Review Essay

'Too High in Human Terms': The Costs of High Security Imprisonment

Bree Carlton, *Imprisoning Resistance: Life and Death in an Australian Supermax*, Sydney Institute of Criminology: Sydney (2007)

Bernie Matthews, *Intractable*, Pan MacMillan: Sydney (2006)

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Introduction

Prison is often thought of as a singular institution but is more helpfully understood as a series of Chinese boxes or babushka dolls, ever smaller and smaller ones fitting inside the larger. Much of the power, control and discipline exercised in and through the prison system is dependent on a series of differentiated and interlinked institutions and regimes, varying from open prisons at the outer and most benign reaches of the system through to the high security, 'trac' or 'supermax' section or unit, itself located within a high security setting, as the inner, most contained and hidden box. Classification and movement through these differentiated institutions is one of the central mechanisms of penal power and a key determinant in how prison is actually experienced by prisoners as a lived total environment and by prison staff as a working environment. There is no starker illustration of the significance of classification into and out of high security units than the fact that the immediately precipitating factor in the barricade and fire at Jika Jika which claimed the lives of five prisoners in 1987, was the repudiation by the Director of Prisons of a decision to reclassify Robert Wright, who had been 'buried' in Jika Jika for seven years.

The role of high security units historically has been to combine a range of functions: that of prevention of escape, punishment, discipline, and control. Recent discussion of high security units has taken place beneath the new American label 'supermax' which had its origins in the experience of lockdowns at Marion prison in Illinois in 1983 (King 1999:163) following the killing of two prison officers on one day. The notion of 'supermax' has taken on a cultural and political life which obscures the long history of 'secondary punishment', 'trac', 'punishment' and 'segregation' sections and conditions in Australian prisons from the establishment of the penal colonies on. To the extent that 'supermax' is presented as something completely new this is highly misleading; its emergence must be put in the context of the particular Australian history of punishment units, of the 'prison within the prison', from places of secondary punishment like Port Arthur, Morton Bay, Norfolk Island, through to Grafton, Katingal, the Goulburn HRMU, Pentridge, Jika Jika, and Barwon Acacia unit.

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One of the many strengths of the two books under review is that they do provide specific recent Australian histories of high security prison units from two States, NSW and Victoria. Bernie Matthews' racy autobiographical account, *Intractable*, recounts his journey through the NSW prison system, including the bash regime for 'intractables' at Grafton prison in NSW which operated from 1943 to 1976 and the transition to sensory deprivation at Katingal, which operated from 1975 until its closure on the recommendation of the Nagle Royal Commission in 1978. Bree Carlton in *Imprisoning Resistance* offers a committed researcher's account of the transition from H Division at Pentridge prison in Victoria to the high security Jika Jika unit which operated from 1979 until its closure as a high security unit after the October 1987 fire that claimed the lives of five prisoners, Arthur Gallagher, James Loughnan, David McGauley, Richard Morris and Robert Wright. Importantly then, both books focus on transitions and transmission, the deeply flawed attempts to transfer the problematic functions of high security prison regimes into new architectural settings and 'new' control regimes, in part a shift from control and punishment through direct and brutal physical violence to forms of environmental and psychological control, or what the Jika Jika prisoners referred to as 'mind games'.

Rather than engage in a summary of the contents of each of these books, which complement each other in various ways, albeit being very different in style, this review will pick out a number of common themes for consideration. The first theme is that of resistance; resistance by prisoners to the various manifestations of power operating in high security regimes. The second theme is that of attempted shifts in regime from physical to psychological control. The third theme is legitimacy and 'official discourse', the struggle over competing accounts of events between prisoners and their supporters, prison officers, prison administrators and Departments, Commissions of inquiry and Inquests, governments and the state. The fourth theme is that of mourning and the construction of what Judith Butler calls 'ungrievable lives'. The fifth and final theme is the importance of finding a way out of the cycle of violence which high security regimes perpetuate. Certain avenues for bringing aspects of high security regimes to account will be discussed in more detail later in the essay. Briefly stated, these are recourse to the courts to challenge the legality of long term classification to high security regimes (*Sleiman v Commissioner of Corrective Services*); the use of the common law doctrine of a 'fair trial' to challenge remand conditions (*R v Benbrika*; Carlton & McCulloch 2008); and recourse to the *United Nations Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) under international law and the requirement for the establishment of an enhanced prison inspection regime or National Preventative Measure (NPM) following the Rudd Government's proposed ratification of the *Optional Protocol to the Convention Against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT).

Resistance

At 22 years of age, Bernie Matthews was transferred to Grafton gaol on 9 December 1971 after trying to escape from Parramatta gaol's 'punishment' section, 'The Circle', the previous day. He had been in The Circle since his recapture for escaping from Central Industrial Prison at Long Bay in 1970. In short Matthews was a serial escapee, leading to the formal classification 'intractable' and a trip to Grafton where since 1943 'tracs' had been sent for 'super punishment', in what Justice Nagle was later to describe in the Royal Commission Report as a 'regime of terror' (Nagle 1978:108). The thinking behind the

establishment of Grafton tracs was the logic that still serves to justify harsh high security regimes; that some form of 'ultra intensive' regime, whether marked by extreme physical violence, sensory deprivation, isolation and lock down, is a necessary deterrent to ensure discipline through the rest of the prison system.

Matthews describes his reception 'biff' on that day, the initial baton blows for looking at an officer, the yells of 'cunt', 'bastard', 'arsehole', 'maggot'; being ordered to strip off, followed by a severe flogging with batons by a semi circle of large and robust prison officers who were in receipt of a 'climatic allowance' for performing these duties (ibid 134).

