETTING

1. MORAL ARCHITECTURE

Imprisonment in Canada begins with this intellectual movement and the cross-pollination of ideas between reformers in England and the United States. The "systematic use of the sanction of imprisonment" in Canada begins with the building of the Kingston Penitentiary in 1835.⁷¹ As C.J. Taylor documents, these philosophies of silence were built into the design of the Canadian prison from the start. The Kingston Penitentiary was built according to the principles of "moral architecture," designed out of a concern for "more rational punishment of deviant behaviour as well as a response to more general concerns about disorder in society."⁷²

The penitentiary was primarily modelled after the Auburn facility with its solitary confinement at night and silent group labour during the day.⁷³ Its design was proposed in the Kingston Penitentiary Report of 1832, which included the results of tours of prisons in the United States and frequent references to the

68. Caroline Arscott, "Convict Labour: Masking and Interchangeability in Victorian Prison Scenes" (2000) 23 *Oxford Art J* 123.

69. Jütte, *supra* note 65 at 164.

70. Jackson, *supra* note 44 at 6.

71. *R v Gladue*, [1999] 1 SCR 688 at para 53.

72. Taylor, *supra* note 52 at 385.

73. *Ibid* at 387. The cell-block design also drew on architecture of Sing Sing (*ibid* at 392).

works of John Howard and the Boston Prison Discipline Society.⁷⁴ Though the commissioners were unable to visit the Eastern State Penitentiary (also known as Cherry Hill) in Philadelphia due to the cholera epidemic, the report studied the Pennsylvania model and its regime of perpetual solitude.⁷⁵ The report recommended the Auburn system and presented plans drawn by William Powers, then Deputy Keeper at Auburn.⁷⁶

Included in the report is a letter by Powers to the commissioners about the virtues of the silent system: “You are aware that the particularly excellent and distinguishing characteristic of the *Auburn system* is non-intercourse among the convicts, while at the same time, they are employed by day, in active useful labor. This is the grand foundation on which rests the whole fabric of Prison discipline.”⁷⁷ For Powers, “to prevent communication among the convicts, it is necessary that they should be under the most vigilant and strict surveillance of the officers; and therefore, any arrangements that can be made to facilitate *inspection*, must be considered as improvements of no small importance.”⁷⁸

As Brandon LaBelle explains, “the silent system is a disciplinary silence designed to bear down on the body as the final mark of the law and to force the criminal into a state of deep solitude while quite often leading to insanity.”⁷⁹ Reviewing the disciplinary records of the Kingston Penitentiary, Hemsworth writes that “silence materialized historically as a form of violence, through both the political act of denying a person their voice and that of physically choking inmates and their ability to make sound.”⁸⁰

2. THE INSISTENCE OF SOUND

Despite the strictures of the silent system, its disciplinary violence, meant to “produce docile bodies through ‘subtle coercion,’”⁸¹ was resisted at every turn by the insistence of sound: “The difficulty inmates had in obeying the silent rule,

74. *Ibid* at 395.

75. *Ibid* at 387.

76. *Ibid*.

77. William Powers, *Appendix to the Journal, 1832-1833, Report of the Commissioners Appointed by an Act of the Last Session of the Provincial Legislature, For the Purpose of Obtaining Plans and Estimates of a Penitentiary to be Erected in This Province* at 192 [emphasis in original].

78. *Ibid* [emphasis in original].

79. *Acoustic Territories: Sound Culture and Everyday Life* (Bloomsbury USA, 2010) at 71, cited in Katie Hemsworth, “‘Feeling the Range’: Emotional Geographies of Sound in Prisons” (2016) 20 *Emotion Space & Society* 90 at 95 [Hemsworth, “Feeling the Range”].

80. “Carceral Acoustemologies,” *supra* note 5 at 23.

81. *Ibid* at 22.

as well as their advantageous use of undetectable sounds to resist confinement, exposes the system of sonic control as theoretically powerful yet easily betrayed by its practical fragility.”⁸² Hemsworth cites Reverend R.V. Rogers, who testified before the 1849 Brown Commission: “The silent system is not at all carried out; the men talk and laugh in groups together through the yard, constantly; they know every thing going on outside, and the want of discipline is quite notorious and often noticed by strangers.”⁸³ The silent system was eventually abandoned in the 1930s because of its futility: “It was impossible to stop sounds altogether. More importantly, inmates quickly recognized the benefit of the dynamic properties of acoustic space that made it very difficult to detect the source, and used this as a form of sonic resistance.”⁸⁴

3. SHIFTING JUSTIFICATIONS: FROM FORCED WITHDRAWAL TO ADMINISTRATIVE SEGREGATION

The abandonment of the silent system did not mark the end of disciplinary silence in Canadian prisons, however. After all, the “moral architecture” that created the conditions for the silent system remained in place. While silence is no longer described as the general organizing principle of the prison, enforced silence remains at the core of practices of solitary confinement that anchor the practices of imprisonment today. Looming as a disciplinary threat, solitary confinement is taken as a precondition for the functioning of the contemporary prison—keeping apart those that threaten the safety and security of the institution, those whose safety is at risk in the general population, or even those who cannot bear the prison’s cacophonies. Even as the federal government was moving legislation through the House of Commons that purported to eliminate so-called administrative segregation, government lawyers argued in an Ontario courtroom that it was an “appropriate and necessary last resort for managing a difficult and dangerous prison population.”⁸⁵

Though the justifications for confinement have shifted from repentance to “institutional security or safety,”⁸⁶ its core practices have stayed. Its name in the

82. *Ibid* at 23.

83. *Ibid*.

84. Hemsworth, “Feeling the Range,” *supra* note 79 at 95. See also Nicholas Bujalski, “‘Tuk, tuk, tuk!’ A History of Russia’s Prison Knocking Language” (2022) 81 *Russian Rev* 491.

85. *Brazeau v Attorney General (Canada)*, 2019 ONSC 1888 at para 15 [*Brazeau*].

86. “Commissioner’s Directive 711: Structured Intervention Units” (30 November 2019), online: *Correctional Service Canada* <csc-scc.gc.ca/politiques-et-lois/711-cd-en.shtml> [perma.cc/4GRP-ME3M]. See also *Corrections and Conditional Release Act*, SC 1992, c 20, s 34(1) [*CCRA*].

law has also changed with each new justification. In recent decades, the law has known it as “dissociation” and as “administrative” or “disciplinary segregation.”⁸⁷ Historically, the concept of confinement has “been renamed and recalibrated when faced with exposure and challenge.”⁸⁸ Most recently, in what Senator Kim Pate has called a “cynical exercise” in “linguistic trickery,” it has been transformed into “structured intervention units” (SIUs).⁸⁹ Although its justifications and names bear little resemblance to the practice as it was imagined initially, the traces of those original logics still bear significantly on how confinement is practiced and experienced.

4. EXPERIMENTS IN SENSORY DEPRIVATION

The period of concern for the souls of convicts and that of institutional security and safety are linked by a grim period of experimentation on prisoners. In the late 1960s and early 1970s, the Government of Canada financed experiments on prisoners in confinement, seeking to learn about the effects of sensory deprivation.⁹⁰ Before implementing solitary confinement as a means to separate particularly violent offenders, the government constructed a Special Correctional Unit near Laval, Quebec, to isolate a “violent hostile, sometimes psychotic, hard-core group of inmates” from the general population.⁹¹ A criminologist working on the initiative called it “an opportunity...to test objectively some hypotheses on sensory deprivation which were made before the opening of the

87. “Dissociation” was governed by the *Penitentiary Service Regulations*.

PC 1962-302, SOR/62-90, s 2.30, online (pdf): <www.publicsafety.gc.ca/lbrt/archives/ke%2097%20p452%201962-eng.pdf> [perma.cc/RL35-TYYX].

