Charter: A Course Podcast S4E3 - Section 12 of the Charter

Transcripts are auto-generated

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Lisa Kerr (pull quote):

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I think probably the most important point here is just to remember that section 12 isn't one of those Charter provisions that's actually really hard to abide by, right? It doesn't take a lot of sort of state resources or anything to bring it to life. We don't have to give up a lot in order to not do cruel and unusual punishment, right?

Intro Music:

Charter a course, I will charter a course. If we can just get the country to trust us.

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Charter a course, southeast, west and north, and along the way we may find justice. Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north, and along the way we may find justice.

Cheryl Milne:

Hello and welcome to the fourth season of Charter a Course, a podcast created by the David Asper Center for Constitutional Rights.

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at the University of Toronto. I'm Cheryl Milne, your host and the Executive Director of the Asper Centre. We focus on current Canadian constitutional law issues, highlighting aspects of constitutional litigation and exploring the meaning of our rights under the Canadian Charter of Rights and Freedoms. Whether you are a law student, a lawyer or a curious person, we hope you'll learn about an aspect of Canadian constitutional law and litigation that interests you.

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Today's episode focuses on section 12 of the Canadian Charter of Rights and Freedoms. Section 12 provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. Joining us to discuss section 12 is Professor Lisa Kerr, an associate professor and director of the criminal law group at Queen's University Faculty of Law. She earned her law degree at the University of British Columbia and holds graduate degrees from New York University, where she was named a Trudeau Scholar.

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She has worked and researched extensively in the fields of sentencing and prison law. For example, she worked as a staff lawyer for prisons, legal services, and was involved in groundbreaking litigation challenging solitary confinement in both BC and Ontario, and actively assists the Queen's Prison Law Clinic with strategic litigation. Lisa, welcome, and thank you so much for joining us.

Lisa Kerr:

Thank you for inviting me.

Cheryl Milne:

So, let's start by turning back the clock to the early 1980s when the Charter was being drafted.

02:20

How does Section 12 come to be included in the Charter?

Lisa Kerr:

Well, this idea of a prohibition on cruel and unusual punishment actually has a very long history in constitutional thought. It traces back to the Magna Carta, to the English Bill of Rights. It shows up in the Eighth Amendment in the United States. So, we had really hundreds of years of experience in constitutional democracies, and we decided to bring that language into Section 12.

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The main idea behind it, Section 12 limits what the state can do in response to wrongdoing. It says no matter what someone has done, usually a criminal offender, that the state has some boundaries in terms of how it can respond. The state cannot use excessive punishment and cannot use degrading or dehumanizing forms of treatment or punishment. So there's...

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An American lawyer named Bryan Stevenson, who's kind of a famous guy for all he's done on death penalty and racial justice. He was one of my teachers at NYU. And he has this thing he always says, which is the question with the death penalty isn't do they deserve to die, but do we deserve to kill? And I think with that quote, he's alluding there to sort of the particular US history with the death penalty, which has been very dysfunctional and racist.

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But I like the quote because I think it just helps us, it helps remind us of something that's important in section 12, which is that it's not just about what someone deserves, right? What a criminal offender deserves. It's partly about that. But it's also about us, right? About who we are, what it means to live in a country with limits on state power, with human dignity as a constraint on policy.

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So that's what section 12 does. It says, we've just decided to take certain extreme or disproportionate punishments off the table. We can punish, but we will have a limit on that power to punish.

Cheryl Milne:

Well, talking about sort of starting back so far in history, we certainly have changed or evolved in what we think is cruel and unusual. I know we're gonna touch on that, but when you think of what might have been acceptable back during the Magna Carta.

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and what we have now, it's really been this evolution. Given your view on the significance of Section 12 in our constitutional design, what do you think about proposals to use the Section 33 override, so the notwithstanding clause, in order to allow the government to make use of penalties that the Supreme Court has said today are cruel and unusual?

Lisa Kerr:

Yeah, so I do think that it is a very important moment to remember the history.

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that the ban on cruel and unusual punishment is this really deep, longstanding feature of constitutional democracy. And I think that helps remind us of the stakes of proposing to override this protection, right? We cannot impose cruel and unusual punishment without losing a key part of our identity as a constitutional democracy. And I think probably the most important point here is just to remember that

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Section 12 isn't one of those Charter provisions that's actually really hard to abide by, right? It doesn't take a lot of, sort of state resources or anything to bring it to life. We don't have to give up a lot in order to not do cruel and unusual punishment, right? We can and do impose tough punishment on lawbreakers, right? Our legal system, we make use of all kinds of severe punishment, fines, surveillance, imprisonment for long periods of time.

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including for life, all kinds of related losses. So I think we really have to ask, what are politicians saying when they promise to use the override provision to get past section 12? They're saying severe punishment isn't enough, right? We have to be free to be cruel. We have to be free to be grossly disproportionate. We have to be free to be dehumanizing.

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And I know what we would lose in doing that, but I really have to ask what it is that we would gain. And it's always going to be an easy thing for politicians to propose to throw away this Charter right. It tends to be a right that's invoked by people who've caused harm. And that's actually why it's so important for it to be in the Charter. It's possibly the most powerful example.

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of the need for counter-majoritarian protection just because of who it is that invokes it.

Cheryl Milne:

Now you mentioned the death penalty as something that comes to mind when we hear the term cruel and unusual punishment. As many of our listeners may know, the death penalty has been abolished in Canada. Could it be reintroduced or does section 12 preclude that from happening?

Lisa Kerr:

Yeah, that's exactly right. I mean, I do think that...

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the death penalty is what comes to mind when you hear this phrase, cruel and unusual. Maybe you'd think of also sort of corporal punishments, the historical relics, right? Like the lash or banishment, those kinds of ancient penalties. But what is it, right? What does it mean today in a country like Canada? And I think there are sort of some conservative quarters that might say that these kinds of physical or bodily punishments are all that Section 12...

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covers. I would say it definitely prohibits those things. But the truth in Canada is that we just haven't had to litigate these kinds of extreme forms of penalty because most have just already fallen into disuse by the time we get the Charter in 1982. And that's true for the death penalty as well, right? So in Canada, we carried out our last execution in 1962, 20 years before the Charter.

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So we've never really had to ask the courts the most direct version of the question, right? Does the death penalty violate section 12? But there is the case of Burns and Raffay where the Supreme Court held that Canadian officials can't extradite, in this case to the United States, where there's a risk of the death penalty. That was decided though under section seven, which said that government officials need to sort of obtain assurances that the death penalty won't be sought.

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The court didn't expressly say Section 12 forbids capital punishment. It just kind of wasn't before the court because it wasn't the Canadian state that would have been carrying it out. But I'll mention the Bissonnette decision, and I know we'll talk more about this one. In that case, the Supreme Court holds that life without the prospect of a parole hearing, life imprisonment without parole, what's called LWOP, that that's a cruel and unusual method of punishment. And it seems crystal clear from...

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from Bissonnette, from Burns, other jurisprudence, that should the death penalty be reintroduced in Canada, it would not survive constitutional review.

Cheryl Milne:

And we know that the death penalty still is very much an active penalty south of the border. You've mentioned the Eighth Amendment in the US that has the same language as Section 12. What are the similarities and differences in terms of the impact of this constitutional right in each country?

Lisa Kerr:

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Yeah, it's so interesting to compare the Eighth Amendment and Section 12, because as you say, they do have the same language, right? It's the same concept, but the Eighth Amendment has had a very different impact on the penal landscape of the United States, right? On the death penalty, on sentencing policy generally. And so a comparative perspective on this topic is really interesting because it reminds us that the exact same words in a constitutional document will have such a different...

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effect according to sort of the politics, the history, the culture of a place. But just to sort of briefly describe the impact the Eighth Amendment has had. So, in the US today, over half of US states still have the death penalty. I think in Canada, we actually find that remarkable, maybe even kind of shocking. But I think Canadians are sometimes like too quick to take from this that the US is some barbaric lawless place where...

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cruel and unusual prohibition is meaningless. And I don't think that's quite right. And what I find so interesting about the death penalty in the United States today is that while it hasn't been comprehensively abolished, it's really an extremely kind of conflicted and contested institution. And David Garland has a great book on this called Peculiar Institution, America's Death Penalty in an Age of Abolition. Garland was my...

