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Punishment and Its Limits

Debra Parkes*

I. INTRODUCTION

The nearly three decades in which Beverley McLachlin was a member of the Supreme Court, including 18 as Chief Justice, witnessed a number of shifts in Canadian penal policy and in the reach and impact of criminal law. During the Harper decade (2006 to 2015) in which the federal Conservatives enjoyed a majority government led by Prime Minister Stephen Harper, criminal justice policy took a turn toward the punitive. The federal government tore a page out of the American legislative handbook and sought to “govern through crime”,¹ albeit in a more restrained Canadian style.² Criminologists Anthony Doob and Cheryl Webster have posited that pre-Harper, Canadian criminal justice policy was grounded in four pillars that enjoyed support across party lines. These pillars were that social conditions matter; that harsh punishments do not reduce crime; that the development of criminal justice policies should be informed by expert knowledge; and that changes in the criminal law should address real problems.³ These principles were cast aside, Doob and Webster argue, beginning at least in 2006 with the passage of numerous crime bills that, to name just a few, created new crimes with enhanced penalties;⁴ proliferated mandatory

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¹ Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

² See, for example, Debra Parkes, “The Punishment Agenda in the Courts” (2014) 67 S.C.L.R. 589 [hereinafter “The Punishment Agenda in the Courts”].

³ Anthony Doob & Cheryl Webster, “The Harper Revolution in Criminal Justice Policy... and What Comes Next” (2015) 36(3) Policy Options 24.

⁴ *An Act to amend the Criminal Code (auto theft and trafficking in property obtained by crime)*, S.C. 2010, c. 14, amending *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter “*Criminal Code*”], ss. 333, 333.1 (theft of a motor vehicle), s. 353.1 (obliterating a vehicle identification number), ss. 355.1-355.5 (new proceeds of crime offences); *An Act to amend the Criminal Code*

minimum sentences; reduced the availability of conditional sentences served in the community;⁵ made it easier to have someone declared a dangerous offender (and therefore, imprisoned indefinitely);⁶ removed opportunities for early parole;⁷ and more.

While this account is compelling and importantly identifies a key (overtly) punitive turn,⁸ Canadian criminal law has long been rooted in punishment, albeit a punitiveness that is sometimes draped in a “liberal veil”.⁹ For example, it was a previous Liberal government that enacted the first batch of mandatory minimum sentences for firearms offences as part of its gun control legislation introduced in 1995.¹⁰ During the 2000s, the New Democratic Party government in Manitoba was unabashedly “tough on crime”, regularly calling on the federal government to enact more punitive criminal laws, including new offences and longer sentences.¹¹ Politicians of all stripes have contributed to the expansion of the criminal law throughout Canada’s history.¹²

Whatever its history or purposes, the evidence is clear: Canadian criminal law does not deliver on many of its promises and its impact is not distributed evenly across society. The #MeToo movement has called attention to how underreported and pervasive sexual violence is in

(*identity theft and related misconduct*), S.C. 2009, c. 28, amending *Criminal Code*, *id.*, s. 56.1, ss. 402.1-403; *An Act to amend the Criminal Code (unauthorized recording of a movie)*, S.C. 2007, c. 28, amending *Criminal Code*, s. 431.2.

⁵ *Safe Streets and Communities Act*, S.C. 2012, c. 1, amending *Criminal Code*, *id.*, s. 742.1.

⁶ *Tackling Violent Crime Act*, S.C. 2008, c. 6, amending *Criminal Code*, *id.*, Part XXIV, s. 752ff. See Jordan Thompson, “Reconsidering the Burden of Proof in Dangerous Offender Law: Canadian Jurisprudence, Risk Assessment and Aboriginal Offenders” (2016) 79 Sask. L. Rev. 49, citing an increase in the number of dangerous offender designations following the amendments and noting that various aspects of the new regime “have overwhelmingly contributed to the increase in DOs as a whole and specifically, DOs with Aboriginal identity” (at 50).

⁷ *Abolition of Early Parole Act*, S.C. 2011, c. 11, s. 10(1), repealing s. 125(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. But, see *Canada (Attorney General) v. Whaling*, [2014] S.C.J. No. 20, [2014] 1 S.C.R. 392 (S.C.C.) [hereinafter “*Whaling*”] (declaring the retrospective application of this change invalid under the *Canadian Charter of Rights and Freedoms*).

⁸ See generally, “The Punishment Agenda in the Courts”, *supra*, note 2, at 591-94 and Debra Parkes, “Women in Prison: Liberty, Equality and Thinking Outside the Bars” (2017) 12 J.L. & Equality 127, at 132-36.

⁹ Kelly Hannah-Moffatt and Dawn Moore, “The liberal veil: revisiting Canadian penalty” in John Pratt *et al.*, *The New Punitiveness: Trends, Theories and Perspectives* (U.K.: Willan Press, 2005) 85.

¹⁰ *Firearms Act*, S.C. 1995, c. 39.

¹¹ Andrew Woolford and Jasmine Thomas, “Exceptionalism and Deputization under Today’s NDP: Neo-liberalism, the Third Way, and Crime Control in Manitoba” (2011) 26:1 C.J.L.S. 113.

¹² Julia Hughes, “Restraint and Proliferation in Criminal Law” (2010) 15(1) Rev. Const. Stud. 117, at 119.

contemporary Canada, and how the vast majority of sexual assault survivors do not even seek justice in the criminal system.¹³ The 2018 jury acquittal of Gerald Stanley, a white farmer in Saskatchewan, for the murder of Colten Boushie, a young Cree man, has prompted #JusticeForColten rallies and called attention, once again, to systemic racism in the criminal justice system.¹⁴ Indigenous People are, at once, over-policed, over-incarcerated, and under-protected by Canadian law. While crime rates have declined or remained static in recent decades, calls for more punitive laws resonate with the public, resulting in our prisons and jails being packed with people who are Indigenous, poor, racialized and disproportionately dealing with disabling mental health issues. The shocking number of missing and murdered Indigenous women¹⁵ has, until recently, been met with indifference and utterly inadequate justice system responses. At the same time, Indigenous women now account for an astonishing 38 per cent of women in federal prisons,¹⁶ despite comprising less than four per cent of the general population.

