

Osgoode Hall Law Journal

Volume 39, Number 2/3 (Summer/Fall 2001) Mandatory Minimum Sentencing in Canada Article 6

Searching for Smith: The Constitutionality of Mandatory Sentences

Kent Roach

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj



Citation Information

 $Roach, Kent. \ "Searching for Smith: The \ Constitutionality of Mandatory Sentences." \ Osgoode \ Hall \ Law \ Journal \ 39.2/3 \ (2001): 367-412. \ http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss2/6$

This Special Issue Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Searching for Smith: The Constitutionality of Mandatory Sentences

Abstract

The jurisprudence of the Supreme Court of Canada on the constitutionality of mandatory minimum sentences, from R. v. Smith to R. v. Latimer, is reviewed and assessed in light of relevant developments in constitutional law and sentencing. These include the Supreme Courts increasing interest in constitutional minimalism and corresponding reluctance to rely on hypothetical offenders and facial declarations of invalidity. The manner in which the Court's increasing concern for crime victims and fault levels has been used to justify upholding mandatory sentences is examined. The author also relates this jurisprudence to trends in sentencing, including an increasing acceptance of mandatory sentences as deserved punishment relative to the fault of offenders. Also explored is the possibility that the Court's decision to uphold mandatory penalties as not being grossly disproportionate may require a ratcheting up of the sentencing tariff to maintain ordinal proportionality. The impact of enacting mandatory minimum sentences on the Court's dichotomy between the punitive and restorative purposes of sentencing is also addressed. Finally, the author concludes that the Supreme Court has abandoned many of the premises of Smith giving Parliament the dominant role in deciding whether to enact mandatory minimum sentences. The author argues that a return to the activism of Smith would produce a strong judicial voice in favour of individualized punishment utile not providing the final word in dialogues between the Court and Parliament on the subject of punishment.

SEARCHING FOR SMITH: THE CONSTITUTIONALITY OF MANDATORY SENTENCES®

By Kent Roach*

The jurisprudence of the Supreme Court of Canada on the constitutionality of mandatory minimum sentences, from R. v. Smith to R. v. Latimer, is reviewed and assessed in light of relevant developments in constitutional law and sentencing. These include the Supreme Court's increasing interest in constitutional minimalism and corresponding reluctance to rely on hypothetical offenders and facial declarations of invalidity. The manner in which the Court's increasing concern for crime victims and fault levels has been used to justify upholding mandatory sentences is examined. The author also relates this jurisprudence to trends in sentencing, including an increasing acceptance of mandatory sentences as deserved punishment relative to the fault of offenders. Also explored is the possibility that the Court's decision to uphold mandatory penalties as not being grossly disproportionate may require a ratcheting up of the sentencing tariff to maintain ordinal proportionality. The impact of enacting mandatory minimum sentences on the Court's dichotomy between the punitive and restorative purposes of sentencing is also addressed. Finally, the author concludes that the Supreme Court has abandoned many of the premises of Smith giving Parliament the dominant role in deciding whether to enact mandatory minimum sentences. The author argues that a return to the activism of Smith would produce a strong judicial voice in favour of individualized punishment while not providing the final word in dialogues between the Court and Parliament on the subject of punishment.

À l'aide d'arrêts de la Cour suprême du Canada allant de R. e. Smith à R. e. Latimer, l'auteur analyza la validité constitutionnelle des gaines minimales obligatoires à la lumière de développements récents en droit constitutionnel et dans la détermination de la peine Ces développements récents incluent l'intérêt accru de la Cour suprême dans le concept du minimalisme constitutionnel et la réticence correrrandante de vantair se fier sur des idées de contrevenants hypothétiques et des déclarations enmae facte d'invalidité. L'auteur exemine la facon dant la Cour suprême s'est fié à la fois sur son intérêt aceru face aux victimes de crimes et la faute requise pour de confirmer l'imposition des peines obligatoires. L'auteur fait le lien entre cette jurisprudence et les tendances dans l'imposition des paines, y compris l'acceptation des peines obligioires comme étant une peine méntée qui correspond à la responsabilité des contrevenants plutôt que de regarder ce qui est requis paur leur réhabilitation ou leur dissuasion. L'auteur considère également si le fait que la Cour à déterminé que les paines obligatoires ne sont pas grossièrement disproportionnées paurroit signifier que les directives fournies en matière de détermination de la come devrant être compécs afin de conserver l'aspect de proportionnalité. L'impact qu'aura la promulgation des peines minimales obligatoires sur la dichotomie de la Cour entre les objectif punitifs et réparateurs de la détermination de la paine est aussi discuté dans cet article. Finalement, l'auteur suggère que la Cour suprême a obandonné plusieurs des concepts énoncés dans l'arrêt Small, donnant ainsi au Parlement le rôle dominant de décider de promulguer ou non des gemes minimales ebligatoires. L'auteur maintient que le retour à l'espnt d'activisme qui a eccompagné l'arrêt Smith preduirait une vaix appréciable en favour de la punition individuelle, tout en évitant de danner le dernier mot dans ce dialogue entre la Cour et la Parlement au sujet de la détermination de la paine

^{© 2001,} K. Roach.

Professor of Law and Criminology, University of Toronto. The author thanks Ltz Sheehy, Kim Pate, and Osgoode Hall Law School for the invitation to speak at a conference on mandatory sentencing where an earlier draft of this article was presented. The author also thanks Julian Roberts for helpful discussions and disagreements about this article.

I.	INTRODUCTION	368
II.	THE EVOLVING JURISPRUDENCE ON THE CONSTITUTIONALITY OF MANDATORY SENTENCES A. Smith B. The Dangerous Offender Cases C. Luxton D. The License Suspension Cases E. Wust F. Morrisey G. Latimer	372 372 374 375 376 377 378 380
III.	THE SECTION 12 JURISPRUDENCE IN LIGHT OF DEVELOPMENTS IN CHARTER REVIEW A. From the Old Activism to the New Minimalism B. Balancing the Rights of the Accused with those of Society and Victims C. The Interaction of Fault and Penalty	
IV.	THE SECTION 12 JURISPRUDENCE IN LIGHT OF DEVELOPMENTS IN SENTENCING A. Increased Emphasis on Just Deserts B. Trying to Maintain Proportionality in the Face of Mandatory Sentences C. Getting Caught on the Wrong Side of the Punitive and Restorative Divide	395 395 399 405
V.	THE IMPLICATIONS OF THE SECTION 12 JURISPRUDENCE FOR SENTENCING POLICY AND REFORM	408
VI.	CONCLUSION	412

I. INTRODUCTION

The constitutionality of mandatory sentences raises difficult and complex questions at the intersection of constitutional law and sentencing. When a court is asked to strike down or not apply a mandatory sentence as a form of cruel and unusual punishment contrary to section 12 of the Canadian Charter of Rights and Freedoms, it is being asked to engage in judicial review of a democratically enacted law. The court's view of its relationship with the legislature is bound to enter into the equation. At the same time, the court is also being asked to determine whether the mandatory sentence is grossly disproportionate to what would otherwise be an appropriate and fit sentence. Its view of the purposes and principles of sentencing and the priority of these competing concerns is also bound to

Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter Charter].

enter into the equation. In short, the court's decision about whether a mandatory sentence is cruel and unusual punishment will depend on its approaches to both constitutional law and sentencing.

Much has changed in both fields since the Supreme Court's 1987 decision in R. v. Smith² where it struck down a seven-year mandatory minimum sentence for the importation of narcotics as an unjustified form of cruel and unusual punishment. My concern is not only with the twists and turns that can be detected in the doctrine, but also with deeper and more fundamental shifts in both constitutional law and sentencing. With respect to the former, the Court has become more restrained about applying the Charter to potentially overbroad laws and more deferential to Parliament's decision to enact mandatory penalties that stress some purposes of punishment over others. The Court also seems to be increasingly attracted to the constitutional minimalism and passive virtues involved in deciding cases one at a time, even if that means leaving in place laws that can result in cruel and unusual punishment. It has also departed from a strict due process approach to protecting the constitutional rights of the accused and, instead, has balanced competing rights and interests in criminal justice. often deferring to Parliament's attempt to protect victims and potential victims of crime.

The changes in sentencing since Smith have been equally dramatic. Parliament codified the principles and purposes of sentencing in 1996 and the Court has, since that time, decided an unprecedented number of sentencing appeals. Parliament has proclaimed the proportionality of the sentence to the gravity of the offence and the degree of responsibility of the offender as the fundamental principle of sentencing. Furthermore, Parliament has significantly increased the number of mandatory sentences in an attempt to deter and denounce a broad range of crimes involving firearms and child prostitution. The Court has recognized denunciation and retribution as legitimate purposes of sentencing and has drawn a dichotomy between punitive purposes that focus on punishing the offender and deterring others and, restorative purposes that focus on rehabilitating the offender and responding to the needs of the offender, the victim and, the community. Understanding the doctrinal shifts in constitutional law and sentencing, both on the surface and at the deeper level of structural changes, is necessary to develop a sense of the impact, if any, that the Court's approach to section 12 of the Charter might have on mandatory sentences in the future.

² [1987] 1 S.C.R. 1045 [hereinafter Smith].

The first Part of this article will outline the evolving jurisprudence about whether mandatory sentences constitute cruel and unusual punishment. Since its decision in *Smith*,³ the Court has upheld every mandatory minimum sentence that has been challenged under section 12 of the *Charter*. These sentences include mandatory life imprisonment, ineligibility for parole for twenty-five years for first degree murder in *R*. v. *Luxton*;⁴ mandatory life imprisonment, ineligibility for parole for at least ten years for second degree murder in *R*. v. *Latimer*;⁵ a seven-day mandatory minimum sentence for driving with a suspended license in *R*. v. *Goltz*;⁶ and a four-year mandatory minimum sentence for criminal negligence causing death with a firearm in *R*. v. *Morrisey*.⁷

The second Part will examine these decisions in light of the Court's changing approaches to *Charter* review. The Court's increased restraint in striking down mandatory sentences on the basis of their cruel and unusual effects on hypothetical offenders will be related to its increased attraction to "constitutional minimalism" or "deciding one case at a time," This section will also examine how the Court's increased deference to mandatory sentences is related to more general patterns of deference to the ability of legislatures to balance competing interests and to protect the disadvantaged—in this case, victims and potential victims of crime. Finally, it will be suggested that the Court's approach to mandatory sentences in the context of murder and regulatory offences is linked with related rulings requiring proof of fault for those offences. As required by constitutional standards, the Court has increasingly emphasized the offender's fault as a justification for imposing mandatory penalties of imprisonment, even though traditionally, sentencing has not been exclusively calibrated on the basis of the offender's fault.

Part three will evaluate the section 12 cases in light of changing approaches to sentencing, especially the increased acceptance of retributive "just deserts" principles that focus on sentencing as a response to the

³ Ibid.

⁴ [1990] 2 S.C.R. 711 [hereinafter Luxton].

⁵ [2001] 1 S.C.R. 3 [hereinafter *Latimer*]. In this case, the author represented the Canadian Civil Liberties Association (CCLA), which intervened to argue that the mandatory sentence violated s. 12 of the *Charter*.

⁶ [1991] 3 S.C.R. 485 [hereinafter Goltz].

⁷ [2000] 2 S.C.R. 90 [hereinafter Morrisey].

⁸ See generally C. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

offender's fault in committing a crime. Since *Smith*, the Court has become more prepared to focus on the gravity of the offence and the offender's responsibility for the offence, as measured by *mens rea*, as opposed to the need to deter or rehabilitate offenders in light of their particular characteristics. The Court intervened in *Smith* because it was not necessary to send a hypothetical first-time nineteen-year-old offender who imported a joint of marijuana after spring break, to the penitentiary for seven years in order to prevent such a person from committing crimes in the future. In the more recent case of *Morrisey*, however, it rejected the appeal of the remorseful first-time offender and recovering alcoholic who, after a trauma in his life, unintentionally and while drunk killed his friend with a firearm, even though a four-year sentence was probably not required to deter or rehabilitate this particular offender.

