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**The Application of the Cruel and Unusual Punishment  
Clause under the Canadian Bill of Rights**

**Stan Berger\***

Section 2(b) of the *Canadian Bill of Rights* prohibits those who are responsible for the execution of federal laws from imposing cruel or unusual treatment or punishment. More particularly, it directs the courts to inquire into the quality of those treatments and punishments which have been imposed or which are authorized by some federal legislation.

It reads as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared and in particular 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.<sup>1</sup>

In 1960, when the *Canadian Bill of Rights* was enacted, penology had advanced to the point where a judge could hardly be expected to inquire into the quality of punishment without regard to its social consequences. However, judges were uncomfortable with the thought of playing an active role in the legislative process and sought to restrict the scope of their inquiry to the narrowest possible field. They did so by giving the words "cruel" and "unusual"

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<sup>1</sup> *Canadian Bill of Rights*, S.C. 1960, c.44; R.S.C. 1970, Appendix III.

their literal meanings. The words were read conjunctively so that if the impugned punishment could not be characterized as both "cruel and unusual" it could not run foul of the *Canadian Bill of Rights*. Thus in one case,<sup>2</sup> it was held that a sentence of whipping for rape under section 136 of the *Criminal Code*,<sup>3</sup> 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 and in school is to some extent enforced by corporal punishment. If not the most common it is certainly one of the most common forms of punishment.<sup>4</sup>

In that case the Court neatly avoided any examination of the quality of the punishment imposed. In others,<sup>5</sup> where the Court had been forced to address the issue squarely, they were quick to dismiss it as not bearing any significance to the outcome of the case. In these latter cases one receives the distinct impression that the judges were guided by their own instincts rather than by any well-defined principles of law. This was regrettable because section 2(b) was obviously intended to protect the individual against certain kinds of punishments and if judges were not willing to set out which punishments were covered by the statute, little reliance could be placed on it. The position of those who were punished pursuant to federal laws remained, for some fifteen years, as uncertain as it had been before the enactment of the *Canadian Bill of Rights*.

The last two years have produced three remarkable cases which focused attention on a section of the *Canadian Bill of Rights* which appeared to be destined for oblivion. *R. v. Miller and Cockriell*,<sup>6</sup> *McCann v. The Queen*<sup>7</sup> and *Regina v. Shand*<sup>8</sup> have developed a set of criteria which will enable future courts to measure treatments and punishments against the elusive standards set out in section 2(b). The comprehensive manner in which the Courts have dealt

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<sup>2</sup> *Regina v. Dick, Penner & Finnigan* (1965) 1 C.C.C. 171.

<sup>3</sup> *Criminal Code*, S.C. 1953-54, s.136; R.S.C. 1970, c.C-34, s.144; since amended to delete punishment by whipping, *Criminal Law Amendment Act, 1972*, S.C. 1972, c.13, s.70.

<sup>4</sup> *Supra*, note 2, 177.

<sup>5</sup> *Re Laporte and the Queen* (1972) 8 C.C.C. (2d) 343; *R. v. Hatchwell* (1974) 14 C.C.C. (2d) 550 (B.C.C.A.); reversed on other grounds (1975) 54 D.L.R. (3d) 419, 21 C.C.C. (2d) 201, 4 W.W.R. 68 (S.C.C.).

<sup>6</sup> (1975) 63 D.L.R. (3d) 193, 24 C.C.C. (2d) 401 (B.C.C.A.); (1976) 70 D.L.R. (3d) 324 (S.C.C.).

<sup>7</sup> (1975) 68 D.L.R. (3d) 661, 29 C.C.C. (2d) 337 (F.C.T.D.).

<sup>8</sup> (1976) 64 D.L.R. (3d) 626 (Ont. County Ct); (1976) 70 D.L.R. (3d) 395 (Ont. C.A.).

with section 2(b) in these cases renders previous judicial statements emanating from a Canadian court hopelessly inadequate. On a broader scale, these judgments reflect the prevailing views of judges from the lowest to the highest court in Canada on the status of the *Canadian Bill of Rights*.

This study is an attempt to place these three recent cases in their proper perspective. It will begin with a brief historical survey of the "cruel and unusual punishment" clause; its origination in England and its development in the United States. This will be followed by a critical evaluation of the three Canadian cases — *Miller and Cockriell*, *McCann* and *Shand*. An attempt will be made to draw out of these cases a set of practical guides for determining whether a particular punishment or treatment is cruel and unusual. Attention will also be given to the status attributed to the *Canadian Bill of Rights* since section 2(b) can only serve a useful purpose if judges are prepared to regard the Act which sustains it with special significance. The study will conclude with some general observations on the efficacy of remedies available to the victim of cruel and unusual punishment. No matter how highly they are praised, rights and freedoms are only truly respected when there is recourse against those who would disregard them.

## I. The Origin and Development of Section 2(b) of the Canadian Bill of Rights

### A. Original Meaning

The first reference to cruel and unusual punishment occurs in the English *Bill of Rights* of 1689:

Whereas the late King James the Second by the assistance of diverse and evill councillors, judges and ministers imployed by him did endeavour to subvert and extirpate the Protestant religion and the lawes and liberties of this Kingdome ... and whereas excessive baile hath beene required ... and excessive fines have beene imposed. And *illegal* and cruel punishments inflicted... And thereupon the said Lords ... doe in the first place ... for the vindicating and asserting their ancient rights and liberties declare ... [t]hat excessive baile ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.<sup>9</sup>

There is some difference of opinion as to which punishments were meant to be prohibited. It has been suggested that the "cruel and unusual punishment" clause was meant to prohibit barbarous methods of punishment.<sup>10</sup> The memory of such grotesque scenes as were enacted during the treason trials of 1685 (*The Bloody*

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<sup>9</sup> *Bill of Rights*, 1689, 1 Wm & Mar. (2d Sess.), c.2 (U.K.) (emphasis added).

<sup>10</sup> Macaulay, *History of England* (1964), vol.II, 371.

*Assize*) could not have been far from the minds of the drafters of the clause. Yet others, such as Anthony Granucci, have argued that the clause was prompted by the judgment in the trial of Titus Oates and prohibited not barbarous methods of punishment but penalties which were excessive.<sup>11</sup> Both views have been rejected in a recent Canadian article dealing with the subject.<sup>12</sup> The learned authors argue that there is not enough evidence to connect the clause with either of these events and in any case there is no distinction to be made between them, since on both occasions the punishments imposed were barbarous and excessive. They conclude that the clause was no more than an "objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court".<sup>13</sup>

While Granucci's reasons for denying any causal connection between *The Bloody Assize* and the "cruel and unusual punishment" clause appear less than convincing,<sup>14</sup> there is sufficient evidence to support his conclusion that the clause was a reiteration of the English policy against disproportionate penalties. The Oates affair still provides the only recorded contemporary uses of the terms "cruel and unusual" and "cruel and illegal". In response to Oates' petition for a release from judgment, the dissenting minority in the House of Lords considered his sentence to be contrary to the newly passed *Bill of Rights*.<sup>15</sup> The House of Commons agreed and condemned the punishment as "cruel and illegal".<sup>16</sup>

The distinction made between Oates' punishment and that administered in *The Bloody Assize* also appears to be justified. Of the punishments inflicted upon Oates, only the whippings would qualify as barbarous. Granucci's view of the whippings derives from the diary of John Evelyn<sup>17</sup> which suggests that while the whippings were severe they did not amount to torture. Welling and Hipfner, for their part, rely on Macaulay's account<sup>18</sup> which is far from objective. As between the two, a contemporary account

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<sup>11</sup> Granucci, "Nor cruel and unusual punishment inflicted": the original meaning (1969) 57 Calif.L.Rev. 839.

<sup>12</sup> Welling & Hipfner, *Cruel and Unusual? Capital Punishment in Canada* (1976) 26 U.of T.L.J. 55.

<sup>13</sup> *Ibid.*, 59.

<sup>14</sup> *Ibid.*, 58.

<sup>15</sup> Howell (ed.) *Cobbet's Complete Collection of State Trials* (1816), vol.10, column 1325.

<sup>16</sup> Gray, *Debates in the House of Commons From the Year 1667 to the Year 1624* (1763), vol.9, 287.

<sup>17</sup> De Beer (ed.), *The Diary of John Evelyn* (1955).

<sup>18</sup> *Supra*, note 10, 370-1.

is to be preferred to that of a nineteenth century Whig historian whose politics set the tone for his writing.

Granucci's conclusion receives support in the text of the legislative enactment itself.<sup>19</sup> The tenor of the sections cited above shows that there was a desire to break away from the excesses of the past. It is significant that in seventeenth century England it was common to use the word "cruel" as a synonym for the words "severe" and "excessive".<sup>20</sup>

### B. *Judicial Developments*

English courts treated the clause as a statement of principle and not as a check on the English Parliament.

American courts were at first cautious in their interpretation of the clause. Thus the infliction of death was not considered to be "cruel and unusual" *per se*.<sup>21</sup> However, in a dissenting United States Supreme Court opinion in 1892, Field J. first advanced the proposition that excessive punishment violated constitutional limitations:

The inhibition [of the Eighth Amendment] is directed, not only against punishments of the character mentioned, [torture] but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.<sup>22</sup>

Had this opinion prevailed, a prison sentence of fifty-four years for engaging in numerous illegal liquor sales would have been struck down as cruel and unusual. While the sentence could not be categorized as torture amounting to outright barbarity, it was unreasonable and through the test of disproportionality,<sup>23</sup> Field J. was able to underline this point.

The United States Supreme Court first invalidated a penalty in 1910. In *Weems v. United States*<sup>24</sup> a public official in the Philippines had been convicted of falsifying an official document to conceal the wrongful disposition of small sums of money. He was fined and sentenced to fifteen years of *cadena temporal*, an Hispanic punishment consisting of hard and painful labour, constant

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<sup>19</sup> *Supra*, p.163.

<sup>20</sup> See the quotation from Swift in *Oxford English Dictionary* (1933), vol.2, 1216; and Blackstone's discussion of punishments of unreasonable severity in *Commentaries on the Laws of England* 18th ed. (1778), vol.4, 16-17.

