

ARTICLE

# CRUEL, UNUSUAL, AND CONSTITUTIONALLY INFIRM: MANDATORY MINIMUM SENTENCES IN CANADA

Sarah Chaster \*

CITED: (2018) 23 Appeal 89

---

INTRODUCTION . . . . .	90
I. AN OVERVIEW OF MANDATORY MINIMUM SENTENCING. . . . .	90
A. An Overview of Sentencing in Canada. . . . .	91
B. The History of Mandatory Minimum Sentences . . . . .	92
C. Academic Reaction to MMS: Social Science and Political Perceptions . . . . .	92
II. FROM <i>SMITH</i> TO <i>LLOYD</i> —CRUEL AND UNUSUAL PUNISHMENT. . . . .	95
A. Section 12 and the Reasonable Hypothetical . . . . .	96
B. Gross Disproportionality: A Workable Threshold? . . . . .	100
C. Prosecutorial Discretion and Hybrid Offences . . . . .	100
D. What Remedy? . . . . .	102
E. <i>Nur</i> and <i>Lloyd</i> : Success and Failure. . . . .	103
III. LEGISLATIVE EXEMPTION CLAUSES AND RESIDUAL CONSTITUTIONAL FRAILTIES . . . . .	105
A. Legislative Exemption Clauses . . . . .	105
i. General Exemption Clause. . . . .	108
ii. Threshold of “Substantial and Compelling Circumstances” . . . . .	109
iii. Written Reasons Requirement . . . . .	110
B. Constitutional Challenges: Section 15 . . . . .	111
i. Section 15: Substantive Inequality in MMS . . . . .	112
ii. Section 1: Deference and Dialogue . . . . .	117
CONCLUSION . . . . .	118

---

\* Sarah Chaster completed her BA at the University of British Columbia and her JD at the University of Victoria, graduating in 2017. She sincerely thanks Professor Gerry Ferguson and Assistant Professor Michelle Lawrence (University of Victoria, Faculty of Law) for their leadership of the criminal law term—and their assistance with this paper.

She is currently clerking for Chief Justice Richard Wagner at the Supreme Court of Canada, though the opinions she expresses in this article are hers, and they do not represent the opinions of the Court—or reflect her work at the Court.

## INTRODUCTION

Mandatory minimum sentences (“MMS”) are a quandary in Canadian criminal law. Lawyers, social scientists, and academics constantly criticize the *Criminal Code*’s increasingly comprehensive mandatory minimum sentencing schemes. These critics question the constitutional infirmities and policy justifications of MMS. At the same time, MMS have long attracted judicial deference.

However, in April 2015, for the first time in nearly 30 years, the Supreme Court of Canada (“the Court”) struck down a mandatory minimum sentence in *R v Nur* (“*Nur*”). The Court then struck down another mandatory minimum sentence in April 2016 in *R v Lloyd* (“*Lloyd*”).

These rapid changes in judicial treatment of MMS from Canada’s highest court raise many questions. In particular, what will be the future of mandatory minimum sentencing in Canada? That future is, for now, unclear: do the decisions in *Nur* and *Lloyd* augur a threat to the continued use of mandatory minimum sentencing in Canada, or will they reinforce the *status quo*? Is the Court responding to the criticisms of those lawyers, social scientists, and academics, or will these decisions justify judicial deference to mandatory minimum sentencing schemes?

In this analysis and assessment of the state of MMS in Canada,<sup>1</sup> I briefly engage with the evolution of MMS and academic commentary on their evolution and use. I then examine how the Court’s approach to MMS in *Nur* and *Lloyd* altered—or upheld—section 12 (*Canadian Charter of Rights and Freedoms* (“*Charter*”)) principles, which commonly feature in challenges to minimum sentences. Finally, I evaluate the possibilities for *Charter* challenges to MMS beyond section 12, as well as avenues for future reform.

Ultimately, this article aims to demonstrate that, though they are politically appealing, MMS can be crude, cruel, and undesirable devices in the sentencing process. The majority in *Lloyd* addressed the underlying infirmities in mandatory minimum sentencing, and it directed Parliament to develop “legislative exemption clauses” to render MMS constitutionally compliant. I applaud this judicial direction, and argue that the most reasonable response to these underlying constitutional infirmities is a legislative exemption clause, inserted into the *Criminal Code*, which would permit sentencing judges to depart from MMS in “substantial and compelling circumstances.” In the alternative, if Parliament is unable or unwilling to adopt legislative exemption clauses, I argue that Canadian courts should be less deferential, and more openly activist in assessing the underlying justifications and undesirable consequences of MMS.

## I. AN OVERVIEW OF MANDATORY MINIMUM SENTENCING

MMS have been described by the Court as a “forceful expression of government policy in the area of criminal law” and a “clear statement of legislative intent.”<sup>2</sup> They are not in themselves unconstitutional and have historically been upheld by the Court as an acceptable, albeit harsh, sentencing device. More recently, however, MMS have also been denounced by the Court as provisions which “by their very nature have the potential

1 A brief introductory comment on the scope of this paper is warranted. I address MMS of imprisonment only and do not consider other mandatory penalties such as fines, prohibitions, or periods of parole ineligibility. I also do not address arguably less controversial mandatory penalties for such offences as murder and high treason and instead limit the scope of this paper to the rapid increase in MMS attaching to offences which historically did not entail minimum penalties.

