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## Disarming Canadians, and Arming them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime--An Essay on an Apparent Contradiction

Helene Dumont

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# Disarming Canadians, and Arming them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime—An Essay on an Apparent Contradiction

## Abstract

In an article published in French in 1997, the author offered reflections on feminism and criminal law that would allow for a better control of violent crime, without Parliament having to resort to excessively severe sentences. In this respect, she argued that there was no contradiction in supporting the radical ban of firearms in Canada, while opposing a minimum sentence of four years under the Firearms Act, which currently affects approximately ten serious Criminal Code offences. After setting out her position in favour of the "disarmament" of Canadians, the author argued that minimum sentences of four years were unconstitutional. Such sentences would constitute cruel and unusual punishment under section 12 of the Charter. They would also be contrary to one of the principles of fundamental justice guaranteed under section 7, which mandates proportionality between offences and sentences. Finally, the author argued that minimum mandatory sentences could not fulfill the objectives of general deterrence and of deserved retribution. On the contrary, they are ineffective in helping to reduce violent crime, and lead to arbitrary applications. In her epilogue to her 1997 article the author expresses her regret that the principle of proportionality has not been promoted as a constitutional principle of justice in the Momsey and the Latimer cases, and wonders if times are too hard for tolerance and moderate sentencing.

## Keywords

Violent crimes—Prevention; Firearms—Law and legislation; Mandatory sentences; Canada

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# DISARMING CANADIANS, AND ARMING THEM WITH TOLERANCE: BANNING FIREARMS AND MINIMUM SENTENCES TO CONTROL VIOLENT CRIME. AN ESSAY ON AN APPARENT CONTRADICTION<sup>©</sup>

BY HÉLÈNE DUMONT\*

In an article published in French in 1997, the author offered reflections on feminism and criminal law that would allow for a better control of violent crime, without Parliament having to resort to excessively severe sentences. In this respect, she argued that there was no contradiction in supporting the radical ban of firearms in Canada, while opposing a minimum sentence of four years under the *Firearms Act*, which currently affects approximately ten serious *Criminal Code* offences.

After setting out her position in favour of the "disarmament" of Canadians, the author argued that minimum sentences of four years were unconstitutional. Such sentences would constitute cruel and unusual punishment under section 12 of the *Charter*. They would also be contrary to one of the principles of fundamental justice guaranteed under section 7, which mandates proportionality between offences and sentences. Finally, the author argued that minimum mandatory sentences could not fulfill the objectives of general deterrence and of deserved retribution. On the contrary, they are ineffective in helping to reduce violent crime, and lead to arbitrary applications. In her epilogue to her 1997 article, the author expresses her regret that the principle of proportionality has not been promoted as a constitutional principle of justice in the *Morsey* and the *Latimer* cases, and wonders if times are too hard for tolerance and moderate sentencing.

Dans un article publié en 1997, l'auteur a offert des réflexions inspirées à la fois du féminisme et du droit pénal qui permettraient un meilleur contrôle sur les crimes violents sans toutefois nécessiter que le Parlement impose des peines excessivement sévères. L'auteur a souligné qu'il n'y avait pas de contradiction entre le fait d'encourager un mouvement radical qui a comme objectif l'interdiction des armes à feu, et le fait d'opposer la peine minimale de quatre ans imposée en vertu de la *Loi sur les armes à feu* qui s'applique présentement à une dizaine d'infractions du *Code criminel*.

Après avoir argumenté en faveur du désarmement des canadiens, l'auteur a fait le point que la peine minimale de quatre ans était inconstitutionnelle. Une telle peine constituerait une peine cruelle et inusitée et serait donc incompatible avec l'article 12 de la *Charte*. Cette peine serait aussi contraire aux principes de justice fondamentale garantis par l'article 7 de la *Charte*, qui exige la proportionnalité entre l'infraction et la peine imposée. Finalement, l'auteur a maintenu que les peines minimales obligatoires ne pouvaient pas satisfaire aux objectifs de la discussion et du châtiement mérité. Au contraire, ces peines seraient inefficaces à réduire le crime violent et pourraient résulter en applications arbitraires. Dans l'épilogue de son article paru en 1997, l'auteur a exprimé son regret que le principe de proportionnalité n'a pas été promu comme étant un principe constitutionnel dans les arrêts *Morsey* et *Latimer*, et elle se demande si ces temps sont trop difficiles pour la tolérance et l'imposition de sentences modérées.

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<sup>©</sup> 2001, H. Dumont. Article published in the *Canadian Criminal Law Review*, "Désarmons les Canadiens et armons-nous de tolérance: Bannir les armes à feu, bannir les peines minimales dans le contrôle de la criminalité violente, essai sur une contradiction apparente" (1997) 2 Can. Crim. L.R. 43. Translated with the financial support of the Department of Justice of Canada and with permission of Carswell, a division of Thompson Canada Limited. Carswell does not guarantee the accuracy of the translation.

\* Héléne Dumont, Full Professor, Faculty of Law, Université de Montréal.

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In recent years, the call for better firearms control has been strongly driven by shocking murders that have alarmed the Canadian public. The *Firearms Act*<sup>1</sup> was adopted in a political climate of controversy and confrontation between pressure groups with opposing viewpoints. On one hand, the reaction of women to the horrible tragedy at the École Polytechnique gave rise to the movement for increased firearm control, and resulted in a petition for a radical ban on firearms being signed by an unprecedented number of Canadians. This was followed by active and continuous efforts in favour of a new *Firearms Act*.<sup>2</sup> On the other hand, rich firearms dealers, avid collectors, farm and sport hunters (some of whom are poachers), banded together to defend their freedom of expression and the right to own firearms, describing these weapons as merely inanimate objects.

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<sup>1</sup> Bill C-68, *An Act Respecting Firearms and Other Weapons*, 1st Sess., 35th Parl., Ottawa, 1995 (1st reading 14 February 1995).

<sup>2</sup> *Firearms Act*, S.C. 1995, c. 39 (assented to 5 December 1997); See also Department of Justice, *Background Information on Firearms Control* (Ottawa, Department of Justice) [hereinafter *Background Information*].

Much to the disappointment of the “anti-firearms lobby,” then Minister of Justice Allan Rock presented a bill that did not ban commercially-sold weapons that are not sports-related. He also endorsed one of the arguments of the “pro-firearms lobby” by proposing a bill that sought to severely punish violent criminals committing crimes with firearms, but did not target peaceful owners of firearms.

This article reflects on the apparent contradiction between supporting a total ban on firearms in Canada, while opposing the tougher sentences set out in the *Firearms Act*.<sup>3</sup> Regardless of how they may appear, the arguments that follow relate as much to ideology as they do to law.

## I. A POSITION OF PRINCIPLE: FROM PERSONAL EXPERIENCE TO DEEP-SEATED CONVICTION

To help the reader better understand how my personal experience has shaped my thinking, I should state from the outset that the tragedy at the Ecole Polytechnique hit close enough to home, such that I consider myself a deeply-affected witness of the events. As Dean of the Faculty of Law at the Université de Montréal at the time of the shootings, and an official participant in the academic follow-up to the event, it would be an understatement to say that I was haunted by the fear and grief of the survivors and the victims’ loved ones. I was also deeply upset to learn that the daughter of a friend of mine and the sister of one of my law students had been among the victims. My belief that we urgently need to disarm Canadians and fight to ban firearms in Canada, indeed all weapons that cannot be categorized as collectors’ items or for “sport,” partly stems from this horrible incident.<sup>4</sup>

### A. *Fear Management by Parliament*

It is often said that fear is a bad counsellor. As fear greatly clouds any rational examination of reality, it should not be the driving force behind our criminal laws. Feelings of fear and insecurity on the part of Canadians, have been significant factors in setting standards of criminal law in the

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<sup>3</sup> See especially *Criminal Code*, R.S.C. 1985, c. C-46, ss. 220, 236, 239, 244, 272-73, 279, 279(1), 344, 346.

<sup>4</sup> Without hesitating, I signed the Canada-wide petition on better firearm control that circulated after the Polytechnique shootings.

latter years of this century.<sup>5</sup> However, those who must ensure the protection of Canadians should not allow fear to cloud their judgment. Experiencing fear and confusion when faced with serious problems in society is completely natural, and allows the legislator to empathize with the Canadian public. However, this does not remove the legislator's obligation to choose and develop criminal laws that are most likely to ensure peace, security, tolerance, and justice in Canadian society. Faced with mass distress, the legislator should not lose sight of the political and democratic responsibility to direct legislative solutions towards a more peaceful and just society, but draw on the expertise available in a well-organized state governed by the rule of law.

The idea that imposing minimum sentences for serious criminal offences might reduce violent crime constitutes a questionable handling of feelings of insecurity in the Canadian public on the part of the lawmakers. While a greater control of firearms is a better strategic means to promote the development of a peaceful society, increasing the severity of punishments does not guarantee us a more peaceful society.

As we look back on the criminal laws adopted in the 1980s and 1990s, we see that to better control violent crime, particularly violence against women and children, the state chose to use the most violent weapon in its arsenal: punitive law in its most severe form. I am not, in any way, claiming that harm done to the human body and mind is not an important issue. It is, indeed, right to demand that criminal law address all types of violence that have formerly been tolerated or deliberately ignored. Emerging rhetoric on fundamental rights has undeniably led Canadians to become more interested in seeking better protection of their personal and public safety. However, this interest has resulted in an irrational increase of their fear and insecurity, and a decrease in their concern for liberty, tolerance, and justice. The government has documented studies on the Canadian public's misperception of the extent of violent crime in Canada,<sup>6</sup>

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<sup>5</sup> Department of Justice, *Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda* (Ottawa: Department of Justice, 1995) [hereinafter *Towards Safer Communities*]. The introduction states at 1: "The Government was elected by Canadians in 1993, in part because of its pledge to protect the basic rights of all citizens to live in peaceful and safe communities. That pledge included action on gun control, young offenders, hate crime, and violence against women and children."

<sup>6</sup> See *National Attitudes Towards Crime and Gun Control: A Research Report for the Ministry of the Solicitor General of Canada*, (Ottawa: Supply and Services Canada, 1997); J. Roberts, "Public Opinion, Crime and Criminal Justice," in M. Tonry, ed., *Crime and Justice, A Review of Research*, (Chicago: University of Chicago Press, 1992) vol. 16; K. Hung & S. Bowles, "Public Perceptions of Crime" (1995) 15:1 *Juristat* 1 at 2ff [hereinafter "Public Perceptions"]; Report of the Canadian Sentencing

a misperception that leads many to call for criminal laws with teeth. Nevertheless, despite their knowledge of the extent of violent crime in Canada and especially of the inaccurate nature of the Canadian public's perception of the issue, legislators did not hesitate to pass laws based on the feelings of intolerance and fear that were founded on these misperceptions.