It was permitted “for the maintenance of good order and discipline in the institution” or when it was in the “best interests of an inmate.” The regulation, and its enabling legislation, the *Penitentiary Act*, was replaced, in 1992, by the *Corrections and Conditional Release Act*, which renamed the practice “segregation.” See *CCRA*, *supra* note 86, ss 31-37, 44(1)(f). Bill C-83 replaced sections 31-37 (administrative segregation) with “structured intervention units” and repealed subsection 44(1)(f) (disciplinary segregation). See *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 38th Parl, 2019, cl 10-11 (assented to 21 June 2019).

88. Parkes, “Prisoner Litigation,” *supra* note 8 at 179.

89. “Solitary by Another Name is Just as Cruel” (12 November 2018), online: *The Globe and Mail* <theglobeandmail.com/opinion/article-solitary-by-another-name-is-just-as-cruel> [perma.cc/M3AQ-5ZKQ].

90. Geraint B Osborne, “Scientific Experimentation on Canadian Inmates, 1955 to 1975” (2006) 45 *How J Crim Justice* 284 at 285.

91. *Ibid* at 286.

Special Correctional Unit.⁹² Prison officials also experimented on prisoners with LSD, electroshock therapy, and pain tolerance.⁹³

Doctor Louis Gendreau, then-director of medical services for the federal penitentiary service, provided the justification for these experiments in a 1963 memo, writing that scientific testing on inmates provided them with “an opportunity to identify themselves with society, whose laws they have violated. It gives participating inmates a feeling of self-respect. It builds up the self-esteem of those who have a low opinion of themselves; they know they can become useful to millions of people.”⁹⁴ In his reasoning, the fact that prisoners were subjected to experiments was not a result of their subjection to civil and social death. Rather, they were subjected to experiments as a way to participate in the life of the outside world, through a sacrifice of their bodies and minds.

Reflecting on the central role that solitary confinement has played in prison discipline, despite evolutions in language and policy, Jackson writes, “[T]oday, one would search in vain to find any reference to it in the statutes, the regulations, or the myriad directives that together form the legislative and administrative structure for penitentiary discipline.”⁹⁵ But the changes in language are misleading: “[I]f we seek continuity in language in tracing what has become of solitary confinement we will conclude that it, like the cat-o’-nine-tails, has been cast aside as an agent of discipline....[T]o trust in language would be to err.”⁹⁶ While philosophies have shifted, the effects of the older philosophies persist partly through the endurance of the architecture and the limits it places on the imagination. Indeed, while the federal government claimed the new SIUs would “end the practice of segregation,”⁹⁷ the cells in some institutions are the very same. Then-Minister of Public Safety Ralph Goodale confirmed this fact at a Senate committee studying the bill: “I’ve heard the criticism that the physical infrastructure of SIUs will be largely the same as segregation, and in many cases, that’s true.”⁹⁸ Though he promised that changes were being made to those cells, he argued that “the cells themselves are not the key issue.”⁹⁹ Rather, “what makes

92. *Ibid.*

93. *Ibid.* at 286-87.

94. *Ibid.* at 298.

95. *Supra* note 44 at 43.

96. *Ibid.*

97. Senate of Canada, Standing Senate Committee on Social Affairs, Science and Technology, *Evidence*, 42-1, No 59 (8 May 2019) (Hon Ralph Goodale, PC, MP).

98. *Ibid.*

99. *Ibid.*

segregation *segregation* is not the physical cell; it is the lack of human contact. It is the isolation.”¹⁰⁰

This is an apt demonstration of the power of the “moral architecture” to shape the penal imagination through the endurance of structures and logics. With the ideological roots of the penitentiary in mind, let us turn to look at the case law to see how, if at all, judges have contended with the persistence of sound and its other (silence) as a mode of discipline and resistance.

II. SOUNDING OUT THE CASE LAW

A. SOLITARY CONFINEMENT

Solitary confinement provides a crucial case study for a sensory account of the prison because it shows the ways that the original sensory logics persist throughout their evolutions and contortions. Even when solitary confinement is no longer the default condition of the prisoner, no longer theorized as a place of repentance and spiritual healing, it is placed as a lynchpin in the order and mission of the prison. Even as the solitary cell is actually described as unbearably loud by some, this original site of enforced silence is theorized as a necessary last resort. And, even as solitary confinement is no longer prized for its silence, sound often shows its insistence in the references to it, both in prisoners’ accounts of their experiences in solitary confinement and in the judicial accounts of the practice that have proliferated in recent years as the practice of solitary confinement has come under significant legal attack.

100. *Ibid* [emphasis added]. Whether the new SIU regime has ended the practice of segregation remains to be seen. As the Structured Intervention Unit – Implementation Advisory Panel noted in its scathing First Year Report, “[t]ime spent out of the cell and in meaningful human contact were factors that were supposed to distinguish the new SIU regime from what preceded it.” However, the government did not release the data necessary for the panel to evaluate the new regime. The Structured Intervention Unit – Implementation Advisory Panel, Statement, by Anthony N Doob (19 August 2019) at 2, citing Public Safety Canada, The Structured Intervention Unit – Implementation Advisory Panel, *First Year Report*, by Anthony Doob (11 August 2020). In April 2022, the Canadian Human Rights Tribunal considered the government’s contention that including SIUs in a long-standing human rights complaint concerning administrative segregation would amount to “fresh complaints” that had “no factual or legal link” to the original complaints. The Tribunal allowed the complaint to consider SIUs, finding that “[a]llegations of systemic discrimination related to isolated and restrictive conditions of confinement have been part of these proceedings since their outset.” *Canadian Association of Elizabeth Fry Societies v Correctional Services of Canada*, 2022 CHRT 12 at paras 8, 17 [CAEFS]. Simcha Wolfish is co-counsel to the Canadian Association of Elizabeth Fry Societies in this case.

These legal attacks have ranged from *Charter* challenges of the practice itself, to a systemic human rights complaint alleging that the Correctional Service of Canada's use of segregation and confinement practices discriminate against women in the federal prison system, to individual claims and class action lawsuits brought by those who have suffered its harms.¹⁰¹ Three related cases from Justice Perell of the Ontario Superior Court of Justice cite a lengthy quote from Charles Dickens upon his visit to Cherry Hill. In it, Dickens describes a system of "unknown punishment" in a "silent cell," a system of "rigid, strict, and hopeless solitary confinement" that he believed to be "cruel and wrong."¹⁰² Its intentions, he wrote, were "kind, humane, and meant for reformation" but "very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers."¹⁰³ In the faces of the prisoners, Dickens saw a "slow and daily tampering with the mysteries of the brain" which was "immeasurably worse than any torture of the body."¹⁰⁴

1. THE DESTRUCTION OF INTERRELATIONAL SUBJECTIVITY

Dickens's description of the suffering of the "silent cell" has some resonance with descriptions of contemporary confinement in the case law. For example, in *R v Capay*, the judge concluded the analysis of whether the treatment of Adam Capay, a young man and member of Lac Seul First Nation, constituted cruel and unusual punishment with the pronouncement that "the treatment of the accused was, in my opinion, outrageous, abhorrent, and inhumane."¹⁰⁵ He found that Mr. Capay, "a young, mentally ill, Indigenous man, was detained in continuous

101. See e.g. *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243; *CAEFS*, *supra* note 100; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 [BCCLA]; *Brazeau*, *supra* note 85.

102. *Brazeau*, *supra* note 85 at para 89, citing Charles Dickens, *American Notes for General Circulation* (Chapman & Hall, 1913); *Reddock v Canada (Attorney General)*, 2019 ONSC 5053 at para 111 [Reddock]; *Francis v Ontario*, 2020 ONSC 1644 at para 61 [Francis].

103. *Brazeau*, *supra* note 85 at para 89.