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doctoral supervisor and he's just really one of the most brilliant thinkers on sort of institutions of punishment. What Garland emphasizes is that the death penalty today is rarely sought by prosecutors. It's rarely imposed by juries. It's rarely carried out by prison officials. Only 27 states have it. Only 21 capital sentences were imposed last year.

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24 executions carried out last year. So, this is a very marginal institution in terms of the landscape of punishment in the US. And part of why that system looks the way it does is because of how much constitutional law the US Supreme Court has laid down, starting in the 1970s, about what a constitutional death penalty requires. That's a strange phrase to us, but there's a lot of rules around how you can carry this out. And that's resulted in...

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the narrowing reduction and the juridification of the American death penalty. So just to close on this point, there's an enormous body of law under the Eighth Amendment in the US on the death penalty, on prison conditions. And this body of law is far larger than what Canadian courts have produced. So, at the end of the day, our courts have, I think, announced much more meaningful concrete limits under Section 12. But the Eighth Amendment has done a lot of work...

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to place limits on what is really a far larger and more complex sort of system of punishment.

Cheryl Milne:

Well, that leads nicely into what my next sort of area of questioning is really about how section 12 actually operates. It hasn't had the lengthy history that the US law has, but we can look at the text and see what the courts have, how they've interpreted various aspects of it. So first of all, the text uses the word everyone.

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But what does that really mean in terms of who can claim protection against cruel and unusual punishment?

Lisa Kerr:

Yeah. So we now have a clear answer to that question as of a 2020 Supreme Court decision out of Quebec that makes clear Section 12, it only applies to people. It doesn't apply to corporations. And, you know, you can imagine why a corporation might want this protection, right, as a tool to fight against large fines that...

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that might be imposed for regulatory offenses. But the court held in this Quebec case that section 12 has always been centered on this idea of human dignity, right? This right that human beings retain. And a corporate entity just does not have that same sort of dignitary interest. So, the court talks about how we wouldn't say you've been cruel to a building when you blow it up, right? Section 12 is really concerned with human pain and suffering and there's both a physical and mental aspect to that, so.

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It's pretty clear on that issue now.

Cheryl Milne:

So, what I think is probably more difficult to understand sometimes is what the terms treatment and punishment actually mean, how that language has been interpreted by the courts as well. Can you just talk a little bit about what that means?

Lisa Kerr:

Yeah, so I agree. I think that's been a more difficult one. And I don't think things are crystal clear here. But to my mind,

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The punishment piece is really clear what punishment covers. And it's played just a far bigger role in the case law. So, the punishment part of section 12 speaks to penalties imposed for those who commit criminal offenses, right? So, punishment is going to include a prison sentence, monetary fine if it's a penalty for a criminal offense. And I think that it speaks to both the length or duration of imprisonment, but also the conditions, right?

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things like solitary confinement, other sort of ways of carrying out the penalty. I think punishment captures all of that. The treatment part has had less attention in the case law, but it seems clearer that it covers things that the state might do to someone for non punitive reasons. Right. So not as punishment. And it could include things like detention in the immigration context, deportation, extradition. And the main idea in the law on the few cases we have on this is that...

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there has to be sort of a significant ongoing degree of state control, of state interference, right? Immigration, many immigration sort of regimes would satisfy this, I think, in order for the state action to be sort of covered by Section 12. So, to me, the punishment piece is the criminal law piece, and then the treatment piece is sort of other things the state does to people, but not as punishment for a crime.

Cheryl Milne:

Well, there is the one case in which the Canadian Doctors for Refugees case in which...

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the denial of medical care, particularly for children who were refugee claimants, was something that was considered to be treatment under that section. And so that was struck down. There's a current case, a couple of cases, I think, that are going before the federal court about cessation. And what that means is the removal of a person's permanent residency status because as a long-term sort of refugee in Canada, they've either gone back to their home country or...

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obtained a passport from their home country and the provisions just do an automatic almost removal of their permanent residency. And I think Section 12 is being argued in that case as an infringement. Whether the court will pick up on that, I don't know, but that's an active argument that's going forward. I mention it because the Asper Center is intervening in one of those cases.

Lisa Kerr:

It's an important case. It's really important. Yeah.

Cheryl Milne:

And what about the meaning of cruel and unusual?

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How have the courts gone about defining what constitutes that?

Lisa Kerr:

So very consistently, the courts have said that this is a high threshold, that it speaks to penalties that are not just disproportionate, not just severe, not just tough, but grossly disproportionate. These are penalties that, as the court has said, shock the conscience of ordinary Canadians, that outrage our evolving standards of decency, that violate...

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notions of human dignity. So this is all, you know, very sort of the language of a very high threshold. Now, I'll just say Canadian law has mostly not focused on the conjunction, right? The idea that the penalty must be cruel and unusual. There is an outlier view in Canada that is more sort of textual in nature. And this view...

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emphasizes the conjunction and says it has to be both cruel and unusual. So, the idea that for common penalties, right, like imprisonment, that these could never violate section 12. So, an Alberta Court of Appeal judge actually took that view in a case called Hills that I think we're going to talk more about later. So, he said in that case that because jail and prison is imposed every day, a jail or prison sentence can never infringe section 12. Now that view is...

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clearly wrong. The law is clear that particular terms of custodial time can infringe section 12. And I'll just say, even if we're going to go with a really textual approach here, a grossly disproportionate term of imprisonment is an unusual one, right, in our legal system, along with being cruel. So, I think it's both that view from Alberta is both wrong as a matter of precedent and also in terms of just reading.

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and thinking through the language. So, the Supreme Court agreed with me on that and rebuked this judge for sort of preferring his own views to the law. But that sort of one issue aside, the law has just been really clear over the years that this is a high threshold.

Cheryl Milne:

So, let's look at some of the examples then of some of the cases where Section 12 has been litigated and you've already alluded to some of those. And most of them have really arisen in the context of

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constitutional challenges to mandatory minimum sentencing. So, first of all, let's just start with what is a mandatory minimum sentence. What does that mean?

Lisa Kerr:

Yeah, it's a good place to start. It's a phrase we hear a lot. But I think sometimes we don't often necessarily understand the place of them in our system. So, a mandatory minimum, it's a minimum sentence that a judge is legislatively required to impose. And what it means is the judge can go above the mandatory...

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but can't go below. So, it functions not as a ceiling, but as a floor. And I think to really understand the significance of mandatory is you kind of have to know how things ordinarily work in our sentencing courts. And ordinarily judges in our system have a lot of discretion at sentencing. The criminal code might say what the maximum penalty is, so the ceiling.

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But these are hardly ever ordered, right? They're for the worst case, the worst offender. They're very rare. And the criminal code mostly doesn't specify minimum penalties. So, it's unusual for the code to say, judges, you're not allowed to go below this particular penalty even if you think the case has these really strong mitigating factors, even if you think another penalty would be far more effective. And just...

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Practically speaking, what mandatories mean is that politicians in Ottawa are deciding on the minimum fit sentence rather than the judges who are actually overseeing cases and in our courts every day. So, these have been really popular political tools in recent years. And I do think that in some cases they have worked well. Maybe the impaired driving context is an example of that where...

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They were sort of needed at a particular moment in time to sort of remind judges that this is serious misconduct. But in general, mandatory minimums have really like not fared well in the courts. Many have been struck down. And, you know, I always emphasize, I'm kind of amazed, blown away, disappointed, crushed by how much money we've spent on mandatories, right? It's been a really costly endeavor for Canadians. So, if you think about...

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We've just litigated these things. I mean, the case law is just enormous, all over the lower courts, all over the courts of appeal, lots of Supreme Court of Canada cases. If you think about the legal aid fees, the government lawyer salaries, the judicial resources, at the end of the day, the government really doesn't have a lot to show for all this spending. Number one, many have been struck down, almost all that the courts reviewed have been struck down. Number two, in most cases, judges would have already imposed...

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the mandatory, right? It's just the rare, heavily mitigating case that judges want the freedom to go below. So, you know, this is a long answer, but I'm passionate on this one. You know, mandatories, I think are really premised on a lack of trust and judges and prosecutors, right? It's sort of saying they can't exercise their discretion properly or consistently. And I just don't think that's true in our legal system.

