

THE DEATH PENALTY, MANDATORY PRISON SENTENCES, AND THE EIGHTH AMENDMENT'S RULE AGAINST CRUEL AND UNUSUAL PUNISHMENTS[©]

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The text of section 12 of the *Canadian Charter of Rights and Freedoms* and the Eighth Amendment to the *United States Constitution* prohibit cruel and unusual punishment in language that is similar but not identical. Still, in considering constitutional restrictions on punishment, the decisions of the Supreme Court of Canada and the United States Supreme Court both focus on the concept of gross disproportionality between the offence committed and the state's response. Despite the appearance of similarity, this article maintains that differences in the American law of sentencing explain why Canada ought not follow or adopt the United States approach to minimum sentences.

On retrouve un langage similaire mais non-identique pour interdire l'imposition d'une peine cruelle et inusitée à l'article 12 de la *Charte canadienne des droits et libertés* et dans le texte du huitième amendement à la Constitution des États-Unis. Toutefois, lorsque l'on considère les limites constitutionnelles face aux peines imposées, les décisions de la Cour suprême du Canada et de la Cour suprême des États-Unis se concentrent sur la disproportion exagérée potentielle entre l'infraction commise et la réponse de l'État. Malgré l'apparence d'une similitude entre le Canada et les États-Unis à cet égard, l'auteur maintient que des différences observées dans le droit américain démontrent pourquoi le Canada ne devrait pas adopter l'approche américaine face aux peines minimales.

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I. INTRODUCTION

At the time, the Supreme Court of Canada's decision in *R. v. Smith*¹ showed early promise of a path-breaking approach to section 12 of the *Canadian Charter of Rights and Freedoms*.² True enough, in striking the *Narcotic Control Act's*³ minimum sentence, the Supreme Court of Canada cautioned against stigmatizing every disproportionate or excessive sentence.⁴ Mister Justice Lamer's reasons stressed, instead, that the test for review should be relatively strict, and should require a finding of gross disproportionality between the offence committed and the sentence imposed.⁵ Still, he found a violation of section 12's prohibition against cruel and unusual punishment, because section 5(1) of the *Narcotic Control Act* required a seven-year prison sentence for importing narcotics, without regard to the type or quantity of the substance involved. Under section 1 of the *Charter*, Mr. Justice Lamer held that the mandatory sentence had to fail the *Oakes* test's⁶ requirement of minimal impairment. Given the availability of other means to achieve the legislative goal, there was no need for an indiscriminate sentence, and little reason to jail small-time offenders to deter serious drug traffickers.⁷

Almost fifteen years later, *Smith* stands as the sole instance of the Supreme Court of Canada's willingness to strike a mandatory sentence under section 12 of the *Charter*.⁸ Nor does it appear that the pattern is

¹ [1987] 1 S.C.R. 1045 [hereinafter *Smith*].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. Section 12 of the *Charter* provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."

³ *Narcotic Control Act*, R.S.C., 1985, c. N-1 [repealed 1996, c.19, s.94].

⁴ *Smith*, *supra* note 1 at 1072 (*per* Mr. Justice Lamer). While Madame Justice Wilson, Mr. Justice LeDain and Mr. Justice La Forest agreed that the minimum sentence was unconstitutional (Mr. Justice McIntyre dissenting), Chief Justice Dickson was the only member of the panel to join Mr. Justice Lamer's reasons.

⁵ *Ibid.* (stating that s. 12 will only be infringed where the sentence is so unfit, having regard to the offence and the offender, as to be grossly disproportionate).

⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

⁷ *Supra* note 1 at 1080-81 (stating that a minimum sentence, if necessary, could be based on the quantity of drug imported, the type of narcotic imported, the offender's status, or a combination of factors).

⁸ See *R. v. Luxton*, [1990] 2 S.C.R. 711 (upholding the *Criminal Code's* mandatory sentence of twenty-five years, without parole, for first-degree murder); and *R. v. Goltz*, [1991] 3 S.C.R. 485 (upholding a minimum penalty of seven days' imprisonment for driving while prohibited, under the

about to change: the Supreme Court of Canada has confirmed that only in exceptional circumstances will minimum prison terms be vulnerable under the *Charter*.⁹ Given its early criminal jurisprudence under the *Charter*, which was, for the most part, highly solicitous of the accused's constitutional rights, the judiciary's caution on this issue might, [on first impression], seem misplaced. As to sentencing, the conventional wisdom is that discretion best serves the objectives of the criminal justice system by responding to the circumstances of particular offences committed by specific individuals.¹⁰ By substituting an inflationary floor for the attention to any number of factors customarily thought to be the hallmark of justice at the sentencing phase of a criminal trial, mandatory minima compromise the wisdom of that age-old truism that the punishment should fit the crime.

From a constitutional perspective, it may be difficult to understand how any mandatory sentence could survive the proportionality phase of the *Oakes* test. By definition, the imposition of a mandatory prison term contradicts the concept of minimal impairment. In fact, mandatory sentences resemble complete bans on expressive freedom in the sense that both contemplate a form of absolute interference with freedom, and in neither case do the circumstances matter at all. Yet, while complete bans on section 2(b)'s entitlement are notoriously difficult to justify, mandatory minima have been consistently upheld since *Smith*.¹¹ One reason is that, while section 1 of the *Charter* invariably decides the constitutionality of restrictions on expressive freedom, sentencing provisions rarely proceed to that stage of the analysis. Absent a breach of section 12's prohibition against cruel and unusual punishment or treatment, section 1's test of

British Columbia Motor Vehicle Act).

