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# From *Smith* to *Smickle*: The Charter's Minimal Impact on Mandatory Minimum Sentences

Debra Parkes \*

## I. MANDATORY MINIMUM SENTENCES IN CANADA: GROWTH AND POPULAR APPEAL

On March 13, 2012, Bill C-10, the *Safe Streets and Communities Act*,<sup>1</sup> received Royal Assent. Among other significant changes to criminal and penal law,<sup>2</sup> the Bill added new mandatory minimum sentences, including a number to the *Controlled Drugs and Substances Act*.<sup>3</sup> With these amendments, the number of mandatory minimum sentences approaches 100.<sup>4</sup> In 1987, when the Supreme Court of Canada decided *R. v. Smith*,<sup>5</sup> the foundational case interpreting section 12 of the *Canadian*

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<sup>1</sup> Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, S.C. 2012, c. 1.

<sup>2</sup> Bill C-10 was dubbed the Omnibus Crime Bill because it combined nine bills that had been dealt with separately during the previous parliamentary session, making substantial and wide-ranging changes to a number of statutes. Changes include adding further restrictions on the availability of conditional sentences, making “protection of society” the fundamental principle of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, reducing the availability of pardons, and replacing as a guiding principle for corrections a commitment to “us[ing] the least restrictive measures consistent with the protection of the public, staff members and offenders” with a new principle that the measures “are limited to only what is necessary and proportionate to attain the purposes of this Act”.

<sup>3</sup> S.C. 1996, c. 19.

<sup>4</sup> By my count there are now 84 mandatory minimum sentences in the *Criminal Code*, R.S.C. 1985, c. C-46, and 14 in the *Controlled Drugs and Substances Act*, *id.* (counting a hybrid offence as one even where there is a minimum sentence for both indictable and summary options; and counting a first offence minimum as one and a subsequent offence minimum as another). There are other ways to count that would yield a higher or lower number, but the key point is that we have witnessed a rapid proliferation of mandatory sentences, beginning in 1996 and escalating from 2006-present.

<sup>5</sup> [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter “*Smith*”].

*Charter of Rights and Freedoms*,<sup>6</sup> the right to be free from “cruel and unusual treatment or punishment”, there were just nine mandatory minimum sentences on the books.<sup>7</sup> Coinciding with the passage of Bill C-10 through Parliament, and some high-profile opposition to the Bill,<sup>8</sup> a justice of the Ontario Superior Court released her decision in *R. v. Smickle*,<sup>9</sup> declaring the three-year minimum penalty for possession of a loaded firearm invalid as constituting cruel and unusual punishment contrary to section 12 of the Charter. The decision has been heralded as a harbinger of future Charter challenges to provisions of Bill C-10.<sup>10</sup> For example, David Daubney, former General Counsel, Criminal Law Policy and Coordinator of Sentencing Reform at Justice Canada, said in his blog upon the passage of Bill C-10:

The proliferation of mandatory minimum sentencing will lead to fewer guilty pleas, significant processing delays, big increases in the number of accused persons awaiting trial in already overcrowded provincial remand facilities and just plain injustice as discretion is moved from judges to prosecutors. There will be many more Charter challenges and acquittals. Canadians will be less safe.<sup>11</sup>

Much could be (and has been) said about the extent to which mandatory minimum sentences are bad policy.<sup>12</sup> Their proliferation has been

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<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>7</sup> Julian V. Roberts, Nicole Crutcher & Paul Verbrugge, “Public Attitudes to Sentencing in Canada: Exploring Recent Findings” (2007) 49:1 *Can. J. Crimin. & Crim. Jus.* 75, at 81 [hereinafter “Roberts, Crutcher & Verbrugge”].

<sup>8</sup> For example, an online campaign by a youth-oriented organization, Lead Now, organized rallies, demonstrations at MP’s offices, and an e-mail campaign that resulted in over 30,000 Canadians sending messages urging Senators to vote against Bill C-10. See Lead Now, *Tell the Senate: Don’t rubber stamp the Crime Bill*, online: Lead Now <<http://leadnow.ca/keep-canada-safe>> [hereinafter “Lead Now”]. A number of provincial governments, led by Quebec, expressed opposition to the Bill and the financial strain it would put on provincial budgets. See The Canadian Press, *Provincial pleas for federal crime bill funding dismissed*, online: CBCNews <<http://www.cbc.ca/news/canada/prince-edward-island/story/2012/01/26/pei-crime-bill-justice-minister-meeting-584.html>> [hereinafter “The Canadian Press”].

<sup>9</sup> [2012] O.J. No. 612, 280 C.C.C. (3d) 365 (Ont. S.C.J.) [hereinafter “*Smickle*”].

<sup>10</sup> Liberal MP Irwin Cotler has suggested that Bill C-10 will face numerous Charter challenges. Cotler asked the Minister of Justice, Rob Nicholson, a number of questions in the House of Commons related to the government’s preparedness for such constitutional challenges. See *House of Commons Debates*, 41st Parl., 1st Sess., No. 103 (March 30, 2012) at 6739 (Hon. Irwin Cotler) [hereinafter “*House of Commons Debates*”].

<sup>11</sup> David Daubney, “Sad day for Canadians” (March 11, 2012), online: David Daubney Blog <<http://www.daviddaubney.com/2012/03/sad-day-for-canadians.html>>.

<sup>12</sup> See, e.g., Paula Mallea, *The Fear Factor: Stephen Harper’s “Tough on Crime” Agenda* (Ottawa: Canadian Centre for Policy Alternatives, 2010); Michael Tonry, “The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings” (2009) 38:1 *Crime and*

undertaken by legislators in the face of a massive body of evidence, accumulated over nearly 50 years, showing that minimum sentences not only do not deliver on their promise to deter crime,<sup>13</sup> but that they have many negative, unintended effects such as fostering circumvention by justice system participants and reducing transparency and accountability by pushing discretion down to prosecutors rather than to sentencing judges.<sup>14</sup> They create distortions in sentencing, ratcheting up the “floor” such that sentences become longer overall, with negative societal returns. Legislators pursue mandatory minimum sentences, in the face of such evidence, because they are seen as politically popular, appealing to large segments of the electorate who have little information about the principles and operation of the criminal justice system. However, research into public support for mandatory minimum sentences reveals a more complex picture in which the principle of proportionality (which is compromised by mandatory minimum sentences) is highly valued by members of the public.<sup>15</sup>

The appeal of mandatory penalties is rooted in a distrust of the judiciary. They are a pointed response to a perceived problem of lenient sentencing,<sup>16</sup> a perception that virtually all members of the legal and judicial communities reject and that only tends to make any sense when one compares sentences in Canada to those in the United States, a jurisdiction which has (by far) the highest incarceration rate in the world.<sup>17</sup> Results of Canadian public opinion polls show a perception of

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Justice 65 [hereinafter “Tonry”]; Mark Mauer, “The Impact of Mandatory Minimum Penalties in Federal Sentencing” (2010) 94:1 *Judicature* 6; Athar K. Malik, “Mandatory Minimum Sentences: Shackling Judicial Discretion for Justice or Political Expediency?” (2007) 53:2 *Crim. L.Q.* 236 [hereinafter “Malik”]. See also the various articles published from the symposium, “Mandatory Minimum Sentences: Law & Policy” (2001) 39:2&3 *Osgoode Hall L.J.* 261.

<sup>13</sup> Anthony N. Doob & Cheryl Marie Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis” (2003) 30 *Crime and Justice* 143.

<sup>14</sup> Tonry, *supra*, note 12.

<sup>15</sup> See Julian V. Roberts, “Public Opinion and Mandatory Sentencing: A Review of International Findings” (2003) 30 *Criminal Justice and Behavior* 483 (drawing on research in the United Kingdom, the United States, Canada and Australia). Roberts concludes that when presented with a summary of basic facts about real cases, members of the public tend to oppose mandatory minimum sentences. On the other hand, a general question, without context or reference to the range of cases that would be caught, nor to the various principles of sentencing, tends to elicit a more positive view of mandatory sentences.