These realities are evidence of the extent to which we overuse criminal law to address social problems, at great human and fiscal cost. We persist in pursuing punishment over more productive ways of dealing with harm and anti-social behaviour. We ignore the social determinants of crime. And we have become complacent about the deep inequalities throughout the criminal justice system. These conditions cry out for fundamental reform of our criminal law.

It is, of course, not the role of the Supreme Court (or any court) to set criminal justice policy; that is the role of government. However, in the 37 years since the *Canadian Charter of Rights and Freedoms* was entrenched in Canadian law, it is unquestionably the role of judges to answer the

¹³ Zosia Bielski, “How sexual assault survivors look beyond police, courts for justice” *Globe and Mail* (February 4, 2017), online: <<https://www.theglobeandmail.com/life/how-sexual-assault-survivors-look-beyond-police-courts-forjustice/article33893684/>>.

¹⁴ The killings of Helen Betty Osborne (Cree) and J.J. Harper (Oji-Cree) with impunity in Manitoba in the 1980s prompted the sweeping Aboriginal Justice Inquiry of Manitoba. See Murray Sinclair and Alvin Hamilton, Commissioners, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Aboriginal Justice Inquiry, 1991). The Report’s opening words, “The justice system has failed Manitoba’s Aboriginal people on a massive scale,” remain true today.

¹⁵ Margo McDiarmid, “Still no way to tell how many Indigenous women and girls go missing in Canada each year” *CBC News* (December 20, 2017), online: <<http://www.cbc.ca/news/politics/indigenous-missing-women-police-data-1.4449073>> (a 2014 report by the Royal Canadian Mounted Police found 164 Indigenous women who were missing and 1,017 Indigenous women who had been murdered over the past 30 years, but many advocates believe the numbers to be higher).

¹⁶ Office of the Correctional Investigator, *Annual Report of the Correctional Investigator 2016-2017* (June 28, 2017), at 48, online: <<http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf>>.

constitutional questions that come before them and, where appropriate, to find laws and government action invalid for overstepping constitutional bounds.¹⁷ Furthermore, in the course of interpreting criminal provisions — even in non-constitutional cases — courts are guided by values and assumptions that result in expanding or contracting the scope of criminal liability and punishment. One such value is the principle of restraint, codified in section 718.2(d) and (e) of the *Criminal Code*.¹⁸ Section 718.2 states, in part that “(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.” Beyond sentencing, the principle of restraint is rooted in liberal concerns about individual liberty. Appeals to restraint may also be grounded in a more fundamental skepticism, informed by evidence of the criminal justice system’s failure to deliver on its promises and the disconnect between its liberal assumptions (*i.e.*, that humans are free, rational, and equal) and the realities of social inequality.¹⁹

In the years since the Charter was enacted, the Supreme Court of Canada has been called on to determine the constitutionality of various punitive measures, some old and some new. This article explores the way that some of those constitutional questions were answered, with a focus on McLachlin opinions, both before and after she became Chief Justice. It examines the extent to which she was a force for reining in the punishment agenda, particularly during the latter half of her time on the Court. The paper does not purport to comprehensively examine Justice McLachlin’s criminal law decisions for evidence of restraint or proliferation of punishment. Such a review would no doubt reveal a mixed record. Some decisions such as *Canada (Attorney General) v. Bedford*²⁰ and *Carter v. Canada (Attorney General)*²¹ eliminated criminal liability for acts related to prostitution and

¹⁷ See generally, Beverley McLachlin, “Charter Myths” (1999) 33 U.B.C. L. Rev. 23-36, at 31 (identifying as one of six Charter myths “The Myth that Courts can Decline to Decide Charter Issues”). *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

¹⁸ R.S.C. 1985, c. C-46.

¹⁹ See generally, Marie-Eve Sylvestre, “Moving Towards a Minimalist and Transformative Criminal Justice System”: Essay on the Reform of the Objectives and Principles of Sentencing”, report prepared for the Research and Statistics Division, Department of Justice Canada (August 5, 2016), online: <<http://www.justice.gc.ca/eng/rp-pr/jr/pps-opdp/pps-opdp.pdf>> [hereinafter “Sylvestre, ‘Moving Towards’”].

²⁰ [2013] S.C.J. No. 72, [2013] 3 S.C.R. 1101 (S.C.C.).

²¹ [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331 (S.C.C.).

assisted suicide as these offences were found to violate the Charter. Others, such as notably her decision in *R. v. Creighton*,²² held that the Charter did not require a subjective standard of fault for criminal offences and that a broad range of crimes (such as manslaughter and criminal negligence causing bodily harm) only required a lower standard of objective fault. *Creighton* substantially expanded the scope of criminal liability beyond what had been assumed at common law.²³

While that kind of thorough review of Justice McLachlin's impact on criminal law would be a welcome contribution to the literature, this paper has a more modest focus. It zeroes in on the opinions she wrote in constitutional cases about sentencing and penal laws, including two decisions released in her final years on the bench, *R. v. Nur*²⁴ and *R. v. Lloyd*,²⁵ striking down mandatory minimum sentences for unjustifiably infringing section 12 of the Charter. It also considers an earlier decision rendered in *Sauvé v. Canada (Chief Electoral Officer)*,²⁶ on the unconstitutionality of prisoner voting bans. The McLachlin opinions in these cases speak back in various ways to punitive laws and, in all of them, she led the Court — either by majority or unanimity — to impose firm limits on the state's right to punish. She is, at times, refreshingly blunt in her rejection of unsupported assertions by government of the benefits of punitive laws. Looking back at some of her early decisions shows that these concerns were long-standing for Justice McLachlin, including when she dissented from majority decisions upholding the constitutionality of mandatory minimum sentences.²⁷ The paper concludes with a brief consideration of the guidance provided through this body of case law to future courts dealing with constitutional challenges to punitive laws and policies.

