7-1-2008

# Proportionality in the Criminal Law: The Differing American versus Canadian Approaches to Punishment

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Roozbeh (Rudy) B. Baker, J.D.*



## INTRODUCTION

In a passage cited approvingly by Don Stuart in his well known treatise *Canadian Criminal Law*,[1] the Law Reform Commission of Canada, in its 1976 Report, cautions against the excessive use of the criminal law power. Noting that the "criminal law is a blunt and costly instrument," the Law Reform Commission urges restraint in its application. As society's "ultimate weapon," the criminal law power must be used with the utmost restraint. It is with this powerful warning in mind that this Article shall set forth to present a brief comparative survey of the American and Canadian constitutional prohibitions upon excessive criminal punishment. Specifically, the focus of this Article shall be upon the Eighth Amendment of the *United States Constitution*[2] and s.

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1. *See* DON STUART, CANADIAN CRIMINAL LAW 62 (4th ed. 2001) (citing Law Reform Commission, *Our Criminal Law* (1976)).

2. *U.S. Const.* amend. VIII. Hereinafter referred to as the *U.S. Constitution*. The Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

12 of the *Canadian Charter of Rights and Freedoms*[3] (both of which prohibit "cruel and unusual punishment") and their effect on mandatory criminal sentencing[4] (via penal statute) in the two countries. Part I briefly explains the differences between the jurisdictional application of criminal justice in the United States and Canada. Part II of this Article presents and explains the American Eighth Amendment approach to the constitutionality of mandatory criminal sentencing. Part III of this Article presents and explains the Canadian s. 12 approach to the constitutionality of mandatory criminal sentencing. Part IV of this Article compares the two national approaches and presents the underlying argument of this Article, namely that if one's concern is the fair and proportionate application of justice, then the Canadian approach to reconciling the constitutional prohibition against "cruel and unusual punishment" and the application (through penal statute) of mandatory criminal sentencing is the superior one. Part V of this Article shall explore the possible reasons for the differing national approaches to mandatory criminal sentencing.

## I. JURISDICTIONAL NOTE

The jurisdictional applications of the criminal law power are somewhat different in both countries, a difference that must be explained before a proper analysis of any aspect of the two national systems can take place.

In the United States, it is the fifty states of the federal union that generally possess jurisdiction over the criminal law power. The federal government itself does possess the power to create statutory crimes via the express authority granted by the *necessary and proper clause* of the U.S. Constitution, and the implied authority granted by the *commerce clause*.[5] Such federal criminal law is mostly employed to ensure compliance with federal administrative regulations, or to deal with interstate crimes that the local authorities are ill equipped to handle,[6] and as such is limited

3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 12. Hereinafter referred to as the *Charter*. Section 12 reads as follows: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

4. Quickly defined, a mandatory sentence is a sentence set by law with no discretion for the judge to individualize punishment. *See* BLACKS LAW DICTIONARY 1368 (7th ed. 1999).

5. *U.S. Const.* § 8.

6. WAYNE R. LAFAVE, CRIMINAL LAW § 2.8(c) (3rd ed. 2000).

in its scope.[7] The fifty states, unlike the federal government, need not search for some express or implied authority to apply the criminal law power, as it is accepted that they possess the regulatory power[8] to do so.[9] As such, each of the fifty states has the authority to codify the criminal law in their jurisdictions and to adopt whatever sentencing procedures they choose.

In Canada, s. 91(27) of the *British North America Act*[10] specifically allocates the criminal law power to the federal government. Thus, unlike the United States with fifty-one different criminal codes,[11] Canada possesses only one – enacted by the federal Parliament sitting in Ottawa. Also, unlike the United States, Canada employs a unitary (rather than dual) court system, with the provincial courts enforcing both federal and provincial law, and the Supreme Court of Canada acting as a general court of appeal for both federal and provincial law issues.

## II. THE AMERICAN APPROACH

The Eighth Amendment prohibition on cruel and unusual punishment can be generally cited as having two important features: (1) it restricts the techniques which can be used to cause punishment; and (2) it restricts the amount of punishment that can be imposed for offenses.[12] Originally, the Eighth Amendment was applicable only to the federal government and not to the states.[13] It would take the passage of the Fourteenth Amendment and its *due process clause* in order to incorporate the Eighth Amendment directly into the various state constitutions.[14]

As to the first feature of the Eighth Amendment, the caselaw is fairly clear as to what specific forms of punishment are prohibited. In the case *In re Kemmler*,[15] Chief Justice Fuller of the U.S. Supreme Court, writing for the majority, held that while the punishment of death itself was not manifestly "cruel and unusual"

7. This Article shall not concentrate on the limited U.S. federal criminal law power.

8. The regulatory power of the states is also often referred to as the "police power."

9. LAFAVE, *supra* note 6, at § 2.9.

10. *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 91(27). Hereinafter referred to as the *BNA Act*.

11. The fifty states plus the federal government.

12. LAFAVE, *supra* note 6, § 2.14(f).

13. But note that most of the states do have some sort of state constitutional provision barring excessive punishment.

14. *See generally* Robinson v. California, 370 U.S. 660, 667 (1962).