<sup>16</sup> Roberts, Crutcher & Verbrugge, *supra*, note 7.

<sup>17</sup> As of 2011, the United States had the highest prison population rate in the world, at 743 per 100,000 of the national population, followed by Rwanda (595) and Russia (568). Nearly 60 per cent of countries have prison populations below 150 per 100,000. Canada’s prison population in 2011 was 117 per 100,000. Roy Walmsley, *World Prison Population List*, 9th ed., online: International Centre for Prison Studies <<http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>>.

leniency in sentencing, a finding that is consistent with polling data in other comparable jurisdictions such as the United Kingdom.<sup>18</sup>

Given the critique of the judiciary that is implicit in the legislative adoption of mandatory sentences, it is interesting to examine how judges have dealt with challenges to the constitutionality of these provisions. As other commentators have noted, the Supreme Court of Canada has generally taken a deferential approach in these cases,<sup>19</sup> setting a high threshold of “gross disproportionality” for a mandatory sentence to constitute “cruel and unusual punishment” prohibited by section 12, and accepting mandatory sentences as a valid and proportionate legislative response to the goal of reducing crime and protecting society.<sup>20</sup>

The most recent round of parliamentary and public debate around mandatory sentencing featured a higher level of opposition to the use of these provisions (at least in relation to drug offences) than had been seen in previous years.<sup>21</sup> The assertion was often made that in addition to clogging the courts,<sup>22</sup> the mandatory minimum sentences in Bill C-10 will not withstand a constitutional challenge.<sup>23</sup> Given the prominence of this debate, coinciding as it did with the *Smickle* decision which a number of commentators argue was a sign of constitutional challenges to come,<sup>24</sup> this paper attempts to assess the impact that the Charter has had, and may have in the near future, on mandatory minimum sentences and their proliferation. To answer those questions, the paper will first briefly review the Supreme Court case law on the constitutionality of mandatory minimum sentences. The next two sections will outline the approach

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<sup>18</sup> Roberts, Crutcher & Verbrugge, *supra*, note 7, at 83-84.

<sup>19</sup> See, e.g., Benjamin L. Berger, “A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*” (2009) 47 S.C.L.R. (2d) 101, at 105 [hereinafter “Berger”]; Lisa Dufrainmont, “*R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12” (2008) 42 S.C.L.R. (2d) 459 [hereinafter “Dufrainmont”]; Malik, *supra*, note 12; and Kent Roach, “Searching for *Smith*, The Constitutionality of Mandatory Sentences” (2001) 39:2&3 Osgoode Hall L.J. 367 [hereinafter “Roach, ‘Searching for *Smith*’”].

<sup>20</sup> I have noted in the related context of prisoners’ rights cases that, with a few notable exceptions, Canadian courts have continued a pre-Charter trend of deference to correctional decisions and policies. Debra Parkes, “A Prisoners’ *Charter*? Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*” (2007) 40:2 U.B.C. L. Rev. 629.

<sup>21</sup> Lead Now, *supra*, note 8; The Canadian Press, *supra*, note 8.

<sup>22</sup> Kim Mackrael, “Tory crime bill to put pressure on courts,” *The Globe and Mail* (December 19, 2011), online: <<http://www.theglobeandmail.com/news/politics/tory-crime-bill-to-put-pressure-on-courts/article2277143/>>.

<sup>23</sup> *House of Commons Debates*, *supra*, note 10; CBC News Canada “What worries critics about omnibus crime bill”, *CBC News* (March 6, 2012), online: CBC News <<http://www.cbc.ca/news/canada/story/2012/03/06/f-bill-c10-objections.html>>.

<sup>24</sup> Cristin Schmitz, “No win for default sentencing” *The Lawyers Weekly* (February 24, 2012), at 1.

taken in the recent *Smickle* decision in the Ontario Superior Court of Justice before moving on to argue that courts should subject the purported goals, justifications and impacts of mandatory minimum sentences to a more searching form of Charter scrutiny as we enter the fourth decade of the Charter's operation.

## II. SECTION 12, MANDATORY MINIMUM SENTENCES AND CHARTER MINIMALISM

*Smith*<sup>25</sup> is the starting point, and indeed the high-water mark, in the Supreme Court's interpretation and application of section 12 of the Charter which provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment."<sup>26</sup> In *Smith*, a majority of the Court declared invalid a section of the *Narcotic Control Act*<sup>27</sup> which imposed a mandatory minimum sentence of seven years imprisonment for importing a narcotic into Canada.

The majority decision penned by Lamer J. established that a section 12 analysis will proceed in two stages when the constitutionality of a minimum sentence is challenged. First, the court must consider whether the minimum sentence amounts to cruel and unusual punishment based on the circumstances of the individual before the court. If the answer is no then the court will proceed to consider whether the minimum sentence would be cruel and unusual if applied to a "reasonable hypothetical". In *Smith*, it was the reasonable hypothetical — a person with no criminal record who brings a single marijuana joint across the border — that the Court found to violate section 12. *Smith* himself had been convicted of importing seven-and-a-half ounces of cocaine. Ultimately, the majority states that the standard to be applied is one of "gross disproportionality" and not whether the sentence is "merely excessive".<sup>28</sup> For the first-time offender with one joint, it is not particularly difficult to conclude that the seven years in prison is grossly disproportionate.

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<sup>25</sup> *Smith, supra*, note 5.

<sup>26</sup> *Supra*, note 6; for a discussion of the pre-Charter roots and interpretation of the prohibition against "cruel and unusual punishment", see Michael Jackson, "Cruel and Unusual Treatment or Punishment?" (1982) Charter Edition U.B.C. L. Rev. 189.

<sup>27</sup> R.S.C. 1970, c. N-1, s. 5(2). The *Narcotic Control Act* was later replaced by the *Controlled Drugs and Substances Act, supra*, note 3, which now includes numerous mandatory minimum sentences.

<sup>28</sup> *Smith, supra*, note 5, at para. 55.

The decision in *Smith* rejected the suggestion that prosecutorial discretion (*i.e.*, to lay a lesser charge or to proceed summarily where that is an option) can render valid a mandatory minimum sentence that violates section 12 in its application either to the individual before the court or based on a reasonable hypothetical.<sup>29</sup> The Court rejected the notion that the responsibility to mitigate the potentially unconstitutional severity of a mandatory sentence could be assigned to prosecutors, parole boards or anyone else.<sup>30</sup> This issue features in a significant way in *Smickle*, since the offence in issue is a hybrid one whereby the Crown may proceed by indictment (in which case the mandatory three-year sentence applies) or by summary conviction (in which case there is a *maximum* sentence of one year in jail and no mandatory minimum).

Since *Smith*, the Supreme Court has found only one other sentence to violate section 12. In *Steele v. Mountain Institution*,<sup>31</sup> the Court held that the continued detention of a man who had been imprisoned for 37 years under an earlier incarnation of a dangerous offender provision was grossly disproportionate. However, the Court stressed the particular facts of the case, stating that the test must be “stringent and demanding” so as not to “trivialize the Charter”.<sup>32</sup>

Kent Roach has characterized the post-*Smith* Supreme Court decisions upholding mandatory minimum sentences as moving from activism to minimalism in interpreting and applying section 12.<sup>33</sup> For example, in *R. v. Morrissey*,<sup>34</sup> a majority of the Court insisted that any reasonable hypothetical must be *common* (for example, unfortunate hunting accidents), going so far as to exclude the facts of real, reported cases that were considered unusual or rare.<sup>35</sup> This deferential approach represents a significant departure from *Smith*, where the willingness to centre the analysis around an uncommon, yet reasonable hypothetical fact situation meant that the invalidity of the seven-year mandatory minimum could be addressed directly, without waiting for an inevitable injustice to actually happen. Roach notes that “[g]iven the realities of both prosecutorial discretion and plea bargaining, it might have taken forever for the perfect

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<sup>29</sup> *Id.*, at paras. 68-69.

