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CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT?
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A Brief History

Section 12 of the Canadian Charter of Rights and Freedoms¹ provides that:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

This particular formulation is derived from paragraph 2(b) of the Canadian Bill of Rights,² the relevant part of which declares that:

No law of Canada shall be construed or applied so as to,
(b) impose or authorize the imposition of cruel and unusual treatment or punishment.

While paragraph 2(b) is the immediate statutory predecessor to section 12 of the Charter, the “cruel and unusual punishment” prohibition is firmly grounded in the original English Bill of Rights of 1688.³ The judgment of Mr. Justice Marshall in the United States Supreme Court decision of Furman v. Georgia,⁴ a case which con-
sidered the meaning of the United States Constitution's Eighth Amendment\(^5\) ban on cruel and unusual punishment, contains this review of the common English antecedents of this clause:

The Eighth Amendment's ban against cruel and unusual punishments derives from English law. In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offences. Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain.

Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offences. Death, of course, was the usual result.

The treason trials of 1685 — the "Bloody Assizes" — which followed an abortive rebellion by the Duke of Monmouth, marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights. However, two Canadian legal scholars, B. Welling and C. A. Hipfner, have concluded that there is not sufficient evidence to connect the cruel and unusual punishment clause with either the Bloody Assizes or the trial of Titus Oates. Nor is there evidence which supports a distinction between barbarous methods of punishment and penalties which are merely excessive. The only meaning which the evidence supports, in their view, is that the clause prohibits unprecedented punishments, not authorized by statute, and beyond the jurisdiction of the sentencing Court: B. Welling and C. A. Hipfner, Cruel and Unusual? Capital Punishment in Canada (1976) 26 U. of T.L.J. 55. Stan Berger, in The Application of the Cruel and Unusual Punishment Clause under the Canadian Bill of Rights (1978) 24 McGill L.J. 161, the most recent Canadian commentary interpreting the same evidence as that cited by Welling and Hipfner, concludes that that evidence is sufficient to support Granucci's conclusion that the clause was a reiteration of the English policy against disproportionate penalties. Although the great majority of American legal scholars who have sought to grapple with the original meaning of the Eighth Amendment have focused on its English sources, a recent study has suggested that this is too restrictive. This study suggests that as vital a source as was English intellectual and political history, the European Philosophers of the Enlightenment, Voltaire, Montesquieu and especially Beccaria were also important. They argue that Beccaria's Treatise on Crimes and Punishments (1788), together with the works on criminal law reform of these other great thinkers, provided the philosophical basis for the principle of proportionality of punishment. Since these works influenced American colonial leaders, the principle of proportionality must necessarily be reflected in the Eighth Amendment: D. A. Schwartz and J. Wishingrad, Comment, The Eighth Amendment, Beccaria, and the Enlightenment: an Historical Justification for the Weems v. United States Excessive Punishment Doctrine (1975) 24 Buffalo L. Rev. 783. For a criticism of this referential incorporation of Beccaria's views on proportionality, see C. W. Schwartz, Eighth Amendment Proportionality Analysis and the Compelling case of William Rummel (1980) 71 J. Crim. L. and Criminology 378.

\(^5\) U.S. CONST. amend. VIII.
of Rights containing the progenitor of our prohibition against cruel and unusual punishments. The conduct of Lord Chief Justice Jeffreys at those trials has been described as an "insane lust for cruelty" which was "stimulated by orders from the King" (James II). The assizes received wide publicity from Puritan pamphleteers and doubtless had some influence on the adoption of a cruel and unusual punishments clause. But, the legislative history of the English Bill of Rights of 1689 indicates that the assizes may not have been as critical to the adoption of the clause as it is widely thought. After William and Mary of Orange crossed the Channel to invade England, James II fled. Parliament was summoned into session and a committee was appointed to draft general statements containing "such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties." An initial draft of the Bill of Rights prohibited "illegal" punishments, but a later draft referred to the infliction by James II of "illegal and cruel" punishments, and declared "cruel and unusual" punishments to be prohibited. The use of the word "unusual" in the final draft appears to be inadvertent.

This legislative history has led at least one legal historian to conclude "that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties," and not primarily a reaction to the torture of the High Commission, harsh sentences or the assizes.

Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the English Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments.6

The Case Law

In the first fifteen years after the enactment of the Canadian Bill of Rights, paragraph 2(b) was argued in a significant number of cases as the basis for invalidating particular punishments or penalties. While these cases without exception rejected the argument, there was no extensive discussion of the relevant principles which ought to be brought to bear on the application of paragraph 2(b). Typical of what one judge has referred to as "the rather barren approach" taken by these early decisions is that of *R. v. Hatchwell*.