> I gritted my teeth and remembered what other tracs had told me about the reception biff at Grafton. Never yell or make a noise during the flogging. It was a sign of weakness to other prisoners if you yelled or screamed out in pain. Tracs were judged by how well they could handle it. Pain and suffering was hard currency inside the walls of Grafton Jail. I continued to grit my teeth and tried to cover my naked body as their batons beat a tattoo over my back and bare shoulders.
>
> The crescendo of batons meeting bare flesh made a distinctive sound. It was a sound I would never forget. A sound that would haunt me and remain buried in the recesses of my memory for the rest of my life (Matthews 2006:27).

Matthews recounts how his response to the violence was to

> switch on and off to reality. Out of the present and into a world of nothingness. It became a mental void where batons, boots, fists or abuse could not penetrate. It was a defence mechanism I had cause to refine over the years.
>
> As jail time inside Grafton began to erode my sensibilities, replacing them with an all-consuming and prolonged desire for revenge, the mental switch off system strengthened my mind and made it immune to the physical brutality and chaos around me (ibid:29).

Here then is a firsthand account of some among many strategies of resistance to a violent prison regime: escape attempts, emotional hardening and distancing, adoption of an exaggerated culture of masculinity based on a blunted sensibility to violence as the norm, a brooding resentment and desire for revenge, a determination not to be broken or cowed. Other strategies at Grafton included a descent into self harm, madness and suicide.

Bree Carlton's detailed unpicking of the regimes at H Division in Pentridge and Jika Jika places resistance at the very core of understanding and explanation, offering a more theorised account of resistance in high security settings. She draws on Cohen and Taylor's (1972) categorisation of resistance into five types:

- 'self protection', involving a 'range of active and passive refusals to cooperate with prison staff, prisoner intransigence and challenges to rules';
- 'campaigning', involving the 'formalising of responses such as moaning, niggling complaining and making a nuisance of oneself into professional campaigns about prison conditions';
- 'escaping', involving 'transgressing the bounds of the institution';
- 'striking', involving modes of resistance such as hunger strikes,
- 'confronting', signifying 'a last resort willingness to take chances in a powerless situation' and involving acts such as 'building barricades, cell destruction and lighting fires (2007:131-132).

To these Carlton adds 'bodily resistance' both collective and individual, such as 'bronze ups' – smearing cells with bodily wastes – no wash protests, and self mutilation, acts which

constitute a 'desperate vehicle for resistance when other external paths have been removed' (ibid:133). Carlton quotes Rhodes:

> In an intensive management unit, the circularity of the relationship between the mechanism of domination and the act of resistance is blatant; the inmate is able to make the constraints of prison 'play spontaneously upon himself' in unexpected and inverted ways. He discovers that his body, the very ground of the panoptical relationship, is also its potential undoing (Rhodes 1998:287 quoted in Carlton 2007:133).

Carlton's discussion of 'bronze ups' as a form of resistance, acts of desperation by people with minimal outlet for normal modes of communication and protest is highly instructive, for such protests are easily dismissed as manifestations of the primitivism of the inmates rather than the inhuman nature of the regime. Her detailed treatment of the escalating forms of protest, the deaths of John Williams and Sean Downie and the fatal fire, provides a powerful alternative account to 'official over-reliance on individual prisoner violence, dangerousness and social inadequacy as simplistic explanations and excuses for institutional malfunctions, crisis and death' (261). Designed as an 'escape and resistance-proof panopticon that would maximise order and instil total disciplinary control' (260) the 'unaccountable power structures, abusive excesses and pressures created by conditions in Jika Jika only served to intensify prisoner frustrations, feelings of injustice and therefore exacerbate extreme acts of desperation and violent resistance' (261).

Buried Alive: From Physical Violence to Mind Control

The Grafton 'trac' regime was ended after media exposure on the eve of the NSW Royal Commission into Prisons; it was no longer tenable to continue the 33 year denials. Matthews was the first Grafton 'trac' transferred to the new Katingal, later described by Justice Nagle as 'the end of the line for a variety of misfits within the prison system' (Nagle 1978:150). Matthews's initial take was equivocal: 'Katingal's isolating atmosphere was like living in a submarine or an atomic bomb shelter. Night and day blended into one continuous vacuum devoid of fresh air, sunlight or any other natural element. All light inside the building was artificial.' His reaction was 'one of total confusion. Disorientation and disbelief overwhelmed me. It was a complete culture shock … I had gone from one extreme to the other. At one end of the State they had flogged the living shit out of me and now they wanted to kill me with kindness' (173).

> The transition from Grafton to Katingal had created mixed emotions in all of us. Some hated the place and found it impossible to adapt to the suffocating environment while others, like me, found Katingal a welcome respite from the nerve-racking institutionalized brutality of Grafton (181).

Matthews gained access to a typewriter and involved himself in researching and writing, writing three plays, becoming a 'bush lawyer' (200) and engaging in a letter writing campaign over his treatment and prisoners rights in general, corresponding with a wide range of people and agencies all around the world. But 'the prolonged incarceration and intense confinement took its toll. Hunger strikes, attempted suicides, assaults and violent outbursts became common occurrences' (189-190). Bashings were reintroduced as a response and relations between prisoners and staff, already attenuated by the minimal contact and the total dependency of prisoners on officers to do everything, open doors, turn on the water, became toxic.

> Time inside Katingal became a dripping acid, slowly destroying any concept of a world beyond the building. The entire punishment block became a festering boil waiting for eruption. Even my

> self-imposed cocoon that had isolated me from the effects of the building while I pursued intellectual cultivation with my writing was beginning to exhibit stress fractures (213).

Matthews torched the workshop and was charged. Two months later, Russell Cox escaped from the 'escape proof' prison. There was a Christmas day riot at the Central Industrial Prison at Long Bay. Helen Goulding, Matthews' lawyer, died in a traffic accident. Katingal prisoners rioted to try to force the closure recommended by Justice Nagle.