15. In re Kemmler, 136 U.S. 436 (1890).

certain specific punishments were, such as burning at the stake, crucifixion, and breaking on the wheel.[16] The Court enunciated a test to see whether a specific form of punishment was excessive in light of the Eighth Amendment protection was: whether the form of punishment "implie[d] there something inhuman and barbarous, something more than the mere extinguishment of life."[17] In *Chambers v. Florida*[18] the Court extended the list of prohibited punishments it had enumerated in *Kemmler* to include the rack, the thumbscrew, the wheel, and excessive solitary confinement.[19]

It is the second feature of the Eighth Amendment (i.e., its restrictions on the amount of punishment that can be imposed for offenses) that directly affects mandatory criminal sentencing. The path the U.S. Supreme Court has taken in order to ultimately reach the rule it has today has been somewhat tortuous and at times contradictory. In *Weems v. United States*,[20] the U.S. Supreme Court took the first tentative step in fashioning a test to determine whether certain extended prison terms ran afoul of the Eighth Amendment prohibition. The accused, Weems, was an American official in the Philippines[21] who was condemned to a mandatory term of fifteen years of hard labor for the crime of falsifying public records. Writing for the majority, Justice McKenna held that inasmuch as the words of the Eighth Amendment were not precise and their scope not static, the Amendment had to draw meaning from the evolving standards of decency of a maturing society.[22] Given this view, Justice McKenna concluded that the punishment that had been imposed upon Weems was in fact inherently cruel and excessive in relation to the crime committed. Justice McKenna's opinion, specifically its identification of an "evolving standard of decency," came very close to reading a proportionality standard into the Amendment that was previously thought to only refer to the punishment at issue, not at all looking to the actual crime for which said punishment was imposed. It would take seventy-three years, but in the case of *Solem v. Helm*,[23] the U.S. Supreme Court did in fact read a proportionality stan-

16. *Id.* at 446.

17. *Id.* at 447.

18. Chambers v. Florida, 309 U.S. 227 (1940).

19. *Id.* at 237.

20. Weems v. United States, 217 U.S. 349 (1910).

21. At the time a U.S. commonwealth, whose criminal law was administered by the U.S. federal government.

22. *Weems*, 217 U.S. at 379.

23. Solem v. Helm, 463 U.S. 277 (1983).

dard into the Eighth Amendment; and consequently fashioned a test to determine whether a mandatorily imposed penal sentence was so disproportionately excessive in relation to the crime committed so as to be "cruel and unusual." The accused, Solem, was convicted by a South Dakota court for issuing a "no account" check for $100. The crime was ordinarily punishable by a five year term but under South Dakota's recidivist statute[24] Solem, previously convicted of six nonviolent felonies, was classified as a Class 1 felon and was thus sentenced to a mandatory term of life imprisonment without the possibility of parole. The U.S. Supreme Court reversed Solem's conviction, holding that the mandatory life term violated the Eighth Amendment prohibition against cruel and unusual punishment. Writing for the majority, Justice Powell stated that the "principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence," and consequently went on to directly read a proportionality standard into the Eighth Amendment, stating that the Amendment prohibited "not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[25] Justice Powell based his holding on the view that the framers of the Eighth Amendment had intended to incorporate into the Amendment all of the common-law principles of punishment up to that point, including the view found in the *1688 English Bill of Rights*,[26] that punishment required a principle of proportionality.[27] Justice Powell went on to fashion the following 3-prong test, to be used in order to determine whether a prison sentence violated the new proportionality standard found in the Eighth Amendment's prohibition on cruel and unusual punishment:

> In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense . . . (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.[28]

Justice Powell's reading of a proportionality standard into the Eighth Amendment prohibition would have far reaching effects

24. *S.D. Codified Laws* § 22-6-1(7) (Supp. 1982).
25. *Solem*, 463 U.S. at 284.
26. *See Bill of Rights*, (Eng.), I Will. & Mar., sess. 2, c. 2.
27. *Solem*, 463 U.S. at 285-286.
28. *Id.* at 292.

upon the application of mandatory criminal sentencing (through penal statute) in the United States. For the first time in American jurisprudence there was a clear enunciation that the Eighth Amendment prohibition applied not only in reference to the punishment at issue, but also in reference to the crime for which it was imposed.