Although the Court also recognized that life imprisonment and ineligibility for parole for ten years was not necessary to protect the public or to rehabilitate Mr. Robert Latimer, it nonetheless upheld the mandatory sentence in his case. The lack of utility of the mandatory sentence as applied to Latimer, given his personal characteristics and circumstances, did not, in the Court's view, outweigh the need to denounce murder as the most serious crime. The gravity of the murder was measured by the mens rea requirement as opposed to the offender's motive. The Court built on the acceptance of denunciation and retribution in R. v. $M(C.A.)^{0}$ and Parliament's proclamation of proportionality as the fundamental principle of sentencing, to uphold mandatory sentences in Morrisey and Latimer. It did so on the basis that Parliament was entitled to stress denunciation. retribution, and general deterrence over concerns about rehabilitation and deterrence of the particular offender, which had driven the decision in Smith. The dichotomy between the punitive and restorative aims of sentencing found in R. v. Gladue¹⁰ and the conditional sentencing cases has had the ironic effect of legitimating mandatory sentences that Parliament clearly placed on the punitive side of the line.

The last Part will briefly speculate on what role, if any, the Court's decisions on the constitutionality of mandatory minimum sentences might play in sentencing in the future. In one of the first articles that I wrote as an academic, I predicted that because of its concern with offender

⁹ [1996] 1 S.C.R. 500 [hereinafter M (C.A.)].

^{10 [1999] 1} S.C.R. 688 [hereinafter *Gladue*]. In this case, the author represented Abangmal Legal Services of Toronto, which intervened in support of the accused's appeal. See also *R. v. Fraulx*, [2000] 1 S.C.R. 61 [hereinafter *Proulx*].

characteristics and what was necessary to deter or rehabilitate specific offenders, "Smith will act as an individualizing brake on shifts to retributive philosophies of sentencing and determinate sentencing practices."11 No one, not even a wet behind the ears law professor, could make the same claim about the recent cases. Morrisey suggests that section 12 of the Charter will not be an effective barrier to the development of mandatory sentences even for non-intentional crimes that result in serious harm. Together with Latimer, it suggests that the Court will take a narrow approach to the moral responsibility of offenders and the circumstances of offences by focusing on the mens rea of the crime committed as a primary justification for the imposition of mandatory sentences. It appears as if the Court will defer to Parliament's decision to stress denunciation, retribution, and deterrence over specific deterrence, rehabilitation, and the restorative principles of sentencing. If the Court does intervene when a mandatory sentence causes injustice, the current signs are that it will do so with caseby-case exemptions that, unlike in Smith, will leave the mandatory minimum sentence intact.

The decision of whether to have mandatory sentences now appears to be almost exclusively in the hands of Parliament. This is alarming because only the independent judiciary can withstand the political allure of mandatory sentences. The courts are uniquely situated to draw the attention of Parliament and the public to the adverse effects of mandatory sentences in particular cases and to defend the need for continuing judicial discretion in tailoring punishment to particular crimes and particular offenders. A return to the activism of *Smith* would not necessarily give the Court the final word on matters of penal policy, but it would add an important voice in favour of individualized punishment to the debate.

II. THE EVOLVING JURISPRUDENCE ON THE CONSTITUTIONALITY OF MANDATORY SENTENCES

A. Smith

The Supreme Court's first decision on the constitutionality of mandatory sentences was *Smith*, which involved the constitutionality of the mandatory minimum of seven-years imprisonment for importing narcotics. The case involved a twenty-seven-year-old man with prior convictions who

¹¹ See K. Roach, "Smith and the Supreme Court: Implications for Sentencing Policy and Reform" (1989) 11 S.C.L.R. 433 at 473.

returned from Bolivia with seven and one-half ounces of cocaine worth more than one hundred thousand dollars and was sentenced to eight-years imprisonment for importing narcotics. In his plurality judgment, Mr. Justice Lamer indicated that courts should show deference to Parliament and not invalidate every mandatory sentence, but only those that were grossly disproportionate and excessive so as to outrage standards of decency. He also warned that courts should not "stigmatize every disproportionate or excessive sentence" as unconstitutional, thereby precluding the role of appeals on fitness of sentencing. Despite these notes of caution, Mr. Justice Lamer stressed that the pursuit of constitutionally valid penal purposes did not ensure the validity of mandatory sentences. Courts should examine not only the gravity of the offence and the circumstances of the case, but also "the personal characteristics of the offender ... in order to determine what range of sentences would have been appropriate to punish, rehabilitate, or deter this particular offender or to protect the public from this particular offender."12 The focus on the particular case and the personal characteristics of the particular offender played an important role in Mr. Justice Lamer's conclusion that the mandatory sentence was cruel and unusual because it could be applied to a young person caught bringing a joint of marijuana back to Canada after spring break. The hypothetical offender was a nineteen-year-old student who imported a very small amount of drugs as his or her first offence.

Having concluded that the mandatory minimum sentence of sevenyears imprisonment would be cruel and unusual as applied to such a sympathetic offender, Mr. Justice Lamer held that the section 12 violation had not been justified under section 1 of the *Charter*. Although the mandatory sentence was rationally connected to the important objective of deterring the import of drugs, there was "no need to be indiscriminate" and Parliament could have tailored the mandatory penalty so that it did not apply to small-time offenders.

In his dissent, Mr. Justice McIntyre argued that there was "an air of unreality about this appeal" because the mandatory sentence was not cruel and unusual as applied to Mr. Smith, who definitely was neither a small-time nor first offender. He concluded that the seven-year mandatory minimum was not so long as to outrage the public conscience or degrade human dignity, especially when it was considered that an offender caught by the seven-year mandatory minimum would be eligible for day parole in a little over a year and full parole after twenty-eight months. He also

¹² Supra note 2 at 1074.

warned that the Court should be careful not to question the wisdom of the mandatory penalty. Parliament was entitled to determine that the gravity of importing narcotics and the need to deter the drug trade "are of paramount importance and that, consequently, the circumstances of the particular accused should be given relatively less weight." Mister Justice McIntyre's lengthy dissent in *Smith* is of more than historical interest because many of its themes are reflected in the Court's recent decisions in *Morrisey* and *Latimer*.

B. The Dangerous Offender Cases

The same year that it struck down the mandatory minimum sentence of seven years for importing narcotics, the Supreme Court upheld the dangerous offender provisions. This could be seen as the flip side of *Smith* because both decisions were premised on the Court's acceptance of the multiple purposes of sentencing including instrumental concerns about preventing or deterring future crime. The difference was that in the dangerous offender cases, the Court deferred to Parliament's decision to emphasize future protection from dangerous offenders as opposed to maintaining its approach in *Smith* that Parliament's mandatory sentence was grossly disproportionate to what was necessary to ensure that young first-time offenders did not commit future crimes. Mister Justice La Forest, for the majority in the dangerous offender cases, stated that:

[i]n a rational system of sentencing, the respective importance of prevention, deterrence, retribution, and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.¹⁴

Only Mr. Justice Estey, in dissent, defended a retributive approach by arguing it has "long been an element of the criminal law of this country that sentences must be proportionate to the offence committed." He stressed that indeterminate detention was disproportionate to the crimes committed by the offender, namely break and enter, theft, unlawful use of a weapon during a sexual assault, and unlawful use of a firearm during an indictable offence.

¹³ Ibid. at 121.

¹⁴ Lyons v. The Queen, [1987] 2 S.C.R. 309 at 329.

¹⁵ Milne v. The Queen, [1987] 2 S.C.R. 512 at 531.

In 1990, the Court intervened to hold that the continued detention of a fifty-five-year-old sexual offender who had been imprisoned for thirty-seven years under dangerous offender provisions constituted cruel and unusual punishment. It stressed the facts of the case, adding:

[i]t will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*.¹⁵

The caution and focus on the facts of the individual in this case set the tone for subsequent judgments.

C. Luxton¹⁷

In 1990, the Court in *Luxton* upheld the mandatory sentence of life imprisonment with ineligibility for parole for twenty-five years for first degree murder in a case where the accused stabbed a cab driver to death while forcibly confining her. Chief Justice Lamer stressed that any person convicted of murder would now be constitutionally required to have at least subjective knowledge that the victim was likely to die. There was added blameworthiness because a person convicted of first degree murder under section 231(5) of the *Criminal Code* would have:

exploited a position of power and dominance to the gravest extent possible by murdering the person that he or she is forcibly confining. The punishment is not excessive and clearly does not outrage our standards of decency ... it is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat our most serious crime with an appropriate degree of certainty and severity.¹³

The severe penalty "demonstrates a proportionality between the moral turpitude of the offender and the malignity of the offence" with particular attention to the fact that the offender had subjective foresight of death and was illegally dominating the victim. With respect to offender characteristics and the effects of long term punishment, the Court noted

¹⁶ Steele v. Mountain Institute, [1990] 2 S.C.R. 1385 at 1417.

Supra note 4.

¹⁸ See the companion case of R. v. Martincau, [1990] 2 S.C.R. 633.

¹⁹ R.S.C. 1985, c. C-46 [hereinafter *Code*].

²⁰ Supra note 4 at 460.

that the offender could apply for the Royal Prerogative of Mercy, temporary absences for humanitarian reasons, and to a jury after fifteen years, to be declared eligible for parole. The Court, of course, could not know whether Mr. Luxton would actually receive any of these privileges and in the years since its decision "these opportunities to make individual claims for leniency, mercy, or special consideration, have been diminished both by statute and practice."

D. The License Suspension Cases

In a six to three decision in 1991, the Court upheld the constitutionality of a mandatory minimum sentence of seven-days imprisonment for the offence of knowingly driving with a suspended license. For the majority, Mr. Justice Gonthier argued that the Court of Appeal and, by implication, his dissenting colleagues, had given "insufficient weight to the gravity of the offence."²² He stressed that Mr. Goltz "knowingly and contemptuously" and without any excuse, violated a prohibition against driving as a result of past driving infractions.²³ Following Smith, Mr. Justice Gonthier recognized the need to also examine the particular circumstances of the case, the personal characteristics of the offender, and the effects of the sentence on the offender. He noted that Goltz's mandatory minimum seven-day sentence could be served on weekends to enable him to continue to work. In the event of true hardship, Mr. Justice Gonthier hypothesized that he could be temporally released. As was the case in Luxton, the Court could not be sure whether a particular offender would receive such discretionary treatment. In considering the role of hypotheticals, he stressed that the Court should not consider remote and extreme examples and suggested that a person who drove in an emergency while prohibited might have a necessity defence.

Madame Justice McLachlin (with the concurrence of Chief Justice Lamer) dissented on the basis that the Court was obliged to consider a broader range of circumstances in which the mandatory penalty could be applied. Some drivers might have been prohibited from driving because of a failure to pay licensing fees or court judgments as opposed to a bad driving record. Madame Justice McLachlin also examined the hypothetical example of a prohibited driver who moves a car at a scene of an accident

²¹ A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 295-96.

²² Goltz, supra note 6 at 506.

²³ *Ibid.* at 502.

and who lost his or her job because of the mandatory seven days of imprisonment. In this case, the dissent reflected the concern about hypothetical offenders that was apparent in *Smith*.

Four years later, the Court was required to return to British Columbia's mandatory minimum sentence of seven-days imprisonment for driving while prohibited, when it held that the sentence violated section 7 of the Charter. In R. v. Pontes,²⁴ driving with a prohibited license was found to be an absolute liability offence, unlike the offence in Goltz, which required that the accused knowingly drive while prohibited from doing so. The Court indicated that people convicted without fault under an absolute liability offence could not be imprisoned under section 7 of the Charter. Once again, the focus in this case was on whether the gravity and the blameworthiness of the offence justified the mandatory penalty of imprisonment, and not on the personal characteristics of the offender.

F. Wust²⁵

After its 1991 decision in Goltz, the Court did not revisit mandatory sentences for nearly a decade. In R. v. Wust, the Court held that the new mandatory minimum sentence of four years for robbery with a firearm, could be reduced by the amount of time spent by the accused in custody before conviction. As a matter of statutory interpretation (albeit statutory interpretation to avoid a Charter violation), the Court unanimously held that the enactment of a mandatory sentence did not depart from a general provision that the sentencing judge had the discretion to take into account time already spent in custody when determining the sentence. Madame Justice Arbour suggested that "[m] and atory minimum sentences are not the norm in this country, and they depart from the general principles of sentencing expressed in the Code," particularly the principle of proportionality.²⁶ Not counting "dead time" against the mandatory minimum sentence would result in disproportionately harsh sentences for the "best offenders" caught by the mandatory minimum sentences. They would be sentenced to the full four years whereas worse offenders

²⁴ [1995] 3 S.C.R. 44 [hereinafter *Pontes*].