6 Supra, note 4, at 316-20.

7 (1973) 14 C.C.C. (2d) 556 (B.C.C.A.).
where the accused had argued that the sentence of preventive deten-
tion imposed pursuant to having been found an habitual criminal pursuant to section 688 of the Criminal Code was cruel and unusual punishment. This argument was disposed of by Robertson J.A. of the British Columbia Court of Appeal in one paragraph:

Thirdly, it is submitted that a sentence of preventive detention is “cruel and unusual treatment or punishment” within the meaning of para. (b) of s. 2 of the Canadian Bill of Rights: cruel because there is no prescribed limit to its length — and I note that the same is true of a term of life imprisonment — and unusual because a precedent of precisely, or almost precisely, the same nature cannot be found elsewhere; counsel did not, as he could not, go as far as to submit that imprisonment in itself is cruel treatment or punishment within the meaning of para. (b). I feel that I need say no more than that I do not think that this submission can succeed.9

Other cases were content to give paragraph 2 (b) a strictly literal meaning. Thus in R. v. Dick, Penner and Finnigan10 the Manitoba Court of Appeal held that a sentence of whipping for rape under section 136 of the Criminal Code [this section is now 144, and the punishment by whipping was deleted in 1972], while possibly cruel, did not constitute an unusual punishment.

[C]orporal punishment is not unusual in any sense of the word; in some form or other almost everyone has received it. Discipline in prisons, in the home, in the school is, to some extent, enforced by corporal punishment. If not the most common, it is certainly one of the most common of all forms of punishment.12

Since 1975 the courts have been confronted with far more substantial arguments by counsel as to the proper interpretation of paragraph 2 (b) and in a series of judgments dealing with the issues of solitary confinement in prison, the minimum seven year term of imprisonment for importation of a narcotic under the Narcotic Control Act13 and the death penalty have sought to articulate the relevant principles and criteria which ought to be brought to bear on any judicial inquiry under paragraph 2 (b). It is these cases which properly provide the focus for analysis in seeking to gauge the future course of judicial developments under section 12 of the Charter.

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9 Supra, note 7, at 564.
11 S.C. 1953-54, c. 51.
12 Supra, note 10, at 177.
Before undertaking such an analysis, however, it is appropriate to consider judicial developments in the United States on the interpretation of the Eighth Amendment. There are three reasons for this. First because, as with paragraph 2 (b) of the Bill of Rights and section 12 of the Charter, it traces its origins back to common English antecedents. Second, because American courts have over a longer period and through more extensive litigation refined their approach, and third, and perhaps most important, because one of the key issues in the Canadian cases has been the relevance and usefulness of the United States jurisprudence.

It is generally accepted that the leading United States authority on the Eighth Amendment is the 1972 decision of the United States Supreme Court in Furman v. Georgia which concerned the constitutionality of the death penalty. Although all nine justices wrote separate opinions, the judgment of Brennan J., one of the justices in the majority in the case, is especially useful as containing a careful review of previous decisions of the Supreme Court and seeking to draw from them the principles which have been developed by the Court in interpreting the Eighth Amendment. Brennan J.'s judgment has been particularly influential with several of the Canadian judges who have accepted the relevance of the American case law.

Mr. Justice Brennan, drawing upon the decision of the Supreme Court in Trop v. Dulles, saw the unifying principle of the Eighth Amendment in this way:

"The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards."

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

Mr. Justice Brennan proceeded to derive from jurisprudence of the Supreme Court a set of principles to focus a judicial inquiry on whether a challenged punishment comports with human dignity.

The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly,
may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering... even though "[t]here may be involved no physical mistreatment, no primitive torture," *Trop v. Dulles*... severe mental pain may be inherent in the infliction of a particular punishment.16

In the case of *Trop v. Dulles*, where the Court held that the punishment of expatriation violated the Eighth Amendment, one of the conclusions underlying that holding was its infliction of severe mental pain. But, as Mr. Justice Brennan pointed out, it is not just the presence of severe pain that has led American Courts to strike down certain punishments.

The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like," are, of course, "attended with acute pain and suffering."... When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

A second principle which Mr. Justice Brennan felt inherent in the Eighth Amendment is that the State must not arbitrarily inflict a severe punishment.

This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others.18

The third principle identified by Mr. Justice Brennan is "that a severe punishment must not be unacceptable to contemporary society...."19 The question under this principle is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the court's task is to review the history of a challenged punishment and to examine society's present practices in respect to its use.

The final principle identified in Mr. Justice Brennan's judgment is that a severe punishment must not be excessive:

A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport

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16 *Id.*, at 271.
17 Id., at 272-73.
18 Id., at 274.
19 Id., at 277.
with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted...the punishment inflicted is unnecessary and therefore excessive...

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment.20

Having identified the four principles, Mr. Justice Brennan went on to explain how they were all interrelated.

There are, then, four principles by which we may determine whether a particular punishment is "cruel and unusual." The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. Yet "[i]t is unlikely that any State at this moment in history[,]...would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such punishment. Nor, finally, is it likely that this Court would have to consider a severe punishment that is patently unnecessary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle.21

After reviewing the punishments which the Court had held to be within the prohibition of the clause (twelve years in chains at hard and painful labour, Weems v. United States;22 expatriation, Trop v. Dulles;23 and imprisonment for being addicted to narcotics, Robinson v. California24) Mr. Justice Brennan continued:

Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive

20 Id., at 279-80.
21 Id., at 281.
22 217 U.S. 349 (1910).
under one or the other of the principles. Rather, these "cruel and unusual punishments" seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is "cruel and unusual." The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.25