⁹ See *R. v. Morrisey*, [2000] 2 S.C.R. 90 (upholding a mandatory minimum of four years imprisonment for criminal negligence causing death with a firearm); and *R. v. Latimer*, [2001] 1 S.C.R. 3 (upholding a mandatory minimum of ten years without eligibility for parole for second-degree murder).

¹⁰ See *Criminal Code*, R.S.C. 1985, c. C-46, amended 1995, c. 22 and 1997, c. 23, ss. 718 and 718.1-3 (outlining a variety of general principles to guide the exercise of discretion in sentencing).

¹¹ Under s. 2(b), see *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084 (invalidating absolute restrictions on access to public property); and *RJR-MacDonald v. Canada (AG)*, [1995] 3 S.C.R. 199 (invalidating Parliament's absolute prohibition on tobacco advertising). As for s. 12, see text accompanying *supra* notes 8 and 9.

justification and requirement of minimal impairment do not come into play.¹²

Any broad commentary on the relationship between the *Charter's* guarantees and section 1's standard of justification is beyond the scope of this article. Likewise, it is not possible to engage a full analysis of the Supreme Court of Canada's conception of cruel and unusual punishment under section 12. Suffice to say that a restrictive definition of the entitlement has enabled the Supreme Court of Canada to uphold mandatory sentences without having to confront the obstacle presented by section 1's proportionality requirement of minimal impairment. Yet by asking whether a sentence is grossly disproportionate under section 12, the Supreme Court of Canada imports a section 1 concept of justification into its definition of the guarantee. The resulting hybrid analysis is characterized as an interpretation of the right but effectively functions as a form of section 1 analysis. By design, though, the assessment is incomplete. An approach that focuses on the question of breach, at the expense of justification under section 1, allows the Supreme Court of Canada to avoid those parts of the *Oakes* test that cannot be satisfied.

If there is cause for dissatisfaction over Canada's approach to mandatory minima, little is gained by turning to the American experience. Outside the death penalty, virtually no constitutional recourse exists in the United States for offenders convicted of crimes that attract mandatory sentences. For purposes of comparison and critique, this paper provides an overview of mandatory minima under the *United States Constitution*,¹³ with the following caveat. Sentencing in the United States is a subject of unimaginable complexity. Consequently, it is not feasible in this space to attempt more than a general outline. Accordingly, the article is divided into three parts: the first identifies three factors that provide a context for understanding the relationship between the Eighth Amendment and sentencing policy in the United States; the second analyzes the developments that led up to the United States Supreme Court's key

¹² But see *Goltz*, *supra* note 8 at 522-33 (per Madame Justice McLachlin, as she then was, declaring in dissent that the violation "could not be said to infringe the rights protected by s. 12 'as little as possible' nor would the effects in all circumstances be proportional to the objectives to be served," and that the driving offence could not be saved under s. 1 of the *Charter* because it is overbroad. As she stated, "the material does not demonstrate any obvious or probable need for a deterrent which has such an indiscriminate reach").

¹³ U.S. Const. amend. VIII [hereinafter *Constitution*].

decision in *Harmelin v. Michigan*;¹⁴ and the third offers observations and conclusions about the relationship between constitutional interpretation and sentencing in Canada and the United States.

II. MANDATORY PRISON SENTENCES, CAPITAL PUNISHMENT, AND FEDERALISM

Even on a superficial examination, there is little similarity between mandatory sentences in Canada and the United States. Although not unknown, minimum prison terms are not common in this country. The *Criminal Code* provisions guaranteeing that those convicted of first- and second-degree murder will serve sentences of determinate lengths may have helped assuage the public when Canada abolished the death penalty.¹⁵ Leaving that example aside, there are no more than twenty-nine offences in the *Criminal Code* that carry a mandatory minimum sentence at present.¹⁶ Yet a trend is developing with the introduction of a number of mandatory sentences in recent years, especially in relation to firearms offences.¹⁷ As far as legislators are concerned, it seems that the mandatory minimum has attained a measure of respectability. The question for the moment, then, is whether the Supreme Court of Canada's reluctance to discourage these initiatives will embolden Parliament to increasingly rely on such measures in the future.

Turning to the United States, an initial point of comparison is that, rather than the exception, mandatory sentences are pervasive, both at federal and state levels. They are a form of punishment that can be traced back at least two centuries. However, mandatory minimum sentences did not gather momentum as a crime control device until the 1950s, when the federal government signaled its support for harsh penalties by introducing the *Narcotic Control Act*¹⁸ of 1956. Some years later, in further response to

¹⁴ 501 U.S. 957 (1991) (upholding a mandatory life sentence without parole under the state of Michigan's 650-life drug law) [hereinafter *Harmelin*].

¹⁵ *Criminal Code*, *supra* note 10 at s. 745 (establishing mandatory life sentences for those convicted of murder, and detailing, in its subparagraphs, the schemes that apply to first- and second-degree murder).

¹⁶ N. Crutcher, "The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada" (2001) 39 *Osgoode Hall L.J.* 273.

¹⁷ For a partial list of these offences see *Mornsey*, *supra* note 9 at 129-30 (per Madame Justice Arbour, dissenting in part).

