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The Punishment Agenda in the Courts

Debra Parkes[*]

I. INTRODUCTION

In a speech to the American Bar Association in 2003, U.S. Supreme Court Justice Anthony Kennedy said, "When the door is locked against the prisoner, we do not think about what is behind it. ... Were we to enter the hidden world of punishment, we would be startled by what we see."[1] In 2011, a decision of that Court startled many Americans by what it revealed about punishment in California's prisons. In *Brown v. Plata*,[2] a majority of the U.S. Supreme Court upheld an injunction that had put the entire California prison system under a population cap due to evidence of severe overcrowding, inhumane conditions and utterly inadequate medical treatment, which violated the Eighth Amendment guarantee against "cruel and unusual punishment". Conditions included 200 prisoners incarcerated in a gym with as few as three correctional officers guarding them, 54 prisoners sharing one toilet, suicidal prisoners being held for prolonged periods in telephone-booth-sized cages without toilets, and other horrors. Justice Kennedy, who penned the majority opinion in *Brown*, took the rare step of appending photos of some overcrowded cells and cages in California prisons.[3]

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[1] American Bar Association Annual Meeting, "An Address by Anthony M. Kennedy, Associate Justice, Supreme Court of the United States" (August 9, 2003), online: <http://meetings.americanbar.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf>.

[2] 131 S. Ct. 1910 (2011).

[3] For a critical perspective on the decision to attach photos to the opinion, see Dahlia Lithwick, "Show, Don't Tell: Do photographs of California's overcrowded prisons belong in a Supreme Court decision about those prisons?" *Slate* (May 23, 2011), online: <http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/show_dont_tell.1.html>.

Shedding light on the hidden world of punishment in Canada can be an important function of Charter litigation. The panel out of which this paper arose prompted participants to reflect on changes in interpretation of the *Canadian Charter of Rights and Freedoms*,[4] the issues and cases that have prompted those changes, and the potential for the Charter to address challenging social issues. This paper examines that question in the context of an intensifying punishment agenda in Canada. I use the term punishment agenda[5] to describe not only an increasing prison population,[6] but more fundamentally, a policy agenda that is based on an ideology — often in the face of contradictory evidence — that more punishment (particularly incarceration) will make Canadians safer.[7]

This paper suggests that Charter litigation by prisoners is valuable as part of a critical response to that agenda and to redress some of the concrete harms caused by its policies and practices. Speaking through their judgments, some judges are becoming the new critics of the punishment agenda, at a time when academic and community voices are being ignored in policy debates.[8] The paper will begin with a brief description of some aspects of the punishment agenda before moving on to consider case law under the section of the Charter that seems to speak directly to punishment and its limits, the section 12 right to be free from "cruel and unusual treatment or punishment". A dominant strand in the section 12 case law, at least in terms of appellate attention, has been the minimal impact the section has had in limiting the proliferation of

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[4] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[5] Criminologist Justin Piché also uses the term in a similar way on his blog, "Tracking the Politics of Criminalization and Punishment in Canada": <http://tpcp-canada.blogspot.ca/>.

[6] In 2013, the federal prison population reached an all-time high of over 15,000 prisoners (up from 12,000 a decade earlier): *Annual Report of the Office of the Correctional Investigator 2012-2013* (June 28, 2013), online: <http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20122013-eng.pdf>. Provincial jail populations are also expanding at a rapid rate. For example, Manitoba's correctional facilities are at 126 per cent capacity and prisoners are being double-, triple- and quadruple-bunked in cells: Office of the Auditor General of Manitoba, "Managing the Province's Adult Offenders", *Annual Report to the Legislature*, Chapter 6 (March 2014), online: <http://www.oag.mb.ca/wp-content/uploads/2014/03/Chapter-6-Managing-the-Provinces-Adult-Offenders-Web.pdf>.

[7] Paula Mallea, *The Fear Factor: Stephen Harper's "Tough on Crime" Agenda* (Ottawa: Canadian Centre for Policy Alternatives, 2010). In the U.S. context, see Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York: Oxford University Press, 2007).

[8] Prime Minister Stephen Harper's former chief of staff, Ian Brodie, has spoken publicly about the extent to which ignoring and discrediting academic expertise is a political strategy that has paid off for the government: John Geddes, "Why Stephen Harper thinks he's smarter than the experts" *Maclean's* (August 9, 2010), online: <http://www.macleans.ca/news/canada/cracking-eggheads/> [hereinafter "Geddes"].

mandatory minimum sentences.[9] The paper will discuss some of the recent lower court decisions invalidating mandatory sentences, noting some interesting developments but also the persistence of deference to legislatively mandated minimum sentences. Attention will then shift to another strand of section 12 case law that presents a different kind of challenge to the punishment agenda, namely, the application of section 12 in the context of prison conditions and the treatment of prisoners.[10] The paper will conclude with some thoughts on the limitations and potential of Charter litigation in the prison context.

II. THE PUNISHMENT AGENDA

Identifying a contemporary punishment agenda in Canada is not meant to suggest that Canadian society was previously not punitive. While Canada's incarceration rate has been much lower than the world-leading United States over the last three decades, it has been considerably higher than that in many European countries.[11] Dawn Moore and Kelly Hannah-Moffatt have described Canada's criminal justice and correctional system as having a "liberal veil" over a punitive system.[12] In the early 1990s, new federal corrections legislation was enacted that, for example, committed corrections to human rights principles, to accommodating diverse populations, and to using the least restrictive measures consistent with

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[9] See, *e.g.*, Kent Roach, "Searching for *Smith*: The Constitutionality of Mandatory Minimum Sentences" (2001) 39 Osgoode Hall L.J. 367 and Debra Parkes, "From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences" [hereinafter "Parkes, 'From *Smith* to *Smickle*'"] in Benjamin Berger & James Stribopoulos, eds., *Unsettled Legacy: Thirty Years of Criminal Justice under the Charter* (Markham, ON: LexisNexis Canada, 2012) 183.

[10] This is not to suggest that s. 12 is the most important section for prisoners' rights litigation. In fact, s. 7 (particularly in the procedural rights context) and, to a certain extent, s. 15 have been more successfully argued by prisoners and have the potential to address more nuanced issues beyond clearly inhumane treatment. See Parkes, "A Prisoner's Charter?" *infra*, note 30, at 649-53, 659-60. See also the recent decision in *Inglis v. British Columbia (Minister of Public Safety)*, [2013] B.C.J. No. 2708, 2013 BCSC 2309 (B.C.S.C.) (cancellation of mother-baby program in B.C. jail violates ss. 7 and 15 rights).

[11] See the World Prison Population Lists compiled by Roy Walmsley, International Centre for Prison Studies, University of Essex, online: <http://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=27>.

[12] Kelly Hannah-Moffatt & Dawn Moore, "The liberal veil: revisiting Canadian penality" in John Pratt *et al.*, *The New Punitiveness: Trends, Theories, Perspectives* (Cullompton, U.K.: Willan Publications, 2005) 85. The authors contend that the (mostly American) literature describing a "punitive turn", focusing as it does on the rise of boot camps, death penalty, chain gangs and overcrowded prisons, does not adequately take into account the extent to which welfare practices, therapeutic interventions, and programming that purports to be gender- and culturally sensitive, have been central to Canadian penality in recent decades.

public safety.[13] It was meant to be a system that fosters accountability, providing opportunities for "correcting" the behaviour of law-breakers who were understood as responsible for their own rehabilitation. The reality of imprisonment in Canada was often quite different from these ideals,[14] but the liberal veil was largely intact.

However, some of the recent legislative and policy changes are undeniably and nakedly punitive, such as the sharp increase in number and length of mandatory minimum sentences for a variety of crimes (including, most recently, drug offences),[15] the abolition of accelerated early parole for first-time, non-violent offenders,[16] and a near-elimination of the non-carceral conditional sentence of imprisonment,[17] which was to be served in the community on strict conditions. A further example of the new punishment agenda can be found in changes to the legal regime for people found not criminally responsible ("NCR") on account of mental disorder, including the creation of a new category of "high risk accused" who face new conditions and punishments in a regime that is meant to be therapeutic, not punitive.[18] There was considerable criticism of these new punitive measures from academics, legal groups and advocacy groups working in the criminal justice system for being out of step with the evidence about what works to reduce crime. However, those criticisms largely went unheeded as the government adopted an anti-intellectual stance in an apparent effort to appeal to voters.[19]

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[13] *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [hereinafter "CCRA"].