In the American cases on the Eighth Amendment it is the cruelty of the punishment rather than its unusualness which has been chosen as the principal criterion by which its propriety should be gauged. The courts have declined to give the word "unusual" a restricted meaning. In *Furman v. Georgia*, Mr. Justice Marshall, in his historical discussion of the clause, noted that in the original draft of the English Bill of Rights, the words used were "illegal" and "cruel" punishments. Adopting the reasoning of Anthony Granucci,26 the final phraseology in the use of the word "unusual" must be laid simply to chance and sloppy draftsmanship. Chief Justice Burger, although dissenting on the issue of whether the death penalty came within the prohibition of the Eighth Amendment, agreed that "[t]he term 'unusual' cannot be read as limiting the ban on 'cruel' punishments or somehow expanding the meaning of the term 'cruel'."27 Chief Justice Warren, in the earlier case of *Trop v. Dulles* clearly indicated that the approach of the Supreme Court was to examine "the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual'".28

In *Furman v. Georgia* the majority (of which Brennan J. was a member) concluded that the death penalty statutes before the court in that case violated the Eighth Amendment. The common de-

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25 *Supra*, note 4, at 282.
26 *Supra*, note 4.
27 *Supra*, note 4, at 381.
28 *Supra*, note 14, at 100.
nominator in the separate judgments of the majority was that the sentence of death authorized under the statutes before the court, in light of the absence of standards to guide judges or juries, and in light of its infrequent imposition, was arbitrarily and capriciously applied and therefore ceased to further any state purpose. In response to the decision in *Furman*, many of the states whose death penalty statutes were thereby rendered unconstitutional rewrote them. In 1976 the Supreme Court in *Gregg v. Georgia*[^29] *Jurek v. Texas*[^30] and *Proffitt v. Florida*[^31] ruled on a number of these revised statutory schemes. The plurality of the court held that the death penalty statutes, to be valid, specified standards for sentencing authorities, whether they be judges or juries, were necessary so as to eliminate arbitrary results, and further that it was necessary that the sentences make particularized findings regarding the defendant’s character or circumstances of the crime. Although Brennan J. was in the minority in the *Gregg* and associated decisions, maintaining his view that the death penalty was unconstitutional per se, the tests which he developed in *Furman* were adopted with some modification by the plurality of the court in *Gregg*. The judgment of the court restated those tests in this way:

> [A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. ... [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

> But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with "the dignity of man," which is the basic concept underlying the Eighth Amendment.[^32]

According to the plurality in *Gregg* the inquiry into exclusiveness had two aspects. Although the Courts could not invalidate a category of penalties because it deemed less severe penalties adequate to serve the ends of penology, the sanction imposed "cannot be so totally without penological justification that it results in gratuitous infliction of suffering."[^33]

The first of the Canadian cases which raised the interpretation of paragraph 2(b) in full-blown form and the only one which has

[^33]: *Id.*, at 184.
been considered by the Supreme Court of Canada, like *Furman* and *Gregg*, concerned the death penalty. In *R. v. Miller and Cockriell* the British Columbia Court of Appeal was faced with the argument that the death penalty provisions of the Criminal Code for capital murder violated paragraph 2(b). The majority judgment of the British Columbia Court of Appeal, in rejecting this argument, took a very narrow approach to the issue. The appellants had sought to rely upon the American decisions, including *Furman v. Georgia* but the majority rejected the relevance of these cases because of the different approach which the United States Supreme Court adopted in interpreting the Constitution of the United States as compared to construing an Act of Parliament, and also because “a meaning given by the Supreme Court of the United States to a phrase in the Constitution, however correct it may be in that context... throws little, if any, light on the meaning of the same phrase in our *Bill of Rights*.”

Robertson J.A., preferring a conjunctive interpretation of paragraph 2(b) whereby punishment must be both “cruel” and “unusual”, and after accepting for the sake of argument that hanging is cruel punishment, concluded that:

1. [P]unishment by death for murder is not unusual in the ordinary and usual meaning of the word;
2. Parliament, when it enacted the amendments to the Code, [in 1973] was of the opinion that the punishment was not an unusual one and the Court cannot substitute its opinion (if it is different) for Parliament’s;
3. Parliament wished its enactment to prevail and by necessary implication excluded the application of s. 2 of the *Bill of Rights*.

Mr. Justice McIntyre, in dissent, took a much broader view. He rejected the majority’s argument that the American cases were not of any assistance to the court since the constitutional basis of the relationship between the courts and the Legislature is fundamentally different in the United States and the principles derived from those cases could not be imported into Canada “to assist in the resolution of a peculiarly Canadian constitutional problem.” He traced the common heritage of the Eighth Amendment and paragraph 2(b), the English Bill of Rights, and stated therefore that the framers of the American Constitution, in adopting the language of the English

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35 Id., at 452.
36 Id., at 456.
37 Id., at 460.
Bill of Rights in the Eighth Amendment, were adopting English law "which had become or was to become Canadian law and consideration of this question and its mention in the Canadian Bill of Rights involves the introduction of no foreign concept into our Canadian system."\textsuperscript{38} McIntyre J. also was of the view that the Canadian Bill of Rights had introduced some element of judicial review of legislation into the Canadian constitutional system and therefore, while arguments based upon the entirely different nature of the American constitutional division of powers might have had considerable force before 1960, they were no longer so compelling. McIntyre J. concluded his review of the relevance of the United States' decisions in this way:

I am fully aware that American authority does not bind me... but I have found it helpful in seeking principles upon which this matter should be considered in a civilized society.\textsuperscript{39}

On the issue of whether the punishment of death must be, as the majority decision concluded, both cruel and unusual, McIntyre J. having referred to the scholarly literature and the United States case law, came to a different conclusion:

[I]t is permissible and preferable to read the words 'cruel' and 'usual' [in section 2(b) of the Bill of Rights] disjunctively so that cruel punishments however usual in the ordinary sense of the term could come within the proscription. The term 'usual' refers in my view not simply to infrequency of imposition... but to punishments unusual in the sense that they are not clearly authorized by law, not known in penal practice or not acceptable by community standards.\textsuperscript{40}

McIntyre J.'s judgment then proceeded to identify the standards or tests to be applied in determining whether capital punishment (or any other punishment or treatment) violated paragraph 2(b):

It would not be permissible to impose a punishment which has no value in the sense that it does not protect society by deterring criminal behaviour or serve some other social purpose. A punishment failing to have these attributes would surely be cruel and unusual. ... Furthermore... I am of the opinion it would be cruel and unusual if it is not in accord with public standards of decency and propriety, if it is unnecessary because of the existence of adequate alternatives, if it cannot be applied upon a rational basis in accord-

\textsuperscript{38} Id., at 461.
\textsuperscript{39} Id., at 465.
\textsuperscript{40} Id.
ance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain.\footnote{Id., at 468.}

Professor Stan Berger\footnote{Berger, supra, note 4.} has summarized the McIntyre five-fold test to determine whether a punishment is cruel and unusual as the social purpose, the public decency, the arbitrariness, the necessity and the disproportionality tests.

McIntyre J. concluded that on all the tests the punishment of death was “cruel and unusual”. In his view there was no evidence to show that it had a special deterrent effect which could not be equally served by lesser punishments. Even if such an effect could be shown, in his view capital punishment was no longer accepted as a legitimate and acceptable punishment by a substantial majority of the community. He pointed to the fact that there had been no execution in Canada since 1962 and its lack of use amounting almost to de facto abolition indicated that it was not in accord with popular feeling and the standards of decency recognized by the community. He further concluded that it was not shown to be necessary for the safety or proper regulation of the community or for the protection of those responsible for the maintenance of law and order in the community and that the sentence of life imprisonment was fully capable of protecting the public and was not shown to be any less effective in deterring attacks on police officers and prison guards. McIntyre J. found that the evidence as to the actual imposition of capital punishment, which prior to the de facto suspension of the death penalty in 1962 had been visited upon only a few of those who qualified for it, indicated that it had been arbitrarily applied and arbitrarily withheld. Finally McIntyre J. concluded that the death penalty was an excessive punishment in that its severity far exceeded what is necessary to restrain the evils of violent crime.

In the Supreme Court of Canada,\footnote{Ritchie J., writing for the majority, upheld the majority view of the British Columbia Court of Appeal and in so doing he supplemented the reasons of Robertson J.A. Ritchie J., endorsing the approach of Martland J. in the Burnshine case that section 2 of the Bill of Rights did not create new rights but only confirmed existing ones, held that section 2 was properly to be read in light of section 1. According to Ritchie J. the} Ritchie J., writing for the majority, upheld the majority view of the British Columbia Court of Appeal and in so doing he supplemented the reasons of Robertson J.A. Ritchie J., endorsing the approach of Martland J. in the Burnshine case that section 2 of the Bill of Rights did not create new rights but only confirmed existing ones, held that section 2 was properly to be read in light of section 1. According to Ritchie J. the
declaration of the right of the individual not to be deprived of life in paragraph 1(a) was qualified by the words “except by due process of law”. Therefore, “at the time when the Bill of Rights was enacted there did not exist and had never existed in Canada the right not to be deprived of life in the case of an individual who had been convicted of ‘murder punishable by death’ by the duly recorded verdict of a properly instructed jury”.

Under this interpretation paragraph 2(b) could not qualify any punishment which was imposed pursuant to due process of law because such punishment did not violate any existing right recognized by paragraph 1(a). Mr. Justice Ritchie further concluded that the retention by Parliament of the death penalty as part of the Criminal Code after the enactment of the Bill of Rights constituted strong evidence that Parliament did not intend the word “punishment” in paragraph 2(b) to preclude the death penalty for a convicted murderer. Again, applying the argument of the British Columbia Court of Appeal, Ritchie J. saw the absence of a non obstante clause as evidence of Parliamentary intention that there was no conflict between the Bill of Rights and the death penalty. As Professor Berger has acutely observed:

The irony is that the absence of a non obstante clause was being used by the court to render operative a punishment which might otherwise violate section 2(b), when the opening words of section 2 state this to be the very purpose of including such a clause.