<sup>30</sup> Roach, “Searching for *Smith*”, *supra*, note 19, at 382.

<sup>31</sup> [1990] S.C.J. No. 111, [1990] 2 S.C.R. 1385 (S.C.C.).

<sup>32</sup> *Id.*, at 1417.

<sup>33</sup> Roach, “Searching for *Smith*”, *supra*, note 19, at 381-86.

<sup>34</sup> [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.) [hereinafter “*Morrissey*”].

<sup>35</sup> *Id.*, at para. 50.

small-time offender — the teenaged student coming home from Florida with a joint of marijuana — to have appeared before the Court.”<sup>36</sup>

In addition to limiting the scope of reasonable hypotheticals, the Court in the post-*Smith* cases accepts as constitutionally valid the way that mandatory minimum sentences raise the floor set by Parliament and ratchet up sentences generally. Justice Arbour dissented in *Morrisey*, although she did not find the four-year mandatory minimum sentence invalid, expressing concerns about the “inflationary floor” and the potential that it could be grossly disproportionate in individual cases.<sup>37</sup>

Jamie Cameron has characterized the interpretation of section 12 by the Supreme Court post-*Smith* as a “faint hope” provision that should be reinvigorated.<sup>38</sup> As a companion argument to a proposal that section 7 should be limited to procedural review, Cameron argues that section 12 should do more analytical work to address substantive criminal law. In particular, she argues that section 12 should require proportionality between fault and punishment, not simply focus on (gross) disproportionality. She is also critical of the way that the Supreme Court has considered fault, in an abstract, de-contextualized way in section 12 analysis.<sup>39</sup>

In *R. v. Latimer*,<sup>40</sup> the Supreme Court rejected an argument that the mandatory minimum sentence for murder (a life sentence with no parole eligibility for at least 10 years) was grossly disproportionate in the case of a father who killed his daughter who had a serious physical disability, a case of so-called “compassionate killing”.<sup>41</sup> The Court took a highly deferential stance, stating that “[t]he choice is Parliament’s on the use of minimum sentences, though considerable difference of opinion continues

<sup>36</sup> Roach, “Searching for Smith”, *supra*, note 19, at 382.

<sup>37</sup> *Morrisey*, *supra*, note 34, at para. 82.

<sup>38</sup> Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the Charter” in J. Cameron & J. Stribopoulos, eds., (2008) 40 S.C.L.R. (2d) 553, at 583.

<sup>39</sup> *Id.*, at 588. See also Kent Roach, “The Charter versus the Government’s Crime Agenda” in (2012) 58 S.C.L.R. (2d) (forthcoming) [hereinafter “Roach, ‘Charter versus Government’”].

<sup>40</sup> [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.) [hereinafter “*Latimer*”].

<sup>41</sup> This characterization of Robert Latimer’s killing of his daughter, Tracy, as compassionate is contested by disability rights groups who argue that calls for leniency in relation to Robert Latimer necessarily devalue the lives of people with disabilities. See Isabel Grant, “Rethinking the Sentencing Regime for Murder” (2001) 39:2&3 Osgoode Hall L.J. 655, for an argument that this approach, as well as the opposing position that Tracy’s death was a mercy killing for which Latimer should not be culpable, both miss the mark. She argues that the *Latimer* case (and others) demonstrate that the sentencing regime for murder should be changed to eliminate the harsh minimum parole ineligibility periods, maintain the distinction between murder and manslaughter, and build in flexibility to allow judges to tailor the sentence to fit the crime.



on the wisdom of employing minimum sentences from a criminal law policy or penological point of view.”<sup>42</sup>

On the other hand, *R. v. Wust*<sup>43</sup> is an example of the Supreme Court acknowledging the disproportionate impact of mandatory minimum sentences, albeit not in the context of interpreting section 12. Justice Arbour makes it clear:

Mandatory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the *Code*, in the case law, and in the literature on sentencing. In particular, they often detract from what Parliament has expressed as the fundamental principle of sentencing in s. 718.1 of the *Code*: the principle of proportionality.<sup>44</sup>

It is important to keep in mind that the decision in *Wust* did not require a finding of Charter invalidity. It was merely a matter of statutory interpretation that credit for pre-trial custody could be considered by the sentencing judge to reduce a sentence below the statutory minimum. To do otherwise would lead to the absurd result that a “best offender” who received the minimum sentence (with no credit for pre-trial custody) could serve more time than a “worse” offender who deserved a longer sentence but was credited for pre-trial custody.<sup>45</sup>

The most recent consideration of a mandatory minimum sentence by the Supreme Court came in the 2008 decision in *R. v. Ferguson*.<sup>46</sup> In that case, the Court cleared up years of uncertainty in the jurisprudence by rejecting the use of constitutional exemptions to address exceptional cases in which gross disproportionality would result from the imposition of a mandatory minimum sentence. Chief Justice McLachlin held that the legislative objective behind mandatory minimum sentences is the removal of judicial discretion such that a constitutional exemption would

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<sup>42</sup> *Latimer*, *supra*, note 40, at para. 88.

<sup>43</sup> [2000] S.C.J. No. 19, [2000] 1 S.C.R. 455 (S.C.C.) [hereinafter “*Wust*”].

<sup>44</sup> *Id.*, at para. 18.

<sup>45</sup> *Id.*, at para. 42.

<sup>46</sup> [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter “*Ferguson*”]. A subsequent decision which addressed Charter issues in the context of mandatory minimum sentences but not on the basis of s. 12 was *R. v. Nasogaluak*, [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206 (S.C.C.) [hereinafter “*Nasogaluak*”]. In that decision, the Supreme Court affirmed the power of sentencing judges to consider police or other state misconduct, whether amounting to a Charter violation or not, as a mitigating factor that could reduce a sentence. Nasogaluak was an Indigenous man who was badly beaten by the police in the course of his arrest for impaired driving. A unanimous Supreme Court held that in “exceptional cases” it may even be appropriate to sentence below a mandatory minimum sentence to provide a meaningful remedy for unconstitutional acts. However, on the facts of the case, the minimum sentence of a \$600 fine for a first offence of impaired driving was upheld.

be an unacceptable remedy. She went on to comment that if a law did lead to gross disproportionality in a particular case (a finding she was not willing to make in relation to *Ferguson*<sup>47</sup>), the Court would have to declare the provision invalid.<sup>48</sup> In an article published shortly after *Ferguson*, Benjamin Berger suggested that the Court's rejection of constitutional exemptions "amounts to a constitutional push-back on the politics of minimum sentences".<sup>49</sup>

The next section considers a recent Ontario Superior Court decision which may be characterized as just such a constitutional push-back on the (lack of) logic behind at least one minimum sentence. The reasoning of the Court and the potential implications of this case will be addressed.

### III. *SMICKLE: FERGUSON* COMING HOME TO ROOST?

In the early morning hours of the night he was charged, Leroy Smickle was lounging in his underwear in his cousin's apartment, holding a loaded gun in one hand and a laptop in the other, taking a webcam photo of himself to post on Facebook. At that moment, the police, bearing a search warrant, broke into the apartment looking for illegal firearms believed to be owned by Smickle's cousin. Smickle was convicted of possession of a loaded firearm and careless storage of a firearm. This "foolish act" as described by the judge did not warrant the three-year mandatory minimum sentence for possession of a loaded firearm which applied because the Crown had proceeded by indictment pursuant to section 95(2) of the *Criminal Code*.<sup>50</sup> She found that a three-year sentence would be grossly disproportionate, amounting to cruel and unusual punishment contrary to section 12 of the Charter.