¹⁸ Pub. L. No. 84-728, 70 Stat. 651 (1956).

the problems associated with drug trafficking and drug abuse, another initiative emerged with the *Comprehensive Drug Abuse and Prevention and Control Act*¹⁹ of 1970. When it subsequently became clear that such measures were neither fair nor efficacious, federal legislation eliminated most minima related to drug offences, with the exception of the Continuing Criminal Enterprise²⁰ offences. By the 1980s, however, mandatory sentences began to rebound, starting with federal statutes that placed a focus on drug offences, violent crime, and serious felonies.²¹ In 1994, President William Jefferson Clinton signed the *Violent Crime Control and Law Enforcement Act*,²² which provides for the long-term removal from society of persons convicted of a third violent felony. Congress enacted its mandatory life-imprisonment scheme, or “three-strikes” law, against a backdrop of anti-crime sentiment that prompted more than sixteen state legislatures to consider similar measures.²³

Although recidivist statutes have an enviable pedigree in the history of American criminal justice, the three-strikes sports metaphor is a more recent phenomenon that has, for the time being, captured the United States’ imagination. Between 1993 and 1995, twenty-four states enacted such legislation, which generally requires long prison terms for criminals with three convictions for specified offences.²⁴ Three-strikes is a generic term that can accommodate any number of statutory variations. For example, a typical model might impose a life sentence without release for twenty-five years, following a third conviction for a serious violent crime.²⁵ Even so, the range can be significant within the generic. For instance, the state of Washington requires a minimum ten year sentence on conviction for a second felony, third misdemeanour, or third petit larceny, and life

¹⁹ Pub. L. No. 91-513, 84 Stat. 1236, codified at 21 U.S.C. §§ 801-1509 (1970).

²⁰ K. Lutjen, “Culpability and Sentencing under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment no Longer Fits the Criminal” (1996) 10 N.D. J. L. Ethics & Pub. Pol’y 389 at 396.

²¹ *Ibid.* at 395-99.

²² Pub. L. No. 103-322, 108 Stat. 1902-1955, codified in 18 U.S.C. § 3559(c) (1994).

²³ R.D. O’Connor, “Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal ‘Three-Strikes and You’re Out’ Scheme” (1995) 36 B.C.L. Rev. 847 at 848-49. This article provides an extensive review and analysis of mandatory minima in the federal justice system.

²⁴ T. Marvell & C. Moody, “The Lethal Effects of Three-Strikes Laws” (2001) 30 J. of Leg. Stud. 89.

²⁵ *Ibid.*

imprisonment in the case of a third felony, fifth misdemeanour, or fifth petit larceny. Meanwhile, California's three-strikes law subjects a person convicted of a second felony to punishment that doubles the sentence given a first time felony offender; under the same legislation, an offender convicted of a third violent or serious felony must serve the greater of twenty-five years imprisonment or triple the sentence of a first time felony offender.²⁶

Two further examples illustrate how three-strikes laws raise questions of proportionality between the offence committed and sentence imposed. In California, a man with prior felony convictions was sentenced to twenty-five years to life for the clinching offence: he stole one slice of pizza.²⁷ Elsewhere, an accused was sentenced to life imprisonment, albeit following earlier convictions, for stealing one hundred dollars from a bicyclist.²⁸ If the punishment sounds harsh, the rationale of three-strikes legislation is that offence-specific incarceration does little to rehabilitate a core group of criminals. "Selective incapacitation" is viewed as the solution to that problem. It removes individuals from circulation, often for life, to prevent them from having the opportunity to commit any further offences.²⁹

Three-strikes laws are controversial for any number of reasons. Even a brief canvas of the literature little confidence in the deterrence value of such measures. As well, mandatory sentences contribute to overcrowding in American prisons.³⁰ In addition, mandatory sentences enhance prosecutorial discretion at the expense of the authority

²⁶ This information is taken from M. McClain, "Three Strikes and You're Out: The Solution to the Repeat Offender Problem?" (1996) 20 Seton Hall Legis. J. 97.

²⁷ *Ibid.* at 117, n. 90 (detailing the defendant's prior convictions for robbery, attempted robbery, drug possession and unauthorized use of a vehicle, but noting that under the sentence imposed for stealing a piece of pizza the accused would face the same jail time as if he had raped a woman, molested a child or committed a car-jacking).

²⁸ *Ibid.* at n. 92 (explaining that the defendant had been convicted of possession of drugs, disturbing the peace, resisting arrest and two counts of theft, neither of which was classified as a violent crime; adding, as well, that the three-strikes law came into effect one day before he stole \$100 from a bicyclist, and that rendered him a three-time felon who faced a prison sentence of twenty-five years to life, a sentence "roughly three times what a convicted murderer would serve").

²⁹ The notion is that if a small group of incorrigible career criminals is responsible for a majority of serious crimes, then long prison terms will remove them from circulation and thereby reduce the crime rate. Supporters of three-strikes laws maintain that such statutes will end the criminal careers of high-rate offenders. See L. Beres & T. Griffith, "Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation" (1998) 87 Geo L.J. 103 at 113-14.

³⁰ *Supra* note 20 at 417-19.

traditionally exercised by trial courts.³¹ Most importantly, as the above examples show, three-strikes laws invite and validate disproportionalities between the offence committed and the sentence imposed.³²

Another form the mandatory minimum sentence takes in the United States is absolute punishment for the first-time commission of certain offences. One example, the so-called “650-life” provision, destines an individual convicted of a drug offence to life imprisonment, often without parole. Although possession of a threshold amount of drugs triggers the sentence under this variation, one factor discussed by the Supreme Court of Canada in *Smith*, this kind of mandatory sentence is imposed without individualized sentencing.³³

A second variable in the United States is capital punishment, which was abolished in Canada some years ago.³⁴ Though the death sentence is not a minimum today, as it once was in many states, debate as to its constitutionality remains current. Though now constrained by the “individualized capital sentencing doctrine,” capital punishment is unique because it is final. Despite the evolution of limits on the death penalty in the jurisprudence, the availability of ultimate punishment affects the constitutional status of non-capital sentencing. If the death sentence—the state’s most extreme penalty for the commission of crime—is not unconstitutional, it is difficult to imagine how any lesser punishment, including one that imposes life imprisonment without parole, can offend the Eighth Amendment.³⁵

³¹ *Ibid.* at 419-24.

