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# A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*

Benjamin L. Berger\*

## I. INTRODUCTION

Struggles between broad penal policy and judicial discretion at sentencing have a deep history in the common law. From the earliest years of the English common law, and for centuries thereafter, there was a fixed penalty for almost all felonies: death by hanging.<sup>1</sup> The resulting inflexible harshness in sentencing was, on its face, unacceptable given the range of offences and circumstances that could be caught by this fixed rule of punishment. As Baker explains, this mandatory sentence “excluded undue savagery as well as undue mercy, but it introduced excessive uniformity: the multiple murderer expected nothing worse than the accidental slayer or the petty villain who stole two shillings”.<sup>2</sup> Yet this legal rule that seemed intolerable — and that appears today as utterly barbaric — survived for centuries because judges found means to evade its harshness. One device seized upon by common law judges was “benefit of clergy”. Benefit of clergy arose as a political resolution between the papacy and the English monarchy and crystallized in the aftermath of the controversy that erupted after the murder of Thomas Becket in 1170. The compromise was that the punishment of clerics would be a matter for ecclesiastical authorities only and, as such, if an accused could demonstrate to a common law court that he was a clergyman,

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<sup>1</sup> J.H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), at 512 [hereinafter “Baker”]. Baker explains that there were very limited exceptions to this rule, including (for obvious reasons) a special rule for suicide, which was punishable by forfeiture only.

<sup>2</sup> Baker, *id.*, at 512.

he would not be punished under the laws of England, but rather would be handed over to the Church.<sup>3</sup>

Although strictly applied in its early years, benefit of clergy transformed into a judicially endorsed legal fiction between 1350 and 1490. Judges came to use benefit of clergy as an available tool to mitigate the harshness of the sentencing regime; benefit of clergy thus began its life as a means of avoiding the mandatory death penalty. In the early years, those claiming benefit of clergy were closely scrutinized to ensure that they were, indeed, clerics; however, by the 14th and 15th centuries, whether one could read became the only criterion for determining if one was “clergy” and, thus, not subject to ordinary English law. And the test for whether an offender was literate had its own extreme artificiality. An accused convicted of a felony would “fall on his knees and ‘pray the book’”.<sup>4</sup> He would then be asked to read or recite a passage from the psalter — called the “neck-verse” — and if he could do so satisfactorily, he had successfully proven his clergy. The neck-verse soon became standardized, the accused always being asked to read or recite the same passage: verse 1 of Psalm 51.<sup>5</sup> Soon, that verse was inscribed on gaol walls and memorized by prisoners who, if they could recite it at the appropriate time, were deemed “clergy” by force of legal fiction and exempted from the death penalty.<sup>6</sup> The use of this device quickly became widespread, with nearly half of all convicted felons successfully claiming benefit of clergy.<sup>7</sup> The existence of unrefined and overly harsh sentencing rules impelled actors in the criminal justice system to look to means at their disposal to patch the resulting injustices in the system — and one result was a vast population of fictional clergy. Though this use of the benefit of clergy meant that the death penalty could be avoided in this period of the common law,<sup>8</sup> this fiction exacted a toll on the integrity

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<sup>3</sup> See S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (London: Butterworths, 1981), at 420.

<sup>4</sup> Baker, *supra*, note 1, at 514.

<sup>5</sup> In Hebrew editions and translations from the Hebrew, the passage is Psalms 51:3: “Have mercy on me, O God, as befits Your faithfulness; in keeping with Your abundant compassion, blot out my transgressions.” Baker reproduces it in the Latin that the convict would, at the time, have had to recite: “*Miserere mei Deus secundum magnam misericordiam tuam, et secundum multitudinem miserationum tuarum dele iniquitatem meam.*”

<sup>6</sup> Baker writes that “with a little preparation anyone of intelligence could save his life”. Baker, *supra*, note 1, at 514.

<sup>7</sup> Baker, *id.*, at 514, citing Cockburn, *Assize Records: Introduction*, at 117-21.

<sup>8</sup> Parliament would eventually begin to respond with legislation curtailing this fiction, first establishing that one could have the benefit of clergy only once, and later making an increasing number of offences “non-clerigible”. Benefit of clergy was ultimately abolished in 1827. For this later history of benefit of clergy, see Baker, *id.*, at 514-15. Milsom, *supra*, note 3, at 421, offers a short and classic summary: “The common law would have sent all felons to the gallows; the benefit

and health of the system of law. The continued existence of the mandatory sentence of death over this period of time “had a stultifying effect on the substantive law. ... Legal ingenuity was devoted to elaborating the evasions instead of improving the substance of the law”.<sup>9</sup>

Despite the vast and apparent differences in both the social context and the law of the Middle Ages as compared to modern practices of crime and punishment, the contemporary Canadian criminal justice system continues to wrestle with the tensions produced by fixed mandatory sentences when judges are faced with the exigencies of justice based on the particularities of a given case. The death penalty is no longer the source of concern in Canada; rather, it is the existence and current proliferation of mandatory minimum sentences. The tools are very different as well: issues of the justness of such fixed minimums are filtered through constitutional law, with the narrow protection against cruel and unusual treatment or punishment under section 12 of the *Canadian Charter of Rights and Freedoms*<sup>10</sup> setting the standard for judicial interference with legislated minimums. But just as in former times, Canadian judges in the Charter era have reached for available tools to repair injustices produced by legislative sentencing schemes that include minimum sentences putatively applicable to all offenders who commit given offences, irrespective of the gravity and circumstances of the crime or of the blameworthiness of the individuals involved. The Supreme Court of Canada established one means of addressing a manifestly unjust minimum sentence: if, positing reasonable hypotheticals, an accused could show that a mandatory minimum sentence would result in cruel and unusual punishment, the law was unconstitutional and should be declared of no force or effect pursuant to section 52(1) of the *Constitution*.<sup>11</sup> But the “reasonable hypothetical analysis” was contained by limiting the hypotheticals to those situations that “could commonly arise in day-to-day life”,<sup>12</sup> “as opposed to far-fetched or marginally imaginable cases”.<sup>13</sup> The hypotheticals would have to reflect situations that were “‘common’ rather than ‘extreme’ or ‘far-fetched’”.<sup>14</sup>

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of clergy as it developed would have saved them all; and legislation sought to introduce order by deciding when the second anachronism should interfere with the first.”

<sup>9</sup> Baker, *supra*, note 1, at 512.

<sup>10</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>11</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter “*Smith*”]; *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.) [hereinafter “*Goltz*”].

<sup>12</sup> *Goltz*, *id.*, at 511.

<sup>13</sup> *Id.*, at 506.

<sup>14</sup> *R. v. Morrissey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90, at para. 33 (S.C.C.) [hereinafter “*Morrissey*”]. See Kent Roach, “Searching for *Smith*: The Constitutionality of Mandatory Sentences”

But life offers up more than we can imagine in our reasonable hypotheticals — more than the common and ordinary — so the question remained, what is to be done when faced with the extraordinary and theretofore unimagined case? Courts and commentators began to interpret the broad remedial power conferred by section 24(1) of the Charter as the tool available and appropriate in such circumstances. If, in the case before him or her, no matter how exceptional or uncommon the circumstances, the minimum sentence would inflict cruel and unusual punishment on the offender, a judge could confer a “constitutional exemption” that would reassert judicial discretion to craft a fair and just sentence by excepting this individual from the statutory sentence, while leaving the legislation otherwise applicable.<sup>15</sup> Such a remedy would mitigate the unconstitutional harshness of the sentence in a given case, but the law would remain “on the books”, constitutional in its ordinary application.

In *R. v. Ferguson*,<sup>16</sup> a decision issued early in 2008, the Supreme Court of Canada put an end to the use of constitutional exemptions in such situations. The Court not only declined to issue a constitutional exemption in this case but further ruled that the only remedy available in such cases is the more radical declaration of invalidity pursuant to section 52(1). With this extinction of the constitutional exemption, some lamented the loss of “a workable solution to the problem of the exceptional case”,<sup>17</sup> concerned that this “source of comfort is no longer available”.<sup>18</sup> One possible reading of *Ferguson* is as a retreat from close scrutiny of minimum sentences. My argument in this article is that this reading of

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(2001) 39 Osgoode Hall L.J. 367 [hereinafter “Roach”] for an account of the increased restraint with which the Court approached the scrutiny of mandatory minimums under s. 12 in the period from *Smith to R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.). Roach links this trend to a general “constitutional minimalism” that could be discerned in the Court’s jurisprudence during this era.