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But anyways, that's sort of the history there of what they are and the politics behind them.

Cheryl Milne:

Well, there's always the perception that it's vote getting as well. So that it appeals to a sort of a simplistic view of our criminal justice system that, you know, do the crime, pay the penalty, and tends to be this sort of harshness if you don't know all of the facts of the situation. So, as you said, the courts have been receptive to those challenges that they...

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Many of them have been struck down through Charter challenges. Can you just tell us a little bit about some of those cases?

Lisa Kerr:

Yeah, it's a great history here. So, the famous early case that everything flows from is called Smith, and it was decided in 1987. This is the first Section 12 case, and it's about a mandatory minimum. The mandatory in Smith was seven years for importing drugs. So, this was a really extreme provision, right?

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and it cast a really wide net in terms of the offense. So, you read the offense provision, the mandatory applied the seven years. Didn't matter how much drugs you brought in. Didn't matter the type of drug that you brought in. It didn't matter whether you made money, whether there was profit, whether you had managerial responsibility. And it didn't matter whether you were 19 years old, and this was a first offense. So that's a really extreme penalty and the court strikes it down...

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And it's really an easy case because it's just such a broadly drafted offense provision and it's such a massive penalty. Canada is just not going to send a 19-year-old who brings a joint over the border to prison for seven years. Right. So that's sort of the facts of the case and it was an easy one, but the court in Smith does two significant things and it's reasoning that have been sort of with us ever since in this area of law.

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First, the court says that section 12 is going to have this very high standard I mentioned, gross disproportionality. So, the court makes clear that it's acceptable for parliament to put mandatory minimums in the code. That's within their policy purview. They can do it. The mandatory can be punitive. It can be disproportionate. It just can't be grossly disproportionate. So that's sort of the high standard piece. Second, the court gives us...

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It doesn't use this language in Smith, but gives us what winds up being understood as the reasonable hypothetical device. And this becomes hugely consequential in terms of the fate of mandatories in this country. And what this device does, the reasonable hypothetical, is it allows judges to think about not only whether the penalty is unconstitutional for the person in front of them, right? Mr. Smith in the Smith case. Judges can also think about whether it could be...

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grossly disproportionate for a reasonable hypothetical offender. In Smith, it wasn't grossly disproportionate for him. He brought in an enormous quality of drugs. They were worth a lot of money. He had a long record, all of that. For him, actually, the fit penalty was eight years. But Smith says, well, you're not limited to that as judges. You can think about how will it apply? There's lots of debate about this, how it should work. It's been sort of one of the more controversial areas of this part of the law.

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I do think this device is justified because mandatory minimums can shape outcomes in criminal cases without actually being imposed. So, they can shape how resolution agreements get reached, how plea bargaining unfolds. There's a lot to sort of explain about how that all works. But I do actually think that in this particular corner of constitutional law, probing the foreseeable applications of a mandatory is really particularly important to be able to do.

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And, but it's interesting to think back now, every single mandatory minimum that the Supreme Court of Canada has struck down, it's been done on the basis of a reasonable hypothetical, not on the basis of the person before the court.

Cheryl Milne:

So that's the example like you gave of the 19 year old coming across the border with a single joint.

Lisa Kerr:

Exactly.

Cheryl Milne:

That wasn't the facts in Smith, but that's the reasonable hypothetical that the court would have looked at to see, is this a reasonable penalty?

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for how the crime is described. A turning point, I think, in more relatively recent times is the case called Nur. Can you tell us what happened in that particular case?

Lisa Kerr:

Yeah, it's interesting. So, if we just kind of first reflect on the history between Smith in 1987 and Nur in 2015, in that interim period, the court does not strike down another mandatory minimum, right? There were a few that came before it. They're all upheld.

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scholars are starting to think, hey, what the heck? We thought Smith was going to be this strong decision, but it doesn't seem to be working. Doesn't seem to be that strong after all. And so Nur is this a case that's interesting because in Nur, the government lawyers actually sort of invited the court to resile from Smith, right, and said, listen, Smith was obviously an outlier, so give it up. And so that's what's before the court in Nur.

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Now in terms of the facts or the offense provision in Nur, it's a firearm possession case and there's two mandatory penalties at issue. Three years for unlawfully possessing a prohibited or restricted firearm that's either loaded or has ammunition sort of nearby. And then there's a five year penalty if you are a repeat offender on a second offense. So for the person again before the court, Mr. Nur.

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It was not a grossly disproportionate sentence just on the facts of his case. But of course, we've said judges are allowed to go beyond that and think about reasonable foreseeables. And here the court strikes this provision, this three-year mandatory and five year. And it's largely for the same kind of concern as in Smith, right? Just given that this offense covers an extraordinary range of conduct, right? From the sort of...

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less serious to more serious. And so, for the hypothetical scenario, the court said, there could be a sort of largely responsible gun owner who stores an unloaded firearm safely with ammunition nearby, but who has made basically a regulatory mistake in terms of committing this offense. And so, the court said, listen, we're not sending that guy to penitentiary for three years...

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that that doesn't, it's essentially a regulatory offense. A fine might be appropriate, probation might be appropriate, but three years federal penitentiary, that just is not a fit in our system. So, as I said, Nur is really significant because the court firmly rejects the invitation from the Crown to give up on this reasonable hypothetical thing, you know, resile from Smith and...

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Once Nur is handed down, and I'll tell you, Nur surprised me. I didn't know, like, for a fact... I thought, like, I definitely thought Lloyd would be the mandatory for drug trafficking would be struck

down, and it is a year after Nur. But with firearms, I wasn't quite sure what the court would do here. But with Nur, we know after Nur that many, many other mandatory minimums are constitutionally suspect, and so now we're sort of seeing more of them fall in the wake of that decision.

Cheryl Milne:

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So you started talking about some of the more recent cases since Nur. I think that one of them is a more recent one called Hillback, so that we now have quite a bit of new law reviewing mandatory minimums. Can you just tell us a little bit about what's been happening there?

Lisa Kerr:

Absolutely. So, 2023 was a really big year in terms of mandatory minimums. And it's interesting, all three of the decisions, Hills, Hilbach and Bertrand Marchand were all written majority decisions by Justice Martin.

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who also decides Boudreau a few years earlier. So she's had this really outsized impact on section 12 jurisprudence. I feel like all I do is read Justice Martin opinions. So Hills and Hilbach, I'll touch on both of them. They're both coming from the Alberta Court of Appeal. They sort of fit together. And Hills, the court winds up striking a mandatory...

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And in Hilbach, the court winds up upholding a mandatory, and for the first time in many, many, many years. So Hllbach is significant, right? Why does the court uphold the mandatory in Hilbach? So, in Hill's, the offense was basically firing a gun at a place, being reckless about whether someone could be present at the place. So intentionally discharging a firearm into or out of place is what the offense says. And the penalty was four years imprisonment.

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The court strikes that down and it is again on the basis of reasonable hypotheticals. The court basically says it could be young people who are just playing around with a BB gun. A BB gun meets the definition of firearm because it can take an eye out. And so, they could be playing around really just kind of thoughtlessly about whether people are present at this place. Now that is not how the offense was committed in Hills. It was much more serious...

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conduct and for him it's not a grossly disproportionate penalty. But for these hypothetical scenarios, Justice Martin says a fit sentence would be actually no imprisonment, right? Would be 12 months probation. Four years is grossly disproportionate to that. There are two parts of Hills that I think are really important in terms of the development of the law. First, Hills makes clear that judges can think about mitigating personal characteristics.

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when they construct these reasonable hypothetical scenarios. So, what that means is, as they're thinking about the hypothetical offender who might do this, they can think about things that are mitigating. So, what is mitigating in our system? Well, things like youth, things like poverty, mental illness, indigenous background can be mitigating in some people's circumstances. So those kinds of factors appear every day.

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in our criminal courts as mitigating. And so, Justice Martin makes clear, you can think about those things when you're thinking about whether a penalty is going to be grossly disproportionate. I think that's hugely significant. It had been debated for a long time. Nur kind of settled it, but not clearly enough. And now we just have that crystal clear. When you're looking at mandatories and how they might apply, definitely think about the kinds of social disadvantage, the kind of difficult background factors...