104. *Ibid.*

105. 2019 ONSC 535 at para 415 [Capay].

segregation in deplorable conditions for 1,647 days.¹⁰⁶ He faced the cruelty of isolation from the beginning: “[H]e was subjected to near total isolation during the initial three month period of segregation during which time his mental health deteriorated dramatically.”¹⁰⁷

Mr. Capay’s case finally received attention after a visit to the Thunder Bay Jail by Renu Mandhane, then-Chief Commissioner of the Ontario Human Rights Commission.¹⁰⁸ Mr. Capay was being held in silence. The judge notes that for much of his confinement, he had no access to a radio and limited access to a telephone.¹⁰⁹ One of the cells in which he was confined was so soundproof that, as a corrections officer testified, officers on duty “would not be able to hear inmates yelling at them from cells inside those blocks.”¹¹⁰

The silence described in the case is not just that of the physical conditions of Mr. Capay’s confinement. It is also the silence of those responsible for his treatment. Ms. Mandhane was not scheduled to speak with Mr. Capay but was alerted to his situation by a union representative.¹¹¹ When she initially asked to speak with him, “she was met with silence and surprise. The social worker told her that the accused did not really like to talk to people.”¹¹² Ms. Mandhane persisted, and it turned out that Mr. Capay was, in fact, prepared to speak with her. She describes being taken downstairs into a “windowless ‘kind of...day room area...range’ with ‘a kind of quiet, very quiet sort of feel to it,’” that was “unlike anything [she] had experienced before.”¹¹³ Ms. Mandhane recalled that Mr. Capay was speaking “in a distinctive way, a very slow, labored sort of, like... when you’re struggling to find words.”¹¹⁴ She testified that he apologized for his way of speaking as he had spoken to so few people in his years of isolation.¹¹⁵ The

106. *Ibid* at para 414. See Dylan Robinson, “Intergenerational Sense, Intergenerational Responsibility” in Keavy Martin & Dylan Robinson, eds, *Arts of Engagement: Taking Aesthetic Action in and Beyond the Truth and Reconciliation Commission of Canada* (Wilfrid Laurier University Press, 2016) 43 (on the parallels between the sensory regime of the prison and the incarceration of the senses and subjects in the Indian Residential School as of Indigenous material culture in the museum). See also Dylan Robinson, *s thá:yset: shxweli li te shxwelitemelh xits’etáwtxw / The Museum’s Incarceration of Indigenous Life* (Keynote delivered at ISEA2020: 26th International Symposium on Electronic Art, 2020) [unpublished].

107. *Capay*, *supra* note 105 at para 414.

108. *Ibid* at para 62.

109. *Ibid* at paras 18, 20, 21

110. *Ibid* at para 72.

111. *Ibid* at para 51

112. *Ibid* at para 54.

113. *Ibid* at para 55.

114. *Ibid* at para 56.

115. *Ibid*.

judge also described the testimony of a psychiatrist about Mr. Capay's experience of auditory hallucinations that "may well have been exacerbated by the accused's time in segregation."¹¹⁶

Mr. Capay's apologies for being out of practice in speech and his experience of auditory hallucinations read as two poignant examples of what Guenther describes in her work as "becoming unhinged," as "a precise phenomenological description of what happens when the articulated joints of our embodied, interrelational subjectivity are broken apart."¹¹⁷ Guenther writes:

Solitary confinement deprives prisoners of the bodily presence of others, forcing them to rely on the isolated resources of their own subjectivity, with the (perhaps surprising) effect of eroding or undermining that subjectivity. The very possibility of being broken in this way suggests that we are not simply atomistic individuals but rather hinged subjects who can become unhinged when the concrete experience of other embodied subjects is denied for too long.¹¹⁸

While some cases describe the experience of prisoners as one of unbearable silence, others describe noise without respite. Here, the prisoners experience not a simple lack of the presence of others, but the reduction of their co-existence to parallel existences, shared only by the noise they each create. For example, in *British Columbia Civil Liberties Association v Canada (Attorney General)*, Leslie Brownjohn describes his segregation cell: "The segregation unit was very loud. Other inmates in segregation would frequently scream and kick their cell doors. Between the noise and the constant light in my cell, I had significant difficulty sleeping."¹¹⁹

In the same case, witness BobbyLee Worm, a Cree woman from Saskatchewan, described the years she spent under the Management Protocol, a regime that subjected mostly Indigenous women deemed "difficult to manage" to extended periods of segregation.¹²⁰ She described her experience leaving solitary confinement:

I sometimes experienced hallucinations while I was in segregation. I would see moving shadows and think that I could hear my name being called. I did not usually tell anyone about these incidents because I was afraid that I would be put into the Regional Psychiatric Centre and forced to take medication. The few times I did talk to correctional staff about these sorts of experiences, I felt they were dismissive

116. *Ibid* at para 257.

117. *Supra* note 38 at xii.

118. *Ibid*.

119. *BCCLA*, *supra* note 101 para 114.

120. Parkes, "Prisoner Litigation," *supra* note 8 at 172.

or that it was something they viewed as “routine” in solitary. They suggested I was exaggerating and that it was no big deal.

I also became hypersensitive about being in large spaces, making reintegrating into the general population very challenging. Large spaces overwhelmed me. I was also especially sensitive to loud noises. These symptoms were probably the most severe after I had been on the MP [Management Protocol] for a few months.¹²¹

The judge also cited government expert witness Doctor Paul Gendreau, who testified to the beneficial effects of solitary confinement for some inmates:

With respect to the exacerbating effects of segregation on mentally ill inmates, Dr. Gendreau cites literature to the effect that such inmates have difficulty processing information in conditions where they are inundated with sensory input, which can be the case in general population cells with their constant noise. They therefore function better in quiet environments such as segregation, though he acknowledges that is not a reason to leave them there.¹²²

2. NO-SPEAKING RANGES

Outside of solitary confinement, some prisoners experience similar isolation and its effects. For example, in *Bacon v Surrey Pretrial Services Centre (Warden)*, the petitioner describes the intensity of deprivation after being transferred out of segregation into a new range, where he was double-bunked yet told that “this was a no-speaking range.”¹²³ He stated in his affidavit that “they said that I am prohibited from communicating directly or indirectly with any other prisoners on the unit and would be charged if I did. I can only use the cell call button in the case of a ‘severe medical emergency.’”¹²⁴ He is not watched inside his cell but he is heard: “There is no camera in the cell, but there is a microphone unit right outside my door.”¹²⁵ The isolation had to continue when out of his cell: “I have been told that I will be alone on my time out and that I must not talk to anyone.”¹²⁶ Even on his calls to his lawyer, he is heard: “The telephones are immediately adjacent to the guard’s desk. Because it is so quiet on the unit, the guards can hear my telephone calls to counsel.”¹²⁷ The prohibition on communication was not limited to speech: “On November 10, 2009, when I was at court, the guards searched

121. *BCCLA*, *supra* note 101 at para 281.

122. *Ibid* at para 225.

123. 2010 BCSC 805 at para 249 [*Bacon*].

124. *Ibid*.

125. *Ibid*.

126. *Ibid*.

127. *Ibid*.

my cell. They took my pen, saying that pens are not allowed on a segregation unit. I had to show them my special request form to get my pen back.”¹²⁸ Even though he was now bunked with another inmate, he reported feeling completely cut off in his cell:

The Segregation Unit always seemed to be noisy. This unit is dead silent. There are 2-5 guards on the unit but I never hear them talking to one another. When I have my hour out, they do not talk to me. It is very awkward. I believe that there are four other prisoners on this unit, because I have seen file folders and dinner carts, but I have not seen or heard the prisoners. The Segregation Unit seems relaxed by comparison. The rules are much more “in your face” here. It is higher security. It is much more isolated.¹²⁹

3. THE NORMALIZATION OF ISOLATION

Sounds persist throughout these accounts, even when only mentioned briefly. In the figures of the social worker who says that Mr. Capay does not like to speak and the guard who ignores Ms. Worm’s pain, we find a normalization of isolation. Ms. Worm testifies to a refusal of that normalization. Similarly, Mr. Capay’s willingness to speak with Ms. Mandhane—perhaps the first person with power derived from outside the prison structure who has come to meet him—testifies to a resistance to the normalization of his isolation.