Having concluded on these grounds that paragraph 2(b) was not intended to include punishment by death for murder, it was not necessary for Ritchie J. to rule on the proper interpretation of “cruel and unusual punishment”. The Court did however, albeit obiter, indicate its view that the majority view of the Court of Appeal was the appropriate approach and that any punishment had to meet the test of being both “cruel” and “unusual”, and that since the death penalty had been a feature of the criminal law of Canada ever since Confederation, it cannot be said to have been an unusual punishment in the ordinary accepted meaning of that word. In similar fashion Ritchie J. endorsed the approach of the Court of Appeal majority judgment in rejecting the applicability of the United States decisions, concluding that the Canadian Bill of Rights and the United States Constitution “differ so radically in their pur-

45 Supra, note 43, at 196.
46 Supra, note 4, at 170.
pose and content that judgments rendered in interpretation of one
are of little value in interpreting the other.”

Chief Justice Laskin, writing for himself, Dickson and Spence JJ.,
while concurring with the majority that the death penalty did not
violate paragraph 2(b), did so on an entirely different basis. He
rejected the subordination of section 2 to section 1 and the argu-
ment that the proper interpretation of the Canadian Bill of Rights
can be discerned from the course of Parliamentary legislation with
the possibility, sanctioned by the majority, of implied repeal without
the presence of an non obstante clause. The Chief Justice also saw
the relevance of American decisions in the proper interpretation of
paragraph 2(b) in a different light than the majority. While at one
point in his judgment expressing his approval of their relevance in
somewhat muted terms (“the various judgments in the Supreme
Court of the United States, which I would not discount as being
irrelevant here”)
the Chief Justice in later parts of his judgment
analyzes the issue before the Court within the context of the prin-
ciples formulated by Mr. Justice Brennan in the Furman decision.

On the issue of whether the proper approach to paragraph 2(b)
was a disjunctive or conjunctive approach the Chief Justice sug-
gested that the American cases lent support to the view that the
words are not to be treated as conjunctive, requiring that punish-
ments be both cruel and unusual, but rather “as interacting ex-
pressions colouring each other, so to speak, and hence, to be con-
sidered together as a compendious expression of a norm.”
In adopting this approach, Laskin C.J.C. reasoned that this was “in line
with the duty of the Court not to whittle down the protections of
the Canadian Bill of Rights by a narrow construction of what is a
quasi-constitutional document.” These words are of particular sig-
nificance given the status of the Charter of Rights and Freedoms.

On the appropriate test to be applied in the determination of
whether a punishment violated paragraph 2(b), the Chief Justice
clearly affirmed that while originally the cruel and unusual punish-
ment clause may have been aimed at methods of punishment, it
cannot reasonably be limited to methods but may include punish-
ments which are disproportionate and excessive. As he stated:

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47 Supra, note 43, at 198.
48 Id., at 184.
49 Id.
50 Id.
Section 12

[T]here are social and moral considerations that enter into the scope and application of section 2(b). Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(b), but I doubt whether a more precise one can be found.51

Having said this, the Chief Justice then proceeded to deal with the appellants’ arguments within the context of the criteria articulated by Mr. Justice Brennan in Furman v. Georgia as restated by Mr. Justice McIntyre; that the death penalty was unusually severe and hence degrading to human dignity; that it was arbitrarily imposed; that it was not acceptable to a large segment of the population and that it was excessive in that it cannot be shown to have had any deterrent effect on murder that could not be realized by less drastic punishment. The Chief Justice rejected the argument that in the Canadian context the death penalty was arbitrarily imposed, since the death penalty was, in contradistinction to the statutes under challenge in Furman v. Georgia, a mandatory one. It is important to note that the rejection here of the arbitrariness test was not as to the appropriateness of the test but rather its applicability to the penalty under attack in Miller and Cockriell.

The Chief Justice was more sweeping in his rejection of the argument that the death penalty was unacceptable to a large segment of the population on the basis that this would be asking the court to define and apply paragraph 2(b) by a statistical measure of approval or disapproval of the death penalty. The Chief Justice went on to consider at some length the submissions based upon severity and excessiveness accepting as a premise that if these were made out then they would be sufficient to sustain the attack on the death penalty as cruel and unusual punishment. In the event, however, the Chief Justice concluded that the death penalty did not conflict with these principles. The primary ground for this conclusion was that the appellants had relied upon the argument that the purposes of punishment in relationship to the crime of murder of policemen and prison guards could be equally well served by a less drastic punishment such as life imprisonment. They argued and presented evidence designed to show that there was no convincing proof of general deterrence as far as murder was concerned by reason of the imposition of capital punishment. The Chief Justice rejected

51 Supra, note 42, at 183.
this argument on two grounds. First, he was of the view that the burden of proof was not, as the appellants had argued, and as Mr. Justice McIntyre had accepted, upon the Parliament of Canada to show that capital punishment was an effective deterrent; second, in assessing the issue of purposes of punishment it was not proper to limit the enquiry to one of general deterrence. Parliament could legitimately have regard to retribution or to the social outrage that may reasonably find expression in a penal policy of a mandatory death penalty for what the community regards as the most outrageous types of murder. Furthermore, there was a legitimate social purpose in protecting police officers and prison guards in relation to prisoners already serving life sentences for whom the death penalty would operate as a deterrent.\(^5\)