²⁵ [2000] 1 S.C.R. 455 [hereinafter Wust].

²⁶ Ibid. at 466.

sentenced to more than four years could receive credit (often at a 2:1 ratio) for dead time spent in pre-trial custody.²⁷

F. Morrisey²⁸

In Morrisey, the Court returned to another of the mandatory fouryear sentences enacted in 1995 for offences involving firearms, this time upholding the constitutionality of a mandatory minimum sentence of fouryears imprisonment for criminal negligence with a firearm causing death. This was probably the most problematic of the ten mandatory sentences enacted in 1995 because it applied to a person who was not necessarily engaged in illegal activity and whose fault was entirely the product of criminal negligence as opposed to intentional wrongdoing.

The actual facts of the case were reasonably sympathetic. The offender, Mr. Marty Morrisey, was a thirty-five-year-old man with no prior record, who lived with his mother and was very remorseful about the death of his friend, the brother of his former girlfriend. He had overcome a drinking problem, but began drinking after the break up of the relationship with the victim's sister. He was extremely intoxicated when he fell off a bunk bed causing a loaded firearm he was carrying to discharge into the head of the victim.

Even more so than in Goltz, Mr. Justice Gonthier, for the majority of the Court, focused on the gravity and nature of the offence in determining whether the mandatory penalty was cruel and unusual. He stressed that the accused would be convicted only if his conduct was unreasonable, exhibited wanton and reckless disregard for human life or safety, and constituted a marked departure from the standard of care expected from those handling firearms. Given the crime, it was permissible for Parliament to emphasize the sentencing goals of general deterrence, denunciation, and retributive justice more than those of rehabilitation and specific deterrence. This statement constitutes a different array of sentencing goals than those expressed in Smith, where Mr. Justice Lamer had defined the issue under section 12 as whether the sentence was grossly disproportionate given the need "to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender." There was little reason to think that four years in the penitentiary was

²⁷ Ibid. at 478-79.

²⁸ Supra note 7.

²⁹ Supra note 2 at 1074.

necessary to deter or rehabilitate Morrisey, the remorseful first-time offender. Nevertheless, the mandatory sentence was justified on the basis that it was necessary to deter others from negligently using firearms and to denounce and seek retribution for the crime.

In assessing the particular circumstances of the case and the effects of punishment on the particular offender, Mr. Justice Gonthier examined the aggravating and mitigating factors of the crime without much emphasis on the offender's characteristics. The offender's remorse and lack of a previous record was dismissed as typical of the non-intentional crime with which he was charged. Mister Justice Gonthier also noted that the offender would be eligible for day parole after ten months and full parole after sixteen months, even though Mr. Justice Lamer in Smith had not considered the availability of parole in mitigating the mandatory sentence and had indicated that the duty of ensuring that sentences were constitutional could not be delegated to prosecutors or anyone else. In this case, more so than in Goltz, the Court's examination of the characteristics of the offender and the circumstances of the particular crime was dominated by its focus on the gravity of the offence.

Morrisey represents an even greater departure from Smith in its treatment of reasonable hypothetical situations. The Court suggests that the adjudicator is "to consider only those hypotheticals that could reasonably arise"—in this case, deaths arising from playing with guns and from hunting mishaps. A significant number of reported cases were disqualified as reasonable hypotheticals because they were classified as marginal, extreme, or far-fetched possibilities as opposed to common ones.³⁰

Madame Justice Arbour (Chief Justice McLachlin concurring) argued in a separate judgment that "real cases, representing situations that have arisen, must be seen as reasonable hypotheticals for purposes of a s. 12 analysis, no matter how unusual they may appear." Relying on actual cases, Madame Justice Arbour noted that the mandatory sentence could have harsh effects on abused women, Aboriginal offenders, and police officers who negligently caused deaths with a firearm. This insight, taken from real cases, did not, however, cause Madame Justice Arbour to conclude that the mandatory sentence should, as in *Smith*, be declared unconstitutional because of the certainty that it would someday impose cruel and unusual punishment. Instead, she concluded that at least for

³⁰ Morrisey, supra note 7 at 18.

³¹ Ibid. at 30.

broad manslaughter-like offences, the mandatory penalty should be upheld. She hinted that courts in future cases might have to decline the application of the mandatory sentence if it is grossly disproportionate to the particular offender and crime.

The result was something quite close to American-style "as applied" analysis defended by Mr. Justice McIntyre in *Smith*. Possibly unconstitutional mandatory penalties could be upheld from facial challenges, but subsequent courts could respond to exceptional cases presumably by fashioning constitutional exemptions on a case-by-case basis. Even those judges on the Court who were the most concerned about the potentially harsh effects of the sentence were not prepared to strike it down. Unlike Mr. Justice Lamer in *Smith*, they were prepared to wait for an actual case where the application of the mandatory sentence would be unconstitutional.

G. Latimer³³

In Latimer, the Court upheld the mandatory minimum penalty of life imprisonment with ten years ineligibility for parole as applied to Robert Latimer. Latimer killed his daughter Tracy, a twelve-year-old girl who could not communicate her wishes because of a severe form of cerebral palsy and who required surgery to deal with the painful dislocation of her hip.³⁴ The Court restricted itself to the particular case and concluded that while "the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration, we are mindful of the important role that the mandatory minimum sentence plays in denouncing murder" particularly in cases where the offence is planned and "its consequences are highly publicized, [so that] like-minded individuals may well be deterred by severe sentences" and where the victim "is a vulnerable person with respect to age, disability, or other similar factors." In this case, the Court placed

³² In combination with the Court's decision in R. v. Rose, [1998] 3 S.C.R. 262, this concurrence suggests some implicit support for the use of constitutional exemptions not tied to a general declaration of invalidity. It was thought that the Court would resolve this issue in Latimer, supra note 5, but it did not. On the availability of constitutional exemptions see generally K. Roach, Constitutional Remedies in Canada, looseleaf (Aurora: Canada Law Book, as updated) at 14.560ff.

³³ Supra note 5.

The Supreme Court's full summary of the facts can be found at *ibid*. at 11-15. The exact facts of the case are a matter of some dispute beyond the scope of this paper, but are discussed in symposia on the case in (2001) 39 C.R. (5th) 29ff; and (2001) 64 Sask. L. Rev. 469ff.

³⁵ Latimer, supra note 5 at 161.

greater emphasis on general deterrence than it did in *Smith*, where it stressed that considerations of general deterrence could not prevent punishment from being cruel and unusual.

The Court emphasized that the offender's characteristics, the lack of a need for public protection or rehabilitation, and the particular circumstances of the case, including Latimer's motive to prevent his daughter from undergoing painful surgery, did not displace the gravity of the offence as measured by "an assessment of the criminal fault requirement or mens rea element of the offence rather than the offender's motive or general state of mind ... [T]he mens rea requirement for second degree murder is subjective foresight of death: the most serious level of moral blameworthiness." The Court averted to controversy over the wisdom of mandatory sentences "from a criminal law policy or penological point of view," but concluded that "the choice is Parliament's on the use of minimum sentences." It also noted the possibility of the Royal Prerogative of Mercy as "a matter for the executive, not the courts." As was the case in Luxton, the Court could not know whether the sentence in this particular case would be reduced sometime in the future by the executive.

III. THE SECTION 12 JURISPRUDENCE IN LIGHT OF DEVELOPMENTS IN CHARTER REVIEW

This survey of cases suggests that the doctrine for determining whether mandatory minimum sentences are constitutional has evolved considerably since *Smith*. The Court is much more cautious about striking down mandatory sentences on the basis of their effects on hypothetical offenders. It is also more willing to defer to Parliament's decision to stress some sentencing purposes over others, especially those related to societal and victim interests in mandatory penalties. The Court is also placing greater emphasis on the fault that must be proven before an offender is convicted and sentenced under a mandatory minimum penalty. In this section, I will explore how these changes are related to some broader shifts in *Charter* review.

A. From the Old Activism to the New Minimalism

As in other early decisions under the *Charter*, in *Smith*, the Court extended itself to decide issues that could have been avoided. It would have

³⁶ *Ibid.* at 159, 161.

been easy for the Court to have followed the American practice of focusing on whether a mandatory penalty was cruel and unusual as applied to the facts of the particular case before it. Although Smith's sentence was subsequently reduced from eight to six years in recognition of the changed range of penalties, no one seriously contended that he was a small-time importer or that the penalty in this case constituted cruel and unusual punishment. Given the realities of both prosecutorial discretion and plea bargaining, it might have taken forever for the perfect small-time offender—the teenaged student coming home from Florida with a joint of marijuana—to have appeared before the Court. Most small-time offenders would not have been charged or would have quickly pleaded to the lesser offence of possession of marijuana.

In the early years of the Charter, the Court was often inclined to establish broad rules and guidelines to structure Charter adjudication. Smith was a perfect example of this tendency. The Court accepted its responsibility under the Charter and refused to delegate to prosecutors, parole boards, or other members of the executive, the task of mitigating the potential severity of the mandatory penalty. It was eager to underline that the crucial issue under section 12 of the Charter was the effect of punishment on the particular offender, and that Parliament's valid legislative purposes in enacting mandatory penalties did not insulate them from review. The Court's reliance on facial invalidation of the mandatory penalty in Smith also reflected its preference for such blunt remedies in other early Charter cases. It was reluctant to leave laws that were potentially unconstitutional on the books because the legislature was better suited to reconstructing or saving legislation,³⁷ and because potentially unconstitutional laws could cause harm. In the context of freedom of expression, the Court explicitly recognized that potentially unconstitutional legislation could chill legitimate expression. 38 Similarly, a mandatory minimum sentence could impose unfair pressure on the accused to plead guilty to a lesser offence. Even if the hypothetical teenaged importer of a joint in Smith would not have been convicted of importing, he or she might have quickly and gratefully plead to the lesser offence of possession once

³⁷ Hunter v. Southam Inc., [1984] 2 S.C.R. 145 at 169.

³⁸ Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232 at 251. More recently, the Court has been less concerned about the ability of potentially unconstitutional laws to chill legitimate expression. See for example: R. v. Butler, [1992] 1 S.C.R. 452; R. v. Sharpe, [2001] 1 S.C.R. 45.

informed about the mandatory minimum penalty for importing and the possibility of a conviction.

In Smith, the court stressed that utilitarian concerns about the deterrence of others should only be considered under section 1 of the Charter, where they would be held to exacting requirements of proportionality focusing on the availability of less restrictive means to achieve the objective. Mister Justice Lamer's dismissal of the state's case under section 1 was typical of the early years of the Charter as he quickly zeroed in on the availability of less restrictive means to deter the importation of drugs by limiting the application of the mandatory sentence to big-time offenders.

The Court subsequently diluted the strict proportionality requirements of R. v. Oakes³⁹ and the criminal law was not immune to such trends. By 1992, for example, the Court was willing to accept that a reverse onus on bail should be applied even to small-time offenders accused of importing or trafficking narcotics.⁴⁰ The Court's section 12 decisions after Smith reflect a more general deferential turn in its approach to the Charter both outside and within the criminal law.

One vehicle for deference available to the Court was to emulate the practice of U.S. courts where constitutional decisions were avoided (the passive virtues) or their ambit was minimized (constitutional minimalism). Alexander Bickel and Cass Sunstein⁴¹ defend these techniques as approaches for minimizing the risk of judicial error and maximizing legislative options in a system based on judicial supremacy. Although these techniques are not without their Canadian supporters,⁴² they are generally unnecessary and even inadvisable in Canada. Under the *Charter*, courts can make bolder and broader decisions about the ambit of rights without

³⁹ [1986] 1 S.C.R. 103. On this period of *Charter* review and signs of its decline see D. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990).

⁴⁰ R. v. Pearson, [1992] 3 S.C.R. 665.

On the passive virtues of avoiding constitutional decisions by engaging in statutory interpretation and other methods, see A. Bickel, *The Least Dangcrous Branch: The Suprame Court at the Bar of Politics*, 2d ed., (New Haven: Yale University Press, 1926) c. 4. On constitutional minimalism as advocated by Sunstein, see *supra* note 8.