²² [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

²³ For critical analyses of the way these decisions expand criminal liability through excluding subjective factors and social context from the assessment of criminal fault, see Marie-Ève Sylvestre, "The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2010-2011) 42 *Ottawa L. Rev.* 389 [hereinafter "Sylvestre, 'Redistributive Potential'"] and Isabel Grant, "Developments in Substantive Criminal Law: the 1993-94 Term" (1995) 6 S.C.L.R. (2d) 209.

²⁴ [2015] S.C.J. No. 15, [2015] 1 S.C.R. 773 (S.C.C.) [hereinafter "*Nur*"].

²⁵ [2016] S.C.J. No. 13, [2016] 1 S.C.R. 130 (S.C.C.) [hereinafter "*Lloyd*"].

²⁶ [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.) [hereinafter "*Sauvé*"].

²⁷ See her dissents in *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.) [hereinafter "*Goltz*"] and *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90 (S.C.C.) [hereinafter "*Morrisey*"] discussed *infra*, text accompanying notes 59 and 60.

II. RESTRAINING PUNISHMENT

The everyday practice of sentencing in courtrooms across the country, as well as the adjudication of constitutional cases involving challenges to sentencing practices or particular punishments is far removed from the realities of incarceration and largely disconnected from the way that its principles and goals are achieved (or not) through the sanctions imposed. A classic case in point is the persistence in appealing to the principle of deterrence in sentencing, despite decades of research showing that sentence severity generally does not influence decisions to commit crime or not.²⁸ Another example is the disconnect between what we know about the lack of oversight and accountability of imprisonment²⁹ and numerous instances of lawlessness in Canadian prisons;³⁰ and assumptions about prisons as safe places for rehabilitation³¹ and personal transformation. Numerous reports have documented abuses, illegality, and a lack of meaningful oversight of imprisonment in Canada,³² but sentencing generally proceeds without consideration of these facts — what conditions the individual will likely experience in federal or provincial prisons — and on the shaky assumption that rehabilitation is a realistic expectation in most cases.³³ There is a chasm between what we know about punishment and what we do, in the same way as there is a deep disconnect between what we know about human motivation, choice, constraint, and the assumptions we make about fault in substantive criminal law.³⁴

²⁸ Anthony Doob & Cheryl Webster, “Searching for Sasquatch: Deterrence of Crime Through Sentence Severity” in Joan Petersilia & Kevin R. Reitz, eds., *Oxford Handbook of Sentencing and Corrections* (Oxford: Oxford University Press, 2012) 173.

²⁹ Debra Parkes, “Imprisonment and the Rule of Law” in Janine Lespérance *et al.*, eds., *Canada and the Rule of Law* (Ottawa: International Commission of Jurists Canada, 2017) 193.

³⁰ See, for example, the events surrounding the death of 19-year-old Ashley Smith in a federal segregation cell while correctional officers watched, a death that was later ruled a homicide by a coroner’s inquest jury. Chief Coroner of Ontario, *Inquest Touching the Death of Ashley Smith: Jury Verdict and Recommendations* (December 2013), online:

<<http://www.caefs.ca/wp-content/uploads/2014/01/A.S.-Inquest-Jury-Verdict-and-Recommendations1.pdf>>.

³¹ There are many examples of defence counsel asking for federal prison time for their client, on the assumption that they will have access to programs and supports. See, for example, *R. v. Haultain*, [2012] A.J. No. 1114, 2012 ABCA 318 (Alta. C.A.).

³² See, for example, Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996).

³³ For a thoughtful take on how prison conditions should inform sentencing decisions see Lisa Kerr, “Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment” (2017) 32(2) C.J.L.S. 187-207.

³⁴ Sylvestre, “Moving Towards”, *supra*, note 19.

1. Mandatory Sentences

The constitutionality of mandatory minimum sentences has emerged as a contested site in debates over the limits of punishment and two recent McLachlin decisions have intervened in a significant way in those debates. Mandatory minimum sentences appeal in a simplistic way to public calls for safety and accountability for crime. However, they contribute to the mass incarceration of Indigenous people, do not deter crime, and are extremely costly in human and fiscal terms.³⁵ In pursuit of their underlying purpose — to remove discretion from judges perceived to be overly lenient in sentencing — these sentences transfer discretion to the unreviewable charging decisions of prosecutors.³⁶ Mandatory sentencing laws have proliferated³⁷ in Canada over the past 25 years and until recently, Charter rights have not acted as a meaningful check on governments intent on enacting them. In the decades following the early Charter decision in *R. v. Smith*,³⁸ declaring a mandatory seven-year sentence for importing a narcotic invalid on the basis that it amounted to

³⁵ Isabel Grant & Elizabeth Sheehy, “Cleaning Up the Mandatory Minimums Mess” *Policy Options* (May 8, 2018), online: <<http://policyoptions.irpp.org/magazines/may-2018/cleaning-up-the-mandatory-minimums-mess/>>.