How can our criminal laws better reflect the public's concern for safety, while promoting their desire for a democratic society based on peace, liberty, tolerance and justice? To accomplish this goal, legislators and the Canadian public as a whole, should try to apply more reason than fear in developing criminal law—infrastructure for safety. They must recognize the symbolic and political power of criminal laws, and determine the effectiveness of each punitive measure is in terms of securing personal and public safety. Finally, legislators must always choose the solutions that will result in a peaceful, free, tolerant, and just society.

#### B. *The Symbolic Power of Criminal Laws is Sometimes Enough*

The relatively short-term efficiency of the new *Firearms Act* can be criticized, specifically its limited ability to immediately change the attitude of firearm owners. However, what we need to focus on is the new law's symbolic power.<sup>7</sup>

Firearms are themselves highly symbolic. They evoke strength and power in those, usually men, who possess them. Firearms give the owner control over a supposedly hostile environment, present in nature, the city or people, and are even considered a natural extension of the human arm, to the point where some claim gun ownership as a right. When not wielded by a human being, they are seen as inherently harmless. In short, a stricter law on the possession and use of firearms would seek to address all of these symbols.<sup>8</sup>

The law challenges these symbols by stating the following: possession of a firearm is not natural; firearms are not needed for safety or defence against a supposedly hostile environment; possession of a firearm is a privilege, not a right; a firearm is a dangerous object. My support for a

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Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 87ff [hereinafter *Archambault Report*]; See also D. Golash & J. Lynch, "Public Opinion, Crime Seriousness, and Sentencing Policy" (1995) 22 *Am. J. Crim. L.* 702.

<sup>7</sup> N. Boyd, "Bill C-68: Simple Problem, Complex Solutions" (1995) 37 *Can. J. Crim.* 214 at 216-18.

<sup>8</sup> See H. Buckner, "Sex and Guns: Is Gun Control Male Control" (89th annual American Sociological Association conference on Deviance and Control, 5 August 1994, online. H. Buckner website <<http://www.btuckner.com>> (date accessed: 25 January 2002).

stricter firearm law is largely based on my rejection of all symbols that have traditionally been linked to firearms. The Canadian legislation on firearms is the bearer of new symbols. For example, it inscribes in law the fact that unlike Americans, Canadians can live without firearms.<sup>9</sup>

When I re-examine my passing fear to determine if it was an imprudent influence in leading me to promote a Canadian law prohibiting all military and para-military weapons, and handguns, I deduce that it simply directed my interest toward the "disarmament" of Canadians. Rather, my desire for tolerance and peace is what drives my support for a stricter firearm law. Creating a society without weapons, at least with considerably fewer weapons, is a more tangible way of attaining peace in our society and cultivating tolerance among the Canadian population.<sup>10</sup> Is tolerance not a quality that we like to think of as being distinctly Canadian? Why then, if we are so tolerant, do we have to own firearms?

### C. *The Creation of a Feminist and Tolerant Opinion*

Some of my reflections on fear, tolerance, and peace also take me back to the main elements of my feminist vision of criminal law. Much feminist legal literature demonstrates that, for women, in addition to the fear of crime and violence, there is also a fear of being mistreated by the judicial system.<sup>11</sup> For example, Canadian feminism has contributed considerably to changing the legal rules on reprehensible human conduct in the private and public domains, as well as politicizing violent acts that previously went unpunished. One need only think of the numerous

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<sup>9</sup> According to information collected by the Coalition for Gun Control, the rate of homicides not involving the use of a firearm is slightly higher in the United States than in Canada (1.7 times), but is ten times higher in homicides involving a firearm. On this subject see M. Killias, "International Correlations Between Gun Ownership and Rates of Homicide and Suicide" (1993) 148 *Can. Med. Assoc. J.* 1721; P.J. Cook, "The Effect of Gun Availability on Violent Crime Patterns" (1981) 455 *The Annals* 63; A. Kellerman *et al.*, "Gun Ownership as a Real Factor for Homicide in the Home" (1993) 329 *New Eng. J. Med.* 1084.

<sup>10</sup> R. MacLellan, "Canada's Firearms Proposals" (1995) 37 *Can. J. Crim.* at 173-74.

<sup>11</sup> *A National Symposium on Women, Law and the Administration of Justice* (Ottawa: Supply and Services Canada, 1992); Department of Justice, *Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action* (Ottawa: Department of Justice Canada, 1992); E. Adelberg & C. Currie, *In Conflict with the Law: Women and the Canadian Justice System*, (Vancouver: Press Gang, 1993).



debates<sup>12</sup> on spousal, child and sexual abuse, pornography, prostitution and sexual harassment, to realize the enormous influence that the feminist movement has had on these issues. Sexual exploitation and violence committed against women and children have become highly political issues. For example, the feminist perspective has sufficiently influenced the perspective of Canadians, leading many to accept that Marc Lépine, the Polytechnique killer, committed political murders. By targeting fourteen women and none of the men present at the time of the massacre, this violent man, a student in a stereotypically male environment, was the essence of all the individual and collective objections towards legal and policy changes on gender equality.<sup>13</sup>

The government addressed many requests for more concrete legal protection of victims of abuse and violence by supporting new criminal laws.<sup>14</sup> It also facilitated criminal prosecution by making criminal law a better tool in condemning the many acts of violence committed against women and children.<sup>15</sup> It has therefore begun to tap into the symbolic power and strength of criminal laws, so that reprehensible behaviour is no longer tolerated. In this painstaking job of condemning injustices toward women and children, lawmakers quickly came to believe that, for justice to be served in these cases, more severe punishments were needed.

There is currently a parallel in criminal legislation between the suppression of spousal and family abuse and the sexual exploitation of women and children, and the renewed interest in the death penalty,

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<sup>12</sup> *Report of the Committee on Sexual Offences Against Children and Youths*, vol. 2, (Ottawa: Supply and Services Canada, 1984) (Chair: R.F. Badgley); *Report of the Special Committee on Pornography and Prostitution*, vol. 2, (Ottawa: Supply and Services Canada, 1985) (Chair: P. Fraser).

<sup>13</sup> T.Wills, "Guns are a Phallic Symbol: Female MPs" *The [Montreal] Gazette* (27 March 1991) B1; House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Solicitor General* (10 June 1992) at 67:44-67:46 (The Honourable Mary Collins).

<sup>14</sup> See especially Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences*, S.C. 1980-81-82-83, c. 125; Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 33; Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 (3d Supp.), c. 19.

<sup>15</sup> Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1992*, (Ottawa: Statistics Canada, 1994) at 25-26. While witnessing an increase in violent crime rates in Canada between 1977 and 1991, the Canadian Centre for Justice Statistics witnessed a drop in this rate beginning in 1992 and warned against interpreting statistics on this particular point by correlating two very different realities: the actual rate of violent crime incidents in Canada and the actual rate of reported cases that, if it increased, was due to policies promoting reporting of such incidents. See *ibid.* at 16 where it is stated, "Recent increases in violent crime may partially be due to heightened public awareness and reduced tolerance of violence, and thus an increased propensity to report such crimes." See also D. Hendrick, "Canadian Crime Statistics, 1994" (1995) 15:12 *Jurstat* 1.

lengthening prison terms, eliminating parole and criminal dangerousness, getting tough on young offenders, providing for permanent supervision of ex-offenders, and the universal and perpetual monitoring of sex offenders.<sup>16</sup> Our present laws present somewhat of a paradox: at the dawn of the millenium, Canadian criminal legislation is more effectively addressing concerns for protecting women and children through criminal laws that are less humane and less humanistic. In fact, parliament is telling us that better protection of women and children through criminal law flows from an ideology of resentment. Moreover, legal feminism is demanding draconian criminal laws that would make up for the impunity previously engendered by past abusers through the extreme punishment of future abusers.

In the new punitive measures outlined in the *Firearms Act*, particularly those imposing minimum sentences of four years for the use of a firearm in the commission of a serious criminal offence, lawmakers claim that an objective of the law is to provide tougher tools to combat violence in society. Because this political issue can be easily associated with what feminists condemn, the legislator would have us believe that these punitive measures are inspired by feminist demands for tougher criminal laws to counter violent crime.<sup>17</sup> However, the impetus for these particular punishments comes chiefly from the influence of the firearms lobby on criminal law, the right-wing ideology of the "Reform Party," and the electioneering opportunism of the party in power.<sup>18</sup> In keeping with its humanistic and humanizing potential, legal feminism must move away from an ideology of resentment when it comes to influencing the development of criminal laws.

Canadian feminists have learned numerous lessons from the historical condition of women, allowing them to make a sound case for a different prescriptive development in Canadian criminal law. This collective experience should also motivate them to promote more humane punitive practices, to develop a more humanistic approach to crime control and

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<sup>16</sup> *Towards Safer Communities*, *supra* note 5.

<sup>17</sup> *Background Information*, *supra* note 2 at 1. It is interesting to note that minimum sentences are the first control measures stated; B. Cox, "Tough Gun Law Needed to Protect Women: Minister," *The [Montreal] Gazette* (5 December 1990) B1.

<sup>18</sup> According to Wendy Sukler, the Coalition for gun control did not suggest minimum sentences in its militant action: W. Sukler, "Workshop on Policy for Gun Control in Canada: Impact and Prospects of the 1995 Reform" (Annual Conference of the Canadian Association of Law Teachers, Brock University, June 1996) [unpublished].

punishment, and to promote gentler, more positive strategies likely to decrease violence in society.<sup>19</sup>

If we look back on the historical role of women, we find that the roots of feminist thinking support crime control that is relatively more moderate and humane. Women must apply the lessons learned from their historical powerlessness and change their view of punishment to give crime control a different face. In fact, history shows that as peacemakers at home and in private life, women were generally deprived of any public role, including that of going to war.

Though unacceptable, this historical situation nevertheless allowed women ample opportunity to see the benefits of forgiveness, reconciliation, and redress in maintaining harmonious relationships, despite the disadvantages and the inequality of their subordinate role in private life. They have also seen the repercussions of a just war—killing their husbands and sons, raping themselves and their daughters—and the painful compromises and dissatisfactions of an often imperfect peace. Why then, based on this long experience of the significant merits of forgiveness, reconciliation and peace, would women not develop a political mindset in favour of promoting forgiveness, reconciliation and restoring peace in the application of crime control and punishment? Why wouldn't they suggest alternative solutions to violence in society?

We can imagine punishment that goes beyond resentment towards a criminal and his crime, by making some allowance for forgiveness and reconciliation, and by favouring the development of a restorative and peaceful justice. The lessons learned from the history of women can also teach us to foster the development of a peaceful, free, tolerant, and just society. Excessive punishment paves the way for an ideology of resentment, which should not be associated with humane and tolerant feminism.

## II. A LEGAL POSITION: FROM THE UNCONSTITUTIONALITY OF MINIMUM SENTENCES TO THEIR DISPUTABLE IMPLEMENTATION

In re-examining firearm legislation, legislators decided to apply a minimum sentence of four years to approximately ten serious *Criminal*

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<sup>19</sup> In an interesting article on the idea that feminists should only use law to reach certain goals based on clearly specified conditions, the author suggests some pitfalls to avoid and alternatives to criminal law that can truly impact the lives of women. See L. Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9:1 *Can. J. L. & Society* 75.