³² “The unbending rigidity of mandatory minimums has led to a host of problems unanticipated or inadequately considered by their drafters, and have augmented the disparity, manipulability, and uncertainty already present in the federal sentencing system. Mandatory minimums shift the focus of sentencing away from the offender and his or her culpability to the offense and its perceived seriousness. To underemphasize the characteristics, history, and role of an offender is to sacrifice proportionality for the procedural benefits of uniformity and certainty.” *Ibid.* at 390. The same critique applies to mandatory sentences in state criminal justice systems.

³³ Typically, as in *Harmelin*, *supra* note 14, this law imposes a mandatory sentence of life in prison without possibility of parole, on conviction of possessing 650 grams or more of cocaine, and without consideration of mitigating factors.

³⁴ Canada abolished the death penalty in 1976. As for extradition, the Supreme Court of Canada has now decided that individuals cannot be extradited unless assurances are given that the death penalty will neither be sought nor imposed: *United States v. Burns*, [2001] 1 S.C.R. 283 [hereinafter *Burns*].

³⁵ *Supra* note 13. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

A third and final consideration affects the United States Supreme Court's interpretation of the Eighth Amendment. In Canada, given the *Constitution Act's*³⁶ allocation of criminal law to the federal government, division of powers issues do not play a significant role in the debate about sentencing, including mandatory minima.³⁷ In the United States, though, where the fifty states have jurisdiction over criminal justice, the situation is entirely different. Each state has the power to define the substantive criminal law and to adopt whatever sentencing policies it chooses. The federal government adds a further layer of complexity by exercising criminal law powers despite the lack of express constitutional authority to do so.³⁸

For purposes of this article, federalism has the following implications for the Eighth Amendment. As far as the United States Supreme Court is concerned, state jurisdiction over criminal justice poses a serious obstacle to the constitutional review of sentencing laws. Accordingly, outside of capital offences, the United States Supreme Court has effectively abandoned the task of establishing sentencing standards to govern the policies adopted by fifty states with differing conceptions of just deserts. As for the federal government's sentencing practices, separation of powers concerns lean the United States Supreme Court in a deferential direction, albeit for different reasons.³⁹

This introduction identified the dynamics that affect the United States Supreme Court's response to mandatory minima. The prevalence of mandatory sentences is not the only point of difference that sets the United States apart from Canada. In addition, members of the United States Supreme Court cannot agree whether the Eighth Amendment applies in non-capital cases. Though some justices reject the possibility that non-capital sentences can be considered a form of cruel and unusual punishment, others take the view that penalties are subject to proportionality review regardless whether the sentence imposed is death or life imprisonment. Moreover, some maintain that objective criteria of

³⁶ See *infra* note 37.

³⁷ See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s.91(27) (granting the federal government exclusive jurisdiction over "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters").

³⁸ See the *Sentencing Reform Act*, 28 U.S.C. §§ 991-998 (1988), which created the Sentencing Commission. Further discussion and analysis of federal sentencing is beyond the scope of this paper.

³⁹ *United States v. Mistretta*, 488 U.S. 361 (1989) (concluding that federal sentencing guidelines were a valid and constitutional delegation of legislative authority to the Sentencing Commission, and that the separation of powers between legislative and judicial branches had not been violated).

proportionality can be formulated and applied to the full range of sentencing policies across the nation. Yet, the naysayers contend that objectivity in sentencing is impossible and therefore reject the suggestion that the Eighth Amendment places limits on state sentencing policies.

III. NO PENALTY IS *PER SE* CONSTITUTIONAL⁴⁰

The status of mandatory *prison* sentences under the Eighth Amendment reached a turning point in *Harmelin*.⁴¹ There, by a fragmented and contentious vote, a majority in the United States Supreme Court upheld the state of Michigan's 650-life law. Earlier decisions, including the United States Supreme Court's landmark opinions on the death penalty, serve as a prelude to the intense disagreements in *Harmelin*. In essence, whether the issue is one of capital punishment or a prison term, and whether the question arises under recidivist legislation or not, the United States Supreme Court has been fundamentally unable to come to terms with mandatory sentences.

Constitutional wrangling about the Eighth Amendment broke open in the early 1970s with *Furman v. Georgia*,⁴² which was followed, in relatively short order, by *Gregg v. Georgia*,⁴³ *Woodson v. North Carolina*,⁴⁴ and *Coker v. Georgia*.⁴⁵ In the aftermath of *Furman*'s shocking suggestion that capital punishment was unconstitutional, the United States Supreme Court found it necessary to regroup. *Gregg* accordingly clarified that the death penalty is not *invariably* cruel and unusual punishment, that it is not an inherently barbaric or unacceptable mode of punishment, and that it is not *always* disproportionate to the crime for which it has been imposed. Put another way, whether a capital sentence offends the Eighth Amendment raises a situational, or contextual question. According to *Gregg*, a

⁴⁰ *Solem v. Helm*, *infra* note 49.

⁴¹ *Supra* note 14.

⁴² 408 U.S. 238 (1972) (concluding that the imposition and carrying out of the death penalty would constitute cruel and unusual punishment) [hereinafter *Furman*].

⁴³ 428 U.S. 153 (1976) (concluding that Georgia's statutory scheme for the imposition of the death penalty satisfied the concerns of *Furman* and was constitutional) [hereinafter *Gregg*].