<sup>21</sup> *Wilkerson v. Utah* 99 U.S. 130 (1878) (death by firing squad); *In Re Kemmler* 136 U.S. 436 (1890) (death by electrocution).

<sup>22</sup> *O'Neil v. Vermont* 144 U.S. 323, 339-40 (1891).

<sup>23</sup> For a more detailed discussion concerning this test, see text *infra*, p.178.

<sup>24</sup> 217 U.S. 349 (1909).

enchainment and a number of accessory penalties, including subjection to continual surveillance for life and civil interdiction (deprivation of parental authority and of the right to dispose of property *inter vivos*). In a 4-2 decision the Court held that the sentence was excessive in relation to the crime committed. Taking a comparative approach, McKenna J. said that it was a "precept of justice that punishment for crime should be graduated and proportional to [the] offence".<sup>25</sup> *Cadena temporal* was juxtaposed against lesser penalties prescribed for a variety of more serious federal crimes, including certain degrees of homicide and punishments for similar crimes under American and Philippine law. In response to the suggestion that the framers intended to prohibit only barbarous methods of punishment, it was said that

it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth.<sup>26</sup>

Six years later the *Weems'* extension of the Eighth Amendment<sup>26a</sup> came under attack in *Badders v. United States*.<sup>27</sup> Mr Justice Holmes, citing a pre-*Weems'* *dictum*, said, "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one".<sup>28</sup>

It was not until 1958 in the case of *Trop v. Dulles*<sup>29</sup> that the Supreme Court had occasion to strike down another penalty as unconstitutional. This time the penalty was loss of citizenship for desertion in wartime. Warren C.J. stated that the basic concept underlying the Eighth Amendment was "nothing less than the dignity of man", and that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".<sup>30</sup>

These were the significant developments prior to 1972. In that year, the United States Supreme Court handed down its celebrated decision in *Furman v. Georgia*.<sup>31</sup> Unfortunately the decision beclouds

<sup>25</sup> *Ibid.*, 367.

<sup>26</sup> *Ibid.*, 372-73.

<sup>26a</sup> U.S. Const. amend. VIII. The Eighth Amendment reproduces the words of the English Bill of Rights almost verbatim: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

<sup>27</sup> 240 U.S. 391 (1916).

<sup>28</sup> *Howard v. Fleming* 191 U.S. 126, 136 (1903).

<sup>29</sup> 356 U.S. 86 (1957).

<sup>30</sup> *Ibid.*, 100-101.

<sup>31</sup> 408 U.S. 238 (1971).

more than it clarifies. Each justice wrote a separate opinion and it is difficult to find any agreement among the majority as to the nature of the question before them or the type of tests appropriately employed in Eighth Amendment litigation. Nevertheless, the decision provided the most thorough analysis of the Eighth Amendment to that date, and was given considerable attention by the Canadian Courts in *Miller and Cockriell*,<sup>32</sup> *McCann*<sup>33</sup> and *Shand*.<sup>34</sup>

The *Furman* case consolidated three writs of *certiorari* reviewing death sentences imposed on three men (two had been convicted of rape and one of murder). These men had been convicted under statutes which gave the jury the option of imposing a sentence of death or life imprisonment upon a finding of guilt. In a 5-4 decision, the Supreme Court ruled that these statutes violated the prohibition against cruel and unusual punishment; the jury option could only be exercised arbitrarily and this was incompatible with the rights protected under the Eighth Amendment. Brennan J. spoke for the majority:<sup>35</sup>

When the punishment of death is inflicted in a trivial number of cases in which it is legally available the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed it smacks of little more than a lottery system.<sup>36</sup>

This theme was not new; the majority in *Furman*, like the Convention Parliament of 1688, was concerned with the abuses that result when enormous power is placed in the hands of a select few without any guidelines for its exercise.

There was further agreement among the majority on another point. The interpretation of "cruel" punishment advanced by White J., like the more elaborate tests of cruel and unusual punishment of Brennan and Marshall JJ., emphasized that there must be "justification" for the punishment imposed. According to White J., while execution could be justified in terms of deterrence and retribution, those ends were not being served because of the infrequency of imposition between 1967 and 1972. Brennan and Marshall JJ., on the other hand, accepted as their starting premise that capital punishment *per se* was "excessive" because it served no legitimate social purpose any more effectively than a less severe punishment.<sup>37</sup>

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<sup>32</sup> *Supra*, note 6.

<sup>33</sup> *Supra*, note 7.

<sup>34</sup> *Supra*, note 8.

<sup>35</sup> White, Marshall, Douglas, Stewart & Brennan JJ. constituted the majority.

<sup>36</sup> *Supra*, note 31, 293.

<sup>37</sup> *Ibid.*, 312-13 *per* White J., 300 *per* Brennan J., 354-59 *per* Marshall J.

Although it would not become more effective if it were used more often, the fact that it had been used sporadically indicated that there were grave societal doubts as to its efficacy.

It is to be noted that the word "excessive" was used here in a completely different context than it had been in *Weems*.<sup>38</sup> The logical extension of *Weems* would be that since murder and rape are among the most severe offences, they demand the most severe punishment. Indeed, by examining punishments for such crimes in other jurisdictions, it would become apparent that capital punishment was not an excessive penalty for either offence. The "necessity test" adopted in *Furman* effectively overcomes the "proportionality test" used in *Weems* by establishing an inherent relationship between the punishment and the crime instead of a relative standard which measures the punishment in comparison with that imposed for similar and less serious crimes within and outside the United States.

While *Furman* illustrates the possibility of using the necessity test to invalidate a punishment which is found to be proportionate according to the *Weems* test, it may also be used to validate a punishment which is found to be disproportionate. Since it is possible that the punishments imposed for other crimes might be too lenient,<sup>39</sup> an independent assessment of the punishment prescribed for the crime in question might result in a finding favorable to its continuance. In spite of these differences, the two tests are not always in conflict. As will be illustrated later in this article,<sup>40</sup> the *Weems* test is useful in determining whether a particular punishment is appropriate with respect to retribution.

To decide whether capital punishment was justified, Brennan and Marshall JJ. looked at the three possible social purposes which might be served — deterrence, protection of society from the criminal and retribution. Brennan J. argued that most capital crimes could not be deterred by the threat of punishment because those who committed such crimes did not act rationally.<sup>41</sup> For punishment to have deterrent effect the offender must be in a state of mind to weigh the consequences of his actions. Marshall J. took a less extreme stand; while recognizing that the death penalty might have some deterrent effect, he concluded that it was unnecessary

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<sup>38</sup> *Supra*, note 24.

<sup>39</sup> See Holmes J.'s discussion of *Weems* in *Badders*, *supra*, note 27, see *infra*, p.166.

<sup>40</sup> *Infra*, p.178.

<sup>41</sup> *Supra*, note 31, 301.



because imprisonment would be just as effective.<sup>42</sup> Protection of society from the criminal was not considered a legitimate social purpose in view of the fact that convicted murderers generally behaved themselves while in prison and had low rates of recidivism upon their ultimate release. Lastly, both judges rejected retribution as a justification for capital punishment: "The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper".<sup>43</sup>

The effect of *Furman* was recently revealed in a series of United States Supreme Court decisions.<sup>44</sup> The majority of the Court recognized that a mandatory death penalty, other than at the arbitrary option of the jury, will not run counter to the prohibition against cruel and unusual punishment as long as it is limited in its application to a narrowly defined offence.<sup>45</sup> Thus, due consideration would be given to such matters as the character and record of the offender and the circumstances surrounding the commission of the offence. This would allow the advantages of the jury option to be retained while eliminating its major weakness.

## II. Three Case Studies

### A. *Capital Punishment: Regina v. Miller and Cockriell*<sup>46</sup>

Until the enactment of the *Criminal Law Amendment Act* (No. 2, 1976),<sup>47</sup> capital punishment was authorized for certain crimes in Canada. Unlike the mode of imposition authorized by the statutes in *Furman*, juries in Canada were not given any discretion to choose between the death penalty and life imprisonment since the mandatory sentence for a capital crime was death.<sup>48</sup>

The defendants in *Miller and Cockriell* were convicted of murder punishable by death for the fatal shooting of a police officer. One

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<sup>42</sup> *Ibid.*, 347.

<sup>43</sup> *Ibid.*, 345, *per* Marshall J.

<sup>44</sup> *Gregg v. Georgia* 44 U.S.L.W. 5230 (1976); *Woodson & Waxton v. North Carolina* U.S.L.W. 5267 (1976); *Jurek v. Texas* 44 U.S.L.W. 5262 (1976); *Roberts v. Louisiana* 44 U.S.L.W. 5281 (1976).

<sup>45</sup> Since both Brennan and Marshall JJ. are of the opinion that capital punishment cannot be justified no matter how it is imposed, they have not shared the majority view. See, *e.g.*, *Jurek v. Texas*, *supra*, note 44.

<sup>46</sup> *Supra*, note 6.

<sup>47</sup> S.C. 1974-75-76, c.105.

<sup>48</sup> R.S.C. 1970, c.C-34, ss.47(1), 75(2); R.S.C. 1970, c.C-34, s.214, as am. by s.214(2), S.C. 1973-74, c.38, s.2; R.S.C. 1970, c.C-34, s.218, as am. by s.218(2), S.C. 1973-74, c.38, s.3.

of the primary grounds of appeal was that the death penalty was cruel and unusual punishment, contrary to the *Canadian Bill of Rights*. Although capital punishment had been abolished by the time the case came before the Supreme Court of Canada, the point raised was not a moot one. Section 25(2) of the *Criminal Law Amendment Act*<sup>49</sup> provided that if a person under sentence of death at the time the Act came into force had appealed his conviction and the appeal had been dismissed after the Act had taken effect, his sentence would become one of life imprisonment and he would only be eligible for parole after twenty-five years. If section 2(b) of the *Canadian Bill of Rights* rendered that portion of sections 214 and 218 of the *Criminal Code* which referred to the death penalty inoperative, then the appellants could not have been found guilty of "murder punishable by death" and section 25(2) could not apply. Thus the appellants' right to parole during the first twenty-five years of their sentence depended on whether the death penalty was cruel and unusual punishment.