³⁶ Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences” (2012) 57 S.C.L.R. (2d) 149, at 150-52 [hereinafter “Parkes, ‘From *Smith* to *Smickle*’”]. It is important to remember, however, that individual Crown attorneys are subject to prosecutorial guidelines that limit their discretion, including in cases involving mandatory minimum sentences. See, for example, *Public Prosecution Service of Canada Deskbook*, Chapter 6.4 Mandatory Minimum Penalties under the *Criminal Code*, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfp/fps-sfp/tpd/p6/ch04.html#section_2>. That section states that it “will generally be inappropriate to either agree to a plea to a lesser offence, or to stay or withdraw a charge, when it is done with the intent of avoiding the imposition of an MMP, where the evidence supports the original charge. Also, where there are two possible charges in a prosecution and one has an MMP and one does not, or both have an MMP but one is higher than the other, the one with the MMP or the one with the highest MMP should proceed.” Federal prosecutors need the consent of the Chief Federal Prosecutor to agree to stay or withdraw an offence with a mandatory sentence.

³⁷ For a paper published in 2012, I tallied nearly 100 mandatory sentences, with the vast majority of those being added in the preceding 20 years: Parkes, “From *Smith* to *Smickle*”, *id.* I counted 84 mandatory minimum sentences in the *Criminal Code*, *supra*, note 4, and 14 in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [hereinafter “*Controlled Drugs and Substances Act*”] (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). A study by the British Columbia Civil Liberties Association identified approximately 50 mandatory minimum sentences in the *Criminal Code*, noting that different methods of counting may yield different absolute numbers while concluding that “it is beyond doubt that mandatory minimum sentences of imprisonment are a growing trend in Canada”: Raji Mangat, *More than We Can Afford: The Costs of Mandatory Minimum Sentencing* (Vancouver: British Columbia Civil Liberties Association, 2014), at 9.

³⁸ [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.).

cruel and unusual punishment, the Supreme Court went quiet, upholding a number of mandatory minimum sentences³⁹ on the basis that they were not “grossly disproportionate” when applied to the accused and a limited range of hypothetical cases, meaning that they did not “shock the conscience of Canadians”.⁴⁰

The trajectory of the Supreme Court’s section 12 jurisprudence took a turn in 2015. In her opinion *R. v. Nur*,⁴¹ and shortly thereafter in *R. v. Lloyd*,⁴² the Chief Justice breathed life into the analysis that determines whether a measure constitutes cruel and unusual punishment, making section 12 a more meaningful check on the overreach and harms of mandatory sentences. At issue in *Nur* was section 95(2)(a) of the *Criminal Code*, which imposes a three-year minimum sentence for possession of a firearm that is loaded or kept with readily accessible ammunition, where the Crown proceeds by indictment. The problem with the mandatory sentence in *Nur*, as the Chief Justice stated, is that it “casts its net over a wide range of potential conduct.”⁴³ Indeed, this is the reality for most mandatory sentences. However, more specifically, the offence in *Nur* is a hybrid one for which the Crown may proceed summarily or by indictment. It punishes conduct that is very dangerous and morally blameworthy, as well as much less serious scenarios. For Chief Justice McLachlin, it was important to consider the full reach of the sanction to determine its constitutionality.

The Chief Justice flatly rejected the submissions of provincial attorneys general who argued that in reviewing a mandatory minimum sentence for compliance with section 12 a court should only consider its impact on the accused person before the Court. Her decision made it

³⁹ See, for example, *R. v. Luxton*, [1990] S.C.J. No. 87, [1990] 2 S.C.R. 711 (S.C.C.) (mandatory life sentence and mandatory 25-year parole ineligibility period for first degree murder); *Goltz*, *supra*, note 27 (minimum seven days in prison and \$300 fine for a first offence of driving while prohibited); *Morrisey*, *supra*, note 27 (four-year minimum sentence for manslaughter committed with a firearm); *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.) [hereinafter “*Latimer*”] (mandatory life sentence and minimum 10-year parole ineligibility period for second degree murder).

⁴⁰ *Lloyd*, *supra*, note 25, at para. 33. For a sample of the critical commentary on this deferential line of cases, see Kent Roach, “Searching for *Smith*: The Constitutionality of Mandatory Minimum Sentences” (2001) 39 Osgoode Hall L.J. 367; Peter Sankoff, “The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case” (2013) 21:3 Constitutional Forum Constitutionnel 1; Benjamin 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 [hereinafter “Berger, ‘More Lasting Comfort’”]; Parkes, “From *Smith* to *Smickle*”, *supra*, note 36.

⁴¹ *Nur*, *supra*, note 24.

⁴² *Lloyd*, *supra*, note 25.

⁴³ *Nur*, *supra*, note 24, at para. 82.

clear that the key “question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples’ situations, resulting in a violation of s. 12.”⁴⁴ The only limit on this analysis is that “far-fetched” or “remote” situations are excluded.⁴⁵ She confirmed that the personal characteristics of people potentially caught by the mandatory minimum cannot be excluded from the analysis, noting that “what is reasonably foreseeable necessarily requires consideration of the sort of situations that may reasonably be expected to be caught by the mandatory minimum, based on experience and common sense.”⁴⁶ In doing so, she reinvigorated the analysis from *Smith* that had been significantly limited in the intervening section 12 decisions of the top court.

In applying the new reasonable foreseeability approach to the sentence at issue in *Nur*, the Chief Justice cited the hypothetical identified by the Court of Appeal, namely “a situation at the licensing end of the spectrum of conduct caught by section 95(1) for which a three-year sentence would be grossly disproportionate — where a person who has a valid licence for an unloaded restricted firearm at one residence, safely stores it with ammunition in another residence, e.g. at her cottage rather than her dwelling house.”⁴⁷ Situations like this one that are essentially licensing offences have arisen in the case law and are clearly within the foreseeable application of the law, although it may be rare for the Crown to proceed by indictment in such cases. On that point, the Chief Justice cited *Smith* to reject the argument of the attorneys general that prosecutorial discretion could be relied on to salvage the constitutionality of the mandatory sentence.