Both Katingal and Jika Jika were based on 'overseas trends and new methods of psychological control including sensory deprivation, behavioural modification, social isolation, total surveillance and security' (Carlton 2007:95). While the transition from Pentridge H block to Jika Jika showed a similar shift in strategy from reliance primarily on overt physical violence to a combination of environmental and psychological control, the baton was never far from sight at Jika Jika. The fact that some prisoners to this day believe that Sean Downie was killed by prison officers in the course of an assault on him, against the formal findings of the official inquest which found he hanged himself and set fire to his cell, illustrates the atmosphere of loss of trust and expectation of violence as routine, obtaining in Jika Jika.

Craig Minogue's tight summary of the reasons offered at the inquest as to why Unit 4 prisoners supported the barricade and fire protest of Unit 2 prisoners is an indication of the pressures engendered in Jika Jika.

> 1. Long term placement in Jika; 2. The R&A Classification Committees; 3. Constant intimidation and standover tactics; 4. Threats of violence and death from prison officers; 5. The dehumanising conditions and mind games in the Division; 6. The double standards that existed between what the protection prisoners received and what we received; 7. Deaths of inmates in Jika under suspicious circumstances; 8. And to a much lesser extent, the transfer of AIDS inmates to Jika (224).

Legitimacy and 'Official Discourse'

The second half of Carlton's book is a detailed and exemplary account of the conduct of the two inquests into the deaths of John Williams and Sean Downie, Downie's in particular, and the inquest into the deaths of Arthur Gallagher, James Loughnan, David McGauley, Richard Morris and Robert Wright. Carlton follows every twist and turn under the general rubric of 'Concealing Crisis', following the mechanics of attempts to evade any institutional liability, highlighting various deficiencies in the inquest processes, and the tendency to 'official discourse' which seeks to 'redeem the legitimacy of state agencies and institutions through the 'confrontation and appropriation of unofficial versions of discreditable episodes' (ibid:190, quoting Burton & Carlen 1979:44). Copious examples are offered of the discrediting of prisoner evidence, 'discrediting resistance as dangerousness and violence', attacking the credibility of prison officers who did not toe the official line (shades of John Pettit who broke ranks at the Nagle Commission to give evidence of the Grafton 'biff'–triggering an eventual admission by the Prison Officer's Association) in particular officer Desmond Sinfield who was the officer who had done more than any other to try to save the trapped prisoners, sustaining very serious injuries in the process. 'Because he deflected from [the] line, Sinfield was publically discredited, humiliated and vilified by the OOC [Victorian Office of Corrections] during the inquest' (Carlton 2007:217).

> During the inquest the OOC attempted to suppress evidence, silence witnesses, attack and discredit its critics. Most notably the OOC sought to challenge and effectively curtail the powers

> of the coroner and when such attempts were unsuccessful it desperately resorted to publicly questioning the State Coroner's credibility' (ibid:219).

Coroner Hallenstein was scathing of these tactics in the Inquest report:

> The Office of Corrections has sought to be unaccountable. When pushed by the Coroner's investigation, it has treated the Coroner as an adversary, both in the courts and by way of personal and public attack. It has objected, protested and litigated, rather than provide information exclusively within its possession. It has used public resources to protect itself, its interests and its image. It has been prepared to bully, apply pressure and deceive, rather than to face the truth. It has placed itself in priority to the community it serves (Hallenstein 1989:116, quoted in Carlton 2007:220).

The Coroner found that Wright was directly responsible for lighting the fire and that the other prisoners who died contributed to their deaths through the construction of the barricades. But the OOC contributed to the deaths by

> [f]ailing to account for, and respond to: the warnings of barricade and fire; the barricade of Side 1 corridor door; the fire which required breach, immediately, of the barricaded Side 1 door; the risk of injury to, and death of Side 1 prisoners from reasonably foreseeable smoke inhalation. The OOC also failed to have available a planned, swift, practiced, and certain method of breaching a barricaded door in circumstances where the events of the barricade and fire had been reasonably foreseeable and warned of. The ultimate failure of the OOC in this case lies in its own hierarchical, ineffectual and moribund administration (Hallenstein 1989:97-98; quoted in Carlton 2007:245-246).

Amidst the many recommendations for improved procedures, equipment and training, the Coroner recommended the appointment of a Royal Commission, Board of Inquiry or Judicial Inquiry and made further comments on the conduct and behaviour of the OOC during the hearing.

> The conduct of the OOC in this case raised deep and fundamental concern for our community's free institutions and its democratic style. Like any public institution, the OOC is accountable to the community it serves. Unlike many public institutions, the affairs of the OOC are behind closed walls and are not easily subject to public scrutiny. The OOC has misinterpreted this position of advantage as a license for secrecy, rather than requiring the maximum of openness and accountability. This OOC has used this position of advantage to try and manipulate the facts to try and prevent their proper investigation, and in a manner which could be described as corrupt (Hallenstein 1989:115; quoted in Carlton 2007:247-248).

The strength of the Coroner's recommendations, later subject to a concerted attempt to minimise and water them down in a range of inquiries such as the Murray Inquiry, highlights the problematic features of too ready an invocation of aspects of Burton and Carlen's (1979) 'official discourse' argument, namely its over arching functionalism. For while the *effect* or *result* of particular inquiries may well be and often are, the work of 'professional functionaries' ('the state's men') who further 'overall hegemonic and legitimation strategies of the state' through 'discursive incorporation', legitimacy repair, celebration and reaffirmation (Burton & Carlen 1979:51-52) the tendency to see this as a *function* or *necessity* forecloses on the political struggle to make this otherwise, engenders a cynicism which saps activist endeavours. Some inquiries can have profoundly 'destabilising' effects on government (Gilligan 2002:294). The strength of the 'official discourse' thesis comes to the fore if it is treated not as a 'general textual function' (Burton & Carlen 1979:8) of 'discursive incorporation through which legitimacy crises are repaired' (ibid:7-8) but as a deconstruction of the particular paradigms and syntax through which 'discursive closure' is attempted (D Brown 2004:26-28).