With respect to the *Smith* standard that cruel and unusual punishment requires a finding of gross disproportionality, Molloy J. looked to the way that (arguably) subjective elements had been adopted as part of the standard. In particular, she considered the language of "[shocking] the conscience" and "[outraging] standards of decency" such that Canadians

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<sup>47</sup> *Ferguson, supra*, note 46, involved a police officer fatally shooting a man detained in police cells following an altercation between the two men. The officer was originally charged with murder but a jury convicted him of manslaughter, which carried a minimum four-year sentence because it was committed with a firearm.

<sup>48</sup> *Ferguson, supra*, note 46, at para. 57.

<sup>49</sup> Berger, *supra*, note 19, at 105.

<sup>50</sup> R.S.C. 1985, c. C-46.

“would find the punishment abhorrent or intolerable”.<sup>51</sup> However, she held that the test was largely an objective one:

I remain of the view that the analysis of what constitutes cruel and unusual punishment is essentially an objective test. To the extent that community tolerance is part of that test, it can only be with reference to a community fully informed about the philosophy, principles and purposes of sentencing set out in the *Criminal Code*, the rights enshrined in the Charter, and the particular circumstances of the case before the court.<sup>52</sup>

Justice Molloy stated that she would have reached the conclusion that the mandatory three-year sentence was grossly disproportionate on either an objective or subjective test: “In my opinion, a reasonable person ... would consider a three year sentence to be fundamentally unfair, outrageous, abhorrent and intolerable.”<sup>53</sup>

The unique nature of this particular offence played a central role in *Smickle*. The fact that the offence is a hybrid one with a summary option that has no minimum sentence and a one-year maximum looms large. This bifurcation and accompanying Crown discretion indicates that Parliament has recognized that there are some circumstances in which possession of a loaded firearm may justify no prison sentence at all.<sup>54</sup> Justice Molloy concluded that the case before her was exceptional because of the nature and purpose of the possession, meaning that an appropriate sentence would lie outside the normal range. In deciding on a one-year conditional sentence, she canvassed three comparator cases, including one involving a former Ontario cabinet minister, John Snobelen, who had received an absolute discharge for the same offence in a case where the Crown had proceeded summarily.<sup>55</sup>

In *Smickle* the structure of the hybrid scheme for prosecuting this offence (a one-year maximum jail sentence if the Crown proceeds summarily and a three-year minimum prison sentence if the Crown proceeds by indictment) was held to be arbitrary and therefore breach

<sup>51</sup> *Smickle, supra*, note 9, at paras. 42-46, citing *Smith, supra*, note 5, and other s. 12 cases.

<sup>52</sup> *Smickle, supra*, note 9, at para. 47.

<sup>53</sup> *Id.*, at para. 89.

<sup>54</sup> *Id.*, at paras. 52-53.

<sup>55</sup> *R. v. Snobelen* (April 25 2008), unreported (Ont. C.J.) Brown J., cited in *Smickle, supra*, note 9, at paras. 69-70. Snobelen knowingly had a Colt 22 semiautomatic handgun, together with ammunition and two other firearms, in his home for a number of years. He had acquired them when he bought a ranch and its contents in Oklahoma. He testified that he had intended to turn the guns in, but neglected to do so. The guns were discovered during a police search based on information from Snobelen's estranged wife.

section 7 of the Charter. It is impossible to have a sentence in the two-year gap between the one-year maximum and three-year minimum sentence. The existence of this two-year gap is clearly irrational.<sup>56</sup> In so finding Molloy J. relied on much of the reasoning of Code J. in *R. v. Nur*<sup>57</sup> (in which Nur was ultimately *unsuccessful* in his challenge to the same mandatory minimum sentence). Justice Code found a violation of section 7 but found that Nur lacked standing to raise it because he was not within the range of people “who would reasonably have faced summary proceedings, but for the arbitrary two year ‘gap’” in section 95(2)(b).<sup>58</sup>

Having found that section 95(2)(b) violated section 12 and section 7 of the Charter, Molloy J. proceeded to consider whether the limit on rights was justified as a reasonable limit pursuant to section 1 of the Charter. Noting that section 7 violations are rarely salvageable by section 1 and expressing doubt that “inflicting cruel and unusual punishment on an individual can be justified based on an overall legislative objective of general deterrence,”<sup>59</sup> Molloy J. spent most of her time on minimal impairment, focusing on arguments about whether and how a “safety valve” of discretion could save the section. The Crown argued that the existing prosecutorial discretion was the necessary safety valve, while the defence asserted that only judicial discretion to depart from the mandatory minimum sentence (*i.e.*, through a constitutional exemption or other means) in exceptional cases could render the law valid.<sup>60</sup>

The Court rejected the Crown’s argument, noting that prosecutorial discretion did not operate to prevent Smickle from being subjected to cruel and unusual punishment. Justice Molloy did not find fault with the Crown’s decision to proceed by indictment against Smickle, stating that “[a]t the time that decision was made, the Crown was not in possession of all of the facts necessary to inform that decision. The decision was

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<sup>56</sup> The version of s. 95(2) included in the 1996 amendments to the Code provided for a maximum one-year sentence (summary conviction) and a minimum one-year sentence (indictable). The new, three-year minimum for an indictable offence was added in the 2008 amendments without apparent consideration of the resulting “two-year gap”. See *R. v. Nur*, [2011] O.J. No. 3878, 275 C.C.C. (3d) 330, at para. 131 [hereinafter “*Nur*”].

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, at para. 140.

<sup>59</sup> *Id.*, at para. 101.

<sup>60</sup> In a similar vein, the Canadian Bar Association argued in its submissions to Parliament on Bill C-10 that such a judicial safety valve should be incorporated into any legislated minimum sentence to address Charter concerns and the principle of proportionality. Canadian Bar Association, *Submission on Bill C-10: Safe Streets and Communities Act*, online: <<http://www.cba.org/cba/submissions/PDF/11-45-eng.pdf>> [hereinafter “Canadian Bar Association”].

made reasonably and in good faith and there is no basis to interfere with it.”<sup>61</sup> However, she cited *Smith* for the proposition that the “safety valve” of Crown discretion cannot save legislation that may result in a grossly disproportionate sentence: “... the courts are duty bound to make that pronouncement [that a law is invalid pursuant to section 52(1)], not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.”<sup>62</sup>

The defence argued that a judicial safety valve, effectively transforming mandatory sentences into *presumptive* sentences from which a judge could depart in exceptional circumstances or where an injustice would result from their imposition, would be a minimally impairing alternative to the rigid mandatory minimum in section 95(2)(b). The Crown had argued that such judicial discretion would defeat the whole purpose of the legislation which is to ensure stiffer sentences for possession of loaded firearms by taking away judicial discretion, a proposition which the court in *Smickle* rejected. Justice Molloy agreed with the defence that such an approach, utilized in the United Kingdom and South Africa, is a minimally impairing alternative.<sup>63</sup>

At the final stage of proportionality, she notes pointedly that “there is no tangible evidence that imposing a mandatory minimum does anything to actually accomplish [the objectives of reducing violent crime and protecting the public]. One might hope that would be the case, but proving it is a far different matter.”<sup>64</sup>

The Crown argued in *Smickle* that if the minimum sentence was found to violate section 12 on *Smickle*'s facts, the appropriate remedy should be some form of *mandamus* or a reduction of sentence. However, Molloy J. did not accept this argument, noting that both proposed remedies amount to constitutional exemptions which were flatly rejected by the Supreme Court in *Ferguson*. In accordance with that decision, a declaration of invalidity is the only remedy available to a judge who has found that a mandatory sentence violates section 12 and is not saved by section 1. Furthermore, it is significant that the Crown's call for a suspended declaration of invalidity was flatly rejected by the Court in *Smickle*. While suspended declarations have become almost common-

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<sup>61</sup> *Smickle, supra*, note 9, at para. 87.