[14] For example, the year after the enactment of the CCRA, prisoners at the Prison for Women in Kingston were infamously strip-searched by a male emergency response team in full riot gear and then placed in illegal segregation for many months, events that were the subject of a wide-ranging commission of inquiry: Hon. Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996).

[15] *Safe Streets and Communities Act*, S.C. 2012, c. 1 (Royal Assent March 13, 2012).

[16] *Abolition of Early Parole Act*, S.C. 2011, c. 11 (Royal Assent March 23, 2011).

[17] *Id.*

[18] *Not Criminally Responsible Reform Act*, S.C. 2014, c. 6 (Royal Assent April 11, 2014).

[19] Geddes, *supra*, note 8. For example, the evidence of a highly respected criminologist, Anthony Doob, was dismissed by a parliamentary committee considering one of these bills on the basis that Doob was an "advocate for criminals": Heather Scoffield, "Critics of omnibus bill 'advocate for criminals,' Conservatives charge" *The Globe and Mail* (October 18, 2011), online: <http://www.theglobeandmail.com/news/politics/critics-of-omnibus-bill-advocate-for-criminals-conservatives-charge/article4255428/>.

We have also seen explicit ideological changes in federal correctional policy. Notably, the 2007 Correctional Service of Canada Review Panel Report, *A Roadmap to Strengthening Public Safety*[20] and the subsequent "Transformation Agenda" include a strong focus on "enhancing offender accountability", propose eliminating statutory release (a key feature of the parole system), and do not contain any mention of human rights principles.[21] One of the amendments buried in one of the many federal crime bills recently passed was a significant change to the "guiding principles" of federal corrections, namely, replacing a commitment to "us[ing] the least restrictive measures consistent with the protection of the public, staff members and offenders" with a new principle that the measures "are limited to only what is necessary and proportionate to attain the purposes of this Act".[22] This is just one example of efforts to explicitly remove "rights" from the correctional equation. Even rights long considered uncontroversial, such as that new punishments could not be applied retrospectively, were the subject of new legislative incursions.[23] Other implications of the punishment agenda are increased prison overcrowding[24] notwithstanding substantial prison expansion and the building of new prisons,[25] growing remand populations,[26] increasing over-representation of Indigenous and racialized prisoners,[27] inhumane treatment in the form of long-term

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[20] Correctional Service of Canada Review Panel, *A Roadmap to Strengthening Public Safety in Canada* (Ottawa: Public Works and Government Services, 2007).

[21] For a thorough, critical review of the Roadmap, see Michael Jackson & Graham Stewart, *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety* (September 2009), online: <http://www.justicebehindthewalls.net/resources/news/flawed_Compass.pdf>.

[22] Bill C-10, *supra*, note 15.

[23] Section 10(1) of the *Abolition of Early Parole Act*, S.C. 2011, c. 11 provided that the abolition of accelerated early parole would apply retrospectively to people who were already serving their sentences at the time the law came into force. A unanimous Supreme Court of Canada found this provision invalid in *Canada (Attorney General) v. Whaling*, [2014] S.C.J. No. 20, 2014 SCC 20 (S.C.C.), for violating the s. 11(h) Charter right against double jeopardy.

[24] Office of the Correctional Investigator, *Annual Report 2012-2013* (Ottawa: Queen's Printer, 2013) [hereinafter "*Annual Report*"].

[25] Criminologist Justin Piché has compiled on his blog, "Tracking the Politics of Criminalization and Imprisonment in Canada", information about the substantial projects and plans related to prison and jail expansion at the federal, provincial, and territorial level, obtained through access to information: <http://tpcp-canada.blogspot.ca/2011/09/are-provinces-and-territories-ready-for.html>.

[26] Lindsay Porter & Donna Calverley, "Trends in the Use of Remand in Canada", *Juristat* no. 85-002-X.

[27] *Annual Report*, *supra*, note 24.

solitary confinement, deaths in custody,[28] and a culture of impunity among correctional staff and prison administration.[29]

In considering whether and to what extent the courts, and specifically Charter litigation, can act as a check on the punishment agenda, the section 12 right to be free from cruel and unusual treatment or punishment comes to mind. It is, of course, not the only relevant Charter right (sections 7, 11, 15 may, in fact, be equally or more likely to form the basis for successful challenges in cases dealing with the state's power to punish and imprison).[30] Nevertheless, while section 12 has had relatively little impact on penal law and policy to date, it has arguably become more relevant in recent years and is therefore, the focus of this paper.

III. SECTION 12 AND THE PUNISHMENT AGENDA

Section 12 of the Charter protects against "cruel and unusual treatment or punishment", although the more common language in international and comparative human rights instruments is that of "cruel, inhuman, or degrading treatment or punishment".[31] In the Canadian context, the prohibition against cruel and unusual treatment or punishment was first found in the 1960 *Canadian Bill of Rights*,[32] but its origin can be traced to the 1688 English *Bill of Rights*.[33] Michael Jackson describes the first 15 years of *Canadian Bill of Rights* jurisprudence as giving very

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[28] Office of the Correctional Investigator, *A Preventable Death* (Ottawa: Queen's Printer, 2009) (on the death of Ashley Smith, who died in her cell with a ligature around her neck while correctional officers watched).

[29] Ombudsman of Ontario, *The Code*, an investigation of the Ministry of Community Safety and Correctional Services' response to allegations of excessive use of force against inmates (June 2013), online: <http://www.ombudsman.on.ca/Investigations/SORT-Investigations/Completed/The-Code.aspx>.

[30] Debra Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*" (2007) 40 U.B.C. L. Rev. 629 [hereinafter "Parkes, 'A Prisoners' Charter?'"].

[31] *Universal Declaration of Human Rights*, December 10, 1948, UNGA Res. 217 A(III), art. 5 and *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171, art. 7. Similar provisions can be found in provisions that also prohibit torture, including the *European Convention on Human Rights*, November 4, 1950, 213 U.N.T.S. 221 and the constitutions of Brazil, South Africa, and New Zealand. See Jeremy Waldron, "Cruel, Inhuman, and Degrading Treatment: The Words Themselves" (2008) *New York University Public Law and Legal Theory Working Papers*. Paper 98, online: <http://lsr.nellco.org/nyu/plltwp/98>.

[32] S.C. 1960, c. 44.

[33] (U.K.) 1 Will. & Mar. Sess. 2, c. 2. See Michael Jackson, "Cruel and Unusual Treatment or Punishment?" (1982) 16 U.B.C. L. Rev. 189 [hereinafter "Jackson"].

limited scope to the provision. For example, in rejecting a challenge to a punishment of whipping for rape, the Manitoba Court of Appeal stated in 1965 that "corporal punishment is not unusual in any sense of the word; in some form or other almost everyone has received it".[34]

After surveying the interpretation of the *Canadian Bill of Rights* provision in the context of challenges to the death penalty,[35] to solitary confinement,[36] and to the mandatory seven-year sentence for importing a narcotic,[37] Jackson argued in 1982 that section 12 should be given significant meaning and interpretive force in the context of prison conditions:

> The focusing of section 12 of the Charter on prison conditions and practices would be particularly appropriate given that typically such practices and conditions are not specifically prescribed by Parliament but rather are applied through the interpretation of very broadly drafted legislative provisions which are made specific through administrative policy making. Judicial monitoring of such practices against the standard of section 12 would therefore involve the courts not in the overriding of clearly expressed legislative intention but rather in the superintendency of decision-making which has always been the most immunized from public scrutiny.[38]

More than 30 years of Charter litigation by prisoners have yielded a few promising decisions,[39] but litigation has done relatively little to enforce prisoners' rights in the face of abuses and illegality in Canadian prisons and jails.[40] Key limitations are the lack of meaningful access to the courts by prisoners, as well as deference paid by judges to the "administrative decision-making" of correctional authorities in the prison context. In particular, section 12 "has had remarkably little impact in

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[34] *R. v. Dick*, [1964] M.J. No. 1, [1965] 1 C.C.C. 171, at para. 18 (Man. C.A.).