The second case to consider in depth the meaning of paragraph 2 (b) is that of McCann v. The Queen\(^6\) in which a group of prisoners at the British Columbia Penitentiary sought a declaratory judgment in the Federal Court of Canada that their indefinite detention under conditions of solitary confinement in the British Columbia Penitentiary constituted cruel and unusual punishment and therefore could not lawfully be authorized by subsection 2.30(1) of the Penitentiary Service Regulations\(^7\) (the provision which permits the Warden to place a prisoner in administrative segregation for the good order and discipline of the institution). At the time of the McCann case only the decision of the British Columbia Court in Miller and Cockriell had been rendered. The prisoner/plaintiffs in the McCann case urged that Mr. Justice McIntyre's criteria were the appropriate ones to apply. Mr. Justice Heald, while he acceded to the view that the terms "cruel" and "unusual" were to be viewed disjunctively as a compendious term, proceeded to deal with the terms conjunctively, first characterizing the treatment of the prisoners in the segregation unit as "cruel", then as "unusual". The primary basis for Heald J.'s conclusion was that, based on the evidence of the expert witnesses and the admission of the Director of the Penitentiary, the treatment served no positive penal purpose. Moreover, Mr. Justice Heald went on to state that:

\(^5\) Id., at 189-90. For further comment on the Miller and Cockriell case, see Berger, supra, note 4; W. S. Tarnopolsky, Just Desserts or Cruel and Unusual Treatment or Punishment? (1975) 10 OTT. L. REV. 1; J. S. Leon, Cruel and Unusual Punishment: Sociological Jurisprudence and the Canadian Bill of Rights (1978) 36 U. T. FAC. L. REV. 222.


\(^7\) Now s. 40 SOR/79-625.
[E]ven if it served some positive penal purpose, I still think the treatment... would be cruel and unusual because it is not in accord with public standards of decency and propriety, since it is unnecessary because of the existence of adequate alternatives.\textsuperscript{55}

In the \textit{McCann} case the prisoners conceded that under appropriate circumstances it was a legitimate penal purpose to segregate certain prisoners but argued and offered evidence that the purpose could be fulfilled without inflicting the gratuitous suffering and unnecessary rigour which existed in the solitary confinement unit at the British Columbia Penitentiary. Heald J. accepted this argument, finding that "adequate alternatives do exist which would remove the 'cruel and unusual' aspects of solitary while at the same time retaining the necessary security aspects of dissociation."\textsuperscript{56} Though evidence had also been offered and argument presented that the confinement of the prisoners was arbitrary in that it had been applied other than in accordance with ascertained or ascertainable standards, Heald J. did not refer to this test in his judgment. He did however bolster his conclusion that the treatment of the prisoners in the segregation was unusual by finding that even given the restricted meaning ascribed to that phrase by the majority of the British Columbia Court of Appeal in \textit{Miller and Cockriell}, that is, its ordinary and natural meaning as defined by the dictionary, certain aspects of the regime came within that definition. In this respect he compared the conditions at the British Columbia Penitentiary with those existing in other Canadian segregation units.

The issue of whether the conditions of solitary confinement in the British Columbia Penitentiary constituted cruel and unusual punishment arose again for decision in a rather different way in the subsequent case of \textit{R. v. Bruce, Wilson and Lucas}.\textsuperscript{57} That case involved criminal charges of, \textit{inter alia}, unlawful confinement brought against three prisoners, including one who had been a plaintiff in the \textit{McCann} case, who had taken hostages inside the penitentiary at a time when they were in the prison population. Their defence was that of necessity: that they honestly believed that they were about to be placed back in solitary confinement and took hostages as the lesser evil to avoid the greater evil of being placed in confinement amounting to the imposition of cruel and unusual punishment.

\textsuperscript{55} \textit{Supra}, note 53, at 368. For a comprehensive Review of the issue of Solitary Confinement see M. Jackson, \textit{Prisoners of Isolation Solitary Confinement in the Canadian Penitentiary} (1983).

\textsuperscript{56} \textit{Id.}, at 370.

\textsuperscript{57} (1977) 36 C.C.C. (2d) 158 (B.C.S.C.).
or treatment. Mr. Justice Toy, rendering judgment after the Supreme Court of Canada decision in *Miller and Cockriell*, declined to follow the Heald judgment in *McCann*. Toy J. was of the opinion that the treatment in solitary confinement was neither cruel nor unusual according to the dictionary definition of those words. Having thus concluded, Toy J. proceeded, however, to apply to the overall conditions in solitary confinement the approach and formula construing paragraph 2(b) adopted by Chief Justice Laskin in *Miller and Cockriell*, “in the absence of any other guide from the majority judgment”.

That formula he understood as involving a consideration of whether the punishment prescribed is so excessive as to outrage standards of decency. Applying that formula, after noting that:

> Canadian society has not had to concern itself with what goes on behind the prison walls, and unlike the subject of capital punishment, there have not been made apparent any discernible guidelines that would indicate to me what the current standard of public decency is.