<sup>15</sup> For a discussion of the history of, and some issues raised by, constitutional exemptions see Peter Sankoff, “Constitutional Exemptions: An Ongoing Problem Requiring a Swift Resolution” (2003) 36 U.B.C. L. Rev. 231 [hereinafter “An Ongoing Problem”]; Peter Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000) 11 N.J.C.L. 411.

<sup>16</sup> [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.) [hereinafter “*Ferguson*”].

<sup>17</sup> Lisa Dufraimont, “*R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12” (2008) 42 S.C.L.R. (2d) 459, at 470 [hereinafter “Dufraimont”]. See also Peter W. Hogg, *Constitutional Law of Canada*, looseleaf ed., vol. 2 (2007), at 40-21. Hogg approves of the use of constitutional exemptions in minimum sentence cases, saying that there is “much to be said for it” in that “[i]t would enable the courts to keep in force a minimum sentence that was not disproportionate in the great majority of its applications, while applying normal sentencing principles to the rare set of facts where the defendant’s lack of moral culpability would make the minimum sentence cruel and unusual.”

<sup>18</sup> Dufraimont, *id.*, at 474.

*Ferguson* fails to reflect the core message of the case, a message that, if internalized by judges, amounts to a constitutional push-back on the politics of minimum sentences. It is a decision that clearly and emphatically calls upon judges to stop cleaning up the occasional mess that trails behind minimum sentences and, instead, to impel Parliament to wrestle with the details of justice in sentencing. It is a decision that resists the opening of a chasm between the law as it is written and the law as it is applied, a chasm that, as the story of benefit of clergy demonstrates, ultimately erodes the integrity of the legal system. This is not, in my view, a rosy or hopeful reading of the case; rather, it is the strong message of *Ferguson* when read as an intervention in the politics of minimum sentences. *Ferguson* ought to be received by advocates and judges as a direction to stop devoting legal ingenuity to elaborating the evasions and, instead, to seek to improve the substance of the law.

## II. THE POLITICAL APPEAL AND PRACTICAL PERIL OF MINIMUM SENTENCES

Mandatory minimum sentences are in political fashion. On February 28, 2008, the day before the judgment in *Ferguson* was released, Royal Assent was given to the *Tackling Violent Crime Act*,<sup>19</sup> which not only increased certain existing minimum sentences but also added to the already long list of minimum sentences in the *Criminal Code*.<sup>20</sup> Early in 2009, the Conservative government introduced two Bills that would increase or add minimum sentences for organized crime<sup>21</sup> and would establish mandatory minimum periods of incarceration for certain drug offences, particularly targeted at those involving criminal organizations and crimes that might affect youth.<sup>22</sup> By way of example, Bill C-14 would impose a minimum sentence of four years' imprisonment on

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<sup>19</sup> S.C. 2008, c. 6.

<sup>20</sup> R.S.C. 1985, c. C-46. Dufraimont, *supra*, note 17, at 464, reports that “[a]s of 2006, about 40 *Criminal Code* offences carried minimum terms of imprisonment, including first and second degree murder, numerous firearms and weapons offences, various sexual offences involving children and a few impaired driving offences.”

<sup>21</sup> Bill C-14, *An Act to amend the Criminal Code (organized crime and protection of justice system participants)*, S.C. 2009, c. 22 (Royal Assent, June 23, 2009 [not in force]). It is important to note the breadth of the definition of a “criminal organization”, found in s. 467.1(1) of the *Criminal Code*. Any group of three or more persons facilitating or committing (or whose purpose includes committing) a “serious offence” that would accrue to its benefit is, potentially, a criminal organization.

<sup>22</sup> Bill C-15, *An Act to amend the Controlled Drugs and Substances Act and to make related and consequential amendments to other Acts*.

anyone who intentionally discharged a firearm while being reckless as to the life or safety of another and would classify any gang-related murder as first degree murder. Bill C-15 would impose a minimum sentence of two years' imprisonment for trafficking in a host of drugs, including heroin, "in or near any ... public place usually frequented by persons under the age of 18 years". Importing any amount of marijuana for the purposes of trafficking would be punishable by a minimum sentence of one year. A minimum sentence of two or, in some circumstances, three years would be imposed on anyone producing any amount of a Schedule I substance. These amendments were largely a political response to a spate of gang-based crimes in British Columbia's Lower Mainland. Justice Minister Rob Nicholson explained that, in introducing this legislation, "[o]ur message to potential offenders is clear: if you sell or produce drugs, you will face jail time."<sup>23</sup> The government's press release explained that "[t]his Government is taking the necessary steps to crack down on crime and to ensure the safety and security of our neighbourhoods and communities."<sup>24</sup>

Yet the weight of social science evidence indicates that minimum sentences are not effective as a crime-control strategy<sup>25</sup> and numerous commissions that have considered the issue have suggested abolition of fixed minimums.<sup>26</sup> Minimum sentences do not make communities safer.

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<sup>23</sup> "Tories bring in mandatory sentences for serious drug crimes" *CBC News* (February 27, 2009) online: CBC News <<http://www.cbc.ca/canada/british-columbia/story/2009/02/27/bc-guns-gangs-legislation.html?ref=rss>>.

<sup>24</sup> "Government re-introduces legislation to fight serious drug crimes" *Department of Justice* (February 27, 2009) online: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc\\_32338.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2009/doc_32338.html)>.

<sup>25</sup> See Anthony N. Doob & Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39 *Osgoode Hall L.J.* 287, at 293-97, offering the following sharp summary of the social science evidence: "mandatory minimum sentences do not deter more than less harsh, proportionate sentences" (at 291). See also Roach, *supra*, note 14, at 389: "There is little evidence to support the hope that mandatory penalties of imprisonment, which may not even be known to the general public, will serve as effective deterrents of crimes committed against vulnerable people."

<sup>26</sup> See the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Canadian Government Publishing Centre, 1987) (Chair: J.R. Archambault) [hereinafter "1987 Canadian Sentencing Commission"]. The Canadian Sentencing Commission observed that, reaching back to the 1952 Royal Commission on the Revision of the *Criminal Code*, "all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished" (at 178). The Commission itself concluded that, with the exception of the penalties prescribed for murder and high treason, mandatory minimum sentences "serve no purpose that can compensate for the disadvantages resulting from their continued existence" (at 188) and, emphasizing the principle of proportionality and the importance of determining a just sentence in the particular case before a court, stated that mandatory minimum sentences "have no place in a sentencing framework designed to provide guidance in the determination of individual sentences" (at 189).

The extreme form of mandatory minimum sentencing reflected in the U.S. experiment with strict sentencing “guidelines” has been a terrible failure,<sup>27</sup> contributing to massive increases in rates of incarceration.<sup>28</sup> The U.S. experience is also one of minimum sentences deepening racial and gender inequities in the administration of criminal justice.<sup>29</sup> Canadian commentators emphasize this potential for mandatory minimum sentences to visit disproportionately harsh effects on already marginalized or vulnerable groups within the criminal justice system.<sup>30</sup> All of this information is widely available and there should be little doubt

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<sup>27</sup> See Frank O. Bowman, III, “The Failure of the Federal Sentencing Guidelines: A Structural Analysis” (2005) 105 Colum. L. Rev. 1315 [hereinafter “Bowman”]. Bowman describes U.S. policies surrounding sentencing and corrections in the last quarter of the 20th century as involving two trends. First, “the country undertook a national experiment in mass incarceration as a response to crime” (at 1317). Second, whereas penal policy in the first 75 years of the 20th century gave importance to rehabilitative objectives and conferred considerable discretion on sentencing judges, in the last 25 years “many jurisdictions moved to regimes of structured sentencing featuring varying combinations of statutory minimum sentences, sentencing guidelines, and other mechanisms designed to channel or constrain judicial sentencing discretion” (at 1318). See also Gary T. Lowenthal, “Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform” (1993) 81 Cal. L. Rev. 61, at 61-62 [hereinafter “Lowenthal”], citing “[t]wo developments ... that have transformed felony sentencing in the United States” — the creation of determinate sentencing schemes and the creation of minimum sentencing laws. Although an early supporter of the federal sentencing guidelines, even Bowman has since “with the greatest reluctance, concluded that the federal sentencing guidelines system has failed” (at 1319). In terms that ought to be of substantial concern to those forming penal policy in Canada, Bowman explains: “I have reached this conclusion not merely because the system too often produces bad outcomes in individual cases and sometimes in whole classes of cases, but more importantly because the basic structure of the guidelines-centered system has evolved in a way that makes self-correction virtually impossible” (at 1319).