Only one aspect of the majority judgment in the British Columbia Court of Appeal deserves attention. Reading the words "cruel and unusual" conjunctively, the majority reasoned that if Parliament thought the sentence of death "unusual", then in 1973 when it amended the *Criminal Code* it would have provided that for all crimes where the prescribed sentence was death, the sentence would continue to operate notwithstanding the *Canadian Bill of Rights*.<sup>50</sup> 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. To the Court, the insertion of the *non-obstante* clause is unnecessary with respect to section 2(b), even though no words in section 2 indicate that it should have such a limited effect.

In his dissenting judgment, McIntyre J.A. adopted the approach used by Brennan J. in the *Furman* case by reading the words "cruel" and "unusual" disjunctively.<sup>50a</sup> The basis for this view is that the word "unusual" was inadvertently used in the English *Bill of Rights* — an argument which may be reasonably inferred from the way in which the word "unusual" was introduced into that Act.<sup>51</sup>

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<sup>49</sup> S.C. 1974-75-76, c.105.

<sup>50</sup> *R. v. Miller & Cockriell* (1975) 63 D.L.R. (3d) 193, 246 (B.C.C.A.).

<sup>50a</sup> *E.g.*, "cruel punishment however usual in the ordinary sense of the term could come within the proscription", *ibid.*, 257.

<sup>51</sup> *Supra*, p.163-64.

The Act explains that the prohibitions contained therein were motivated by the "illegal" and cruel punishments inflicted during the reign of James II. Then, for some inexplicable reason, the word "unusual" is substituted for the word "illegal". McIntyre J.A. therefore assumed that "unusual" referred to punishments not authorized by law and devoted his attention to the word "cruel". Only three members of the Supreme Court were prepared to take this approach.<sup>52</sup>

McIntyre J.A. suggested a five-fold test for determining whether capital punishment violated section 2(b) of the *Canadian Bill of Rights*.<sup>53</sup> The test may, however, be applied to all treatments and punishments authorized or imposed by federal laws. The preliminary question is whether capital punishment serves any legitimate social purpose (hereinafter referred to as the "social purpose test"). If it does not, it is cruel and unusual but even if it does, it will be considered cruel and unusual if it does not accord with public standards of decency (the "public decency test"); if it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards (the "arbitrariness test"); if it is unnecessary because of the existence of adequate alternatives (the "necessity test"); and if it is excessive and out of proportion to the crimes it seeks to restrain (the "disproportionality test").<sup>54</sup>

#### i) The public decency test

The *Canadian Bill of Rights* begins by declaring that "in Canada there have existed and shall continue to exist the following human rights and fundamental freedoms".<sup>55</sup> These words express an intention to set out rights and freedoms which do not vary with time. This intention cannot be supported by the public decency test put forth by McIntyre J.A., who sought to show that capital punishment no longer commanded that "degree of unanimity required to give it general social acceptance".<sup>56</sup> The logical inference to be drawn from his statement is that if capital punishment was accepted by the majority of the Canadian population it would not be cruel and unusual. It is easy to pay lip-service to the notion that punishment must conform to public standards of decency and propriety when there are, to borrow the words of Warren C.J.

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<sup>52</sup> *R. v. Miller & Cockriell* (1976) 70 D.L.R. (3d) 324, 332 (S.C.C.) (Laskin C.J.C., Spence and Dickson J.J., concurring).

<sup>53</sup> *Supra*, note 50, 260-73.

<sup>54</sup> *Ibid.*

<sup>55</sup> S.C. 1960, c.44, s.1; R.S.C. 1970, App. III.

<sup>56</sup> *Supra*, note 50, 265.

in *Trop v. Dulles*, "evolving standards of decency that mark the progress of a maturing society".<sup>57</sup> However, what weight is to be given to public opinion when the public is overcome by fear, hysteria, prejudice or ignorance? The Nuremberg Trials have taught us that human rights must not be made dependent on prevailing attitudes, no matter how civilized the people in question appear to be. A variable standard, such as public decency, cannot guide a people who have been led astray. Moreover, even if the public were in a position to judge which punishments are acceptable, how could the public view be ascertained. While Parliament theoretically should reflect the sentiments of the people, the mere fact that it has enacted the *Canadian Bill of Rights* illustrates that it is not infallible. Laskin C.J. ruled out the possibility of resorting to polls when he said that

... the contention of unacceptability to a large segment of the Canadian population appears to me to be asking this Court to define and apply s.2b by a statistical measure of approval or disapproval of the death penalty. This is not what s.2b prescribes.<sup>58</sup>

The Chief Justice suggested in an earlier part of his judgment that history might be invoked to resolve the question of whether a punishment was so excessive as to outrage standards of decency.<sup>59</sup> This does not mean that the right to be free of cruel and unusual punishment would be tied to laws in existence prior to 1960; it is only the rights and freedoms recognized in the *Canadian Bill of Rights* which are declared invariable. The laws of Canada in force at the time of its enactment may violate these invariable rights and freedoms because the latter do not derive their meaning from any particular law in force in Canada in 1960. They have a broader base, calling into account laws and customs which have evolved over the course of centuries in England and Canada. Nevertheless, while the Chief Justice's suggestion does relieve some of the danger which accompanies the public decency test, it merely begs the question. The judge must be supplied with the means of determining which laws and customs in existence prior to, and at the time of the enactment of the *Canadian Bill of Rights*, best reflect the public's sense of decency. Calling history into account creates stability in the administration of the law but also increases the possibility that section 2(b) will become meaningless as each judge relies on his own interpretation of history. Because of the enormous shadow of law and custom, a judge must be provided

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<sup>57</sup> *Supra*, note 29, 100-101.

<sup>58</sup> *Supra*, note 52, 334.

<sup>59</sup> *Ibid.*, 331.

with a guiding light. He should not be permitted to roam free in such an expansive area.

The test of public decency in the *Trop*<sup>60</sup> case also fails to provide ascertainable standards. If punishment is to be acceptable if it accords with the evolving standards of decency in a society enlightened by humane justice, the judge will be left to decide what such a society would consider to be decent. Therefore, one must look elsewhere to find manageable criteria for determining whether treatment or punishment is cruel and unusual.

ii) **The arbitrariness test**

There are difficulties in applying the arbitrariness test to the enforcement of capital punishment. As indicated above, unlike the United States, Canada never recognized the jury option as a mode of imposing capital punishment. Only the Governor General in Council could have been guilty of arbitrarily inflicting the death sentence through the exercise of executive clemency.<sup>61</sup> As McIntyre J.A. said:

I intend no criticism of those who have faced the awesome responsibility for the decision between life and death when clemency was considered. However, the best and most high-principled of men exercising discretion in matters of this gravity will apply individual tests, individual ideas and beliefs, and the result which emerges will of necessity bear an arbitrary complexion.<sup>62</sup>

It is not sufficient to say that the Governor General in Council cannot commute the death penalty to life imprisonment without acting arbitrarily. If, as in *Furman*, arbitrariness in the application of a penalty renders the law which authorizes it inoperative, a murderer convicted in Canada would be in a far worse position than he would have been had the law remained in effect. For the law which authorized the arbitrary application of the penalty thereby becoming inoperative, is not section 218(1) which imposed the death penalty, but rather section 684(1) which provided for executive clemency. All that would remain between a convicted murderer and death would be the Royal Prerogative.

In view of the decision in *Smythe v. The Queen*,<sup>63</sup> it is questionable whether section 2(b) could have any curative effect on the exercise of the Royal Prerogative. If the discretionary power of the

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<sup>60</sup> *Supra*, note 29.

<sup>61</sup> See s.684(1) of the *Criminal Code*, R.S.C., 1970, c.C-34, repealed by 1974-75-76, c.C-105, s.23.

<sup>62</sup> *Supra*, note 50, 270.

<sup>63</sup> [1971] S.C.R. 680.

Attorney-General to choose the mode of prosecution was beyond reproach because it formed part of the British and Canadian conception of equality before the law, why would the Supreme Court be any more willing to review an exercise of discretion under the Royal Prerogative?<sup>64</sup>

The arbitrariness test might have been used in a different sense. While applying the test to executive clemency it could have been used to bring into question the operability of section 218(1). By sentencing the offender to death or life imprisonment at the discretion of the Cabinet, the Court is "authorizing" the subsequent application of "individual tests, individual ideas and beliefs".<sup>65</sup> It is therefore authorizing the Cabinet to apply a severe punishment in a randomly selective manner. Section 2(b) can be interpreted as prohibiting a court "from relinquishing its responsibility to guard against the authorization or imposition of executions in circumstances which make the punishment cruel and unusual".<sup>66</sup> The court has the duty to preclude this possibility by declaring the capital punishment sections of the *Criminal Code* inoperative.

This "authorization loophole" was not given any attention in *Miller and Cockriell*. The Supreme Court of Canada was not prepared to accept that the Governor in Council acted arbitrarily in commuting death sentences. As an American commentator on the *Furman* case said:

It seems to me as inherently plausible that ... governors of states conduct themselves with deliberation and caution so as to err on the side of mercy, reserving their ultimate punishment for those whose transgressions are most clearly established and seem to them most revolting. This explanation, if it is accurate (and no one knows whether it is) is not arbitrariness but the antithesis of arbitrariness.<sup>67</sup>

The arbitrariness test is far from useless. If it serves no other purpose at least it accentuates the underlying policy of section 2(b) — punishment is only legitimate when it can be imposed on a rational basis according to manageable standards.

### iii) The social purpose test and the necessity test

These tests go hand in hand. Evidence which is put forth to establish that a punishment has a legitimate social purpose will

<sup>64</sup> The *Smythe* decision would not have applied to the exercise of executive clemency discussed above, because this commuting power by the Governor in Council is merely a creature of statute and is not a part of our British heritage.

<sup>65</sup> *Supra*, note 50, 270, per McIntyre J.A.

<sup>66</sup> *Supra*, note 12, 82.

<sup>67</sup> Polsby, *The Death of Capital Punishment? Furman v. Georgia* [1972] Supreme Ct Rev. 1, 20.

also be used to show that this purpose (or purposes) could not be served by any less severe punishment. While both tests allow the court to view the particular treatment or punishment in a social context rather than in a vacuum, both tests present similar practical difficulties.