> Official discourse on law and order confronts legitimation deficits and seeks discursively to redeem them by denial of their material geneses. Such a denial establishes an absence in the discourse. This absence, the Other, is the silence of a world constituted by social relations the reality of which cannot be appropriated by a mode of normative argument which speaks to and from its own self image via an idealised conception of justice (Burton & Carlen 1979:138).

The 'discursive closure' sought by the OOC in the Jika Jika deaths inquest was not forthcoming from Coroner Hallenstein and 'the Other', although dead and therefore physically absent, were far from silent in highlighting the 'material genesis' of the 'legitimation deficits' their deaths had occasioned. Similarly Bernie Matthews, sitting in Katingal with access to a typewriter, seeking to put the Department under 'microscopic examination' (205), working on a much cited submission to the Nagle Royal Commission which detailed the transmission and reproduction of delinquency from Boys Homes to Juvenile Detention Centres to prison to 'tracs', did not see himself as contributing to 'discursive closure'; nor was he. His submission detailed numerous individual case studies which demonstrated the way violence visited on predominantly young male property offenders in prison regimes such as the Grafton 'tracs' was later manifest in crimes of extreme violence, in short highlighting the role of brutal prison regimes in fueling crimes of violence. One example was Peter Schneidas, a Katingal inmate who started out as a 'paperhanger' or cheque fraudster and was sent to Grafton early in his prison career. Schneidas committed all his subsequent acts of violence, including the murder of prison officer Mewburn, within the prison system. When Justice Nagle to the surprise of many recommended the closure of Katingal, 'the cost [being] too high in human terms' (Nagle 1978:165) the closure which resulted was far from 'discursive', as Bernie Matthews' joy on being driven out the gates and back to Parramatta gaol attests. 'The exhilaration I felt was like that of an astronaut's orbital re-entry. … After two years and eight months on another planet inside the New South Wales prison system, I finally saw daylight again' (246).

Mourning, 'Ungrievable Lives' and Deflection

Judith Butler argues that

> [s]ome lives are grievable, and others are not; the differential allocation of grievability that decides what kind of subject is and must be grieved, and which kind of subject must not, operates to produce and maintain certain exclusionary conceptions of who is normatively human: what counts as a livable and grievable death? (Butler 2004:xiv-xv).

These words might have been written with the Jika Jika prisoners killed in the protest fire in mind. Tabloids and 'quality' broadsheets were united in their denial of humanity to the dead. 'Gruesome death for cold-blooded murderers'; 'Five were convicted of violent crime' (*Australian* 31/10/87); 'a vicious killer', 'a vicious and callous killer', 'certified insane', 'Victoria's most hated killer', and so on (*Herald* 30/10/87). In the *Sun* 'offensive, sarcastic reference to the tributes by aggrieved friends and family members' was made for '[f]ew among the general public would mourn the death of men described as ruthless and brutal criminals. But the tributes revealed the prisoners were well loved by some' (*Sun* 31/10/87). A Chief Inspector of Police weighed in, Wright's death 'has done everyone a favour' (ibid; all quoted in Carlton 2007:229). As Butler notes: 'if a life is not grievable, it is not quite a life; it does not qualify as a life and is not worth a note. It is already the unburied, if not the unburiable' (Butler 2004:34).

The focus on the criminality of the deceased served to deflect attention from the causes behind the protest which lay in the conditions and practices at Jika Jika and from the

incompetence and negligence of prison authorities in their response to the fire. This concentration on the criminal records of the victims was repeated ad nauseam by Jeremy Rapke, Counsel for the Victorian Office of Corrections (OOC) at the inquest into the deaths.

Carlton quotes US prisoner Jack Henry Abbott:

> If I were beaten to death tomorrow, my record would go before the Coroner's jury – before anyone who had the power to investigate – and my 'past record of 'violence' would vindicate my murders. In fact, the prison regime can commit any atrocity against me, and my 'record' will acquit them (Carlton 2007:191).

The effect of ready resort to criminal records to deflect attention from abuse is not just pernicious but becomes in itself a contributing factor in subsequent events, a 'yeast' for later disturbances and violence sparked by resentment that officials can get away with denying or covering up events that prisoners directly experienced. An example is the way demands for a Royal Commission into the bashings at Bathurst in 1970 were deflected by Commissioner McGeechan's advice to the Minister that: 'it comes to whether the word of law enforcement officers is to take precedence over the uncorroborated probably malefic (sic) allegations of people with long criminal histories and demonstrated inability as responsible members of society' (Nagle 1978:196). The Grafton bash regime might have been shut down in 1955 when *Public Service Act* charges were laid against a warder for striking a prisoner. At the inquiry the allegations were dismissed, being 'made by young men with very long criminal records' while the warder had an 'unblemished record' (Finnane 1997:158; D Brown 2005:45-47). The 'regime of terror' continued for another two decades.

The extent to which accounts of prisoners can be discounted, not by an impartial and independent investigation of the particular claims but by a blanket denial of their veracity based on an assumption that the moral status of 'criminal' or 'prisoner' necessarily precludes veracity, and such denials maintained in legal, political and media discourse, is an indication of the strength or weakness, of a specific democratic political culture. For a political culture in which lack of veracity is presumptively assigned on the basis of the status or identity of the claimant (identities such as 'criminal', 'prisoner', 'unlawful non-citizen', 'terrorist' for example) is a political culture lacking in a key safeguard against the abuse of power, a political culture prey to the corrosive effects of the politics of exclusion, fear and demonisation. Whether as individuals we are concerned or not with particular issues such as the treatment of prisoners, they indirectly affect us all in that the health and well being of a democratic polity depend in part on the prospects of, as EP Thompson put it so succinctly, 'the bringing of power to particular account.' (Thompson 1980:167; see generally D Brown 2008).