In thinking about the limits of punishment, a particularly significant aspect of *Nur* is the Chief Justice’s candid discussion of the principle of deterrence as it relates to sentencing severity. Considering whether the section 12 violation entailed by the mandatory sentence was a reasonable limit under section 1, she noted that “[d]oubts concerning the effectiveness of incarceration as a deterrent have been longstanding”,⁴⁸ citing the 1987 Sentencing Commission Report.⁴⁹ She went on to cite the extensive

⁴⁴ *Id.*, at para. 57.

⁴⁵ *Id.*, at para. 68, citing *Goltz*, *supra*, note 27.

⁴⁶ *Nur*, *id.*, at para. 74.

⁴⁷ *Id.*, at para. 79.

⁴⁸ *Id.*, at para. 113.

⁴⁹ Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach — Report of the Canadian Sentencing Commission* (Ottawa: The Commission, 1987).

criminological literature which “suggests that mandatory minimum sentences do not, in fact, deter crimes”.⁵⁰ As one commentator recently noted, “it is difficult to contain the logic of this ruling to mandatory minimum sentences alone.”⁵¹ Indeed, shortly after *Nur*, the Chief Justice signed onto the dissenting opinion of Gascon J. in *R. v. Lacasse*,⁵² in which the dissenters would have overturned a trial judge’s sentencing decision for impaired driving causing death because it overemphasized deterrence, minimized key mitigating factors, and did not individuate.

While *Nur* dealt with firearms, it was a drug offence at issue in *Lloyd*.⁵³ Section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*⁵⁴ mandated a minimum sentence of one year in prison for trafficking or possession for the purpose of trafficking in a Schedule I drug such as heroin, cocaine, methamphetamine, where the individual has been convicted of any drug offence other than simple possession within the previous 10 years. The Chief Justice developed and applied the more nuanced reasonable foreseeability analysis she introduced in *Nur*, holding that the mandatory one-year sentence caught within its net conduct for which the sentence would be grossly disproportionate. In addition to selling drugs, the definition of trafficking includes sharing or administering a drug, meaning that the mandatory sentence would apply to a person addicted to drugs who shared a small amount of drugs with a friend or spouse and who had a conviction for a similar offence nine years earlier.⁵⁵ The provision applies to any amount of Schedule I drugs and the previous conviction need not even be for a Schedule I drug; it could be a conviction in relation to a small amount of marijuana, for example. Many street-level traffickers, who are themselves users, are paid in drugs and only traffic to support their addiction. The Chief Justice foresaw the mandatory sentence applying to an individual such as this who, between conviction and sentence, was able to address the addiction through treatment and was not deserving of a one-year jail sentence, but a sentencing judge would be required to make that order. She concluded

⁵⁰ *Id.*, at para. 114.

⁵¹ Benjamin L. Berger, “Reform of the Purposes and Principles of Sentencing: A Think Piece”, report prepared for the Research and Statistics Division, Department of Justice Canada (October 2016), online: <http://www.justice.gc.ca/eng/tp-pt/jr/rpps-ropp/RSD_RR2016-eng.pdf>, at 9 [hereinafter “Berger, ‘Think Piece’”].

⁵² [2015] S.C.J. No. 64, [2015] 3 S.C.R. 1089 (S.C.C.).

⁵³ *Supra*, note 25.

⁵⁴ S.C. 1996, c. 19.

⁵⁵ *Lloyd*, *supra*, note 25.

that such a sentence would be grossly disproportionate in the circumstances and would “shock the conscience of Canadians”.⁵⁶

In declaring the mandatory sentence in *Lloyd* invalid, the McLachlin majority required that Parliament either narrow the penalty’s reach to “catch only conduct that merits the mandatory minimum sentence” or to “provide for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases.”⁵⁷ Notably, the dissent in *Lloyd* looked to the Court’s previous jurisprudence on mandatory sentences and suggested that Parliament is traditionally entitled to deference and “not obliged to create exemptions to mandatory minimums as a matter of constitutional law.”⁵⁸ It is certainly the case that *Nur* and *Lloyd* marked a departure from the deferential stance of the Supreme Court jurisprudence on mandatory sentences, but it was a welcome one that had been foreshadowed by a number of Justice McLachlin’s earlier opinions.

Beginning very earlier in her tenure on the Court, McLachlin J. dissented in the 1991 decision in *Goltz*,⁵⁹ where the majority upheld a mandatory seven-day prison sentence. She would have found it to violate section 12 of the Charter, taking the view that for the constitutional analysis to be meaningful it needed to consider reasonable hypotheticals that might arise. A decade later she also signed on to Arbour J.’s dissent in *Morrisey*,⁶⁰ a decision acknowledging that mandatory minimums had the effect of inflating the sentencing floor for crimes to which they were attached. As in her dissent in *Goltz*, the dissenting opinion in *Morrisey* emphasized the need for a meaningful reasonable hypothetical analysis, one that considered characteristics and circumstances of accused persons that might reasonably arise. Finally, the Chief Justice’s unanimous decision for the Court in *R. v. Ferguson*,⁶¹ also foreshadowed the approach she later took on behalf of the Court in *Nur*. In *Ferguson*, the question before the Court was whether an individual could be exempted under section 24(1) of the Charter from the application of an otherwise valid mandatory minimum sentence if it would be unconstitutional as applied to that person. Chief Justice McLachlin ruled that constitutional exemptions were not available to remedy unconstitutional sentences. If a law produced unconstitutional effects as it applied to anyone, that law

⁵⁶ *Id.*, at para. 33.

⁵⁷ *Id.*, at para. 3.

⁵⁸ *Id.*, at paras. 95 and 108.

⁵⁹ *Supra*, note 27.

⁶⁰ *Supra*, note 27.