Scarcely eight years after the *Solem* decision, the U.S. Supreme Court reversed course in *Harmelin v. Michigan*,[29] greatly weakening the proportionality standard that *Solem* had read into the Eighth Amendment prohibition against cruel and unusual punishment. The accused, Harmelin, was convicted by a Michigan court of possessing 672 grams of cocaine. Under Michigan's mandatory minimum criminal sentencing guidelines,[30] anyone convicted of possession of over 650 grams of a controlled substance was automatically sentenced to a mandatory term of life imprisonment without the possibility of parole. Partially reversing the *Solem* holding, a deeply divided U.S. Supreme Court upheld Harmelin's mandatory sentence as not violative of the Eighth Amendment. Writing a concurring opinion, which because of its three-judge plurality states current law,[31] Justice Kennedy stated that the Eighth Amendment encompassed a "narrow proportionality principle" which only prohibited sentences judged "greatly disproportionate" to the crime committed.[32] Justice Kennedy narrowed the Eighth Amendment proportionality standard that *Solem* had established because "the fixing of prison terms for specific crimes involves a substantial penological judgment that, as a general matter, is 'properly within the province of legislatures, not

29. Harmelin v. Michigan, 501 U.S. 957 (1991).

30. *Mich. Comp. Laws Ann.* § 333.7403(2)(a)(i)

31. *See* McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir.1992) (citing and following Justice Kennedy's concurrence in *Harmelin* as on point and stating current law: "By applying a head-count analysis, we find that seven members of the Court [in *Harmelin*] supported a continued Eighth Amendment guaranty against disproportional sentences. Only four justices, however, supported the continued application of all three factors in *Solem*, and five justices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not. Only Justice Kennedy's opinion reflects that view. It is to his opinion, therefore, that we turn for direction."); *see* McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir.1992) (agreeing with the 5th Circuit in *McGruder* and following Justice Kennedy's concurrence in *Harmelin* as on point and stating current law); *see also* Lockyer v. Andrade, 538 U.S. 63, 72-73 (2003); Ewing v. California, 538 U.S. 11, 20 (2003) (both holding that Justice Kennedy's concurrence in *Harmelin*, with its adoption of a narrow proportionality principle into the Eighth Amendment protection against excessive mandatory criminal sentencing, stated current law).

32. *Harmelin*, 501 U.S. at 997.

courts.'"[33] With such principles in mind, Justice Kennedy fashioned a corollary to the 3-prong test enumerated in *Solem*. Now, the first prong of the *Solem* test would itself act as a threshold test.[34] Hence, if the offense at issue was a grave or serious one, no further analysis would be necessary (i.e., one would not need to look at the second and third prongs of the *Solem* test).[35] Any period of imprisonment would be permitted in relation to a grave offense. If the offense at issue were non-grave, only then would the second and third prongs of the *Solem* test be employed.[36] Justice Kennedy did not specifically define in his opinion what constituted a grave versus non-grave offense, and a survey of lower court decisions citing the amended *Solem* test Justice Kennedy fashioned in *Harmelin* do not shed a great deal of light on the separation of grave or serious versus non-grave offenses. For example, lower courts have not only held as grave or serious offenses multiple armed bank robberies,[37] the sale of 0.8 grams of heroin,[38] and the violation of child pornography laws;[39] but also misdemeanor theft[40] and a first drug offense.[41] The only common thread shedding some light on when a court will classify an offense as grave or serious has been offered by the 5th Circuit in *Smallwood v. Scott*,[42] where the Court held that crimes of violence and those non-violent crimes posing serious threats to others (such as drunk driving, for example) could be classified as grave or serious for the purposes of Justice Kennedy's modified *Solem* test as fashioned in *Harmelin*.[43]

With the promulgation of the *Harmelin* decision, the law in the United States concerning the Eighth Amendment and its effect upon mandatory criminal sentencing (in its current form) was set. The 3-prong *Solem* test was kept but drastically altered, with *Harmelin* transforming the first prong into a threshold test. Although the standard of proportionality was not completely read out of the Eighth Amendment by *Harmelin*, its scope was greatly narrowed. In that *Harmelin* transformed the first prong of the *Solem* test into a threshold test, if an offense was subsequently

33. *Id.* at 997 (quoting, in part, *Rummel v. Estelle*, 445 U.S. 263, 275-276 (1980).
34. *Harmelin*, 501 U.S. at 1004-1005.
35. *Id.*
36. *Id.*
37. U.S. v. Marks, 209 F.3d 577, 583 (6th Cir. 2000).
38. U.S. v. Frisby, 258 F.3d 46, 50 (1st Cir. 2001).
39. U.S. v. MacEwan, 445 F.3d 237, 250 (3d Cir. 2006).
40. Smallwood v. Scott, 73 F.3d 1343, 1346-47 (5th Cir. 1996).
41. Henderson v. Norris, 258 F.3d 706, 710-11 (8th Cir. 2001).
42. *Smallwood*, 73 F.3d 1343.
43. *Id.* at 1347-1348.

classified as grave or serious, then any length of imprisonment could be justified.

## III. THE CANADIAN APPROACH

The s. 12 prohibition on cruel and unusual punishment is fairly new to the Canadian scene, the *Canadian Charter of Rights and Freedoms*[44] only coming into force in 1982. This reality aside, however, almost from the very first day of its enactment, s. 12 has become the subject of much litigation – especially in regards to its effect upon mandatory criminal sentencing (through penal statute) in Canada.