The first problem is an evidentiary one; must the defence prove that the punishment in question serves no legitimate social purpose, such as deterrence for example, or alternatively must it prove that even if the punishment does serve some social purpose, this purpose could be achieved by a less severe punishment. Or does the Crown bear the burden of proving that the penological aims of the punishment in question could not be realized through a lesser punishment? Because both tests often require a judge to weigh contradictory evidence, the outcome of the trial will largely depend on who must assume the burden of proof.

McIntyre J.A. assumed that the burden of proof fell on the Crown, and not surprisingly, he concluded that capital punishment did not serve any legitimate social purpose nor could it be justified if it did. Addressing the initial question of social purpose, he concentrated on the "primary proposition used to justify [its] imposition" — deterrence.<sup>68</sup> Like Brennan J. in *Furman*, he concluded that capital punishment "fails to acquire the justification of deterrent value".<sup>69</sup> Reaching this conclusion on the basis of an "inference" drawn from the statistical data before him,<sup>70</sup> he conceded a little later in his reasoning<sup>71</sup> that "differing interpretations" may be placed on statistics.<sup>72</sup> Moving to the alternative test of necessity, McIntyre J.A. again concluded that the Crown had not discharged the burden of proof.<sup>73</sup> It thus followed that imprisonment could adequately deter the criminal and protect society.

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<sup>68</sup> *Supra*, note 50, 260.

<sup>69</sup> *Ibid.*, 261.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, 266.

<sup>72</sup> Indeed, in one study, a positive correlation was made between crime rates for crimes including murder and rape, and the severity of the potential punishment. See Ehrlich, *The Deterrent Effect of Criminal Law Enforcement* (1972) 1 J. Legal Studies 259. Although the study did not directly deal with capital punishment, as Professor Wheeler has said, "it would be illogical to conclude that even though capital punishment is more severe a punishment than imprisonment his [Ehrlich's] conclusions are inapplicable to capital punishment". See Wheeler, *Toward a Theory of Limited Punishment: The Eighth Amendment After Furman v. Georgia* (1972) 25 Stan.L.Rev. 62, 77n. While it is not known whether McIntyre J.A. referred to this study, he undoubtedly referred to similar ones.

<sup>73</sup> *Supra*, note 50, 267-68.

In the Supreme Court, Chief Justice Laskin could not agree with Mr Justice McIntyre that there was any burden upon the state to show that capital punishment was a deterrent.<sup>74</sup> He accordingly went on to find that it did deter others from murdering police officers. However, the Chief Justice's reluctance to accept a reversal of the burden of proof where there was a significant encroachment upon the subject's liberty was unjustified. In the United States, the state may prevail in such circumstances only "by showing a subordinating interest which is compelling".<sup>75</sup> There is no reason why the same should not hold true in Canada.

Laskin C.J.'s approach reflects a stubborn adherence to Dicey's principle of parliamentary sovereignty;<sup>76</sup> an existing Parliament may not be limited by its predecessors.<sup>77</sup> Since the *Canadian Bill of Rights* cannot bind Parliament according to this view, it is free to do what it pleases with the subject's liberty, provided that the legislation is, in pith and substance, within its legislative competence.<sup>78</sup> If Parliament is sovereign in this sense then it need not justify any deprivation of liberty; be it large or small, there is no point in imposing the burden of proof upon those who purport to enforce Parliament's laws.

Dicey's principle of parliamentary sovereignty has been the subject of criticism over the years. In the words of Sir Ivor Jennings, legal sovereignty means nothing more than that "the courts will always recognize as law the rules which Parliament makes by legislation, that is, rules made in the customary manner and expressed in the customary form".<sup>79</sup> The *Canadian Bill of Rights*

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<sup>74</sup> *Supra*, note 52, 336-37.

<sup>75</sup> *Griswold v. Conn.* 381 U.S. 497 (1965).

<sup>76</sup> Dicey, *Introduction to the Study of the Law of the Constitution* 10th ed. (1961) 39-40.

<sup>77</sup> *Ibid.*, 64-68.

<sup>78</sup> E.g., *Union Colliery of British Columbia Ltd v. Bryden* [1899] A.C. 580 (P.C.); *Cunningham v. Tomey Homma* [1903] A.C. 151 (P.C.); *Morgentaler v. The Queen* (1975) 53 D.L.R. (3d) 161, 173 *per* Laskin J.

<sup>79</sup> Jennings, *The Law and the Constitution* 5th ed. (1960), 149. This position is supported by the following writers: Dixon, *The Law and the Constitution* (1935) 51 L.Q.R. 590, 603; Cowan, *Parliamentary Sovereignty and the Entrenched Sections of the South African Act* (1951), 16; Friedmann, *Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change* (1950) 24 A.L.J. 103. Jennings's view has been given judicial expression in *The Bribery Commissioner v. Ranasinghe* [1965] A.C. 172, 197-98, where the Privy Council decided that a legislature, whether sovereign or not, could not ignore the conditions (manner and form requirements) of law-making imposed by the instrument which itself regulates the power of the legislature to make laws. For the application of this principle in Quebec, see Brun & Tremblay, *Droit*



presents the manner and form requirements for passing valid acts of Parliament. If Parliament chooses to ignore the prescribed manner and form, its legislative actions must give way to the *Canadian Bill of Rights* in the event of conflict.<sup>80</sup> In this sense the *Canadian Bill of Rights*, like its counterpart in the United States,<sup>80a</sup> stands above the legislative arm of government. Once it is recognized that Parliament is not free to interfere with the subject's liberties it is not asking too much to impose upon the Crown the burden of justifying the more serious encroachments.

If the Crown were to assume the burden of proof, it would not be that onerous, for retribution can often be invoked to justify punishment even though McIntyre J.A. chose to ignore this concept completely.<sup>81</sup> Retribution must be a legitimate social purpose of capital punishment since it would appear from McIntyre J.A.'s reasoning that the purpose is legitimized by the efficacy of the punishment.<sup>82</sup> It cannot be denied that capital punishment serves to vindicate the legal order better than any other penalty could.

Laskin C.J. implied as much:

It is not difficult to appreciate that the kind of revulsion that an orderly society may feel against murder, and especially murder of policemen and prison guards, may express itself in a correspondingly severe sanction that would be deemed inappropriate for less grievous offences.<sup>83</sup>

However, without guidelines for determining the amount of retribution deserved, the severity of the punishment will ultimately depend upon the sentiments of each judge. Moreover, if the guidelines adopted involve nothing more than an appreciation of social attitudes in the jurisdiction of the judge who tries the case, the punishment's continued operation will depend on the caprice of a potentially misguided people.<sup>84</sup> It is at this point that the disproportionality test becomes significant.

*publique fondamentale* (1972), 245 *et seq.*, 254 *et seq.* In Canada, generally, see Tarnopolsky, *The Canadian Bill of Rights* 2d rev.ed. (1975).

<sup>80</sup> *Regina v. Drybones* [1970] S.C.R. 282, (1969) 9 D.L.R. (3d) 473.

<sup>80a</sup> U.S. Const. amend. VIII.

<sup>81</sup> As is evidenced by the remarks of Marshall J. in *Furman*, *supra*, note 31, retribution is no longer favourably regarded by some judges as a legitimate social purpose.

<sup>82</sup> When McIntyre J.A. considered whether deterrence was a legitimate social purpose, he looked to the effects of capital punishment. Thus if the prosecution discharged the burden of proving that capital punishment had a deterrent effect, deterrence would have been a legitimate social purpose, *supra*, note 50, 260.

<sup>83</sup> *Supra*, note 52, 337.

<sup>84</sup> From this perspective, the social purpose test shares all the dangers and uncertainty of the public decency test. *Supra*, p.171-73. Nevertheless the former

iv) The disproportionality test

Had McIntyre J.A. considered retribution to be a legitimate social purpose he would have employed the *Weems*<sup>84a</sup> formulation of the disproportionality test to complement the test of necessity. The murder of a police officer would be compared to other serious crimes in which the penalty was less severe than death. If a lesser penalty could satisfy the community's sense of outrage at a crime producing relatively the same results, then the penalty prescribed for the offence in the case in question would be disproportionate and unnecessary as a retributive device. By comparing the penalties imposed in Canada with those imposed in other jurisdictions, the possibility of error might be further reduced. To keep variables to a minimum it would be advisable to rely on jurisdictions with similar cultural and social conditions.

If Mr Justice McIntyre's tests were adopted by the Supreme Court and the burden of proving that capital punishment served some legitimate purpose which could not be adequately served by a lesser punishment was shifted onto the Crown, it is submitted that the Court would still come to the conclusion that capital punishment was not cruel and unusual. While the Crown might be unable to satisfy the Court that capital punishment was a greater deterrent than life imprisonment, the scale would tilt in its favor once the retributive aspects of the punishment were considered. The Crown would have to buttress its argument by showing that the additional severity of capital punishment was proportionate to the additional retribution implicit in the crime. This could be done by referring to the recent decisions of the United States Supreme Court.<sup>85</sup> These judgments provide strong evidence that another jurisdiction considers the sentence of death proportionate to the community's outrage, for if this were not the case, the United States Supreme Court would not have held the death sentence constitutional under any circumstances. Retribution must have been the decisive factor in these cases because the prosecutor could not have convinced the Court that capital punishment deterred murder better than life imprisonment. There is still too much controversy surrounding its deterrent effects. Indeed, Stewart J. suggested that retribution played a key role in *Gregg v. Georgia*:

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test is to be preferred since attention is not focused exclusively on the shared beliefs of the community, but upon rehabilitative and deterrent goals as well.

<sup>84a</sup> *Supra*, note 24.

<sup>85</sup> *Supra*, note 44.

[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.<sup>86</sup>

It is unlikely that the Supreme Court of Canada will adopt the McIntyre tests in the near future. While Laskin C.J. and the two judges who concurred with him<sup>86a</sup> were prepared to adopt the tests to some extent, six other members of the Court ignored them completely. The opinion of Ritchie J., supported by four others,<sup>86b</sup> indicates that section 2(b) will play an insignificant role in the disposition of future cases before the Supreme Court.<sup>87</sup> Moreover, like the opinion of Robertson J.A. in the Court of Appeal, the majority decision unduly restricts the application of the *Canadian Bill of Rights*.<sup>88</sup>

For Ritchie J. the cruel and unusual punishment mentioned in section 2(b), did not include capital punishment. He relied on the words of section 1(a) of the *Canadian Bill of Rights*:

[I]n Canada there have existed and shall continue to exist a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof *except by due process of law*.<sup>89</sup>

He adopted the interpretation of these words given by Martland J. in the case of *Regina v. Burnshine*;<sup>90</sup> the *Canadian Bill of Rights* did not purport to create new rights and freedoms, but merely codified existing rights and prohibited their infringement by any federal statute. Thus Mr Justice Ritchie reasoned that at the date of enactment an individual who had been convicted of a capital offence "by the duly recorded verdict of a properly instructed jury"<sup>91</sup> had no right to his life.