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that might make this penalty extremely grossly unfit, right? Second important part of Hills is judges, Justice Martin says judges can think about the effects of the sentence that are, that's imposed. So, this was an idea that had been kind of mentioned in Smith, but really hadn't been explored in subsequent cases. So, what does that mean? The effect of imprisonment. Justice Martin says judges should look at the impact of imprisonment, right?

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what prison is going to actually be like for someone, right? And she's really recognizing with that, that prison is different for different people. People are differently situated and four years for one person is not going to be the same as four years for another. And she actually gives three examples of particularly vulnerable groups when it comes to custody. She first mentions law enforcement. So maybe some rhetorical advantage, just starting with police officers who might be in custody.

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But she also mentioned people with disabilities. Prison is much harder for them. People who might experience systemic racism in custody. So, for those, and I don't think this is a closed list, right? I think that this part of Hills is this really broad invitation to sentencing judges to think about perspective, individual vulnerability to the prison environment. I think that's relevant to sentencing as well as to Section 12 doctrine.

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So those are the important bits in Hills. And of course, the penalty is struck, but Hilbach is really important too. And Hilbach, as I said, it's the first mandatory the court upholds since 2008. And this is a much more serious offense, right? Than what's at issue in Hills. So, this offense is robbery with a restricted or prohibited firearm used. So, the firearm has to be used, right? But it doesn't have to be loaded and it doesn't have to be used in the sense of fired...

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just with you and sort of facilitating the robbery. And so, I say that all because the dissent really emphasized the fact that in this particular case, it was an unloaded firearm, which obviously reduced the risk enormously, the decision this guy made to not put ammunition in. But okay, so with that, it was a five-year mandatory. So, this is a stiff penalty. Now what's striking about Hilbach is this is the first one really ever...

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where it's before the Supreme Court and there's no reasonable hypothetical. That's not how the case is argued. That's not how it's litigated, the Hilbach. There's a companion case where there's some hypotheticals, but Mr. Hilbach focuses on his own circumstances. Now, maybe it's because his own circumstances were so very compelling. He is a young indigenous man. He is incredibly strong. And by strong, I mean, you know, very difficult...

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Gladue factors in his background and his personal family history. A really difficult life story, it's quite mitigating. He's only 19, he has a daughter. All of this in our system of sentencing is heavily mitigating. He's also sort of turned his life around in some ways. He's gotten out of gang involvement, which had been a problem earlier for him by the time of sentencing. So, there's lots of reasons to sort of maybe think five years is a bit severe for this guy.

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And in fact, the trial judge agrees with that. The trial judge says, I'm going to strike the five-year mandatory. The fifth sentence for this man is a provincial sentence. Two years lost the day. I want to get him out. The trial judge is really concerned with keeping him out of federal. Why? Because the trial judge is concerned, and this is a case from the Prairies, where the gang issue for indigenous men in penitentiaries is very serious.

36:48

This trial judge wants to keep him out of what he thinks will be criminogenic conditions of federal custody for him. He thinks if I send this guy to federal prison, we will lose him for life. He'll get back involved in gangs. He's too young to deal with that environment. The risk factors are already there. I want to try to keep him in provincial. So, it's quite remarkable in terms of what the trial judge does. The Supreme Court does not agree. And once again...

37:17

authored by Justice Martin, the majority says it's actually a three-year sentence that would be the fit sentence, but that doesn't cause her to strike down the five-year mandatory, right? She says the five-year mandatory is actually not grossly disproportionate to the three-year fit sentence. And so, I think what's significant about that is that we see this really considerable gap in Hilbach between the fit sentence, three years, and the mandatory of five. So, we learn from that that, you know,

37:46

It's a reminder, it is true that section 12, it's a high threshold. It doesn't require a fit sentence, clearly not on the outcome of Hilbach. And so that's kind of, you know, maybe something we can be critical of in the decision. Something I really appreciate in the decision and I think we can build from Justice Martin makes very clear that the Gladue factors in this case, the particulars of this man's indigenous background and the...

38:15

experience of custody that he's facing, she says these factors should be given significant weight. So, we at least have that strong language. There's no question that stuff matters and it matters a lot. We might question whether it mattered enough in terms of her final decision. So, there's my sort of take on Hills and Hilbach. And yeah, it was a very big year for this area of law, and we'll be dealing with...

38:42

the ramifications for the incoming years for sure.

Cheryl Milne:

So, and just to be clear for our listeners who might not be familiar with some of the terms, so first of all, most people know, but not everyone, that if you have a sentence of under two years that you serve those in a provincial jail as opposed to a federal prison, and prison sentences of over two years are served in federal penitentiaries. And there are...

39:10

I mean, the perception is that those are much harsher places because of the higher security. There's lots of reasons for, I mean, there's lots of differences between them that are more nuanced than that. And then also just with talking about Gladue, Gladue was a case in which the court said that in sentencing, judges need to take into account the history and background of Indigenous.

39:38

offenders in sentencing and looking at our history of residential schools and the impact on families and generations in Canada and just the general impact of discrimination and hardship that have been experienced by Indigenous communities and individuals in Canada. So, and that has been put into the criminal code as factors that the court has to consider in sentencing. So that's just the...

40:07

by way of a little kind of explanation. So, I know most people are aware of that. The other thing I just want to add before I go into my next question, which is probably the most well-known, but people don't necessarily think about it this way, that mandatory minimum sentence is the life sentence for first degree and second degree murder. And so, we do have this very long mandatory minimum sentence.

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And people don't think of it that way, I think sometimes because of the parole eligibility that serves to mitigate that or change it somewhat. But people, you know, it's 25 years without parole, but people serve beyond that, because if they don't get parole, they still have a life sentence. So, that leads me to my next question, because we've seen in the past few years this...

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trend that I think comes from south of the border of this idea of consecutive sentences. And we've heard, I mean, the US has consecutive life sentences or very long life sentences, which mean that

there's just no opportunity for anyone to get parole at all. We're talking about, you know, if you have two life sentences, what does that mean? You only have one life. But we've seen it in the UK as well. They've been recently sort of the conservative government was...

41:28

was trying to try to implement and impose consecutive life sentences. So, section 12 has been considered by the Supreme Court in that context as well, and you mentioned the Bissonnette case earlier. Can you just talk about how section 12 applies to that concept of consecutive sentencing?

Lisa Kerr:

Yeah, so I'll just, I'll build on some of what you said there that was very helpful. In Canada,

41:55

as you say, the mandatory penalty for murder, first and second, is life imprisonment. And that's how it's been since we abolished the death penalty in the 1970s. It's our toughest mandatory and it's the one that really no one ever thinks of repealing. There're scholars who are very critical of it and so on, but there's no real sense that that's a political kind of option or that the court might do it or anything. It seems to be kind of one of the most entrenched...

42:23

mandatories, even though it was really just implemented as a sort of way of abolishing the death penalty. It was a matter of political expediency to offer these very severe penalties of life with 25 years, no parole eligibility. We had never kind of kept people in prison that long before abolishing the death penalty. So, it was really sort of arising out of the difficulties associated with abolishing the death penalty. But rather than being a principal thing or something we needed in order to

42:53

to achieve rehabilitation or something. And you're absolutely right to say that many people are incarcerated beyond their eligibility dates. So here at Queens, we have the prison law clinic where our students go in and assist incarcerated people with their legal issues. And we have many clients at the clinic who are in there 30, 35 years, right? And they may never have even had a parole hearing.

43:20

They may struggle to ever get down to minimum security, which is the only place where you might have a chance of being released. They might struggle to get institutional support for release, which the Parolel Board takes a really careful look at. There are all kinds of reasons why life really means life in a lot of these cases. Even if you do get released after the 25 years, you always have that threat of reincarceration over your head. It's ongoing surveillance...even someone like Robert Latimer...

43:50

who we would question whether he ever should have been incarcerated at all, is still serving his life sentence, right? And is still unable to travel freely and still reporting to his parole officer and so on. Everyone will remember the Latimer decision, basically a mercy killing of his daughter, but he winds up convicted of second-degree murder. So, turning to Bissonnette. So, the Bissonnette case was about a Harper era law...

44:17

that changed and made more severe our system of sentencing for murder. So, as I've said, since the 1970s, it was life and a very long period of parole ineligibility. Well, the Harper government didn't think that was tough enough, right? But as you say, how do we impose, you only have one life, how do we take away more for those who have multiple victims, right? If there's multiple victims, we should be able to...