<sup>28</sup> Bowman, *id.*, at 1328, remarks that “by any standard the severity and frequency of punishment imposed by the federal criminal process during the guidelines era is markedly greater than it had been before”, citing a 600 per cent increase in federal inmate populations since the 1980s.

<sup>29</sup> For an analysis that focuses on increased disparities, including racial disparities, that have arisen under the guidelines, see Albert W. Alschuler, “Disparity: The Normative and Empirical Failure of the Federal Guidelines” (2005) 58 Stan. L. Rev. 85 [hereinafter “Alschuler”]. Alschuler summarizes his findings as follows (at 85):

When viewed from any coherent normative perspective, the Federal Sentencing Guidelines have failed to reduce disparity and probably have increased it. Even on paper, these Guidelines often fail to treat like offenders alike, and the Guidelines are worse in practice than on paper. The luck of the judicial draw appears to determine the sentences offenders serve as much as or more than it did before the Guidelines; the region of the country in which an offender is sentenced now makes a greater difference than it did before the Guidelines; and racial and gender disparities have increased.

See also David B. Mustard, “Racial, Ethnic and Gender Disparities in Sentencing: Evidence from U.S. Federal Courts” (2001) 44 J.L. & Econ. 285 [hereinafter “Mustard”].

<sup>30</sup> For a discussion of the disproportionate impact of mandatory minimum sentences on Aboriginal peoples, see Larry N. Chartrand, “Aboriginal Peoples and Mandatory Sentencing” (2001) 39 Osgoode Hall L.J. 449 [hereinafter “Chartrand”]; for the potential insidious effects of mandatory minimums on battered women, see Elizabeth Sheehy, “Battered Women and Mandatory Minimum Sentences” (2001) 39 Osgoode Hall L.J. 529 [hereinafter “Sheehy”].



that the politicians responsible for Canada's headlong dive into the proliferation of minimum sentences are aware of it. Yet the tune of minimum sentencing seems to be a political siren song. Faced with public fear arising from serious and highly publicized incidents of violent crime, politicians can find a strong and clear answer in the introduction of new mandatory minimums. The response of introducing new and "tough" minimum sentences is easily explained to and by the media and readily digested by the public. The political message is neat: the government views these crimes as very serious, utterly unacceptable and anyone who puts the community at risk in this way should be removed from society. The mandatory minimum sentence is perfectly packaged for a public whose attention is focused by current high-profile crimes, even if crime rates (including violent crimes) are in fact on the decline.<sup>31</sup> A government can move swiftly, acting decisively while underscoring a "tough on crime" position. In all of this there are votes to be won. Furthermore, a government can take comfort in the knowledge of its relative political security in making such legislative interventions. When the public mood is one of fear and apprehension of risk, opposition politicians will find little appeal in challenging a government on the wisdom of such clean-cut and decisive penal policies. To attempt to push a government on the effectiveness and necessity of minimum sentences carries the very real political risk of being tarred as unsympathetic to victims and, more generally, "soft on crime", irrespective of what the evidence suggests about the efficacy of such measures and the systemic toll that minimum sentences take on the administration of criminal justice in the *longue durée*. The conventional wisdom is that there are simply no votes to be gained in a counsel of parsimony and patience as regards criminal justice; to believe *and to behave* otherwise as a politician requires a measure of political courage unshackled to populism that, based on recent history, we have little basis to expect. In the end, the mandatory minimum sentence is an ideal tool on which a government

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<sup>31</sup> In "Crime Statistics in Canada, 2007", the Canadian Centre for Justice Statistics reported that the national crime rate reached its lowest point since 1977, while a drop in violent crime "continued the downward trend in violent crime evident since the early 1990s and marked the lowest rate in nearly 20 years" (at 4). Rates of homicide, attempted murder, sexual assault, assault, and robbery all dropped. Statistics Canada reported that "[a]mong the few crimes to increase in 2007 were drug offences and impaired driving, both of which tend to be influenced by police enforcement practices. Drug offences were up 4%, with cannabis possession accounting for most of the increase." See Canadian Centre for Justice Statistics, "Crime Statistics in Canada, 2007" (Statistics Canada – Catalogue no. 85-002-X, Vol. 28, no. 7), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008007-eng.pdf>>.

steeped in “tough on crime” rhetoric can rely in times of public fear about crime; and so the politics of minimum sentences augur strongly in the direction of the continued proliferation of fixed minimum sentences.

Once drawn down from the order papers and fixed as a part of the criminal justice system, these minimums carry with them a number of perils that seriously disrupt the proper day-to-day administration of justice in Canada. Although perhaps not matters with which most politicians are concerned — or at least not until the financial costs of these minimums visit them — these are the issues presented by minimum sentences with which judges, Crown and defence must wrestle.

Certain of these perils are institutional in nature. One clear practical difficulty with minimum sentences is that, to the extent that they incarcerate those who might otherwise have received a non-custodial sentence, these fixed minimums increase the prison population, further overcrowding a corrections system already bursting at the seams.<sup>32</sup> We are seeing prisoners bunked two and three to a cell and the creation of any minimum sentence without a parallel increase in the funding of corrections facilities simply exacerbates this problem. For those unmoved by prison conditions alone, viewed from the perspective of the intersection of penal policy and public safety, the increased crowding of the prison system without a corresponding increase in funding to correctional services means that education and rehabilitation programs

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<sup>32</sup> After canvassing the practice of “triple-bunking” and the overcrowding in Toronto’s Don Jail, in *R. v. Smith*, [2003] O.J. No. 1782, at para. 8 (Ont. C.J.), Schneider J. referred to the standards set by the United Nations Congress on the Prevention of Crime and Treatment of Offenders and concluded that “the Toronto jail as presently operated is substandard and ... an embarrassment to the Canadian Criminal Justice System”. Judge Schneider drew similar conclusions, and canvassed in greater detail the Standard Minimum Rules for the Treatment of Prisoners, adopted by the United Nations Congress on the Prevention of Crime and Treatment of offenders and to which Canada is a signatory, in *R. v. Permesar*, [2003] O.J. No. 5420 (Ont. C.J.). In *R. v. Kravchov*, [2002] O.J. No. 2172, 4 C.R. (6th) 137 (Ont. C.J.), Kenkel J. awarded more than 3:1 enhanced credit for pre-trial custody to an offender who had been subjected to deplorable conditions, many a product of overcrowding and the consequent practice of triple-bunking. Justice Watt addressed the practice of “triple-bunking” or “triple-celling” in *R. v. Jabhour*, [2001] O.J. No. 3820 (Ont. S.C.J.), concluding (at para. 43) that “[t]hree adults in a six by nine cell is a bit much, no matter who sleeps where. The overcrowding raises significant health concerns and is simply unacceptable.” See also *R. v. Prince*, [2006] O.J. No. 3776, at para. 87 (Ont. C.J.); *R. v. Robinson*, [2001] O.J. No. 5325, at para. 35 (Ont. C.J.). Many of these judicial discussions arose in the context of judges assessing whether to award “enhanced credit” for pre-trial custody, one means by which judges can reflect the deplorable conditions in the underfunded correctional system and exert some pressure for reform. On March 27, 2009, the Conservative government gave first reading to Bill C-25, *An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)*, also titled *The Truth in Sentencing Act*. The Bill would abolish the practice of awarding 2-for-1 credit for pre-trial detention, instituting a new general standard of giving only 1:1 credit and creating a new maximum of 1:1.5 credit only “if the circumstances justify it”.