The references to sound included in these judgements do not paint a uniform picture. But noisy or quiet, they point to a form of auditory violence that pushes towards a form of social death:

To be socially dead is to be deprived of the network of social relations, particularly kinship relations, that would otherwise support, protect, and give meaning to one’s precarious life as an individual. It is to be violently and permanently separated from one’s kin, blocked from forming a meaningful relationship, not only to others in the present but also to the heritage of the past and the legacy of the future beyond one’s own finite, individuated being.¹³⁰

Scarcely in these decisions do the judges reflect on the purposes and effects of sound and silence. However, these references to sound point to a violent manipulation of the ways in which the self is constructed through the senses, and the senses are constructed through the presence of others. It shows how solitary confinement’s original goal of “forced withdrawal from the distractions of the

128. *Ibid.*

129. *Ibid.*

130. Guenther, *supra* note 38 at xxi.

senses into silent and solitary confrontation with the self”¹³¹ is not an opportunity for self-reflection but an attack on the self itself. However, these references also show how, in Guenther’s words, the testimony of prisoners “bears witness not to the utter annihilation of the person, not to an absolute indifference of life and death, but to a *life against death* that is more than bare survival, a relationality that is exploited but not annihilated.”¹³²

B. THE PERSONAL AND COMMUNAL SOUNDSCAPE OF THE PRISON

1. EXTREME NOISE: ORDINARY PAINS AND INCONVENIENCES VERSUS CRUEL AND UNUSUAL SONIC PUNISHMENT

Enforced silence is one form of auditory violence. Extreme noise is another. Courts have dealt with the issue of noise on a limited number of occasions. Unsurprisingly, the cases that deal directly with noise are less about the harms of the ambient noise of the range and more about campaigns of harassment by prison guards. Some also touch on cases of noise caused by prisoners to harass each other or of punishments received for making noise. In what follows, we shall examine each of these grievances, or “differends” (to use the terminology of the French philosopher, Jean-François Lyotard) in turn.¹³³

R v MacPherson is a particularly shocking example of punishments for noisiness.¹³⁴ Mr. MacPherson was banging on his cell door repeatedly, demanding to speak with a lawyer, a request that had been denied for “at least 40 days.”¹³⁵ After apparently kicking the door for about an hour and a half, he was warned “for the last time’ to cease banging on the cell door.”¹³⁶ He responded by “hitting the door and shouting at the guard: ‘Are you gonna let me call a lawyer you piece of shit?’”¹³⁷ The guards respond by strapping Mr. MacPherson onto a stretcher and placing a hockey helmet on his head.¹³⁸ The judge notes that “[p]ossibly the

131. Ignatieff, *supra* note 59 at 58. See also Phillip Vannini, Dennis Waskul & Simon Gottschalk, *The Senses in Self, Society, and Culture: A Sociology of the Senses* (Routledge, 2012); David Howes, *Senses and Sensation: Critical and Primary Sources*, vol 2, *History and Sociology* (Bloomsbury, 2018).

132. Guenther, *supra* note 38 at xxiv [emphasis in original].

133. See *The Differend: Phrases in Dispute*, translated by Georges Van den Abbeele (University of Minnesota Press, 1988).

134. (1996) 177 NBR (2d) 1 (CA) [*MacPherson*]; Parkes, “A Prisoners’ Charter,” *supra* note 34 at 656.

135. *MacPherson*, *supra* note 134 at para 31.

136. *Ibid* at para 29.

137. *Ibid* at para 30.

138. *Ibid* at paras 36-37.

guards were ‘tuning him out’ and did not hear or fully understand the significance of Mr. MacPherson’s comments on the tape that: ‘My circulation in my hand is cut off... The circulation is cut off.’¹³⁹

In *Wild v Canada* (“*Wild*”), the inmate alleged that

certain officers on duty during night shifts made loud noises while conducting rounds. They would, among other things, purposely rattle the handle on his cell door and kick his cell door, and keep the night light on in his cell, in order to awaken him. As a result, Mr. Wild claims that he was deprived of sleep which led to neurological damage.¹⁴⁰

Mr. Wild claimed damages totalling 3.1 million dollars.¹⁴¹

Mr. Wild was advised by authorities that “it was unrealistic to expect that there will not be any noise or light during the night hours” and “unit staff have been reminded to be considerate when offenders are asleep.”¹⁴² The prison based some of its defence on Mr. Wild’s refusal to wear earplugs, which Mr. Wild claimed would have caused him to sleep in and miss breakfast. The judge rejected this argument: “An inmate should have the right to a restful night’s sleep without being unnecessarily awakened at the frequency and duration of time alleged by Mr. Wild.”¹⁴³

The judge upheld the policy of hourly rounds, which he found “fully justified and desirable in an institutional setting to ensure public safety and the safety of the inmates.”¹⁴⁴ However, he was also “satisfied that these nightly awakenings for the most part were deliberate and unnecessary.”¹⁴⁵ Additionally, he found “that the actions of these officers of the defendant fall below the standard of conduct of a reasonable person of ordinary prudence in the circumstances.”¹⁴⁶ However, he dismissed Mr. Wild’s claim because any link between the disturbances and Mr. Wild’s neurological issues was based on his own “self-diagnosis.”¹⁴⁷ This meant that unless the noise produced effects that were medically recognizable, the harms of the noise dissipated, along with the noise itself.

139. *Ibid* at para 40.

140. 2004 FC 942 at para 2 [*Wild*].

141. *Ibid* at para 7.

142. *Ibid* at para 41.

143. *Ibid* at para 43.

144. *Ibid* at para 44.

145. *Ibid* at para 45.

146. *Ibid*.

147. *Ibid* at para 53. On the evidentiary problems that arise in cases involving the litigation of allegedly abnormal noise, see Michael Mopas, “Howling Winds: Sound, Sense, and the Politics of Noise Regulation” (2019) 34 CJLS 307.

A similar claim was brought in *Cerra v Canada (Attorney General)*, in which an inmate alleged that the practice of “waking him from sleep on a recurring basis throughout the night” constituted cruel and unusual punishment.¹⁴⁸ The judge followed the reasoning in *Wild*, finding it “inevitable that inmates will be awoken from time to time during security rounds.”¹⁴⁹ The judge dismissed Mr. Cerra’s application for judicial review because Mr. Cerra’s grievance was treated seriously, and “[n]oise levels were monitored for a period of time to ensure that correctional staff was adhering to good practices and following policy and no violations were identified.”¹⁵⁰ Mr. Cerra simply did not present the evidence to support his complaint that he was being harassed. He was ordered to pay 250 dollars in costs to the Attorney General of Canada.¹⁵¹

In *R c Bois* (“*Bois*”), the defendant asked for quadruple or triple credit for his time in pre-trial detention, for several reasons, including “bruits de toutes sortes,” blaming it on “surpopulation carcérale.”¹⁵² The judge rejected this claim because all detainees face the same conditions and they would all be entitled to the same credit for the harsh conditions they face: “L’accusé décrit tout simplement les conditions que vivent quotidiennement les prévenus séjournant dans un centre de prévention en attendant leur procès ou le prononcé de leur peine.”¹⁵³ The judge doubted that these conditions even had such a serious effect on the prisoner; otherwise, he could have taken steps to speed up his case.¹⁵⁴ The reasoning in this case highlights perhaps one of the most serious limitations of litigation as a strategy to address systemic harms in prison: Who is Mr. Bois to claim that the conditions everyone faces in prison caused him particular harm?

In *Gustavson v H.M.T.Q.*, an inmate serving an indeterminate sentence filed a writ of habeas corpus, arguing that “the indeterminate sentence is a cruel and unusual punishment and amounts to torture given the prison’s restriction on his daily physical movements. He complain[ed] of all of the sounds and noises one associates with a prison, including closing of steel doors and flushing of toilets, and the loss of his family relationships.”¹⁵⁵ As in *Bois*, there was little

148. 2012 FC 464 at para 2 [*Cerra*].

149. *Ibid* at para 5.

150. *Ibid* at para 7.

151. *Ibid* at para 8.

152. 2010 QCCQ 4292 at para 98 [*Bois*].

153. *Ibid* at para 99 (“[t]he Accused simply describes the conditions that defendants experience daily in a remand centre while waiting for their trial or their sentence” [translated by authors]).

154. *Ibid* at para 100.