*Code* offences when committed with a firearm, in situations in which these same offences may otherwise have different maximum sentences.<sup>20</sup>

We can already predict that the constitutionality of these new minimum sentences will soon be challenged. The following constitutional and systemic analysis aims to show that these sentences are cruel, unjust, and ineffective in controlling violent crime. They constitute a repressive solution that does not advance Canadian society towards peace, liberty, tolerance, and justice. In this regard, punishment does more harm than good and opens the door to arbitrary applications.<sup>21</sup>

For the sake of argument, I will use the new punitive measures for manslaughter to illustrate my view. The new section 236 of the *Criminal Code* states:

Every person who commits manslaughter is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

Manslaughter actually covers a very large range of reprehensible acts causing death. Indeed, this offence can range from accidental death to near murder.<sup>22</sup> Moreover, according to a survey of 400,000 sentencing decisions handed down between 1991 and 1992 in Canada, 80 per cent of homicide sentences vary between thirty days and eleven years, for an average of four years.<sup>23</sup>

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<sup>20</sup> *Criminal Code*, *supra* note 3. See especially ss. 224, 272 (maximum of fourteen years) and ss. 236, 239, 273, 279, 279.1, 344 and 346 (maximum of life). Parliament imposes the same minimum sentence for two sexual assault offences of different severity (ss. 272, 273), and states that infliction of bodily harm with a weapon should result in as harsh a sentence as homicide with a weapon.

<sup>21</sup> For an article voicing the same opinion, see P. Landreville, "Peine minimum à sévérité maximum" *Le Devoir* (23 December 1994) A11.

<sup>22</sup> *R. v. Cascoe* (1970), 54 Cr. App. R. 401, cited in the *Archambault Report*, *supra* note 6 at 519-520: "[M]anslaughter is of course a crime which varies very greatly in its seriousness. It may sometimes come very close to inadvertence. That is one end of the scale. At the other end of the scale, it may sometimes come very close to murder." The Commission also cites *R. v. Gregor* (1953), 31 M.P.R. 99 (C.S.N.R.): "There are certain cases of manslaughter where the line between crime and accident is narrow... ." For an example of near-murder, see *R. v. MacDonald* (1974), 20 C.C.C. (2d) 144 (C.A. Ont).

<sup>23</sup> Canadian Centre for Justice Statistics, *Sentencing in Adult Provincial Courts. A Study of Six Jurisdictions, 1991 and 1992*, (Ottawa: Statistics Canada, 1993) at 17 (Figure 8).

### A. *Cruel and Unusual Punishment*

By stating that manslaughter committed with a firearm is objectively more serious than any other form of homicide without a firearm, the new legislation makes a categorical judgement. In homicide cases where circumstances would otherwise lead a judge to impose a prison sentence of considerably less than four years, the judge may not have the opportunity to examine the concrete severity of the offence or the actual degree of fault of its perpetrator. Nevertheless, this sentencing can still take place when the homicide did not involve a firearm.

#### 1. Excessive disproportion

Sentencing case law on homicide contains several examples where a much lighter sentence than the new legislated minimum was imposed by taking into account the exceptional mitigating circumstances and by applying the general principles of sentencing.<sup>24</sup> For the various offences with the new minimum sentence it is not difficult to identify and imagine situations where offenders could have received a less severe sentence in the past.

The arguments used to determine the unconstitutionality of the minimum sentence in the *Smith*<sup>25</sup> case can be applied here. Punitive excess is inherent in the law because the mandatory and inflexible legislated sentence may have a clearly exaggerated, disproportionate, and completely unwarranted effect on the offender, whose act does not require punitive condemnation of this severity.<sup>26</sup>

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<sup>24</sup> See *R. v. MacKay* (1980), 40 N.S.R. (2d) 616 (C.A.); *Attorney General of Quebec v. Rubin* (1984), 39 C.R. (3d) 67 (Qc. Sup. Ct.); *R. v. Hardy* (1976), 33 C.R.N.S. 76 (Qc. Sup. Ct.).

<sup>25</sup> *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 [hereinafter *Smith*].

<sup>26</sup> *Ibid.* at 1080, per Mr. Justice Lamer. Even by following Mr. Justice Gonthier's reasoning in *R. v. Goltz*, [1991] 3 S.C.R. 485 at 490-521 [hereinafter *Goltz*], we can easily find reasonable and convincing hypothetical cases for which this sentence is too long. In a recent case at the Supreme Court of Nova Scotia, Judge Scalan invalidated, based on s. 12 of the *Charter*, the four-year minimum sentence for criminal negligence causing death. See *R. v. Morrissey*, (1996) 3 C.R. (5th) 301 S.C., aff'd (1997) 169 N.S.R. (2d) 13 (S.C.), rev'd (1998) 167 N.S.R. (2d) 43 (C.A.) [hereinafter *Morrissey (C.A.)*]. The trial judge analyzed hypothetical situations by keeping in mind that a court cannot invalidate legislation by referring to unrealistic and farfetched applications, and he states at 312: "As in *Smith*, I am satisfied that it is inevitable that this minimum sentence provision is going to cast such a wide net that people will be caught by that net where the punishment of four years would indeed be cruel and unusual having regard to the circumstances of the accused and the offence."

## 2. Affront to human dignity and the impact on collective conscience

While it is legally easier to use an unconstitutionality test to demonstrate the exaggerated disproportion of the new minimum sentences by carrying out a contextual analysis of the application of the legislation to homicide cases and by observing sentencing in the Canadian courts, it is more difficult to contend that all homicides committed with a firearm, including the less reprehensible ones, should not be punished by a four-year prison term. In other words, nothing stops the legislator from applying different standards of severity to crimes committed in Canada. Lawmakers could also claim that they are simply keeping pace with the values of Canadians by addressing violent crime with greater rigour and determination.<sup>27</sup> They could state that the new four-year minimum is now proportional to the severity officially set out for all serious *Criminal Code* offences committed with a firearm. This would reflect an increased condemnation of violent crime in Canada. Canadians may even complain that punishments for violent crime are currently greater than the four-year minimum.<sup>28</sup> Consequently, this sentence would not constitute an affront to human dignity or offend public decency, even in a less blameworthy case of homicide.

If public opinion is to dictate whether the length of a prison term is an affront to public decency or human dignity, then the *Charter's*<sup>29</sup> role as a fundamental legal tool to promote a higher standard of public decency and human dignity risks being compromised. In this regard, the shocking, indecent or degrading nature of a sentence must be demonstrated in another way. The law is indecent when it has erratic or tyrannical effects on people. While it is necessary to measure the affront of a minimum sentence against a standard of public decency, it is also appropriate to consider whether the legislator's lawmaking is exceptional and exorbitant, as compared to its usual approach in determining the seriousness of crimes. If the lawmaking is exceptional, does it address problems that have become exceptional in scope? In a democracy, legislating by exception can

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<sup>27</sup> *Towards Safer Communities*, *supra* note 5; Department of Justice, *Consideration of the Department of Justice Outlook on Program Priorities and Expenditures from 1995 to 1998*, (Ottawa: Ministry of Public Works and Government Services Canada, 1995).

<sup>28</sup> "Public Perceptions," *supra* note 6; *Background Information*, *supra* note 2: "Deterrence and longer sentences are the main firearm control measures and reflect the importance Canadians give to public safety." [translation by author].

<sup>29</sup> *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.

constitute an affront to public decency if it becomes a regular instrument of control. Under the rule of law, the barometer used to determine whether a minimum sentence of four years constitutes an excessive punishment that shocks our collective conscience has to be based on our democratic lawmaking practices, and not on the intuitions, impressions, and emotions of Canadians.<sup>30</sup>

Since codification of the criminal law in 1892, our lawmaking tradition has been to express the objective and relative seriousness of crimes in terms of maximum prison sentences of a certain number of years.<sup>31</sup> In this way, we know that homicide is more serious than theft, and that homicide and attempted murder, aggravated theft, and drug trafficking are in the same category of gravity because the legislation prescribes the same maximum sentence for them.

Traditionally in Canada, we have relied little on minimum sentences. Indeed, minimum sentences have faced constitutional challenges precisely because they are unusual.<sup>32</sup> They are widely criticized in texts on sentencing reform<sup>33</sup> and are not very popular with prosecutors or defense attorneys alike. Lastly, the legislator recognizes the unusual nature of minimum sentences by declaring that when in doubt, all legislation referring to a prison term must be interpreted as a maximum, not a minimum sentence.<sup>34</sup> The legislator not only breaks with normal practice by resorting to minimum sentences, but also prescribes the same minimum sentence of four years to offences of different gravity that are not all punishable by the same maximum sentence. In this respect, the legislator abandons the idea of gradually increasing the severity of a sentence with the seriousness of the

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<sup>30</sup> *Smith*, *supra* note 25 at 1074 (per Justice Lamer), 1087 (per Justice McIntyre); *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 791 (per Justice Sopinka), 832 (per Justice LaForest) [hereinafter *Kindler*]; *R. v. Burlingham*, [1995] 2 S.C.R. 206 at 288-89 (per Justice Sopinka); *R. v. Collins*, [1987] 1 S.C.R. 265 at 281-82 (per Justice Lamer).

<sup>31</sup> The legislator prefers the following maximums: 6 months, 1, 2, 5, 10 or 14 years. For general information, see H. Dumont, *Pénologie. Le Droit Canadien Relatif aux Peines et aux Sentences*, (Montreal: Thémis publishing, 1995) at 152, 216-23, 231.

<sup>32</sup> *Smith*, *supra* note 25; *Goltz* *supra* note 26; *R. v. Parsens* (1988), 40 C.C.C. (3d) 128; *R. v. Krug*, [1985] 2 S.C.R. 255.

<sup>33</sup> *Archambault Report*, *supra* note 6 at 189-90; Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* by R. Ouimet (Ottawa: Queen's Printer, 1969) at 226 [hereinafter *Ouimet*]. The report argues that minimum sentences should be abolished: "[M]inimum mandatory sentences in cases other than murder constitute an unwarranted restriction on the sentencing discretion of the court."

<sup>34</sup> *Criminal Code*, *supra* note 3, s. 718.3(2).

harm.<sup>35</sup> The minimum sentence goes against the very way in which the *Criminal Code* expresses the relative gravity of offences and constitutes a punitive measure that amounts to legislating by exception.

In any case, the immoderate severity of minimum sentences must be assessed using a barometer that gauges the degree of punishment in a more concrete and less impressionistic way than supposed public demands for tougher punishments. In an article entitled "Underpunishing Offenders: Towards a Theory of Legal Tolerance,"<sup>36</sup> criminologists Peter Tremblay, Gilbert Cordeau and Marc Ouimet present sentencing data studies by comparing the "demand" for punishment (as expressed by the public) to the "supply" (as expressed by court officers). Their results show that court officials as a whole are less punishment-oriented than the general public. This support for lighter sentences by court officials may stem from the fact that the officials are players in the justice system while as a spectator the public is more strongly convinced of the effectiveness of sentences. Their firm belief that punishment works along with the lack of first-hand knowledge of its true limited effectiveness, may be the determining factors that lead citizens to seek tougher sentences. The legislator does not have to exploit this call for greater punishment by disregarding everything that is known about the social and economic ill effects of severe sentences and the uncertainty of proper application in the administration of criminal justice.