are less available to inmates, most of whom, irrespective of the length of their sentence, will ultimately re-enter society.<sup>33</sup>

Another peril of minimum sentences lies in the pre-trial incentives that they trigger. Although the exercise of charging discretion is common and necessary in our system, mandatory minimums can “invite evasion by justice system officials”,<sup>34</sup> potentially inducing police and prosecutors alike to refuse to proceed with a charge or to charge with alternative offences in an effort to avoid the infliction of what might be a disproportionate minimum penalty in the circumstances. The substantive law is thus distorted through the loss of nuance and contextual responsiveness in sentencing. Perhaps most significantly, plea negotiations can also be dangerously distorted by minimum sentences. Chillingly, given our systemic reliance on guilty pleas,<sup>35</sup> we have increasingly understood that the pressures surrounding plea bargaining can present real risks of miscarriages of justice.<sup>36</sup> The multiplication of high minimum

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<sup>33</sup> With prison overcrowding, “there is less of everything to go around, so the same space and resources are made to stretch even further. The opportunities for inmates to participate in self-improvement and rehabilitative programs, such as academic, employment and vocational training are curtailed”. John Howard Society of Alberta, “Prison Overcrowding” (1996), at 2, online: The John Howard Society of Alberta <<http://www.johnhoward.ab.ca/PUB/PDF/C42.pdf>>.

<sup>34</sup> Dufraimont, *supra*, note 17, at 465.

<sup>35</sup> Statistics Canada reports that 89 per cent of guilty dispositions in 2006-2007 were based on a guilty plea. See Statistics Canada, “Adult Criminal Court Statistics” (May 20, 2008), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/080520/dq080520e-eng.htm>>. Based on the figures provided by Statistics Canada, this means that of all of the cases that enter the system, including the 30 per cent of cases that result in a stay of proceedings or charges withdrawn, almost 60 per cent of all cases are disposed of by way of guilty plea. If one looks only at the cases that make it to either an acquittal or a finding of guilt, 84 per cent of cases are dealt with by guilty plea. See Canadian Centre for Justice Statistics, “Adult Criminal Court Statistics, 2006/2007” (Statistics Canada – Catalogue no. 85-002-XIE, Vol. 28, No. 5), online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008005-eng.pdf>>.

<sup>36</sup> See *R. v. Hanemaayer*, [2008] O.J. No. 3087, 234 C.C.C. (3d) 3 (Ont. C.A.), in which the Court entered acquittals for the accused, who had pleaded guilty to, and served a sentence for, crimes he did not commit. The case was built on deeply flawed eyewitness identification evidence. In setting aside his guilty pleas and declaring the case a miscarriage of justice, Rosenberg J. commented (at para. 18) that, although his guilty pleas were voluntary, unequivocal and informed:

the court cannot ignore the terrible dilemma facing the appellant. He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.

See also the *Inquiry into Pediatric Forensic Pathology in Ontario* (“The Goudge Commission”), vol. 3 (Toronto: Queen’s Printer for Ontario, 2008), at 451-52. Justice Goudge references the fact that a number of the cases engaged by this inquiry, which was triggered by the misconduct of forensic pathologist Dr. Charles Smith, involved guilty pleas and that “in a number of these cases, the defendants assert their innocence and explain that they felt compelled to plead guilty to avoid the severe consequences that would follow a conviction on the original charges”. Although his mandate precluded drawing conclusions about these cases, Goudge J. nevertheless noted that “the concern

sentences simply magnifies this risk. Met with a choice between the risk of conviction for an offence with a high minimum sentence and pleading guilty to a lesser offence in which judicial sentencing discretion remains undisturbed by Parliament, the incentives for an innocent accused to plead guilty become particularly powerful and clear.<sup>37</sup>

These institutional and procedural perils all interact with another substantial issue raised by minimum sentences: their potential for disparate impact on those already overrepresented and vulnerable within the criminal justice system. As noted above, the U.S. experience is of precisely this disproportionate effect, wherein inflexible sentencing regimes have exacerbated inequities in the criminal justice system.<sup>38</sup> In Canada, scholars have pointed to minimum sentences as having particularly troublesome consequences for Aboriginal peoples, with serious concerns also raised about disparate racial impacts and the manner in which mandatory minimums have contributed to gender inequities in the criminal law.<sup>39</sup>

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remains that individuals may plead guilty to crimes they did not commit when, for example, a murder charge with mandatory life imprisonment and lengthy parole ineligibility is reduced to a charge of criminal negligence together with a joint submission of 90 days' imprisonment". In early 2009, Richard Brant asked the Ontario Court of Appeal to reopen and reassess his conviction for aggravated assault in relation to the death of his son. Faced with Dr. Smith's evidence that the child had been shaken to death — evidence that has since been seriously discredited — he had pleaded guilty instead of facing a manslaughter charge. See Kirk Makin, "The Justice System's 'Dirty Little Secret'", *The Globe and Mail* (Wednesday, January 14, 2009), at A5. It is a common theme in the literature on plea bargaining that "the risk of convicting the innocent increases when the coercive elements surrounding plea bargaining are left unchecked": Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50 *Crim. L.Q.* 14, at 38.

<sup>37</sup> See Dianne L. Martin, "Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions" (2001) 39 *Osgoode Hall L.J.* 513. Discussing the various ways in which minimum sentences can contribute to wrongful convictions, Martin observes that "the risk of certain imprisonment, whether because a mandatory minimum sentence is involved or because of the nature of the offence, is almost as helpful in inducing guilty pleas as the denial of bail" (at 517). In Kate Stith, "The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion" (2008) 117 *Yale L.J.* 1420, at 1454, the author observes that "throughout the period of 'mandatory' guidelines, guilty pleas steadily displaced trials in the federal system" to the point that "[t]he default is the plea bargain (or sentence bargain), with the adversarial jury trial serving as a kind of judicial review for defendants who are not content with administrative adjudication by the prosecutor." Discussing, as does Stith, the manner in which minimum sentences shift discretion from the judge to the prosecutor, Lowenthal, *supra*, note 27, at 78, also observes that "[t]he mandatory sentencing consequences of a guilty verdict pressure defendants, who otherwise might test state's evidence, into accepting guilty pleas."

<sup>38</sup> See Alschuler, *supra*, note 29; Mustard, *supra*, note 29.

<sup>39</sup> See Chartrand, *supra*, note 30; Faizal R. Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001) 39 *Osgoode Hall L.J.* 491; Sheehy, *supra*, note 30.

Yet the peril of minimum sentences that triggers constitutional concerns related to section 12, and with which *Ferguson*<sup>40</sup> engages, flows from the essential — and fundamentally problematic — feature of minimum sentences: they represent an *a priori* political judgment about what is a just punishment in all circumstances. Such judgments are intrinsically dangerous. Parliament has declared that the fundamental principle of sentencing is that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”<sup>41</sup> The essence of a minimum sentence is that it purports to know in advance the floor of proportionality for a given offence, irrespective of the specifics of the case. But life serves up circumstances far more complex and difficult than even the most prescient parliamentary committee can anticipate. Cases can find their way before courts — indeed, I share Arbour J.’s conviction expressed in *Morrissey*<sup>42</sup> that cases *will* find their way before sentencing judges — in which exceptional circumstances make a minimum sentence so unfit as to unjustifiably offend the section 12 protection against cruel and unusual treatment or punishment. Although this is particularly true of crimes that cover broad ranges of behaviour, such as criminal negligence (at issue in *Morrissey*) or manslaughter (at issue in *Ferguson*), given the combined effects of time and the extraordinary vicissitudes of life, cases will arise that put pressure on any substantial minimum sentence tested against our constitutional commitments and fidelity to the morality of proportionality in sentencing.<sup>43</sup> The question is what is to be done in such cases. *Ferguson* answers this question and, I argue, does so in a manner that has

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<sup>40</sup> *Supra*, note 16.

<sup>41</sup> Section 718.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>42</sup> *Supra*, note 14, at para. 66. Justice Arbour wrote of “the inevitability that a four-year penalty will be grossly excessive for at least some plausible future manslaughter convictions”.