This conclusion is premised on two assumptions, both of which are unacceptable. In the first place, Ritchie J. seems to add a proviso to section 2(b); "cruel and unusual . . . punishment" seems to become "cruel and unusual punishment subject to the *Criminal Code* in

<sup>86</sup> *Ibid.*, 5239.

<sup>86a</sup> Spence and Dickson JJ.

<sup>86b</sup> Pigeon, Martland, Judson and de Grandpré JJ.

<sup>87</sup> *Supra*, note 52, 340-52.

<sup>88</sup> For a recent case comment on the Supreme Court decision and its implications for future interpretation of the Quebec *Charter of Human Rights and Freedoms*, S.Q. 1975, c.6, see Brun, *Feu la D.C.D. l'arrêt Miller et la peine de mort* (1977) 18 C.de D. 567.

<sup>89</sup> S.C. 1960, c.44, s.1(a); R.S.C. 1970, App. III (emphasis added).

<sup>90</sup> [1975] 1 S.C.R. 693, 705.

<sup>91</sup> *Supra*, note 52, 343.

force on August 10, 1960". Admittedly section 2(b) does not exist in a vacuum. It must be tied to the body of law and custom inherited from Britain and developed in Canada. But section 2(b) does acknowledge the existence of a right which has a broader base than any one particular law in force at the time of the enactment of the *Canadian Bill of Rights*. If, as submitted earlier in this paper,<sup>92</sup> Granucci is correct in his thesis that the English *Bill of Rights* was a reiteration of the English policy against disproportionate penalties, then this policy has become constitutionally entrenched and is part of Canadian law.<sup>93</sup> The "cruel and unusual punishment" clause should then be interpreted in light of the disproportionality principle as well as the various provisions of the *Criminal Code*. It has already been submitted<sup>93a</sup> that this would lead to the same result but the method used would be more in accordance with the intent and purpose of the *Canadian Bill of Rights* and would show a greater respect for the principles upon which the constitution of Canada is founded. Moreover, it would be consistent with the opinion given by Ritchie J. himself in *Drybones*.<sup>94</sup> The Crown in that case had submitted that *Drybones'* right to equality before the law was circumscribed by the laws of Canada as they existed at the time of the enactment of the *Canadian Bill of Rights*, which included section 94 of the *Indian Act*.<sup>95</sup> To support this argument the Crown invoked the opinion of Ritchie J. in *Robertson and Rosetanni v. The Queen*.<sup>96</sup> To clarify his position in that case Ritchie J. replied:

If it had been accepted that the right to freedom of religion as declared in the Bill of Rights was circumscribed by the provisions of the Canadian statutes in force at the date of its enactment there would have been no need in determining the validity of the *Lord's Day Act* to consider the authorities in order to examine the situation in light of the concept of religious freedom which was recognized in Canada at the time of the enactment of the Bill of Rights. It would have been enough to say that freedom of religion as used in the Bill must mean freedom of religion subject to the provisions of the *Lord's Day Act*. This construction would however run contrary to the provisions of s.5:2 of the Bill.<sup>97</sup>

Ritchie J. also assumed incorrectly in *Miller and Cockriell* that due process of law was synonymous with sections 2(e) and 2(f) of

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<sup>92</sup> See *supra*, p.164.

<sup>93</sup> In *R. v. Hess* (2) [1949] 4 D.L.R. 199, 208, O'Halloran J. recognized that the preamble of the *British North America Act, 1867*, 30-31 Vict., c.3 (U.K.) which provided for "a constitution similar in principle to that of the United Kingdom" thereby adopted the principles of the *Bill of Rights* of 1689.

<sup>93a</sup> *Supra*, p.178.

<sup>94</sup> *Supra*, note 80.

<sup>95</sup> R.S.C. 1970, c.I-6.

<sup>96</sup> [1963] S.C.R. 651.

<sup>97</sup> *Supra*, note 80, 296.

the *Canadian Bill of Rights*.<sup>98</sup> According to this line of reasoning, an individual may be deprived of his life, liberty or the security of his person by the "duly recorded verdict of a properly instructed jury"<sup>99</sup> so long as that jury is acting pursuant to a law of Canada which was in force at the time of the enactment of the *Canadian Bill of Rights*. For section 2(b) to be effective the courts must consider the quality of treatments and punishments authorized or imposed by federal laws. However, if the "due process" clause is interpreted in the manner suggested by Ritchie J., this review mechanism is circumvented whenever a given law is one which was in force as of August 10, 1960, and had been applied in criminal proceedings conducted in accordance with the fundamental principles of justice. Indeed, Laskin C.J. recognized this problem when he said,

... it is s.2 of the *Canadian Bill of Rights* which gives force to s.1 and hence, especially since the prescriptions of s.2 are stated to be effective "in particular", I would not diminish their import by reference to what is more generally prescribed in s.1.<sup>100</sup>

Finally, it is somewhat disconcerting to find Ritchie J. in agreement with the majority view in the Court of Appeal, contending that the retention of the death penalty after the enactment of the *Canadian Bill of Rights* afforded a strong indication of Parliament's intention to exclude punishment by death from the ambit of section 2(b).<sup>100a</sup> This view, as mentioned before,<sup>101</sup> cannot be sustained without doing violence to the text of the *Canadian Bill of Rights*. Moreover, even if a judge may seek the meaning of section 2(b) from legislation enacted after 1960, to what extent must he consider subsequent legislation? On the basis of Mr Justice Ritchie's opinion, it could have been argued that the fact that Parliament had since abolished capital punishment, constituted "strong evidence" that it had always been intended that the word "punishment" in section 2(b) included punishment by death. Laskin C.J. dismissed such a proposition when he said:

[T]his court may certainly consider the course of parliamentary enactments and the state of the statute book as of the time when it comes to a decision but it would abdicate its function if it surrendered to parliamentary policy without making an independent assessment of the compatibility of a particular policy reflected in a challenged statute with the

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<sup>98</sup> A similar opinion was expressed by Laskin J., as he then was, in *Curr v. The Queen* [1972] S.C.R. 889, 898.

<sup>99</sup> *Supra*, note 52, 343.

<sup>100</sup> *Ibid.*, 329.

<sup>100a</sup> *Supra*, note 52, 344.

<sup>101</sup> See *supra*, p.170.

Canadian Bill of Rights regardless of a subsequent change in that policy by Parliament.<sup>102</sup>

B. *Solitary Confinement: McCann v. The Queen*<sup>103</sup>

A group of inmates at the British Columbia Penitentiary launched an action in the Federal Court of Canada demanding that their confinement within the Special Confinement Unit of the Penitentiary (S.C.U.) be declared cruel and unusual treatment or punishment. They also demanded a declaration that section 2.30(1) of the *Penitentiary Service Regulations*<sup>104</sup> was inoperative because it conflicted with the provisions of the *Canadian Bill of Rights*. Finally, the inmates demanded an order compelling the penitentiary director who was impleaded as a defendant, to act in accordance with the Court's declarations.

The evidence revealed that the inmates of the S.C.U. had been confined to cells eleven by six feet in size with a height of eleven feet. The cells had three solid cement walls and a solid steel door. A light shone inside the cells twenty-four hours a day though it was dimmed at night. The inmates were required to sleep in close proximity to the toilet bowl in their cells. The ventilation was poor and most of the time the cells were either too hot or too cold. They received very little fresh air exercise and at mealtime they would be harassed by the guards. The inmates testified that the treatment they had received had caused them considerable mental suffering which had led, in certain cases, to physical and psychological deterioration, self-mutilation and attempted suicide. Extensive expert testimony substantiated the evidence given by the inmates themselves. Both the penologists and the inmates who had been in solitary confinement in other institutions agreed that conditions in the S.C.U. were among the worst anywhere in North America. It should be noted that at least some of the inmates were dangerous, unpredictable and showed a propensity to escape.

The Federal Court granted the declaration. Although Heald J. preferred the minority opinion of the Court of Appeal in *Miller and Cockriell*, he followed the majority and applied a conjunctive

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<sup>102</sup> *Supra*, note 52, 336.

<sup>103</sup> *Supra*, note 7.

<sup>104</sup> P.C. 1962-3020, 8 March 1962; SOR/162-90, (1962) 96 Can.Gaz., pt.II, 295, (no 6, 28/3/1962); enacted pursuant to s.28 of the *Penitentiary Act* S.C. 1960-61, c.53. S.2.30(1) authorizes the director of a penitentiary to order an inmate to be dissociated from the other inmates, where in his discretion such dissociation is necessary "for the maintenance of good order and discipline in the institution" or "in the best interests of the inmate".

interpretation, finding that the conditions in the S.C.U. constituted cruel and unusual treatment according to the ordinary meaning of those words.<sup>105</sup>

Heald J. had no difficulty in coming to the same conclusion when he applied the tests propounded by McIntyre J.A. In the first place it was found that solitary confinement as practised at the British Columbia Penitentiary did not serve to rehabilitate the inmates. Indeed, the penitentiary director admitted as much and similar opinions were given by penologists who were called to testify. Thus the only possible justification for continued confinement in the S.C.U. was the maintenance of good order and discipline in the institution. However, while this was a legitimate social purpose in view of the character and disposition of the inmates in question, it could have been achieved without imposing the unwholesome conditions which existed in the S.C.U. While Mr Justice Heald made it clear that it was not his function to make specific recommendations he nevertheless subscribed to those submitted by an expert. Some of the recommendations included the removal of solid steel doors, the enlargement of segregation cells, the closure of lights during the night and the abolition of mandatory sleeping positions.<sup>106</sup> Other suggestions included daily outdoor exercise, visiting between inmates within a "secured" area and less deprivation of personal possessions. There would also appear to be general agreement that prolonged and continuous solitary confinement is dangerous to the mental and physical well-being of the inmate. This latter finding could raise a great deal of difficulty, for in the absence of an adequate alternative it would seem that the inmates' mental and physical health would have to be sacrificed.<sup>107</sup>

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<sup>105</sup> *Supra*, note 7, 695. At the time of the ruling, the Supreme Court of Canada had not yet rendered its decision in *Miller and Cockriell*.