It should also be noted that the willingness to punish varies depending on whether a person has knowledge of a case through direct participation in the administration of justice, as a juror, for example, or learns of a case from media coverage. As Justice Cory emphasized in *Kindler*,<sup>37</sup> history tells of many cases where the jury displayed compassion, clemency, and humanity to avoid sentencing the criminal too harshly. A jury of laypersons does not necessarily demand the same severity of punishment as the general public, nor does it tend to condemn as quickly.

The excessive severity of minimum sentences of four years is also evidenced by the fact that lawmakers were not reacting to a wave of violent crime. Nor were they addressing a social issue that had taken on disastrous proportions. In fact, the Canadian legislator's choice to impose minimum sentences is not justified by the statistics on violent crime. In the last few

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<sup>35</sup> *Supra* note 20.

<sup>36</sup> P. Tremblay, G. Cordeau & M. Ouimet, "Underpunishing Offenders: Towards a Theory of Legal Tolerance" (1994) 36 *Can. J. Crim.* 407.

<sup>37</sup> *Kindler*, *supra* note 29 at 804.



years, violent crime constituted approximately ten percent of reported crime. Since 1992, rate of reported crime has dipped, while the rate of incarceration has continued to skyrocket.<sup>38</sup> Although the application of minimum sentences may be limited to a "small" sample of crimes, they will have the undesirable result of increasing the rate of incarceration and of exacerbating prison overpopulation.<sup>39</sup>

In the final analysis, Canadian lawmakers respond to criticism by claiming that their punitive choice is a highly moral one that is reflective of an increase in the collective consciousness of Canadians. However, there are no good moral bases to justify the recent level of punishment prescribed in Canadian society.<sup>40</sup> When in doubt, we should demand that the law impose as little punishment as possible. An evolving standard of collective consciousness or public decency is seen as a reflection of the progress of a civilization. It is inexcusable that society should approve of, or develop, punishments that are increasing in severity. Interpretation of section 12 of the *Charter* must not lead to this result. Minimum sentences have the potential for being cruel. On a moral level, Canadian society should do without them.

#### B. *An Unjust Sentence*

The *Archambault Report* was particularly insightful in shedding light on the injustice of minimum sentences and on their incompatibility with the fundamental principles of proportionality between offences and sentences, and equality among offenders.<sup>41</sup>

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<sup>38</sup> M. Reed, "Correctional Services in Canada: Highlights for 1993-94" (1995) 15:5 *Juristat* 1 at 1, 2, 11.

<sup>39</sup> Department of Justice, *Low-risk Offenders* (Ottawa, Department of Justice): "The federal inmate population increased by about 22 per cent from 1990 to 1995; and if current trends continue, it will increase another 50 per cent in the next ten years."

<sup>40</sup> N. Christie, *Limits to Pain*, (Oxford, Martin Robertson, 1982).

<sup>41</sup> *Archambault Report*, *supra* note 6 at 186:

[P]rinciples of proportionality and equity should further guide the judge in determining a just disposition in the particular case before the court. At this level, each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined. Although the offence should be the focus in determining the appropriate penalty, the circumstances of the offender must also have some weight ... Absolute uniformity of impact may never be perfectly attained - the punishment may never be truly commensurate with the seriousness of the offence and blameworthiness

Precedents from the Supreme Court indicate that the principle of proportionality is a constitutional obligation, and may even constitute a fundamental principle of justice.<sup>42</sup> The unconstitutionality of the minimum sentence of four years can also be illustrated by an argument based on section 7 of the *Charter*.<sup>43</sup>

### 1. Just proportionality

The observance of just proportionality as a principle of justice would imply that homicide legislation, for example, be drafted to be consistent with the principle of proportionality. Let us examine in greater detail the principle of proportionality of offences and sentences as it applies to the new manslaughter legislation and take a concrete example to determine if the minimum sentence of four years challenges the constitutional principle of proportionality.

Although it cannot be applied to all homicides committed with a firearm, criminology literature and criminal cases identify the psychological traits of offenders who cause death with a firearm. The traits tend to reflect

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of the offender. There are too many variables for that to happen, but it is a goal to which this Commission is committed and which mandatory minima militate against.

<sup>42</sup> *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at 529 [hereinafter *M. (C.A.)*]: "It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender." In this decision, Justice Lamer makes a point of relating this point of view to the protection offered by s. 12 of the *Charter* in order to avoid too easily assuming that all disproportional or excessive sentences are unconstitutional. However, it is by recognizing the fundamental principle of proportionality that we can ultimately identify an exaggerated sentence. There are other passages from rulings that identify the inextricable connection between the fundamental principle of proportionality set out in s. 7 and that of the excessiveness of the sentence under s. 12 of the *Charter*. See especially *Smith*, *supra* note 25 at 1074, per Justice Lamer: "The notion that there must be a gradation of punishments according to the malignity of offences may be considered to be a principle of fundamental justice under s. 7, but, given my decision under s. 12, I do not find it necessary to deal with that issue here."

<sup>43</sup> See also *Re B.C. Motor Vehicle Act*, [1995] 2 S.C.R. 486 at 532-33, per Justice Wilson:

While the legislature may as a matter of government policy make this an offence, and we cannot question its wisdom in this regard, the question is whether it can make it mandatory for the courts to deprive a person convicted of it of his liberty without violating s. 7. This, in turn, depends on whether attaching a mandatory term of imprisonment to an absolute liability offence such as this violates the principles of fundamental justice. I believe that it does. I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system ... to keep punishment to the minimum necessary to achieve the objectives of the system.

less moral turpitude than those of offenders who kill with a knife.<sup>44</sup> Homicide committed with a firearm can be impulsive, spontaneous, barely intentional or unintentional, and unpremeditated. Homicide with a firearm could be considered relatively less involved, because it implies a quickness of action, and can be committed without physical contact between the assailant and victim. An example is when an offender acts through a momentary loss of self-control. Homicide through another means, such as the use of a knife or bare fists, may be more violent, implying greater malice on the part of the attacker, and greater indifference to the victim's suffering before death.<sup>45</sup>

Therefore, in determining the sentence, a judge will want to distinguish between the two types of homicide, by reflecting the different degrees of guilt and moral turpitude on the part of the two offenders. Without the minimum sentence, the judge is able to punish the homicide committed with a knife more severely than the homicide committed with a firearm. With the new legislation, the firearm homicide will be punished in every instance by four years of imprisonment, whereas a less severe sentence could be imposed for the homicide committed with a knife.

This example reveals the legislation's intent. It shows that the law disapproves most of the means used to commit the crime. At sentencing, courts can no longer take the offender's true degree of moral culpability into account in determining a fair sentence.<sup>46</sup> In other words, the legislator creates a new rule of proportionality, whereby the means used to commit a homicide results in a four-year term, irrespective of the offender's degree of moral culpability.

As an alternative to this method of sentencing, judges and legislators could say that committing a crime with a weapon constitutes an

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<sup>44</sup> See, e.g., *MacKay*, *supra* note 24 (suspended sentence for homicide with a gun); *R. v. Trenchfield* (1978), (1979) 9 C.R. (3d) S-1 (Ont. S.C.) (six years for homicide with a knife); *R. v. Bearçy* (1989), 4 W.C.B. 383 (Ont. C.A.) (six years for homicide caused by beating). See also *Mormsy (C.A.)*, *supra* note 26.

<sup>45</sup> See the numerous decisions cited in C.C. Ruby, *Sentencing*, 3d ed (Toronto, Butterworths, 1987) at 409-423.

<sup>46</sup> The principle of proportionality (a fundamental principle) also receives legislative sanction in the new sentencing legislation, aforementioned, *supra* note 43; see *Criminal Code*, *supra* note 3, s. 718.1. The fact that, in two distinct laws passed at almost the same time, the legislator contributes to the principle of proportionality and breaches the same principle by creating minimum sentences of four years is questionable.

aggravating circumstance.<sup>47</sup> It is hard to understand why lawmakers did not choose this legislative technique. This option would certainly have complied with the principle of proportionality. In this regard, constitutional case law amply supports the argument that minimum sentences are unjust and violate section 7 of the *Charter*.

The Supreme Court rejected the legislative attempt to upgrade a homicide to murder if it was perpetrated during the commission of a serious offence on the ground that it would allow an offender to be sentenced to a minimum of life without requiring proof of the perpetrator's subjective foresight of death.<sup>48</sup> This legislation would have excessively punished those who involuntarily caused death, even if the act involved aggravating circumstances, such as the commission of a serious crime.

The *Creighton* ruling,<sup>49</sup> although criticized by some as destroying the legacy of the common law theory of guilt, demonstrates how different issues of unconstitutionality can arise in matters of homicide. In fact, if the principles of guilt were not totally followed in this case, it was to better recognize a fundamental penological principle: that of the necessary proportionality of offences and sentences. In a homicide offence that results in two offenders being found guilty of the same crime, when one has only the minimum *mens rea* required and the other shows more moral turpitude, the sentence must be able to fluctuate in intensity and vary according to different degrees of moral culpability.<sup>50</sup>

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<sup>47</sup> The legislator considers abuse of the offender's spouse and children to be an aggravating circumstance of an offence. See *Criminal Code*, *supra* note 3, s. 718.2(ii). The legislator has, therefore, chosen to punish spouse and child abuse more severely, without abandoning the principle of proportionality stated in s. 718.1. However, in the *Firearms Act*, *supra* note 2, spouse and child abuse with a firearms is now more severely punished. This adds to s. 718.2 (ii) of the *Criminal Code*, while contradicting s. 718.1.

<sup>48</sup> *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; See generally A. Boisvert, "Les Exigences Constitutionnelles en Matière de Faute Pénale: un Bilan Critique" (1994) 73 Can. Bar. Rev. 161.

<sup>49</sup> *R. v. Creighton*, [1993] 3 S.C.R. 3 [hereinafter *Creighton*]. I agree with much of the criticism of this ruling and the damaging effects it has on the coherent theory of offence in criminal law. See e.g. A. Brudner, "Proportionality, Stigma and Discretion" (1996) 38 Cr. L.Q. 302; A. Boisvert, *supra* note 48; M. J. Bryant, "Criminal Fault as per the Lamer Court and the Ghost of William McIntyre" (1995) 33 Osgoode Hall L.J. 79. However, this case gave constitutional status to the sentencing principle of proportionality. Even though the notion of fault is different in determining guilt and sentences, the constitutional principle requires taking the offender's degree of moral turpitude into account to determine a sentence.