<sup>62</sup> *Smith, supra*, note 5, at para. 69, cited in *Smickle, supra*, note 9, at para. 109.

<sup>63</sup> *Smickle, supra*, note 9, at paras. 114-116; see also Julian V. Roberts, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05\\_10/index.html](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/index.html)>.

<sup>64</sup> *Smickle, supra*, note 9, at para. 120.

place in Charter decisions, Molloy J. returned to the high threshold articulated in *Schachter v. Canada*,<sup>65</sup> namely, that delaying the effect of a declaration of invalidity should be rare and exceptional.<sup>66</sup> This more stringent approach is welcome, both in this case because a suspended declaration would have deprived Leroy Smickle of any remedy,<sup>67</sup> and in the law more broadly because suspended declarations have been proliferating, based on appeals to “dialogue” between courts and legislatures,<sup>68</sup> rather than for the limited reasons articulated in *Schachter*.

In the end, Leroy Smickle spent a significant amount of time in jail pending trial, notwithstanding the ultimate disposition of a one-year conditional sentence. When he was on bail he was under strict conditions amounting to house arrest. He received seven months’ credit for time served and for restrictions on his liberty while on bail. Smickle certainly paid for his “foolish act”.

#### IV. SMICKLE AND A POSSIBLE DEPARTURE FROM CHARTER MINIMALISM

For some time, criminal and constitutional law scholars have been lamenting the minimalist, deferential approach to Charter scrutiny of mandatory minimum sentences. In 2001, reacting to the decisions in *R. v. Goltz*<sup>69</sup> and *Morrissey*, Kent Roach called for a return to the activism of *Smith*, arguing that “vigorous judicial enforcement against cruel and unusual punishment by striking down mandatory sentences has the potential to produce a robust and democratic dialogue between the courts and the legislature that considers both the effect of punishment on offenders and the adequacy of less draconian alternatives.”<sup>70</sup>

Writing in the wake of *Ferguson*, Lisa Dufraimont and Benjamin Berger took different approaches to the future of section 12 challenges to mandatory minimum sentences. Dufraimont interpreted the Court’s

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<sup>65</sup> [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.) [hereinafter “*Schachter*”].

<sup>66</sup> *Smickle*, *supra*, note 9, at para. 151.

<sup>67</sup> See Kent Roach, “New and Problematic Restrictions on Constitutional Remedies: *R. v. Demers*” Editorial Comment (2004) 49:3 Crim. L.Q. 253 (discussing the injustice involved in the refusal to permit a constitutional exemption from a delayed declaration of invalidity in the context of an individual with a chronic mental disability who was found unfit to stand trial).

<sup>68</sup> Sujit Choudhry & Kent Roach, “Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies” (2003) 21 S.C.L.R. (2d) 205; Bruce Ryder, “Suspending the Charter” (2003) 21 S.C.L.R. (2d) 267.

<sup>69</sup> [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.) [hereinafter “*Goltz*”].

<sup>70</sup> Roach, “Searching for *Smith*”, *supra*, note 19, at 411.

rejection of constitutional exemptions as a retreat from substantive scrutiny of mandatory minimum sentences and a “lost opportunity” to provide a remedy for exceptional cases that will inevitably be caught within the wide net of mandatory penalties.<sup>71</sup> On the other hand, Berger argued that *Ferguson* amounted to a “constitutional push-back on the politics of minimum sentences”.<sup>72</sup> He supported the Court’s rejection of a role for the judiciary in “mopping up the hard cases with constitutional exemptions”, which would lend legitimacy to a legislative process that may not have paid sufficient attention to the substantive fairness of the laws it creates.<sup>73</sup> While Dufraimont essentially argued that the spectre of invalidating a mandatory sentence for all purposes, based on an exceptional case, would exert substantial pressure on judges to uphold laws in the face of compelling exceptional cases that might arise, Berger expressed more confidence in the ability and willingness of sentencing judges — and implicitly appellate courts — to make unpopular decisions when faced with compelling cases.

How, then, should we understand *Smickle*? Is it a courageous decision in the face of immense pressure? And what is the Supreme Court of Canada likely to do when this case inevitably comes before it? Might *Smickle* signal a new, more rigorous approach to assessing mandatory minimum sentences under the Charter?<sup>74</sup>

On one level, the application of sections 7 and 12 of the Charter in *Smickle* addresses the worst, most irrational elements of the law. The two-year gap that arose through piecemeal amendments to the *Criminal Code*, ratcheting up the floor for this offence, is rightly found to be arbitrary. In fact, the two-year gap is completely irrational and it is surprising that it had not been addressed earlier by the courts or Parliament.<sup>75</sup> This was, in many ways, an easy case. That said, outside of *Smith* and *Steele*, the Supreme Court has not been persuaded to utilize section

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<sup>71</sup> Dufraimont, *supra*, note 19, at 470. See also Kent Roach, “The Future of Mandatory Sentences after the Death of Constitutional Exemptions” Editorial Comment (2008) 54:1 Crim. L.Q. 1.

<sup>72</sup> Berger, *supra*, note 19, at 105.

<sup>73</sup> *Id.*, at 119.

<sup>74</sup> As this manuscript was being finalized for publication, another decision to declare a mandatory minimum sentence invalid was released: *R. v. L. (C.)*, [2012] O.J. No. 3094, 2012 ONCJ 413 (Ont. C.J.) (mandatory three-year sentence for the broadly framed offence of trafficking a firearm).

<sup>75</sup> In *Nur*, *supra*, note 56, at para. 131, Code J. had reviewed the legislative history of the provision and concluded that the two-year gap was probably an oversight that had not been corrected. He found a violation of s. 7 but declined to address it because an appropriate sentence for Nur was outside of the gap.

12 in cases that presented sympathetic facts, although some lower courts have.<sup>76</sup>

It is possible to conclude that the positions of both Berger and Dufraimont have been vindicated by *Smickle*, at least at this early stage. Given the indefensible arbitrariness of the two-year gap between the maximum summary conviction sentence and the minimum indictable offence sentence, the result was inevitable and obvious to many. Justice Code had as much as said so in *Nur*. Justice Molloy just finally had the facts. However, the very fact that Code J. did not declare the law invalid in *Nur* when he was faced with the section 7 arbitrariness argument is an example of Charter minimalism in operation.

Dufraimont has argued that “[t]he fundamental problem is that the persistence of an invalid mandatory minimum sentence has distorting effects,”<sup>77</sup> such as exerting pressure on accused persons to plead to lesser offences to avoid overly broad mandatory minimum sentences. Liz Sheehy has noted the distorting effects of mandatory sentences, particularly for battered women who are charged with murder in relation to the death of their abusive partners.<sup>78</sup> In the course of her section 1 analysis in *Smickle*, Molloy J. listed this and a number of other “deleterious effects of the mandatory minimum regime”, including the following:

- (1) the sentence inflation for persons who, although not deserving a sentence of less than a one year sentence, must now receive at least three years;
- (2) the danger of increased recidivism by incarcerating youthful first offenders for extended periods of time with hardened criminals;
- (3) contributing to the over-crowded conditions in our correctional facilities;
- (4) the systemic disincentive for guilty pleas and early resolutions if the minimum sentence will be three years in prison for any offender charged with the indictable offence; and,
- (5) as the Supreme Court noted in *Smith*, the unfair advantage given to the Crown as an accused will be under pressure to plead guilty to a lesser included offence in order to avoid the risk of the mandatory minimum.<sup>79</sup>

Given the deferential, minimalist approach that has been taken to section 12, the focus of much commentary has been on the “exceptional

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<sup>76</sup> For example, the sentencing judges in *Morrissey*, *supra*, note 34, and *Latimer*, *supra*, note 40, had found the mandatory sentence to be grossly disproportionate. However, those findings were reversed on appeal.