P. Monahan, "The Supreme Court in the 21st Century" (2001) 80 Can. Bar Rev. 374 at 398ff, and F.L. Morton & R. Knopff, Charter Politics (Toronto: Nelson, 1992) at 185ff. For an elaboration of my own views about why constitutional minimalism is not necessary under the Charter, see K. Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue? (Toronto: Irwin Law, 2001) at 147-52 [hereinafter The Supreme Court on Trial].

usurping the ability of legislatures to justify contextual departures from the Court's principles under section 1. The Court's bold decision in *Smith* was not necessarily the last word on the use of mandatory penalties for importing narcotics, as Parliament could have enacted a better-tailored mandatory penalty. Mister Justice Lamer specifically averted to this option when he discussed the less drastic alternative of a mandatory sentence that would only apply to repeat offenders or those who imported large quantities of narcotics.⁴³

Although the Court has not rejected reliance on reasonable examples under section 12 of the Charter, it has been less imaginative in conjuring them up. In Goltz, Mr. Justice Gonthier held that the reasonable example must not be far-fetched. He dealt primarily with the case before him, which involved a person who drove knowing his license had been suspended due to his bad driving record. In her dissent, Madame Justice McLachlin, with the concurrence of Chief Justice Lamer, accused the majority of reading down or sanctioning exemptions from the mandatory penalty by examining only a subset of cases in which the mandatory penalty applied. Madame Justice McLachlin was concerned that the logical implication of the majority's approach was that "no law need be found to offend the Charter. The law is declared valid; it is only some of its applications that are invalid." Relying on "case-by-case adjudication by judges would be to deprive people of knowing in advance what the law is" when the "preferable approach is to confront squarely the question of the extent to which a law is inconsistent with the Charter and hence invalid under s. 52 of the Constitution Act, 1982."44 True to Madame Justice McLachlin's predictions, the Court was required to revisit the seven-day mandatory penalty four years later in *Pontes*. In that case, it decided an issue—the unconstitutionality of the mandatory penalty of imprisonment for an absolute liability offence—that could have been decided in Goltz. The Court's minimalism in Goltz resulted in an incremental, case-by-case approach, that necessitated the subsequent decision in *Pontes*.

Recent decisions suggest that the Court is increasingly attracted to the techniques of passive virtues and constitutional minimalism. In Wust,

⁴³ It is possible that even a better tailored mandatory sentence could constitute cruel and unusual punishment when applied to exceptional offenders such as a reluctant and peripheral offender or 'drug mule' who, subject to pressure short of duress, imported large quantities of narcotics. In such a case, the appropriate judicial response would be to uphold the mandatory sentence and to craft a constitutional exemption from it for the exceptional offender. I am grateful to an anonymous referee for bringing this scenario to my attention.

⁴⁴ Goltz, supra note 6 at 511-12.

it avoided the constitutional issue by relying on statutory interpretation to hold that mandatory sentences could be reduced by deadtime. Interpreting a statute so as to avoid a constitutional violation is a classical use of the passive virtues as advocated by Bickel. Such a judicial approach makes it easier for the legislature to respond to the Court's judgment than if the Court decided the case on constitutional grounds. The problem in the Canadian context, however, is that the legislature can respond even to a constitutional judgment with ordinary legislation that limits or overrides the constitutional right declared by the Court. 45

In *Latimer*, the Court decided only whether the penalty was cruel and unusual as applied to the defendant and not the broader issue of whether the mandatory penalty for second degree murder should be struck down or could be unconstitutional when applied to other murder cases, including those in which the victim consented to his or her death. This is a classic example of the minimalism involved in "as applied" analysis that only examines the particular facts of the case.

In Morrisey, the Court warned that reasonable hypotheticals must be based on common applications of the mandatory penalty and refused to consider actual cases in which the mandatory penalty of four-years imprisonment for unlawful homicide with a firearm would have been applied to battered women, Aboriginal offenders, and police officers. The focus on commonly occurring examples meant that little attention was paid to the range of different personal circumstances of the offender that could be caught by the mandatory penalty, unlike in Smith, where the use of a teenaged student as a hypothetical offender loomed large. Madame Justice Arbour (with the concurrence of Chief Justice McLachlin) argued that the Court should not ignore these real cases. However, even this case followed the trajectory of constitutional minimalism by holding that the mandatory penalty should be upheld despite the possibility, as represented by real reported cases, that it might be unconstitutional.

The trend towards examining the effects of the penalty in the case at hand, perhaps supplemented by commonly occurring examples, makes life more difficult for defence lawyers by forcing them to defend the injustice of applying the penalty to their particular offender. In *Morrisey*, the Court was not impressed with the offender's remorse, lack of prior record, or struggle with alcohol, and noted that the family of the victim

On the similarities between the common law and the *Charter* in this respect, see K. Reach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80 Can. Bar Rev. 481 [hereinafter "Dialogues"].

feared him. Likewise, with respect to Latimer, the Court noted his "initial attempts to conceal his actions, his lack of remorse, his position of trust, the significant degree of planning and premeditation, and Tracy's extreme vulnerability" as aggravating factors that helped justify the penalty. Most real offenders, as opposed to hypothetical ones, will have some characteristics commonly considered to be aggravating factors. *Morrisey* and *Latimer* suggest that the Supreme Court will not be shy about identifying these factors and using them as a partial justification for the mandatory sentence.

When the Court did consider hypothetical offenders in *Morrisey*, it did so in a manner that did not account for the variety of personal characteristics that might have applied to offenders, especially characteristics that relate to the specific deterrence and rehabilitation of the hypothetical offender in the future. The Court concluded that the four-year mandatory penalty was not grossly disproportionate when dealing with the common examples of offenders who played with guns or accidentally shot someone on a hunting trip. The Court ignored the possibility that some of these offenders might have personal characteristics such as youth, old age, illness, past abuse, Aboriginal heritage, disadvantaged background, remorse, or habitual and non-controllable factors that did not produce an incapacity to appreciate the risk,⁴⁷ which, arguably, should affect the sentence and even the constitutionality of the mandatory sentence.

The Court also ignored the variety of circumstances (intoxication, pressure not caught by the duress defence, mental disorder not caught by the mental disorder defence, successful attempts at rehabilitation, or reparation since the crime) under which these common hypothetical crimes could occur. Exceptional circumstances relating to particular offenders and offences are, unfortunately, not caught by the generic notion of commonly occurring examples. In short, the Court's diminished enthusiasm for relying on hypothetical examples makes it more difficult than it was in *Smith* to have mandatory penalties struck down on the basis of the injustice they could cause to the best possible offender.

⁴⁶ Supra note 5 at 160.

These are factors that would not be considered under the objective standard of liability articulated by the majority in R. v. Creighton, [1993] 3. S.C.R. 3.

B. Balancing the Rights of the Accused with those of Society and Victims

At the time of its decision in *Smith*, the Court conceived of criminal justice issues through the bipolar lens of due process. On one side was the accused in possession of legal rights and on the other was society with legitimate interests based on section 1 of the *Charter*. In *Smith*, Mr. Justice Lamer stressed that in interpreting section 12 of the *Charter*, the Court should focus on the effects of the mandatory penalty on particular offenders. According to him, society's interests in deterring the importation of narcotics should only be considered under section 1 where they would be held to a strict proportionality analysis. Perhaps because drugs were thought to be a "victimless" or, at least, a consensual crime, there was no consideration of the interests of people who might be harmed by the importation and distribution of cocaine.

The Court no longer relies exclusively on the due process logic of *Smith* and many of its other early *Charter* decisions. Rather, the Court has applied more deferential section 1 tests to a number of criminal justice issues and has committed itself to defining the rights of the accused, and equality and security rights of victims or potential victims of crime, in a relational fashion that reconciles competing rights. Chief Justice McLachlin, who once insisted on the strict due process paradigm in her decisions in *Seaboyer*⁴⁸ and *Keegstra*. Once we recognizes that although "the criminal law is generally seen as involving a contest between the state and the accused ... it also involves an allocation of priorities between the accused and the victim, actual or potential."

The interests of the state in convicting and punishing offenders have been augmented in Parliament and in the Court by the rights of victims. On the surface, this change in the law and politics of the *Charter* and in criminal justice would seem not to have any application to the section 12 cases discussed above. Since *Smith*, the Court has not even reached a section 1 analysis because it has held that every mandatory penalty challenged has not been cruel and unusual punishment. Nor has it needed

⁴⁸ R. v. Seaboyer, [1991] 2 S.C.R. 577.

⁴⁹ R. v. Keegstra, [1990] 3 S.C.R. 697.

⁵⁰ R.J.R. Macdonald v. Canada, [1995] 3 S.C.R. 199 at 332.

See generally K. Roach, Due Process and Victims' Rights: The New Law and Palutes of Criminal Justice (Toronto: University of Toronto Press, 1999) describing a punitive victims' rights model of criminal justice in which disadvantaged groups are offered criminal justice reforms in response to concerns that they suffer inequality and insecurity.

to apply a more deferential test of justification designed to recognize Parliament's role in reconciling competing interests or rights. Even in *Latimer*, the Court did not explicitly apply a relational approach that defined (and at the margins limited) the accused's rights under section 12 with the life, security, and equality rights claimed by intervenors representing the disabled community and pro-life groups.

There are signs, however, that the section 12 jurisprudence has not been immune from the Court's increased recognition of social and victim interests in criminal sanctions, or from Parliament's willingness to assert those interests in a punitive manner. In Luxton, the Court relied on the notion that the illegal domination of the victim by the accused was a theme central to the crime of first degree murder. The Court regarded the mandatory penalty as part of "society's condemnation of a person who has exploited a position of power and dominance to the greatest extent possible by murdering the person he or she is forcibly confining."52 In response to well-publicized cases involving very sympathetic victims, Parliament subsequently added to the list of underlying offences that result in a first degree murder conviction in order to provide protection for victims of criminal harassment and criminal organization offences in subsections 231(6) and 231(6.1) of the Code.53 There have also been calls from commentators to expand the section further to include other victims, including victims of hate crimes and domestic violence.⁵⁴

Concerns about victims have not been limited to the context of murder. In Goltz, 55 the Court took note of the social costs of traffic accidents, the disproportionate involvement of bad drivers in traffic accidents, and the social interests and difficulties in deterring bad drivers from driving. In Morrisey, 56 the Court upheld a mandatory penalty enacted

⁵² Luxton, supra note 4 at 724.

⁵³ S.C. 1997, c. 16, s. 3; and S.C. 1997, c. 23, s. 8.

I. Grant, D. Chunn & C. Boyle, The Law of Homicide, looseleaf (Toronto: Carswell, 1994) at
 7-28. They conclude that mandatory life sentences for murder should be retained with ineligibility for parole "to reflect our outrage at Canada's most serious crime." *Ibid.* at 7-55, 7-56.

⁵⁵ Supra note 6 at 508-09.

⁵⁶ Supra note 7 at 121. The threshold of social costs seems to be getting lower. In Goltz, supra note 6 at 509, Mr. Justice Gonthier noted that 622 persons had been killed in traffic accidents in British Columbia in one year whereas in Morrisey, supra note 7 at 117, he observes that "[i]n 1995 alone, there were 49 'accidents' causing death involving firearms, coupled with 145 homicidal deaths involving firearms." In both cases, the implicit assumption must be that without mandatory sentences the death toll may have been higher. This assumption is not generally supported by deterrence theory or empirical studies of deterrence, which suggest that increasing the severity of punishment alone does not deter

as part of gun control legislation in the wake of the massacre of fourteen women at Montreal's Ecole Polytechnique. It took note of the social costs of non-intentional firearm deaths and held that Parliament was entitled to stress deterrence and denunciation of firearm offences and to provide "retributive justice to the family of the victim and the community in general." There are suggestions in Morrisey that, contrary to Smith, Parliament's concern about using mandatory sentences to deter people other than the particular offender may be a legitimate consideration in determining whether the mandatory sentence violates section 12 of the Charter.57 This suggestion became clearer in Latimer,53 where the Court noted that in cases of planned and highly publicized crimes "where the victim is a vulnerable person with respect to age, disability, or other similar factors," it may be necessary to ensure that "like-minded individuals may well be deterred by severe sentences." A concern about crime victims, including crime victims from section 15 groups, has been invoked as a justification for mandatory sentences. Victims' rights have also been used to justify the punitive crime control response embodied in mandatory penalties.