2 *R v Nasogaluak*, 2010 SCC 6 at para 45 [*Nasogaluak*]; *R v Nur*, 2015 SCC 15 at para 132 [*Nur*].

to depart from the principle of proportionality in sentencing” and function as a “blunt instrument [...] which may, in extreme cases, impose unjust sentences.”<sup>3</sup> Because this article explores the perplexing tension between these positions, I must begin by situating MMS in their historical and theoretical context.

## A. An Overview of Sentencing in Canada

Sentencing in Canada is governed by Part XXIII of the *Criminal Code*. The fundamental purpose of sentencing, as set out in section 718, is “to protect society and to contribute, along with crime initiatives, to respect for the law and the maintenance of a just, peaceful and safe society [...]”<sup>4</sup> Criminal sanctions respond to a number of different objectives, including denunciation, deterrence, separating offenders from society where necessary, rehabilitation, providing reparations for harm done, and promoting a sense of responsibility in offenders.<sup>5</sup>

Judges prioritize these sentencing objectives in different ways, depending on the offender, the nature of the offence, and societal pressures of the day. Parliament specifically declined to establish any internal hierarchy between the sentencing objectives when this provision was codified; it is generally accepted that for some offenders, the sentencing objective of denunciation will be prioritized over rehabilitation, as an example, and for some offences, restitution will be prioritized over separation of the offender from society. Sentencing judges determine the priority to be placed on the various sentencing objectives, depending on the specific factors raised before them. However, in the context of MMS, the priority is almost always denunciation, deterrence, and separation of offenders from society, at the expense of rehabilitation.

Regardless of which sentencing objectives are prioritized, judges are bound by the fundamental principle of sentencing in section 718.1, to the effect that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.<sup>6</sup> By virtue of this codification, proportionality is paramount in the sentencing process. As the Court held in *R v Ipeelee*, “proportionality is the *sine qua non* of a just sanction.”<sup>7</sup> Proportionality embodies the “just deserts” philosophy of sentencing in that a given sentence must reflect the gravity of the offence, responding to the objective of denunciation, while remaining appropriate relative to the moral blameworthiness of the offender, thereby responding to the need for restraint.<sup>8</sup>

Within the constraints of proportionality and minimum legislated punishments, sentencing judges enjoy broad discretion and considerable deference on appellate review.<sup>9</sup> Canadian jurisprudence reflects an acceptance, both tacit and explicit, that such broad discretion is fundamental to the very nature of sentencing. Offenders and their particular circumstances are rarely identical. Sentencing judges must be armed with a broad grant of discretion to craft appropriate sentences for the myriad circumstances of offenders before them. Therefore, as the Court has acknowledged, between the “distant statutory poles” of maximum and minimum punishments, “the *Code* delegates to trial judges considerable latitude in ordering an appropriate period of incarceration which advances the goals of sentencing and properly reflects the overall culpability of the offender.”<sup>10</sup>

3 *Nur*, *supra* note 2 at para 44.

4 *Criminal Code*, RSC 1985, c C-46, s 718 [*Criminal Code*].

5 *Ibid.*

6 *Criminal Code*, *supra* note 4, s 718.1.

7 *R v Ipeelee*, 2012 SCC 13 at para 37 [*Ipeelee*].

8 *Ibid.*

9 *R v M (CA)*, [1996] 1 SCR 500 at para 90.

10 *Ibid* at para 37.

Despite the increasing use of mandatory punishments such as fines, prohibitions, and periods of incarceration, sentencing in Canada continues to be a highly and necessarily individualized process.<sup>11</sup>

## B. The History of MMS

When the *Criminal Code* was enacted in 1892, few offences carried a minimum penalty.<sup>12</sup> Rather, *maximum* penalties were used to set the upper limit, leaving broad judicial discretion as to the severity of the sanction within that limit. Thus, the Canadian Sentencing Commission noted that, in 1892, “mandatory minimum penalties were the exception to [the] rule.”<sup>13</sup>

The proliferation of MMS in Canada is a relatively recent phenomenon. Though the increase in MMS is regularly attributed to the “tough on crime” stance of Canada’s most recent Conservative federal government (under Prime Minister Stephen Harper), that proliferation of MMS actually began with the Liberal federal government in the 1990s, under Prime Minister Jean Chrétien, as part of a stricter approach to gun control.<sup>14</sup> There were only nine MMS legislated in Canada in 1987.<sup>15</sup> In 1995, the *Firearms Act* introduced more mandatory penalties to the *Criminal Code*,<sup>16</sup> though there was a further flourishing of MMS in the 2000s and 2010s. By the end of 2012, between the *Criminal Code* and *Controlled Drugs and Substances Act* (“CDSA”), there were nearly one hundred MMS.<sup>17</sup> While MMS are still the exception to the rule, their growing use in Canadian criminal policy has made them increasingly controversial.