[35] *R. v. Miller*, [1976] S.C.J. No. 91, 31 C.C.C. (2d) 177 (S.C.C.).

[36] *McCann v. Canada*, [1975] F.C.J. No. 161, 29 C.C.C. (2d) 337 (F.C.T.D.).

[37] *R. v. Shand*, [1976] O.J. No. 2178, 30 C.C.C. (2d) 23 (Ont. C.A.). This provision was later declared invalid under s. 12 of the Charter in *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter "*Smith*"].

[38] Jackson, *supra*, note 33, at 211.

[39] Perhaps the strongest judicial statement of prisoners' rights can be found in the majority decision of McLachlin C.J.C. in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.), [hereinafter "*Sauvé*"], holding that a (limited) prisoner voting ban violated the s. 3 right of prisoner-citizens to vote and could not be saved by s. 1. The Chief Justice stated that it was constitutionally impermissible for the government to make prisoners "temporary outcasts from our system of rights and democracy" (at para. 40).

[40] Parkes, "A Prisoners' Charter?", *supra*, note 30, at 629.

litigation concerning conditions of confinement".[41] Challenges to double-bunking,[42] for example, had been dismissed. However, there had been relatively few substantive challenges made to prison conditions, due at least in part to the very limited access to legal aid for prisoner litigation[43] and other barriers to mounting such challenges, including short prison stays, mootness and a relative dearth of lawyers with expertise in prison law. Before looking more closely at the prison condition cases, it is useful to examine briefly the area of section 12 case law that has received the most attention — its application to mandatory sentences of imprisonment.

1. Section 12 as a Limit on Punitive Sentences

With the proliferation of mandatory minimum sentences in recent years, alongside popular support, there has come substantial criticism from the academy and the legal profession. On the subject of mandatory sentences and the Charter, I wrote in 2012:

> Much could be (and has been) said about the extent to which mandatory sentences are bad policy. Their proliferation has been undertaken by legislators in the face of a massive body of evidence, accumulated over nearly 50 years, showing that minimum sentences not only do not deliver on their promise to deter crime but that, in addition, they have many negative, unintended effects such as fostering circumvention by justice system participants and reducing transparency and accountability by pushing discretion down to prosecutors rather than to sentencing judges. …
>
> We know from the US experience that prosecutorial discretion is exercised unevenly on the basis of race and that mandatory sentences create distortions, ratcheting up the "floor" such that sentences become longer overall, with negative societal returns.[44]

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[41] *Id*., at 659.

[42] See, *e.g.*, *Piche v. Canada (Solicitor General)*, [1984] F.C.J. No. 1008, 17 C.C.C. (3d) 1 (F.C.T.D.), affd [1989] F.C.J. No. 204, 47 C.C.C. (3d) 495 (F.C.A.).

[43] A 2003 study commissioned by the federal Department of Justice found legal aid coverage for prisoners in legal aid plans across the country to be woefully inadequate: Department of Justice Canada, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans* (Ottawa: Department of Justice, 2002). The study did not include consideration of (essentially non-existent) funding for prisoner challenges in the provincial context and, in any event, the funding situation has only worsened in the last decade.

[44] Parkes, "From *Smith* to *Smickle*", *supra*, note 9. See also Scott Bernstein, *Throwing Away the Keys: The human and social cost of mandatory minimum sentences* (May 30, 2013) online: <http://www.pivotlegal.org/throwing_away_the_keys_the_human_and>.

However, as much as critics might wish it to be so, Charter review is not an investigation into whether a particular law is good policy. The question, at least under section 12, is whether the law amounts to cruel and unusual punishment. On that question, appellate courts have been quite deferential to the legislative decision to enact mandatory sentences.

(a) Mandatory Sentences in the Supreme Court of Canada

R. v. Smith[45] was the first decision of the Supreme Court of Canada to interpret section 12 and it was an important one. The court invalidated a seven-year mandatory minimum sentence for importation of a narcotic on the basis that the sentence could be "grossly disproportionate" and "outrage standards of decency" when applied to the circumstances of a hypothetical first offender who brought a single marijuana cigarette across the border.[46] In the course of their opinion, Dickson C.J.C. and Lamer J. stressed that a court considering the constitutionality of a sentence should look at the effects of the sentence, including the "nature and conditions under which it is applied", going on to note, for example, that a three-year sentence for a property crime would be grossly disproportionate if served in solitary confinement.[47]

The post-*Smith* case law confirmed that section 12 analysis will proceed in two stages when the constitutionality of a minimum sentence is challenged. First, the court must consider whether the minimum sentence amounts to cruel and unusual punishment based on the circumstances of the individual before the court. If no violation is found at that stage, then the court will proceed to consider the sentence whether it would be cruel and unusual (*i.e.*, grossly disproportionate) if applied to a reasonable hypothetical, which in *Smith* was the first-time offender with one joint.

Since *Smith*, the Supreme Court has declared a punishment to be "cruel and unusual" in only one other case, despite a number of challenges having been made.[48] In *Steele v. Mountain Institution*,[49] the

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[45] *Smith*, *supra*, note 37.

[46] Smith himself had been convicted of importing 7½ ounces of cocaine.

[47] *Smith*, *supra*, note 37, at para. 57. As will be discussed below, there may be an increasingly important role for s. 12 to play in imposing constitutional limits on inhumane prison conditions.

[48] *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.) [hereinafter "*Goltz*"]; *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.) [hereinafter "*Morrisey*"]; *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Latimer*"].

[49] *Steele v. Mountain Institution*, [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385 (S.C.C.).

Court held that the continued detention of a man who had been imprisoned for 37 years under an earlier incarnation of a dangerous offender provision was grossly disproportionate. However, the Court stressed the particular facts of the case, stating that the test must be "stringent and demanding" so as not to "trivialize the *Charter*".[50]

In short, the Supreme Court's approach has been decidedly deferential to Parliament. The section 12 bar is set very high, requiring that the sentence be so grossly disproportionate as to "outrage standards of decency". A 2007 Supreme Court decision, *R. v. Ferguson*,[51] held that there is no jurisdiction for a judge to constitutionally exempt an individual from a mandatory sentence that would amount to a grossly disproportionate sanction. It has been argued that this decision, foreclosing the "safety valve" of a constitutional exemption in rare cases, combined with the proliferation of new mandatory sentences, will increase the likelihood of confrontations between courts and Parliament over the validity of mandatory sentences.[52]

One final Supreme Court of Canada decision on the subject of mandatory minimum sentences is worthy of note. *R. v. Nasogaluak*[53] involved a serious beating by police of an Indigenous accused, resulting in broken ribs and a collapsed lung, which were only treated a day after the arrest when the accused was released from custody. On sentencing for impaired driving, the defence moved for a stay of proceedings but the trial judge ordered a reduced sentence — a conditional discharge — on the basis of the Charter violation. On eventual appeal, the Supreme Court of Canada held that the Charter breaches could be taken into account to mitigate sentence but not below a mandatory minimum, other than in "exceptional circumstances" involving an "egregious" Charter breach.[54] And the facts in that case were not considered exceptional.

This brief tour through the Supreme Court case law highlights the extent to which the provision has operated, in Jamie Cameron's words, as

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[50] *Id.*

[51] [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.).

[52] Benjamin Berger has characterized *Ferguson* as a "constitutional push-back against the politics of minimum sentences": Benjamin L. Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" in J. Cameron, P. Monahan & B. Ryder, eds. (2009) 47 S.C.L.R. (2d) 101, at 105 [hereinafter "Berger"]. See also Peter Sankoff, "The Perfect Storm: Section 12, Mandatory Minimum Sentences, and the Problem of the Unusual Case" (2013) 22 Const. Forum Const. 3.

[53] [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206 (S.C.C.).