<sup>50</sup> *Contra R. v. Arkell*, [1990] 2 S.C.R. 695. In this case, it was decided that the classification of murders under s. 214(5) of the *Criminal Code* to determine the sentence, was neither arbitrary nor irrational because there was a relationship between the classification and the offender's degree of guilt. In *R. v. Shropshire*, [1995] 4 S.C.R. 227 at 243 [hereinafter *Shropshire*]. Justice Lamer's opinion on s. 744

Among the various forms of guilt theory expressed during the debate on the constitutionality of legislated offences, henceforth for purposes of establishing the accompanying responsibility scheme we have a theory of guilt concerning sentencing that emphasizes the principle of proportionality of offences and sentences. A court that cannot apply this principle of proportionality and that must by legislative decree impose a minimum sentence on someone that does not deserve it, will end up punishing the offender too harshly. This state of affairs is not just.<sup>51</sup>

## 2. Increasing sentence severity

While it is theoretically possible that judges could impose a lesser sentence in the case of a knife homicide than in the case of a gun homicide, we can presume that they would try to apply the principle of proportionality more severely to punish the offender whose crime seems more reprehensible. As such, a minimum sentence of four years could serve to lengthen all homicide sentences and all sentences in general.

Coming back to the two previously mentioned homicides, one with a firearm and one with a knife, a 1993 study by the Canadian Centre for Justice Statistics states that two-thirds of convictions for manslaughter were accompanied by an average prison term of four years.<sup>52</sup> Consequently, before changes to the *Firearms Act*, a judge could deem a homicide with a knife as being more reprehensible than a homicide with a gun, and use the average sentence as a benchmark to punish both homicides. With the new legislation, a judge must consider the minimum of four years as a base sentence for the homicide with a gun. For all other homicides to which the minimum sentence does not apply, if they are seen as relatively more reprehensible, they may receive a sentence of more than four years when, on average, these homicides used to be punished by sentences of under four years.

Generally, minimum sentences cause all other sentences to become longer. By applying minimum sentences to some criminal offences such as impaired driving, use of a firearm, and drug trafficking—until this was

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of the *Criminal Code* raises the idea that, in second degree murder, there are various degrees of seriousness and guilt that call for a range of sentences between ten and twenty-five years.

<sup>51</sup> This can be summarized in Justice Sopinka's words in *Kindler*, *supra* note 29 at 791: "Principles of fundamental justice are not limited by public opinion of the day. The protection afforded by s. 7 extends to individuals who face unjust situations which are not recognized as such by the majority."

<sup>52</sup> "Public Perceptions," *supra* note 6, table 8.

declared unconstitutional in *Smith*, the legislator predetermines the seriousness of the crime irrespective of its context, and compares it to all other crimes that are not accompanied by a minimum sentence. In fact, the legislator introduces an "intruder" as perceived by the courts into the crime gravity scale. A crime with a minimum sentence need only be perceived as relatively less serious than other crimes that are usually punished by an equal sentence for the courts subsequently to increase the sentences affecting the crimes they consider more serious.<sup>53</sup>

### C. *An Ineffective Sentence*

The legislator may argue that minimum sentences meet important goals and constitute an essential means of control, while ensuring the least possible infringement on the rights of the accused. Thus, it may be argued that minimum sentences are acceptable in a free and democratic society under section 1 of the *Charter*.

Legislators outlined the rationale for minimum sentences through various background papers and action plans on firearm control.<sup>54</sup> They argued that minimum sentences are essential to preventing violence in our society by deterring crimes committed with a firearm. The Government's Action Plan on Firearms Control states: "it is suggested to impose longer minimum sentences for the use of a firearm when committing certain serious offences."<sup>55</sup> Harsher punishments are desired since present sentences fall short of what legislators consider sufficient. Let us look more closely to see if imposing minimum sentences is likely to reach the objectives of general prevention and retribution set out by lawmakers.

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<sup>53</sup> Landreville, *supra* note 21; P. Landreville, "Prison Overpopulation and Strategies for Decarceration" (1995) 37 Can. J. Crim. 39; H. Dumont, *Les solutions de Rechange à la Peine d'Emprisonnement du Droit Pénal Canadien: Le Triomphe de l'Intolérance et de l'Irrationalité sur l'Humanisme et la Liberté*, (Cowansville: Yvon Blais Publishing, 1994) at 899-900.

<sup>54</sup> Department of Justice, *The Government's Action Plan on Firearms Control* (Ottawa: Public Works and Government Services Canada, 1994) at 6-8 [hereinafter *Government Action Plan*]; *Background Information*, *supra* note 2 at 1.

<sup>55</sup> *Ibid.* at 6-7; See MacLellan, *supra* note 10 at 174-75; O. Fedorowycz, "Homicide in Canada-1995" (1995) 16:11 *Juristat* 1. The study indicates that homicide committed with a knife is slightly more frequent (31.2 per cent) than homicide committed with a gun (30 per cent).

1. The ineffectiveness of the sentence in attaining general deterrence

Returning to the homicide example, the government believes harsher sentences will reduce the number of homicides committed with a firearm. The potential offender is henceforth supposed to be more deterred by the prospect of a minimum sentence of four years imprisonment than would be the case if the sentence did not exist.

However, during its review of the bill, the government had access to a study concluding that minimum sentences were not a particularly good method of overall crime prevention.<sup>56</sup> As compared to the targeted reduction in crime rates with the imposition of minimum sentences, the study concluded that any impact would be minimal. Moreover, all studies on the subject indicate a lack of any significant correlation between harsher sentences and crime reduction. They further show that offenders are not generally aware of the sentences they may face when committing these crimes.<sup>57</sup>

In fact, assuming minimum sentences do have a significant potential to reduce crime committed with a firearm, this potential could only be established by comparing the results of mandatory minimum sentences and those of the previous sentence. The government must be unaware of the vast range of sentences handed down in homicide cases. It is also impossible to assume offenders know the specific punishment for the form of homicide they are about to commit. Before committing a homicide, an offender generally knows that it is illegal to kill, that it is serious, and that it leads to imprisonment. It is difficult to imagine that minimum sentences could exert an increased overall deterrence or raise an offender's knowledge of the various punishments, thereby reducing the risk that they would commit a crime.

Unfortunately, many crimes perpetrated with a firearm are committed in incidents of family and spousal abuse, and with legally owned hunting rifles. Access to a firearm may be the main risk factor for such

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<sup>56</sup> *Research on the Application of the Criminal Code Section 85* by C Meredith, B Steinke & S Palmer (Ottawa: Department of Justice Canada, 1994) [hereinafter *Application Research*]; Canadian Sentencing Commission, *Sanctions Légales et Dissuasion*, by D. Cousineau (Ottawa: Department of Supply and Services Canada, 1988); A. Blumstein, J. Cohen & D. Nagin, eds. *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington: National Academy of Sciences, 1978) at 95-159; W. M. Evan, *Social Structure and Law: Theoretical and Empirical Perspectives* (Newbury Park: Sage Publications, 1990) at 72-73.

<sup>57</sup> S. Brochu, O. Duranleau & N. Bourdeau, "Impaired Driving: Analysis of Sherbrooke Statistics" (1990) 30 Can. J. Crim. 279; See also R. Hastings, "A Comment on the Proposals for Firearms Controls" (1995) 37 Can. J. Crim. 220 at 226-27.

offences.<sup>58</sup> Therefore, by enforcing stricter firearms control and safe storage, the government would be taking crucial steps to reduce risk. In the long run, reducing the number of handguns and military or para-military guns can also have an impact on the number of robberies. In general, having fewer weapons could lower the number of fatal accidents and suicides.<sup>59</sup> The government could demonstrate a logical relationship between the objective of generally preventing violent crime and a stricter control of firearms.<sup>60</sup> On the other hand, it is more difficult to show the logical relationship between the objective of general prevention and the imposition of a minimum sentence of four years. This relationship is tenuous and marginal at best, and appears completely non-existent in most cases.

As it is impossible to establish the deterrent value of four-year minimum sentences; their effectiveness will have to be re-evaluated each time a crime requiring their application is committed. These sentences will continue to be evaluated in terms of the failure of an overall prevention policy. Their usefulness and their effectiveness will thus be judged through the application of the new offence categories and the prosecution of their perpetrators.

## 2. The irrationality of the sentence in administering deserved retribution

These excessively severe minimum sentences will likewise work against the legislator's objective of punishing offenders who commit them. In fact, minimum sentences generally reduce the likelihood of conviction. For example, since 1976 section 85 of the *Criminal Code* has provided for a minimum sentence of one year for the use of a firearm while committing an indictable offence, to be served consecutively to the sentence imposed for the original offence. A study carried out for the government reports

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<sup>58</sup> Kellerman, *supra* note 9; See also the detailed review by T. Gabor, "The Proposed Canadian Legislation Firearms: More Symbolism than Prevention" (1995) 37 Can. J. Crim. 195.

<sup>59</sup> Boyd, *supra* note 7.

<sup>60</sup> Decision Dynamics Corporation, *Evaluation of the Canadian Gun Control Legislation: Final Report*, by E. Scarff (Ottawa: Solicitor General, 1983); Research and Statistics Section, *Firearms Statistics: Updated Tables* by Q. Hung, (Ottawa: Department of Justice, 1995); Department of Justice, *Domestic Homicides Involving the Use of Firearms*, (Ottawa: Department of Justice, 1992); T. Gabor, *The Impact of the Availability of Firearms on Violent Crime, Suicide and Accidental Death: A Review of the Literature with Special Reference to the Canadian Suicide* (Ottawa, Department of Justice, 1994).



that this minimum sentence has never met its objective.<sup>61</sup> Two-thirds of the charges laid under section 85 did not result in conviction because of dismissal, stay of proceedings, or discontinuance by the complainant. This situation can be partly explained by the lack of evidence and plea bargaining. Because this offence is ordinarily associated with an initial offence, judges generally apply the aggregate sentence principle so that the sum of the sentences reflects the objective seriousness of the offence and the overall guilt of its perpetrator. Consequently, this technique thwarts the aim of systematically tougher sentencing via the imposition of minimum sentences.<sup>62</sup>

Other adverse systemic impacts are to be expected from mandatory minimum sentences. The prospect of harsh minimum sentences will result in more legal proceedings and fewer guilty pleas. The defence is likely to use every legal technicality possible to protect its client from the minimum sentence. One of two things may happen: either proceedings will be more difficult for the Crown because the defence is more aggressive or, given their increased caseload, Crown attorneys will find many good reasons to offer a lesser sentence in exchange for a guilty plea on a charge that does not carry with it the minimum sentence.

For a long time, studies have shown that the harsher the punishment the more difficult it is to enforce.<sup>63</sup> When harsh punishments are too frequently imposed, judicial mechanisms will step in to make it difficult to enforce the sentence. Political will to extend enforcement to crimes that previously went unpunished must be implemented by imposing moderate sentences. No one sentence can be both frequent and severe. The development of lighter sentences as alternatives to harsher sentences increases the frequency of these lighter sentences, while greater harshness of a punishment decreases its frequency and use. Therefore, we can expect that the legislator's goal of punishing more offenders who commit a serious criminal offence with a firearm, will inevitably be stymied.