44:43

give you more punishment was the theory. So, they allowed judges to start stacking the parole in eligibility periods, but this was a very poorly designed law. All it allowed judges to do was like add a second period. So, it didn't allow judges to go from 25 to 30 for a second victim. It said, no, just do another 25. So, if you get to 50, you've now created life without the possibility of parole because prisoners tend to die when they're 60.

45:10

Even the youngest person would wind up dying before their parole eligibility dates. So effectively, the law was LWOP for Canada. Life without parole, LWOP, what in the UK they call whole life sentencing, whatever you call it. It's incarceration with no hope of release. And the law was not mandatory. This was not mandatory. The stacking of the parole ineligibility, judges had discretion on that.

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And we actually saw leading up to the Bissonnette decision, some judges declined to do it, right? They said in the Bruce MacArthur case, he was a serial killer. You could have stacked the parole if you wanted. The judge there said in Toronto that he refused to engage in the symbolism of it, right?

But for some judges, they did impose it, and it winds up going up to the Supreme Court in Bissonnette. Alexandre Bissonnette was the Quebec Mosque shooter. He went in...

46:08

to a mosque and murdered seven men who were peacefully praying, hurt many more in the process. So really the most grave misconduct and harm that is imaginable. And he winds up potentially incarcerated, you know, for life with periods of parole ineligibility that would go well beyond his lifespan. And it actually attracts a unanimous Supreme Court decision, right? They unanimously...

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strike down this law in an opinion authored by the Chief Justice. So, it really does not get more weighty in terms of authority and the court held that this parole stacking provision that brings in LWOP to Canada, that it is cruel and unusual punishment. So, it's a really important decision that tells us and the world that Canada will not be joining the ranks of the United States and allowing LWOP...

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that we will have a limit. Now, of course, this doesn't mean anyone gets released at their 26th year, we've already discussed, but it means they at least have the right to have the parole board open their file, right? That the parole board's going to say, okay, what are you up to? What have you been like in prison all these years? Have you changed? And the person has to be able to tell a pretty profound story...

47:34

on how they've changed and how their risk is now manageable, especially someone who's committed offenses like this. And in many ways, I'm not sure it's a mountain one could ever really climb for the parole board for an offense like this, but the important piece is that they have the right to try.

Cheryl Milne:

Another aspect of the Bissonnette decision is this two tracks of section 12, which you talk about in a paper that you co-authored with Professor Benjamin Berger.

48:02

Could you just tell us a little bit more about that particular aspect of the decision?

Lisa Kerr:

Yeah. So the court does endorse this idea that was really central in our article. And I think it was an important distinction actually for the court to arrive at the ultimate decision. So, the distinction we were arguing for was that section 12 actually covers two distinct tracks or the court calls it prongs...

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that there are two distinct wrongs really that section 12 is concerned with. So, the first one, what the court calls the severity prong. This is the one we've mostly already talked about today. These are the mandatory minimum cases where the problem with the laws at issue in those cases is a problem of too much punishment, whether there's a severity problem...

48:55

too large of a fine or sort of too long of a prison term, right? The method of punishment is acceptable, imprisonment or a fine, but the problem is, is it too much such that it becomes grossly disproportionate? So that's what we call the severity prong. And that, we said, was really not the problem with life without the possibility of parole. It's not the problem of too much punishment for Mr. Bissonnette.

49:21

The problem was what we said was the second part of Section 12, which is really kind of newly and more clearly articulated in Bissonnette. So, the second prong has a different focus. And here the focus is on the method or type of punishment, right? Whether the kind or method or type of punishment is just an unacceptable form. So, you could think of the lash, lobotomization, castration, capital punishment, all these ghoulish things...

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Right? Under this prong, the concern is not with the amount of what is an otherwise legitimate method of penalty, but it's a problem of saying that this way of doing punishment is just incompatible with human dignity. Right? So, if we say, you know, if we were to bring back the lash and we dealt with a case where 15 lashes were imposed, I don't think we would say that's grossly disproportionate. It should have been eight lashes.

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It's not a problem. It's not that kind of problem. Right? It's that the lash is cruel and unusual in any amount. It's an unacceptable method. And so, what the court said, actually, is that life without the possibility of parole is an unacceptable method. The problem here isn't too much punishment. The problem here is imprisonment without hope. And why is that? Because there has to be some minimal...

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recognition of someone's capacity to change and reform and rehabilitate. Now, it doesn't have to be much recognition of that. We've already said it's life imprisonment and you're not going in front of the parole board for 25 years. And if you don't succeed in front of the parole board, that's fine, we're taking you back to your cell. So that's not much recognition of the sort of dignitary interests of a prisoner. But you can't fully extinguish it.

51:19

You can't fully extinguish any sort of recognition that this person could change, develop, grow, rehabilitate. That is beyond the pale. And the court said that's just not within the legitimate arsenal of sanctions for the Canadian state to make use of. So, a really important decision that both made clear that Canada wasn't going to be a part of this...

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and also, that there's this really important part of Section 12 doctrine. And as I said, at the top of our discussion, we haven't had to litigate the methods prong very much because we got the Charter in 1982 and we were kind of done with hanging and done with all these sort of more historical methods of punishment. And so, we didn't have to litigate as much under this prong and that's why it wasn't well articulated in the jurisprudence, but we still have it and it was relevant here.

Cheryl Milne:

52:14

So I want to move away from sentencing now, and I'm also sort of mindful of the time, and there's so much to cover under the concept of cruel and unusual treatment and punishment, but I want to move to the concept of administrative segregation, because Section 12 has been used to challenge actual conditions in prison, not just the overall sentence or the type of sentence, but also...

52:42

the living circumstances that people find themselves in prisons. And administrative segregation is one of those kinds of conditions that people in prison experience. So, can you explain first what administrative segregation is?

Lisa Kerr:

Yeah, so that's just the legislative language that we had for a long time for the practice of solitary confinement. And what it means is taking an inmate out of the regular general population and putting them in isolation.

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And historically at least, and I think to a degree today, it meant we would put people in a cell alone for almost the entire day and night. It could be 22, 23 hours with no time limits, no idea when you would get out. You know, and I'll just say, I think there are some legitimate reasons to sort of separate inmates from one another and from the general population. But the way this was done historically in Canada, it was done in really abusive and lawless ways with no oversight...

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with no attention to the mental health effects, and with really kind of extreme forms of physical and social isolation. So that's what administrative segregation refers to.

Cheryl Milne:

And for lengthy periods of time. Certainly, you know, people, we've heard cases of people being in essentially solitary confinement for weeks, months, and even in some of the extreme circumstances years. Yes. So, tell us a little bit about the cases that

54:11

And they've involved both arguments under Section 7, life, liberty, and security of the person, as well as Section 12. And we can start with the British Columbia Civil Liberties Association and Canada case.

Lisa Kerr:

Yeah, so the BC case was really not decided under Section 12. It was, as you say, more of a Section 7 and 15 case. Justice Lease gets the trial judge there, and he finds this is really the core kind of empirical finding in BC.

54:39

is that solitary has these really severe effects on mental health, that it delivers psychological harm, increased incident of self harm and suicide. And what he finds is that while the prison says that it uses solitary to pursue the safety and security of the institution, the practice has the opposite effect, right? It actually leads to more disorder and more difficulty. So prisons make use of it as sort of a kind of...

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immediate or short-term response to a problem within the prison, but then it winds up actually intensifying the difficulties that inmates have and making it really hard to reintegrate them, which is part of why we would see people held for such long periods of time. So he winds up saying, this whole regime, it's arbitrary under section 12. And he's concerned with the lack of oversight. What's really interesting is that section 12 is really not a key part of the case, right?

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It gets nine paragraphs in a decision that's 600 paragraphs long. So, we might have expected section 12 to have a big role, but it's really not as important as the sort of more procedural defects and substantive defects that are identified under section seven.

Cheryl Milne:

So yeah, the arbitrariness comes under the principles of fundamental justice under section seven. There was a similar case in Ontario, the Canadian Civil Liberties Association...