## C. Academic Reaction to MMS: Social Science and Political Perceptions

I must begin by acknowledging that MMS are not necessarily unconstitutional.<sup>18</sup> “Standard” penalties are “the exclusive prerogative of Parliament”<sup>19</sup> and sentencing judges are bound to follow them. Although MMS are increasingly challenged, the debate is by no means one-sided. Some academics accept that, though the increasing trend towards MMS is undeniably tough on crime, it is difficult to argue that the penalties imposed are unfit since they apply only to very serious conduct.<sup>20</sup> On this view, MMS are justified as a legislative prerogative: “[s]ociety and Parliament alike regard such conduct as being particularly dangerous and thus deserving of a clear measure of their denunciation and deterrence.”<sup>21</sup> MMS are perceived as a forceful expression of Parliamentary opinion, and a harsh but valid sentencing device.

11 CED 4th (online), *Sentencing* at § 1.

12 In 1892, only the most serious offences such as murder and high treason carried a mandatory minimum sentence. See generally Canada, Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, (Ottawa: Minister of Supply and Services Canada, 1986) at 176 [CSC].

13 *Ibid* at 176.

14 *R v Morrisey*, [2000] 2 SCR 90 at para 70 [Morrisey].

15 Debra Parkes, “From Smith to Smickle: The Charter’s Minimal Impact on Mandatory Minimum Sentences,” (2012), 57 SCLR (2d) 149 at 149 [Parkes, “From Smith to Smickle”].

16 *Morrisey*, *supra* note 14 at para 70.

17 Parkes, “From Smith to Smickle”, *supra* note 15 at 149.

18 For further discussion on this point, see *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at para 97 [Smith].

19 CED, *supra* note 11 at § 7.

20 Gary Clewley, Paul McDermott & Rachel Young, *Sentencing: A Practitioner’s Guide* (Toronto: Thomson Reuters, 1995) at 1-13.

21 *Ibid*.

Supporters of MMS argue that judicial discretion has *never* been unfettered, and that legislators have long relied on MMS to achieve uniformity in sentencing.<sup>22</sup> In this sense, MMS operate as a bastion against the idiosyncrasies of the sentencing judge. As the Court has held, “a key objective of mandatory minimum sentences is the removal of judicial discretion in pursuit of greater certainty and consistency in sentencing.”<sup>23</sup> MMS ensure rather than inhibit the rule of law by contributing to certainty and predictability in our discretionary sentencing regime.<sup>24</sup> In legislating a minimum sentence, Parliament has presumably asked, “what sentence would be appropriate for the least morally culpable person whose behaviour still constitutes the elements of the offence?”<sup>25</sup> In answering this question, Parliament must perform a “nuanced, multi-faceted policy analysis of the moral status of the behaviour in question.”<sup>26</sup> Essentially, a defence of MMS asks, why ought the courts hold the figurative reins in the sentencing process? Is the passage of MMS not an iterative, vital, and fundamental part of our democratic process? Distrust of seemingly unfettered judicial discretion permeates this rhetoric.

While these arguments have long contributed to curial deference to Parliament in the context of MMS, much of the academic community denounces their increased use. In 1987, the Canadian Sentencing Commission issued a comprehensive Report on Sentencing which recommended the outright abolition of mandatory minimum penalties for all offences, with the exception of murder and high treason.<sup>27</sup> The Commission’s most salient concerns turned on unfettered prosecutorial discretion, the minimal deterrent effect of mandatory penalties, and the lack of regard for the wide range of circumstances in which offences are committed.<sup>28</sup> The Commission’s message was clear: “mandatory minimum penalties create at least as many difficulties as they attempt to solve.”<sup>29</sup>

Though more and more frequent, the criticisms of MMS remain fundamentally unaltered. Not only are MMS constitutionally vulnerable, they are seen as a flawed policy device which insidiously create problems rather than responding to real concerns. A light unspooling of the “massive body of evidence”<sup>30</sup> accumulated on MMS exposes common threads of complaint:

(i) MMS increase costs on an overburdened justice system.

(ii) MMS result in higher rates of incarceration.

(iii) MMS increase trial frequency and *Charter* challenges. This is likely to occur because more accused persons will go to trial now that guilty plea negotiations for a sentence below the mandatory minimum are no longer possible. Further, the dramatic spike in MMS, particularly for drug-related offences, will likely result in increasing *Charter* challenges to the arguably unconstitutional nature of these provisions.

22 Lincoln Caylor & Gannon Beaulne, *Parliamentary Restrictions on Judicial Discretion in Sentencing: A Defence of Mandatory Minimum Sentences*, (2014) Macdonald-Laurier Institute at 2.

23 *R v Ferguson*, 2008 SCC 6 at para 54 [*Ferguson*].

24 Caylor et al, *supra* note 22 at 16.

25 *Ibid.*

26 *Ibid.*

27 *CSC*, *supra* note 12 at 189.

28 *Ibid* at 65. Notably, over half of the sentencing judges surveyed by the Commission felt that minimum penalties constrained their ability to impose a just sentence. Over half also believed that such sentences contributed to inappropriate agreements between Crown and defence counsel (*Ibid* at 180). Given that this judicial disapproval occurred at a time when there were only nine mandatory minimum sentences in Canadian criminal law, one can only imagine the level of concern such a survey would show today.

29 *Ibid* at 66.