<sup>43</sup> Morris J. Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment” (2008) 28 *Oxford J. Legal Stud.* 57. Justice Fish defends proportionality as the fundamental principle of sentencing and, addressing the increased use of mandatory minimum sentences in Canada, warns that it is “plain that derogation from this fundamental principle will necessarily lead in some cases to the imposition of disproportionately harsh sentences” (at 69). Allan Manson describes mandatory minimum penalties as “an aberrant and unrealistic ‘one size fits all’ approach which is antithetical to the individualized Canadian approach” and similarly concludes that “[b]y submerging individual characteristics and the infinite circumstances in which offences can be committed into a uniform mould, the mandated sentence will produce some unfair and inordinately harsh responses”: Allan Manson, “Motivation, the Supreme Court and Mandatory Sentencing for Murder” (2001) 39 *C.R.* (5th) 65, at 71. See also the 1987 Canadian Sentencing Commission, *supra*, note 26, at 186: “[E]ach criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined.”

greater potential to disturb the politics of minimum sentences than was offered by the constitutional exemption.

### III. INTERPRETING *FERGUSON*

The *Ferguson* case arose out of the fatal shooting of a police detainee by an RCMP constable. Constable Ferguson, the accused, testified that while placing the detainee in cells, the detainee attacked him, pulling his vest over his head and grabbing Constable Ferguson's firearm. In the ensuing struggle one shot was discharged into the detainee's stomach, wounding him non-fatally. The booking officer testified that he heard the second, and fatal, headshot up to three seconds later.

Section 236(a) of the *Criminal Code* imposes a minimum sentence of four years for manslaughter with a firearm. There is, of course, considerable potential overlap between this offence and the offence considered and upheld on the basis of the "reasonable hypotheticals" analysis in *Morrisey*<sup>44</sup> — criminal negligence causing death with a firearm, a crime also punishable by a four-year mandatory minimum sentence.<sup>45</sup> Based on this precedent, Constable Ferguson did not challenge the general constitutionality of section 236(a) on the basis of a reasonable hypotheticals analysis in the courts below<sup>46</sup> but, rather, argued that on the peculiar facts of his case, the minimum sentence would amount to cruel and unusual punishment, contrary to section 12 of the Charter, and that the appropriate remedy should be a constitutional exemption granted pursuant to the wide remedial power conferred on courts by section 24(1) of the Charter. Despite what might be regarded as the relatively unsympathetic facts in this case, counsel for Constable Ferguson no doubt took some cue from Arbour J.'s reference in *Morrisey* to one situation in which she imagined that section 220(a) of the *Criminal Code* might offend section 12 of the Charter: "police officers or security guards who are required to carry firearms as a condition of their employment and who, in the course of their duty, negligently kill someone with their firearm."<sup>47</sup> In arguing for a constitutional exemption,

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<sup>44</sup> *Supra*, note 14.

<sup>45</sup> Section 220(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>46</sup> *Ferguson*, *supra*, note 16, at para. 11.

<sup>47</sup> *Morrisey*, *supra*, note 14, at para. 86. Justice Arbour was careful to qualify her comments: "Of course, the law will hold such persons to a high standard of care in the use and

Ferguson was leaning on Arbour J.'s suggestion, and certain opinions of lower courts,<sup>48</sup> that when such exceptional circumstances arise the appropriate approach would be to exempt the individual from the application of the minimum sentence but to leave the law intact given its generally constitutional operation. The Court in *Ferguson* was, thus, faced with two questions: first, whether the mandatory minimum for manslaughter was cruel and unusual punishment in the circumstances of Constable Ferguson's case and, second, what the appropriate remedy is when a mandatory minimum is found to breach section 12.

Chief Justice McLachlin, writing for a unanimous Court, found on the facts that the four-year minimum did not constitute cruel and unusual punishment. In so doing, the Court reiterated and clarified the role of the sentencing judge in finding facts for the purposes of sentencing following a jury trial. *Ferguson* is now the leading case on this point, giving a compendious statement of the rules articulated in *R. v. Brown*,<sup>49</sup> in *R. v. Gardiner*<sup>50</sup> and in statute.<sup>51</sup> Having found that there is "no basis for concluding that the four year minimum sentence prescribed by Parliament amounts to cruel and unusual punishment on the facts of this case",<sup>52</sup> the Court could have chosen to leave the appropriate remedy for mandatory minimums that breach section 12 to another day but decided instead that "[t]he matter having been fully argued, it is appropriate to settle the question of whether a constitutional exemption would have been available."<sup>53</sup>

The essence of the decision is, thus, the remedial question of what a court is to do when a mandatory minimum sentence breaches section 12. *Ferguson* decides the fate of the constitutional exemption applied to minimum sentences. The Court is clear and unequivocal in its conclusion that the appropriate remedy in such exceptional cases is not a

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handling of their firearms; however, it is nonetheless conceivable that circumstances could arise in which a four-year penitentiary term could constitute cruel and unusual punishment."

<sup>48</sup> In *Ferguson, supra*, note 16, at para. 43, McLachlin C.J.C. listed lower court decisions that had considered the use of constitutional exemptions. Whereas the Ontario and New Brunswick Courts of Appeal had ruled against the use of constitutional exemptions to exempt individual offenders from mandatory sentences, the Courts of Appeal of Saskatchewan and the Northwest Territories had granted such exemptions and the B.C. Court of Appeal had approved of them in *obiter*. The Quebec Court of Appeal had offered signals in both directions.

<sup>49</sup> [1991] S.C.J. No. 57, [1991] 2 S.C.R. 518 (S.C.C.).

<sup>50</sup> [1982] S.C.J. No. 71, [1982] 2 S.C.R. 368 (S.C.C.).

<sup>51</sup> See especially *Criminal Code*, s. 724.

<sup>52</sup> *Ferguson, supra*, note 16, at para. 29.

<sup>53</sup> *Id.*, at para. 33. This statement no doubt brings the ruling into the Court's category of "binding *obiter*" enunciated in *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609, at paras. 53ff (S.C.C.).

constitutional exemption pursuant to section 24(1) of the Charter but, rather, to declare the law of no force and effect pursuant to section 52(1) of the Constitution. Chief Justice McLachlin offered four reasons for this conclusion. Her first argument was jurisprudential. She surveyed the prior decisions of the Supreme Court of Canada and concluded that, although the Court had recognized constitutional exemptions as an ancillary remedy appropriate to provide relief to a claimant during the currency of a suspension of a declaration of invalidity,<sup>54</sup> as to stand-alone constitutional exemptions, “the weight of authority thus far is against them and sounds a cautionary note.”<sup>55</sup> Second, she reasoned that the use of constitutional exemptions would be inconsistent with respect for Parliament’s intent in enacting minimum sentences, which the Court concluded “is to remove judicial discretion to impose a sentence below the stipulated minimum.”<sup>56</sup> To judicially create a sentencing discretion by use of a constitutional exemption would be directly contrary to this intent and, accordingly, a declaration of invalidity is the least intrusive remedy still consistent with Parliament’s intent.<sup>57</sup> Chief Justice McLachlin concluded that these two reasons alone were “sufficient to exclude constitutional exemptions as an appropriate remedy for unconstitutional mandatory minimum sentences.”<sup>58</sup> Yet she went on to provide two more bases for this conclusion: the remedial structure of the Charter and the rule of law. Chief Justice McLachlin explained that section 24(1) was properly confined to remedying unconstitutional *acts* by government

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<sup>54</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.). Chief Justice McLachlin explains in *Ferguson, id.*, at para. 46, that “a court may grant such an exemption in order to relieve the claimant of the continued burden of the unconstitutional law during the period that the striking out remedy is suspended”.

<sup>55</sup> *Ferguson, id.*, at para. 48.

<sup>56</sup> *Id.*

<sup>57</sup> This is, effectively, the test established in *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.); and *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.). The Court’s conclusion that Parliament’s specific and strong purpose was to exclude judicial discretion effectively precluded a s. 52(1) remedy of reading down the legislation. Chief Justice McLachlin explains in *Ferguson, id.*, at para. 50, that “the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended. It follows that a constitutional exemption should not be granted.” See Kent Roach, “Editorial: The Future of Mandatory Sentences after the Death of Constitutional Exemptions” (2008) 54 C.L.Q. 1 [hereinafter “The Future of Mandatory Sentences”], in which Roach argues that a more tailored s. 52(1) remedy would have been both preferable and appropriate and that “[t]he justification for such judicial actions is that the constitution [*sic*] requires that the legislation be altered.” Roach also argues, at 2, that the Court’s view that “allowing courts to fashion exemptions would undermine certainty, fair notice and the rule of law also seems a bit exaggerated”.