⁶¹ [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.).

was invalid and should be so declared. While this decision denied a discretionary remedy in some cases, it was a bold statement of Parliament's responsibility to enact constitutional laws; the Court was not going to clean up Parliament's mess or remedy its overreach. Benjamin Berger aptly predicted that *Ferguson* "may trouble the easy politics around minimum sentences and will at least send the right judicial message about the substantive demands we make of our penal laws".⁶²

The recent decisions in *Nur* and *Lloyd* are important for the life they breathe into the section 12 analysis. However, the pathologies of our criminal justice system run much deeper than the proliferation of mandatory minimum sentences and the gross disproportionality standard for section 12 remains a high bar. In short, "a great deal of unfairness can take place short of gross disproportionality".⁶³ Therefore, it is heartening that concern about over-reaching punitiveness emerges in other cases involving the constitutionality of sentencing measures, including in *R. v. Safarzadeh-Markhali*.⁶⁴ At a time of soaring pre-trial detention rates,⁶⁵ the Harper government passed the *Truth in Sentencing Act*⁶⁶ which aimed to eliminate enhanced credit for pre-trial detention. The Chief Justice wrote the unanimous opinion in *Safarzadeh-Markhali*, declaring invalid the denial of enhanced credit for pre-sentence custody when the person being sentenced was denied bail primarily because of a prior conviction.⁶⁷ The impact of this provision was found to be unconstitutionally overbroad because it deprived individuals of their liberty in ways that have nothing to do with its legislative purpose of enhancing public safety and security.⁶⁸

⁶² Berger, "More Lasting Comfort", *supra*, note 40.

⁶³ Benjamin L. Berger, "Constitutional Principles" [hereinafter "Berger 'Constitutional Principles'"] in Markus D. Dubber & Tatjana Hoernle, eds., *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), at 19.

⁶⁴ [2016] S.C.J. No. 14, [2016] 1 S.C.R. 180 (S.C.C.).

⁶⁵ Correction Services Program – Canadian Centre for Justice Statistics, "Trends in the use of remand in Canada, 2004/2005 to 2014/2015" *Juristat* (January 10, 2017), online: <<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/14691-eng.pdf?st=4gubbpNF>>.

⁶⁶ S.C. 2009, c. 29.

⁶⁷ *Criminal Code*, *supra*, note 4, s. 719(3.1).

⁶⁸ This decision built on the unanimous opinion of the Court penned by Karakatsanis J. in *R. v. Summers*, [2014] S.C.J. No. 26, [2014] 1 S.C.R. 575 (S.C.C.), which was a pointed rejection of the "logic" of the *Truth in Sentencing Act* that time spent on remand should be credited 1-1 ("crediting a single day for every day spent in a remand centre is often insufficient to account for the full impact of that detention, both quantitatively and qualitatively", at para. 2).

2. Prisoner Disenfranchisement

We turn now to another key McLachlin decision, this time outside the sentencing context. *Sauvé*⁶⁹ dealt with the constitutionality of a prisoner voting ban and McLachlin C.J.C.'s majority opinion took aim at the excesses of punishment. She also signed on to other decisions limiting punishment such as the unanimous opinion in *Whaling*,⁷⁰ in which the Supreme Court had little trouble finding the retroactive repeal of an early parole process to violate section 11(h) of the Charter; *United States of America v. Burns*,⁷¹ on the constitutional limits on extradition to face the death penalty; and two decisions, *May* and *Khela*, upholding the rights of prisoners to seek timely *habeas corpus* review of unlawful prison conditions.⁷² However, the focus of this section will be her decision in *Sauvé* and what it says about the limits of punishment and the role of courts in enforcing those limits.

Sauvé was a constitutional challenge to section 51(e) of the *Canada Elections Act*,⁷³ which disenfranchised prisoners serving a sentence of two years or more. Rick Sauvé, a lifer, together with a group of Indigenous prisoners, argued that prisoner disenfranchisement violated sections 3 and 15 of the Charter, the right to vote and the equality guarantee respectively. In a 5-4 decision, the Chief Justice wrote a forceful majority opinion finding the law to be an unjustified infringement of the section 3 Charter right of all citizens to vote. In so doing, *Sauvé* imposed a significant limit on popular punitiveness in Canada.⁷⁴ The decision made clear that prisoners — or citizen lawbreakers, to use the Court's terminology — “do not hold attenuated, weaker versions of the rights enjoyed by other Canadians” and are “unequivocally full rights holders under the Charter”.⁷⁵ The Charter, the majority proclaimed, “emphatically says that prisoners are protected citizens, and short of a constitutional amendment, lawmakers cannot change this”.⁷⁶

⁶⁹ *Supra*, note 26.

⁷⁰ *Supra*, note 7.

⁷¹ [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

⁷² *May v. Ferndale Institution*, [2005] S.C.J. No. 84, [2005] 3 S.C.R. 809 (S.C.C.) and *Mission Institution v. Khela*, [2014] S.C.J. No. 24, [2014] 1 S.C.R. 502 (S.C.C.).

⁷³ R.S.C. 1985, c. E-2.

⁷⁴ Debra Parkes, “Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts” [hereinafter “Parkes, ‘Prisoner Voting Rights in Canada’”] in Christopher Mele & Teresa A. Miller, eds., *Civil Penalties, Social Consequences* (New York: Routledge, 2005), at 247. See also Efrat Arbel, “Contesting Unmodulated Deprivation: *Sauvé v. Canada* and the Normative Limits of Punishment” (2015) 4:1 *Can. J. Hum. Rts.* 121 [hereinafter “Arbel”].

⁷⁵ Parkes, “Prisoner Voting Rights in Canada”, *id.*, at 247.

⁷⁶ *Sauvé*, *supra*, note 26, at para. 37.