30 Parkes, “From Smith to Smickle”, *supra* note 15 at 151.

(iv) MMS reduce transparency and accountability in the sentencing process by shifting discretion from judges to prosecutors.<sup>31</sup>

(v) MMS spawn the possibility of wrongful convictions by exerting pressure on the accused to plead to a lesser offence in order to avoid a conviction which carries a minimum sentence.

(vi) MMS distort the sentencing process by creating an “inflationary floor.” The minimum sentence becomes reserved for the best offender in the best circumstances, driving up the entire range of sentences for all but the very “best” or least morally blameworthy offenders.

(vii) MMS have been assailed as a cause of substantive inequality by disproportionately affecting marginalized populations.<sup>32</sup>

If the various criticisms can be distilled into a single comment, it is this: MMS are based on a seductive but spurious philosophy that mandatory minimum sentencing imposes a fit and fair penalty in all instances for given offences.

In addition to these consequences, MMS reportedly fail to achieve their fundamental justification: *deterrence*.<sup>33</sup> Commentators Anthony Doob and Cheryl Webster have dubbed the tenuous link between severity of sentence and deterrent effect a “null hypothesis.”<sup>34</sup> After an exhaustive review of social science evidence and literature, Doob and Webster conclude that sentence severity does not affect levels of crime.<sup>35</sup> Given the dearth of evidence to the contrary, it is difficult to ignore the assertion that severe sentences simply do not deter crime to any greater extent than more moderate sentences. I suggest we must grapple with this evidence to understand the real utility of MMS, rather than defending their continued use with the cracked shield of deterrence.

The state of MMS in Canadian criminal policy is deeply ruptured. On the one hand, they may be viewed as a severe but inherently constitutional tool that has properly received decades of curial deference. On the other, they may be seen as crude instruments which threaten the fundamental principle of proportionality and fail to live up to their central promise of deterrence. Academic commentary amounts to a clarion call for deeper consideration, at a judicial and legislative level, of the continued use of MMS in Canadian criminal justice. With this understanding of MMS in the theoretical context, I turn to their treatment by the Court, the nature of judicial and legislative dialogue on the subject, and possibilities for future reform.

---

31 Prosecutorial discretion is increased by the prosecutor’s option to serve notice of intention to seek greater punishment in some cases. It is also increased by the decision as to whether to proceed summarily or by indictment in hybrid offences; this decision may compel the court to impose a mandatory minimum sentence for certain offences in the event of a conviction.

32 For a more detailed examination of these arguments around MMS and substantive equality, see Parkes, “From Smith to Smickle”, *supra* note 15; Rosemary Cairns Way, “A Disappointing Silence: Mandatory Minimums and Substantive Equality” (2015) 18 CR-ART 297(WL Can) [Cairns Way, “A Disappointing Silence”]; Legal Society, “Throwing Away the Keys: The Human and Social Cost of Mandatory Minimum Sentences”, report by Darcie Bennett and Scott Bernstein (2013) [Pivot Report]; and Tim Quigley, “Reducing Expectations While Maintaining the Function of Canadian Criminal Law” (2015) 62 CLQ 274.

33 For further examination of this point, see *CSC*, *supra* note 12 at 182 and *Smith*, *supra* note 18 at para 20.

34 Anthony Doob & Cheryl Webster, “Sentencing Severity and Crime: Accepting the Null Hypothesis” (2003) 30 *Crime & Just.* 143.

35 *Ibid.*

## II. FROM SMITH TO LLOYD—CRUEL AND UNUSUAL PUNISHMENT

Section 12 is the most commonly invoked *Charter* provision in challenging the constitutionality of MMS. It reads: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”<sup>36</sup>

In 1987, the Court first struck down a mandatory minimum sentence in the seminal case of *R v Smith*.<sup>37</sup> At the time, the *Narcotics Control Act* imposed a seven-year minimum sentence for the importation of narcotics, regardless of the type, the quantity imported, and whether the purpose was for trafficking or personal consumption.<sup>38</sup> Writing for the Court, Justice Lamer, as he then was, set out the analytical framework to assess whether a punishment is “cruel and unusual” in contravention of section 12. He set a high threshold. Beyond being unfit or “merely excessive,”<sup>39</sup> the punishment must be *grossly disproportionate* to what would have been otherwise appropriate. To be grossly disproportionate, the prescribed punishment must be “so excessive as to outrage the standards of decency.”<sup>40</sup> Courts “should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation.”<sup>41</sup>

The test enunciated in *Smith* consists of two parts. First, a court examines the particular offence and offender to determine whether the sentence is grossly disproportionate.<sup>42</sup> If the sentence is not grossly disproportionate in the case at bar, the court then engages in a generalized inquiry to determine whether the sentence would be grossly disproportionate in a “reasonably hypothetical” scenario. This second step in the inquiry resulted in the provision being struck down in *Smith*. While the seven-year minimum was not grossly disproportionate for the specific offender before the Court, it would have been grossly disproportionate for a hypothetical young offender who drove into Canada with his or her “first joint of grass.”<sup>43</sup> In short, the ambit of the provision was simply too broad, capturing conduct that should not be subject to the mandatory minimum, and the provision was therefore struck down.<sup>44</sup>

The Court’s use of the reasonable hypothetical in *Smith* could have foreshadowed increasing judicial activism in the assessment of MMS. Indeed, Justice Lamer commented on the courts’ “lingering reluctance”<sup>45</sup> in testing penal sanctions for compliance with section 12, and reminded them of their constitutional obligation to do so. However, the decades following *Smith* did not result in rigorous curial examination of MMS. Rather, the intervening years saw judicial minimalism in the face of the increasingly aggressive use of mandatory minimums. Debra Parkes writes that, since *Smith*, “the Supreme Court’s approach has been decidedly deferential to Parliament” and has given section 12 “little substantive content or application.”<sup>46</sup> Twenty-eight years elapsed before another MMS was struck down by the Court.