Toy J. concluded that the people generally admitted to solitary confinement under administrative segregation are not “subjected to a harshness so severe that public decency dictates that the courts should decide that it be stopped.” As in the *McCann* case Toy J. had before him evidence concerning the existence of alternative measures to the solitary confinement regime which would ensure that the security and good order of the institution would not be undermined. However he dismissed that evidence as irrelevant since in his view this test had not found favour in any of the judgments of the Supreme Court of Canada. This part of Mr. Justice Toy’s judgment is most suspect since, as I have sought to explain, the Chief Justice, while concluding that the appellants in *Miller and Cockriell* had not sufficiently discharged the onus upon them to prove that life imprisonment was an adequate alternative to capital punishment having regard not just to deterrence but also retributive purposes of punishment, clearly signalled his acceptance of the excessive punishment test.

The fourth case, which concludes this survey of recent Canadian case law on paragraph 2(b), is *R. v. Shand* where Judge Borins,

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58 *Id.*, at 169.
59 *Id.*, at 170.
60 *Id.*
61 (1976) 29 C.C.C. (2d) 199 (Ont. Co. Ct.).
in considering the application of paragraph 2(b) to the minimum mandatory sentence for importation of a narcotic under the Narcotic Control Act, applied the tests developed by Mr. Justice McIntyre. Judge Borins concluded that:

In relation to the crime committed, the person who committed it, the nature, quantity and value of the drug involved, the current range of sentences for closely related offences, the sentences provided for closely related offences in the Food and Drugs Act and sentences for comparable crimes in other jurisdictions, a term of imprisonment for seven years is unusually excessive punishment. In my view a compulsory sentence of seven years for a non-violent crime imposed without consideration for the individual history and background of the accused is so excessive that it “shocks the conscience” and because of its arbitrary nature fails to comport with human dignity. I appreciate the need to deter potential offenders from increasing the supply of narcotic substances in Canada. However, I am of the opinion that this element of general deterrence is provided by the provision of a maximum penalty of life imprisonment. Finally, even assuming some deterrent value, a compulsory sentence of seven years in this case is completely unnecessary because it serves no positive penal purpose more effectively than a less severe punishment. The existence of adequate alternatives, absent the mandatory sentence of seven years, enable the Court to fulfil the legitimate objects of the criminal law.

In Shand Judge Borins did not hold that the seven year mandatory minimum was cruel and unusual punishment in all cases of importation. He held that it was in the particular case before him and therefore declined to apply that sentence.

On appeal, the Ontario Court of Appeal reversed Judge Borins. In so doing, however, the court, while expressing a need for caution in light of the then pending appeal before the Supreme Court of Canada of the Miller and Cockriell case, accepted as appropriate several of the McIntyre tests. The court stated:

Therefore, we are prepared to accept that the so-called “disproportionality principle” . . . has relevance to what is cruel and unusual punishment, but it is a principle that needs to be developed in the Canadian context of our constitution, customs and jurisprudence. In this development great assistance can be obtained from the American precedents, across their rather broad spectrum, and to a lesser extent, from some of the articles in the American periodicals.

As developed during the argument on whether the words “cruel and unusual” should be read conjunctively or disjunctively, it be-

62 Supra, note 13.
63 Supra, note 61, at 234.
64 (1976) 30 C.C.C. (2d) 23 (Ont. C.A.).
came apparent that there is a “core meaning” to the phrase “cruel and unusual treatment or punishment”. It has yet to be distilled and enunciated in Canada. In provincial Courts of Appeal, that process will best be carried out on a case by case basis.

Assuming that disproportionality is a matter to be considered,... In our view a minimum sentence of seven years for importing a drug contrary to the Act is not so disproportionate to the offence that the prescribed penalty is cruel and unusual. The drug problem in Canada is still of major proportions....

This type of national evil requires the opinion of Parliament as to appropriate penalties, not that of individual Judges.65

The Court of Appeal looked to some of the American cases and in fact found as the most persuasive the New York decision of The People v. Broadie66 in which statutory minimum sentences for drug offences were upheld against challenges based on the Eighth Amendment. While accepting the disproportionality test, the Court of Appeal rejected Judge Borin’s application of the arbitrariness test based on the pattern of prosecutorial discretion. The evidence before Judge Borins had shown that in Ontario relatively few charges were laid under the importation section. He compared the fact that there were five times the number of convictions for importation in Quebec than there were in Ontario, with only about one-third the number of total narcotic convictions then in Ontario. The Court of Appeal affirmed that in its judgment the Supreme Court of Canada decision in R. v. Smythe67 had immunized prosecutorial discretion from challenge under the Bill of Rights.

Changes in the Law Introduced by Section 12 of the Charter of Rights and Freedoms

Section 12 uses the identical language in phrasing the right protected by section 12 as did paragraph 2(b) of the Bill of Rights. A number of submissions were made to the Parliamentary Committee considering the Charter, recommending that the words be changed to read “cruel or unusual” to make it clear that the disjunctive approach would prevail in any future litigation. Other submissions suggested that Canada adopt the language of the Universal Declaration of Human Rights of 1948, Article 5 of which reads:

.Id., at 37-39.
No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.\(^6\)

Interestingly enough, the original Bill introduced in 1959 of the Canadian Bill of Rights had used this language which was, however, replaced by the "cruel and unusual punishment or treatment" formulation. The decision of the Privy Council in Runyowa v. Regi\text{n}am\(^9\) suggests, however, that the cruel and unusual punishment formulation may encompass more than the language embodied in the United Nations Declaration. In that case a challenge had been made to a mandatory death penalty imposed on two young men for setting a fire. The challenge was based on a provision in the Southern Rhodesia Constitution which was cast in the language of the Universal Declaration. Reliance was made upon United States authority supporting the principle of disproportionality and the Privy Council held the U.N. form of wording was aimed at the type or mode of punishment but, unlike the U.S. formulation, was not designed to permit any inquiry into the appropriateness or excessiveness of a punishment for a particular offence.