⁴⁴ 428 U.S. 280 (1976) (concluding that North Carolina's mandatory death sentence for first-degree murder violated the Constitution).

⁴⁵ 433 U.S. 584 (1977) (invalidating the state of Georgia's death sentence for the crime of rape, as grossly disproportionate and an excessive punishment prohibited by the Eighth Amendment) [hereinafter *Coker*].

punishment will be excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is nothing more than the purposeless and needless imposition of pain and suffering. Alternatively, a punishment will violate the Eighth Amendment if it is *grossly out of proportion to the severity of the crime*.⁴⁶ In the years since *Gregg*, the United States Supreme Court's case law has see-sawed on the crucial question of whether the death penalty violates the Eighth Amendment in certain circumstances. For example, *Coker*, which was decided alongside *Gregg*, held that imposing the death penalty for the crime of rape was a grossly disproportionate and excessive punishment, that violated the Constitution.⁴⁷

A few years after *Furman* opened up the Eighth Amendment, *Rummel v. Estelle*⁴⁸ and *Solem v. Helm*⁴⁹ raised the question whether the same principle of proportionality could apply to non-capital cases. The fact that death is the most extreme sanction does not mean it is the only form of punishment that is cruel and unusual. Unfortunately, in considering that proposition, the United States Supreme Court has been unable to agree whether sentencing is subject to the Eighth Amendment's proportionality principle.

In *Rummel*, a majority led by Mr. Justice Rehnquist dismissed the prospect of constitutional review, and upheld the sentence. The defendant in that instance received a life sentence for defrauding a credit card to obtain \$80 worth of goods or services in 1964, forging a check in the amount of \$28.36 in 1969, and obtaining \$120.75 by false pretences in 1973.⁵⁰ A majority of the United States Supreme Court showed few qualms in condemning him to life in jail for what amounted to a non-violent and relatively trivial series of offences committed over a period of almost ten years.⁵¹

Mister Justice Rehnquist's opinion flatly rejected the suggestion that a proportionality principle had somehow been incorporated into non-

⁴⁶ *Supra* note 43 at 187 (emphasis added).

⁴⁷ *Supra* note 45 at 592.

⁴⁸ 445 U.S. 263 (1980) (Mr. Justices Brennan, Marshall, Powell and Stevens, dissenting) [hereinafter *Rummel*].

⁴⁹ 463 U.S. 277 (1983) (Chief Justice Burger and Mr. Justices White, Rehnquist and Madame Justice O'Connor, dissenting) [hereinafter *Solem*].

⁵⁰ *Supra* note 48 at 265-67.

⁵¹ Mr. Justice Rehnquist noted that under the Texas policy of granting "good time" credits, there was a possibility of parole for *Rummel*, "however slim" it might be. *Ibid.* at 280-81.

capital cases by the death penalty jurisprudence. Thus, he stated, “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”⁵² Citing Mr. Justice Stewart in *Furman*, he explained the fundamental difference of the death penalty: capital punishment is “unique in its total irrevocability”, “unique in its rejection of the rehabilitation of the convict,” and “unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”⁵³ After dismissing *Weems v. United States* as an isolated and exceptional precedent, the United States Supreme Court maintained that felonies punished by significant terms of imprisonment, including life, are “purely a matter of legislative prerogative.”⁵⁴ To recognize that the State of Texas could have imprisoned William James Rummel for life had he stolen 5 thousand dollars, 50 thousand dollars, or 500 thousand dollars, rather than the \$120.75 he took in committing his third offence, Mr. Justice Rehnquist declared, “is virtually to concede that the lines to be drawn are indeed ‘subjective’ and therefore properly within the province of legislatures, not courts.”⁵⁵

He also emphasized the impossibility of formulating objective criteria to measure the proportionality of sentencing legislation in fifty states. What is the United States Supreme Court to do, he inquired, when Arizona regards it a felony to steal any “neat or horned animal”; when stealing “avocadoes, olives, citrus or deciduous fruits, nuts and artichokes” is serious in California; and when stealing one hundred dollars in one state will earn the thief a short jail term in one state and ten years’ imprisonment in another.⁵⁶ Emphasizing the obvious, that “[p]enologists themselves have been unable to agree whether sentences should be light or heavy,” Mr. Justice Rehnquist concluded that “any ‘nationwide trend’ toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts.”⁵⁷ Leaving such institutional and federalism concerns aside, he agreed that the state had an interest in treating those more harshly who “by repeated criminal acts have shown that

⁵² *Ibid.* at 272.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 274. See also *Weems v. United States*, 217 U.S. 349 (1910) (concluding that *cadena temporal*, which consisted of fifteen years’ imprisonment in hard labour with chains, for falsifying a public record, violated the Eighth Amendment).

⁵⁵ *Ibid.* at 275-76.

⁵⁶ *Ibid.* at 282.

⁵⁷ *Ibid.* at 283-84.

they are incapable of conforming to the norms of society.”⁵⁸ Segregating such individuals from the rest of society for an extended period of time, in his view, would not offend the *Constitution*.