<sup>77</sup> Dufraimont, *supra*, note 19, at 477, citing *Smith*, *supra*, note 5, at para. 5.

<sup>78</sup> Elizabeth Sheehy, “Battered Women and Mandatory Minimum Sentences” (2001) 39:2&3 Osgoode Hall L.J. 529.

<sup>79</sup> *Smickle*, *supra*, note 9, at para. 121.



cases” that are caught by the rising threshold of the sentencing floor and the need for a judicial “safety valve”.<sup>80</sup> If the Supreme Court had authorized a judicial “safety valve” in the form of a constitutional exemption in *Ferguson*,<sup>81</sup> arguably Parliament’s intention to treat gun crimes more harshly across the board could have been largely satisfied as long as constitutional exemptions were rarely applied. The impact of such a change, namely providing a remedy for “exceptional cases”, would arguably be modest.<sup>82</sup> Perhaps a more significant change would be for the Supreme Court to revisit the narrow approach to reasonable hypotheticals taken in *Goltz* and *Morrissey*, authorizing consideration of a whole range of potential scenarios. However, if the high standard of “gross disproportionality” continues to be applied, then such a change does little to address the fundamentally arbitrary nature of mandatory minimum sentences.

Arguments that lend legitimacy to the ratcheting up of sentences generally by simply increasing the starting point for the sentence and maintaining proportionality are problematic in the sense that they leave the inflationary starting point unscrutinized. As argued by Roach, they “aspire to a just distribution of punishment while being agnostic about the justness of the starting point or anchor for their finely calibrated scale”.<sup>83</sup> He goes on to make the important point that “judicial concerns about maintaining proportionality in light of mandatory sentences attribute a coherence to Parliament’s decision to enact a mandatory sentence that is not realistic.”<sup>84</sup>

The bigger picture that emerges when one considers the proliferation of mandatory minimum sentences through piecemeal changes to our sentencing laws, and the Charter decisions mostly upholding them, is an

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<sup>80</sup> See *e.g.*, Dufraimont, *supra*, note 19; Canadian Bar Association, *supra*, note 60.

<sup>81</sup> Proponents of this approach essentially advocate for the transformation of mandatory minimum sentences into presumptive sentences, along the lines of the model in the United Kingdom. See also Morris J. Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28:1 Oxford J. Legal Stud. 57, at 71 (“Whether Canada should move [in the direction of presumptive sentences] from the mandatory sentencing scheme currently in place is, in principle, a matter for Parliament to decide”).

<sup>82</sup> Kent Roach advocates for such a focus on the disproportionate effects of a particular mandatory sentence on a particular (exceptional) offender, rather than on attempts to prove that the mandatory sentence is arbitrary in relation to its legislative objective. Roach, “Charter versus Government”, *supra*, note 39. I sketch out some elements of the latter, admittedly more expansive, argument below.

<sup>83</sup> Roach, “Searching for *Smith*”, *supra*, note 19, at 402.

<sup>84</sup> *Id.*, at 403, drawing on Julian V. Roberts, “The Hunt for the Paper Tiger: Conditional Sentencing after Brady” (1999) 42:1 Crim. L.Q. 38.

overall sense of irrationality and arbitrariness.<sup>85</sup> The *Criminal Code* is desperately in need of a principled, evidence-based overhaul.<sup>86</sup> However, there are no prospects for such changes any time soon. To the contrary, the lack of respect for — and indeed, open hostility to — research that contradicts the policy choices of the current government is palpable.<sup>87</sup>

In a recent op-ed piece published in the *Ottawa Citizen* on the 30th anniversary of the Charter, Kent Roach argued that

there are signs that the *Charter* will not provide significant restraints on increased use of mandatory sentences and increased use of prison. ... [T]he *Charter*, like the media, tends to focus only on the worst cases of abuse; not the routine cases. New restrictions on conditional sentences and mandatory sentences will change how routine cases are processed everyday in court.<sup>88</sup>

Roach suggests the Charter will probably have little to say about that.

In this climate, judges will likely continue to chip away at the most obvious injustices. Section 12 comes into play in *Smickle*, but only in relation to an “exceptional case” that, I would argue, merely points to deeper problems with mandatory sentences generally. These exceptional cases are the canaries in the coal mine that should prompt a reassessment of our reliance on counter-productive, blunt instruments such as mandatory minimum sentences. The decision in *Smickle* does not, and perhaps

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<sup>85</sup> As just one demonstration of incoherence among provisions in the *Criminal Code*, the factum of the Canadian Civil Liberties Association in *Nur*, *supra*, note 56, compares the sentences available under s. 95(2) for possession of a loaded firearm — a maximum one-year sentence or a minimum three-year sentence — to sentences available for other crimes involving guns. Under s. 87(1) there is no mandatory minimum for pointing a loaded or unloaded firearm at someone; under s. 85(1) there is a mandatory minimum sentence of one year for using a firearm while committing or attempting to commit an indictable offence (such as aggravated assault); and under s. 220(a) there is a mandatory minimum sentence of four years for criminal negligence causing death where a firearm is used. *Nur*, *supra*, note 56 (Factum of the Canadian Civil Liberties Association, at para. 53).

<sup>86</sup> Beyond the sentencing framework, Don Stuart has long argued for a General Part to the *Criminal Code* which would set out important principles and that would assist in interpreting and rationalizing the offences, defences and procedures in Canadian criminal law. Don Stuart, “A Case for a General Part: Lessons from Canada’s Experience with Stephen’s Code Since 1892 and Entrenched *Charter* Standards since 1982” (2009) 20:1 *Crim. L.F.* 113.

<sup>87</sup> For example, in recent hearings before the House of Commons Committee considering Bill C-10, Conservative members of the Committee dismissed as “advocates for criminals” and “too far removed from real life” witnesses such as Dr. Anthony Doob, one of North America’s leading criminologists, and Catherine Latimer, Executive Director of the John Howard Society and a former Director General of Youth Justice, Strategic Initiatives and Law Reform, with the federal Department of Justice. See Heather Scofield, “Critics of omnibus bill ‘advocate for criminals,’ Conservatives charge” *The Globe and Mail* (October 18, 2011), online: <<http://www.theglobeandmail.com/news/politics/critics-of-omnibus-bill-advocate-for-criminals-conservatives-charge/article4255428/>>.

<sup>88</sup> Kent Roach, “The government v. the Charter” *The Ottawa Citizen* (April 13, 2012) at B7.

cannot, speak to the overall arbitrariness of popular punitivism and to the disproportionality of mandatory sentences generally.

One of the most problematic implications of the virtually unrestrained proliferation of mandatory minimum sentences is the extent to which prosecutorial discretion increases. A very significant result of the move to mandatory minimum sentences is a wholesale transfer of discretion from judges to prosecutors. Whether intended or not, this move signals a profound lack of trust in judges (whose decisions are, of course, reviewable through the appellate process) and a simultaneous transfer of discretion, and implicitly trust, to Crown Attorneys (whose decisions are virtually unassailable due to the high degree of deference accorded to prosecutorial discretion which is reviewable only for abuse of process).<sup>89</sup> In *Nur*, a case that raised essentially the same issues as *Smickle* (although the mitigating circumstances were not as sympathetic in *Nur*), the sentencing judge held that the exercise of prosecutorial discretion in proceeding by indictment or summary conviction was a “complete answer” to all of the reasonable hypotheticals which he found would amount to cruel and unusual punishment.<sup>90</sup>

Research largely conducted in the United States where there is now a long history of mandatory minimum sentences reveals that “charge bargaining” and other forms of evading the impact of mandatory minimums increase with the proliferation of minimum sentences.<sup>91</sup> These and other consequences are unintended and raise the spectre of arbitrariness, which has been defined by the Supreme Court in the section 7 case law as a measure that “bears no relation to, or is inconsistent with, the objective”.<sup>92</sup> To the extent that a key objective of mandatory sentences is, as held by McLachlin C.J.C. in *Ferguson*,<sup>93</sup> the removal of judicial discretion in pursuit of greater certainty and consistency in sentencing, most mandatory minimum sentences could be said to entail arbitrary

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<sup>89</sup> In *R. v. Nixon*, [2011] S.C.J. No. 34, [2011] 2 S.C.R. 566 (S.C.C.), the Supreme Court of Canada recently reaffirmed that prosecutorial discretion is reviewable only for abuse of process. The Crown’s repudiation of a signed plea agreement in that case was held not to amount to an abuse of process.