155. 2004 BCSC 592 at para 7.

room to challenge the ordinary pains and inconveniences of incarceration. For the judge, his petition was “nothing more” than an attempt to get around his indeterminate sentence.¹⁵⁶

What we find in these cases is that prison authorities do sometimes engage in campaigns of noise harassment against inmates. While it is possible that an exceptional case could prove otherwise, we also find that, for a claim to be successful, inmates must show that the noise was extraordinary and perhaps deliberate. Inmates must show that it caused them personal and enduring “medically relevant” harm, but they cannot do so. Here, the application of the rule of “medically relevant” harm turns the case from a litigation into a “differend,” to use the terminology of the French philosopher Lyotard:

As distinguished from a litigation, a differend [*différend*] would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgement applicable to both arguments. One side’s legitimacy does not imply the other’s lack of legitimacy. However, applying a single rule of judgement to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule).¹⁵⁷

While prisoners in Canada do not appear to have had much success in litigating excessive noise, US courts have found that excessive noise “‘inflicts pain without penological justification’ and may violate the Eighth Amendment”¹⁵⁸ However, they have also ruled that prisoners are not entitled to a “noise-free prison environment” or to freedom from noise that causes “mere discomfort or inconvenience.”¹⁵⁹

2. MUSIC: JAILHOUSE RAP AND SONIC LIBERATION THEOLOGY

We now turn to a consideration of music in the prison. Considering music is tricky because, as the saying goes, “one person’s music is another person’s noise.” The qualification of sound as noise instead of music depends on a prior categorization, a prior valuation, which is contingent on the social position of the listener.¹⁶⁰ There is lots of room for differends to arise here.

156. *Ibid* at para 20.

157. *Supra* note 133 at xi.

158. *Benjamin v Fraser*, 161 F Supp 2d 151 at 185 (SD NY 2001), citing *Toussaint v McCarthy*, 801 F 2d 1080 at 1110 (9th Cir 1986), cert denied, 481 US 1069 (1987).

159. John Boston & Daniel E Manville, *Prisoners’ Self-Help Litigation Manual* (Oxford University Press, 2010) at 24.

160. Stoeber, *supra* note 25; Eidsheim, *supra* note 29. See also Holger Schulze, ed, *The Bloomsbury Handbook of the Anthropology of Sound* (Bloomsbury, 2020).

In *R v Goulbourne* (“*Goulbourne*”), the presiding judge described the lead up to an altercation that left Mr. Goulbourne cut and bruised, with his right eye swollen shut.¹⁶¹ Specifically, the judge described the “music” being created by Mr. Goulbourne as he sat in his holding cell. The latter was making rap music to entertain himself, “making the beat for his rapping by banging with his hand on the plexiglass wall that was on the outside of the cell bars of the main general male holding cell.”¹⁶² In his testimony, Mr. Goulbourne demonstrated how he was rapping: “[B]anging his hand on the edge of the witness box he performed a verse of the song ‘Awwsome [*sic*]’, a rap song recorded by a performer named ‘Shy Glizzy.’”¹⁶³ Mr. Goulbourne admitted “he was making a lot of noise, as he was ‘entertaining’ himself and the other prisoners and stated plainly that he was not about to stop regardless of what the guards said.”¹⁶⁴ It turned out that the other inmates were not entertained and became agitated.¹⁶⁵ The officer on duty reported the conduct to the supervisor: “By the time he got there a minute or two later an apprehensive silence had overtaken the other inmates, the kind that he said frequently precedes a fight.”¹⁶⁶

It will be observed that Mr. Goulbourne turned to music for self-expression and entertainment, using the physical elements of the prison as his instruments. This, in turn, annoyed his fellow prisoners and called for discipline by the officers, who believed they could hear the silence that precedes a fight. The question arises of whether this perception on the part of the guards is any more grounded than the voices and other auditory hallucinations experienced by prisoners within the silent confines of their cells.

The idea of using the physical structure of the prison to create music also appears in the Radio-Canada/Vice podcast, *Rap carcéral*, which features an interview with Québécois rapper Souldia. He describes a freestyle performance in which he created a beat by banging on the door of his cell, using the echo to

161. 2017 ONSC 2653.

162. *Ibid* at para 14.

163. *Ibid* at para 15 [emphasis in original].

164. *Ibid*.

165. *Ibid* at para 16.

166. *Ibid*. On apprehension as a sensori-legal category, see Safiyah Rochelle, “Encountering the ‘Muslim’: Guantánamo Bay, Detainees, and Apprehensions of Violence” (2019) 34 CJSLS 209.

create a reverb effect.¹⁶⁷ Here, his fellow inmates were cheering him on while the guards came in to discipline him.¹⁶⁸

Music has a long and powerful history as a tool of escape from and resistance to the prison, as a means to build solidarity and forge new kinship ties against all attempts to destroy them. Shana L. Redmond examines the “sound produced by incarcerated Black activists who used music as an escape from a site of death making.”¹⁶⁹ Writing about Marcus Garvey’s prison songs, she observes that “[a]urality was Garvey’s measure of freedom; from speeches to songwriting, he used his voice and those of his members and admirers to imagine alternative engagements with each other as well as to counter the practices of listening and surveilling powers.”¹⁷⁰ For Redmond,

[t]he music performed behind the walls and gates of the prison are not simply a salve; they are, like the spirituals before them, communicative and strategic interventions within the ubiquitous peripheries of the prison that both organize the communities who speak/sing them and make demands on those who listen. By organizing the energies, needs, and desires of their subjects, these songs and their creation become a strategy within Black challenges to and innovations in the performances of U.S. citizenship.¹⁷¹

Redmond cites Angela Davis’s account of a joint protest between women who were incarcerated and those who came to support them. The protestors joined the incarcerated women in chanting.¹⁷² They found that “[i]t was far easier for us to be heard through the windows by the people outside than it was for us to be heard by ourselves, separated as we were by thick concrete walls dividing the cells.”¹⁷³ Music, in this account, demonstrates one aspect of the porousness of the prison walls, forging bonds where walls were meant to prevent them.

Legal scholar SpearIt also shows how Black and Latino inmates in American prisons find, in hip hop music, a theology of liberation and communal struggle against incarceration. SpearIt explains how, particularly for Black inmates in

167. “À l’intérieur: faire son temps” (21 November 2018), online (podcast): *Radio-Canada* <ici.radio-canada.ca/premiere/balados/6201/rap-carceral-prison-musique-gang-rue/episodes/420815/detention-incarceration-torture-souldia-entrevue> [perma.cc/ET2C-5G2K].

168. *Ibid* at 00h:21m:30s.

169. “Song Uncaged: Prison Temporality and Black Pop Culture Escape” (2014) 16 *Souls* 227 at 230.

170. *Ibid* at 228.

171. *Ibid* at 231.

172. *Ibid* at 234, citing Angela Davis, *An Autobiography* (Random House, 1974).

173. *Ibid*.

American prisons and artists outside of them, hip hop music has intersected with Islam to produce powerful critiques of the prison.¹⁷⁴ He terms this phenomenon a “sonic jihad and its aural assault against prisons.”¹⁷⁵ He outlines how, for a global network of Muslim hip hop artists, music is “a way of reconnecting the individual with the self and with history.”¹⁷⁶ In “this religiosity,” he continues, “music plays a central role in a believer’s sense of community—the embodiment of sound as sacred space or sonic theology.”¹⁷⁷ He further notes that this is because “[r]egardless of how the music has evolved or is styled, the prison has remained a consistent locus of resistance for Muslim rappers.”¹⁷⁸ SpearIt observes:

Among African-Americans, the prison towers are a locus of conversion, including for the most famous convert Malcolm X, who described prison as the place where he learned to be “free.” In such circumstances, Islam captivates the captive and forces him to reevaluate the beliefs of the past. For sincere believers, the penal place of “corrections” transforms into *dar ul islam*, or the territory guided by Islamic scripture and eschatology. By “staking out an Islamic space and filling it with a universe of alternative sensations, names, and even a different alphabet, the prison jama’a establishes the conditions of the most dreaded aspect of detention—the duration of one’s sentence, the ‘terror of time.’”¹⁷⁹

SpearIt argues that for the African-American and Latino prisoner, conversion offers a kind of rebirth (in place of social death), a radical break with the past, and a new identity, a “feeling of somebodiness denied by the dominant culture.”¹⁸⁰ For these prisoners, the sonic liberation theology of Muslim hip hop provides the building blocks for an inner transformation and “a framework of religious resistance.”¹⁸¹ It provides the fuel for liberation both individual and collective, building communities within the prison and across its walls, infusing the identities of prisoners with community and history.