The answer to such deflection tactics is that provided by Justice Adams in the case of *Sleiman* to be discussed in a later section:

> This case is about what the law will do to require obedience to and redress departures from the obligations it imposes. It has nothing to do with the personal merits, or lack of them for that matter, of the prisoner. The law is blind to such considerations. The law will be enforced, not because of what is owed to the prisoner, but because of what it owes itself and the community it serves (at [62]).

Deflection and dehumanisation on the basis of criminal record is not unchallengeable. When Sydney's *Daily Telegraph* produced its The Brutes of Katingal front page in a rearguard attempt to prevent the closure of Katingal after its closure was recommended by the Royal Commission, the NSW Prisoners Action Group and Women Behind Bars produced a replica headed The Real Brutes, featuring pictures of Commissioner Walter McGeechan and

Minister Maddison, reporting in detail the findings of the Royal Commission, a masterpiece of counter politics which received widespread circulation (Matthews 2006:photoplate pp184ff; for other accounts of the lead up to, conduct and aftermath of the Nagle Royal Commission see Zdenkowski & Brown 1982; Findlay 1982; Vinson 1982).

Breaking the Cycle of Violence

The pattern that emerges from the transition from one type of high security regime to another elucidated in these two books is that of a cycle of resistance and violence. Prisoner resistance to high security regimes in old prisons such as Grafton and H Division, marked by extreme physical brutality and deprivation which eventually becomes discredited and untenable leads to the 'solution' being seen as the provision of new, modern (Jika Jika won an architectural award) facilities. In the name of security and control rather than hyper punishment, the new regime seeks to minimise contact between prison officers and prisoners; achieve high levels of security from escape through a battery of new technology and prison design features; effect prolonged isolation in highly artificial conditions; make prisoners dependent on prison officers for the most basic functions and needs; prevent the classification of prisoners to the unit from being challenged or made accountable, thereby maximising the power of prison administrators unfettered by the courts; and minimising media, family, legal and support group access to the unit in an attempt to remove its operation from public debate and scrutiny.

The result, to use the prisoners' most common description, is the sensation of being 'buried alive', a form of sensory deprivation, the symptoms of which are summarised by a US prison psychologist quoted by Carlton:

> Tension, irritability, sleeplessness, nightmares, inability to think clearly or to concentrate, and fear of impending loss of impulse control. Sometimes the anxiety is severe enough to be crippling. It interferes with sleep, concentration, work, and study and predisposes prisoners to brief psychotic reactions, suicidal behaviour … it causes misperceptions and overreactions. It fuels the cycle of violence, leading to more violence and terror (103).

In short, the attempt to curb resistance through more strategic and differentiated control mechanisms less reliant on overt physical violence ultimately fails as it generates new forms of resistance, some collective, some individual and inverted, as the spaces for and possible tactics of resistance are reshaped by the new forms of power and control.

The flaws in this process are the failure to examine and attempt to redress the exercise of unaccountable power in high security contexts and the belief that new technologies, environments and forms of discipline and control will produce 'docile' subjects of power. One of the advantages claimed by Jeremy Bentham for his Panopticon was that it would be open to inspection and review, its processes transparent, the power of the gaze being as easily turned on prison guards as prisoners (Bentham 1802; Foucault 1978:204). This has not turned out to be the case in the history of high security units. Bentham would no doubt claim his Panopticon design for a 'diagram of a mechanism of power' (Foucault 1978:205) has never properly been constructed or tried. This is certainly true in the Australian (see generally on Australian prison architecture Kerr 1988) and UK context; indeed very few Panopticon style prisons have been built anywhere. Rather, certain panoptical features have been adopted, chiefly a total and ever present surveillance, usually the gaze of cameras and closed circuit TV rather than Bentham's omniscient observer standing in the central darkened tower. But even an optimal operation of the power of the gaze which did actually

encompass both watcher and watched is always and already subject to administrative arrangements, to rights of entry and access, to the distribution of keys, to control over switches, codes, screens and terminals.

Beyond the constant debate between dispersal and containment and the attempt to devise new techniques and technologies of control which circulate between high security units, what Judith Butler calls the 'new war prisons' such as Guantanamo Bay (Butler 2004:53; M Brown 2005) and the 'normal' domestic prison (for technologies, practices and strategies developed here in the 'hard end' of the penal system spread more deeply into the whole maximum security sector and the prison system as a whole) an age old struggle is enacted, simply expressed in EP Thompson's phrase of 'bringing of power to particular account'. The key to breaking the cycle of resistance and violence evident in the history of high security units so well demonstrated in these two books, is a strategy of making any exercise of power open to scrutiny and justification and conceiving the subjects of power as fully human and legal subjects, whatever they have done to lead to their confinement or sub confinement into a high security section, subjects capable and entitled to contest the forms of power exercised over them, entitled to exercise what I have called a 'discursive citizenship', an ability to take part in media, political and community debate (D Brown 2002, 2005). Regimes which are open to inspection, critique and redress, are reflexive in relation to their practices, are the most likely to be able to break out of or short circuit the cycle of recrimination, hostility, protest and violence.

The basic conditions under which prisoners in any sort of prison regime, especially that of high security, are able to exercise a democratic and discursive citizenship require that

> prisoners must be secured under regimes which are healthy, not conducive to or tolerant of violence; conditions which promote contact with family and friends and the various associations of civil society; conditions which promote the maximum ability to participate in public discourse through access to all forms of media, including the internet; conditions which encourage meaningful literacy, education, work skills and other programs; and conditions which do not permit the isolation and segregation of prisoners for the purpose of punishment or convenience except on justifiable grounds which can be tested against clearly articulated legal standards (D Brown 2002:324).