[54] *Id.*, at para. 6.

the Charter's "faint hope" guarantee,[55] applying in only the most exceptional or egregious cases. It has been given little substantive content or application, even in cases that would seem to squarely raise concerns about the limits of punishment but which are instead decided under section 7.[56] The next section considers some recent cases in which courts are being urged to give section 12 a more substantive application in response to a raft of new mandatory minimum sentences.

(b) Mandatory Sentences in Recent Lower Court Decisions

With that brief review of the Supreme Court case law, it remains to consider some of the recent decisions from lower courts across the country finding certain mandatory sentences to be "grossly disproportionate" and therefore in violation of section 12. Most of the successful section 12 challenges deal with mandatory sentences for firearms offences, most commonly section 95(2), which carries a mandatory three-year sentence for possession of a loaded firearm when the Crown proceeds by indictment.[57] However, successful challenges have also been brought against the new mandatory one-year sentence for possession of a narcotic for the purpose of trafficking when the accused has a criminal record for drugs,[58] the mandatory four-year sentence for intentionally discharging a firearm into a place knowing that or being reckless as to whether another person was in that place,[59] and the three-year mandatory sentence for firearms trafficking.[60] These are some

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[55] Jamie Cameron, "Fault and Punishment under Sections 7 and 12 of the Charter" in J. Cameron & J. Stribopoulos, eds. (2008) 40 S.C.L.R. (2d) 553, at 588 [hereinafter "Cameron"].

[56] See, *e.g.*, *R. v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.), in which the Court preferred to deal with the government's failure to seek assurances that Canadian citizens would not be subject to the death penalty when extradited as a violation of s. 7 rather than s. 12.

[57] *R. v. Nur*, [2013] O.J. No. 5120, 2013 ONCA 677 (Ont. C.A.), leave to appeal granted [2014] S.C.C.A. No. 17 (S.C.C.) [hereinafter "*Nur*"]; *R. v. Smickle*, [2013] O.J. No. 5070, 2013 ONCA 678 (Ont. C.A.) [hereinafter "*Smickle*"]; *R. v. Charles*, [2013] O.J. No. 5115, 2013 ONCA 681 (Ont. C.A.), leave to appeal granted [2014] S.C.C.A. No. 18 (S.C.C.) [hereinafter "*Charles*"]; *R. v. Adamo*, [2013] M.J. No. 302, 2013 MBQB 225 (Man. Q.B.) (also finding violations of ss. 7 and 15) [hereinafter "*Adamo*"]; *R. v. Laponsee*, [2013] O.J. No. 2834, 2013 ONCJ 295 (Ont. C.J.); *R. v. Vandyke*, [2013] A.J. No. 1419, 2013 ABPC 347 (Alta. Prov. Ct.) [hereinafter "*Vandyke*"].

[58] *R. v. Lloyd*, [2014] B.C.J. No. 274, 2014 BCPC 8 (B.C. Prov. Ct.). The decision was overturned on the basis that the Provincial Court has no power to declare a law invalid under s. 52 of the *Constitution Act, 1982* and that, in any event, the one-year sentence was unfit. The Court of Appeal substituted a sentence of 18 months: [2014] B.C.J. No. 1212, 2014 BCCA 224 (B.C.C.A.).

[59] *R. v. McMillan*, [2013] M.J. No. 324, 2013 MBQB 229 (Man. Q.B.) [hereinafter "*McMillan*"].

[60] *R. v. L. (C.)*, [2012] O.J. No. 3094, 2012 ONCJ 413 (Ont. C.J.).

of the cases that are working their way to appellate courts and likely, in some instances, to the Supreme Court of Canada. It is no secret that most judges do not like mandatory sentences.[61] However, few judges are as direct about their opposition to mandatory sentences on policy grounds as was Lamoureux J. of the Alberta Provincial Court in the recent *Vandyke* decision:

> Mandatory minimum penalties do not advance proper sentencing principles set forth in s. 718 of the *Criminal Code*, they do not advance any realistic goal of deterrence, they do not target dangerous offenders but rather catch in their net a very broad spectrum of citizens. Mandatory minimum penalties have an egregious impact on the groups who are already over represented in the Canadian penal system. The Court agrees wholeheartedly with the representations and submissions made by the Criminal Justice Section of the Canadian Bar Association to the standing committee when Bill C-10 was in consideration at the Committee stage. In a free and democratic society every individual deserves to be considered as an individual before the Court in a criminal case.[62]

Mandatory sentences impose a rigid floor on an exercise that is, at its heart, individualized and discretionary. They undermine the fundamental purpose of sentencing, proportionality,[63] and are incompatible with the nature of judgment itself in that they entail a decision *in advance* about what is just.[64] It is not surprising that, in the face of so many new (and increased) mandatory sentences, judges have pushed back on mandatory sentences and other limits on their discretion to craft an individualized, proportionate sentence.[65]

The most significant of these decisions to date is *R. v. Nur*[66] and its companion cases,[67] decided by a five-member panel of the Ontario Court

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[61] See, *e.g.*, *Vandyke*, *supra*, note 57.

[62] *Vandyke*, *supra*, note 57, at para. 24.

[63] *Criminal Code*, s. 718. Note that Bill C-32, the proposed *Canadian Victims Bill of Rights*, would amend that provision to stipulate that the "fundamental purpose of sentencing is to *protect society and to* contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives …" (emphasis added).

[64] Berger, *supra*, note 52, at 112.

[65] See, *e.g.*, successful constitutional challenges in *R. v. Flaro*, [2014] O.J. No. 94, 2014 ONCJ 2 (Ont. C.J.) (mandatory victim fine surcharge) and *R. v. Beck*, [2014] N.W.T.J. No. 20, 2014 NWTTC 9 (N.W.T. Terr. Ct.) (unavailability of enhanced pre-trial credit where the accused is denied bail due to a criminal record).

[66] *Nur*, *supra*, note 57.

of Appeal in 2013. However, before discussing the analysis and result in that case, it is worth highlighting a few of the trial level decisions that have invalidated mandatory sentences. Those decisions can then be considered for their consistency (or not) with the approach taken in *Nur* and the path we might also expect the Supreme Court of Canada to take.

In *R. v. McMillan*,[68] Menzies J. invalidated a four-year mandatory sentence for intentionally discharging a firearm into a place knowing that or being reckless as to whether another person was in that place, contrary to section 244.2(1)(a) of the *Criminal Code*. McMillan shot a gun into the home of an individual by whom he had been bullied. The Court found that the mandatory minimum sentence was grossly disproportionate for this young man, who had been bullied extensively in the community and who had been on extremely strict bail conditions of house arrest while awaiting trial (which meant that he did not receive any credit for pre-trial "custody").

Another interesting decision is *R. v. Adamo*,[69] dealing with the mandatory three-year sentence for possession of a loaded firearm in section 95(2), which is considered in *Nur* and a number of other cases. Adamo had suffered a brain injury that had left him with a significant cognitive impairment, memory problems, impulse control and paranoid ideas consistent with psychosis. Justice Suche found that, in addition to being grossly disproportionate and therefore a violation of section 12, the mandatory three-year sentence violated section 7 (as arbitrary, grossly disproportionate, and overly broad) as well as section 15 (on the basis of mental disability). Her decision involves some very interesting arguments that strike at the heart of the logic of mandatory sentences, including the reality that there is no downward discretion to take into account diminished mental capacity (short of a mental disorder defence), for example.

In *R. v. Lloyd*,[70] a B.C. judge declared invalid the mandatory one-year sentence in section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*[71] for possession for the purpose of trafficking if the accused has been convicted of a designated drug offence in the past

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[67] *Smickle*, *supra*, note 57; *Charles*, *supra*, note 57; *R. v. Chambers*, [2013] O.J. No. 5116, 2013 ONCA 680 (Ont. C.A.); *R. v. Meszaros*, [2013] O.J. No. 5113, 2013 ONCA 682 (Ont. C.A.); and *R. v. Rocheleau*, [2013] O.J. No. 5137, 2013 ONCA 679 (Ont. C.A.).

[68] *McMillan*, *supra*, note 59.

[69] *R. v. Adamo*, *supra*, note 57.

[70] *R. v. Lloyd*, [2014] B.C.J. No. 145, 2014 BCPC 11 (B.C. Prov. Ct.), revd [2014] B.C.J. No. 1212, 2014 BCCA 224 (B.C.C.A.).