The Supreme Court of Canada has held that the phrase "cruel and unusual" in relation to s. 12 is conjunctive in its meaning.[45] A punishment therefore must be both cruel as well as unusual if it is to violate s. 12 of the *Charter*. The initial test as to whether a punishment was both cruel and unusual was first enumerated in the case of *R. v. Smith*.[46] The accused, Smith, was apprehended while trying to re-entering Canada from Bolivia (where he had vacationed), with 7.5 ounces of cocaine. Under s. 5(1) of Canada's *Narcotic Control Act*,[47] anyone convicted of importing any type of narcotic into the country was automatically sentenced to a mandatory minimum term of seven years imprisonment. The Supreme Court of Canada reversed Smith's conviction, holding that the mandatory prison term he had been sentenced to violated the s. 12 prohibition against cruel and unusual punishment. The majority opinions classified as cruel and unusual any punishment "so excessive as to outrage the standards of decency."[48] Certain methods of punishment such as the rack, the thumbscrew, the stocks, torture of any kind, and long periods of solitary confinement were classified as always being cruel and unusual, and thus always violative of s. 12.[49] This approach was quite similar to the U.S. Supreme Court's reasoning in *In re Kemmler*.[50] Other punishments, such as mandatory minimum sentences, could "outrage the

44. Hereinafter referred to as the *Charter*.

45. See the pre-*Charter* case of *R v. Miller and Cockriell* [1977] 2 S.C.R 680, 689-690. Subsequently, the opinion expressed here in relation to s. 2(b) of the legislatively (as opposed to constitutionally) entrenched *Canadian Bill of Rights* was accepted in relation to s. 12 of the constitutionally entrenched *Charter* as well.

46. *R. v. Smith*, [1987] 1 S.C.R. 1045.

47. *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 5(2).

48. *Smith*, [1987] 1 S.C.R at 1072, citing *Miller*, [1977] 2 S.C.R. at 688.

49. *Smith*, [1987] 1 S.C.R at 1109.

50. *Kemmler*, 136 U.S. at 436.

standards of decency" and run afoul of s. 12 if they were "grossly disproportionate" to the crime committed.[51] (Note that the Supreme Court of Canada here readily accepts the existence of a full proportionality standard in s. 12, as opposed to the U.S. Supreme Court with only accepts a narrow proportionality standard.)[52] The test for "gross disproportionality" conducted by asking the following three questions of the punishment rendered: (i) was the punishment necessary to achieve a valid penal purpose; (ii) was the punishment founded on recognized sentencing procedures; and (iii) were there alternatives to the punishment imposed.[53] The above questions however, according to the *Smith* holding, could not be asked bearing in mind the circumstances of whatever case one had in front of oneself at the time. Instead, the test had to be conducted under the hypothetical of the most innocent possible offender.[54] Thus, in the instant case, it mattered not that Smith was a seasoned narcotics trafficker. His sentence had to be analyzed by the *Smith* test under the most innocent possible offender hypothetical (i.e. a naive young person returning from vacation, not from the drug running haven of Bolivia but rather from the U.S., carrying not 7.5 ounces of cocaine but rather a single joint of marijuana). Under such a hypothetical then, according to Justice Lamer, Smith's mandatory minimum criminal sentence was indeed disproportionate to the "crime" committed:

> [A] judge who would sentence to seven years in a penitentiary a young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let's postulate, his or her first "joint of grass," would certainly be considered by most Canadians to be a cruel and, all would hope, a very unusual judge.[55]

The requirement that the *Smith* test be conducted using the hypothetical of the most innocent possible offender, creates obvious problems in relation to the application of mandatory criminal sentencing in Canada. In the words of Peter W. Hogg, former Dean of Osgoode Hall Law School (York University, Toronto):

> The test employed in *Smith* was the test of the most innocent possible offender: is it possible to imagine a hypothetical case for which the minimum sentence would be

51. *Smith*, [1987] 1 S.C.R at 1109.
52. *Solem*, 463 U.S. at 277.
53. *Smith*, [1987] 1 S.C.R at 1074.
54. *Id.* at 1053.
55. *Id.*

> grossly disproportionate? It does not matter that the hypothetical case has never arisen, and is never likely to arise having regard to police and prosecutorial discretion. Nor does it matter that the minimum sentence is appropriate (or too low) for the offender actually before the Court. A McIntyre J. pointed out in dissent, the decision in effect entrenches the discretion of the sentencing judge to take account of all the circumstances of the offender and of the offence.[56]

Indeed, it seemed that *Smith* had in effect condemned the application of any and all mandatory criminal sentences as cruel and unusual in relation to s. 12 of the *Charter*.