Under these conditions, a democratic and discursive citizenship is possible as 'a process through which participation in a public discourse takes place; a process through which identities are recognised, equalities asserted, differences acknowledged and voices communicated and heard' (ibid).

There will always be resistance in some form or other, for it is a mode of survival, a way of asserting an essential humanity. Certain forms of response to that resistance are to be expected, for example, an attempt within limits to prevent escapes, to prevent or defend against attacks on prison staff and prisoner on prisoner violence, and so on. The point is that legitimate exercises of accountable power can be defended and explained when challenged. If they are unnecessary, vindictive, excessive, or unlawful, such exercises should be brought to account and their future occurrence prevented as far as possible by changes in policy and practice.

Recent Challenges

Classification/segregation

A starting point in rendering high security units accountable is to 'legalise' the classification process by making it open to judicial challenge (see generally Robinson 2002). Two Goulburn HRMU prisoners, Emad Sleiman and Basssam Hamzy are currently engaged in a civil action seeking to establish that detention in the HRMU amounts to being segregated without a formal segregation order and is thus unlawful. The two prisoners have cleared the first hurdle which is to obtain the leave of the court to bring the action, which requires the court to be satisfied that the 'proceedings are not an abuse of process and that there is a *prima facie* ground for the proceedings' (*Felons (Civil Proceedings) Act* 1981 (NSW) s5). This requirement is itself a civil disability peculiar to prisoners, enacted when the NSW Government overturned the common law 'civil death' doctrine enunciated in the *Dugan* case, but stopped short of restoring prisoners' full civil rights to sue, requiring them to obtain the permission of the court.

Sleiman had been detained in the HRMU high security unit for two periods, one of just over four years and another of two and a half. Hamzy has similarly been held at the HRMU for extended periods. The *Crimes (Administration of Sentences) Act* 1999 (NSW) s10 provides that the Commissioner may direct that an inmate be held in segregated custody on the grounds that they constitute or are likely to constitute a threat to

(a) the personal safety of any other person, or

(b) the security of a correctional centre, or

(c) good order and discipline within a correctional centre.

Such a direction is then subject to review, ultimately by the Serious Offenders Review Council. Sleiman and Hamzy allege that detention in the HRMU amounts to being segregated without a segregation direction under the Act and their detention is therefore unlawful. Essentially they are arguing that the Commissioner is using his wide classification powers under the Regulations to avoid the various restrictions and review procedures that flow from a segregation direction under s10 of the Act. In granting leave for the case to proceed, Adams J noted that:

> Having regard to the exceptional character of segregated custody so far as the well being of the prisoner is concerned and the unique regime instituted by the Parliament as a safeguard, it is obvious that compliance with its requirements is no mere matter of legal technicality but of fundamental importance. To place a prisoner in segregation without such compliance and set at nought the safeguards of the Act is a serious departure from the law. …
>
> How, then, is the law to be enforced? First, by recognizing the mandatory character of the requirements of the Act; second by permitting a prisoner who alleges that the Act has not been obeyed in his case to approach the Court for relief, providing there is a *prima facie* case and it is not an abuse of process to take proceedings; and, third, by recognizing, though much of a prisoner's liberty is taken, yet some is retained and that, though it might not be great, yet it is important and will be protected. In my view, such liberty – at least arguably – is protected by, and its unlawful restriction is the commission of, the tort of false imprisonment (*Sleiman* at [61] and [63]).

The decision when the case is fully argued and decided will be of considerable importance, for it raises the question of 'whether a prisoner in Sleiman's situation had a right to what has

been called in some cases "residual liberty", unlawful interference with which rendered his imprisonment unlawful and therefore compensable by damages' (at [34]). Hopefully, the NSW Court will follow a Canadian line of legal authority which in *Miller v The Queen* 'established the fundamental principle that *habeas corpus* will lie to determine the validity of the confinement of an inmate's segregation and, if such confinement is found unlawful, to effect release into the general inmate population of the gaol' (at [53]). Miller was extended in *May v The Warden of Ferndale institution and Others* in holding that a transfer of prisoners from a minimum security institution to a medium security gaol, a transfer involving the concealing of 'crucial information' used in the transfers meant that 'the transfer decisions were made improperly and, therefore, they are null and void for want of jurisdiction … [and it] follows that the [prisoners] were unlawfully deprived of their liberty' and were to be returned to the minimum security regime (at [53]).

The Right to a Fair Trial and Remand Conditions

Another example of the illuminating and remedial effects of recourse to the courts to enforce standards of human treatment and conditions, this time under the rubric of a right to a fair trial, was apparent in the case of *R v Benbrika* (see Carlton & McCulloch 2008). In that case, involving remand prisoners facing trial on terrorist related offences, Bongiorno J upheld a defence submission for a stay of the trial on the basis that the conditions of imprisonment in the Acacia unit at Barwon were such that a fair trial was not possible. The defence argument was that

> the oppressive conditions in which they are currently incarcerated and transported is having such an effect on their capacity to attend to their own interests in defence of the charges against them that the trial they are currently engaged in is unfair and will become more so as time passes (*Benbrika* at [80]).

Bongiorno J ruled that

> The minimum alterations to the accuseds' conditions of incarceration and travel which would be necessary to remove the unfairness currently affecting this trial are as follows:
>
> 1. That they be incarcerated for the rest of the trial at the Metropolitan Assessment Prison, Spencer Street.
>
> 2. That they be transported to and from court directly from and to the MAP without any detour.
>
> 3. That they be not shackled or subjected to any other restraining devices other than ordinary handcuffs not connected to a waist belt.
>
> 4. That they not be strip searched in any situation where they have been under constant supervision and have only been in secure areas.
>
> 5. That their out of cell hours on days when they do not attend court be not less than ten.
>
> 6. That they otherwise be subjected to conditions of incarceration not more onerous than those normally imposed on ordinary remand prisoners, including conditions as to professional and personal visitors (at [100]).