<sup>58</sup> *Ferguson, id.*, at para. 57.



pursuant to otherwise constitutional laws whereas unconstitutional *laws* must be dealt with by recourse to section 52(1).<sup>59</sup> To use section 24(1) to address a legislated mandatory minimum with unconstitutional effects would undermine principles central to the rule of law, largely by impairing the certainty and predictability of the law by creating a situation in which “the law is on the books, but in practice, it may not apply.”<sup>60</sup>

The legal effect of the decision is, thus, clear and can be briefly stated: constitutional exemptions are no longer available in Canada as a means of attending to the exceptional case that arises in which a minimum sentence would impose cruel and unusual punishment. Instead, the offending law should be declared of no force and effect for all purposes; the law should be “struck down”.

But if that is the narrow legal effect of *Ferguson*, how should we interpret this decision? In particular, ought we to receive the case as, effectively, a retreat from scrutiny of mandatory minimum sentences? Should the case be understood as representing the loss of a principled means of addressing the perils of minimum sentences? Perhaps most meaningfully put, what message should lower court judges and advocates take from *R. v. Ferguson* about the appropriate posture to assume towards mandatory minimum sentences? And, indeed, what is the political message of *Ferguson*?

To interpret the decision, one must first be clear about two things that *Ferguson* does *not* stand for. First, *Ferguson* does not affect the reasonable hypotheticals analysis enunciated in *Smith*,<sup>61</sup> *Goltz*<sup>62</sup> and *Morrisey*.<sup>63</sup> None of these cases were overruled by the Court. Indeed, McLachlin C.J.C. makes clear that “[o]rdinarily, a s. 12 analysis for a mandatory minimum sentence requires both an analysis of the facts of the accused’s case and an analysis of reasonable hypothetical cases.”<sup>64</sup> The reason the Court did not undertake a careful reasonable hypotheticals analysis in *Ferguson* is that Constable Ferguson did not make this argument in the courts below, raising the matter for the first time at the Supreme Court. Chief Justice McLachlin concluded simply that “Constable Ferguson has not pointed to a hypothetical case where the

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<sup>59</sup> *Id.*, at paras. 58-66.

<sup>60</sup> *Id.*, at para. 70. See also paras. 67-73.

<sup>61</sup> *Supra*, note 11.

<sup>62</sup> *Supra*, note 11.

<sup>63</sup> *Supra*, note 14.

<sup>64</sup> *Ferguson, supra*, note 16, at para. 30.

offender's minimum level of moral culpability for unlawful act manslaughter using a firearm would be less than in the reasonable hypotheticals considered in *Morrissey*.<sup>65</sup> Accordingly, after *Ferguson*, an accused can still challenge a mandatory minimum sentence on the basis that, positing reasonable hypothetical situations that do not arise in his or her case, the sentence could produce cruel and unusual punishment.<sup>66</sup> If a court agrees, the minimum sentence is unconstitutional and of no force or effect pursuant to section 52(1). But as I have discussed, the band of situations covered by "reasonable hypotheticals" is limited to the "common" case. *Ferguson* confirms that an accused can *also* challenge a minimum sentence on the basis that on the facts of his or her own case — no matter how uncommon or exceptional the situation — the minimum sentence would inflict cruel and unusual punishment.<sup>67</sup> The question in *Ferguson* is simply what to do if a court agrees. As such, *Ferguson* leaves two routes open to challenging minimum sentences on the basis of section 12: an argument based on reasonable hypotheticals and an argument based on the peculiar facts of one's case.

Second, the Court did not adjust or affect the test for what constitutes cruel and unusual punishment under section 12 of the Charter. Chief Justice McLachlin confirms the rule, enunciated in *Smith*,<sup>68</sup> that "[t]he test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate."<sup>69</sup> To be grossly disproportionate "the sentence must be more than merely

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<sup>65</sup> *Id.*, at para. 30.

<sup>66</sup> To posit one such reasonable hypothetical arising from recent legislative changes, a hypothetical similar to one suggested by Dufrainmont, *supra*, note 17, at 469, imagine a young weapons enthusiast with no criminal record who orders a non-functional replica rifle from the United States, knowing that he is not permitted to do so. Pursuant to s. 103(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, which was amended in 2008 as part of the *Tackling Violent Crime Act*, *supra*, note 19, this individual would receive a minimum sentence of three years' imprisonment. For further posited reasonable hypotheticals, see Paul Calarco, "R. v. *Ferguson*: An Opportunity for the Defence" (2008) 54 C.R. (6th) 223, at 226-27.

<sup>67</sup> For example, even if a mandatory minimum sentence of four years for unlawful act manslaughter using a firearm is not unconstitutional on the basis of reasonable (meaning "common") hypotheticals, if the unlawful act involved a young man pointing a gun at a friend in jest and pulling the trigger, mistakenly thinking that it was unloaded, and if the individual before the court was dying of leukemia and had less than two years to live, a court might nevertheless conclude that a mandatory four-year term of imprisonment would be cruel and unusual on the exceptional facts of the case. Once one turns one's attention from a reasonable hypotheticals analysis to consider the exceptional case, the peculiar circumstances of the offender become particularly salient and there is no natural limit on the constellation of such circumstances that might appear. Imagine, for example, that this accused was also of diminished mental capacity or the sole caregiver of an ailing parent.

<sup>68</sup> *Supra*, note 11.

<sup>69</sup> *Ferguson*, *supra*, note 16, at para. 14.

excessive”; “the sentence must be ‘so excessive as to outrage standards of decency’ and disproportionate to the extent that Canadians ‘would find the punishment abhorrent or intolerable’”.<sup>70</sup> It thus remains true that it is no easy task to satisfy a court that, on the facts of your case, a minimum sentence would inflict cruel and unusual punishment. Although some such claims have been successful, it remains the case that this very high threshold is open to criticism and ripe for reconsideration.<sup>71</sup> (Are we really satisfied with a law that would create consistently excessive sentences so long as this unfitness does not outrage our standards of decency?) However, this legal hurdle is the same whether the ultimate remedy would be a constitutional exemption or a declaration of invalidity pursuant to section 52(1).

What, then, is the *significance* of the Court’s decision in *Ferguson*? My argument is that, in directing judges not to hesitate to strike down legislation that, on the facts of an exceptional case before them, would inflict cruel and unusual punishment, this judgment exerts constitutional pressure on the politics of minimum sentences in a way that the constitutional exemption simply could not. Inasmuch as this is so, the decision should be received favourably by those wary of the perils of minimum sentences.

In this respect, the most illuminating component of the judgment is the Chief Justice’s remarks after she concludes that the combined considerations of the Court’s past jurisprudence and respect for Parliament’s intent are “sufficient to exclude constitutional exemptions as an appropriate remedy for unconstitutional mandatory minimum sentences”.<sup>72</sup> The discussion of the remedial scheme of the Charter and the rule of law that follows — analysis not strictly necessary to her conclusion — exposes a concern for the substantive integrity of the penal law. The Chief Justice explains that the mandatory wording of section 52(1) is an indication that unconstitutional laws — “over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians”<sup>73</sup> —

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<sup>70</sup> *Id.*, citing *R. v. Wiles*, [2005] S.C.J. No. 53, [2005] 3 S.C.R. 895, at para. 4 (S.C.C.).

<sup>71</sup> For an argument that the protection afforded by s. 12 should be expanded by relaxing this standard, see Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the Charter”, in Jamie Cameron & James Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (Markham, ON: LexisNexis Canada, 2008) 553. Cameron argues, at 588, that “[t]he Court has given section 12 an interpretation which has crippled the entitlement” by “displac[ing] a concept of proportionality which would examine the relationship between the blameworthiness of the accused and the prescribed punishment”. Cameron’s argument is part of a larger plea to restrict the substantive ambit of s. 7, instead treating issues of moral blame with more robust s. 12 scrutiny.