36 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

37 *Smith*, *supra* note 18.

38 *Ibid* at para 66.

39 *Ibid* at para 55.

40 *Ibid* at para 54.

41 *Ibid* at para 55.

42 *Ibid* at para 88.

43 *Ibid* at para 2.

44 *Ibid* at para 75.

45 *Ibid* at para 47.

46 Debra Parkes, “The Punishment Agenda in the Courts” (2014), 67 SCLR (2d) 489 at 598 [Parkes, “The Punishment Agenda”].

In the 2015 decision of *Nur*, the Court considered MMS for the possession of loaded prohibited firearms, contrary to section 95(1) of the *Criminal Code*. Writing for the majority, Chief Justice McLachlin struck down these provisions as violating section 12 of the *Charter* based on their application to reasonably foreseeable cases.<sup>47</sup> Since section 95 encompassed a wide range of conduct stretching from serious firearms infractions to mere licensing transgressions, the minimum sentences inevitably led to grossly disproportionate sentences for those at the lower end of the spectrum. In dissent, Justice Moldaver disputed the propriety of the reasonable hypotheticals raised by the majority. He argued that the hybrid nature of the scheme operated as a “safety valve,” preventing the imposition of MMS in less serious cases where the Crown could proceed summarily.<sup>48</sup>

A year later, in *Lloyd*, the Court again considered the constitutionality of MMS, this time in the context of a trafficking offence under the *CDSA*. The Court again struck down the minimum sentence, relying on *Nur* to illustrate constitutional vulnerabilities of MMS<sup>49</sup> and offering explicit guidance to Parliament in regards to addressing them.

The interplay between the majority and dissenting judgments in *Nur* encompasses the constellation of issues raised by MMS. Accordingly, I use *Nur* as a lens through which to examine the evolution of section 12 since *Smith*, buttressed by the subsequent application of the *Nur* analysis in *Lloyd*. In the next section, I address the central issues in the section 12 analysis, broken down as: (1) the section 12 test and the scope of a “reasonable hypothetical”; (2) the maintenance of gross disproportionality as the threshold for a section 12 violation; (3) prosecutorial discretion and hybrid schemes; and (4) available remedies when a section 12 violation has been made out. Finally, I consider the strengths and weaknesses of the changes to section 12. While the Court in *Nur* demonstrated only a limited engagement with the social science evidence and the adverse consequences of MMS, I argue that *Nur* has nevertheless breathed new life into the section 12 analysis. I suggest this assertion is reflected in the Court’s application of its revived section 12 analysis in *Lloyd* and explicit comments on the steps that must be taken to cure the constitutional infirmities of MMS. Taken together, I suggest these decisions mark what will very likely become a turning point for future judicial assessments of the constitutional validity of MMS.

### A. Section 12 and the Scope of the Reasonable Hypothetical

Arguably, the most dramatic change from *Nur* in the section 12 analysis is its reformulation of the reasonable hypothetical. Determining the availability and scope of the reasonable hypothetical has been of signal importance in the jurisprudence since *Smith*. Indeed, in *Nur*, Chief Justice McLachlin identified this issue as “the heart of this case.”<sup>50</sup> She firmly rooted the reasonable hypothetical at the protected core of the section 12 analysis and rebuffed arguments for the abandonment of this analytical tool.<sup>51</sup> Writing for the majority in both *Nur* and *Lloyd*, Chief Justice McLachlin applied several reasonable hypotheticals to illustrate the unconstitutional applications of the MMS in each case. I suggest that by rephrasing and expanding the scope of “reasonably foreseeable” situations against which the validity of legislation may be tested, the Court has loosened the stranglehold of what had become increasingly restrictive reasonable hypothetical analyses.

The Court in *Smith* did not provide much guidance for the assessment of the scope of reasonable hypotheticals. Lower courts were left with little direction as to how common, reasonable, or detailed the hypothetical must be. The Court explored these issues further

47 *Nur*, *supra* note 2 at para 4.

48 *Nur*, *supra* note 2 at paras 146-156.

49 *R v Lloyd*, 2016 SCC 13 at para 3 [*Lloyd*].

50 *Nur*, *supra* note 2 at para 47.