Consequently, the legislator has chosen an ineffective means in trying to better control violent crime. It is irrational and must be eliminated

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<sup>61</sup> *Application Research*, *supra* note 56 at 7.

<sup>62</sup> *Government Action Plan*, *supra* note 54 at 7.

<sup>63</sup> M. Cusson, "Pourquoi punir?" in *Criminologie et Droits de l'Homme* (Paris: Dalloz, 1987) at 122; P.J. Cook, "The Economics of Criminal Sanctions" in M. Friedland, ed., *Sanctions and Rewards in the Legal System, A Multidisciplinary Approach*, (Toronto: University of Toronto Press, 1989) at 51-73; Law Reform Commission, *Droit, Objectifs Publics et Observation des Normes* (working paper) (Ottawa: Department of Supplies and Services Canada, 1986).

in light of better alternatives, such as stricter firearm control.<sup>64</sup> In addition, the legislator could have made the use of a firearm an aggravating factor of the gravity of an offence, rather than creating a sentencing scheme that is cruel and unjust.

#### D. *An Arbitrary Sentence*

Minimum sentences have several adverse effects on crime control. In fact, their disadvantages greatly outweigh any advantages.

##### 1. Good and bad systemic discretion

The law's severity is supposed to be offset by the discretionary power of police officers and prosecutors to select which cases to prosecute and which pleas to accept on reduced charges. Maintaining a high guilty plea level in the Canadian judicial system depends, in part, on the widespread practice of rewarding this plea with more lenient sentences.<sup>65</sup>

We should not ignore the adverse possibility of increased hidden justice in the judicial system. Minimum sentences mean that the legislator removes the court's discretion to impose an appropriate sentence on the offender in favour of a predetermined legislated sentence that is supposed to apply to all cases. This complete removal of judicial discretion will inevitably be replaced by the prosecutor's concealed discretion. The justice system cannot operate without discretion. In fact, it is an integral part of decisions and judgments, and should not be seen as something that is intrinsically bad. However, by resorting to minimum sentences, the legislator reveals a great deal about its own assessment of the good and bad use of discretion by decision-makers in the justice system.

On the basis of studies, lawmakers have been convinced that Canadian sentencing creates unjustified disparities and that it is up to them to set the guidelines for determining sentences in order to oversee judicial discretion and promote greater sentencing consistency.<sup>66</sup> In all of the sentencing models suggested to eliminate the disparity between sentences and to better oversee judicial discretion (the *Archambault Report*,<sup>67</sup>

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<sup>64</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

<sup>65</sup> Dumont, *supra* note 31 at 172-77.

<sup>66</sup> Government of Canada, *Sentencing*, (Ottawa: Department of Justice Canada, 1984).

<sup>67</sup> *Supra* note 6.

*Daubney Report*,<sup>68</sup> *Bill C-22*<sup>69</sup>), the idea of eliminating discretion by setting up predetermined legislated sentences was never proposed.

Whether we like it or not, the minimum sentence of four years, a particularly harsh minimum<sup>70</sup> given the length of prison terms generally imposed in Canada, will constitute a legislated scale that deprives judges of their duty to assess and set appropriate sentences. The legislator claims to be targeting abuses of judicial discretion in sentencing and, consequently, eliminates judicial discretion for serious *Criminal Code* offences. However, when it came time to choose a sentencing model under the new *Sentencing Act*,<sup>71</sup> the same lawmaker was extremely timid in its strategies to manage judicial discretion. It also disregarded many appropriate suggestions of the Archambault Commission<sup>72</sup> addressing sentencing disparity resulting from excessive use of judicial discretion.

The government also raised great concerns about the discretion of prosecutors, knowing that minimum sentences will increase this discretion, inevitably leading them to negotiate the lessening of charges carrying minimum sentences. To solve this problem, Allan Rock, then Minister of Justice, apparently discussed the situation with his provincial and territorial counterparts. He is reported to have asked the Attorneys General "to urge their deputies to apply section 85 of the *Criminal Code* effectively and to set out guidelines to this effect."<sup>73</sup> Furthermore, he is supposed to have asked them to instruct Crown attorneys to seek the sentences outlined in the law each time that it is possible to prove to the court that firearms were used to commit the crime. Without wanting to criticize all the laudable efforts of the Minister of Justice to promote better firearm control in Canadian society, it is impossible for me to accept that an Attorney General, motivated as he or she may be by good intentions, should act as an enlightened despot.

Although the minister was shown the ineffectiveness of the minimum sentence under section 85 of the *Criminal Code*, he persisted in enacting them. As Philip C. Stenning wrote, "[i]f it doesn't work, let's do

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<sup>68</sup> Standing Committee on Justice and Solicitor General, *Taking Responsibility*, (Ottawa: Queen's Printer, 1988) [Chair: D. Daubney].

<sup>69</sup> *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, 1995*, S.C., c.22.

<sup>70</sup> *Supra* note 21.

<sup>71</sup> *Supra* note 69.

<sup>72</sup> See *Archambault Report*, *supra* note 6.

<sup>73</sup> *Government Action Plan*, *supra* note 54 at 8; *Supra* note 10 at 181-82.

more of it.”<sup>74</sup> Now that prosecutors have been ordered to use their discretion properly, everything is supposed to be settled.

However, the increase of hidden discretion cannot be eliminated by political exhortations to prosecute offenders. Moreover, any instruction by an Attorney General to his or her deputies that serves to completely remove all prosecutorial discretion from the prosecutor in a particular case, is a questionable judicial practice in itself. The Crown attorney does exercise discretion in deciding to prosecute. However, since this is no more than a discretionary administrative act, it cannot be transformed into an exercise of authority related to a superior’s instruction; it cannot be accomplished under the orders of a third party, nor can a person be forced completely to give up their discretion. In this regard, guidelines that deprive an individual of his or her discretion to make decisions based on the merits and circumstances of each case, have already been eliminated in administrative<sup>75</sup> and criminal law.<sup>76</sup>

Unrealistic orders and guidelines from an Attorney General to his or her deputies, where the prosecutors’ caseload becomes considerably heavier because of a law that they do not necessarily want, will not be well received. Ultimately, these negative repercussions are likely further to undermine public confidence in the sound administration of justice. They may also strengthen the desire of Canadians for harsher punishments, causing them to criticize the present criminal laws as being excessively lenient.

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<sup>74</sup> P. Stenning, “Solutions in Search of Problems: A Critique of the Federal Government’s Gun Control Proposals” (1995) 37 Can. J. Crim. 184 at 190. “The fact that no one else in the world has apparently figured out yet how to achieve this is evidently not considered worthy of mention, let alone discussion. The all-important impression that the government is taking ‘tough action ... to address violence in society’ seems to be all that matters here.”

<sup>75</sup> G. Pépin & Y. Ouellette, *Principes de Contentieux Administratif*, 2d ed. (Cowansville: Yvon Blais, 1982) at 199-200; *Yhap v. Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722 at 738; J. Viliaggi, “L’Application de la Directive et le Rôle du Tribunal Administratif” in *Développements Récents en Droit Administratif* (Québec: Les Éditions Yvon Blais, 1989) vol.2 at 77-85.

<sup>76</sup> *Procureur Général du Québec v. Brunet*, [1994] R.J.Q. 337; Law Reform Commission of Canada, *Controlling Criminal Prosecutions: the Attorney General and the Crown Prosecutor* (Working Paper 62) (Ottawa: Law Reform Commission of Canada, 1990) at 17: “To determine the legality of these guidelines, one would have to determine whether they would be a lawful exercise of discretion if exercised by the Attorney General personally. It would seem that, so long as there remains room to examine the individual case on its own merits, the guidelines would not be improper.”; K. Chasse, “The Role of the Prosecutor” in S. Oxner ed., *Criminal Justice* (Toronto: Carswell, 1982) 79 at 80: “ But because he is a member of cabinet, the Attorney General sets policy and practice in terms of general statements of principle, and not as directives for conducting of particular prosecutions against particular individuals.” See also *R. v. Catagas* (1977), 38 C.C.C. (2d) 296.

This irrational escalation in the severity of punishment will be the direct result of legislation inspired by fear and the desire of election-minded politicians to echo an irrational public opinion that is ill-informed about the actual extent of violent crime.

## 2. Contradictions in penal policy

It would not be possible to end this discussion on the unacceptable nature of minimum sentences without mentioning other systemic contradictions that relate to the penal policy of the Canadian government.

The 1990s penal policy lead to the inexcusable overrepresentation of Aboriginals in correctional institutions, especially in the Prairies.<sup>77</sup> The government claims to want to act on this issue. It emphasizes in Bill C-22 that in imposing a sentence a court must examine all alternatives to imprisonment that are justified in the circumstances, especially in the case of Aboriginal offenders.<sup>78</sup> We also know that the disappearance of traditional aboriginal values, endemic alcoholism, and the disruption of Amerindian culture and poverty, are some of the contributing factors that lead to violent crime among Aboriginal people, especially in the family.<sup>79</sup> We also know that firearms are considered essential tools of the traditional aboriginal way of life.

We need to ask lawmakers how they plan to reconcile the *Firearms Act*, which aims to firmly address violent crime through minimum sentences and absolute prohibition orders on possessing firearms, with the commitments of the new *Sentencing Act*, which encourage courts to be imaginative and examine all alternatives for aboriginal offenders. What can a judge do with minimum sentences? How can we promote greater flexibility in the matter of Aboriginal criminal justice when judges are severely restricted in their authority to choose a sentence?

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<sup>77</sup> T.C. Griffiths & J.C. Yerbury, "Understanding Aboriginal Crime and Criminality: A Case Study" in M.A. Jackson & C.T. Griffiths, eds., *Canadian Criminology: Perspectives on Crime and Criminality* (Toronto: Harcourt Brace & Co., 1995) 383; Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada 1993-1994* (Ottawa, Statistics Canada, 1994), Chart 17; *Towards Safer Communities*, *supra* note 5 at 30-33.

<sup>78</sup> See *Criminal Code*, *supra* note 3, s. 718.2(e).

<sup>79</sup> A.N. Doob, M. G. Grossman & R. Auger, "Aboriginal Homicide in Ontario" (1994) 36 *Can. J. Crim.* 29; S.A. Vanderburg, J.R. Weekes & W.A. Millson, "Early Substance Use and its Impact on Adult Offender Alcohol and Drug Problems" (1995) 7:1 *Forum on Corrections Research* 14; Solicitor General Canada, *Final Report: Task Force on Aboriginal Peoples in Federal Corrections*, (Ottawa: Government of Canada, 1988).

Lighter sentences must be one of the weapons available to combat the problem of violence in society. This is the only punitive option that can lead us to seek strategies other than strict punishment to control violence, and allows communities to deal with violent persons in ways other than with overzealousness and resentment. Lighter sentences are more likely to promote values of tolerance, security, and peace in society and in criminals. Ultimately, they are more conducive to humane and consistent crime control.