174. “Sonic Jihad—Muslim Hip Hop in the Age of Mass Incarceration” (2015) 11 Fla L Rev 201.

175. *Ibid* at 203.

176. SpearIt, “Raza Islamica: Prisons, Hip Hop & Converting Converts” (2012) 22 Berkeley La Raza Law Journal 175 at 188 [SpearIt, “Raza Islamica”].

177. *Ibid* at 189.

178. *Ibid* at 191.

179. *Ibid* at 196 [emphasis in original].

180. Beverly Thomas McCloud, “African-American Muslim Women” in Yvonne Yazbeck Haddad, ed, *The Muslims of America* (Oxford University Press, 1991) 177 at 178, cited in SpearIt, “Raza Islamica,” *supra* note 176 at 196.

181. Gauri Viswanathan, *Outside the Fold: Conversion, Modernity, and Belief* (Princeton University Press, 1998), cited in SpearIt, “Raza Islamica,” *supra* note 176 at 196. On the connection between sound and inner transformation, see Charles Hirschkind, *The Ethical Soundscape: Cassette Sermons and Islamic Counterpublics* (Columbia University Press, 2006); Schulze, *supra* note 160.

SpearIt cites Marable and Aidi, who write that in the prison conversion, the inmate rejects Christian hegemony and its “imposed master narrative of nonbeing and the subjection of Blackness upon which—through chattel slavery, disenfranchisement, and social death—[America] ultimately rests.”¹⁸² For “if prison is about disappearance, and erasure, silence, and violence, then epiphany, conversion, and politicization are a kind of ontological resurrection against social and civic death—redefining one’s existence and challenging the panoptic power of the state.”¹⁸³ Against the noises and silences of the prison, the inmate can find a sonic path towards redemption by joining the “Transglobal Hip Hop *Umma*.”¹⁸⁴

Music can, therefore, help to build community across the walls of the prison that illustrates the porousness of those walls. It can also accentuate a different kind of porousness, in which music—generally rap music—is used by the state both to justify imprisonment and to exercise a silencing power over prisoners after their release. In both circumstances, the state hears this music as criminal activity that calls for imprisonment, asserting or reasserting its control over the auditory world of the criminalized musician.

Ngozi Okidegbe comments on the increased use of accused-authored rap lyric evidence in Canadian criminal proceedings, where such lyrics tend to be interpreted literally. She argues that

the reason for this is that trial actors can lack the cultural competency to recognize rap as artistic expression and to distinguish between a rap artist and their persona. This problem can cause trial actors to mistake rap lyrics for autobiographical depictions of the rap artist’s lived experiences or personal knowledge.¹⁸⁵

Okidegbe cites a study on anti-Black racism and rap music, which found that

[t]he stereotypes associated with rap and hip-hop are perfect candidates for legitimizing anti-Black attitudes and discrimination. These stereotypes not only overlap with already entrenched stereotypes of Black males as violent and criminal-

182. Manning Marable & Hishaam D Aidi, eds, *Black Routes to Islam* (Springer, 2009) at 218, cited in SpearIt, “Raza Islamica,” *supra* note 176 at 197.

183. *Ibid.*

184. SpearIt, “Raza Islamica,” *supra* note 176 at 189, citing H Samy Alim, *Roc the Mic Right: The Language of Hip Hop Culture* (Routledge, 2006) at 33.

185. Ngozi Okidegbe, “A ‘Bad Rap’: R. v. Skeete and the Admissibility of Rap Lyric Evidence” (2018) 66 *Crim LQ* 294, s 1ff (“Contextualization”). See also Abenaa Owusu-Bempah, “Prosecuting Rap: What does the case law tell us?” (2022) LSE Legal Studies Working Paper No 07/2022, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=4062205#> [perma.cc/W2TT-CPPQ]; David M Tanovich, “*R v Campbell*: Rethinking the Admissibility of Rap Lyrics in Criminal Cases” (2016) 24 *Crim Reports* 27.

minded but, more important, they suggest that this behavior is completely under the volition of the offender.¹⁸⁶

Okidegbe argues that

when introduced at trial, the jury may unconsciously rely on these racial stereotypes when determining the weight to accord rap lyric evidence. These unconscious views may cause the jury to improperly view the rap lyric evidence tendered as proof of a black accused's 'heightened' criminality or propensity to commit crime.¹⁸⁷

This is a particularly egregious case of the litigation turned differend.

Additionally, just as the stereotypes associated with hip hop can help rappers land in prison, they can also silence them upon their return or send them back. As formerly incarcerated rappers *Connaisseur Ticaso*, *Lost*, and *Frément* discuss in *Rap carcéral*, rappers often receive parole conditions that associate rap with criminality, placing restrictions on their ability to distribute, perform, or even create music.¹⁸⁸ This makes it difficult or impossible for rappers to pursue their art and make a living with their music without risking a return to prison.¹⁸⁹

The beneficial aspects of music within prison are also utilized by prison officials to exercise further control, giving music an ambivalent role overall. As Chris Waller argues, music played a transformative role in the philosophies of early reformers and has become “incorporated into the discourse and technology of the emerging carceral state.”¹⁹⁰

Perhaps the most extreme example of the use of music for the purposes of control is the sonic torture of American-run detention camps in the Global War on Terror.¹⁹¹ Suzanne G. Cusick explores how loud music is used as an element of harsh interrogation in detention centres operated by the United States, suggesting that those authorities “established as absolute [a] monopoly on acoustical agency”

186. Christine Reyna, Mark Brandt & G Tendayi Viki, “Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice” (2009) 12 *Group Processes & Intergroup Relations* 361 at 364, cited in Okidegbe, *supra* note 185.

187. *Supra* note 185 at 14.

188. “Après la prison, les conditions de liberation” (21 November 2018), online (podcast): *Radio-Canada* <ici.radio-canada.ca/premiere/balados/6201/rap-carceral-prison-musique-gang-rue/episodes/420816/conditions-liberation-connaisseur-bilo-entrevue> [perma.cc/7NTE-X4YA].

189. *Ibid.*

190. Chris Waller, “‘Darker than the Dungeon’: Music, Ambivalence, and the Carceral Subject” (2018) 31 *Intl J Sem L* 275 at 278.

191. Suzanne G Cusick, “‘You are in a Place That is Out of the World...’: Music in the Detention Camps of the ‘Global War on Terror’” (2008) 2 *J Society for American Music* 1 at 3.

as they did over all other aspects of the detainees' lives.¹⁹² Reading first-hand accounts of former prisoners, she seeks to show "how manipulations of the acoustic disrupted prisoners' use of hearing and vocalisation both to locate themselves in intelligible worlds and to create relationships with those worlds. It is this disruption of ordinary relationality that produces the desired destruction of subjectivity."¹⁹³ She insists, however, that "a focus on hearing, vocalisation and psychological trauma is insufficient to explain the violence of what one former prisoner called 'the music programme.'"¹⁹⁴ Rather,

the destruction of prisoners' subjectivities partly depends on the acoustically and philosophically salient fact that manipulations of the acoustical environment always produce the somatic effect of sympathetic vibration. Always compelled by the physical properties of sound to vibrate in their very bones with those sounds, the prisoners subjected to the music programme have no choice but to become, themselves, the characteristic sounds of their captors.¹⁹⁵

Echoing Guenther's descriptions of the effects of solitary confinement, Cusick writes that this program had the effect of causing "prisoners' subjectivities to implode."¹⁹⁶ For instance, some detainees are constantly assaulted by loud noise in their cells, while one of Cusick's interlocutors describes being held in a silent soundproofed cell. These conditions disrupt ordinary "acoustical relationality," making it almost impossible for detainees to "hear their way into an understanding of place and space that could constitute a world."¹⁹⁷

A further example is provided by Maria Ristani's account of the Saydnaya Prison in Syria where prisoners are subject to, among other things, "ear-surveillance, weaponized listening, enforced silence, or sonic assaults."¹⁹⁸ Ristani terms this

192. Suzanne G Cusick, "Towards an Acoustemology of Detention in the 'Global War on Terror'" in Georgina Born, ed, *Music, Sound and Space* (Cambridge University Press, 2013) 275 at 288.