[71] S.C. 1996, c. 19, s. 5(3).

10 years. This decision was made on the basis of a hypothetical scenario put forward by Lloyd, that of an addict who has in his or her possession a small amount of an illicit drug that he or she intends to share or does share with a spouse or friend.[72] The Court found the mandatory one-year sentence "grossly disproportionate" in relation to this hypothetical (although not far-fetched) accused. The judge noted that this kind of drug sharing happens daily in the downtown east side of Vancouver and that many of the individuals involved have prior convictions for designated drug offences.

At issue in *Nur* was the mandatory three-year sentence for possession of a loaded firearm (or a firearm with readily accessible ammunition). The Ontario Court of Appeal declared that mandatory sentence invalid.[73] However, it did so on narrow grounds. Justice Doherty, writing for the Court, said that this mandatory sentence, along with the other mandatory sentences for gun crimes, was a "rational legislative response to the very real public safety concerns".[74] The problem was only that section 95 casts too wide a net. Justice Doherty held that the three-year sentence was grossly disproportionate in relation to a reasonable hypothetical, namely, a licensed gun owner who has an unloaded firearm and ammunition in a nearby drawer. If he safely stored that gun at his cottage rather than at his home, as required by his firearms certificate, he would still trigger the mandatory three-year federal prison term for what amounts to a "licensing offence". It was this disconnect between the regulatory nature of the offence in some (hypothetical) cases and the three-year penitentiary term that would "outrage standards of decency" as required for a section 12 violation. Justice Doherty was quick to differentiate this offence from other firearms offences that require proof of some other intended or actual unlawful activity,[75] and for which long sentences are implicitly rational. Further evidence of the appellate Court's deferential stance is found in Doherty J.A.'s rejection of the section 7 claim in *Nur.* That argument was based on the two-year gap between the maximum summary conviction sentence (one year) and

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[72] The definition of "traffic" in the *Controlled Drugs and Substances Act*, s. 2(1) includes "to give" or "to administer" an illicit drug.

[73] A five-year mandatory minimum sentence in s. 95(2)(a)(ii) for a second conviction for possession of a firearm was also found to violate s. 12 and was declared invalid in the companion case of *Charles*, *supra*, note 57. This result was seen by the Court to flow naturally from the reasoning in *Nur* that the mandatory sentence for the first offence was grossly disproportionate in the case of a reasonable hypothetical.

[74] *Nur*, *supra*, note 57, at para. 56.

[75] *Id.*, at paras. 49-53.

the minimum sentence if the Crown proceeded by indictment (three years) for this hybrid offence. The reality that this apparent legislative oversight had produced a situation where no person could receive a sentence for more than one year but less than three years was held not to meet the constitutional standard of arbitrariness, in the Court's view.[76]

If accepted by the Supreme Court, the high bar set for gross disproportionality in *Nur* — focused as the decision was on the continuum captured by section 95(2) from true crime to regulatory offence with only the regulatory end raising section 12 concerns — may not bode well for Charter claims such as those made in *McMillan* and *Lloyd*. Both offences can be characterized as "true crimes", particularly section 244.2(1)(a), which involves discharging a firearm in a place where one is at least reckless as to the potential for people to be present. The possession for the purpose of trafficking offence in *Lloyd* does not have a regulatory end, although it does have a very plausible "less serious" end as captured in the reasonable hypothetical that had been accepted in this case. Justice Doherty's cautious approach and deference to the legislative choice to pursue mandatory minimum sentences is, in fact, quite consistent with the deferential approach adopted by the Supreme Court.

However, it is worth noting that, with the exception of *Smith*, the Supreme Court of Canada case law has not considered mandatory sentences in the context of drug crimes.[77] The recent legislative addition of mandatory sentences for drug offences, including the one at issue in *Lloyd*, raises issues relevant to the section 12 inquiry that have not been addressed in the appellate jurisprudence to date. Intervening before the British Columbia Court of Appeal in *Lloyd*, the B.C. Civil Liberties Association highlighted the extent to which these new mandatory minimum sentences for drug possession catch low-level, drug-addicted individuals who are engaged in street-level transactions for small amounts of drugs.[78] In *Canada (Attorney General) v. PHS Community*

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[76] In *Smickle*, *supra*, note 57. Justice Molloy had found the two-year gap to be wholly irrational and therefore arbitrary. In *R. v. Nur*, [2011] O.J. No. 3878, 2011 ONSC 4874 (Ont. S.C.J.), Code J. had come to a similar conclusion, finding that the gap was created through a legislative oversight. However, he had dismissed the s. 7 claim on the basis of standing.

[77] The Supreme Court of Canada case has focused on firearms offences (*e.g.*, *Morrisey*, *supra*, note 48), homicide (*e.g.*, *Latimer*, *supra*, note 48), and driving offences (*e.g.*, *Goltz*, *supra*, note 48).

[78] Factum of the British Columbia Civil Liberties Association in *R. v. Lloyd*, Court of Appeal File No. CA041594 (May 15, 2014), on file with author.

Services Society,[79] the Supreme Court of Canada demonstrated an understanding of the marginalization of injection drug users and the nature of drug addiction as an illness.[80] Pivot Legal Society, also intervening in the *Lloyd* appeal, took issue with the limited approach to gross disproportionality taken by the Ontario Court of Appeal in *Nur*, urging that the analysis under section 12 must consider relevant personal circumstances of individuals subject to mandatory sentencing laws (such as, for example, their Aboriginal status, drug addiction, parenting responsibilities, and the like).[81] Pivot noted that the hypothetical that grounded the *Smith* decision involved a number of personal characteristics such as age (19 years) and individual circumstances (returning from spring break in possession of one joint).[82] The B.C. Court of Appeal declined to address the constitutional validity of the mandatory sentence at issue in *Lloyd*,[83] but these arguments will likely figure prominently, and will need to be addressed, in future section 12 challenges to the new mandatory sentencing laws.

In relation to both firearms and drug offences, lower court judges will likely continue to try to chip away at some of the most obvious injustices in mandatory sentencing laws. However, after *Nur*, the scope of that review may be curtailed. The magnitude of the departure from proportionality required by the section 12 appellate case law suggests that the section is doing little constitutional work that could not be done by the principled application of other Charter rights such as the arbitrariness or gross disproportionality standards in section 7.[84] Section 12 came into play in *Nur*, but only in relation to a hypothetical "exceptional case" that points to deeper problems with mandatory sentences generally. This very limited carve-out leaves untouched, and in fact bolsters, the underlying logic of mandatory sentences.

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[79] [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.).

[80] *Id.*, at para. 7.

[81] Factum of Pivot Legal Society in *R. v. Lloyd*, Court of Appeal File No. CA041594 (May 15, 2014), on file with author.

[82] *Smith*, *supra*, note 37. Pivot factum in *Lloyd*, *id.*, at para. 18.

[83] *Lloyd*, *supra*, note 58, holding that the Provincial Court did not have jurisdiction to declare the impugned law invalid under s. 52 and further finding that the one-year sentence imposed by the sentencing judge was unfit. A sentence of 18 months was substituted.

[84] See generally, Peter Hogg, "The Brilliant Career of Section 7 of the Charter" in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 195. See also Cameron, *supra*, note 55, at 592 for an argument that "the section 12 jurisprudence must be released from the constraints of the gross disproportionality analysis test, which has made it next to impossible for challenges to mandatory minimums and other departures from individualized justice to succeed" .