The association of mandatory penalties with a punitive victims' rights agenda is unfortunate. There is little evidence to support the hope that mandatory penalties of imprisonment, which may not even be known by the general public, will serve as effective deterrents of crimes committed against vulnerable people. Even without the blunt instrument of a mandatory penalty, paragraph 718.2(a) of the *Code* already deems hatred on section 15 grounds, spousal or child abuse, or other abuses of a position of trust and authority, as aggravating factors in sentencing. The focus on equal protection of the criminal law in politically-charged cases such as *Latimer*, often proceeds on exaggerated assumptions about the extent of protection that the criminal law actually provides. Mandatory sentences

crime. Nevertheless, a focus on the incidence of victimization as a justification for the criminal sanction reflects a "risk society" in which it is easier to calculate risk than reduce it. For an argument that empirical studies do justify the mandatory prohibitions on driving that are imposed as a result of drunk driving convictions, see E. Chamberlain & R. Solomon, "Misplaced Sympathies: Why Driving Prohibitions Are Neither Cruel Nor Unusual" (2001) 45 Crim. L.Q. 331.

While recognizing, as in *Smith*, that "general deterrence cannot, on its own, prevent a punishment from being cruel and unusual," Justice Gonthier also notes that "the punishment is acceptable under s. 12 while having a strong and salutory effect of general deterrence. It cannot be disputed that there is a need for general deterrence. This legislation dictates that those who pick up a gun must exercise care when handling it." *Supra* note 7 at 117.

⁵⁸ Supra note 5 at 41, quoting R. v. Mulvahill (1993), 21 B.C.A.C. 296 at 369.

may be defended in the often vain and, at best, uncertain hope that they will provide protection for various disadvantaged groups that are subject to disproportionate victimization. However, they will also result in injustice when applied to exceptional offenders, including exceptional offenders with the same characteristics as the disadvantaged group that is supposed to be protected by the mandatory penalty. The dichotomy between victims and offenders that drives many punitive forms of victims' rights often breaks down in practice and individuals such as women, the young, Aboriginal people, the disabled, and other vulnerable minorities who are thought to be protected by mandatory sentences may also be caught by them.

C. The Interaction of Fault and Penalty

A final broad trend in the section 12 jurisprudence as it affects mandatory sentences is the Court's increased emphasis on the gravity of the offence as measured by the fault that must be proven to convict the accused. In *Smith*, the Court did not discuss the *mens rea* requirement of importing narcotics. It did not discuss the fact that the *mens rea* requirement would protect a person who honestly believed that he or she was bringing a substance other than illegal drugs across the border. The hypothetical offender that the Court relied upon presumably knew that he or she was bringing a joint into Canada. In subsequent cases, however, the Court has placed greater emphasis on the accused's fault—especially constitutionally-mandated standards of fault—as a justification for the mandatory penalty.

In Goltz, 60 Mr. Justice Gonthier stressed that the mandatory penalty of seven-days imprisonment was being upheld only for the offence of knowingly driving while prohibited, and the mens rea requirement made it "a graver offence ... than would be an offence of driving while unaware of a prohibition." The Court backed up this observation four years later in Pontes, when it held that a person convicted of an absolute liability offence of driving while prohibited could not constitutionally be subject to the mandatory seven-days imprisonment. This harkened back to Madame Justice Wilson's conclusion in the Reference Re Section 94(2) of the Motor Vehicle Act⁶¹ that imprisonment was not a sentence proportionate to the seriousness of an absolute liability offence committed without subjective or

⁵⁹ R. v. Beaver, [1957] S.C.R. 531.

⁶⁰ Supra note 6 at 507.

^{61 [1985] 2} S.C.R. 486 at 533-34.

objective fault. A focus on the absence of fault in absolute liability offences has restrained the use of mandatory imprisonment.

The Court's more recent decision in *Morrisey*, however, suggests that aside from no-fault absolute liability, a focus on fault may not restrain the use of mandatory imprisonment. The Court simply remarked that the offence of criminal negligence causing death was "not an absolute liability offence. It requires proof of conduct which is such a marked departure from the behaviour of a reasonably prudent person as to show a wanton or reckless disregard for the life or safety of others." The Court's increased acceptance of a non-individuated standard of objective fault not related to the prohibited act as a constitutionally appropriate fault standard under section 7 of the *Charter*, has influenced its section 12 decisions.

This reliance on non-individuated standards of fault can have unfortunate and harsh consequences. One of the reasons given in R. v. Creighton for the acceptance of such a broad and non-individuated standard of criminal liability was that trial judges could use their sentencing discretion to tailor the penalty to the circumstances of a broad manslaughter offence that covered near accidents as well as near murders. This discretion could also consider personal characteristics of the offender that were held by the majority to be irrelevant in determining liability. The ability of sentencing discretion to mitigate overly broad and harsh liability standards could quickly be eliminated if Parliament decided to enact a mandatory minimum sentence. As Madame Justice Arbour observes, "prior to the [1995] Firearms Act amendments imposing mandatory minimum punishments for manslaughter and criminal negligence causing death with a firearm, this Court recognized the importance of flexibility in determining the appropriate sentence for the offence of manslaughter."

This flexible approach is no longer applied when manslaughter is committed with a firearm. Now, a trial judge must sentence the offender to at least four-years imprisonment regardless of the circumstances of the offence, the offender's age, health, or other personal characteristics. This approach is a recipe for injustice and harshness. The sentencing discretion

⁶² Supra note 7 at 105.

^{[1993] 3.} S.C.R. 3 [hereinafter *Creighton*]. The standard of negligence accepted by the majority in that case rejects the relevance of offender characteristics such as age, gender, or other personal characteristics unless that characteristic renders the accused incapable of appreciating the risk of nontrivial bodily harm. Madame Justice McLachlin concluded for the majority that "lack of education and psychological predispositions serve as no excuse for criminal conduct, although they may be important factors to consider in sentencing." *Ibid.* at 70.

⁶⁴ Morrisey, supra note 7 at 117.

relied upon by the Court in *Creighton* has been severely curtailed by the mandatory sentences enacted by Parliament less than two years after the Court's oft-criticized decision in that case. In making decisions about standards of liability and the ambit of defences in substantive criminal law, judges should be cautious about assuming that sentencing discretion will be available to mitigate the potentially harsh effects of their rulings. If the Court had known that mandatory minimum sentences were imminent, it might have adopted the stronger *mens rea* requirement defended in dissent by Mr. Justice Lamer in *Creighton*. This approach required objective foresight of risk to life, not just a risk of bodily harm, and allowed some offender characteristics to influence the standard of reasonable conduct. Unfortunately, it is probably too late to reverse *Creighton*, even though people convicted of negligent manslaughter with a gun will now be subject to a mandatory minimum of four-years imprisonment that was not in place at the time of the Supreme Court's decision.

The hard lessons of the unanticipated consequences of subsequent Parliamentary intervention are not limited to the manslaughter context. The Court's decision in Luxton to uphold the sentence of life imprisonment with no eligibility for parole for twenty-five years was based on two assumptions: that first degree murderers would only be convicted for crimes based on illegal domination of the victim, and that they could apply to a jury to be declared eligible for parole after serving fifteen years. Both of these facts, however, have subsequently been altered by Parliament. In response to particular crimes, Parliament has added criminal harassment and criminal organization offences to the list of underlying offences for constructive first degree murder. This list of crimes is likely to increase in the future as Parliament responds to terrible and well-publicized crimes.⁶⁵ In addition, Parliament has reduced the likelihood that first degree murderers will be declared eligible for parole in "faint hope hearings" in a variety of ways. 66 Consequently, the Court should be prepared to revisit its prior precedents in light of these legislative changes. Moreover, it should

Bill C-36 proposes that killings during terrorist activities be added to first degree murder. See K. Roach, "The Dangers of a *Charter*-Proof and Crime-Based Response to Terrorism" in R. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 139.

In response to Clifford Olson's failed faint hope application, multiple murderers have been excluded, applications are screened, the jury must be unanimous and victim impact statements are now admissible at faint hope hearings. See J.V. Roberts & D.P. Cole, "Sentencing and Early Release Arrangements for Offenders Convicted of Murder" in J.V. Roberts & D.P. Cole, eds., Making Sense of Sentencing (Toronto: University of Toronto Press, 1999) 277 at 289ff.

not justify its decisions about criminal fault and cruel and unusual punishment on the assumption that any injustice or harshness can be cured by the benevolent exercise of discretion—discretion that may not be exercised in any individual case and that may be removed by Parliament altogether.

The Court's decisions in *Luxton* and *Latimer* to uphold mandatory life imprisonment for murder are good examples of how *mens rea* requirements have been used to justify mandatory penalties. One of the reasons given by Chief Justice Lamer for upholding the mandatory minimum penalty in *Luxton* was that it was no longer possible "to classify unintentional killings as first degree murder." The offence of first-degree murder ensured that the offender would have an added degree of fault. This added degree of fault included an assessment of the deliberation involved in the killing, knowledge that the person being killed was a police officer or prison guard, or the commission of a very serious underlying offence involving the illegal domination of the victim.

In Latimer, 63 the Court made it clear that subjective foresight of death was sufficient to justify life imprisonment with ineligibility for parole for ten years. It stated that "in considering the character of Mr. Latimer's actions, we are directed to an assessment of the criminal fault requirement or mens rea element of the offence rather than the offender's motive or general state of mind." Just as it is irrelevant to determining criminal liability, motive is considered by the Court to be irrelevant in determining whether mandatory life imprisonment is cruel and unusual punishment for murder. This approach could mean that a person who knowingly but compassionately kills a relative, spouse, or friend who requests assistance in ending his or her life in order to relieve suffering could be subject to the mandatory penalty. The accused's motive would be irrelevant to assessing the gravity of their offence. Similarly, an accused who knowingly killed another person because their child was threatened would, absent a duress defence precluded by section 17 of the Code, also be subject to the mandatory penalty. Again, the offender's motive would be irrelevant to the gravity of the offence. The same result would be true of an accused who

⁶⁷ Supra note 4 at 720-21.

⁶⁸ Supra note 5 at 39.

killed because of a genuine but unreasonable fear that his or her life was threatened.⁶⁹

In all of the cases since *Smith*, the Court has relied heavily on the fault required for a conviction as a justification for mandatory sentences. In *Pontes*, a focus on fault led to the implicit invalidation of a mandatory sentence of imprisonment for absolute liability offences. By contrast, the presence of subjective fault in *Luxton*, *Latimer*, and *Goltz* and of objective fault in *Morrisey*, helped justify the mandatory penalties. The use of fault in *Luxton* and *Latimer* also lends some support to the idea that due process, in the form of constitutionally-required fault, can be used to justify crime control in the form of mandatory life imprisonment.⁷⁰

The Court's relaxation of constitutionally-required fault standards is also reflected in its section 12 jurisprudence. In its 1991 decision in Goltz, the Court indicated that the offender's subjective knowledge of the prohibited act—driving with a prohibited license—helped justify a mandatory minimum of seven-days imprisonment. By contrast, in 2000 the Court accepted a non-individuated standard of objective foresight of threats to safety as not being incompatible with a mandatory minimum of four-years imprisonment for manslaughter committed with a firearm. It is becoming easier to justify mandatory sentences on the basis of less onerous fault requirements, even for serious offences that carry significant mandatory terms of imprisonment.

Trends in constitutional law help explain the Court's evolving jurisprudence on the constitutionality of mandatory penalties. These trends include the Court's increased attraction to constitutional minimalism and increased reluctance to strike down mandatory penalties on the basis of their possible application to hypothetical offenders. The Court is also more prepared to defer to attempts by Parliament to protect people who may be vulnerable to being victimized by crime. Finally, and as will be suggested in the next part of this article, the Court's increased focus on the offender's fault as a justification for mandatory penalties also dovetails with developments in sentencing since *Smith* that emphasize punishment as a deserved response to crime without regard to whether punishment is required for rehabilitation or for public protection.

These hypothetical examples were included in the CCLA's factum in *Latimer*. See *Latimer*, supra note 5 (Intervenor's factum at paras. 16-20). If faced with such cases, the Court could distinguish *Latimer* given its decision to restrict itself to the facts of that case. See supra note 5 at 38-39.

On the idea that due process can help legitimize crime control, see D. McBarnet, Conviction: Law, the State and the Construction of Justice (London: Macmillan, 1981); and R.V. Ericson & P. Baranek, The Ordering of Justice (Toronto: University of Toronto Press, 1982).