Only four years after the *Smith* decision, Supreme Court of Canada reversed course and placed several restrictions upon *Smith*'s requirement that the *Smith* test be conducted under the hypothetical of the most innocent possible offender. In *R v. Goltz*,[57] the accused, Goltz, was sentenced to a mandatory term of seven days imprisonment for driving with a suspended license[58] – a license that was suspended because he had accumulated numerous driving infractions. The County Court of British Columbia, following the reasoning of *Smith*, applied the three part *Smith* test under the hypothetical of the most innocent possible offender: a person with a suspended license who had driven a vehicle a few feet off the highway because its original driver had become disabled, a simple good Samaritan – as such Goltz's conviction was reversed as being in violation of the s. 12 prohibition.[59] Goltz had in fact driven with a suspended license not just for a few feet and not in order to help anyone, but rather over an extended period of time, due to the simple reason that he did not want to give up the convenience of driving. The Supreme Court of Canada reversed the lower courts ruling and upheld the original conviction. Writing for the majority, Justice Gonthier, while not expressly over-ruling the most innocent possible offender hypothetical requirement of *Smith*, held instead that such hypotheticals had to be reasonable:

> A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the Court is unavoidably required to consider factual patterns other than that presented by the respondent's case, this is not a license to invalidate statutes on the

56. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 53.4 (5th ed. 2006).
57. *R v. Goltz*, [1991] 3 S.C.R. 485.
58. *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 88(1)(c).
59. *Goltz*, [1991] 3 S.C.R. at 530.

> basis of remote or extreme examples. . .The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.[60]

Though not expressly overruling the hypothetical requirement of *Smith*, *Goltz* does allow some sanity back into the process by requiring that any formulated hypotheticals not be obscenely far fetched and ill related to the case at hand. The practical result of *Goltz*, with its relaxation of the *Smith* most innocent possible offender hypothetical requirement, was to allow for a return of mandatory criminal sentencing into Canadian jurisprudence.

With the promulgation of the *Goltz* decision, the law in Canada concerning s. 12 and its effect upon mandatory criminal sentencing (in its current form) was set. The three part *Smith* test remained, but the requirement that the test be performed under the hypothetical of the most innocent possible offender was replaced with the requirement that the hypothetical be "reasonable" and not "far-fetched."[61]

## IV. CONTRASTS BETWEEN THE TWO NATIONAL APPROACHES

While both systems employ complex tests in order to determine proportionality, the Supreme Court of Canada seemingly has had a much easier time of accepting the existence of a proportionality standard within s. 12 than has the U.S. Supreme Court of accepting a proportionality standard within the Eighth Amendment. The result is a Canadian approach that is much more flexible in the application of its employed test than is the American approach; and a Canadian test that is much more focused upon analyzing the actual punishment imposed. Also, because of the existence of the s. 1 over-ride[62] found in the *Charter*, s. 12 protections are not diluted via balancing state interests with the right, unlike United States' approach.[63]

In the United States, because of the *Harmelin* holding, if a crime is found to be grave or serious (i.e., involving violence or posing a serious threat to others), there is no further analysis under the *Solem* rule – any sentence can be imposed. Conse-

60. *Id.* at 515.

61. *Id.*

62. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1. Section 1 reads as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

63. DON STUART, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW 398 (3rd ed. 2001).

quently, the states have largely been left to their own devices. It is largely due to this important fact that in California, under that state's "three strikes" mandatory criminal sentencing scheme, repeat offenders have been sentenced to terms of life imprisonment for crimes such as the petty theft of $100, or for the stealing of food.[64] In Canada however, not only is the full test preformed in every instance, but there is a specific requirement that a "reasonable" hypothetical be employed instead of the exact facts, thus allowing for mitigating circumstances to be taken into account by the trial judge.

There are also important differences to note between the actual three prongs/parts of the two tests employed by the two national courts. The American *Solem* 3-prong test requires only: (i) a judgment regarding the gravity of the offense; (ii) an intrajurisdictional test; and (iii) an interjurisdictional test.[65] There is no determination or analysis in regards to the actual sentence imposed, but rather the analysis turns its full focus on what the punishments for similar crimes are in the same jurisdiction (the second prong of the *Solem* test), and in other jurisdictions (the third prong of the *Solem* test). If a jurisdiction is applying (through penal statute) a mandatory criminal sentence (for a certain crime) that may be overly harsh (in regards to said certain crime), what is the point of conducting an intrajurisdictional test (the second prong of the *Solem* test)? Is there not a reasonably good chance that the jurisdiction in question is applying the overly harsh mandatory criminal sentence across the board? Also, what kind of a safeguard is an interjurisdictional test? In the United States, with fifty-one different criminal codes, one can surely find several different jurisdictions that might perhaps be analogously applying (through penal statute) an overly harsh mandatory criminal sentence for a certain crime. Unlike the American *Solem* test, the Canadian *Smith* test turns its full attention to analyzing the actual punishment imposed. The three part Smith test analyzes: (i) the necessity of the punishment; (ii) the sentencing principles utilized to pass punishment; and (iii) whether there are alternatives to the punishment imposed.[66] Under such a scheme, proportionality is much more readily evident. The very fact that the

64. Jamie Cameron, *The Death Penalty, Mandatory Prison Sentences, and the Eighth Amendment's Rule Against Cruel and Unusual Punishments*, 39 OSGOODE HALL L.J. 427, 433 (2001).

65. *Solem*, 463 U.S. at 292.