2. Section 12 as a Limit on Conditions and Treatment in Prison

Looking beyond the sentencing context, Charter litigation by prisoners has arguably had the most impact in cases dealing with procedural rights such as rights to a hearing, information, and/or counsel in certain situations (transfers to high-security prisons, placement in segregation, and the like) where "residual liberty" is at stake.[85] An exception to this approach is the *Sauvé*[86] decision of the Supreme Court of Canada invalidating a prisoner voting ban as an unjustified infringement of the right to vote guaranteed in section 3 of the Charter. This 5:4 decision contains strong normative statements about prisoners as rights holders who are emphatically not, as the Chief Justice says, "temporary outcasts from our system of rights".[87] However, this case was about symbolic punishment and therefore, the usual government arguments about limiting rights to achieve safety and security of the institution are simply irrelevant. That is a crucial distinction between *Sauvé* and the vast majority of prison Charter challenges that do implicate safety and security and in which there remains a judicial tendency to accord great deference to correctional authorities.[88]

With respect to section 12 specifically, it has had relatively little application in relation to prison conditions. However, this part of the paper will describe a few recent cases in which prisoners have successfully argued that they have been subjected to cruel and unusual punishment, particularly in relation to solitary confinement and other inhumane practices, and will suggest some potential for further development of section 12 analysis in this area.

There is a growing awareness internationally that the prolonged use of solitary confinement (or segregation, as it is termed in the Canadian legislation) is a pressing human rights issue. An expanding body of literature shows the lasting psychological and physical effects of solitary confinement.[89] For example, psychiatrist Stuart Grassian, a leading

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[85] Parkes, "A Prisoner's Charter?", *supra*, note, 30, at 642-49. It is important to note that while there may be a right to counsel, there is no constitutional right to legal aid: *id.*, at 647.

[86] *Sauvé*, *supra*, note 39.

[87] *Id.*, at para. 40.

[88] Parkes, *supra*, note 30, at 641.

[89] Elizabeth Bennion, "Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment" (March 15, 2014): <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411845>; Stuart Grassian, "Psychiatric Effects of Solitary Confinement" (2006) 22 Wash. U.J.L. & Pol'y 325 [hereinafter "Grassian"]; Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement" (2003) 49 Crime & Delinquency 124.

expert on the effects of segregation, has identified "SHU syndrome" in prisoners who have experienced solitary. They demonstrate increased sensitivity to stimuli, hallucinations and other changes in perception, as well as cognitive problems including memory loss, difficulty thinking and impulsiveness.[90] Based on this and other evidence of the damaging effects of solitary confinement, United Nations Special Rapporteur on the Convention Against Torture, Juan Mendez, has called for a ban on the use of solitary for youth and prisoners with mental disabilities, and a limit of 15 days in solitary for anyone else.[91] The widespread and often prolonged use of solitary in Canadian prisons is clearly inconsistent with this international human rights benchmark.

In the United States, where over 80,000 prisoners are in solitary, the widespread practice of indefinite, prolonged segregation is being questioned by courts and lawmakers. In the summer of 2012, a U.S. Senate Judiciary Committee held that country's first ever congressional hearing on solitary confinement. In the face of lawsuits and compelling evidence of solitary's negative effects, a number of states from Mississippi to Maine have radically reduced their use of solitary confinement and have documented subsequent drops in violent incidents and overall safer prisons for staff and prisoners.[92]

In Canada, this issue is not on any legislative agenda, yet the human costs of solitary confinement are enormous. In 2011-2012, there were over 87,000 placements in segregation[93] in the Canadian federal prison systems. On any given day there are about 850 federal prisoners in segregation, meaning that they are locked in a small cell for at least 23 hours per day, usually with no human contact beyond peering through a meal slot. Only about 16 per cent were "voluntary" placements in the sense that the individuals sought protective custody out of fear for their own safety. Just over two per cent were imposed as punishment for institutional infractions such as mouthing off to a guard or disobeying an order. All the rest — over 81 per cent — were involuntary placements for

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[90] Grassian, *id.* Other studies have found additional psychiatric effects such as suicidal thoughts, perceptual distortions, chronic depression, emotional flatness and violent fantasies: Haney, *id.*

[91] UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, A/66/268 (August 5, 2011).

[92] American Civil Liberties Union, "State Reforms to Limit the Use of Solitary Confinement", online: <https://www.aclu.org/files/assets/state_reforms_to_limit_the_use_of_solitary_confinement.pdf>.

[93] Ivan Zinger, "Segregation in Canadian Federal Corrections: A Prison Ombudsman's Perspective," presentation at *Ending the Isolation: An International Conference on Human Rights and Solitary Confinement, University of Manitoba* (March 22-23, 2013), online: <http://www.oci-bec.gc.ca/cnt/comm/presentations/presentations20130322-23-eng.aspx>.

"administrative" reasons. Prison officials deemed the isolation necessary for the "good order" of the institution, often citing safety concerns or fears for the health of the prisoners (many of whom have mental health issues, which research shows are exacerbated in solitary[94]). In some cases, such as Ashley Smith's, women and men spend years in solitary in a series of segregation placements.

At the level of provincial and territorial imprisonment, due to a lack of reporting or oversight, the public simply has no information about the use of solitary confinement in the 13 different correctional systems. However, what little we know is troubling. For example, documents received through access to information requests of Manitoba correctional authorities in 2010 revealed that prisoners in the old Portage Correctional Center for Women were regularly held in solitary confinement for reasons not permitted by law, including for "overflow".[95]

The 2010 decision of the Supreme Court of British Columbia in *Bacon*[96] is an example of careful judicial analysis of the actual conditions and impact of solitary confinement assessed against a constitutional standard informed by international human rights norms and expert evidence. Justice McEwan was not prepared to find that solitary confinement was *per se* cruel and unusual punishment,[97] although he came close in saying that "[w]hile there is a growing sense internationally, as well as in Canada, that locking a person down for 23 hours per day is an inappropriate way to treat any human being, the courts remain tethered to the standard of 'gross disproportionality'."[98]

However, in holding that the conditions of administrative segregation imposed on a pre-trial detainee amounted to cruel and unusual treatment or punishment, the Court refused to apply the excessively deferential standard that is often found in prison cases. Justice McEwan reviewed an extensive evidentiary record, including the evidence of Dr. Craig Haney, a leading expert in the United States on the psychological effects of solitary confinement. In concluding that Bacon's treatment violated his section 12 Charter rights, the Court read the decision in *Sauvé* (the prisoner voting rights case) as outlining a normative statement of

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[94] Grassian, *supra*, note 89.

[95] Debra Parkes, "Solitary Confinement of Canadian Prisoners: Normalization and Suspended Rights" (in progress; on file with author).

[96] *Bacon v. Surrey Pretrial Services Centre (Warden)*, [2010] B.C.J. No. 1080, 2010 BCSC 805 (B.C.S.C.) [hereinafter "*Bacon*"].

[97] *R. v. Olson*, [1987] O.J. No. 855, 38 C.C.C. (3d) 534 (Ont. C.A.), affd [1989] S.C.J. No. 7 (S.C.C.).

[98] *Bacon*, *supra*, note 96, at para. 313.

prisoners' rights mandating careful constitutional scrutiny "unmediated by the sort of operational and resource considerations that go into the analysis of a particular standard of treatment".[99]

The decision stands as a very strong statement of the right of prisoners to be free from cruel and unusual treatment or punishment. The treatment of Bacon in segregation included a number of other arbitrary deprivations — including, for example, the denial of writing instruments and visits that caused the prisoner obvious psychological distress. The Court found this treatment to be "cruelty by any measure".[100] The judge had strong words for the provincial correctional authorities, which he said had "seriously lost sight of their responsibility to the judicial branch",[101] given that prisoners are entrusted to them for lawful custody.

The case is remarkable for two reasons. First, it involved a substantial evidentiary record, including expert testimony of a leading expert on the lasting psychological impact of solitary confinement. This was not a legal aid file[102] and, as such, additional resources were available to marshal the kind of evidence necessary to challenge correctional expertise.[103] Second, the judge did not display the kind of deference to correctional decision-making that is often seen in prison cases, including some other recent challenges to solitary confinement. For example, in *R. v. Aziga*,[104] Lofchik J. stated:

> It is recognized that the courts out to be *extremely careful* not to unnecessarily interfere with the administration of detention facilities … . Unless there has been a *manifest violation* of a constitutionally guaranteed right, prevailing jurisprudence indicates that it is *not generally open to the courts to question or second guess the judgment of institutional officials*. Prison officials should be accorded a *wide range of deference* in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security.[105]

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[99] *Id.*, at para. 314.

[100] *Id.*, at para. 316.

[101] *Id.*, at para. 334.