The McLachlin majority holds in *Sauvé* that it is constitutionally unacceptable to deny prisoner voting rights for the dual purpose of enhancing the criminal sanction and promoting respect for the rule of law. This kind of expressive punishment, pursued in the absence of any evidence of its efficacy,⁷⁷ was defended by the government as a reasonable limit on the right to vote under section 1. For the Chief Justice, those objectives barely scraped through the first stage of the *Oakes* analysis,⁷⁸ while they enjoyed strong support among the dissenting judges who were very deferential to the government's vague justifications. Chief Justice McLachlin's opinion pushes back against the popular acceptance of harsh punishments, particularly where there is simply no evidence they are necessary or effective.

It is worth contemplating the impact of *Sauvé* since it has become an important precedent internationally. *Sauvé* takes Canada in a fundamentally different direction from our American neighbours, where lifetime bans on even former prisoners ever voting have been upheld as constitutional.⁷⁹ The *Sauvé* majority has been influential in decisions to reject prisoner voting bans on human rights grounds by the European Court of Human Rights,⁸⁰ the South African Constitutional Court,⁸¹ and the High Court of Australia,⁸² among others.

Domestically, *Sauvé* also set a new tone for rights litigation by prisoners in the Charter era. While some judges continue to meet prisoner's rights claims with a posture of deference toward correctional legislation and decision-making,⁸³ we have seen some important successes by prisoners in constitutional and human rights cases dealing with conditions of confinement. For example, in the recent trial decisions in Ontario⁸⁴ and

⁷⁷ "The record does not disclose precisely why Parliament felt that more punishment was required for this particular class of prisoner, or what additional objectives Parliament hoped to achieve by this punishment that were not accomplished by the sentences already imposed." *Id.*, at para. 25.

⁷⁸ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

⁷⁹ *Richardson v. Ramirez*, 418 U.S. 24 (1974). Approximately 6.1 million Americans are denied the right to vote by felony disenfranchisement laws: The Sentencing Project, *Felony Disenfranchisement*, online: <<https://www.sentencingproject.org/issues/felony-disenfranchisement/>>.

⁸⁰ *Hirst v. United Kingdom (No 2)*, (2005) ECHR 681.

⁸¹ *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10.

⁸² *Roach v. Electoral Commissioner* (2007) 239 ALR 1 (H.C. Aust.).

⁸³ Debra Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms" (2007) 40 U.B.C. L. Rev. 629 and Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill L.J. 43.

⁸⁴ *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, [2017] O.J. No. 6592, 2017 ONSC 7491 (Ont. S.C.J.).

British Columbia⁸⁵ declaring unconstitutional certain aspects of the federal law authorizing solitary confinement, deeply entrenched and widespread correctional laws and policies are being subjected to close scrutiny and have been found wanting. *Sauvé* is rightly considered an important case for limiting the state's power to punish.⁸⁶

III. THE FUTURE OF RESTRAINING PUNISHMENT

The political process has utterly failed to rein in punishment. Under Harper, punitive laws proliferated but despite promises of the Trudeau government to roll back some of these excesses and to reform criminal law more broadly, the results so far have been disappointing. The pointed prompt from the Supreme Court in *Nur* and *Lloyd* to at least provide a safety valve from the excesses of mandatory sentences has not yet yielded a legislative response.⁸⁷ With at least 174 Charter challenges to mandatory minimum sentences before Canadian courts,⁸⁸ sentencing policy is being changed on a piecemeal and inconsistent basis.

The Liberal government's omnibus crime bill, C-75,⁸⁹ introduced in March 2018, sets out to amend a number of *Criminal Code* provisions, including those dealing with bail, preliminary inquiries, and jury selection, but we are hearing crickets on sentencing reform (other than the proposed increase in the Bill of the default maximum penalty for summary conviction offences to two years less a day, from six months). Unfortunately, the only movement is a ratcheting up, rather than a ratcheting down, of sentences. Recently, Senator Kim Pate stepped into the legislative void,⁹⁰ introducing a Private Member's Bill in the Senate that would restore judicial discretion to depart from mandatory sentences where the circumstances warrant.⁹¹

⁸⁵ *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2018] B.C.J. No. 53, 2018 BCSC 62 (B.C.S.C.) [hereinafter "*BCCLA v. Canada*"].

⁸⁶ Arbel, *supra*, note 74.

⁸⁷ Amanda Carling *et al.*, "Mandatory minimum sentencing should be Trudeau's first resolution" *The Globe and Mail* (January 2, 2018), online: <<https://www.theglobeandmail.com/opinion/mandatory-minimum-sentencing-should-be-trudeaus-first-resolution/article37465763/>>.

⁸⁸ Canadian Press, "Tired of waiting, Kim Pate prepares a bill to tackle mandatory minimum penalties" *iPolitics* (April 10, 2018), online: <<https://ipolitics.ca/2018/04/10/tired-of-waiting-kim-pate-prepares-a-bill-to-tackle-mandatory-minimum-penalties/>> [hereinafter "Canadian Press"].

⁸⁹ Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl. (First Reading: March 29, 2018), online: <<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/first-reading>>.

⁹⁰ Canadian Press, *supra*, note 88.

⁹¹ Bill S-251, *An Act to amend the Criminal Code (independence of the judiciary) and to make related amendments*, 1st Sess., 42nd Parl. (First Reading: May 29, 2018), online: <<http://www.parl.ca/DocumentViewer/en/42-1/bill/S-251/first-reading>>.