<sup>106</sup> *Ibid.*, 681.

<sup>107</sup> It should not be assumed that there is unanimity of opinion on the characterization of certain features of solitary confinement as cruel and unusual treatment or punishment. Within two years of the decision in *McCann*, the B.C.S.C. refused to follow it. In *Regina v. Bruce, Wilson and Lucas* (1977) 36 C.C.C. (2d) 158, three inmates of the B.C. Penitentiary charged with extortion and kidnapping in the taking of hostages, pleaded that there was a reasonable justification or excuse for the commission of extortion and raised the defence of necessity. Relying on the decision in *McCann* and the evidence of the same experts who had testified in that case, the inmates argued that what they had done was prompted by the fear that their administrative segregation was imminent and their physical and mental well-being was endangered.

Toy J. held that the conditions of solitary confinement at the B.C. penitentiary did not constitute cruel and unusual treatment or punishment. Preferring

In spite of granting a declaration that the conditions in the S.C.U. were cruel and unusual, Heald J. refused to grant the inmates' request for a declaration that section 2.30(1) of the *Regulations* was inoperative. He reasoned that

... the clearly stated objective of Regulation, s.2.30(1) is the maintenance of good order and discipline within Canadian penitentiaries. This is, in my view, a valid federal objective and for this reason, the Regulation is *intra vires* and cannot be declared inoperative.<sup>108</sup>

Since section 2.30(1) implemented section 91:28 of *The British North America Act, 1867*<sup>108a</sup> Heald J. could find constitutional support for its continued operation.<sup>109</sup> In finding such support, the learned justice had adopted an argument which had previously been used in connection with section 1(b) of the *Canadian Bill of Rights*.<sup>110</sup> According to the "B.N.A. Argument",<sup>111</sup> the *Canadian Bill of Rights* has not rendered Parliament powerless to exercise the authority entrusted to it by the Constitution.<sup>111a</sup>

It becomes apparent from the Federal Court's alternative responses to the inmates' first two demands that a different rule will apply where the issue concerns the operation of a law than where the issue is simply whether the particular facts of the case point to a violation of a right guaranteed in the *Canadian Bill of Rights*. The courts, wherever possible, seek to construe federal laws in accordance with the *Canadian Bill of Rights*. Despite the fact that an infringement of a right recognized and declared therein has been carried out pursuant to the execution of a federal law, if that law can be construed in such a way that it is consistent with the *Canadian Bill of Rights*, the court will not interfere with its continued operation.

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to treat the expression "cruel and unusual" in its compendious form, the judge attempted to apply the vague formula suggested by Laskin C.J. in *Miller and Cockriell* (see *supra*, p.172) concluding that the treatment administered was not "so excessive as to outrage standards of decency" (*supra*, note 52, 170). The views of experts were given short shrift, since the judge felt that there was a distinction to be made between standards accepted from the standpoint of penology and those set out in section 2(b) of the *Canadian Bill of Rights*. The decision is on appeal.

<sup>108</sup> *Supra*, note 7, 696. See also *Regina v. Roestad* (1972) 5 C.C.C. (2d) 564 (Ont.County Ct).

<sup>108a</sup> 30-31 Vict., c.3 (U.K.).

<sup>109</sup> *Supra*, note 7, 696.

<sup>110</sup> *A.G. Canada v. Canard* (1975) 52 D.L.R. (3d) 548, 571-73 (S.C.C.).

<sup>111</sup> Hogg, *The Canadian Bill of Rights — Equality Before the Law*, *A.G. Canada v. Lavell* (1974) 52 Can.Bar Rev. 263, 266.

<sup>111a</sup> This emerges from the preamble of the Act, which declares that the *Canadian Bill of Rights* was enacted so as to reflect the respect of Parliament for its constitutional authority.



From one perspective, this is understandable. Clearly, much confusion would ensue if the courts were to render a federal law inoperative every time a violation of the *Canadian Bill of Rights* occurred. However, if *McCann* is a reflection of what has become normal practice, it is submitted that the courts' approach has become too cautious. Stability will not be unduly threatened if an attempt is made to look beyond the words of the law in question to determine whether it should operate. Indeed the words of the enactment can only be understood in light of surrounding circumstances. If judicial notice is taken of the fact that there have been persistent violations of the *Canadian Bill of Rights* committed in the course of executing a particular federal law, chances are that the broad language in which the law is couched lends itself to such abuse. If this is the case, the law should be rendered inoperative so that a new one may be written which is less likely to be abused. In light of recent publicity concerning conditions in solitary confinement in other penitentiaries<sup>112</sup> one may wonder whether Heald J. was correct in dismissing the conditions in the S.C.U. as an isolated incident.

In response to the inmates' final demand, Heald J. refused to grant an order compelling the head of the institution to respect the Court's declaration that the inmates' confinement was cruel and unusual treatment within section 2(b). The order sought was essentially one of *mandamus* and since the award of a prerogative writ lies within the court's discretion,<sup>113</sup> the refusal might have been justified on the grounds that to grant such a remedy would be to "introduce confusion and disorder" into the penitentiary system.<sup>114</sup> The order would effectively prevent the confinement of inmates within the S.C.U. and if alternative facilities were not available within the institution, inmates would have to be transferred. If inmates in other institutions with sub-standard conditions were to file similar applications, the net result would be to overcrowd those peniten-

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<sup>112</sup> *The Montreal Star*, Feb. 19, 1977, H-15, reported that René Vaillancourt, a convicted murderer serving time at Millhaven Penitentiary, ordered a Toronto lawyer to take action on his behalf for alleged cruel and unusual treatment he had suffered due to six months of solitary confinement, during which he was confined to a narrow cell for up to twenty-three hours a day. See also *Le Devoir*, Montreal, Feb. 19, 1977, 3 and *The Globe and Mail*, Toronto, Feb. 19, 1977, 4. For a more thorough examination of conditions in Canadian prisons, see McNeil & Vance, *Cruel and Unusual*, (1978).

<sup>113</sup> See de Smith, *Judicial Review of Administrative Action* 3d ed. (1973), 510.

<sup>114</sup> Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus as it obtains both in England and Ireland* (1853) nc 16, 68; *Connelly v. Publicover* [1940] 4 D.L.R. 43 (N.S.S.C.); *R. v. Paddington Valuation Officer, ex.p. Peachey Property Corporation Ltd* [1964] 1 W.L.R. 1186 (Q.B.).

tiaries which met the requirements set by the Federal Court in *McCann*. A court could exercise its discretion by refusing to grant an injunction enjoining penitentiary authorities from carrying out a director's order to confine an inmate to a sub-standard cell upon similar grounds.<sup>115</sup>

However, a court is not precluded from granting *mandamus* or an injunction if it sees fit to do so. In *Regina v. Institutional Head of Beaver Creek Correctional Camp, Ex parte MacCaud*<sup>116</sup> the Ontario Court of Appeal recognized that the prerogative writ of *certiorari* would lie with respect to the exercise by an institutional head of a penitentiary of his disciplinary jurisdiction if the procedure sought to be reviewed was one which was required to be exercised judicially and the institutional head had acted in excess of his jurisdiction.<sup>117</sup> It therefore follows that *mandamus* which will normally lie even where the respondent is not required by law to act judicially,<sup>118</sup> should be available against the director of a penitentiary where he has acted outside the powers conferred upon him by legislative enactment. Section 2.27 of the *Penitentiary Service Regulations*<sup>119</sup> casts upon the head of a penitentiary the duty to "take all reasonable steps to ensure the safe custody of inmates committed to his care".<sup>120</sup> Section 2(b) of the *Canadian Bill of Rights* as interpreted by the decision in *McCann* defines what conditions are required to ensure the safe custody of inmates in solitary confinement. If facilities which meet these conditions are readily available, it is reasonable to expect that the inmate will be confined to them alone. If a penitentiary director orders that an inmate be confined to other sub-standard facilities he has clearly exceeded his jurisdiction and *mandamus* should lie to compel him to act in accordance with the powers which have indeed been given to him. The same reasoning should apply when an injunction is sought, for it has been held that unauthorized action by Crown officials is not protected by doctrines of Crown immunity because such actions are not really official actions at all.<sup>121</sup>

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<sup>115</sup> *Supra*, note 113, 391.

<sup>116</sup> (1968) 2 D.L.R. (3d) 545, [1968-9] 5 C.R.N.S. 317 (Ont.C.A.).

<sup>117</sup> *Ibid.*, 554.

<sup>118</sup> I.C.E.D. (Ont.) 3d ed. (1973) *Administrative Law*, s.161.

<sup>119</sup> P.C. 1962-3020, 8 March 1962; SOR/169-90 (1962) 96 Can.Gaz., pt.II, 295, (no 6, 28/3/1962); enacted pursuant to s.28 of the *Penitentiary Act* S.C. 1960-61, c.53.

<sup>120</sup> *Ibid.*, s.2.27.

<sup>121</sup> *Nireaha Tamaki v. Baker* [1901] A.C. 561 (P.C.), applied in Canada in *Rattenbury v. Land Settlement Board* [1929] S.C.R. 52. Also see Strayer, *Injunctions Against Crown Officers* (1964) 42 Can.Bar Rev. 1, 12.