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and Canada where Section 12 was argued. Not that it wasn't argued in the other one, but it seems to have been picked up a little bit more. Can you describe what happened there? Well, at the lower court level, actually, Section 12 really doesn't play a role there either. Justice Morocco, as the trial judge there, he's also focused on Section 7. The big thing that he was focused on was the fact that the legislative scheme allowed

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prison wardens to review their own decisions. So, this is very weak in terms of procedural fairness, the lack of an appropriate sort of structure of review. So that's what he's focused on. But by the time

it gets to the Court of Appeal, the focus does become Section 12. And you see from the Ontario Court of Appeal and a decision from Justice Bonoto, she finds...

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that solitary is cruel and unusual when it extends beyond 15 days. So that's the time that the evidence showed the harms really kick in. That's when you get sort of long standing, irreversible, really difficult mental health effects. So, she says, after 15 days inmates are facing a risk of severe and often enduring negative health consequences. This is cruel and unusual punishment.

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this is the point at which Section 12 is infringed. So, it's interesting now in terms of the landscape in Ontario, I think within even our jails, there's a recognition of this, that 15 days is the limit.

Cheryl Milne:

So, the mental health impact of administrative segregation or solitary confinement as most people call it, was a critical consideration in both cases.

57:49

And the immense psychological harm flowing from that has also been at the forefront, also of class actions related to this issue. How important is that recognition and how significant do you see psychological and mental health considerations being in future section 12 jurisprudence?

Lisa Kerr:

Yeah, on that I would just say, it's absolutely true that the mental health harms, the idea that this practice is torture, the idea that it makes, you know, in the US...

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supermaximum solitary litigators have a phrase, they would say, it makes healthy people sick and sick people sicker. That this was a practice that was just devastating for people. We can't live with this degree of isolation. And, you know, we can separate inmates from one another for legitimate reasons without imposing extreme forms of social, physical, occupational isolation that is just destructive to...

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anyone's mental health and just extraordinarily damaging for someone who already is mentally vulnerable, which so many people in prison are. So, I agree that that's been just central to the litigation and the class action pieces have been really important in recent years. They're obviously built on these constitutional findings, but now seeking really significant damages and there has to be a vehicle like that, right?

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I'm unfortunately never involved in cases where there's lots of money that gets paid out at the end of the day. But it's really important that there are lawyers who do that work because that's what really makes the government pay attention when they're suddenly facing a huge bill to pay for constitutional wrongs. And it's absolutely the case that the mental health piece and the impact on mentally ill people in custody has been central to that work.

Cheryl Milne:

Well, we actually discussed the class actions in this context with Professor Kent Roach.

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in another episode and although there are huge sums of money because of the numbers of people involved, so the government has to pay a lot, it may not necessarily be very much for the individual who's experiencing it, is one of the concerns about class actions.

Lisa Kerr:

Yeah, it's more of a, it's a pain for the government, but it's not a meaningful remedy for the individual prisoners.

Cheryl Milne:

Exactly. You know, just as we wrap up, I want to turn to sort of the other ways and ways section.

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can have an impact. And we mentioned earlier about sort of the immigration context, you alluded to the Boudreault case at one point. And so, it's, I guess it could be called a more innovative use of Section 12 was to pursue it in the context of socioeconomic rights. So, in the case of immigration, it has to do with deportation and loss of status. The Boudreault case was about

01:00:36

kind of mandatory penalty, which was a fine or a surcharge, as they called it. Can you just talk about how Section 12 has been used in those other kinds of contexts that aren't necessarily prison sentences and the harsh penalties that you've been talking about?

Lisa Kerr:

Yeah. So Boudreault is just absolutely one of my favorite cases. It's such an important decision. And at issue in Boudreault were these mandatory victim surcharges.

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And they were really small fines for some, $100 for a summary offense conviction, $200 for indictable. But for many, many years, judges had discretion to waive the fine, right? If they were facing, if they were sentencing someone who, you know, had a few summary conviction offenses, they were potentially going to have $400 or $500 to pay, they're living on social assistance, they know there's no capacity to pay, they might have waived the fine.

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But this is another Harper era law. And it comes in and it says, no, the fines are going to be mandatory now. Judges are going to have no discretion to waive them. And if the person can't pay, then the legal system is going to have to just bring them back in front of the courts over and over and over again indefinitely for potentially the rest of their lives to see if they have wrestled up 400 bucks yet. And judges were...

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I think especially provincial court judges were very annoyed by the mandatory nature of this scheme because they just knew it was pointless, a pointless kind of source of harassment of the many, many people living in poverty who they saw before them every day. So, it went up to the Supreme Court of Canada, but it was a big question, right? I said that it's a high threshold under Section 12, but could a hundred or $200 fine ever be understood as cruel and unusual? And you know, I always play this clip...

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from the Supreme Court of Canada hearing from my students, the opening submissions of a very skilled Ottawa defense lawyer named James Ford. I just love the way that he instantly kind of

addressed this issue. He got up and he said, straight away, he said, this case is all about context. If it's not about context, then it's only 100 bucks. Green fees. And I love the reference to green fees, which...

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Maybe if you're in my family-

Cheryl Milne:

But that's back to what I was saying earlier about it's healing to the context in which judges are.

Lisa Kerr:

Exactly. Judges know what green fees are, okay? I unfortunately know as well because I have some people very passionate about golf in my family. So that's the fee you pay to play around a golf, right? And so, with that phrase, he's really reminding the judges in the entire room, right? That anyone who knows what that phrase means, green fees, right, is not going to understand...

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Why a $300 or $400 fine is an unpayable indefinite burden. So you're going to need to turn your mind to the context. And that's exactly what Justice Martin does in her decision. And she really gets into like the detail of what does this scheme look like as it is administered and why it is so difficult and how, you know, if judges even had sort of an ability to sort of prorate it according to income, it could have been far more acceptable, but they didn't.

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So, she does strike that one down. And it's interesting, under section 12, she says, part of why it's a problem is it prevents sentencing judges from applying these really central principles like proportionality, rehabilitation, and those Gladue factors we mentioned. And it's interesting, all three of those things have never really been recognized as constitutionally protected. But Justice Martin kind of sneaks them all in and says, when they're all impaired...

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that could add up to a Section 12 infringement in the way it does here. So, it's a great case and great advocacy in that case.

Cheryl Milne:

And it does just show the range of what could be considered cruel and unusual, as you say, based on the context. You have to look at the individual that's at the center of it and what the impact is on them. That's a critical piece.

Lisa Kerr:

Right.

Cheryl Milne:

Well, I wanna thank you, Lisa, for giving us this really...

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great overview of Section 12 and the cases that have been decided by our court. And I think that this is a really good primer for anyone who wants to know what this means. It's a really important section of our Charter. Before you go, are there any upcoming projects of yours that you'd like to highlight for our listeners?

Lisa Kerr:

01:05:10

Sure, yeah, academics were always happy to self-advertise. I do have a paper coming out that I'm excited about that's a co-authored piece with Michael Perlin, who's a very experienced appellate crown. He actually was on Boudreault and many others at the Supreme Court. And what we're talking about in this paper that's coming out in the Supreme Court Law Review is around the legitimacy of the reasonable hypothetical device.

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We actually think there's some arguments in favor of using that device that the Supreme Court hasn't articulated, and that it might help sort of lay some controversy to rest if the court would say more about why we need the device. And then we also try to rein in some of the creative work of defense lawyers who've gotten a little too creative sometimes with sketching out the hypotheticals. And we say, actually, it would be better to sort of rein that in a little bit. And we kind of say,

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say how we think that could be done in a principled way. And so, it was great to co-author, especially with a Crown prosecutor. And I think together we were able to sort of say things and explore arguments that we couldn't have done on our own. So, I was really glad to do that with him.

Cheryl Milne:

Well, I look forward to reading it. And when it's available, we'll put up a link in our show notes so that our listeners can access it as well. So, thanks again, Lisa. This has been a great conversation.

Lisa Kerr:

Great conversation. Thank you.

Cheryl Milne:

01:06:35

Welcome back. For this episode's Practice Corner, we will be discussing how Section 12 Charter Rights have been pursued through various types of advocacy, including litigation and participation in the legislative process. To illustrate this, we will be talking about the efforts to reform administrative segregation in Canada. To help us break this down, we are excited to welcome Catherine Latimer to the podcast. Catherine is the Executive Director of the John Howard Society of Canada...