On the first issue of whether the conjunctive or disjunctive approach will prevail in future cases, I would suggest that the fact that Parliament continued to use the same language in section 12 as in paragraph 2(b) of the Bill of Rights cannot be taken as resolving the matter in favour of a conjunctive approach. It is quite clear that the courts have split on this issue and it is equally clear that those judges who favoured the conjunctive approach also favoured a narrow construction of paragraph 2(b) and a rejection of the relevance of the American authorities principally on the basis that the nature of the United States Constitution was radically different from that of the Canadian Bill of Rights. A strong argument can now be made that the entrenchment of the Charter of Rights brings the status of rights in the Charter in much closer approximation to those rights guaranteed in the United States Constitution and therefore the grounds adopted by the majority of the Supreme Court in Miller and Cockriell for distinguishing the relevance of the United States approach are no longer cogent. Quite apart from this point, it is further suggested that the majority decision of Mr. Justice Ritchie in Miller and Cockriell, premised as it is on the frozen rights theory, the subordination of paragraph


2(b) to section 1 and the possibility of implied repeal of the Bill of Rights does not reflect an appropriate starting point for a proper interpretation of section 12 of the Charter of Rights.

Section 12 of the Charter is not subordinated to the provisions of section 7 which is the modified successor to paragraph 1(a) and which guarantees the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice (as opposed to due process of law). Rather, both section 7 and section 12 are qualified by section 1 which subjects all rights in the Charter to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The survival of Ritchie J.'s analysis in Miller and Cockriell that a punishment cannot be challenged under the cruel and unusual punishment clause so long as it is imposed through due process of law (or in accordance with the principles of fundamental justice) would require the conclusion that so long as a punishment is so imposed it constitutes a reasonable limit prescribed by law. Such a conclusion carries its own refutation because it gives no independent meaning to section 1. If the principles of fundamental justice were intended to have the overriding qualifying effect which this argument would require it would have been easy enough for Parliament to have said so. Quite clearly section 1 means something other than the qualifying words of section 7. Paralleling the demise of this part of Ritchie J.'s analysis is the undermining of the concept of implied repeal by the explicit provisions of the Charter in section 33 which not only provide for the non obstante clause (as did the Bill of Rights) but limit the duration of such a clause.

It is the writer's judgment that Chief Justice Laskin's view in the Miller and Cockriell case that a broad approach should be taken to the cruel and unusual punishment clause "in line with the duty of the Court not to whittle down the protections . . . of what is a quasi-constitutional document" is more in keeping with the entrenchment of the clause in section 12 of the Charter. The elevation of Mr. Justice McIntyre to the Supreme Court of Canada and the other significant changes in the composition of Canada's ultimate court of appeal suggest that future litigation will focus on the McIntyre-Laskin tests and that they will be subjected to a process of refinement in the Canadian context.

Some guidance in terms of the areas in which the law may develop can be gathered from the American experience where the

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70 Supra, note 43.
primary focus for the application of the Eighth Amendment has been in the prison context. It is here that the courts have used the Eighth Amendment as a basis for ensuring that minimum standards of decency and civilized behaviour are observed. There have been numerous successful challenges to conditions of solitary confinement overcrowding, unsanitary conditions and other situations where the courts have felt that the practices not only contravened elemental conditions of decency but also could not be justified on any legitimate penal purpose. While the original focus of much of the litigation was on particular prison practices such as solitary confinement, the more recent case law has focussed on the so-called "totality of conditions" in which some United States courts have held that prison conditions and practices which might not be unconstitutional if viewed individually can, when viewed as a whole, make confinement cruel and unusual punishment.

The focussing of section 12 of the Charter on prison conditions and practices would be particularly appropriate given that typically such practices and conditions are not specifically prescribed by Parliament but are rather applied through the interpretation of very broadly drafted legislative provisions which are made specific through administrative policy-making. Judicial monitoring of such practices against the standard of section 12 would therefore involve the courts not in the overriding of clearly expressed legislative intention but rather in the superintendency of decision-making which has always been the most immunized from public scrutiny. The

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Supreme Court of Canada in *Martineau No. 2* 273 has already made it clear that prison decisions may be subject to judicial review where there is a failure to comply with the duty to act fairly which results in serious injustice. In the *Solosky* 74 decision the Court has indicated that judicial review of prison rules is appropriate to ensure that in the formulation and application of those rules an appropriate balance is made between the fundamental civil rights of a prisoner which have not been taken away expressly or implicitly by statute and the need to maintain institutional order. It is suggested that a broad approach to section 12 based on the application of the McIntyre-Laskin tests can properly be viewed as a vital part of the judicial armoury to ensure that the rule of law runs behind prison walls.

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74 *Solosky v. The Queen (1979) 50 C.C.C. (2d) 495.*