Section 2(b) of the *Canadian Bill of Rights* also serves as a yardstick for measuring the standard of care which is required of prison authorities by the common law.<sup>122</sup> Penitentiary authorities are not exercising reasonable care in providing for the inmates' safety when they permit confinement which has been declared cruel and unusual by a court of law. Consequently, an action in tort could be taken against the Crown under section 3(1)(a) of the *Crown Liability Act*.<sup>123</sup>

### C. Mandatory Minimum Sentences: *Regina v. Shand*<sup>124</sup>

There are few mandatory minimum sentences in the *Criminal Code*.<sup>125</sup> One the most severe is prescribed under the *Narcotic Control Act*.<sup>126</sup> Under section 5(2) of the Act there is a minimum sentence of seven years imprisonment for anyone convicted of importing a narcotic. In *Regina v. Shand*, the accused pleaded guilty before Borins J. to a charge under section 5(2). While in Peru, Shand had purchased twenty-four ounces of cocaine for \$800.00. The substance had a street value of \$1000.00 an ounce. Shand had hidden the cocaine in a false compartment in one of his suitcases and loaned it to a Miss Thompson, who was not informed of its secret contents. The two returned to Canada together but disembarked separately at Toronto International Airport. When the cocaine was discovered in Miss Thompson's suitcase by a customs officer, she was charged with importing a narcotic. Some two weeks later Shand voluntarily came forward and admitted responsibility for importing the cocaine into Canada, explaining that he felt "morally obliged" to confess since his business partner had been "wrongly charged".<sup>127</sup> His intention in purchasing and importing the cocaine had been to realize a quick profit. Shand was clearly not in the business of importing narcotics and had constructed the false compartments in his suitcases for the purpose of circumventing laws which prohibited the removal of precious artifacts from various South American countries. Canada had no corresponding laws prohibiting the in-

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<sup>122</sup> *Ellis v. Home Office* [1953] 2 All E.R. 149 (C.A.); *Timm v. The Queen* [1965] 1 Ex.C.R. 174.

<sup>123</sup> R.S.C. 1970, c.38.

<sup>124</sup> (1976) 64 D.L.R. (3d) 626 (Ont. County Ct).

<sup>125</sup> R.S.C. 1970, c.C-34, s.218(1) (first and second degree murder), s.47 (high treason), s.234(b) (driving a motor vehicle while under the influence of alcohol or drugs).

<sup>126</sup> R.S.C. 1970, c.N-1.

<sup>127</sup> *Supra*, note 124, 659.

portation of such artifacts. Indeed, Shand had never been involved in any criminal proceedings prior to this incident. At trial, various witnesses testified on his behalf that the commission of the offence was completely out of character. Shand himself testified that he had acted impulsively and that what he had done was a "gross mistake".<sup>128</sup> It was argued on his behalf that the mandatory minimum sentence constituted cruel and unusual punishment in this case. A declaration was sought that section 5(2) was inoperative.

Although Judge Borins declined to grant the declaration, he held that he was not bound by section 5(2) in Shand's case because in relation to the offender and the facts which led to his conviction, seven years imprisonment constituted cruel and unusual punishment.<sup>129</sup> Sentencing Shand to two years, less one day and a fine of \$5000.00, Judge Borins thought that in this case rehabilitation, deterrence of future misconduct and the protection of society were not legitimate social purposes and should be disregarded in determining a suitable penalty. The fine was appropriate because of the element of anticipated profit. The Attorney General of Canada successfully appealed on behalf of the Crown and the Ontario Court of Appeal imposed the minimum seven year sentence.<sup>130</sup>

While the *McCann* case had already been decided by the time the County Court ruled in *Shand*, the Supreme Court decision in *Miller and Cockriell* had not yet been delivered. Like Heald J., Judge Borins preferred to rely on Mr Justice McIntyre's interpretation of section 2(b) rather than the one given by the majority of the Court of Appeal.<sup>131</sup> Four tests were used to determine whether the mandatory minimum sentence would run afoul of section 2(b) in this case.

The first test, an offshoot of the "public decency test", had been used before by Warren C.J. in the *Trop*<sup>131a</sup> case and by Brennan J. in *Furman*.<sup>131b</sup> Simply stated, the test provided that in determining whether a punishment is cruel and unusual, the court must ask whether the punishment comports with human dignity.<sup>132</sup> This test did not prove to be a decisive factor in the resolution of the issue before the County Court and it is submitted that the test will never be of any practical assistance in determining which punishments

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<sup>128</sup> *Ibid.*, 630.

<sup>129</sup> *Ibid.*, 662.

<sup>130</sup> (1976) 70 D.L.R. (3d) 395.

<sup>131</sup> *Supra*, note 50.

<sup>131a</sup> *Supra*, note 29.

<sup>131b</sup> *Supra*, note 31.

<sup>132</sup> *Supra*, note 124, 639.

come into conflict with section 2(b). Polsby, commenting on the use of the test in *Furman*, recognized this when he said:

This formula affords no means of distinguishing cruel and unusual punishment from punishment in general. All punishment affronts human dignity. That in some sense is one of its important purposes. So long as the criminal process is used to label intolerable behavior as intolerable and to castigate those who have stepped out of bounds it is inevitable that the sensibilities of whoever suffers at the hands of justice will smart . . . . The question therefore is not whether human dignity is affronted but whether it is affronted in a way or to an extent which is impermissible . . . . Thus we must seek further for the distinguishing characteristics of cruel and unusual punishments.<sup>133</sup>

The second test used by Judge Borins was the "arbitrariness test" and this proved to be of some assistance in reaching a decision. Just as McIntyre J.A. had questioned whether the Cabinet could exercise its discretion in commuting sentences of death to life imprisonment in anything but an arbitrary manner, Judge Borins doubted whether the prosecutor could exercise his discretion fairly in the formulation of charges to instigate prosecutions.<sup>134</sup> Shand could have been charged with possession of narcotics or possession for the purpose of trafficking — neither of which carry a mandatory minimum of seven years imprisonment.<sup>135</sup> Judge Borins relied on statistics compiled in the *LeDain Report*<sup>136</sup> which revealed that over a three year period in Quebec convictions for importing made up a greater proportion of the total convictions in that province for offences under the *Narcotic Control Act* than in Ontario over the same period of time. These statistics are far from conclusive evidence that section 5(2) was being arbitrarily enforced. There was no data indicating in how many cases prosecutorial discretion was exercised in Quebec and Ontario to lay a charge for an offence other than importing when the accused was apprehended while bringing a narcotic into Canada.<sup>137</sup> Nor can it be said that the case of Shand himself was evidence that the law was being arbitrarily administered for there was no way of knowing whether other charges had been laid in cases similar to Shand's.

If the Supreme Court continues to assume that the burden is upon the defence to prove that a law is in conflict with the *Canadian Bill of Rights*, it is unlikely that this evidence will ever surface.

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<sup>133</sup> *Supra*, note 67, 19.

<sup>134</sup> *Supra*, note 124, 640.

<sup>135</sup> *Narcotic Control Act*, R.S.C. 1970, c.N-1, ss.3(2), 4(3).

<sup>136</sup> *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, Information Canada (1973).

<sup>137</sup> *Supra*, note 124, 641.

Since the "arbitrariness test" provides one of the more accurate guides in determining whether a sentence is cruel and unusual and in view of the fact that the Crown could obtain the information required for the application of this test far more easily than any individual, the prosecution and not the defence should assume the burden of proving that the charge of importing narcotics is being laid in accordance with ascertained or ascertainable standards. This would encourage the prosecution to prepare its arguments more carefully and in turn would lead to more informed judgments. Moreover, if the prosecution cannot show that charges are being laid upon a rational basis, then the mandatory minimum sentence upon conviction cannot but be applied arbitrarily and section 5(2) would properly be declared inoperative.

The Court of Appeal however did not dismiss the claim of arbitrariness on the ground that the defendant had failed to substantiate his allegation. Arnup J.A., giving the opinion of the Court, eliminated the possibility that prosecutorial discretion was reviewable in a court of law when he said that it was "unfettered".<sup>138</sup> While some support for this view can be found in *Smythe*,<sup>139</sup> Laskin C.J. in *Miller and Cockriell* stated that it could not be "assumed" that prosecutorial discretion would be "incompetently or dishonestly exercised".<sup>140</sup> The Chief Justice's cautious choice of words leaves open the possibility that the prosecution might have to account for its actions in the future.

Indeed, in *R. v. Ittoshat*<sup>141</sup> a stay of proceedings was granted when an Indian was brought a thousand miles from his home to be tried for causing a disturbance in a public place<sup>141a</sup>. Malouf J. stated the following:

[T]his court has not only the right but also the duty to protect citizens against harsh and unfair treatment. The duty of this Court is not only to see that the law is applied but also, which is of equal importance, that the law is applied in a just and equitable manner.<sup>142</sup>

A distinction should be drawn between judicial review of prosecutorial discretion on a case by case basis and judicial review of the legislation which creates opportunities for the prosecutor to exercise this discretion. The administration of the criminal justice system

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<sup>138</sup> *Supra*, note 130, 406.

<sup>139</sup> *Supra*; note 63. See also *R. v. Court of Sessions for the Peace, Ex parte Lafleur* (1967) 3 C.C.C. 244, 248.

<sup>140</sup> *Supra*, note 52, 340.

<sup>141</sup> (1970) 12 D.L.R. (3d) 266, 5 C.C.C. 159 (C.S.).

<sup>141a</sup> S.C. 1953-54, c.51, s.160(a)(ii); now R.S.C. 1970, c.C-34, s.171(1)(a)(ii).

<sup>142</sup> *Supra*, note 141, 162.

would not be hampered by allowing review on a case by case basis. It is therefore difficult to share the concern which Arnup J.A. expressed in the Court of Appeal.

Two other criticisms of the Court of Appeal's decision must be made. While Arnup J.A. said that he was prepared to accept the "so-called 'disproportionality principle'"<sup>143</sup> he was not prepared to apply it in Shand's case. He purported to apply the test by invoking the American case of *The People v. Broadie*<sup>144</sup> where statutory minimum sentences for drug offences (some longer and some shorter than seven years) were held to be constitutional because they were not grossly disproportionate to the offences for which they were prescribed. It should be noted though, that in reviewing the offences which included drug trafficking, the Court in that case attached considerable weight to the "epidemic dimensions of drug abuse" in the State of New York.<sup>145</sup> In Canada, however, the distribution of harmful and unlawful drugs is not a "widespread and pernicious phenomenon"<sup>145a</sup> and therefore it would seem that Arnup J.A. erred in selecting New York as a standard of comparison. As the Court in *Broadie* pointed out: "[t]hat the harsh penalties for drug trafficking were prescribed in response to a more prevalent crime problem must be weighed in any 'external' comparison".<sup>146</sup>

Judge Borins, on the other hand, applied the "disproportionality test" with more success. He noted that in the United Kingdom no mandatory minimum sentence was provided for importing narcotics. He then made "an internal comparison" by considering the punishments authorized for similar offences under the *Food and Drug Act*.<sup>147</sup>

In order to find "similar offences" one must have a gauge for measuring the gravity of a crime. Professor Wheeler<sup>148</sup> has suggested two criteria: first, the harm that each instance of the crime causes society; and second, the moral culpability attached to the crime itself. Borins J. adopted the first. To determine the harmful effects of cocaine he referred to the *LeDain Report* and summarized the Commission's findings:

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<sup>143</sup> *Supra*, note 130, 409.