Mr. Justice Powell wrote an angry dissent in *Rummel*'s five to four decision, which complained that the state deprived the accused of freedom for the rest of his life, simply for defrauding others, cumulatively, of about \$230. Not only was the punishment grossly disproportionate to the crime, the Texas system assumed that all three-time offenders deserved the same punishment, as he put it, “whether they commit three murders or cash three fraudulent checks.”⁵⁹ As for the objectivity of criteria, he concluded that “a mandatory life sentence for defrauding persons of about \$230 crosses any rationally drawn line” between permissible punishment and the standard set by the Eighth Amendment.⁶⁰

Remarkably, given the views so strongly voiced in *Rummel*, Mr. Justice Powell managed to turn the tables in *Solem*. There, he won majority support for an opinion that applied the proportionality principle to invalidate a mandatory life sentence that carried no possibility of parole.⁶¹ The defendant's list of convictions was more extensive than those of *Rummel*.⁶² This time, however, a majority of the United States Supreme Court concluded that the sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. Far from being reserved to capital cases, Mr. Justice Powell maintained that the principle of proportionality is deeply rooted and frequently repeated in the common law jurisprudence.⁶³ Though he had little choice but to accept that “[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare,” he

⁵⁸ *Ibid.* at 276.

⁵⁹ *Ibid.* at 302.

⁶⁰ *Ibid.* at 307.

⁶¹ *Solem*, *supra* note 49. In the intervening case of *Hutto v. Davis*, 454 U. S. 370 (1982), the United States Supreme Court reprimanded an appellate court for not following *Rummel* and setting aside a forty year sentence and fine for marijuana offences, as a form of cruel and unusual punishment. Mr. Justice Powell concurred in that result, albeit reluctantly, because he regarded *Rummel* as controlling.

⁶² *Solem*, *ibid.* at 279-80. The defendant had been convicted of several non-violent felonies: uttering a no account cheque for one hundred dollars; third-degree burglary (three times); obtaining money under false pretences; grand larceny; and third offense driving while intoxicated.

⁶³ *Ibid.* at 284.

insisted that proportionality analysis is not “entirely inapplicable” in non-capital cases.⁶⁴

Having concluded that mandatory prison sentences are reviewable, Mr. Justice Powell identified “objective criteria” to guide the exercise. Specifically, he proposed that the United States Supreme Court’s proportionality analysis should consider the gravity of the offense and the harshness of the penalty; the sentences imposed on other criminals in the same jurisdiction; and the sentences imposed for commission of the same crime in other jurisdictions.⁶⁵ While acknowledging that courts should defer to the legislatures as well as to the discretion exercised by trial courts, he stated, in plain and forceful terms, that “no penalty is *per se* constitutional.”⁶⁶

Solem left the justices who had formed the majority in *Rummel* fuming in a dissenting opinion. The opinion charged, among other things, that the United States Supreme Court had “blithely discard[ed] any concept of *stare decisis*, trespassed[d] gravely on the authority of the States, and distort[ed] the concept of proportionality of punishment by tearing it from its moorings in capital cases.”⁶⁷

The majority claim that it is possible to decree that “one offense has less gravity than another” was a further issue for the dissenters. Chief Justice Burger regarded this assertion as “nothing other than a bald substitution of individual subjective moral values for those of the legislature.”⁶⁸ As a result of the majority’s opinion, the dissenters declared that the United States Supreme Court had launched itself into “uncharted and unchartable waters,” where sentences with endless permutations would have to be tested against criteria “bankrupt of realistic guiding principles.” This approach would “flood the appellate courts with cases in which equally arbitrary lines must be drawn.”⁶⁹

With the United States Supreme Court shifting its position between *Rummel* and *Solem*, it is not difficult to understand why *Harmelin*⁷⁰ was so important. At the time, whether the proportionality principle would

⁶⁴ *Ibid.* at 289-90 (emphasis in original).

⁶⁵ *Ibid.* at 292.

⁶⁶ *Ibid.* at 290.

⁶⁷ *Ibid.* at 304 (per Chief Justice Burger).

⁶⁸ *Ibid.* at 314.

⁶⁹ *Ibid.* at 314-15.

⁷⁰ *Supra* note 14.

constrain the imposition of mandatory life sentences remained an open question. Without excluding the possibility of review in non-capital cases, *Harmelin* demonstrated that Mr. Justice Powell's majority in *Solem* had gone too far.

The defendant, Harmelin, was sentenced to life imprisonment, with no possibility of parole, for possession of 672 grams of cocaine. The United States Supreme Court's decision to uphold his sentence produced no fewer than five opinions, of which several paragraphs comprising Part IV of Mr. Justice Scalia's reasons secured majority support. There, he made two vital points. First, Mr. Justice Scalia stated that severe mandatory penalties may be cruel, "but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."⁷¹ In candid terms, he explained that punishment which is not otherwise cruel and unusual does not violate the Eighth Amendment simply because it is mandatory.⁷²

Second, Mr. Justice Scalia returned to the distinction between capital and non-capital offences in answer to the suggestion that the sentence was disproportionate because it did not consider mitigating factors individual to the defendant's circumstances. Regardless of the gross disproportionality of a sentence, an individualized determination of the sentence is only required by the *Constitution* in capital cases. As he explained, the individualized capital sentencing doctrine made it clear that "there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."⁷³ Accordingly, he refused to create what he referred to, a touch sarcastically, as an "individualized mandatory life in prison without parole sentencing doctrine."⁷⁴ In so refusing, Mr. Justice Scalia agreed that Harmelin's sentence was unique in a certain way, because life imprisonment without parole is the second most severe penalty known to law. Yet, the possibilities of retroactive legislation reduction and executive clemency ameliorated its harshness. In conclusion, Mr. Justice Scalia reiterated that even where the difference between life without parole and any number of other sentences of imprisonment is greatest, "it cannot be compared with death."⁷⁵ Because

⁷¹ *Ibid.* at 994-95.

⁷² Unusual, in this sense, refers to the criteria identified in *Gregg*, *supra* note 43.