[102] Bacon was a high-profile prisoner, facing charges of first degree murder and conspiracy to commit murder in relation to alleged gang shootings.

[103] Lisa Kerr, "Deference, Expertise, and the Possibility of Prisoners' Rights" (draft manuscript in progress; on file with author).

[104] [2008] O.J. No. 3052 (Ont. S.C.J.) [hereinafter "*Aziga*"].

[105] *Aziga*, *id.*, at para. 34 (emphasis added). This passage was cited in full with approval in *R. v. Marriott*, [2014] N.S.J. No. 139, 2014 NSCA 28 (N.S.C.A.). See also *R. v. Farrell*, [2011] O.J. No. 1813, 2011 ONSC 2160 (Ont. S.C.J.).

In another recent decision, released in March 2014 in the Northwest Territories, the sentencing judge in *R. v. Palmantier*[106] found that the conditions of a pre-trial isolation cell experienced by the accused for 132 days while awaiting trial violated section 12. These conditions included the denial of basic items such as clothing, a shower, running water, a mattress and bedding. As part of the section 12 analysis, Schmaltz Terr. Ct. J. cited the various ways in which the prison conditions violated the norms set out in the United Nations Standard Minimum Rules on the Treatment of Prisoners.[107] It is worth noting that Palmantier had been a difficult prisoner (resisting officers and, on occasion, saying that he was going to kill them). There were understandable safety concerns on the part of the staff and the offences for which he was being sentenced related to serious incidents with correctional staff (resisting peace officers, uttering threats and possessing a weapon). Yet the judge, after hearing evidence from the Deputy Warden, two correctional officers, the accused and another prisoner, found the treatment of Palmantier to be "inhumane and uncivilized" and to "outrage standards of decency".[108]

Like *Bacon*, this decision departs from the pattern of deference to correctional decision-making often seen in the case law. Of the correctional authorities' claims that the denial of necessities such as clothing, bedding and running water were reasonable in response to the physical threats posed by Palmantier, Schmaltz Terr. Ct. J. had the following to say:

> I cannot accept hypothetical speculation as to why reasonable standards cannot be adhered to as a valid reason to disregard reasonable standards. I refer specifically to not supplying a mattress because it could be used as a barricade, or even though the mattress is made of tear proof material, that anything can be torn, or the prisoner had previously torn a mattress; or the reason for not turning the water on in the cell because a prisoner may use his or her hand to stop the drain in the sink, or his or her foot to plug the toilet, and thereby flood the cell; or not providing appropriate clothing because clothing can be used as a weapon.

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[106] *R. v. Palmantier*, [2014] N.W.T.J. No. 21, 2014 NWTTC 10 (N.W.T. Terr. Ct.) [hereinafter "*Palmantier*"].

[107] United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13,1977.

[108] *Palmantier*, *supra*, note 106, at paras. 47-48.

> If standards are not complied with any time one can come up with a scenario in which compliance may result in a difficult situation, then the standards are meaningless. If we were to accept such a position, than the correction authorities could justify never supplying inmates clothing, toiletries, running water, beds and bedding, towels, cutlery. As a society we would not tolerate subjecting people to that kind of treatment, even if they are in custody, it would be inhumane, and "so excessive as to outrage standards of decency", and that is the definition of cruel and unusual treatment. I find the conditions that Mr. Palmantier was held in to be unacceptable, and amount to cruel and unusual treatment, and consequently a breach of his right under section 12 of the *Charter*.
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> As I have said before in *Firth*, I cannot help but wonder how we can expect a person to behave in a respectful and civilized manner, when the state, the authorities, subject the person to inhumane and uncivilized conditions.[109]

Palmantier received a reduction in his sentence as a remedy for the violations of his section 12 rights.

A group of prisoners in Alberta were also successful in 2010 in challenging certain of their conditions of confinement as violations of section 12. In *Trang v. Alberta (Edmonton Remand Centre)*,[110] the judge declared that the section 12 Charter rights of a number of high-profile prisoners were breached "as a result of being locked up, two inmates to a cell, for 18-21 hours a day, with limited access to recreation or other activities for extended periods of time".[111] The men were in these conditions for months or, in some cases, years. This treatment was found to outrage standards of decency. This case was a mixed success in that it took eight years to reach resolution, the only remedies were simple declarations of rights violations in relation to the individual prisoners,[112] and a number of other Charter claims were denied (including, for

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[109] *Palmantier*, *id.*, at paras. 46-48 (citations omitted). In *R. v. Firth*, [2013] N.W.T.J. No. 64, 2013 NWTTC 16 (N.W.T. Terr. Ct.), the same judge had found conditions in the "drunk tank" in Inuvik, N.W.T. to amount to a breach of s. 12.

[110] [2010] A.J. No. 31, 2010 ABQB 6 (Alta. Q.B.) [hereinafter "*Trang*"].

[111] *Id.*, at para. 1157. The Court went on to hold that the men's s. 12 rights were also "breached by the ERC's failure to ensure that underwear was adequately cleaned by the inmate cleaners or that personal underwear was returned by the inmate cleaners" (at para. 1157). In addition, there were findings of s. 15 equality violations in the form of racist comments and actions of correctional staff toward some of the plaintiffs who were Vietnamese.

[112] The decision mentions that the conditions of confinement were taken into account in an earlier decision to stay charges in relation to some of the accused. A civil claim is also still pending. Personal correspondence with Nathan Whitling, counsel in *Trang* (April 2, 2014).

example, allegations about inadequate medical and dental care, double-bunking, and limitations in visits, phone calls, *etc*.).

In *R. v. Aqqiaruq*,[113] an Inuk man successfully argued that his section 12 rights were violated by the conditions in the RCMP holding cells where he was detained for 10 days before being transferred to a correctional centre and subsequently released on a recognizance. The conditions included being in a cell that had lights on 24 hours per day; being denied a shower; being provided with a blanket that had blood on it and smelled of urine; being forced to sleep on the concrete floor because there was only one mattress and three prisoners in the cell; being placed in a cell with a man who was accused of killing his cousin; and being denied prescribed medication at the required times.[114] The man's sentence was reduced from the four months requested by the Crown to one day and time served due to the cumulative effect of breaches of sections 12 and 9. His detention in police holding cells did not meet the requirements of a "correctional centre" in the relevant statute[115] and was therefore unlawful and arbitrary, contrary to section 9 of the Charter.

These cases indicate that a reduced sentence may be an appropriate constitutional remedy for conditions of confinement on remand that violate section 12 or other Charter rights. However, such a remedy should not be limited to the time of sentencing. In her 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*,[116] then Justice Louise Arbour recommended that, upon proof of "illegalities, gross mismanagement or unfairness in the administration of the sentence", a judge could order that the length of an existing sentence be reduced to address the reality that the sentence experienced by the prisoner was more punitive than the (legal) one intended.[117]

The case law is clear that something "more than hard time" is required to find a violation of section 12.[118] The standard of "gross disproportionality" that "outrages standards of decency" applies, but the successful section 12 claims tend to involve findings that the treatment is excessive, arbitrary, inhumane or cruel, usually in the context of solitary confinement or overcrowded pre-trial detention. With the mounting

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[113] *R. v. Aqqiaruq*, [2009] Nu.J. No. 28, 2009 NUCJ 26 (Nu. C.J.).

[114] *Id.*, at paras. 12-14.

[115] *Nunavut Act*, S.C. 1993, c. 28, incorporating the definition of "correctional centre" in the *Northwest Territories Act*. Corrections Service Regulations, R.R.N.W.T. (Nu) 1990, c. C-21.

[116] *Supra*, note 14.

[117] *Id.*, at 183. See also *R. v. MacPherson*, [1996] N.B.J. No. 182, 48 C.R. (4th) 122 (N.B.Q.B.), discussed in Parkes, "A Prisoners' Charter?", *supra*, note 30, at 656.