### III. EPILOGUE: HARD TIME FOR CRIMINALS, HARD TIMES FOR TOLERANCE<sup>80</sup>

Comments on and analyses of recent cases on mandatory minimum sentences and the evolution of the interpretation of section 12 of the *Charter* by the Supreme Court have already been published.<sup>81</sup> In this epilogue, I revisit a few of the ideas developed in my 1997 article and evaluate the impact that Supreme Court decisions have had on the fundamental principle of proportionality in sentencing.

When this article was published in French four years ago, the Supreme Court had not yet rendered its decisions in *Morrisey*<sup>82</sup> and *Latimer*<sup>83</sup> and there was hope, at least in my view, that the *Charter* would be a useful tool in stopping the government from resorting to harsh and unjust punishment in the unusual form of mandatory minimum custodial sentences.

But I was not counting on the shift by the Supreme Court from an interventionist strategy to a deferential attitude towards Parliament. It was also presumptuous to seek that my doctrinal contribution to the general

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<sup>80</sup> For this epilogue, I acknowledge the contribution of my research assistant Marie-Ève Sylvestre, presently an LL.M. student at Harvard Law School.

<sup>81</sup> K. Roach, "Editorial: Mandatory Sentences" (2001) 44 *Crim. L.Q.* 261; A. Boisvert *et al.*, "Editorial" (2001) 6 *Can. Crim. L.R.* 125; N. Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2001) 44 *Crim. L.Q.* 279; B. Sneiderman, "The Case of Bernard Latimer: A Commentary on Crime and Punishment" (1999) 37 *Alta L. Rev.* 1017; A. Manson, "*Morrisey*: Observations on Criminal Negligence and s. 12 Methodology" (2000) 36 *C.R.* (5th) 121; A. Manson, "Motivation, the Supreme Court and the Mandatory Sentencing for Murder" (2001) 39 *C.R.* (5th) 65.

<sup>82</sup> *R. v. Morrisey*, [2000] 2 S.C.R.90 [hereinafter *Morrisey*]; See also *R. v. Wust*, [2000] 1 S.C.R.455 [hereinafter *Wust*].

<sup>83</sup> *R. v. Latimer*, [2000] 1 S.C.R. 3 [hereinafter *Latimer*].

condemnation of mandatory minimum sentences would influence the evolution of criminal law and penology.<sup>84</sup>

The choice is Parliament's on the use of minimum sentences, though considerable difference of opinion continues on the wisdom of employing minimum sentences from a criminal law policy or penological point of view.<sup>85</sup>

Mandatory minimum custodial sentencing is likely here to stay. We cannot eradicate it through the *Charter* safeguards of sections 7 and 12, recommendations of thoughtful studies,<sup>86</sup> or through doctrinal research and analysis.

Moreover, the principled approach to sentencing of Part XXIII of the *Criminal Code* is becoming a thing of the past, as Parliament has since enacted many *ad hoc* exceptional pieces of legislation contrary to general sentencing principles implemented in Part XXIII. For example, the government addressed violent and sexual criminality more seriously in adding eighteen new minimum penalties to the *Criminal Code*.<sup>87</sup> It narrowed parole access and mandatory supervision,<sup>88</sup> planned the extension of preventive detention for a larger group of dangerous criminals, and created a new sanction attaching a lengthy period of supervision to penitentiary long-term offenders.<sup>89</sup> It also decided to submit more juveniles to adult court, and adopted a rigorous punitive attitude toward their criminal responsibility.<sup>90</sup> Harsh sentencing laws are now regarded as securing better protection for women and children. However, this trend is

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<sup>84</sup> H. Dumont, "Désarmons les Canadiens et Armons-nous de Tolérance" (1997) 2 Can. Crim. L. R. 43.

<sup>85</sup> Latimer, *supra* note 83 at 42.

<sup>86</sup> Archambault Report, *supra* note 6; Quinet, *supra* note 33.

<sup>87</sup> Crutcher, *supra* note 81 at 279: "Of more than 460 criminal offences found within the 1999 *Criminal Code* of Canada, 29 carry a mandatory minimum penalty of imprisonment. The bulk of these punishments are a result of Bill C-68, the 1995 *Firearms Act* which added 18 new minimum penalties to the *Criminal Code*. The dramatic increase in the use of this mode of punishment is surprising given the controversial nature of minimal penalties." See also *ibid.* at 303: "In 1996, a Bill was introduced that would create a new offence of aggravated procuring and living of the avails of child prostitution, which would carry a minimum five year term of imprisonment." According to the author, the actual period accounts for the most important use of the mandatory penalty of imprisonment since the first 1862 *Criminal Code*.

<sup>88</sup> *Supra* note 3, ss. 745.6, 746.1

<sup>89</sup> *Ibid.*, Part XXIV.

<sup>90</sup> Bill C-7: *An Act in Respect of Criminal Justice for Young Persons and to Amend and Repeal other Acts*, 1st Sess., 47th Parl., 2001 (passed May 29, 2001).

problematic, as it does not leave room for alternative approaches to resolve the problem of violence in society.

Politicians, supposedly following public demands, implemented these changes in the criminal law with no afterthought for the repercussions on the spirit of the reform favouring moderation and limited use of imprisonment. They even spoke of restorative justice when, in fact, their acts could neutralize any significant impact on sentencing, particularly for Aboriginal offenders and young offenders. However, this chaotic legislative approach to reform in the field of sentencing and punishment, is a matter of concern for experts in the field,<sup>91</sup> who are also preoccupied by media conduct that often stimulate public contempt, intolerance, rage, and injustice. Law and order is trendy. These are hard times for tolerance and moderate sentencing!

Meanwhile, it is ironic to see the Supreme Court developing deference towards short-sighted and poor sentencing lawmaking. The previous dialogue between the legislator and the Supreme Court, however, was not helpful in promoting justice and moderation in the application of criminal law. Reactive legislation after a Supreme Court decision and anecdotal legislation after public outcry are questionable tools that bring chaos and arbitrariness rather than coherence and justice.

At the expense of effective constitutional safeguards for the control of sentencing laws, the Supreme Court is now offering the next best thing to the offender who could be exposed to a cruel punishment: a constitutional exemption. The Supreme Court stops controlling the legislator from enacting unjust sentencing laws—a moral lesson suffices. Indeed, the Court will not apply the law in a case where an extremely disproportionate punishment could be inflicted on an extraordinarily likeable offender, but now, it will not offer a remedy to an unjust sentencing law. The judicial authority washes its hands, even if it sees an injustice done by the legislator!

Relieved by the Supreme Court's new gentle approach towards its sentencing laws, the government may start to consider its "looking good and feeling good legislation" as the product of wisdom. With its renewed

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<sup>91</sup> Although a consensus on the scope of codification and on the importance of codifying all our criminal law does not necessarily exist in Canada, there is unanimity among specialists that the way legislative changes are presently occurring is not making Canadian criminal law just and clear. Indeed, at a 1998 meeting held at Queen's University where a task force examined the question of how to make criminal law just and clear, participants were all critical of actual piecemeal legislative changes to the *Criminal Code*. See D. Stuart, R. Delisle, & A. Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) at 574.



confidence, it may decide to preserve its unjust sentencing laws, while in due time the Governor-in-Council might act kindly and show mercy to Latimer! Doing justice to an offender, unjustly but legally punished, is now left to the clemency of politicians!<sup>92</sup>

Despite the 1996 sentencing reform, the question of how to bring more justice and humanity to sentencing is still a major issue. After a steady decrease of criminality over the last decade and the decline of violent and property crimes, Canadians remain fearful and apprehensive.<sup>93</sup> Parliament is acting on these unfounded feelings of insecurity toward common crimes with the strategy of "being tough on crime," but its result is "being tough on criminals." Recent statistics illustrate that the median length of custody sentences has increased dramatically since 1994-95. A fifty per cent increase is related to crimes against the person,<sup>94</sup> particularly for common and sexual assault, sexual abuse, and manslaughter.<sup>95</sup>

I have raised some concerns about the potential inflationary effect of mandatory sanctions of imprisonment for increasing the severity of all sentences, not only for the crimes to which it is attached, but with regards to crimes considered more serious. Madam Justice Louise Arbour confirmed that minimum sentences will inevitably have this effect. Indeed, the principle of proportionality inevitably operates to apply the minimum sentence to the best offender, in order to give effect to the inflationary legislative scheme.<sup>96</sup>

Re-establishing the principle of proportionality on a firm ground to measure crime and punishment, and strengthening it to allow sentencing flexibility and moderation are the two necessary ingredients to dismantling the logic of escalation that the Supreme Court and the legislators are implementing in sentencing. As recently stated in a different and more dramatic context, "freedom and fear, justice and cruelty have always been at war."<sup>97</sup> In the history of mankind and in the history of criminal law, we

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<sup>92</sup> *Supra* note 83 at 42-43.

<sup>93</sup> R. Kong, "Canadian Crime Statistics, 1997" (1997) 18:11 *Jurstat* 1 at 5.

<sup>94</sup> J.V. Roberts & C. Grimes, "Adult Criminal Court Statistics, 1992/99" (2000) 20:1 *Jurstat* 1 at 13-15.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Morrissey*, *supra* note 82 at 132-35.

<sup>97</sup> President George W. Bush, "Address to a Joint Congress and the American People" (Presidential Address on Capital Hill, 20 September 2001), online: The White House <<http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>> (Date accessed: 23 October 2001).

need, and could have if the 1996 sentencing reform was taken seriously, a comprehensive set of judicial guidelines to instill moderation. We still need the help of the Supreme Court to make peace on the battleground of sentencing, and a more comprehensive principle of proportionality could be a useful tool to achieve peace within sentencing.

A plea for moderation in sentencing was the Canadian government's principal concern when planning the 1996 reform and, since then, it is still relevant policy for sanctioning "good" and "bad" criminals.<sup>98</sup> The reform (section 718.1 of the *Criminal Code*) put forward the principle that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. By designating it as the fundamental principle of sentencing, there is no doubt that Parliament has chosen to raise this principle above others. Properly understood, it signifies the eradication of the idea of achieving general deterrence by aggravating a particular sentence and imposing exemplary punishment on a specific criminal. The deterrent impact of a particular sentence is not supported by empirical research<sup>99</sup> and it is questionable whether it has any effect on the crime rate. Long prison terms that do not fit the specific crime and the specific criminal, but include additional punishment to deter others and reduce the prevalence of crime in the community, are not in accordance with the proportionality principle as set in section 718.1 of the *Criminal Code*.<sup>100</sup>

Before the reform in *Smith*,<sup>101</sup> Justice Lamer interpreted the principle of proportionality when he declared the unconstitutionality of a minimum of seven years for the importation of a narcotic:

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been

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<sup>98</sup> H. Dumont, "Less is Best: the Sentencing Reform Unattainable Goal?" (Session on Criminal Law, Procedure and Evidence, National Justice Institute, 19-21 March 1997).