⁷³ *Supra* note 14 at 995.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.* at 996.

that comparison cannot be made, he said, “[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.”⁷⁶

Otherwise, Mr. Justice Scalia’s opinion offered a pontification on the historical origins of the Eighth Amendment, along with a lecture on the reasons why *Solem* was wrongly decided.⁷⁷ Chief Justice Rehnquist was the only member of the United States Supreme Court to join those parts of the opinion, which were vigorously rejected by Mr. Justice White, joined by Mr. Justice Blackmun and Mr. Justice Stevens in dissent.⁷⁸ Of greater interest here are Mr. Justice Kennedy’s reasons, in which Madame Justice O’Connor and Mr. Justice Souter concurred to produce a majority result upholding Mr. Harmelin’s sentence. Despite agreeing with Part IV of Mr. Justice Scalia’s reasons, these judges wrote separately to explain why their approach to the Eighth Amendment’s proportionality analysis differed. Mister Justice Kennedy took *stare decisis* as his starting point. He stated that it “counsels our adherence to the narrow proportionality principle that has existed in the Eighth Amendment jurisprudence for 80 years.”⁷⁹ Without excluding constitutional review in non-capital cases, he argued, the United States Supreme Court’s decisions recognized a “narrow” proportionality principle which is circumscribed by certain considerations. Those considerations made it clear that review of mandatory sentences under the Eighth Amendment is possible, but unlikely just the same.

In the first instance, Justices Kennedy, O’Connor and Souter agreed that “the fixing of prison terms for specific crimes involves a substantive penological judgment that ... is ‘properly within the province of legislatures, not courts.’”⁸⁰ In this, they accepted that the efficacy of any sentencing system depends on agreement as to the purposes and objectives of the penal system. The responsibility for making those choices should rest with the legislatures. Moreover, as Mr. Justice Kennedy observed, the Eighth Amendment “does not mandate adoption of any one penological theory,” and the federal and state justice systems have accorded “different weights

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 965 (stating that “[i]t should be apparent from the above discussion that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law” (emphasis added)).

⁷⁸ Mr. Justice Marshall also wrote separately in dissent, as did Mr. Justice Stevens, who was joined by Mr. Justice Blackmun.

⁷⁹ *Supra* note 14 at 996.

⁸⁰ *Ibid.* at 998.

at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”⁸¹

Thus, Mr. Justice Kennedy concluded that marked divergences both as to theories of sentencing and the length of prison terms are the “inevitable, often beneficial” result of the federal structure.⁸² In doing so, he provided a reminder that, “[a]bsent a constitutionally imposed uniformity *inimical to traditional notions of federalism*, some State will always bear the distinction of treating offenders more severely than any other State.”⁸³ This consideration raised the question of whether there is any basis in principle to declare that certain sentences violate the *Constitution*. On that point, *Solem*’s third criterion, which contemplated an exercise in comparative sentencing, had been rejected by Mr. Justice Scalia on the grounds that it has “no conceivable relevance to the Eighth Amendment.”⁸⁴ In the circumstances, Mr. Justice Kennedy’s opinion provided a more temperate recognition of the implications for federalism than Mr. Justice Scalia’s assertion that the Eighth Amendment is “not a ratchet.”⁸⁵

Given these concerns, Mr. Justice Kennedy indicated that objective factors should inform the proportionality review “to the maximum possible extent.”⁸⁶ In making that point, he admitted that “[the courts] decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years.”⁸⁷ For that reason, Mr. Justice Kennedy endorsed the distinction between capital and non-capital offences. To conclude, he declared that the Eighth Amendment does not require strict proportionality between a crime and its sentence. It only forbids “extreme sentences that are ‘grossly disproportionate’ to the crime.”⁸⁸ As for *Harmelin*, Mr. Justice Kennedy agreed that “it is far from certain that

⁸¹ *Ibid.* at 999.

⁸² *Ibid.*

⁸³ *Ibid.* at 1000 (emphasis added).

⁸⁴ *Ibid.* at 989.

⁸⁵ *Ibid.* at 990. In full, he stated: “The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions.”

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at 1001.

⁸⁸ *Ibid.*

Michigan's bold experiment [in controlling the drug industry] will succeed." He nonetheless upheld the 650-life provision.⁸⁹

Even with the opening offered by Justices Kennedy, O'Connor and Souter, *Harmelin* made it clear that Mr. Justice Powell's pronouncement that "no penalty is *per se* constitutional" was premature.⁹⁰ To the contrary, *Harmelin* indicated that, outside of circumstances that are exceptional in the sense of *Weems*, non-capital penalties are *per se* constitutional.

IV. SIMILARITY AND DIFFERENCE

The Canadian and American jurisprudence on mandatory minima is not entirely dissimilar. The *Charter* directs a bifurcation of analytical function between sections 12 and 1, which separates the question of cruel and unusual punishment from the question whether it is justifiable for a democratic society to inflict punishments of a certain magnitude. As noted above, this structural construct enables the Supreme Court of Canada to relax the *Charter's* requirements in section 12 cases. Rather than subject mandatory minima to the strict criteria that should apply in every case under section 1, the Supreme Court of Canada has built a concept of proportionality into its definition of the entitlement guarantee. This separation of analytical function will not be found in the American jurisprudence, where there is no textual counterpart to the *Charter's* concept of reasonable limits.