193. *Ibid* at 276.

194. *Ibid*.

195. *Ibid*.

196. *Ibid* at 288.

197. *Ibid* at 276, 288.

198. Maria Ristani, "Sound Prisoners: The Case of the Saydnaya Prison in Syria" (2020) 1 Violence 273 at 281. In 2016, five former detainees, Amnesty International, and Forensic Architecture created an acoustic model of the Saydnaya prison, based on survivors' earwitness testimony. See "Saydnaya: Inside a Syrian Torture Prison" (2016), online: *Forensic Architecture* <forensic-architecture.org/programme/exhibitions/memory-justice> [perma.cc/4M59-27PM]. See also Greg Elmer & Stephen J Neville, "The Resonate Prison: Earwitnessing the Panacoustic Affect" (2021) 19 Surveillance & Society 11.

“no-touch violence,” a form of attack that can “break the inmates’ psychology and assault the body physically as torture always does.”¹⁹⁹

3. ACCESS TO RADIO: INCENTIVIZING DISCIPLINE

We have seen how music opens communal spaces for inmates and facilitates communities that go beyond the prison, both elements that can be essential for survival. As Hemsworth writes:

[L]istening to music in prisons is communal in multiple ways. First, it can be shared among incarcerated people sharing a radio or making music together, and secondly, it can be used privately to connect with other places and beings beyond the confines of prison walls, highlighting the role of music in the production of “transcarceral” space.²⁰⁰

While the reported cases do not engage in any meaningful way with the meaning of music in prisons, they do contain frequent and highly specific references to the availability or non-availability of radio and the number of channels, especially in solitary confinement. For example, in the landmark solitary confinement case of *McCann v The Queen*, the judge notes that the radios were restricted to two channels, though he does not “attach much significance” to that fact.²⁰¹

While none of the cases involves much discussion of the importance of the radio, the frequency with which decisions are made about access to radio, and the fact that prisoners bring up these details in their claims and judges occasionally

199. Ristani, *supra* note 198 at 281.

200. “Feeling the Range,” *supra* note 79 at 93.

201. [1976] 1 FC 570 at 602. In *Bacon*, the radio receives three channels. See *supra* note 123 at para 64. In *R v Blanchard*, the radio receives four channels (and none of them CBC). See 2017 ABQB 369 at para 42. In *R v Francis*, the inmate’s punishment for “Fights/Assaults/Threatens” at Grand Cache Institution was recorded as “Serious (20 days segregation, no T.V., Radio, magazine privileges suspended for 90 Days).” 2006 ABQB 803 at para 30. In *Langlois v Canada (Attorney General)*, “[t]he applicant was convicted under subsection 40(l) of the Act and sentenced to six days of detention with radio only.” 2004 FC 702 at para 19. In *Wilcox*, the inmate’s radio in segregation had four channels. See *Wilcox v Alberta*, 2020 ABCA 104 at para 10 [*Wilcox*]. In *Dorsey v Independent Chairperson at Millhaven Penitentiary*, the inmate was punished with “sanction of punitive dissociation (disciplinary segregation) and loss of privileges (removal of access to radio, tape player and television) for five days.” 2002 FCT 1085 at para 1. In *Graham v Millhaven Penitentiary*, the applicant was sent to disciplinary segregation and was unsuccessful in arguing that he should be allowed the same privileges of access to radio and television as those in administrative segregation. See 2004 FC 1344 at paras 18-20, 31. Alberta’s prison regulations specifically state that prisoners in disciplinary units, a form of solitary confinement, are not entitled to “radio, television and the canteen, visits from family and friends and receipt of incentive allowance.” See *Correctional Institution Regulation*, Alta Reg 205/2001, s 54(2).

note them, is significant. In a sense, it indicates a struggle over the size of the sonic world that will be permitted to a prisoner in segregation. More broadly, it points to the importance of personal musical devices in prison for connecting to the outside world and spending time outside the shared prison soundscape, if only virtually.

Further, as seen in *Goulbourne*, music can be used by prisoners to agitate each other, intentionally or unintentionally. Rice comments on the ubiquity of loud music in accounts of men's prisons, and how it is described as an

expression of resistance to physical confinement, a means of releasing pent-up tension, a form of attack on those within earshot or a performance of masculinity, power and status. It may of course be all these things at once both in and outside prison, but the need for these kinds of expression may be sharper and more pressing for prisoners than they are for those not incarcerated.²⁰²

Thompson v Canada (Attorney General) provides another example of the use of music to annoy fellow inmates. The judge cites an affidavit of prison authorities, which claimed that

the applicant was informed that he would be changing units due to the repeated complaints from staff of disrespectful behavior and lack of adherence to direction from staff to keep his stereo music down. Evidently this issue had reached the point where a majority of the inmates on the range requested he be moved off the range to another unit within Joyceville. The applicant refused transfer to another range, stating he would only go to segregation.²⁰³

These cases highlight the ways that prisoners' attempts to exercise agency over their sound worlds can operate as intra-carceral power struggles. At the same time, headphones and personal musical devices have come to play a crucial role within the prison. Headphones can give prisoners some agency over their own soundscapes and respite from the din of overcrowding. They can provide a temporary withdrawal from the shared carceral soundscape into a privatized zone of listening that can also create moments of distance within community and solidarity efforts.

Music devices, as Waller argues, play a critical role in the management of the prison population "to ensure wellbeing and compliance of prisoners with most regimes facilitating access to music through the form of radios, CD's, and cassette players."²⁰⁴ Because of the importance of these devices to prisoners,

202. Rice, *supra* note 6 at 17.

203. 2007 CarswellOnt 2493 (WL Can) at para 7 (SC).

204. Waller, *supra* note 190 at 277.

music often comes tied to judgements by the regime about prisoners' conduct, with incentive systems allowing the regime to confiscate earned possessions, including music equipment, under certain conditions. In this way, the role of music in prison is often continuous with the mechanisms of carceral control, with its 'humanising' or 'therapeutic' effects being defined as a luxury to be earned through good behaviour and critical engagement with one's moral and psychological treatment.²⁰⁵

The connection between music devices and disciplinary control is demonstrated by the prison authorities' actions in *Antinello v Warden of Dorchester Institution*, in which the inmate was reclassified as a "maximum security risk" inmate and transferred to a maximum-security penitentiary approximately 180 kilometres away, in part because he failed to return a gospel music device to the prison chaplain.²⁰⁶ The judge rebuked the prison administration for this overreaction:

The Applicant's sin would actually have been of failing to return that device at the proper time, a mistake that the Applicant has anyway admitted.

The details, provided to the Court, about that gospel music device, namely how it came to be in possession of the Applicant and how or why it was not returned, have all produced a story that this Court would qualify as probably one of the most inoffensive breach of any detention institution rule, we can think of [*sic*].²⁰⁷

This ability to create a private sound world can be essential for enduring the experience of incarceration and can provide respite from the sensory overload of the range. It "offers a small, but crucial, opportunity to reclaim control and autonomy that is otherwise deprived upon incarceration."²⁰⁸ But the fact that these technologies are important for the well-being of prisoners also means that they have become part of the "disciplinary tool kit" of prison authorities, serving as a reward for good behaviour.²⁰⁹ Kirkpatrick argues that the raucous cacophony of the cell block works to incentivize compliance with behavioural policies that hold out these escapes from noise as a reward.²¹⁰

Because of the noise of the range, Hemsworth writes, headphones have become prized commodities, allowing prisoners to "reclaim personal acoustic space while also filtering out undesirable sound."²¹¹ But "prison authorities

205. *Ibid* at 277-78.