Perhaps the most troubling of mandatory sentences, and one that is often left out of discussions aimed at abolishing them, is the mandatory life sentence and mandatory parole ineligibility periods for murder (25 years for first degree murder and between 10 to 25 years for second degree murder).⁹² Under this mandatory sentencing regime, which is harsh by international standards,⁹³ Canadians sentenced for murder are spending many more years in prison today than they did at the time capital punishment was abolished in 1976.⁹⁴ Nearly one quarter of people under federal correctional supervision are lifers.⁹⁵ The impact of these sentencing provisions is gendered and racialized, as it is for other mandatory sentences. From 2005 to 2015, Indigenous women comprised 44 per cent of new women lifers, and this overrepresentation is even more pronounced than it is for Indigenous men.⁹⁶

Canada's murder sentencing regime has become more punitive in recent years as Parliament has amended the *Criminal Code* to allow parole ineligibility periods to be made consecutive to one another and to abolish an important opportunity for early parole review, the so-called "faint hope clause". The resulting sentences, including those that amount to *de facto* life without parole, raise important constitutional questions that are beginning to come before the courts.⁹⁷ Decades have passed

⁹² It is, however, included in Senator Pate's Bill.

⁹³ Only 11 out of 42 European Union member states impose a mandatory life sentence for murder. In Australia, the majority of states have removed the mandatory life sentence for murder. New Zealand has also replaced the mandatory minimum sentence for murder with a rebuttable presumption in favour of a life sentence. While the mandatory life sentence for murder continues to exist in England and Wales, there are no statutory minimum parole ineligibility periods for murder. In Portugal, life sentences are constitutionally prohibited. See EU, European Commission, *Study on Minimum Sanctions in the EU Member States*, (Brussels, 2015), online: <http://ec.europa.eu/justice/criminal/document/files/rep_ort_minimum_sanctions_en.pdf>, at 42.

⁹⁴ In 1976 the average time in custody for capital and non-capital murder was 15.8 years and 14.6 years, respectively. By 1999, the estimated average time that a Canadian convicted of first degree murder spent in prison was 28.4 years: Mark Nafekh *et al.*, *A Review and Estimate of Time Spent in Prison for Offenders Sentenced for Murder* (Ottawa: Correctional Service of Canada, 2002), online: <<http://www.csc-scc.gc.ca/005/008/092/b27-eng.pdf>>. In other comparable jurisdictions, the number was much lower: 11 years in New Zealand; 14.4 in England; and 14.8 in Australia. Unfortunately, more recent data is not publicly available, but trends in corrections and parole decision-making suggest that the time lifers spend in prison before is likely at least as high (or higher) now than it was in 1999.

⁹⁵ Public Safety Canada, *2015 Annual Report: Corrections and Conditional Release Act Statistical Overview*, online: <<https://www.publicsafety.gc.ca/cnt/rsres/pblctns/ccrso-2015/index-en.aspx>>.

⁹⁶ *Id.*

⁹⁷ See, for example, *R. v. Granados-Arana*, [2017] O.J. No. 5964, 2017 ONSC 6785 (Ont. S.C.J.) (upholding the constitutionality of s. 745.51 of the *Criminal Code*, *supra*, note 4, which allows a court to order that parole ineligibility periods be served consecutively). At time of writing, a Quebec court was seized with a Charter challenge to a 150-year parole ineligibility period made possible by s. 745.51. The challenge was launched by Alexandre Bissonette, the man convicted of

since the Supreme Court of Canada last considered the constitutionality of the mandatory life sentence and parole ineligibility periods for murder⁹⁸ and first degree murder,⁹⁹ in all cases finding no Charter infringement. This question is ripe for reconsideration in the light of legislative changes that have substantially lengthened parole ineligibility periods, particularly given the degree to which earlier courts relied on the faint hope clause to uphold murder sentences as constitutional.¹⁰⁰

The approach Chief Justice McLachlin took to reviewing the constitutionality of mandatory sentences in *Nur* and *Lloyd* and prisoner disenfranchisement in *Sauvé* emphasizes the importance of looking at the real impact and reach of these provisions. She also signalled that evidence matters in justifying punitive laws. In *Nur* and *Lloyd* this meant questioning the “common sense” of deterrence as a principle justifying longer sentences and in *Sauvé* it meant refusing to defer to vague, expressive justifications for punishment. The solitary confinement Charter challenges are working their way toward the Supreme Court,¹⁰¹ along with the many challenges to mandatory sentences. The murder sentencing regime is crying out for a careful examination of its impact in relation to its policy goals and the new constitutional standard for section 12 articulated in *Nur* and *Lloyd*. The lengthening of parole ineligibility periods, the abolition of the faint hope clause, and the way the mandatory life sentence precludes consideration of social context and different levels of culpability, including *Gladue* factors,¹⁰² combine to produce compelling arguments that the regime is cruel and unusual. Clearly, we are going to continue to need the Supreme Court of Canada to act as a check on the state’s punishment agenda. In considering the cases that will no doubt come before them, current and future judges would do well to build on the legacy of Chief Justice McLachlin’s punishment cases.

murdering five people at a Quebec mosque. See Caroline Plante, “Sentencing Quebec mosque shooter to 150 years in prison would deprive him of hope: defence” *The Globe and Mail* (June 20, 2018), online: <<https://www.theglobeandmail.com/canada/article-sentencing-quebec-mosque-city-to-150-years-in-prison-would-deprive-him/>>.

⁹⁸ *Latimer, supra*, note 39.

⁹⁹ *R. v. Arkell*, [1990] S.C.J. No. 86, [1990] 2 S.C.R. 695 (S.C.C.).

¹⁰⁰ *R. v. Bowen*, [1990] A.J. No. 925, 1990 ABCA 317 (Alta. C.A.).

¹⁰¹ The BCCLA decision (*BCCLA v. Canada, supra*, note 85) has been appealed to the BCCA and numerous interveners are applying to speak to the broader context and impact of segregated conditions of confinement: *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2018] B.C.J. No. 2833, 2018 BCCA 282 (B.C.C.A.).

¹⁰² *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