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which is dedicated to pursuing criminal justice reform and advocates for effective, just, and humane responses to both the causes and consequences of crime. Along with participating in the legislative process, the society is also committed to public education. For example, the society maintains a collection of peer-reviewed research and primary source materials related to criminal justice policy in Canada. Before she became the executive director of the John Howard Society, Catherine Latimer worked for...

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The federal government as a policy lawyer. She obtained her law degree at Queens University and holds a master's in criminology from Cambridge University. She currently serves as president of the National Association's Active in Criminal Justice and was appointed to the Order of Canada in 2017. Catherine, thank you for joining us.

Catherine Latimer:

It's a great pleasure to be here, Cheryl. Thank you.

Cheryl Milne:

In our previous discussion in this episode with Professor Kerr, we introduced listeners to administrative segregation, also known as secure isolation.

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or solitary confinement. Could you just begin by briefly reiterating what it is and why the practice raises so many concerns from a prisoner's rights perspective?

Catherine Latimer:

Absolutely. Administrative segregation is a form of solitary confinement and the growing body of medical and other evidence is making it pretty clear that isolated confinement is very damaging to people's physical and mental wellbeing. In fact, the UN has...

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prohibited solitary confinement for more than 15 consecutive days in an effort to sort of mitigate the harm that is caused by that very damaging practice.

Cheryl Milne:

With Professor Kerr, we also touched on the constitutional challenges that were brought against administrative segregation in both BC and Ontario. As some of our listeners may know, the John Howard Society was one of the applicants in the BC case. Can you tell our listeners how this case came into being?

Catherine Latimer:

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Certainly, I mean, it's always a big decision to turn to the courts and go with litigation in order to promote rights. But in this case, we decided that it was necessary when the federal government did not respond to the Ashley Smith coroner's report. They were taking a year to develop a response to the Ashley Smith coroner's report, and they did not in any way limit the duration...

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of administrative segregation, which was recommended by the coroner. And as you know, is pretty much being recommended by all of the experts across the world. So we felt that the reliance on the courts might be the only way to signal that this was a violation of Charter rights and needs to be corrected.

Cheryl Milne:

And can you just tell us a little bit more about the Ashley Smith case? How long was she in solitary confinement?

Catherine Latimer:

Ashley Smith was...

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young. She was like 19 or 20 years old and she had been shipped from one administrative segregation unit to another in the federal system. And she was self-harming, which is often a result of being placed in administrative segregation. Suicide rates in Edmund Sager are very high. The belief was that she was self-harming in order to get contact or get attention and CSC wanted to deter that...

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by not responding quickly to incidents of self harm. So, she had tied a ligature around her neck and the correctional officers were outside the door waiting for her to go unconscious before they went in. And in fact, she died during this process. So, it was very visible what had transpired. And I think it shocked the conscience of a lot of Canadians that this was indeed a very cruel practice.

Cheryl Milne:

So I'd like to turn now to the evidence in the administrative segregation cases...

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that were the more general challenge. And I mean, the evidence of what happened to Ashley Smith is really quite shocking. But what was the other evidence that was led in the challenge itself? Can you tell us a little bit about that evidentiary record?

Catherine Latimer:

Sure. Joe Arvay and Alison Latimer, who were our counsel...

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were very adamant that we needed to build up a very significant evidentiary base, particularly at the trial level, since they expected that it would go on to courts of appeal and they would rely on the evidence that was submitted at the trial level. So, there were a number of affidavits by experts. So those would be medical doctors, academics, all kinds of, and some, and these were very significant pieces of work. For example, Michael Jackson's affidavit was...

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more than 200 pages long in terms of the damages that administrative segregation does. We also relied on expert witnesses like viva voce Boche testimony when that when we went to Trough and we got a court order that I should interview 31 men who had been in solitary confinement or administrative segregation at Millhaven over a specific period of time which we did. We recorded those interviews, and they were they were held.

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And we very much relied on affidavit evidence from prisoners. So, it was quite a large body of evidence that was brought forward at the trial level.

Cheryl Milne:

And what do you think the impact of this evidence was in the case? I mean, we've talked about constitutional litigation and strategies in this podcast, and we often talk about the cases themselves, but how important was the evidence and what was the impact?

Catherine Latimer:

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We think the evidence was very important in that we got a very strong decision at the trial level from the BC courts. And it was, you know, when you have that amount of evidence, it's hard to ignore what's going on. So, it sort of reinforces the perspective that was really needed to be brought to the courts. And I think it was very difficult for the government to respond to that...I think it makes a difference.

Cheryl Milne:

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I think that it forces the court to actually understand what the people who are experiencing it have actually gone through in those mental health issues. It's not abstract anymore. It's actually concrete for them.

Catherine Latimer:

Yes, I think that's absolutely true.

Cheryl Milne:

In 2018, the federal government introduced Bill C-83 largely in response to the Ontario challenge to administrative segregation. It was given royal assent in 2019. And...

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It includes a series of changes to the practice of administrative segregation. Can you give us or take us through some of the key changes in the bill?

Catherine Latimer:

Sure. Basically, what they did was they repealed the provisions that the courts of appeal found to violate Charter rights. And they reintroduced a regime called the Structured Intervention Units, which was to replace that. In my view, there were two really significant findings.

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one by the Ontario court, one by the BC court, the Ontario court called for a capping of administrative segregation at 15 days. And the BC courts called for independent external review within five days of decisions to place people on administrative segregation. So, it clarified that looking at practice of isolating prisoners without meaningful human contact, that is the issue, not what CSC labels...

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it to be. So, CSC can play games with nomenclature and say we don't have solitary confinement, we have administrative segregation, so all those restrictions by the UN don't apply to us, we have

something quite different. When in fact the practice of isolating someone for 22 hours a day or more without meaningful human contact is solitary confinement no matter how they describe it. And the courts we're pretty clear on that too, which I think is a significant, significant funding.

Cheryl Milne:

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So this was a really interesting example of where, I mean, neither of these cases went to Supreme Court of Canada because the government chose not to appeal it further and instead chose to go the legislative route and try and actually enact something that was compliant with the courts of appeal decisions, is that right?

Catherine Latimer:

That's what they tried to do, yes.

Cheryl Milne:

And how was the John Howard Society involved in coming up with this legislation or advocating for it?

Catherine Latimer:

Well, from our perspective,

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Bill C-83 is basically a shell game that allows for the perpetuation of abusive solitaire confinement under a different legislative framework. So, it's a real challenge. We were engaged in consultations about what should be contained in the legislation. And we appeared before Parliamentary committees on that. And I think we were all the advocates that were concerned about human rights and the rights of prisoners...

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were very concerned that the legislative framework that was being proposed was sufficiently lax and sufficiently flexible that it wouldn't necessarily ensure that rights were being protected. So, I can give you some examples of those. But in those structured intervention units, the legislation requires that the correctional service offer the prisoner four hours out of the cell a day, not, you know, get them out of the cell for two...

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For that but offer those prisoners that and offer two hours of meaningful human contact. In effect, they're not getting that. Similarly, they brought in the IEDMs, which are the independent external decision makers, which was to respond basically to the sub section seven Charter problems around failure to provide adequate due process. And their legislative capacity kicks in very late.

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It never looks at whether or not the placement of someone is legitimate, but only looks at whether or not they should be released from administrative segregation because their behavior is more compliant. And we know that behavior can worsen when people are placed in isolated confinement. So, it's a real mess. So, whether the Charter rights were respected depended on how well those changes were administered...

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which I think raised a lot of skepticism or concern by many of us. In fact, my colleague at the BC Civil Liberties Association said during one of the consultations that the government's position in the litigation was that the Corrections and Conditional Release Act provisions around administrative segregation did not violate the Charter, but it was just that they were systematically misapplied at the operational level. So, asking us to have confidence that now CSC would...

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administer this very flexible, lax regime in a manner that protects Charter rights, raise some very pronounced concerns. So yeah, there was a lot of a lot of toing and froing and a lot of a lot of concerns were raised about this particular regime.

Cheryl Milne:

So, did the final version of the bill actually respond to the concerns raised by the civil rights advocates during that legislative process?

Catherine Latimer:

I do believe that Minister Goodell, who was the public safety minister at the time...