<sup>90</sup> *Nur*, *supra*, note 56, at paras. 104, 108.

<sup>91</sup> Tonry, *supra*, note 12.

<sup>92</sup> *Chaoulli v. Québec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at para. 130 (S.C.C.) [hereinafter “*Chaoulli*”], McLachlin C.J.C. and Major J., citing *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at para. 203 (S.C.C.), McLachlin J. dissenting.

<sup>93</sup> *Ferguson*, *supra*, note 46, at para. 54.

deprivations of liberty.<sup>94</sup> Ultimately, mandatory sentences do not remove discretion; they simply transfer it from judges to Crown attorneys. That result is inconsistent with the objective of removing discretion. At a minimum, the approach that the Supreme Court has taken to the arbitrariness standard in criminal law should prompt greater scrutiny of the relationship between the objective(s) of mandatory minimum sentences, including other objectives such as deterring crime, and the extent to which their consequences seem to be quite different and, in fact, disproportionately borne by certain groups over others.

Elizabeth Sheehy has drawn attention to the extent that mandatory minimum sentences have a disproportionate impact on certain racialized groups such as African Canadians and Indigenous peoples.<sup>95</sup> A number of the mandatory minimum sentence cases involve Indigenous or African Canadian men: *Morrissey*, *Nasogaluak*, *Nur*, *Smickle*, and presumably others that we do not know about. David Tanovich has lamented the extent to which race is erased in criminal Charter cases, arguing that “there has been a large-scale failure of trial lawyers to raise race once critical race standards have been established by the courts,”<sup>96</sup> particularly in relation to racial profiling. Tanovich has further argued that courts have ignored the “Golden principle” in Charter cases (the *Golden principle* being that “[t]he *Charter* must be interpreted with a critical race or anti-racist lens to give effect to systemic racism in the criminal justice system including the over-policing of Aboriginal and racialized commu-

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<sup>94</sup> In the most recent Supreme Court of Canada decision to consider arbitrariness as a principle of fundamental justice, *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter “*PHS*”], the unanimous Court found that the decision of the federal government to not grant an exemption to a safe-injection program from the relevant offences in the *Controlled Drugs and Substances Act* was arbitrary. With respect to the state of the law on arbitrariness, the Court noted, at para. 132:

The jurisprudence on arbitrariness is not entirely settled. In *Chaoulli*, three justices (*per* McLachlin C.J. and Major J.) preferred an approach that asked whether a limit was “necessary” to further the state objective: paras. 131-132. Conversely, three other justices (*per* Binnie and LeBel JJ.), preferred to avoid the language of necessity and instead approved of the prior articulation of arbitrariness as where “[a] deprivation of a right ... bears no relation to, or is inconsistent with, the state interest that lies behind the legislation”: para. 232. It is unnecessary to determine which approach should prevail, because the government action at issue in this case qualifies as arbitrary under both definitions.

<sup>95</sup> Elizabeth Sheehy, “The Discriminatory Effects of Bill C-15’s Mandatory Minimum Sentences” (2010) 70:2 C.R. (6th) 302 (the mandatory minimum sentences for certain drug offences that Sheehy was addressing in this article were later rolled into Bill C-10 and passed into law earlier this year). See also Faizal R. Mirza, “Mandatory Minimum Prison Sentencing and Systemic Racism” (2001) 39:2&3 Osgoode Hall L.J. 491.

<sup>96</sup> David M. Tanovich, “The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System” (2008) 40 S.C.L.R. (2d) 655, at 672.

nities”).<sup>97</sup> In addition to race playing a significant role in policing,<sup>98</sup> particularly where there is considerable discretion involved, it has been found to play a salient role in prosecutorial decisions. Research in the United States has found that members of certain racialized groups (such as African-Americans and Latin-Americans) are disproportionately subject to mandatory minimum sentences due to the exercise of prosecutorial discretion.<sup>99</sup>

In the Canadian context, the Supreme Court has openly acknowledged the systemic discrimination experienced by Indigenous peoples in the Canadian criminal justice system, particularly in cases dealing with sentencing<sup>100</sup> and imprisonment.<sup>101</sup> Yet it is exceedingly difficult to reconcile the elimination of judicial discretion entailed by the enactment of mandatory minimums, in a context where Indigenous people are grossly over-represented among those imprisoned, with the direction to sentencing judges in section 718.2(e) of the *Criminal Code* that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”<sup>102</sup> This is one of the many contradictions and incoherencies in our criminal law that

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<sup>97</sup> David M. Tanovich, “Ignoring the *Golden Principle* of Charter Interpretation?” (2008) 42 S.C.L.R. (2d) 441, at 443.

<sup>98</sup> See generally Elizabeth Comack, *Racialized Policing: Aboriginal People’s Encounters with the Police* (Halifax: Fernwood, 2012), at ch. 2.

<sup>99</sup> Joshua B. Fischman & Max M. Schanzenbach, “Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums” 9:4 J. Empirical Legal Stud. (forthcoming in December 2012). Although there has been little, if any, focused research into the relationship between prosecutorial discretion and race in the Canadian context, there have been some disturbing recent cases of Crown misconduct involving racialized accused who were subject to police brutality and later had their own charges stayed. See David M. Tanovich, “*Bonds*: Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power” (2011) 79 C.R. (6th) 132. This is an area that requires further Canadian research such that the impact of prosecutorial discretion in the context of mandatory sentences is better understood.

<sup>100</sup> *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.) [hereinafter “*Gladue*”].

<sup>101</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.) [hereinafter “*Sauvé*”].

<sup>102</sup> The recent decision of the Supreme Court of Canada in *R. v. Ipeelee*, [2012] S.C.J. No. 13, 280 C.C.C. (3d) 265 (S.C.C.) [hereinafter “*Ipeelee*”] amounts to a call for action to lawyers and judges across the country who have not implemented s. 718.2(e) and the principles articulated in *Gladue*, *supra*, note 100 in a meaningful way. Justice LeBel took great pains to emphasize the importance of an individualized consideration of *Gladue* factors in every case involving an Indigenous person. To do otherwise would violate the fundamental principle of proportionality and invite appellate review (*Ipeelee*, at para. 87). A number of Indigenous leaders have criticized Bill C-10 on the basis that it will exacerbate the over-representation of Indigenous people in Canadian prisons. See Robert Everett-Green, “Law and disorder: What Bill C-10 could mean for Canada’s native people” *The Globe and Mail* (February 18, 2012), at F1.

should not be ignored when considering whether a mandatory sentence violates the Charter.