66. *Smith*, [1987] 1 S.C.R at 1074.

question is being presented as to whether the punishment is even necessary (the first part of the *Smith* test) reveals a commitment to closely analyzing the punishment itself in relation to the crime, unlike the American approach which only seeks to analyze the punishment in relation to other punishments within the jurisdiction (the second prong of the *Solem* test), and outside the jurisdiction (the third prong of the *Solem* test).

Section 1 of the *Charter* establishes that rights and freedoms are not absolute, and as such it provides a limitation for certain rights if said limitations are deemed to be reasonable and justified.[67] A s.1 override works in a two stage process. Stage one involves a determination of whether a challenged law limits one of the protected rights in the *Charter* (i.e., whether the challenged law constitutional), while stage two involves deciding whether the limitation is one that is reasonable.[68] Thus, all of the rights protected in the *Charter* are not absolute, but rather subject to an internal test of reasonability. The s.1 override can be thought of as the Canadian answer to the *strict scrutiny test* employed by American courts, but with one very important caveat that it works in reverse. The balancing approach of the *strict scrutiny test* is employed by American courts to (usually) over-ride the validity (i.e., constitutionality) of a law passed by the government. In Canada however, the s. 1 over-ride is used by the government to attempt to save a law that it has enacted – to in effect override the initial judicially determined unconstitutionality of a challenged law.

The actual judicially crafted test used to determine whether the per se unconstitutionality of a law can be overridden via s. 1 of the *Charter* was enumerated by the Supreme Court of Canada in *R. v. Oakes*.[69] The *Oakes* test as two parts: Part one involves determining whether the challenged law is of such "pressing and substantial" concern as to warrant an override.[70] Part two involves the government demonstrating that the means they have chosen are proportional to their objective.[71] Proportionality is determined via the demonstration of a rational connection between the methods of the challenged law and its objectives, a balancing test between the objectives of the challenged law and the effects of

67. BERNARD W. FUNSTON & EUGENE MEEHAN, CANADA'S CONSTITUTIONAL LAW 168 (THOMSON CANADA LIMITED 1993) (1998). *See generally R v. Oaks*, [1986] 1 S.C.R. 103.

68. HOGG (5th), *supra* note 50, § 38.8(a).

69. *Oakes*, [1986] 1 S.C.R. 103.

70. *Id.* at 138-139.

71. *Id.* at 139.

those of its measures which limit *Charter* rights and freedoms, and a determination that the challenged law limits *Charter* rights and freedoms as little as possible.[72]

The advantage of the s. 1 limitation in regards to s. 12 is that it foregoes the necessity of balancing state interests with the interest in maintaining the s. 12 protections at the initial inquiry. The interests of the state are left to a second distinct s. 1 inquiry, separate from the s. 12 analysis. In the United States, state interests in the utility and necessity of punishment must be balanced with the legitimate interest in maintaining Eighth Amendment protections. In Canada, too, this balancing process may occur, but never at the initial stage of inquiry. Canadian criminal justice scholar Don Stuart explains the advantages of such an approach:

> The advantage of the usual two-stage approach to the Charter is that Charter protections are not diluted by balancing State interests at the point of defining the content of the right. This is left to the s. 1 inquiry, where the State must discharge a heavy burden of justification . . . Given that the test is one of gross disproportionality and outraging public decency, it seems highly unlikely that violations of s. 12 will be saved under s. 1.[73]

Given that it is highly unlikely that any s. 12 protections will ever be overturned under a s. 1 inquiry,[74] the Canadian two-step approach seems quite advantageous if one's principle concern is the equal application of justice.

## V. Possible Reasons Why Distinctions Have Developed

### A. *Different Forms of Federalism*

Unlike the United States, Canadian federalism does not employ a separation of powers doctrine. Consequently, the Supreme Court of Canada is much less deferential to the decisions taken on the secondary level than is the U.S. Supreme Court. Deference aside, with fifty-one different criminal justice systems in the United States, it would be virtually impossible for the U.S. Supreme Court to establish invasive review over all of them, even if it wanted to. Scholar Jamie Cameron explains:

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72. *Id.*

73. Stuart (3rd), *supra* note 63, at 398.

74. To date, twenty five years since the introduction of the *Charter*, a s. 12 protection has yet to be overturned by a s. 1 inquiry.

> As far as the United States Supreme Court is concerned, state jurisdiction over criminal justice poses a serious obstacle to the constitutional review of sentencing laws. Accordingly, outside of capital offenses, the United States Supreme Court has effectively abandoned the task of establishing sentencing standards to govern the policies adopted by the fifty states with differing conceptions of just desserts.[75]

Separation of power concerns notwithstanding, the very fact that the states possess jurisdiction over the criminal law power in the United States has led the U.S. Supreme Court to cede large parts of its oversight authority powers in that arena to the states themselves.[76] Part of the motivation behind this thinking has been the American view that one of the principle advantages of federalism is that it allows the various states to experiment with different solutions to the same problem. In *Harmelin* of Justice Kennedy of the U.S. Supreme Court noted, "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure."[77]