IV. THE SECTION 12 JURISPRUDENCE IN LIGHT OF DEVELOPMENTS IN SENTENCING

Changes in sentencing since the 1987 decision in *Smith* have been as dramatic as the changes in constitutional law. This section explores how some of these changes have been reflected in the Court's post-*Smith* decisions concerning the constitutionality of mandatory sentences and, in particular, its increased focus on the gravity of the offence as measured by the offender's fault, its increased concern about maintaining desert-based proportionality, and its increased acceptance of the ability of Parliament to emphasize the punitive purposes of sentencing by enacting mandatory sentences.

A. Increased Emphasis on Just Deserts

The most important post-Smith development in sentencing has been Bill C-41, which codified the purposes and principles of sentencing in 1996. Although Parliament did not go as far as American "just deserts" reforms and sentencing grids, or even the more moderate proposals of the Canadian Sentencing Commission, the 1996 reforms, as exemplified by subsection 718.1 of the Code, recognized that the fundamental principle of sentencing was that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." This approach gave pride of place to the idea that punishment was both justified and limited by what is deserved for the crime. As the Court explained in 1996: "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."

The idea that just deserts both justifies and limits punishment has contradictory attractions. Some commentators stress the idea of just deserts as a limit on punishment, particularly punishment paternalistically imposed for the offender's own good or in the hope of deterring crime. Others stress the idea of just deserts as a justification for punishment, a calculated infliction of hard treatment to respond to the wickedness of crime and a release from the need to demonstrate that punishment serves some instrumental or utilitarian good. Whether just deserts limits or justifies punishment depends on context and politics.

⁷¹ S.C. 1995, c. 22, s. 6.

⁷² M (C.A.), supra note 9 at 529.

In Smith, the Court showed little attraction to a just deserts approach to sentencing. Mister Justice Lamer defined the issue as not simply what punishment was deserved for the particular crime, but what punishment was necessary to deter or to rehabilitate the particular offender given his or her personal characteristics. Smith reflected the sentencing philosophy of the 1969 Ouimet Report, 3 which stressed the need to justify punishment in relation to rehabilitation and deterrence more than it stressed the retributive focus of the 1987 report of the Canadian Sentencing Commission.⁷⁴ The notion that just deserts could limit punishment was, at most, incipient in Smith.75 It appeared to be scuttled when the Court upheld indeterminate detention for dangerous offenders, disregarding Mr. Justice Estey's dissent that such punishment exceeded the gravity of the crime. The Court's concerns with deterrence and rehabilitation led it to strike down the mandatory sentence in that case. That same year these same concerns led the Court to uphold provisions that imposed indeterminate imprisonment on dangerous offenders.

In subsequent years, however, the Court has placed increased emphasis on just deserts as both a limit on, and a justification for punishment. In 1995, the Court held in *Pontes* that a person could not be imprisoned for an absolute liability offence committed without subjective or objective fault. Imprisonment was not an appropriate response to a nofault offence. One year later, the Court recognized retribution as a legitimate component of punishment and distinguished it from vengeance on the basis that retributive punishment was linked in a calculated manner to the offender's moral culpability and *mens rea*. The retributive idea of desert as a limit on punishment can be seen in these cases. The sentence is limited by not only the gravity of the crime committed by the offender, but also by the offender's degree of moral responsibility or moral culpability. However, *Pontes* is the only Supreme Court case in which desert ideas have

⁷³ Report of the Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa: Supply & Services, 1969) at 185.

Canadian Sentencing Commission, Sentencing Reform: A Canadian Approach (Ottawa: Supply & Services, 1987) [hereinafter Sentencing Reform]. At the time Smith was argued, there were still a number of precedents on the books that suggested that retribution should be rejected as vengeance in disguise. See R. v. Hinch and Salanski (1967), 62 W.W.R. 205 (B.C. C.A.); and R. v. Morrissette (1970), 75 W.W.R. 644 (Sask. C.A.).

This argument is elaborated upon in K. Roach, "Smith and the Supreme Court: Implications for Sentencing Policy and Reform" (1989) 11 S.C.L.R. 433.

⁷⁶ M (C.A.), supra note 9.

actually been used to limit punishment. In other cases, the Court has focused on desert and culpability as a justification for punishment.

The Court relied on the constitutional requirement of subjective fault and subjective foresight of death for a murder conviction to justify mandatory life imprisonment in both Luxton and Latimer. In Luxton, ⁷⁷ the Court stressed the "proportionality between the moral turpitude of the offender and the malignity of the offence." In that case the offence was defined as one that involved the continued illegal domination of the victim. In Latimer, the Court stressed "the important role that the mandatory minimum sentence plays in denouncing murder," which, it noted, is one of the purposes of sentencing in section 718 of the Code. It defines denunciation as "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law." Denunciation focuses on the gravity of the offence committed without regard to the moral responsibility of the offender.

The notion that a mandatory penalty may be a deserved response to an offence is also apparent in the Court's decision to uphold mandatory sentences for crimes that are less serious than murder. In Goltz, the Court stressed the contempt for the law that is demonstrated by a driver who knowingly drives while prohibited. In this case, a mandatory penalty of seven-days imprisonment was justified, in large part, on the basis of the offender's subjective fault and contempt for the law.

Even though the conduct was unintentional and the fault was objective and not necessarily related to the prohibited act, in *Morrisey*, the Court also employed the rhetoric of just deserts and proportionality, as measured by the gravity of the crime and the offender's degree of responsibility. Mister Justice Gonthier stressed that:

although less morally blameworthy than murder, criminal negligence causing death is still morally culpable behaviour that warrants a response by Parliament dictating that wanton or reckless disregard for life and safety of others is simply net acceptable ... [t]he centence represents society's denunciation, having regard to the gravity of the crime; it provides retributive justice to the family of the victim and the community in general; and it carves a general deterrent function to prevent others from acting so recklessly in the future."

⁷⁷ Supra note 4 at 712.

⁷⁸ Supra note 5 at 41.

⁷⁹ Supra note 7 at 118, 121. The Court's reference to providing retributive justice to the victim's family is also at odds with the Court's decisions in *Gladue*, supra note 10, and in *Prouls*, supra note 10, which suggest that acknowledgement and reparation of harms suffered by victims are restorative principles of sentencing that are not associated with the use of prison.

The fact that the Court upheld the four-year mandatory minimum sentence for one of the least blameworthy crimes covered by the mandatory sentences enacted in 1995 for firearm offences, ⁸⁰ suggests that the Court's understanding of proportionality and desert may not serve as an effective limit on mandatory sentences.

This use of just deserts to justify mandatory sentences is not inevitable. The Canadian Sentencing Commission recommended the repeal of all mandatory sentences, other than for murder, on the just deserts grounds that "if the punishment is to fit the crime, then there can be no predetermined sentences since criminal events are not themselves predetermined. Although the offence should be the focus in determining the appropriate penalty, the circumstances of the offender must also have some weight,"81 In both Luxton and Morrisey, the reliance on the possibility that offenders might have their sentence mitigated by parole, and in Latimer. the reliance on the possibility of the Royal Prerogative of Mercy, undermines the just deserts ideas that: 1) determinate punishment should be calculated on what is deserved for past crimes; and 2) that it is unjust to punish a person on the basis of what might happen in the future. The Court might, sometime in the future, return to the idea that was incipient in Smith, implicit in Pontes, and explicit in section 718.1 of the Code—that mandatory penalties are disproportionate to the gravity of a crime and to an offender's degree of responsibility—and respond by striking them down. Indeed, in obiter in Wust,82 Madame Justice Arbour suggested that mandatory sentences "often detract from what Parliament has expressed as the fundamental principle of sentencing in s.718.1 of the Code: the principle of proportionality."

Morrisey presented a wonderful opportunity to demonstrate that desert not only justifies, but limits punishment. A mandatory minimum term of four-years imprisonment for manslaughter seems harsh in comparison to an offender's fault which only requires objective foresight of threats to bodily harm and safety. Unfortunately, the opportunity to demonstrate that punishment was limited by desert and fault was lost in Morrisey and the Court may have difficulty finding another opportunity.

The four-year mandatory sentence for offences committed with firearms also applies to attempted murder, causing bodily harm with intent to wound, sexual assault, aggravated assault, kidnapping, hostage taking, robbery, and extortion. Although the consequences of these offences are not as severe as manslaughter, they are generally committed with a higher level of subjective and intentional fault and often involve the illegal domination of the victim.

⁸¹ Sentencing Reform, supra note 74 at 186.

⁸² Supra note 25 at 466.

In recent cases such as Morrisey and Latimer, the Court's focus on the gravity of the crime, the offender's responsibility for the offence as measured by mens rea, and the need to denounce crimes and punish them proportionately, has been used to justify mandatory sentences. This focus has encouraged the Court to place less emphasis on offender characteristics and what is necessary to deter or rehabilitate a particular offender. One searches the recent cases in vain for Smith's emphasis of offender characteristics and gross disproportionality when considered in light of what is necessary for deterrence or rehabilitation of the particular offender. One explanation for this is the increasing emphasis that Parliament and the Court have placed on just deserts as measured by the abstract denunciation of crimes and the responsibility of the offender for the crime as measured by mens rea.

B. Trying to Maintain Proportionality in the Face of Mandatory Sentences

Mandatory sentences are part of a statutory framework that proclaims proportionality as its first principle. This framework suggests that the Court should make sense of constitutional mandatory sentences so as to maintain proportionality between offences and among different crimes that fall within that same offence. There are some signs that the Court, and especially Madame Justice Arbour, are attentive to this obligation. In most cases, the increased emphasis on proportionality will require sentences to be ratcheted up to account for the hard fact that the best offender and least serious version of the crime is caught by the mandatory minimum penalty. In a few cases, a concern about maintaining proportionality has led to a less punitive response.

In Wust, the Court found that deadtime spent in custody before conviction could be counted against mandatory minimum sentences. One of the reasons given for this sensible result was the need to maintain proportionality. If deadtime was not counted, proportionality would be disrupted by allowing the worst offenders, who received more than the mandatory minimum of four-years imprisonment, to have their pre-trial custody deducted from their sentence while the best offender, who only merited the mandatory minimum, would have no such advantage. For example, if the best offender who is sentenced to the four-year minimum has been in custody for a year before conviction, he or she would serve five years. A worse offender who was sentenced to six years imprisonment, but who also served a year of dead time might only serve four years if given two for one credit for the year spent in a remand centre awaiting trial. The result would be grossly unfair and disproportionate because the offender

who committed the more serious crime would serve less time than the offender who committed the least serious version of the crime. In Wust, a concern about maintaining proportionality between the best and worst offenders sentenced for the same offence played an important role in allowing deadtime to be counted against a mandatory minimum term of imprisonment. Proportionality effectively reduced the amount of time served.

Wust, however, is exceptional. In most cases, the same concern about maintaining proportionality will lead to increased punishment on the basis that a mandatory minimum sentence is, by definition, designed to catch the best offender and offence, and provides a floor or starting point for a proportionate scale of punishment. In a sentencing environment that ruthlessly respects proportionality, all other offenders should receive a greater sentence than the best offender and offence caught by the mandatory minimum. In her concurrence in Morrisey, 83 Madame Justice Arbour follows this logic by suggesting that mandatory minimums should act as "an inflationary floor" for sentences "setting a new minimum punishment applicable to the so-called 'best' offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard imposed on all but the very worst offender who has committed the offence in the very worst circumstances." She expressly disagreed with the idea that the new four-year minimum sentence "should not result in a proportional general increase beyond the range of sentences found in pre-1996 cases" even though, as Julian Roberts demonstrates, the available empirical evidence suggests that sentences for an offence often cluster around the mandatory minimum penalty.84 The logic of Madame Justice Arbour's position—the logic of ordinal proportionality—is that the enactment of a mandatory sentence that catches the best offender and the best offence within a particular crime should require punishment above the mandatory minimum for more blameworthy offenders. A concern about maintaining the proportionality of relative punishments can increase

⁸³ Supra note 7 at 133. The converse, recognized by lower courts after Smith, was that even though Smith had not been caught by the mandatory minimum of seven-years imprisonment, his sentence should be reduced from eight to six years because the inflationary seven-year floor on punishment had been knocked out by the Court.

⁸⁴ The Canadian Sentencing Commission found that almost all firearm-based sentences clustered around the one-year mandatory minimum while the most recent data suggest that two thirds of firearm-based sentences cluster around the new four-year mandatory minimum. See J. V. Roberts, "Mandatory Minimum Sentences of Imprisonment: Exploring the Consequences for the Sentencing Process" (2001) 39 Osgoode Hall L.J. 305 at n. 45, 47.

punishment to keep up with the inflated floor that Parliament has set for the best offender and the best offence.