<sup>72</sup> *Ferguson*, *supra*, note 16, at para. 57.

<sup>73</sup> *Id.*, at para. 66.

must not be “left on the books subject to discretionary case-by-case remedies”.<sup>74</sup> If the law admits of substantively unconstitutional results, no matter how rare, section 52(1) mandates that the law be struck down. This is the appropriate result, she explains, because “[t]he ball is thrown back into Parliament’s court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects.”<sup>75</sup>

The Court’s concern for the substantive integrity of the law becomes even clearer when McLachlin C.J.C. moves on to discuss the potential impacts of one remedy or the other on values underlying the rule of law. Viewed from a rule of law perspective, the Court’s chief concern with the constitutional exemption is the chasm that it can open up between what the statutes appear to demand and what courts are doing to mitigate the harshness of these minimums: “[a]s constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.”<sup>76</sup> The Chief Justice reasons that this gap creates unacceptable uncertainty and impedes predictability, but very importantly from the perspective of assessing the Court’s message about the judiciary’s relationship to the legislative politics of minimum sentences, McLachlin C.J.C. concludes her discussion with the following statement: “Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.”<sup>77</sup> The manifest concern is equipping courts with the constitutionally appropriate tools to push Parliament to exercise *its* constitutional role of considering carefully the substantive fairness of the laws it creates. Striking down legislation that permits cruel and unusual punishment, rather than mopping up the hard cases with constitutional exemptions, provides “clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm”.<sup>78</sup>

*Ferguson* is, thus, not simply a decision that tidies up a remedial loose end. Nor, in my view, is it properly read as a retreat from scrutiny of minimum sentences or the loss of a workable solution to the exceptional

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<sup>74</sup> *Id.*, at para. 65.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*, at para. 70. Coughlan shares this view, describing constitutional exemptions as “unavoidably inconsistent” with the rule of law and arguing that *Ferguson* “should be expanded beyond section 12 cases to any situation where it is proposed that a law should remain in place and not be declared invalid, but that the law should not be applied on this occasion”. Steve Coughlan, “The End of Constitutional Exemptions” (2008) 54 C.R. (6th) 220, at 221.

<sup>77</sup> *Ferguson, id.*, at para. 73.

<sup>78</sup> *Id.*

case. To the contrary, *Ferguson* is best read as an intervention by the Supreme Court that holds more promise than the constitutional exemption to moderate and discipline the politics of minimum sentences. Use of the constitutional exemption allowed politicians to remain untroubled in their thrall to the political appeal of the mandatory minimum sentence. My reasoning here is premised on the conviction, expressed earlier, that given a substantial minimum sentence and enough time, the exceptional cases in which a high minimum would inflict cruel and unusual punishment will arise. The constitutional exemption puts the courts in the position of cleaning up these unjust deposits of minimum sentences in a manner that relieves Parliament of the need to think carefully about the hard case when crafting sentencing policy.<sup>79</sup> The political incentives for crafting new and higher mandatory minimums remain unmolested by the constitutional exemption. By contrast, in *Ferguson* the Supreme Court ensured that there would be constitutional counterweights that, added to the political mix, have the potential to slow and moderate the proliferation of minimums. After *Ferguson*, a court met with either reasonable hypotheticals or an extraordinary case that exposes a sentence as permitting cruel and unusual punishment will strike down the law, requiring Parliament to reconsider the justness of the minimum. Parliament's response might be to abandon the minimum, to moderate the minimum, to introduce a qualified discretion for the sentencing judge or — if the legislative wisdom is that the impugned minimum is

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<sup>79</sup> To the contrary, one might point to the enactment of s. 113 of the *Criminal Code* in 1995 as evidence that the granting of constitutional exemptions can exert a certain degree of pressure on Parliament to reconsider and amend mandatory sentencing laws. Section 113 responded to a number of decisions providing constitutional exemptions to mandatory firearm prohibition orders by creating a narrow judicial discretion to mitigate such orders. See *R. v. Chief*, [1989] Y.J. No. 131, 51 C.C.C. (3d) 265 (B.C.C.A.); *R. v. McGillivray*, [1991] S.J. No. 68, 62 C.C.C. (3d) 407 (Sask. C.A.); *R. v. Nester*, [1992] N.W.T.J. No. 15, 70 C.C.C. (3d) 477 (N.W.T.C.A.). Section 113 was enacted, however, at a time when the status of constitutional exemptions was extremely uncertain. My argument is that if, at the time, the status of constitutional exemptions had been certain — whether by consistent use or the Supreme Court of Canada giving them its imprimatur — Parliament would have had little incentive to enact this legislation. This is the same logic that informs Sankoff's view, with which I agree, that "[t]he confirmed existence of a constitutional exemption remedy ... might actually provide the impetus for the drafting of more legislation of mandatory application" ("An Ongoing Problem", *supra*, note 15, at 239). The structural dynamic created by *Ferguson* is akin to that triggered by *R. v. Parker*, [2000] O.J. No. 2787, 146 C.C.C. (3d) 193 (Ont. C.A.), in which the Court declared the marijuana prohibition in s. 4 of the *Controlled Drug and Substances Act*, S.C. 1996, c. 19 to be invalid and suspended that declaration for one year to provide an opportunity for Parliament to respond, ultimately prompting the creation of the *Marihuana Medical Access Regulations*, SOR/2001-227.

necessary and effective — to invoke the notwithstanding clause.<sup>80</sup> Although the latter result is rather unlikely, this unlikelihood demonstrates the effect of *Ferguson*: it injects the realities of sentencing — the real violence and potential harshness of punishment — into the matrix of parliamentary decision-making. This is the most direct effect of *Ferguson*, an effect that will materialize when the hard case comes up in court. But it may even be that the mere knowledge that this is the approach that the judiciary will now take can influence political decision-making about crafting new mandatory minimums. Drafters deprived of the comfort of knowing that legislation (and, with it, the government’s “tough on crime” posture) will remain intact while courts step up to do what is just in the hard case have increased incentive to take this factor — what may be just in the hard case — into account when proposing new or higher minimums.

Viewed from the perspective of constitutional structure and theory, one way of understanding the case is that *Ferguson* improves on the distribution of responsibility for constitutional interpretation in the field of penal law. In a system of constitutional exemptions, Parliament is, at best, required to think about a proposed law’s potential to inflict cruel and unusual punishment once and only with “common” cases in mind. Once a mandatory minimum is enacted and found to be *generally* constitutional, Parliament can utterly wash its hands of the day-to-day application of that law. After *Ferguson*, Parliament can be met with the extraordinary case and required to reassess policy in light of the realities of sentencing. Granted, the Court may still be taking the lead in interpreting section 12, but Parliament is never wholly off the hook for wrestling with the values reflected in section 12 and, as such, the substantive justness — the cruelty or humaneness — of its sentencing policies.<sup>81</sup> Of course, nothing ensures that a given government will take this role to heart. In a “tough on crime” environment, it may be that the

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<sup>80</sup> In this way, *Ferguson* may represent the “return ... to vigorous judicial enforcement against cruel and unusual punishment by striking down mandatory sentences” hoped for by Roach, *supra*, note 14, at 411, a return that he thought would have “the potential to produce a robust and democratic dialogue between the courts and the legislature that considers both the effect of punishment on offenders and the adequacy of less draconian alternatives”.

<sup>81</sup> There is an interesting and potentially important way in which *Ferguson*, *supra*, note 16 may have an effect on Crown conduct as well. After *Ferguson*, in a marginal case in which a court might conclude that a minimum sentence would inflict cruel and unusual punishment, the Crown must now balance proceeding with this charge, rather than an offence for which judicial discretion at sentencing is still intact, against the risk of a declaration of invalidity rather than merely a personal remedy for the accused. In this way, the *use* of legislated mandatory minimums might be somewhat disciplined by *Ferguson*.

easiest political response is to bemoan a court's ruling as "soft on crime" and engage in relatively superficial reconsideration of the law and constitutional imperatives. But *Ferguson* at least creates some structural pressure and the possibility for deeper legislative reflection on the justness of penal policy; and, in the meantime, a mandatory minimum sentence that admits of cruel and unusual punishment — a minimum sentence that therefore has no place in Canadian law — is excised from the statute. Legal ingenuity will be focused not on the means of evading the harshness of laws but, rather, on their substantive quality.