51 *Nur*, *supra* note 2 at paras 49-52.



in the 1991 decision of *R v Goltz*<sup>52</sup> and severely tightened the availability of the reasonable hypothetical in the section 12 analysis. Writing for the majority, Justice Gonthier grudgingly accepted the utility of reasonable hypotheticals but emphasized throughout that courts cannot consider “remote or extreme examples”<sup>53</sup> and must instead focus on “imaginable circumstances that would commonly arise in day-to-day life.”<sup>54</sup> He refused to consider *other* offences which triggered the impugned mandatory minimum sentence.<sup>55</sup> Had those other offences also been considered in the analysis, Justice Gonthier conceded that the provision “would admittedly cast a wider and potentially more suspect net.”<sup>56</sup> If the full scope of the provision casts a perilously broad net, there is arguably no principled basis on which to exclude the provision in all of its potential applications from *Charter* scrutiny.<sup>57</sup> Ultimately, the decision in *Goltz* constrained the reasonable hypothetical analysis to the extent that some concluded that it essentially became a “faint hope clause.”<sup>58</sup>

In the 2001 decision of *Morrisey*, the Court revisited the scope of the reasonable hypothetical analysis. Again, for the majority, Justice Gonthier upheld the restrictions on the use of reasonable hypotheticals earlier imposed in *Goltz*.<sup>59</sup> *Morrisey* is particularly noteworthy for the *dicta* respecting the use of reported cases when crafting a reasonable hypothetical. One might think that the consideration of reported cases would lend itself well to the analysis. Something which not only might reasonably occur in a hypothetical context, but has in fact actually occurred, arguably provides a useful benchmark for potentially unconstitutional instances of a sentencing provision. However, the Court did not follow this reasoning. Justice Gonthier held that reported cases were to be “used with caution” and as a starting point only.<sup>60</sup> In his view, “a reported case could be one of the ‘marginal’ cases, not contemplated by the approach set out in *Goltz*.”<sup>61</sup> Again, this restrictive approach exhibits a logical conundrum, in that events which have in fact transpired are not seen as common enough to reasonably ground the analysis. Such an approach seems likely to result in constitutional violations.<sup>62</sup> Finally, Justice Gonthier restricted the analysis by considering reasonable hypotheticals at a broad, general level of abstraction, rather than at the level of

---

52 *R v Goltz*, [1991] 3 SCR 485 [*Goltz*].

53 *Ibid* at para 45.

54 *Ibid* at para 73.

55 *Ibid* at para 18. In this case, the accused had been found guilty of driving while prohibited under section 86(1)(a)(ii) of the *BC Motor Vehicle Act*, contrary to section 88(1)(a). Section 88(1)(c) mandated a minimum sentence of 7 days’ imprisonment and a CAD300 fine for driving while prohibited under sections 84, 85, 86, or 214. The majority refused to consider reasonable hypotheticals based on *other* offences giving rise to the same prohibition and triggering the mandatory minimum. This “severing” of the other relevant offences narrowly circumscribed the availability of the reasonable hypothetical as an analytical tool. The provision was not considered in all of its applications, and the reasonable hypothetical analysis was consequently tailored to only one application of the MMS. It is logically problematic to constrain the reasonable hypothetical analysis to the extent that other offences which give rise to the *same* mandatory minimum at issue cannot feature into the *Charter* analysis.

56 *Ibid* at para 76.

57 For deeper consideration of these arguments, see the dissenting reasons of Justice McLachlin (as she then was) in *Goltz*, *supra* note 52 at paras 91-112.

58 Palma Paciocco, “Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing” (2014) 18 *Can Crim L Rev* 241 at 243.

59 *Morrisey*, *supra* note 14 at paras 30-31.

60 *Ibid* at para 33.

61 *Ibid* at para 32.

62 For further consideration of these arguments, see the reasons of Justice Arbour in *Morrisey*, *supra* note 14 at para 65.

specificity which he maintained was “never contemplated by *Smith*.”<sup>63</sup> However, details are required in the analysis to demonstrate cases which may be marginal or unusual, but would nonetheless result in unconstitutional applications of MMS.<sup>64</sup> Yet the analysis in *Morrisey* precludes the consideration of details in the reasonable hypothetical analysis, rendering section 12 challenges more difficult.

The subsequent decision in *Nur* injected some much-needed flexibility into the section 12 analysis. After dissenting in both *Goltz* and *Morrisey*, Chief Justice McLachlin wrote for the majority in *Nur* and made four important alterations (or clarifications) to the reasonable hypothetical analysis:

(i) The requirement of common or day-to-day generality from *Goltz* is displaced by a broader test based on “reasonable foreseeability”;<sup>65</sup>

(ii) A ruling that a particular provision is not in violation of section 12 does *not* preclude future challenges to that provision;<sup>66</sup>

(iii) Reported cases *should* be considered in the reasonable hypothetical analysis;<sup>67</sup> and

(iv) Personal characteristics *may* be considered when constructing a reasonable hypothetical, as long as they are not tailored to create remote or far-fetched examples.<sup>68</sup>

---

63 *Ibid* at paras 50-53. In this case, the impugned provision was a four-year minimum sentence for the offence of criminal negligence causing death with a firearm. Rather than looking at the specifics of actual instances of this offence, Justice Gonthier concluded that there were two general types of reasonable hypothetical scenario—an individual playing with a gun, or a hunting trip gone awry—and concluded that in neither hypothetical would a four-year term of imprisonment constitute cruel and unusual punishment. This restrictive approach, which considers reasonable hypotheticals only at a very generalized level, is problematic because it eliminates details from the analysis which could demonstrate an unconstitutional application of the provision.