Still, it seems to make little difference, as neither the Supreme Court of Canada nor the United States Supreme Court has granted the concept of cruel and unusual punishment a generous interpretation. This reluctance might be explained by the language of the constitutional texts, as well as by each Court's history. Before a breach of constitutional rights can be found under either document, the courts must conclude that the punishment imposed is *cruel*. Though some might argue that punishment is inherently cruel, sanctions are necessary. It is therefore difficult to specify with any degree of objectivity when a sentence should be designated as *cruel and unusual*. In any case, there may be an unspoken sense in this jurisprudence that the days of state-imposed cruelty are over. Absent the

⁸⁹ *Ibid.* at 1008. The amount of pure cocaine in the defendant's possession would yield between 32,500 and 65,000 doses. *Ibid.* at 1002. In the circumstances, Mr. Justice Kennedy agreed that the state could with reason conclude that the threats posed by his possession of this large amount of cocaine were "momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Ibid.* at 1003.

⁹⁰ *Ibid.*

infliction of extreme physical pain, understandable disagreement exists as to what might or might not be considered cruel as a form of punishment. It is not apparent, in such circumstances, why the courts, rather than the legislatures, should decide that question. At least in Canada, the courts prefer to debate such concerns under section 7's concepts of fairness and fundamental justice.⁹¹

The jurisprudence in both countries employs a concept of proportionality and in each, the disproportionality between the crime and its punishment must cross a high threshold to violate the *Constitution*. A sentence that is harsh, severe, or merely disproportionate does not invite review: the prohibition against cruel and unusual punishment is not engaged until *gross* disproportionality is shown. The standard is high because the Supreme Court of Canada and the United States Supreme Court appear to agree that sentencing policy is a prerogative of legislative decision-making. The assumption is questionable, especially considering how willing the courts have been to second-guess democratic choices in so many other areas. In Canada, for example, the Supreme Court of Canada showed little hesitation in constitutionalizing the concept of *mens rea*, and extended its interference with the substantive criminal law into the field of defences.⁹²

That the Supreme Court of Canada and United States Supreme Court share an institutional reluctance to declare that the state has been cruel should not be taken as a signal that American experience is relevant or should be regarded as a model for emulation. To the contrary, distinctions on key points of constitutionalism suggest that the United States jurisprudence is of little value in *Charter* interpretation. As the discussion has shown, the United States Supreme Court's response to mandatory prison sentences is entangled in the messy jurisprudence surrounding the death penalty. As a result, the existence of capital punishment has motivated some members of the United States Supreme Court to reject the Eighth Amendment's application to mandatory prison sentences. However, that consideration is entirely irrelevant in Canada, where the death penalty was abolished some years ago. In addition, the

⁹¹ *Kindler v. Canada (Min. of Justice)*, [1991] 2 S.C.R. 779; *Reference re Ng Extradition*, [1991] 2 S.C.R. 858; and *Burns*, *supra* note 34 (concluding that the constitutionality of extraditing individuals to face the death penalty should be addressed under s. 7 and not under s. 12).

⁹² See *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 and *R. v. Martineau*, [1990] 2 S.C.R. 633 (both addressing the issue of *mens rea* under s. 7 of the *Charter*); see also *R. v. Daviault*, [1994] 3 S.C.R. 63 and *R. v. Ruzic*, [2001] 1 S.C.R. 687 (both addressing the constitutionality of defences to criminal offences).

states' jurisdiction over criminal justice led the United States Supreme Court to conclude that constitutional oversight of sentencing policies is inappropriate on federalism grounds. Once again, given section 91(27) of the *Constitution Act, 1867*, that is an irrelevant consideration under section 12 of the *Charter*.

In policy terms, American constraints on the review of mandatory sentences have produced tragic results. United States prisons are horribly overcrowded. An accretion to the power of prosecutors has supplanted the discretion of judges. Most important, mandatory minima impose non-individuated sentences that are disproportionately harsh. The rationale for this response is to deter crime. Thus far, there is little evidence to support any effective connection between mandatory minima and a reduction in crime.

As this article went to press, the Ninth Circuit Court of Appeals rendered its decision in *Andrade v. California*.⁹³ Without invalidating California's three-strikes law, the panel held that Leandro Andrade's life sentence in prison with no possibility of parole for fifty years grossly violated the Eighth Amendment.⁹⁴ The significance of this decision will unquestionably be debated. On one hand, Mr. Justice Paez's majority opinion carefully analyzed United States Supreme Court authority and found the facts of the defendant's case compelling under the Eighth Amendment. From that perspective, *Andrade* may only encourage claims under the *Constitution* in the most egregious circumstances of three strikes legislation. On the other, *Andrade* represents the first lower court challenge to the United States Supreme Court's apparent determination to restrict the Eighth Amendment to capital cases. On that view, the reigning interpretation of *Harmelin* may be vulnerable after all.

Time can only tell; meanwhile, Canadians should challenge the Supreme Court of Canada's reluctance to invalidate mandatory minima under the *Charter*. In addition, Canadians should discourage any initiatives at the legislative level to introduce new forms of mandatory sentence. If ever a reason is needed to explain why these sentences are bad public

⁹³ [2001]CA9-QL 670 (Cir. Ct. App.), online: QL (CA9C) (Mr. Justice Sneed concurring in part and dissenting in part) [hereinafter *Andrade*].

⁹⁴ See also *supra* note 93 at 2 (Andrade was convicted of two counts of petty theft for shoplifting nine videotapes from two Kmart stores. Offences which would ordinarily be treated as misdemeanours, each punishable by up to six months in jail and a fine up to one thousand dollars, fell under the state's three-strikes regime because of the accused's prior offences, which were non-violent and included shoplifting merchandise twice worth a total of \$153.54).

policy, it is the United States, which stands as a compelling example of the failure of mandatory minima as a solution to crime control.

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