Ordinal proportionality refers to the requirement that punishment reflect the comparative seriousness of crimes. As such, it relates to the pattern of punishment and ensures that punishment accounts for the relative seriousness of different crimes both within an offence and among different offences. As Andrew von Hirsch has explained, principles of ordinal proportionality require parity so that "differences in severity of punishments" are allowed "only to the extent that these differences reflect variations in the degree of blameworthiness of the conduct." Madame Justice Arbour's position in Wust reflected a similar concern that a person who committed a more serious and blameworthy version of a crime subject to a mandatory minimum sentence of four-years imprisonment not be treated the same or less harshly than a person who has committed a less serious or blameworthy version of the same crime. However, Madame Justice Arbour's logic and the principle of ordinal proportionality can be taken further to include a concern with the "rank ordering" of different offences in the sense that "punishing one crime more than another expresses more disapproval for the former crime, so that it is justified only if that crime is more serious. Punishments thus are ordered on a penalty scale so that their relative severity reflects the seriousness ranking of the crimes involved."86

It is possible to argue that a constitutional mandatory minimum of four-years imprisonment for an unintentional killing with a firearm should increase the punishment tariff, not only for that crime, but other crimes. If an unintentional killing with a firearm merits four years of imprisonment, the intentional use of a firearm in an attempted murder or a robbery could require much more than four years. A concern about preserving proportionality means that mandatory sentences that have been upheld as constitutional by the Court may ratchet up all sentences. The result will be an upward spiral of increased punitiveness as the constitutional benchmark

A. von Hirsch, "Proportionality in the Philosophy of Punishment" in M. Tonry, ed., Crime and Justice, vol. 16 (Chicago: University of Chicago Press, 1992) 55 [hereinafter "Proportionality"]. For further elaboration, see A. von Hirsch, Censure and Sanctions (Oxford: Clarendon, 1993) at 18.

^{86 &}quot;Proportionality," ibid. at 79.

of when a sentence becomes grossly disproportionate will be an upward moving target.⁸⁷

Roberts argues that the upward spiral in punishment from a mandatory minimum sentence contemplated by Madame Justice Arbour should not occur. The available empirical evidence supports his conclusion because trial judges tend to cluster their sentences around the mandatory minimum penalty, a practice that Roberts concedes violates ordinal proportionality by imposing the same punishment, that is, the mandatory minimum sentence, on less serious and more serious versions of the crime. He also argues that judges should not ratchet up sentences from the new four-year mandatory minimum sentence because that mandatory minimum is itself not proportionate.

The problem with this argument is that the Supreme Court has already concluded that the four-year mandatory minimum sentence is proportionate or at least not so grossly disproportionate so as to constitute cruel and unusual punishment. Thus, four years is now the starting point approved by both Parliament and the Supreme Court. Given the role of proportionality as the fundamental principle of sentencing, there is a strong case that sentences should be ratcheted up to reflect the floor or starting point which applies to the least serious version of the crime.

The point of this argument is that the ability of proportionality to increase punishment once a mandatory minimum sentence has been upheld as constitutional and not grossly disproportionate, reflects a weakness in many desert theories that focus more on questions of ordinal proportionality and retaining a precise relationship between punishment and the seriousness of crimes, and less on questions of cardinal proportionality, which examine the starting point for the internally consistent scale of punishment. Desert considerations that focus on ordinal proportionality seem to aspire to a just distribution of punishment while being agnostic about the justness of the starting point or anchor for their finely calibrated scale. Professor von Hirsch, a prominent desert theorist, admits that the principle of cardinal proportionality places "only broad and imprecise constraints" on the anchoring or starting point for the

Madame Justice Arbour observes that "[s]ince the inflationary effect of the mandatory floor is likely to increase all penalties for this offence, there will arguably be fewer such cases for which four years will be grossly disproportionate and therefore unconstitutional." Morrisey, supra note 7 at 95.

⁸⁸ On the definitive or jurispathic nature of Supreme Court rulings, see R.M. Cover, "Violence and the Word" (1985) 95 Yale L.J. 1601.

appropriate scale of punishment and that the anchoring point may simply be a conventional expression of the "penal traditions of the jurisdiction."

In the section 12 cases, the starting point has been established by Parliament's decision to enact a mandatory minimum sentence and the Court's decision to apply an increased margin of deference to such sentences. Once the Court has decided that four years of imprisonment for even unintentional killings with a firearm is not grossly disproportionate, it becomes easier to uphold other mandatory sentences and to ratchet up all punishments to maintain ordinal proportionality with the legislative and constitutional starting point established by the mandatory minimum. If trial judges do not ratchet up punishment to account for the fact that the mandatory minimum sentence, by definition, catches the least serious version of a particular crime, it will be because they have ignored or evaded the remorselessly inflationary logic of ordinal proportionality, a logic that kicks in once the Supreme Court has accepted a mandatory sentence as valid.

It is difficult to fault Madame Justice Arbour for struggling to maintain proportionality after Parliament has proclaimed it as the fundamental principle of sentencing. The Court has done much the same in its conditional sentencing cases by trying to carve out a proportionate space between probation and prison, ⁵³ perhaps at the expense of the restraint principle. ⁹¹ Nevertheless, as Roberts suggests, judicial concerns about maintaining proportionality in light of mandatory sentences attribute a coherence to Parliament's decision to enact a mandatory sentence that is not realistic. Most mandatory sentences have been enacted by Parliament

However, von Hirsch goes on to suggest that "normative considerations may justify altering this convention. One such consideration is the goal of reducing the suffering visited on offenders." "Proportionality," supra note 84 at 83. Another normative principle that should inform the anchoring point is the need for restraint in the use of imprisonment. For an argument that Roberts, in other recent work, focuses on parity and ordinal proportionality at the expense of restraint and cardinal proportionality, see J. Rudin & K. Roach, "Broken Promises: A Response to Stenning and Robert's "Empty Promises" (2002) 65 Sask. L. Rev. (forthcoming) [hereinafter "Broken Promises"] responding to P. Stenning & J. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask. L. Rev. 137 [hereinafter "Empty Promises"].

⁹⁰ J.V. Roberts, "The Hunt for the Paper Tiger" (1999) 42 C.L.Q. 38; and A. Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform, or Doing the Time Warp Again" (2001) 44 C.L.Q. 375.

On the possible net widening effects of extending conditional sentences beyond the time warranted by a sentence of imprisonment, see K. Roach & J. Rudin, "Gladue: The Judicial and Political Reception of a Promising Decision" (2000) 42 Can. J. Crim. 355 at 369ff, and D. North, "The 'Catch 22' of Conditional Sentencing" (2001) 44 C.L.Q. 342.

to respond to a perceived crisis. Little or no thought is given to the systemic effects of a mandatory minimum sentence on sentencing policy. 92

At the same time, when the Supreme Court upholds a mandatory minimum sentence, its decision that Parliament's starting point for the best offender and the least serious version of the crime is constitutional and not grossly disproportionate, must be seen as a coherent statement about cardinal proportionality and the anchoring point of punishment. In light of this approach, trial judges who continue to give the best and worst offender the same mandatory minimum sentence can be faulted for not respecting the fundamental principle of (ordinal) proportionality in sentencing. The neglect of cardinal proportionality in most desert theories leaves them vulnerable to this ratcheting up effect once Parliament and the Supreme Court approve a mandatory sentence as the starting point for punishment.

The question remains whether trial judges will follow Madame Justice Arbour's suggestions in *Morrisey* and ratchet up punishments to maintain proportionality in light of mandatory minimum sentences. If this happens, the general increase in the sentencing tariff, at least for crimes affected by mandatory minimum sentences, will be another unanticipated, costly, and undesirable consequence of Parliament's political decision to place a minimum sentence into a sentencing environment that gives pride of place to the proportionality principle.

Like Roberts, I hope that this general ratcheting up of penalties from the mandatory minimum sentence does not occur because of my commitment to restraint in the use of imprisonment. At the same time, however, I cannot conclude that a refusal by trial judges to ratchet sentences up from the mandatory minimum can be justified without second guessing the Supreme Court's determination that the four-year mandatory minimum penalty was not a grossly disproportionate anchor for punishment.

When Parliamentarians have thought about the effects of mandatory sentences on sentencing policy, they have expressed a concern that the mandatory minimum sentence will act as a ceiling on punishment for the offence, an observation supported by available empirical evidence about the sentencing practices of judges, but one that defies the principle of ordinal proportionality outlined above. N. Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2001) 44 C.L.Q. 279 at 303.

C. Getting Caught on the Wrong Side of the Punitive and Restorative Divide

Another major change in sentencing since Smith has been the introduction of conditional sentences and new restorative purposes for sentencing. In Gladue⁹³ and Proulx,⁹⁴ the Court recognized that these new features of sentencing were designed to reduce Canada's high rate of incarceration, especially among Aboriginal people. This recognition of the problem of over-incarceration could have been used by the Court to reaffirm its willingness in Smith to invalidate mandatory minimum sentences as a means to achieve restraint in the use of imprisonment. However, there are reasons to believe that the Court's new dichotomy between the punitive and restorative principles of sentencing might have made it easier to justify mandatory sentences.

In the conditional sentencing cases, the Court contrasts denunciation, deterrence, and separation as punitive purposes of sentencing and, rehabilitation, reparation, and acceptance of responsibility as restorative purposes. ⁹⁵ Taken together, and at the risk of oversimplification, the conditional sentencing cases suggest that some crimes—sexual assault and dangerous driving causing death and bodily harm—will often call for a greater emphasis on punitive as opposed to restorative purposes of sentencing and that imprisonment will be seen as a particularly effective way to deter and denounce such crimes. The Court is careful not to preclude the use of conditional sentences for such crimes and it incorporates some punitive elements into conditional sentences. However, the overall message of the cases is clear—some crimes require deterrence

Supra note 10. This case did not involve a conditional sentence but rather an appeal by the accused from a three-year sentence for manslaughter and the meaning of s. 713.2(e) which provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." The Court dismissed Janice Gladue's appeal from sentence, but it noted favourably that she had received day parole after six months on strict conditions including substance abuse treatment. If she had killed her spouse with a firearm rather than a knife, she would have been caught by the new four-year mandatory minimum sentence. On the harmful effects of mandatory sentences on Aboriginal offenders, see L. N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 Osgoode Hall L.J. 449 and R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons" (2001) 39 Osgoode Hall L.J. 469. For contrasting views about the reference to Aboriginal offenders in s. 718.2(e), see: "Empty Promises," supra note 69; and "Broken Promices," supra note 89.

⁹⁴ Supra note 10.

⁹⁵ Ibid. at 115ff.

and denunciation, and prison is the best way to deter and denounce serious crimes.

How does this conditional sentencing jurisprudence relate to mandatory sentences? In section 742.1 of the Code, Parliament has excluded all offences subject to a minimum term of imprisonment from a conditional sentence. A person convicted of a second drunk driving offence and subject to its mandatory minimum term of fourteen-days imprisonment will not be eligible for a conditional sentence even though one requiring treatment and involving some punitive aspects might better fulfill all the punitive and restorative purposes of sentencing. Even the crime in Morrisey—criminal negligence causing death with a firearm—could conceivably result in a conditional sentence were it not for Parliament's categorical exclusion of manslaughter with a firearm from conditional sentences by virtue of section 742.1. Had Morrisey been a candidate for a conditional sentence, he might have been deterred and rehabilitated by conditions of treatment for his drinking problem and a firearm prohibition. His remorse could have facilitated acknowledgment of the harm done and reparation to the victim's family. Punitive aspects such as house arrest could be added to the conditional sentence in order to ensure that it was consistent with denunciation, general deterrence and, that it was a proportionate response to the gravity of the crime and to the degree of moral responsibility.

The categorical exclusion of offences with a minimum term of imprisonment from conditional sentences suggests that Parliament believes that an actual prison term is necessary to achieve the penal purposes of minimum sentences. In the conditional sentencing cases, the Court has also recognized that the punitive purposes of sentencing are generally, but not exclusively, associated with incarceration. When Parliament enacts a mandatory sentence in one stroke of a legislative pen, it precludes the use of a conditional sentence and provides compelling evidence that it has decided to place greater emphasis on the punitive, as opposed to the restorative purposes of sentencing.