64 Consider, for example, the unusual facts of *R v Smickle*, 2012 ONSC 602 [*Smickle*] which demonstrate the necessity of incorporating details into the reasonable hypothetical analysis. Here, a young first offender was caught in his cousin’s apartment, posing with a loaded handgun to take pictures for his online Facebook profile. The police had entered with a search warrant for the offender’s cousin; the offender himself simply happened, very much, to be in the wrong place at the wrong time. He was charged with possessing a loaded firearm contrary to section 95 of the *Code*, an offence which carried a three-year mandatory minimum sentence. The facts of this case were clearly marginal but nevertheless arguably foreseeable, and the approach taken in *Morrisey* would have prevented a reasonable hypothetical analysis which demonstrated the unconstitutionality of the mandatory minimum by depicting this potential scenario.

65 *Nur*, *supra* note 2 at paras 67-68.

66 *Ibid* at para 71. The Court held that if a provision survives a section 12 *Charter* challenge, an offender can always argue in a future case that the provision violates section 12 in his or her specific circumstances. Further, an offender can argue a violation based on a reasonable hypothetical if there are different circumstances or new evidence. Although *stare decisis* requires a “significant change in the reasonably foreseeable applications of the law” for courts to revisit the question, this still allows for a greater degree of flexibility in the section 12 analysis.

67 *Ibid* at para 72. The Court rejected the exclusion of reported cases which might seem “marginal” and held that there is “no principled reason to exclude them on the basis that they represent an uncommon application of the offence.”

68 *Ibid* at paras 73-76. The Court departs from the degree of generality in *Morrisey* and permits the consideration of personal characteristics in a more detailed reasonable hypothetical analysis. It is still problematic, however, because courts are instructed to “[exclude] using personal features to construct the most innocent and sympathetic case imaginable” (*Ibid* at 75). There are many foreseeable situations which are sympathetic, innocent, or strange (particularly in the context of drug offences, where selling drugs to fuel an addiction might result in diminished moral blameworthiness).

Ultimately, the changes in *Nur*, I suggest, are likely to mark a turning point in the section 12 analysis. The Court's approach is flexible, less restrictive, and ultimately could make it easier to demonstrate that MMS may lead to cruel and unusual punishment in reasonably foreseeable circumstances.<sup>69</sup> The seeds of analytical change planted in *Nur* begin to take form in *Lloyd*. There, section 5 of the *CDSA* required a 1-year minimum sentence for certain trafficking offences where the accused had previously been convicted of a similar drug offence. The majority accepted several reasonable hypothetical scenarios as illustrating unconstitutional applications of the provision.<sup>70</sup> The hypotheticals relied on represent the new analytical approach set out in *Nur*. Rather than considering scenarios at a high level of generality, the Court entertained detailed hypotheticals including qualities such as drug addiction, efforts to rehabilitate, degree of social connectivity, and specific time periods between current and prior offending.<sup>71</sup> These hypotheticals illustrate a departure from the pre-*Nur* approach, which would have restricted hypotheticals to those of common generality and devoid of significant reliance on detail and personal characteristics.

Scholars do not agree as to what effect *Nur* will have in the context of MMS. Some suggest that by rephrasing the test as reasonable foreseeability, the Court is merely playing with words while making no substantive changes.<sup>72</sup> While I agree that there are underlying problems in MMS, I suggest that the language in *Nur* is important and will resonate in the analysis. Uncommon scenarios may still be reasonably foreseeable. I suggest that one of the reasonable hypotheticals relied on by the majority in *Lloyd* illustrates this very proposition: an addict who is charged with trafficking under the *CDSA* for sharing a small amount of a drug with a spouse, yet had been convicted nine years before for sharing marijuana on a social occasion.<sup>73</sup> This hypothetical demonstrates the clear difference, as the Court stated in *Nur*, between "what is foreseeable although 'unlikely to arise' and what is 'remote [and] far-fetched.'"<sup>74</sup> Such a hypothetical, though perhaps uncommon, is nevertheless reasonably foreseeable. Parkes has argued that extreme cases, like *R v Smickle*,<sup>75</sup> are the "canaries in the coal mine that should prompt a reassessment of our reliance on counter-productive, blunt instruments such as mandatory minimum sentences."<sup>76</sup> However, she was writing before *Nur*, which seems to have broadened the availability and applicability of the reasonable hypothetical analysis. Courts may no longer need to rely on extreme cases to ground a section 12 violation. Rather, they can use an expanded test based on reasonable foreseeability, which incorporates reported cases and personal characteristics, to demonstrate scenarios where a given minimum sentence will be grossly disproportionate and, consequently, unconstitutional.

---

69 For example, in *Lloyd*, *supra* note 49, a reasonable hypothetical analysis was employed to include characteristics like poverty, marginalization, and drug addiction into the analysis. The dissent rejected the use of such hypotheticals, construing them as the judicial manufacture of "the most innocent or sympathetic case imaginable", which had been rejected in *Nur* (see *Lloyd* at para 91). The dissent construed the use of such hypotheticals as allowing personal circumstances to "overwhelm" the analysis while losing sight of the seriousness of the underlying conduct (*Lloyd* at para 102). I suggest the dissenting opinion reflects the earlier, restrictive approach which dominated section 12 jurisprudence following *Smith*, while the new path for a more easily established section 12 breach is demonstrated in the majority's reliance on such hypotheticals.