<sup>144</sup> 371 N.Y.S. (2d) 471 (1975).

<sup>145</sup> *Ibid.*, 480-81. Over half the addict population in the U.S. is located in New York City. The Court noted that while drug trafficking was punished more severely in New York than in other jurisdictions, California (where a similar drug problem existed) imposed punishment almost as severe.

<sup>145a</sup> *Ibid.*, 476.

<sup>146</sup> *Ibid.*, 480.

<sup>147</sup> R.S.C. 1970, c.F-27.

<sup>148</sup> *Supra*, note 72, 73-74.

With repeated administration of large doses, a toxic psychosis can develop. Significant adverse psychological reactions to cocaine are reported to be rare in Canada. Also, there is little evidence of a significant incidence of adverse physiological reactions to cocaine in Canada. No deaths from the use of cocaine were reported in the years 1969-71. Cocaine can produce, in some people, psychological dependence in the sense that there is often a preoccupation with obtaining the drug, compulsive and repeated self-administration and craving for the drug upon withdrawal in heavy users. Most authorities feel that no significant physical dependence develops with cocaine use, although it may be capable of forming some subtle kind of physical dependence.<sup>149</sup>

This summary would aptly describe the effects of alcohol as well. However, alcohol, unlike cocaine, does not carry any similarly severe penalties for its use, sale or importation.

As far as Wheeler's second criteria is concerned, although Borins J. did not deal directly with the question of whether a mandatory minimum sentence of seven years is a reflection of the blameworthiness of importing cocaine, he did invoke the *Food and Drug Act* as a point of reference. It should be noted that under that Act importing L.S.D. does not carry any mandatory minimum penalty.<sup>150</sup> It is difficult to accept that the degree of moral culpability attached to the offence of importing cocaine or for that matter, its harmful effects could be that much greater than the moral culpability and harmful effects associated with the importation and use of L.S.D. Certainly any differences between the two could not justify the enormous discrepancy between the accompanying sentences. It is submitted therefore that Borins J. was correct in concluding that the seven year minimum sentence authorized for the offence of importing cocaine was excessive.

The second cause for complaint in the Court of Appeal's decision is the complete rejection by the Court of individualized sentencing determinations. The United States Supreme Court has made it clear that statutes which prescribe capital punishment for a broad category of offenders without taking into account factors such as previous record, character of the accused and all the circumstances surrounding the commission of the offence will be struck down as violating the Eighth Amendment.<sup>151</sup> The main thrust of Borins J's opinion in

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<sup>149</sup> *Supra*, note 124, 660.

<sup>150</sup> R.S.C. 1970, c.F-27. S.33 of the Act provides that trafficking includes importing, and under s.42(3), there is no mandatory minimum sentence for trafficking in a restricted drug. The maximum penalty is 18 months where the prosecutor proceeds by way of summary conviction, and 10 years where he proceeds by way of indictment. L.S.D. is a restricted drug. See s.40 and Schedule H of the Act.

<sup>151</sup> *Supra*, note 31.



*Shand* was that mandatory minimum sentences "[remove] from the trial Judge a substantial degree of the discretion possessed by the Court in the imposition of a sentence".<sup>152</sup> He contended that section 5(2) of the *Narcotic Control Act* "ignores the fact that different quantities of narcotics may be involved, that some narcotics are far less harmful than others, that any intent to traffic in the narcotic may be absent, the background of the accused, and possible mitigating circumstances".<sup>153</sup> The inability to review prosecutorial discretion when taken together with broad mandatory sentencing provisions, would result in great injustice. The trend in sentencing is towards relating the punishment to the criminal as well as the crime. In *Shand*, the seven year sentence took no account of the fact that the accused had no previous record, that he was unlikely to repeat the offence and that the offence itself was committed impulsively and out of character.<sup>153a</sup>

On this basis alone and without regard to any evidence concerning the exercise of prosecutorial discretion it is difficult to see how section 5(2) can be applied in a rational manner. When the crime itself is considered, it is also clear that the prescribed sentence is disproportionate. For both these reasons, it would appear that Borins J. was correct in refusing to apply section 5(2) to the particular facts of the case before him and would have been justified in declaring the section inoperative in the future.

### III. Conclusion

The prospects of applying section 2(b) of the *Canadian Bill of Rights* so as to provide a legal recourse for those who are victimized by federal laws which authorize the imposition of cruel and unusual treatments and punishments are not very encouraging. Since the Supreme Court in *Miller and Cockriell* was unanimous in holding that capital punishment as it existed in Canada prior to its repeal did not violate section 2(b) of the *Canadian Bill of Rights*, Parliament could adopt a mandatory death sentence once again without any fear that it would be rendered inoperative in the courts.

The application of section 2(b) to mandatory minimum sentences poses a special problem. Practitioners have been quick to accept the

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<sup>152</sup> *Supra*, note 124, 646.

<sup>153</sup> *Ibid.*

<sup>153a</sup> It is beyond the scope of this paper to discuss whether individualized sentencing determinations should be within the jurisdiction of the legislature or the judge.

Ontario Court of Appeal's decision in *Shand* as the final word on the matter. As mentioned above, the decision does not rest on a firm legal footing and should therefore be disregarded by future courts.

If, as was the case in *Shand*, the prosecution cannot prove on a balance of probabilities that: (1) the mandatory minimum sentence for importing narcotics is proportionate to the offence; (2) it is necessary to satisfy legitimate social purposes; and (3) it is compatible with a rational sentencing procedure, committed to individual sentencing determinations, the courts are bound to disregard the sentence. Traditional doctrines of parliamentary sovereignty and administrative inviolability must not interfere with the consequences which flow from the application of tests which have proven to be the most accurate in determining whether punishment is cruel and unusual. While Canadian judges continue to be suspicious of the *Canadian Bill of Rights*, a defence attorney who is quite certain that his client will be convicted of importing narcotics, has little to lose and much to gain by invoking section 2(b). It is only through a combination of perseverance and patience that a fundamentally inequitable law such as section 5(2) of the *Narcotic Control Act* will eventually become inoperative.

Solitary confinement and general conditions in Canadian penitentiaries pose problems which the courts are ultimately inequipped to handle. It is not enough to say that a court may make an order which effectively prevents the confinement of an inmate to a cell in which conditions do not meet the standards set by section 2(b). The question remains whether the courts will make such an order. The history of judicial appointments in Canada gives little reason to expect that Canadian judges will be at all sympathetic to prisoners who have legitimate cause for complaint. Nearly ten years ago Professor Russel said that judicial appointments seldom went to lawyers or jurists who, in their earlier careers, manifested a lively interest in or associated with the social issues surrounding questions of civil liberties.<sup>154</sup> The case of *Miller and Cockriell* and the Court of Appeal decision in *Shand* suggest that these remarks may be equally applicable today. However, even if future judges show a greater interest in the maintenance and promotion of civil liberties it would be unrealistic to expect them to exercise their discretion by granting orders compelling penitentiary authorities to conform with acceptable minimum standards of treatment when the requisite facilities for such treatment are simply not available. The problem will not be resolved by compensating those who are ill-treated for

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<sup>154</sup> Russel, *A Democratic Approach to Civil Liberties* (1969) 19 U. of T.L.J. 109, 124.

the damages they have suffered. Nor will a court's declaration that penitentiary conditions are cruel and unusual serve as "practical guidance" to penitentiary authorities as Mr Justice Heald had anticipated in *McCann*. Within a year after the *McCann* decision was rendered, there had been at least five outbreaks of violence at the British Columbia Penitentiary, all motivated by treatment of the prisoners.<sup>155</sup> In a statement made by the Inmates Committee on October 18, 1976, the following remarks were made concerning the repair of the riot-torn east wing of the penitentiary, the ravaged north wing and B-7 living unit:

Both of these units should have been condemned by Government agencies years ago. There are those that claim they have been. The irony of it all is that the antiquated conditions of these death traps, with no running hot water, no ventilation, cells more horrible to live in than the worst zoo cages, are to be restored once again with public funds. . . . The British Columbia Penitentiary has become nothing less than a disgrace to Canada.<sup>156</sup>

The Federal Court's inability to stimulate penitentiary reform is tragically illustrated by the fact that the Solicitor General of Canada waited until riots had broken out in September of 1976 at New Westminster, Laval, and Millhaven, before setting up a special committee to enquire into the state of the Canadian penitentiary system. Relief will only come when the federal government is prepared to adopt as a basis of reform the suggestion of two members of the British Columbia Attorney General's Department who, in their brief to the Special Committee said that the act of sending a person to prison was the punishment and it was beyond the prison's role to create further punishment while he was there.<sup>157</sup>

At present, section 2(b) appears to be destined to follow the lead of its predecessor in the English *Bill of Rights*, for if the interpretation given to it by the Supreme Court is followed it will serve as no more than a statement of principle. In order for a principle to be vital, it must be applied in practice and this will entail an extraordinary effort on the part of the Government and the private and public sectors. In the absence of effective legal remedies which can protect the dignity of the individual, one is forced to fall back on human resources. One can only hope that the Canadian people are ready and willing to accept the challenge.

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<sup>155</sup> *The Globe and Mail*, Toronto, Feb. 16, 1977, 8.

<sup>156</sup> This statement was sent to the Office of Civil Liberties, National Capital Region on Oct. 19, 1976 by a friend of the Secretary-Treasurer of the Inmates Committee. The author would like to thank L'Office des Droits des Détenus de la League des Droits de L'Homme for making a copy of the document available.

<sup>157</sup> *The Globe and Mail*, Toronto, Feb. 19, 1977, 11.