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took note of the concerns that were being raised. He showed real deference to CSC's capacity to deliver this, but he did institute two things as a result of concerns that had been raised. One was the structured intervention unit implementation advisory panel. So, this was a group of independent academics, experienced people...

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who were to be given access to all of the data that CSC had on how the implementation was taking place and to offer independent advice. So that was good. I'll tell you a little bit more about that in a second. And the other was that they really included a no-nonsense statutory review clause. So, they made it a mandatory comprehensive parliamentary review at the start of the fifth year after that clause was proclaimed in force in...

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and it was proclaimed in force in June 2019. So, the review should have been based on four years of experience, because it was supposed to be at the beginning of the fifth year, which means that it should have started in June 2023, and it still hasn't started yet. And the reports that were being made by the structured intervention unit implementation advisory panel have been largely ignored. So, while they put these two safeguards in there, they haven't really been effective in...

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being a safeguard against the continuing Charter abuses of prisons. So that's the problem.

Cheryl Milne:

So those review panels have been saying that things haven't gotten better.

Catherine Latimer:

Yes. And the last and final report of the implementation review panel came out, was it last Friday? Under or two Fridays ago, I can't remember which, but under cover of no media attention, nothing. And basically they said the structured intervention units are failing to reform.

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We have been monitoring this for the number of six reports. I think we've issued three annual reports and a few others. And there's no indication that things are improving. This is a problem. But

the government is not responding to that in any construct, nor is parliament taking on its responsibility of conducting that parliamentary review.

Cheryl Milne:

And a lot of people have a hard time, and I'm not saying that our listeners necessarily share this view. We have a lot of law students who are learning about...

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aspects of the Charter that listen and people who care very much about Charter rights. But there are a lot of people who don't really care what happens to prisoners in prison. And so why should we care?

Catherine Latimer:

Well, I think it's important that if we respect the values of the Charter, they apply to everybody. And in fact, the Charter is to protect against abusive state power towards individuals to some extent. And there is just so much abuse given the power relations.

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between the state and prisoners, that I think we need to be particularly vigilant to make sure that their rights are protected. I think it's just a fundamental Canadian value. And I think allowing the government to get away with continuing Charter abuses is a real problem.

Cheryl Milne:

Last summer, the Asper Center and the John Howard Society actually had a student fellow, a fellowship, Rebecca Rabinovich prepared a report on the impact of Bill C-83.

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I will link to the report in this episode's show notes. It was entitled, Charter Rights and Structured Intervention Units Have Rights Abuses of Administrative Segregation Been Corrected. Could you take our listeners through some of the key findings of that report and why it was important?

Catherine Latimer:

Yeah, Rebecca's report was a real blessing. It was well researched and well written, and she took the time to go through all of the evidence that we had from the structured inter...

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intervention unit, implementation advisory panels, a correctional investigator, any case law, you name it, and really did a very thorough analysis as to whether or not the Charter rights that have been, or the Charter infringements that have been identified by the courts have been corrected in the new regime, and she found that they had not been. So, to have that well-researched report, I think is a real asset to moving forward.

Cheryl Milne:

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Yeah, her report is one example of how students can play a role in public interest advocacy. But can you elaborate on some other meaningful ways that students can be involved in law reform work, either at the John Howard Society or just generally?

Catherine Latimer:

I think engaging students in law reform and public interest litigation generally is really important. One, they have a lot of energy and enthusiasm for the issues. And they...

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have great capacity to do the research and to really help in terms of marshalling the arguments that might be useful in ensuring that rights are protected. I think it would be great if, you know, every federal prisoner had a student advocate who was watching to see, you know, what was actually happening behind bars, because the abuses are significant and ongoing, and it would be excellent...

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to engage more students in looking at this particular cause.

Cheryl Milne:

And it's such a vital area for anyone who's interested in criminal law to really understand that, I mean, it goes beyond the criminal trial and being the hot shot criminal defense lawyer or the tough crown is actually understanding what the overall impact is once the finding of guilt has

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it made, like what happens to the people that are in our criminal justice system?

Catherine Latimer:

Absolutely.

Cheryl Milne:

So just to be clear and to go back to Bill C-83, what is its current status?

Catherine Latimer:

Its current status is that it is still continuing without, now without any oversight from the independent advisory panel and they have not had the parliamentary review. So basically, there's more of a carte blanche...

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to continue with the abuses. So, we really need to push for the parliamentary review and to ensure that those rights are respected.

Cheryl Milne:

So, this, my next question is a bit broad, and we have focused, as I said, on constitutional litigation in this podcast. Can you just talk about the role that you think litigation either played within this particular area or just public interest advocacy more generally as it impacts prisoners?

Catherine Latimer:

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Well, I think that public interest advocacy and public interest litigation is particularly important when you're trying to address the interests of people who are marginalized and don't have access to justice and yet are subjected to the state and to justice abuses. So, I think it's particularly important when you're dealing with prisoners. John Howard Society lately has taken to doing more...

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public interest litigation, mainly because there seems to be a real resistance to embrace reforms, legislative reforms, just because they're worth doing and address things that way. So the only way to sort of address that impact is probably to push it through the courts, which is a bit risky, but I think it's very important to do that.

Cheryl Milne:

Yeah, I often tell my students that it's, it's a, you have to take kind of a two-pronged approach at least...

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And maybe a third prong is also public, as you say, public education. And we talked about the John Howard Society doing that because that feeds into what the politicians would care about. So the legislative advocacy could come to fruition. But sometimes you just need that cudgel of the litigation to get governments to act.

Catherine Latimer:

To attract their attention, absolutely, yeah.

Cheryl Milne:

Well, thank you so much for joining us today.

01:26:11

Before I let you go, are there any upcoming projects or other issues that you want to highlight that the John Howard Society is working on?

Catherine Latimer:

Well, we're working on a number of issues to protect the rights of prisoners, particularly around their health issues, which they get sub-standard health care, which is a real problem. But one that I really wanted to share with you, and I think on the conversation we've had so far, is I don't think the rule of law is being respected.

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And that's a real problem for me that the review is not happening, rights abuses are being pointed out and no action is being taken. And the existing oversight mechanisms, which are largely the correctional investigator, seem to be inadequate to actually mobilize change. So, one of the things that I'm keen and we've received a bit of funding from the Canadian Bar Association is to look at Section 4 the Department of Justice Act, which...

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requires the Minister of Justice to see that public administration is being delivered consistent with the law. And that's really not done very well. In fact, I wrote to Minister Lametti, who was the Minister of Justice at the time, after information was delivered to a parliamentary committee, that the Doob-Sprott report indicated that 10% of those placed in a structured intervention unit were being subjected to what the UN would describe as...

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prolonged and prohibited solitary confinement. The minister at the time, Blair, Minister Blair acknowledged that that was true and yet no corrective action was taken. So, I wrote to the minister of justice around his section four obligations and say, you know, there's clearly a failure here to respect the rights of prisoners. You've got an obligation to see that this law is being administered consistent with the law. Charter rights are being infringed...

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Can you please act? And he wrote back saying that he discharged his function by providing legal advice to his colleagues, okay, which is not exactly the superintendents that we would have expected from the Minister of Justice. So, we're looking at that. In fact, Kent Roach from the University of Toronto has agreed to be an advisor on that project, and we would really welcome the input of the Asper Center on some of those issues.

Cheryl Milne:

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I'm sure we'll be talking further about this. It's really important, the work that you're doing, and I thank you for chatting with us today.

Catherine Latimer:

Great pleasure. Keep up the great work, Cheryl.

Cheryl Milne:

01:28:47

So thank you for listening to this episode of Charter of Course. We spent the first part of the episode discussing the elements and key case law on section 12 of the Charter with Professor Lisa Kerr. Thank you to law student Kate Shackleton, who helped research and develop this episode, and thanks to our podcast producer, Tal Schreier. In our next episode, we will be joined by Professor Audrey Macklin and Prasanna Balasundaram to discuss the Charter's applicability to non-citizens. In the meantime, we invite you to check out our past episodes.

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on the regular streaming platforms and the Asper Center website. See you next time.

Outro Music:

Charter a course, I will charter a course, if we can just get the country to trust us. Charter a course, southeast, west and north, and along the way we may find justice. Charter a course, I will charter a course, we can just get the country to trust us. Charter a course, south east west and north...

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