#### IV. JUDICIAL EXPECTATIONS

I have argued that the Court's strong message to sentencing courts is that in any case in which a judge would have previously been satisfied that a constitutional exemption from a mandatory sentence was justified, that judge should instead strike down that statutory minimum, declaring it to be of no force or effect, in accordance with section 52(1) of the Constitution. My interpretation of the significance of *Ferguson* and its potential for disrupting or moderating the contemporary political inertia towards more and increased minimum sentences leans heavily on the expectation that judges will take this as the message of the decision and act upon it.

Accordingly, one challenge that can be put to my argument as to how the case should be received is to ask whether, if this is truly what the Court had in mind, the message to trial judges was sufficiently clear. This kind of challenge is suggested by Professor Dufraimont's analysis of *Ferguson*.<sup>82</sup> Although McLachlin C.J.C. states that "[i]f a mandatory minimum sentence would create an unconstitutional result in a particular case, the minimum sentence must be struck down,"<sup>83</sup> Dufraimont asks whether "[o]n the basis of this brief passage, [we can] really expect lower court judges faced with exceptional cases to disregard prior decisions on the constitutionality of mandatory minimum sentences"<sup>84</sup> and argues that "[i]f the Court envisions lower courts striking down mandatory minimum sentences despite higher court decisions upholding them, then that expectation should be made explicit."<sup>85</sup> I differ in my

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<sup>82</sup> Dufraimont, *supra*, note 17.

<sup>83</sup> *Ferguson*, *supra*, note 16, at para. 13.

<sup>84</sup> Dufraimont, *supra*, note 17, at 475.

<sup>85</sup> *Id.*, at 478.

view of the clarity and content of the Court's message; in my view, the expectation is explicit and does not require lower court judges to ignore precedent. First, with respect to the role of precedent, it must be recalled that the Court is addressing those cases that do not fall within a reasonable hypotheticals analysis. A lower court would be bound in a case that presents facts that are on all fours with a prior analysis that found that a minimum did not offend section 12. But we are dealing with the exceptional case. If a given case presents unique circumstances not already addressed in a prior decision, the Chief Justice is clear in this passage that the sentencing judge must provide a section 52(1) remedy.

With respect to clarity, this admonition to strike down any law that, on the facts of the case before a judge, would result in a cruel and unusual punishment is not, in my view, a "passing reference".<sup>86</sup> It appears in the paragraph in which the Chief Justice is providing a summary of her conclusion in the case, a critical passage in the judgment. Furthermore, this is not the only place in the reasons at which this point is made, nor is it the most emphatic instance of this message. Later in the judgment, as she takes up the analysis of which remedy is appropriate, McLachlin C.J.C. states "[t]he imposition of cruel and unusual punishment contrary to ss. 12 and 1 of the *Charter* cannot be countenanced" and that "[a] court which has found a violation of a *Charter* right has a duty to provide an effective remedy."<sup>87</sup> Perhaps most directly and decisively, at the point in the judgment at which she concludes that the first two rationales would be sufficient to exclude constitutional exemptions, the Chief Justice summarizes her message: "a court that concludes that a mandatory minimum sentence imposes cruel and unusual punishment *in an exceptional case before it is compelled to declare the provision invalid*".<sup>88</sup> The message is, in my view, clear. The Supreme Court is directing judges that their duty is to provide an effective remedy when the case before them shows that a minimum sentence will produce cruel and unusual punishment, advising them that the only appropriate remedy is to strike down the law because it is inconsistent with the Constitution, and conveying to judges that they should not hesitate to do so.

If the direction to lower court judges is clear enough, one might still object that, no matter how clear the instructions as to its use, a sentencing

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<sup>86</sup> *Id.*, at 476.

<sup>87</sup> *Ferguson, supra*, note 16, at para. 34 (emphasis added).

<sup>88</sup> *Id.*, at para. 57 (emphasis added).



judge who was otherwise willing to sand the edges of the law using constitutional exemptions may be reluctant to swing what feels like a sledgehammer. In short, perhaps it is unduly optimistic and overly sanguine of me to predict that sentencing judges, seized with the direction from *Ferguson* and given time and the right case, will see their way clear to striking down a minimum sentence. Setting aside any concerns about the clarity of the Supreme Court's message in *Ferguson*, this objection arises from a suspicion that judges might approach the section 12 inquiry differently with a section 52(1) remedy waiting at the end of the line. Will judges be slower to find an unjustified breach of section 12 given their knowledge that they must strike down the law if they so find?<sup>89</sup> To be sure, the "sticker shock" of being faced with having to strike down an otherwise fair law because of injustices in a single exceptional case is more than that produced by a constitutional exemption. Indeed, I expect that this concern, above all others, is what leads to any sense that *Ferguson* ultimately will spell a retreat from the scrutiny of mandatory minimum sentences. Yet this is a matter of predicting judicial behaviour and can ultimately only be addressed in due course with an empirical answer. My own sense, however, is that most sentencing judges are not timorous souls. With the Supreme Court's message in *Ferguson* made clear, including its emphatic statement about the role of the courts and the correlative role of Parliament in this area, my prediction is that cases will indeed arise in which judges will conclude that, on the facts, a minimum sentence would amount to cruel and unusual punishment and, seized with *Ferguson*, will strike down the law. What is more, whether a given sentence amounts to cruel and unusual punishment is a matter subject to appellate review. As such, it is not only sentencing judges who will be responsible for giving effect to *Ferguson*. With the accretion of cases brought before various judges, with their assessments then reconsidered and tested in the appellate process, I think it entirely reasonable to anticipate that we will indeed see the kind of judicial intervention in the politics of minimum sentences that my reading of *Ferguson* suggests.

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<sup>89</sup> In "The Future of Mandatory Sentences", *supra*, note 57, at 2, Roach calls this the "likely pessimistic scenario" and rightly notes that the risk of *Ferguson* being received in this manner would be that "the drastic consequences of a declaration of invalidity will make jurisprudence under s. 12 of the Charter even more deferential to Parliament's use of mandatory sentences." Roach concedes, however, that this is not the only scenario and that "[t]rial judges who experience first hand the effects of applying mandatory sentences in odd cases may decide to pull the trigger and strike down the entire mandatory sentence."

## V. CONCLUSION — THE CHARTER AND CONSTITUTIONAL GOVERNMENT

Every right guaranteed in the Charter has two aspects. Very importantly, a right offers relief to an individual aggrieved by state action. Both the structure of adjudication and the language of the Charter — guaranteeing rights to “everyone”, “any person”, “every individual” and “every citizen” — keep this dimension of rights protection at the forefront of our minds. But every right also expresses something about the kind of government and laws to which we aspire. The protection against unreasonable search and seizure is normally invoked by a given accused in the context of his or her encounter with the police; but section 8 also contains within it the demand that government take seriously people’s privacy interests in all that it does. The right to a fair trial is enjoyed by everyone charged with an offence; but the benefit of a government of due process and adjudicative fairness also redounds to the community at large. The guarantee of equality is afforded to every individual; but it also evinces an aspiration for a government mindful of and attentive to the potential disparate impact of laws and state action.

“Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” At its core, this article has argued that *Ferguson* should be read as a decision that reminds us that this language is not only a personal protection offered to each individual but also an expression of a norm with which we want our government to seriously wrestle when it turns its attention to questions of penal policy. As I have explained, if judges heed the Court’s decision in *Ferguson* legislators will be forced to contemplate the exceptional case in a way that the continued use of constitutional exemptions would simply not have impelled. This alone might not adequately disrupt the disturbing trend in Canada towards more and higher minimum sentences, but it may trouble the easy politics around minimum sentences and will at least send the right judicial message about the substantive demands we make of our penal laws. *Ferguson* says that the realization of the potential for a minimum sentence to inflict cruel and unusual punishment is not a matter that should be addressed in a given case and then treated as an aberration. It is a flaw in the character of the law that, as a constitutional matter, demands the reappraisal of an *a priori* assessment of what justice will always require.