<sup>99</sup> Cousineau, *supra* note 56; D. Nagin, "General Deterrence: A Review of the Empirical Evidence" in A. Blumstein & J. Cohen, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, (Washington: Panel on Research Council, 1978) at 95-159.

<sup>100</sup> Madam Justice Arbour also made an important observation on the negative side-effect of deterrent sentencing in *Wust*, *supra* note 82 at 467: "Even if it can be argued that harsh, unfit sentences may prove to be a powerful deterrent, and therefore still serve a valid purpose, it seems to me that sentences that are unjustly severe are more likely to inspire contempt and resentment than to foster compliance with the law. It is a well-established principle of the criminal justice system that judges must strive to impose a sentence tailored to the individual case."

<sup>101</sup> *Smith*, *supra* note 25.

appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is 'prescribed by law,' then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.<sup>102</sup>

According to this point of view, a government that wishes to impose a grossly disproportionate minimal custodial sentence to achieve general deterrence has the burden of proving that it is justified in a free and democratic society. Since *Smith*, however, the Supreme Court has blended and blurred its reasoning on the principle of proportionality. It has not distinguished the object of the principle when measuring gross disproportionality for the purpose of section 12 of the *Charter* or when it considers the proportionality of means chosen by the legislator for achieving general deterrence under a section 1 analysis.<sup>103</sup> This blurring and blending has happened in two stages of the reasoning. First, by concluding that mandatory sentences were constitutional in many cases,<sup>104</sup> the Supreme Court began to look at the penological objectives of mandatory terms of imprisonment, such as general deterrence and denunciation, as relevant factors for the evaluation of gross disproportionality of minimum sentences. A consequence of this reasoning is that the rationale and the justifications of the sentencing laws are no longer constitutional issues. Second, the shift from a section 52 constitutional analysis of the legislation to a constitutional exemption analysis had an impact on the burden of proof of both parties and on the scope of their arguments. The government can rest in peace and the offender must concentrate on the "uniqueness" of his or her situation, rather than relying on sentencing policy issues.

The evolution of the constitutional jurisprudence on mandatory sentencing has had another disastrous consequence: the proportionality principle is no longer a principle of restraint and moderation. When the principle of proportionality gives effect to the inflationary scheme of the

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<sup>102</sup> *Ibid.* at 1073.

<sup>103</sup> A. Boisvert, "Peines Minimales Obligatoires et Exemptions Constitutionnelles: la Politique du Pire" 31:3 R.G.D. [forthcoming in 2001].

<sup>104</sup> *Morrissey*, *supra* note 82; *R. v. Luxton*, [1990] 2 S.C.R. 711; *Geltz*, *supra* note 26; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Latimer*, *supra* note 83.

legislator without further questioning the values and purposes of changing the scale of severity for a crime, it allows for any scale of severity. In the long run, it eliminates the possibility of demonstrating gross disproportionality in Canadian sentencing.<sup>105</sup>

Proportionality is a retributive concept that focuses on the offender's past conduct as opposed to utilitarian concerns about the future effects of punishment on the offender or others through deterrence or rehabilitation. Retribution is a legitimate concern in sentencing but it should not be confused with revenge or vengeance which produces an unrestrained and 'uncalibrated act of harm upon another, frequently motivated by emotion and anger.' In contrast, retribution is an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender. It restrains punishment to ensure 'the imposition of a just and appropriate punishment, and nothing more.'<sup>106</sup>

Another form of confusion resulted from the Supreme Court's constitutional jurisprudence concerning the proportionality principle, which requires the appreciation of the degree of responsibility of the offender for the determination of a just sentence. Before *Morrissey* and *Latimer*, especially in the case of manslaughter, the Court promoted the necessity of sentencing flexibility for the operation of the proportionality principle and the adequate adjustment of the severity of a sentence to the offender's degree of fault.<sup>107</sup> The constitutionality of a minimum of four years in *Morrissey*, and of a minimum detention of ten years in *Latimer*, has left us only with the bone of the constitutional principle of proportionality under section 7 of the *Charter*.<sup>108</sup>

The fault required for the determination of responsibility for a specific crime is the same for all offenders accused of this crime and, generally, motivation is not a relevant element for the attribution of guilt. But when it is time to evaluate the blameworthiness of a specific offender for the purpose of a fit and just sentence, his or her motivation, good character, social background, intellectual capacities, and community context (more specifically for Aboriginals) are all relevant aspects for the appreciation of his or her fault. In other words, the most sympathetic and least blameworthy person may have committed a crime with the required fault, but the mandatory sentence can deprive that individual of the right

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<sup>105</sup> *Morrissey*, *supra* note 81 at 136.

<sup>106</sup> K. Roach, *Criminal Law*, 2d ed. (Toronto: Irwin Law, 2001) at 300-01, quoting from *M. (C.A.)*, *supra* note 42.

<sup>107</sup> *Creighton*, *supra* note 49.

<sup>108</sup> *Supra* note 103.

to an assessment by a judge of all relevant dimensions of moral culpability that are encompassed in the proportionality principle of sentencing. Putting aside constitutional arguments for a moment, in the *Latimer* case the trial judge and the jury were convinced that a minimum of ten years was not commensurate with the defendant's moral culpability. They felt that they were not doing justice if they were unable to take his motivation (compassion) into account in sentencing. The notion that there must be a gradation of punishments according to the malignity of offences and degree of turpitude of offenders is a legislative principle of fundamental justice in sentencing. However, considering the results in *Morrissey* and *Latimer*, it is sad to say that the Supreme Court has not yet conferred the *Charter* title of nobility upon this principle.

It is unfortunate that the Supreme Court has given teeth to the principle of proportionality only to allow the "*sky is the limit sentence*" and to quash judicial creating of "lower roof sentences."<sup>109</sup> However, the principle of proportionality is still not strong enough to quash "inflationary floor sentences" in the form of mandatory custodial terms.

The 1996 sentencing reform also proposed a reciprocal principle of proportionality between offenders: the principle of imposing similar sentences for similar crimes and similar offenders (section 718.2(b) of the *Criminal Code*). In my article,<sup>110</sup> I contemplated the idea that manslaughter with a gun or with a knife could justify similar sentences for similar offenders in similar circumstances or could justify different sentences because the degree of moral turpitude of the offender could be greater in the case of manslaughter with a knife. This dimension of the principle of proportionality is essential for implementing equitable sentencing and for offering a remedy to unjustified disparity in sentencing. A mandatory minimum term of imprisonment does not promote fair and equitable sentencing because it might impose less punishment on the worst offender.<sup>111</sup> Meanwhile, the Supreme Court has glorified individualized

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<sup>109</sup> *M(C.A.)*, *supra* note 42; *Shropshire*, *supra* note 50.

<sup>110</sup> *Dumont*, *supra* note 84.

<sup>111</sup> In *Wust*, *supra* note 82, the Supreme Court decided to take pre-sentence custody into account for minimum sentences in order to remedy the unfairness that could result if two accused with similar offences and similar backgrounds are sentenced differently because only one is exposed to a minimum sentence. However, it discarded the constitutional issue of unfair treatment between similar offenders when the question of pre-sentence custody was out of the picture.

sentencing up to a point that does not promote fair and equitable sentencing.<sup>112</sup>

The 1996 sentencing reform has also favoured less restrictive sanctions than imprisonment (sections 718.2 (d) and (e) of the *Criminal Code*). Properly understood, the principle of judicial restraint must be interpreted as being closely tied to the proportionality principle. In other words, imprisonment is the most severe form of punishment, while other punishments are intermediate sanctions (such as probations and conditional sentences) and other sanctions are more lenient penalties (such as fines and discharges). In 1996 the principle of proportionality had a structuring impact on the law of sentencing by allowing the classification of punishment in terms of degree of severity. Legislative mandatory custodial sentences are contrary to the spirit of the 1996 sentencing reform and its structuring principle of proportionality.

The sentencing reform has also pushed the idea of restorative justice at the periphery of mainstream sentencing in stating at section 718 that:

The fundamental purpose of sentencing is to contribute ... to the maintenance of a ... peaceful ... society.

The Supreme Court has pushed this sentencing philosophy a step further in *R. v. Gladue*<sup>113</sup> when interpreting section 718.2 (e) of the *Criminal Code*, and has encouraged judges to be creative in sentencing and to look for alternatives to imprisonment in a thorough fashion, especially for Aboriginal offenders. However, one can speculate about the changes the Supreme Court would have made to its discourse on restorative justice if Mrs. Gladue had carried a gun instead of a knife and had been subjected to the mandatory custodial sentence of four years.

In any case, restorative justice might be helpful in offering a more humane approach to punishing criminals and to dealing with the phenomenon of criminality in society. Rather than asking for a wall-to-wall repressive system of justice, women should promote this option to prevent their children and themselves from being victimized by crimes.

In order to change the present demands for harsh sentencing, the theory of an alternative approach to criminal justice must develop. Restorative justice is a promising theory that could help change the trend.

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<sup>112</sup> *R. v. McDonnell*, [1997] 1 S.C.R. 948.

<sup>113</sup> [1999] 1 S.C.R. 688.

It is based on reconciliation between criminals and society, and on the idea of peace in society that is deeply upset and disturbed by crime.

Restorative justice redefines crime as an affront to the power of the state, rather than in terms of conflict or struggle between a criminal and a victim or the community.<sup>114</sup> Restorative solutions focus on repairing, to the extent possible, the harm done. Grounded in community involvement, it signifies building a community change of heart and giving legitimacy to “in-society” solutions instead of “out-of-society” punishments. To restore justice means to live together in peace again after a conflict. Strategic solutions to restore peace in society may imply giving something back to the victim or to the injured community, but not necessarily as much as the victim’s retaliators demand. It also may not necessarily involve giving back to the criminal as much as he or she deserves. A judge could renew the ancient role of “justice of the *peace*.” The proportionality principle within the perspective of a restorative justice approach could be seen as operating with the idea of decreasing the punishment level. Restorative justice means not only to punish the harm done, but to do something positive for future peace. In the long run, peace is more valuable to the security of society than any intrusive protective sentencing. Punishment should not be used as a commodity—inflicting more pain on criminals should never be assimilated into the delivery of something good. Consequently, when punishment is applied, it should always be an occasion for re-examining our standards of decency and our views on human dignity.

The principle of proportionality is the beam on the scales of justice. To strengthen this fundamental principle of justice is the task of the legislator, the Supreme Court, and all the people for whom tolerance, peace, liberty, and justice are worth promoting.

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<sup>114</sup> H. Dumont “De la Loi C-41 à la Loi C-55: la Détermination de la Peine avec une Main de Fer dans un Gant de Velours” in H. Dumont & P. Healy, eds., *Dawn or Dusk: in Sentencing* (Montreal: Les Éditions Thémis, 1997) at 83-109; Dumont, *supra* note 99, K. Pranis, “Building Community Support for Restorative Justice, Principles and Strategies,” online: <<http://www.realjustice.org/Pages/building.html>> (date accessed: 23 October 2001).