## V. CONCLUSION AND CHALLENGES NOTWITHSTANDING

It has been argued that “[g]ross disproportionality and arbitrariness review [under section 7] may often boil down to trials by social science experts” which the government is bound to win because it has deeper pockets and thus a greater capacity to commission research and hire experts.<sup>103</sup> While this is admittedly a challenge, there are a number of recent precedent-setting Charter decisions in which claimants have introduced, and judges have duly considered, complex social science evidence in the criminal law context.<sup>104</sup> This careful treatment of social science evidence stands in sharp contrast to the way that relatively uncontroversial social science evidence concerning mandatory minimum sentences was rejected outright on ideological grounds in recent parliamentary hearings.<sup>105</sup>

I am aware that my suggestion that the courts subject the purported goals, justifications and impacts of mandatory minimum sentences to a more searching form of Charter scrutiny is at odds with much of the conventional thinking about the respective institutional roles and capacities of courts and legislatures. The deferential, minimalist approach in the section 12 cases is based on the idea that it is generally not the courts’ role to question the policy choices of government.<sup>106</sup> Even if it were possible to truly separate policy choices from other government decisions that are appropriately the subject of judicial review, there are numerous examples, particularly in the criminal context, where the Supreme Court has seen fit to subject the government’s policy choices — and the real impact of the law at issue — to searching review. For example, in *Sauvé v. Canada (Chief Electoral Officer)*,<sup>107</sup> where a majority of the Court declared invalid a ban on prisoners serving two years or more from voting in federal elections, McLachlin C.J.C. held

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<sup>103</sup> Roach, “Charter versus Government”, *supra*, note 39.

<sup>104</sup> Most recently, in *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 BCSC 886 (B.C.S.C.), Smith J considered many volumes of conflicting social science evidence in the course of concluding that the criminal offence of assisting suicide unjustifiably infringes ss. 7 and 15 of the Charter.

<sup>105</sup> Scoffield, *supra*, note 87.

<sup>106</sup> See *e.g.*, *Latimer*, *supra*, note 40, and *Ferguson*, *supra*, note 46.

<sup>107</sup> *Sauvé*, *supra*, note 101.

that the government's objectives for disenfranchising citizen prisoners, namely enhancing civic responsibility and providing additional punishment, were too vague and symbolic to justify limiting the right to vote. Her decision rejected the government's attempts to justify the voting ban in a remarkably robust fashion which included, for example, calling the government's arguments a "façade of rhetoric".<sup>108</sup> The majority also pointed to the fact that the government had not produced any evidence demonstrating that its objectives for the voting ban were being met, while there was evidence of the disproportionate impact of the voting ban on Indigenous prisoners who were, and are, overrepresented among the prison population.

Of course, there are many other decisions in which a more deferential stance has been taken. However, my point is simply that policy choices in the context of criminal law are not immune from meaningful Charter scrutiny, particularly where they affect basic civil and political rights and where it appears that they are not evidence-based. We are arguably seeing a resurgence in substantive review of criminal law under the Charter, at least under section 7, with the recent decisions in *Bedford v. Canada (Attorney General)*<sup>109</sup> and *Canada v. PHS Community Services*.<sup>110</sup> In the latter case, the Supreme Court unanimously held that the federal Health Minister's decision to not grant an exemption from criminal drug laws for the Insite safe-injection clinic in Vancouver was arbitrary because it was inconsistent with the objective of promoting public health and public safety and was contradicted by the weight of social science evidence supporting the health outcomes achieved through the clinic. The Minister's decision in *PHS* was based on a government policy choice that favoured a punitive approach to injection drug use over a harm reduction approach when the latter was strongly supported by the social science evidence. To be sure, the Court did not find the drug offences themselves invalid, but rather focused their decision on the "safety valve" of the exemption clause which, they held, prevented the drug offences from applying in an arbitrary manner.<sup>111</sup> As such, the decision in *PHS* is arguably more consistent with an approach to Charter review that would

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<sup>108</sup> *Id.*, at para. 52.

<sup>109</sup> [2012] O.J. No. 1296, 109 O.R. (3d) 1 (Ont. C.A.). The Ontario Court of Appeal held that the prostitution-related bawdy house offence in the *Criminal Code* was grossly disproportionate in its effects and therefore invalid under s. 7 of the Charter. The Court also read down the overly broad "living off the avails of prostitution" offence to only apply to "circumstances of exploitation".

<sup>110</sup> *Supra*, note 94.

<sup>111</sup> *Id.*, at para. 113.

permit constitutional exemptions, which have also been characterized as safety valves, than with a finding of invalidity. However, constitutional exemptions are not available under *Ferguson* to save mandatory minimum sentences. Therefore, if courts are to abandon their deferential stance in this area, their decisions will likely lead to findings of invalidity along the lines of *Smickle*.

A further implication of my call for greater scrutiny of the relationship between the objectives and actual consequences of mandatory minimum sentences, particularly if it leads to findings of invalidity, is that it may well put the courts on a collision course with a federal government that is clearly committed to going down the punitive path it has carved out. In a manner unprecedented in the Charter era, the current government openly states its disagreement with Charter decisions made by the courts<sup>112</sup> and expresses little enthusiasm for the Charter itself.<sup>113</sup> An “activist” decision that strikes down a mandatory minimum sentence may be just the issue that would persuade the federal government to invoke the section 33 legislative override.<sup>114</sup>

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<sup>112</sup> In one high-profile example of this trend, in a speech delivered at the University of Western Ontario in February 2011, Immigration Minister Jason Kenney criticized the approach taken by federal court judges in immigration cases:

Cases in which, seemingly on a whim, or perhaps in a fit of misguided magnanimity, a judge overturns the careful decisions of multiple levels of diligent, highly trained public servants, tribunals, and even other judges. I believe most Canadians share my concern about such decisions. And I fear that such decisions do serious harm to the overall immigration system and prevent it from doing more good for deserving immigrants. And they undermine public confidence in the government’s ability to enforce our laws as passed by Parliament, and therefore in the entire system.

Jason Kenney, *Minister Kenney’s Speech “Dialogue with the Courts: Judicial Actions and Integrity of Canada’s Immigration and Refugee System” Given at University of Western Ontario Law School February 11, 2011*, online: Jason Kenney <<http://www.jasonkenney.ca>>. This speech prompted responses from the Canadian Bar Association and even from Chief Justice McLachlin herself, defending judicial impartiality and independence. See Chris Carter, “Strong reaction to Kenney speech” *Inside Politics Blog* (February 22, 2011), online: CBCNews <<http://www.cbc.ca/news/politics/inside-politics-blog/2011/02/kenney-speech-drawing-fire.html>>, and Aaron Wherry, “Reminding the minister” *Beyond the Commons* (August 15, 2011), online: Macleans <<http://www2.macleans.ca/2011/08/15/reminding-the-minister/>>.

<sup>113</sup> The federal government did not hold any events to mark the 30th anniversary of the Charter on April 17, 2012, choosing instead to send out a short press release from the Ministers of Justice and Canadian Heritage. See Andy Blatchford, “Happy Birthday, Constitution: Tories’ gift will be a news release” *Canadian Press* (April 12, 2012), online: Global News <<http://www.globalnews.ca/happy+birthday+constitution+tories+gift+will+be+a+news+release/6442619706/story.html>>.

<sup>114</sup> See also Kent Roach, “The Future of Mandatory Sentences after the Death of Constitutional Exemptions” (2008) 54:1 Crim L.Q. 1, at 3 (suggesting that the s. 33 override might be used in a case involving a mandatory sentence).



Nevertheless, it is my view that we have reached a point where someone has to say that the Emperor has no clothes. There is a compelling argument to be made that mandatory sentences deprive people of their liberty in a manner that is arbitrary. They have unintended consequences that undercut their own purposes.<sup>115</sup> To the extent that the courts have deferred to Parliament's faulty logic and purposes that are contradicted by a substantial and growing body of evidence, they have lent legitimacy to a broken system that has immense human and fiscal costs. A more robust form of judicial review of mandatory minimum sentences on Charter grounds is not a full answer to addressing the proliferation of harmful criminal justice policies that are not evidence-based. However, there is a role for judges to play in examining the evidence where policy makers do not. It is my hope that by the time we mark the Charter's next big anniversary, we will be able to celebrate its role in contributing to a retreat from mandatory minimum sentences as one of its accomplishments.

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<sup>115</sup> Tonry, *supra*, note 12.