[118] *R. v. Chan*, [2005] A.J. No. 1118, 2005 ABQB 615 (Alta. Q.B.).

evidence of severe and lasting psychiatric effects of solitary confinement, a court may soon be compelled to find that the practice is *per se* cruel and unusual, at least for prolonged or indefinite periods.[119]

IV. THE POTENTIAL OF PRISONER CHARTER LITIGATION

Numerous reports and commissions of inquiry have pointed to the need for external oversight of imprisonment to bring practices in line with constitutional rights and the Rule of Law.[120] Canada has refused to sign the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[121] which would require establishing a National Preventative Mechanism to inspect places of detention and monitor conditions against international human rights standards.[122] With the Canadian prison population at an all-time high and evidence pointing to a continued upward trend in incarceration, the case for judicial oversight of places of detention has never been stronger.

At the end of his decision in *Trang* declaring that certain remand conditions violated the Charter, Marceau J. observed that

> through the eight years this application has wound its way to conclusion, the fact that the conduct of the administration and staff at the Edmonton Remand Centre has been under scrutiny has led to many meaningful improvements. It is important, therefore, that Legal Aid, where necessary, be available to ensure alleged Charter breaches are pressed before the Courts.[123]

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[119] The UN Special Rapporteur, *supra*, note 91 proposed a limit of 15 days. In her 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Canada Communication Group, 1996), Justice Louise Arbour recommended that the law be amended to prohibit anyone being held in segregation for more than 60 days in a calendar year, whether consecutive or not.

[120] Debra Parkes & Kim Pate, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48 Can. J. Criminology & Crim. Justice 251 (citing, among others, the Arbour Report, *id*.).

[121] Adopted on December 18, 2002 at the 57th session of the General Assembly of the United Nations by Resolution A/RES/57/199 entered into force on June 22, 2006.

[122] In the United Kingdom, Her Majesty's Inspectorate of Prisons ("HMI Prisons") coordinates the work of 21 arm's-length bodies that collectively form the National Preventative Mechanism. HMI Prisons conducts week-long, unannounced, in-depth inspections of all British prisons within a five-year period. See <http://www.justice.gov.uk/about/hmi-prisons/>.

[123] *Trang*, *supra*, note 110, at para. 1161.

In *Mission Institution v. Khela*,[124] the Supreme Court of Canada recently reaffirmed the importance of legal avenues to address rights violations in prison and other unlawful deprivations of liberty:

> *Habeas corpus* is in fact the strongest tool a prisoner has to ensure that the deprivation of his or her liberty is not unlawful. In articulating the scope of the writ in both the *Miller* trilogy and in *May*, the Court has ensured that the rule of law continues to run within penitentiary walls … and that any deprivation of a prisoner's liberty is justified.[125]

Given the growing overcrowding in Canadian prisons and jails, the mounting evidence of lasting psychological and physical effects of solitary confinement and other inhumane treatment, Charter litigation presents a challenge to the punishment agenda, perhaps even more than litigation focused on mandatory sentences. However, we are currently seeing more of the latter and less of the former. Reasons for the low volume of prisoner Charter litigation are many and varied.[126] In many provinces, legal aid funding for prisoner litigation is non-existent or extremely limited.[127] By contrast, funding related to an accused person's defence and sentencing is the core of legal aid plans across the country. Most criminal lawyers are familiar with the trial and sentencing processes, but unfamiliar with the myriad laws, regulations, policies and practices of federal and provincial correctional systems. In addition, even when a strong prisoners' rights case is marshalled by experienced lawyers, there are powerful pressures to settle, contributing to a dearth of case law.[128]

Some of the cases I have discussed above, along with the annual reports of the Correctional Investigator, high-profile events such as the death of Ashley Smith in her segregation cell while guards watched, and numerous reports and commissions of inquiry, all point to the inhumane and illegal treatment and conditions of confinement that one can find in

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[124] [2014] S.C.J. No. 24, 2014 SCC 24 (S.C.C.).

[125] *Id.*, at para. 29.

[126] Debra Parkes, "A Prisoners' Charter?", *supra*, note 30, at 667-70.

[127] For example, in Manitoba there is no Legal Aid funding allocated to prisoner litigation of any kind. Upon a special application, a test case might receive some minimal funding but it would likely have to be pursued in partnership with a lawyer acting *pro bono*.

[128] For example, BobbyLee Worm, an Indigenous woman from Saskatchewan who spent three-and-one-half years in solitary confinement recently settled her lawsuit with the Correctional Service of Canada. This was a case that a number of lawyers under the coordination of the B.C. Civil Liberties Association had been preparing for trial: <http://bccla.org/2013/05/media-province-solitaryconfinement/>.

prisons and jails across the country. Conditions in provincial jails,[129] remand centres and police lock-ups are, in many contexts, particularly inhumane and are not on anyone's legislative agenda to address. The punishment agenda is intensifying in Canada and judicial scrutiny of what is actually going on in prisons is crucial to any strategy for resisting that agenda.

Charter analysis of mandatory sentences tends to focus on, and accept as effective, abstract principles and objectives of sentencing such as deterrence, rehabilitation and denunciation, even in the face of mounting social science evidence that challenges the strength of these assumptions. For example, a core idea underlying mandatory minimum sentences — namely that increasing the severity of a sentence will deter people from committing the crime in question — has been largely discredited by decades of criminological research.[130] Disrupting these deeply embedded assumptions of the criminal justice system could have far-reaching consequences that would not be confined to a particular mandatory sentence at issue in a particular case. Nevertheless, attention to the contradictions and arbitrariness inherent in mandatory sentencing laws (*i.e.*, the way that they limit the accountable and transparent exercise of discretion by judges while expanding the unaccountable and opaque exercise of discretion by prosecutors) should form part of a principled Charter analysis.[131] But based on the judicial deference often accorded to Parliament's decisions to ratchet up minimum sentences, even in the absence of supporting evidence about the effectiveness of such measures, challenges to mandatory minimum sentences are unlikely

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[129] A recent report by the federal Office of the Correctional Investigator of Nunavut's Baffin Correctional Centre ("BCC") paints a particularly disturbing picture of a run-down, overcrowded, mold-infested facility in which prisoners are forced to share permanently stained underwear. The Report states: "[BCC] has been grossly overcrowded for many years, and it is now well past its life expectancy. The current state of disrepair and crowding are nothing short of appalling, and negatively impacts on both inmates and staff. Cells are overcrowded beyond acceptable standards of safe and humane custody." *Report of the Office of the Correctional Investigator (Canada) on the Baffin Correctional Centre and the Legal and Policy Framework of Nunavut Corrections* (April 23, 2013) at 6-7, online: <http://www.justice.gov.nu.ca/apps/UPLOADS/fck/file/Report%20OCI%20on%20NU.pdf>.

[130] See, for example, Cheryl Webster & Anthony Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Joan Petersilia & Kevin Reitz, eds, *The Oxford Handbook of Sentencing and Corrections* (Oxford: Oxford University Press, 2012) 173.

[131] Parkes, "From *Smith* to *Smickle*", *supra*, note 44. For a different argument that would incorporate an arbitrariness analysis into the disproportionality standard under s. 12, see Allan Manson, "Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" in Benjamin Berger & James Stribopoulos, eds., *Unsettled Legacy: Thirty Years of Criminal Justice under the Charter* (Markham, ON: LexisNexis Canada, 2012) 207.

to do more than tinker around the edges of sentencing policy, picking off only the most egregious outlier sentences.

Section 12 Charter litigation that focuses on the actual practices and conditions of imprisonment not only has the potential to provide a remedy for very concrete instances of inhumane and otherwise illegal treatment, it can counteract the tendency to abstract the practice of imprisonment from its real effects and consequences. *Smith* called on judges to consider the "nature and conditions" under which a sentence is served in assessing its validity against the section 12 standard.[132] Cases about prison conditions put abstract decisions about sentence length into sharp relief. Most judges will likely continue to be more comfortable with their jurisdiction to address quantum of sentence rather than questions about the nature and quality of punishment. However, recent section 12 cases have put at least some judges in the role of critic of the punishment agenda, in relation to both mandatory sentences and inhumane prison conditions. The sentencing process assumes a lot about imprisonment, including its ability to rehabilitate and deter the people incarcerated within its walls. Research and litigation to address the facts of prison conditions and treatment can encourage us to think in more complex and critical ways about imprisonment as social policy.

[132] *Smith*, *supra*, note 37, at para. 57.