An adjournment was granted to enable these changes to be made, following an earlier ruling that screens in the court had to be removed. Here then we see the utility of the notion of a 'fair trial' in challenging oppressive prison conditions in a high security unit under which suspects on terrorism related charges were held on remand. It is worth remembering that Sean Downie, whose death at Jika Jika in suspicious circumstances occurred shortly before the fatal fire, was a remand prisoner, who would arguably have been protected from being placed in the Jika regime by the *Benbrika* ruling, especially 6 above. While welcoming this development it is important to point out that such scrutiny is tied to the ongoing trial, so that

once prisoners are convicted, other avenues for contesting oppressive high security conditions have to be pursued. But it bears noting that 25 per cent of Australia's prisoners are on remand, what Hogg calls a 'de facto system of preventive detention' (Hogg 2009:8).

UNCAT, the NSW CCL and the HRMU

Another avenue of potential redress which has opened up is recourse to international law utilising the *United Nations Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) to which Australia is a signatory. An illustration of its potential use in high security contexts is provided by the NSW Council for Civil Liberties in its *Shadow Report prepared for the UN Committee against Torture*, 27 July 2007 and the Concluding observations of the Committee Against Torture in relation to Australia, 15 May 2008. In its Shadow Report the NSW CCL recommended that 'the State party (Australia) invite the Special Rapporteur on Torture to visit the "supermax" prison within a prison (HRMU) at the Goulburn Correctional Centre'. In an Addendum to the Shadow Report the CCL later considered the Goulburn High Risk Management Unit, (HRMU) or HARM-U as it is known by prisoners (Funnell 2006), in greater detail and after setting out a brief history of the HRMU it argued:

- That 'the conditions in the HRMU are having an adverse impact on the mental health of its inmates';
- That mentally ill prisoners are being placed in the HRMU under segregation conditions rather than in the specialist acute psychiatric wing of the prison hospital at Long Bay as illustrated in the Scott Simpson case where a clearly mentally ill accused was held in segregation on remand at the HRMU for almost 12 months, and given anti-psychotic medication but no therapeutic treatment. When later placed in a cell at the MRRC he killed a cell mate within 15 minutes. Two years later he was found not guilty of murder on the grounds of mental illness. Two weeks after the verdict he hanged himself in a cell at Long Bay.
- That the system of a hierarchy of sanctions and privileges used in the HRMU closely resembles the flawed and discredited system used in Katingal and that the 'lessons of the Nagle Royal Commission have been forgotten' (p13 para A42).
- That those held on terrorism related charges are not and should be permitted to see the Official Visitor.
- That there is no mechanism for HRMU inmates to challenge their placement and continued detention in the facility. The courts have no power to intervene and the NSW Commissioner of Corrective Services has suggested that some HRMU inmates will remain in the facility for the term of their natural lives. (Sleiman and Hamzy's action seeks to challenge this, see previous section.)
- That there have been allegations of political interference in the running of the HRMU and a constant stream of selective government and departmental leaks from the HRMU to the popular media.

Here, then, we see complaints of a continuation of some of the discredited practices at Katingal and Jika Jika now allegedly being played out at the HRMU. The UN Committee Against Torture in their Concluding Observations in relation to Australia stated that it was: 'concerned over the harsh regime imposed on detainees in "supermax" prisons' and in particular 'over the prolonged isolation periods detainees, including those pending trial, are subjected to and the effect such treatment may have on their mental health' (p8, para 24).

The Committee recommended that the 'State Party should review the regime imposed on detainees in supermaximum prisons, in particular the practice of prolonged isolation' (Rec 24). And that the Australian Government should advise on what they have done about this within one year (Rec 37). It is not known what if anything has been or is being done to comply with this requirement.

Ratifying OPCAT

A further and allied development which might eventually lead to improved inspection mechanisms for high security units, indeed all prisons and a range of other places of involuntary detention, is the announcement by the Rudd Labor Government that Australia would become a signatory to the *Optional Protocol to the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT). The effect of such ratification is to give operational teeth to UNCAT. One effect of this welcome ratification of OPCAT is that Australian prison inspection regimes will have to be substantially revamped to comply with OPCAT. The opening up of discussion has been assisted by the release of *Implementing the Optional Protocol to the Convention against Torture: Options for Australia*, a report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan of the Centre for Law and Public Policy, University of Western Australia, published by the AHRC on its website in December 2008 (AHRC 2008).

It may be possible to utilise OPCAT to argue that particular high security conditions amount to torture or degrading treatment under UNCAT. Article 1 of UNCAT defines torture as 'any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person' for a range of purposes such as eliciting confessions or punishment on suspicion, by a public official or other person acting in an official capacity, but does not include 'pain and suffering arising only from, inherent in or incidental to lawful sanctions'. However, Article 16(1) of UNCAT extends the definition to any form of degrading treatment by placing an obligation on each State Party to

> [u]ndertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 11 requires every State Party to

> [k]eep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subject to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing [such treatment or punishment].

NPMs, Revamping Australian Prison Inspection Regimes

The two main mechanisms through which compliance with OPCAT requirements are to be monitored are unfettered international inspection by the United Nations Subcommittee on the Prevention of Torture (SPT) and the establishment of a National Preventive Mechanism (NPM). In practice SPTs only visit State parties very infrequently so that the establishment of an NPM is the key mechanism. Institutions of detention subject to inspection are: adult prisons; juvenile detention centres; detention in a police station or lock up; involuntary detention in a closed psychiatric institution; and immigration detention.