206. 2018 NBQB 9.

207. *Ibid* at paras 47-48.

208. Hemsworth, "Carceral Acoustemologies," *supra* note 5 at 27. See also Michael Bull, *Sounding Out the City: Personal Stereos and the Management of Everyday Life* (Berg, 2000) (the touchstone for all contemporary studies of personal soundscape management).

209. Rice, *supra* note 6 at 15.

210. *Supra* note 6.

211. "Carceral Acoustemologies," *supra* note 5 at 27.

may likely use headphones as pacifying technologies for the masses, instead of addressing the more threatening problem of overcrowding directly.”²¹² The ability for certain prisoners to escape the shared carceral soundscape can undermine solidarity between prisoners by privatizing the carceral soundscape and making it more bearable for those prisoners. At the same time, with minimal expense to prison authorities, it allows individual prisoners tools to endure the harms of overcrowding without changing those conditions.

4. HAVING A QUIET PROTEST

In *Burton v Canada (Treasury Board)*, a corrections officer grieved his termination for “failing to adhere to the Use of Force Policy in the removal of inmates from the exercise yard,” among other things.²¹³ On 24 August 2002, the inmates in the Segregation Unit at Matsqui Institution in British Columbia engaged in a “mini-riot.”²¹⁴ Inmates “caused significant damage to the Institution by damaging cell door windows, cell door food slots, setting fires, damaging cells, breaking off sprinkler heads, etc.”²¹⁵ The ruckus lasted into early the next morning.²¹⁶

The following night, the officer attempted to forcibly remove two inmates from the exercise yards, injuring them and breaking his own hand.²¹⁷ A Member of the Public Service Staff Relations Board described a moment between the two inmates, shortly before the officer intervened:

At approximately 7:40 p.m., the grievor went into the exercise yards to talk to Inmate X and Inmate Y to determine if they were ready to return to their cells. Inmate X told the grievor to “fuck off-fuck you.” They had bedding, dry clothes, were lying beside each other and chatting occasionally but were separated by a chain link fence. In essence, they were having a quiet protest.²¹⁸

The judge noted that “[t]hese were not high-profile inmates with a bad reputation. The inmates only became vocal and verbally abusive when an officer was within earshot.”²¹⁹ The overreaction of the corrections official to the prisoners “having a quiet protest” indexes the extent to which sound is in the ear of the perceiver.

212. *Ibid.*

213. Including pleading guilty to assaulting his then common-law wife. 2004 PSSRB 74 at paras 2, 85.

214. *Ibid* at para 84.

215. *Ibid* at para 174.

216. *Ibid* at para 175.

217. *Ibid* at paras 133-35, 201.

218. *Ibid* at para 129.

219. *Ibid.*

It could be stated that it is “all a matter of perception,” providing it is equally recognized how perception (from above, below, alongside, et cetera) *matters*.

C. THE TIMELINESS OF A LEGAL ACCOUNT OF SOUND

Of what use is a study of legal accounts of the sonic regulation of the prison and resistance to it, of the protests, quiet and loud? For one, it can recognize the creativity and agency of those inside, paying attention to what Redmond describes as actions to halt the “destructive erosion of humanity and talent within the prison walls, instead building new horizons through sound.”²²⁰

It can bring to the fore the meaning of time in the prison and the ephemerality of an institution that presents itself as eternal, concrete, and outside of time. Angela Y. Davis cites Gina Dent, who writes:

The history of visibility linked to the prison is also a main reinforcement of the institution of the prison as a naturalized part of our social landscape. The history of film has always been wedded to the representation of incarceration.... Thus, the prison is wedded to our experience of visibility, creating also a sense of its permanence as an institution.²²¹

Against this backdrop of the permanent, timeless prison, Redmond writes that “[a]lternative conceptions and demonstrations of kinship, art, and happiness are fundamental elements within the political repertoires of incarcerated peoples and through these revisions and reversions they develop their prison time against the enclosures of the state. This temporality is their citizenship, one grounded by the alchemy of survival and creation.”²²²

The goal of studying the sound of prison is not to privilege hearing over other senses, but to better understand what Moran calls the “carceral TimeSpace,” the way in which “time and space are co-constitutive.”²²³ The sound of prison is not a function simply of the regulation of prison authorities but is the interaction of that regulation, the construction, design, and acoustics of the prison, and the ordinary and exceptional sounds of those inside it.

While “the ephemeral, slippery qualities of sound provide unique challenges”²²⁴ to this study, they also open new possibilities. As Russell and Carlton write:

220. *Supra* note 169 at 234.

221. Gina Dent, “Stranger Inside and Out: Black Subjectivity in the Women-in-Prison Film” [unpublished], cited in AY Davis, *supra* note 55 at 17-18.

222. *Supra* note 169 at 234.

223. Dominique Moran, “‘Doing Time’ in Carceral Space: Timespace and Carceral Geography” (2012) 94 *Geografiska Annaler: Series B, Human Geography* 305 at 313.

224. Hemsworth et al, “Earwitnessing,” *supra* note 23 at 148.

Counter-carceral acoustemologies highlight that the authoritative control of carceral space is not totalizing, nor is the prison natural or inevitable. Rather, it is a highly contested space, or perhaps more accurately, a set of social relations that are ultimately changeable. Carceral space must continually be remade, fortified and enhanced in order to shore up its inherent permeability, here exploited by activists as an institutional and architectural weakness. From this analysis, we propose that a more nuanced understanding of carceral space and soundscapes—as not entirely separate and static, but relational and in flux—provides greater opportunities for the political task of unmasking the prison as a social and historical product, not an immutable fact.²²⁵

Parkes writes about how rights litigation for prisoners has sometimes “operated to entrench and legitimize solitary confinement, while tinkering around the edges and ‘constitutionalizing’ it with some limits and procedural protections.”²²⁶ The problem is that “if, for example, we seek only to abolish those smaller cages (solitary confinement) but leave intact the logic of caging people in the first place, then some other correctional tool or practice will take the place of solitary and we will soon be fighting that.”²²⁷ Instead, she calls for an “abolitionist lawyering ethic” in which strategies and arguments are developed that reject “carceral logics” instead of legitimizing them.²²⁸ This ethic builds cases out of a “deep commitment to coalition-building and connections to abolitionist and other critical social movements” in order to work towards getting “people out of prison rather than on making prison better.”²²⁹ As more cases are brought following this ethic, more judges will need to contend with the logics of incarceration instead of taking them for granted. Perhaps in these, we will see more than laconic references to sound and gain a better understanding of the role of sound in the logics of imprisonment today.

Yvonne Jewkes, Eleanor Slee, and Dominique Moran argue that prisons have retreated from the visual horizon in recent years, becoming “non-places for non-people,” in ways that “arguably obfuscate the power of the carceral state.”²³⁰ Just as there has been a “visual retreat,” there has been an aural retreat. While authorities no longer expound on the benefits and harms of sound and silence, the sonic regulation of the prison remains a site of contestation. While the judges in the case studies above spend little time reflecting on the meaning

225. “Counter-Carceral Acoustemologies,” *supra* note 19 at 308.

226. “Prisoner Litigation,” *supra* note 8 at 178.

227. *Ibid* at 179.

228. *Ibid* at 183.

229. *Ibid*.

230. “The Visual Retreat of the Prison” in Michelle Brown & Eamonn Carrabine, eds, *Routledge International Handbook of Visual Criminology* (Routledge, 2017) 293 at 303.

of the aural qualities of incarceration, references to sound come up frequently. Noting these references can help to understand the role that sound plays in the logics of incarceration. It forces a reflection on how imprisonment occurs at a particular time, in a particular place. It can facilitate the “great feat of the imagination to envision life beyond” the seemingly inevitable prison.²³¹ It can de-naturalize the prison, and it can reopen possibilities of thought foreclosed by a “moral architecture” that, while poured into iron and concrete, is not timeless and need not be permanent.

231. AY Davis, *supra* note 55 at 19.