Restorative principles of sentencing have been recognized only to be discounted and discarded when the crime seems serious. Parliament's decision to enact a mandatory minimum sentence has been interpreted as an important sign that the punitive purposes of sentencing are far more important than the restorative ones, not just for murder, but also for manslaughter with a firearm. Recent section 12 cases suggest that the Court will be inclined to uphold mandatory sentences on the somewhat circular basis that, by enacting a mandatory sentence, Parliament has made a legitimate choice to stress the punitive purposes of sentencing over the restorative ones.

In Morrisey, ⁹⁶ the Court took the very existence of the mandatory sentence as an indication that Parliament has decided to stress general deterrence, denunciation, and retribution for the offence of manslaughter with a firearm. It then upheld the mandatory sentence, in part, on the basis that Parliament was entitled to stress those penal purposes over rehabilitation, specific deterrence, and the restorative purposes of sentences. In *Latimer*, ⁹⁷ the Court readily admitted "that in this case the sentencing principles of rehabilitation, specific deterrence and protection are not triggered for consideration," but held that the mandatory sentence was justified for other reasons, including denunciation and general deterrence of murdering vulnerable people.

The Court's willingness to discount the restorative principles of sentencing, including concerns about rehabilitation and specific deterrence that figured so prominently in *Smith*, may also explain a cryptic statement in *Latimer*. 98 While the test for section 12 review requires a consideration of the effects of punishment on the individual and the various goals of sentencing, the Court warned that "not all of these matters will be relevant to the analysis and none of these standing alone will be decisive to a determination of gross disproportionality." The problem is that the original test for gross disproportionality in *Smith* relied on factors, notably whether punishment was required to rehabilitate and deter the particular offender, that are no longer emphasized in the section 12 analysis.

Once again, we are left desperately searching for Smith. If Smith came to the Court today there might well be considerable support for Mr. Justice McIntyre's arguments that Parliament was entitled to stress the deterrence and denunciation of the drug trade over the injustice of sentencing a small-time teenaged offender to seven-years imprisonment, even though the offender presents no threat to the community, needs no rehabilitation, and would likely be destroyed by imprisonment. Today, the hypothetical teenaged offender saved in Smith would probably be excluded as an uncommon offender. Even if considered, the teenaged offender could be placed on the wrong side of the punitive-restorative line because of Parliament's enactement of the mandatory penalty.

The Court's acceptance of the restorative purposes of sentencing has had the ironic effect of legitimating its punitive purposes. It is dangerous to be caught on the wrong side of the punitive-restorative line.

⁹⁶ Supra note 7 at 115-18.

⁹⁷ Supra note 5 at 160.

⁹⁸ Ibid. at 157.

Once offenders commit a crime that Parliament has placed into punitive territory, their restorative and rehabilitative claims will be discounted to the extent that they suggest that a fit sentence would be a conditional sentence or an imprisonment sentence less than the mandatory minimum penalty. Such offenders will also find that the courts will be quite deferential to Parliament's decision to place an offence on the punitive side of the line by enacting a mandatory minimum sentence.

V. THE IMPLICATIONS OF THE SECTION 12 JURISPRUDENCE FOR SENTENCING POLICY AND REFORM

The recent section 12 cases suggest that Parliament can create mandatory sentences without worrying very much that they may be invalidated on the basis of hypothetical best offenders. Morrisey and Latimer suggest that the Court will defer to Parliament's judgment on the appropriate mix of penal policy even to the point of applying mandatory sentences that are not necessary to deter or rehabilitate the particular offender before the Court. Some dicta in Latimer 99 suggest that the Court may have completely abdicated review of mandatory sentences under section 12 of the Charter. The Court stated that "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." Parliament should beware, however, that a decision to enact a mandatory minimum sentence in order to make a statement about a particular crime at a particular time may have long term effects if trial judges and courts of appeal follow the logic of seeing the new minimum as a floor that catches the best offender and consequentially ratchet up the tariff for all other offenders. Parliament's decision to enact a mandatory minimum penalty may not only have unforeseen and unintended effects when applied to the best offender, but may also have the unintended and costly consequence of raising the tariff for the offence subject to the minimum.

Can the Court's more deferential approach to mandatory sentences since *Smith* be justified? Commentators who saw cases such as *Smith* as an

¹bid. at 161. Following the hints in Madame Justice Arbour's concurrence in Morrisey, any future judicial interventions are likely to be in the form of constitutional exemptions for exceptional offenders and not declarations of invalidity of the type used in Smith. However, such interventions are not likely given that the Court has yet to indicate that courts can order such constitutional exemptions and some courts of appeal have resisted granting them.

unwarranted form of judicial activism would argue that the Court in Morrisey and Latimer was properly deferring to Parliament's determination of sentencing policy. Given the multiple and often conflicting purposes of sentencing, it can be argued that the elected legislature and not the appointed judiciary should determine the emphasis that should be placed on particular sentencing purposes for particular crimes. A continuation of the Smith approach of invalidating mandatory sentences on the basis of extreme and even far-fetched hypothetical best offenders that could be caught by them, might have produced a conflict between the Court and Parliament over the seriousness of particular crimes and the appropriate blend of penal policies. 160

The problem with the argument for judicial restraint is that it does not situate the judicial review of mandatory sentences in the context of the ongoing dialogue that can occur between the Court and Parliament under the Charter, or give weight to concerns that the Court, and only the Court, can bring to that dialogue. ¹⁰¹ In defending the legacy of Smith it is necessary to go beyond the conclusion that it was an activist decision. First, it is important to recognize that Smith need not have been the last word on how society will punish drug importers. Justice Lamer contemplated the possibility of a legislative reply that would have limited the imposition of the mandatory seven-year sentence "to the importing of certain quantities, to certain specific narcotics of the schedule, to repeat offenders, or even to a combination of these factors." ¹⁰² Parliament did not take up this invitation and the penalty for importing narcotics still has no mandatory sentence. This inactivity can be taken as a sign that mandatory penalties for drug importers were not a policy priority for our elected government.

A decision to invalidate the mandatory penalty for second degree murder in *Latimer* also would not necessarily have constituted the final word on the matter. Parliament could have crafted the exact parameters of a third degree of murder that would not be tied to a mandatory penalty or

The critics of Charter activism fall on both the left and the right of the political spectrum. Compare the common criticism of Smith, supra note 2, as unwarranted judicial activism in R. Knopff & F.L. Morton, Charter Politics (Toronto: Nelson, 1992) at 186-87 and M. Mandel, The Charter of Rights and the Legalization of Politics in Canada, rev. ed., (Toronto: Thompson, 1994) at 207-11. On similarities between the right and left critiques of judicial activism, see The Supreme Court on Trial, supra note 42 at 80-81.

On dialogue, see: P. Hogg & A. Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing After All)" (1997) 35 Osgaade Hall L.J. 75; and "Dialogues," supra note 45.

¹⁰² Supra note 2 at 1080.

one as severe as life imprisonment with ineligibility for parole for ten years. It might also have responded with a presumptive, as opposed to a mandatory sentence, and a requirement that judges justify any departure from the presumptive sentence of life imprisonment on the basis of exceptional circumstances. This approach has been taken in England. Another legislative option, as was recommended by the Canadian Sentencing Commission, would be to enact sentencing guidelines. Judicial activism in striking down mandatory sentences under the *Charter* does not mean that the Court must impose the final word on matters of sentencing and penal policy.

Another constructive by-product of a robust dialogue between courts and legislatures over mandatory penalties might be greater specificity in defining offences. A legislative response to Smith would have served the useful purpose of encouraging Parliament to differentiate between importers who bring small amounts of drugs across the border for personal use and those who are engaged in large-scale commercial enterprises. 104 Likewise, active judicial supervision of the effects of mandatory sentences may persuade legislatures of the need to change mandatory sentences to presumptive sentences. This result has occurred with respect to section 113 of the Code, which allows mandatory weapon prohibitions to be lifted in extraordinary and non-dangerous situations in which offenders need a gun for sustenance hunting and trapping, or to pursue the only vocation open to them. This provision might not have been enacted had a number of courts of appeal not held that the application of the automatic prohibition constituted cruel and unusual punishment and merited constitutional exemptions. If courts had simply deferred to the valid objective of deterring and denouncing weapons offences, the grossly disproportionate effects of this previously mandatory penalty on exceptional offenders may never have come to light.

Judicial activism in invalidating overly broad mandatory sentences can be defended on the basis that the independent judiciary is in a much better position than the elected legislature to evaluate the effects of mandatory penalties on particular offenders. Only the courts are in a position to see the actual effects that mandatory sentences have on the variety of offenders who appear before them. When Parliament enacts

¹⁰³ Crime (Sentences) Act 1997 (U.K.), 1997 c. 43 s. 2.

The new Controlled Drugs and Substances Act, S.C. 1996 c. 19 s. 6 already shows some differentiation by relating the drug imported (but not the quantity) to new and variable maximums of life, ten years, and three years of imprisonment.

mandatory sentences, it must, of necessity, focus on the seriousness of the offence and hope that the mandatory sentence will deter and denounce the crime. There is generally no lobby or no voice for the small-time or exceptional offender. When offenders are considered at all, they are often presented in a manner that stereotypes and demonizes them. Parliamentarians generally think of the drug cartels, the Clifford Olsons, and the Paul Bernardos, not the teenaged-importers of a joint, the desperate drug "mules," the Robert Latimers, or even more sympathetic offenders. To the extent that an effective lobby against mandatory sentences might develop, a temporary, but exciting alliance between civil libertarians, defence lawyers, feminists, and the representatives of disadvantaged groups who can speak to the injustice of mandatory sentences, may be required.

I hope that such an alliance is formed and that it slows down the increased use of mandatory sentences in Canada. At the same time, I am not terribly optimistic about the success of such an alliance given the difficulties of organizing a diverse lobby and the fact that any lobby against mandatory sentences will be unable to appeal to a strong and consistent record by the Supreme Court in invalidating mandatory sentences.

A return to Smith and to vigorous judicial enforcement against cruel and unusual punishment by striking down mandatory sentences has the potential to produce a robust and democratic dialogue between the courts and the legislature that considers both the effect of punishment on offenders and the adequacy of less draconian alternatives. Deferential judicial enforcement of section 12 as applied to mandatory sentences, runs the danger of producing complacent crime control and punitive victims' rights monologues that assume that mandatory sentences are necessary to deter and denounce serious crime.

Of all the recent decisions, the Court's position in *Morrisey* is the most disappointing and the one most likely to encourage Parliament to enact more mandatory minimum penalties. The Court has accepted a significant mandatory minimum of four-years imprisonment for a very broad offence that can include killings with firearms that range from near accidents to near murders. The promise made in *Creighton* that the judge would use sentencing to individualize the sentence to the broad range of conduct caught by manslaughter and the great variety of offender characteristics that are not relevant in determining objective fault, cannot now be realized, at least not for offenders that commit manslaughter with a firearm. A decision to invalidate the mandatory sentence in *Morrisey* would not necessarily have prevented the government from using mandatory penalties in its attempt to deter intentional crimes with firearms or from using presumptive as opposed to mandatory sentences. If four-

years imprisonment is permissible for criminal negligence causing death with a firearm, then such a mandatory penalty could probably be imposed for most intentional criminal offences. The choice over mandatory sentences may well be Parliament's and it may only be the wisdom and self-restraint of Parliament that will prevent the whole-sale introduction of a raft of American-style mandatory penalties.

VI. CONCLUSION

Smith stands as a reminder of a distinctive Canadian approach to punishment and Charter adjudication. The seven-year minimum sentence for importing narcotics struck down in that case would be a very lenient sentence south of the border and American courts would never have concerned themselves with the effects of mandatory penalties on hypothetical offenders. The bold statement of constitutional principles in Smith has been replaced by a more cautious form of constitutional minimalism and deference to Parliament including an increased sensitivity to victims' rights.

The concern in *Smith* with whether a mandatory penalty is grossly disproportionate in light of what is necessary to deter or rehabilitate particular offenders, has been replaced by deference to Parliament's decision to stress punitive purposes of sentencing over restorative ones. *Morrisey* suggests that the Court may defer to a legislative crime control agenda that uses mandatory sentences to denounce and deter a broad range of crimes that fall short of absolute liability offences but include crimes based on non-individuated objective standards of liability. Those commentators who are opposed to mandatory penalties are left searching for *Smith* and for a strong judicial and constitutional voice in support of individualized justice. The return of such a voice would be a welcome addition to our ongoing democratic dialogues on crime and punishment.