The AHRC Report recommended that the AHRC given 'its role as Australia's 'flagship' human rights body in the international arena' is the appropriate body to act as National Coordinating NPM. However, significant resources would need to be devoted to the task:

> There must be proper funding, appropriate organisational and management structures including, preferably, the appointment of an additional Commissioner with specific responsibility for NPM matters, and the recruitment of expertise relevant to OPCAT tasks.[i]

The issue is now subject to consultation between Commonwealth and State and Territory governments and government agencies. Importantly, the Report recommended that the current OPCAT consultation should be broadened to include the non-government sector, peak groups, NGOs and human rights organisations. For some States and Territories the consultation will be a somewhat schizophrenic exercise, given their recent history of restricting prison monitoring agencies. In NSW for example, the ALP Government abolished the position of Inspector General of Prisons in 2003 and has since refused to extend the Ombudsman's powers. A NSW Ombudsman official dealing with prisons has confirmed that 'the Ombudsman does not have the power to conduct unannounced visits into prisons and only has the resources to visit some prisons every two years' (Tadros 2008). In addition the role of Official Visitors has been cut back so they cannot initiate their own inquiries and a number of the more independent Official Visitors have been sacked without explanation (ibid). By way of contrast, the WA Office of the Inspector of Custodial Services offers a legislative model for an OPCAT compliant inspection agency.

To deliver the full promise offered by the Rudd Government's decision to ratify OPCAT, the Commonwealth will need to persuade recalcitrant States and Territories like NSW of the benefits of the openness, accountability, monitoring and formulation of standards, that will flow from a proper inspection regime for all places and categories of detention, consistent with international standards and treaty obligations to prevent acts of torture and degrading treatment. As the AHRC Report puts it: 'the evidence is clear that fully accountable detention processes work for the ultimate benefit of the detaining authorities, the persons who work in places of detention and, above all, for detainees themselves' (AHRC 2008:44).

Conclusion

I have concluded this review essay with some specific examples of current avenues and strategies of redress: legal challenge to high security classification/segregation; utilisation of the right to a fair trial to challenge repressive remand conditions; complaints to the United Nations Human Rights Committee under UNCAT; and the proposed ratification of OPCAT which will require a substantial revamp of Australian prison inspection regimes along the lines of the WA Inspectorate. It is not suggested that these developments in and of themselves will adequately address the many issues and problems surrounding high security imprisonment raised by these two books. Indeed the history of reliance on legal challenge shows it to be highly problematic (Edney 2001; Groves 2001; Minogue 2002). But neither are they unimportant, for they attack the secrecy and lack of accountability which are central to constructing and treating high security prisoners as expendable, 'ungrievable' and irredeemable. An attitude of cynicism and fatalism surrounding attempts to 'bring power to particular account' in such regimes is one of the conditions which renders attempts to open them up to scrutiny more difficult, for it mirrors official attitudes that there is nothing that can be done with this core group of hardened incorrigibles other than simple containment, reducing them to the status of what Agamben (1998) terms *homo sacer*, or 'bare life', the

living who might be killed, entombed out of sight and out of mind, the exception, included only through their exclusion.

When Robert Wright was informed by two very senior Departmental staff and two prison governors that his reclassification out of Jika Jika after seven years, recommended by the Review and Assessment Committee, had been refused by the Director of Prisons, one of the governors encouraged him 'to make a life for himself in Jika'. Wright's response was 'I'll rot in here … if that's what they want to do with us, they can expect a bloodbath' (Carlton 2007:222). As Craig Minogue pointed out, 'It is difficult to explain in words the inhuman conditions that we were expected to live in K Division. It is simply not possible "to make a life for yourself in K division"' (ibid:139). In short, the struggle and protests of Jika Jika were struggles for survival at the limit of a 'bare life', a struggle which for seven prisoners in a period of three months in 1987 was unsuccessful. Their survival could not be ensured, indeed was hindered, some might say prevented, by the Jika Jika regime and by an administration described by Coroner Hallenstein as being 'in a state of general collapse', their performance in relation to the fire marked by 'ineptitude, failure and non-performance in almost every aspect of the events examined' (quoted in Carlton 2007:247).

There is a second reason for closing on these particular forms of challenge. As both Carlton's and Matthews' accounts make clear, the more protest takes the *campaigning* mode, internal prisoner driven complaints connecting up with outside protest taken into political, legal and public forums by a range of media, political, legal, social movement, family and community groups, so the conditions for bringing the exercise of penal power in high security units 'to particular account' as an instance of a wider social democratic and social justice politics, are enhanced. By contrast, an inward spiral into Carlton's 'bodily resistance' mode such as 'bronze ups', aimed largely at making life unpleasant for prison officers, albeit driven by the increasingly closed 'world' in which the Jika Jika prisoners 'lived', smacks of an internal private battle, lacking the public quality that is necessary to breach secrecy and build momentum for change. In as much as such resistance does become public it is readily turned back on the protesters as signifying not a cry of desperation and a product of the limited avenues for expression of grievances but an underlying 'animality'.

The contexts were significantly different but one of the reasons the Jika Jika regime lasted eight years as against Katingal's three was that the Close Katingal campaign was a visible public, political and media campaign, enlisting the support of many groups and individuals, including psychiatrists working in the prison system who decried its effects as sensory deprivation and persuaded a Royal Commissioner that it could not be modified. The campaign was itself part of a broader political movement for prisoners rights and an even broader clamour for accountability and probity in government. The final straw which ensured its closure was the attempted break-in which went close to succeeding and torpedoed the argument that Katingal needed to be retained as NSW's most secure and escape proof prison.

The implication is that, wherever possible, prisoners rights movements in general and opposition to unaccountable penal power exercised in high security units in particular, are issues for all of us, not just those directly and intimately involved. To that extent, both these books deserve a wide readership, for both are testament to the essential humanity of protest and struggle by even the most brutalised and outcast. Responsibility rests on all citizens to demand to know what is being done in their name in the shielded recesses of the Acacia unit at Barwon, Goulburn HRMU and their clones and successors elsewhere.

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