As discussed in Part I, the structural administration of criminal law is radically different between the two countries, with the criminal law power largely exercised by the states in the United States, while in Canada it is exercised by the federal government. The criminal law in Canada therefore is quite uniform, with a single federal criminal code operating throughout the country. The fact that such standardization is built into the system, with the Supreme Court of Canada sitting as a court of general appeal atop a unitary court system, can perhaps explain the Supreme Court of Canada's invasive intervention into the criminal law arena. In many ways, the Supreme Court of Canada can be thought of as the equivalent to a state supreme court in the United States. No one is surprised when the supreme court of California, a court of general appeal, intervenes into the criminal law arena in that state. Indeed, is not that what the court is there for? The uniformity of the federally administered criminal law in Canada also contributes to the fact that there is much less sentencing plea bargaining in that country than in the United States.[78] Perhaps this reality has helped to foster a greater trust in the discretion of

75. Cameron, *supra* note 64, at 435.
76. *Id.* at 446.
77. *Harmelin*, 501 U.S. at 999.
78. STUART (3rd), *supra* at 63, at 67.

appellate judges to administer mandated oversight tests upon the constitutionality of certain mandatory minimum sentences, instead of largely leaving the issue alone if the crime is judged as being grave or serious, the reality in the United States under the *Solem* test.

### *B. Canadian Tensions Between Parliamentary Supremacy and Charter Supremacy*

Canada, which inherited the Westminster system of governance from the UK in 1867, has been continually transfixed by the experiment in model governance that was being conducted south of its border, has vacillated between the two systems of governance – wavering between the Westminster system of an unwritten constitution and supreme Parliament, embodied in the *BNA Act*; and the American system of a written constitution with a clear delineation of checks and balances between the various branches of government, embodied in the *Charter*.

The framers of Canada's original constitutional document, the *BNA Act*, specifically rejected the model of an enumerated bill of rights on the American Model, and instead opted for a model that would entrust the protection of civil liberties to the wisdom of parliament. What the framers of the *BNA Act* did set out to do, however, was categorize an extensive list of enumerated federal and provincial powers.[79]

The absence of a constitutionally entrenched bill of rights did not cause much concern in Canada until after the Second World War and the adoption of the *Universal Declaration of Human Rights* by the United Nations.[80] One of the earliest Canadian advocates for an enumerated Bill of Rights was a young MP by the name of John Diefenbaker, who in 1945 took to the floor of parliament calling for the adoption of such a document.[81] In the federal election of 1958, the same John Diefenbaker, as head of the Progressive-Conservative Party, made the introduction of a Bill of

79. This final point is important because it describes the origins of what would come to be the only judicial review power of the Supreme Court of Canada prior to the adoption of the *Charter* in 1982 —- judicial review on federalism grounds. Thus, pursuant to the *BNA. Act*, the Supreme Court of Canada, prior to the adoption of the *Charter* in 1982, did have the power to strike down either federal or provincial laws for legislating in areas of competence reserved for the other level.

80. HOGG (5th), *supra* at 50, § 35.1.

81. WALTER SURMA TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 12 (2nd ed. 1975).

Rights for Canada one of the central planks of his campaign.[82] The promise was a rash one, as the process for amending the *BNA Act* required not only the consent of all of Canada's fractious provinces, but a special act of the U.K. Parliament as well. Realizing these obstacles, in 1960 the recently elected Progressive-Conservative government of Prime Minister John Diefenbaker instead introduced a statutory *Canadian Bill of Rights*[83] through a simple parliamentary vote. The Bill itself was impressive, and had binding effect on all past and future federal statutes. Drafted by a special joint committee of both houses of Parliament (i.e., the Senate and House of Commons), it took to an extensive study of the enumerated Bills of Rights of nations around the world,[84] eventually producing an impressive document that protected a wide range of civil liberties, from freedom of speech and religion, to freedom from cruel and unusual punishment.

Despite the impressive and admirable list of civil liberty protections afforded by the *Canadian Bill of Rights*, the document contained a number of drawbacks. Most glaringly, it applied only to federal laws, leaving provincial acts immune from its scrutiny. Also, the Bill was unclear as to what its effect was on federal statutes that violated its protections.[85] All of these drawbacks, however, were minor compared to the simple obvious fact that the *Canadian Bill of Rights* was not entrenched in the Canadian Constitution in any way, and at the end of the day was just a simple parliamentary statute. As a result of this inescapable fact, in the few cases that were brought to the Supreme Court of Canada raising the *Canadian Bill of Rights*, the Court erred on the side of caution, viewing the Bill solely as a tool of statutory interpretation. In the case of a federal law alleged to be violative of the *Canadian Bill of Rights*, the Supreme Court of Canada utilized the following formula: Where the right could be upheld without striking down the federal law in question (e.g., the law was silent on the point at issue), then the law was so construed and applied as to uphold the asserted right;[86] where this could not be achieved, the federal law was upheld.[87]

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82. *Id.*

83. *See Canadian Bill of Rights*, S.C. 1960, c. 44.

84. TARNOPOLSKY, *supra* note 81, at 12.

85. For a more detailed discussion see PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 35.3 (a) (1st ed. 1977).

86. *See R. v. Appleby*, [1972] S.C.R. 303; *Curr v. The Queen*, [1972] S.C.R. 889; *Duke v. The Queen*, [1972] S.C.R. 917; *Hogan v. The Queen*, [1975] 2 S.C.R. 574.

87. *See Brownridge v. The Queen*, [1972] S.C.R. 926; *Lowry and Lepper v. The*

The reluctance of the Supreme Court to forcefully apply the *Canadian Bill of Rights* led directly to several movements to patriate the country's original constitutional document, the *BNA Act*, from the U.K., and incorporate a constitutionally enshrined bill of rights within it.[88] The first attempt, in 1971, failed due to the intransigence of Quebec Premier Robert Bourassa who objected to the proposed document's failure to give protections regarding Quebec's jurisdiction over its own separate provincial social welfare programs.[89] The second attempt, in 1982, passed due to the fact that the unanimous consent of all of the country's provinces was no longer required for patriation.[90] Regardless, through a marathon session of negotiations, the federal government was able to garner the support of nine out of the ten provinces (the lone holdout again being Quebec) and submit its proposal for patriating the Constitution to the U.K. Parliament, which was approved on April 17, 1982 by Royal Proclamation. The newly patriated constitution kept the *BNA Act*, but, amongst other things, added to it a constitutionally entrenched bill of rights – the *Canadian Charter of Rights and Freedoms*.

With the patriation of the *BNA Act* and the advent of the *Charter*, Canada made a cleared break with the Westminster model, instead looking towards the American model of specified and enumerated rights. This process however is not yet complete, witness the s. 33 "notwithstanding clause"[91] of the *Charter* which gives the federal Parliament the power to override any *Charter* protection found in s. 2 or ss. 7-15. Thus, Parliamentary supremacy is still alive, to a point, in Canada. It is this tension perhaps that can help explain the Supreme Court of Canada's hesitancy to blindly defer to any and all criminal sentencing statutes emanating from the federal Parliament.

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*Queen*, [1974] S.C.R. 195; *A.G. Ont. v. Reale*, [1975] 2 S.C.R. 624. Peter W. Hogg comes to an identical conclusion in the 1977 Edition of his canonical Treatise. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 25.5 (b) (1st ed. 1977).

88. *Id.*

89. TARNOPOLSKY, *supra* note 81, at 19.

90. *See Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

91. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 33. Section 33 reads as follows (in part): "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

### C. *Different Societal Trends*

Societal trends continue to differ between the countries, a fact that can perhaps help explain the differing national approaches to mandatory criminal sentencing. Unlike the United States, Canada has abolished the death penalty. As such, the Supreme Court of Canada need no longer deal with the question of the death penalty when confronted with the issue of excessive punishment. The U.S. Supreme Court, on the other hand, still routinely deals with the death penalty in that context, a fact that Jamie Cameron, may color the U.S. Supreme Court's viewpoint on the Eighth Amendment prohibition:

> [T]he United States Supreme Court's response to mandatory prison sentences is entangled in the messy jurisprudence surrounding the death penalty. As a result, the existence of capital punishment has motivated some members of the United States Supreme Court to reject the Eighth Amendment's application to mandatory prison sentences.[92]

Other societal trends could also be at work as well. The non-partisan *Law Reform Commission of Canada* has urged extreme discretion in the application of mandatory minimum sentences.[93] With its criminal law federalized and thus centrally administered, as was discussed earlier,[94] in Canada such societal trends may more readily be folded into the criminal law. Such an institutional reality in Canada makes it much easier to analyze and, if warranted, implement suggestions by outside watchdog groups such as the *Law Reform Commission of Canada* into the criminal law on a national scale. In the United States, on the other hand, with the administration of the criminal law power mainly handled by the various states within the federal union, such implementation, if it occurs at all, is done on the more limited state level.

## CONCLUSION

Though close neighbors, and similar in many regards, Canada and the United States are quite different in certain areas. Certainly the administration of criminal justice must be counted as one of said areas of difference. Though the goals and wording of

92. Cameron, *supra* note 64, at 445.

93. STUART (3rd), *supra* at 68 (citing Law Reform Commission, *Report Guidelines: Disposition and Sentencing in the Criminal Process* (1976)).

94. *See* § I of this Article.

both the Eighth Amendment and s. 12 are virtually identical, their application and interpretation, especially in regard to their effects upon mandatory criminal sentencing within the two countries, has been very different indeed. The United States would do well to look and study the Canadian approach to reconciling the constitutional prohibition against "cruel and unusual punishment" and the application (through penal statute) of mandatory criminal sentencing, for when put side by side to the American approach, the glaring limitations of the current modified *Solem* test in use by American courts becomes painfully evident. If the ultimate goal of criminal law is restraint and proportional application, then the current American interpretation of the Eighth Amendment's prohibition on excessive punishment (in relation to mandatory criminal sentencing) falls far short of that standard.