70 *Lloyd*, *supra* note 49 at paras 32-33.

71 *Ibid.*

72 Cairns Way, "A Disappointing Silence", *supra* note 32 at 2. Professor Cairns Way writes that, "while thirty paragraphs are devoted to this semantic clarification, I am not convinced that the problem is semantic. It is a problem about the nature of mandatory minimums." In other words, Professor Cairns Way suggests the problem with MMS is not the linguistic framing of the section 12 analysis, but rather their inherently unconstitutional applications.

73 *Lloyd*, *supra* note 49 at para 32.

74 *Nur*, *supra* note 2 at para 68.

75 *Smickle*, *supra* note 64.

76 Parkes, "From *Smith* to *Smickle*", *supra* note 15 at 165.

## B. Gross Disproportionality: A Workable Threshold?

The high threshold of disproportionality is maintained in *Nur* as the standard against which violations of section 12 must be assessed. Given that proportionality is the central axis on which sentencing objectives turn, such a high standard for the section 12 analysis is surprising. In *Morrisey*, Justice Arbour wrote that the section 12 analysis requires sentences to be upheld even if demonstrably unfit, as long as they are not grossly disproportionate.<sup>77</sup> In *Nur* and *Lloyd*, Chief Justice McLachlin—writing for the majority in both decisions—reached the same conclusion.<sup>78</sup> It seems illogical at best, verging on simply wrong, that our highest court is willing to uphold sentences which are demonstrably unfit, provided that they do not violate the threshold of gross disproportionality.

Some scholars have maligned this threshold as being too draconian. For example, Palma Paciocco has argued for a reconfiguration of the section 12 analysis wherein the threshold would be relaxed to require proof of mere, rather than gross, disproportionality. Given the fundamental role of proportionality in our sentencing process, she asserts that “if mandatory minimum sentencing schemes cannot survive the honest application of [basic constitutional principles like proportionality], they should not survive at all.”<sup>79</sup> While these arguments are persuasive, they seem unlikely to sway the Court, in particular given the recent endorsement of the gross disproportionality standard in *Nur* and *Lloyd*. It bears mention, however, that while this threshold was maintained in *Lloyd*, the Court did make particular note of the fact that the wider the range of conduct and circumstances captured by the minimum sentence, the more likely it is to constitute cruel and unusual punishment and therefore be grossly disproportionate.<sup>80</sup> This comment attenuates the high bar of gross disproportionality to a certain degree. Nevertheless, the Court has long upheld the necessity of a stringent section 12 standard, maintaining that anything less would “trivialize the *Charter*.”<sup>81</sup> Whether the Court will now depart from this standard is doubtful.

## C. Prosecutorial Discretion and Hybrid Offences

One significant point of debate involves the application of MMS in the context of hybrid offences. In some hybrid schemes, the Crown may elect to proceed indictably, thus triggering the mandatory minimum, or may proceed summarily, where the minimum may not apply. This shifts what is arguably proper judicial discretion into the control of prosecutorial discretion.

*Nur* marked the Court’s first consideration of the constitutional validity of a mandatory minimum sentencing provision in the context of a hybrid scheme.<sup>82</sup> In his dissent in *Nur*, Justice Moldaver set much store in the hybrid nature of the impugned provision and the Crown’s consequent ability to proceed summarily where the MMS would be grossly disproportionate. He would see a different analytical framework, where prosecutorial discretion could be challenged for abuse of process with a remedy under section 24(1),

77 *Morrisey*, *supra* note 14 at para 69.

78 *Nur*, *supra* note 2 at para 39 and paras 44-46; *Lloyd*, *supra* note 49 at paras 23-24.

79 P Paciocco, *supra* note 58 at 267.

80 *Lloyd*, *supra* note 49 at para 24.

81 *R v Latimer*, 2001 SCC 1 at para 76.

82 *Nur*, *supra* note 2 at para 147. As Justice Moldaver noted in his dissent, “to date, our section 12 jurisprudence from *Smith* to *Morrisey* has only considered the constitutionality of MMS in the context of straight indictable offences.”

rather than striking down the entire provision under section 52.<sup>83</sup> Since *Smith*, the Court has rejected the reliance on prosecutorial discretion as a means of curing constitutional frailties in MMS.<sup>84</sup> In *Nur*, the majority similarly rejected the possibility that prosecutorial discretion could resolve constitutional defects in MMS. The majority reasoned that sentencing is an inherently judicial and not a prosecutorial function,<sup>85</sup> and trial fairness could be endangered by giving prosecutors a significant advantage over the defence.<sup>86</sup> Further, a review of prosecutorial discretion might be illusory, given the “notoriously high bar” required to establish abuse of discretion.<sup>87</sup> Thus, the majority in *Nur* refused to rely on prosecutorial discretion in hybrid regimes as a way to preclude grossly disproportionate sentences. *Nur* therefore represents another possibility for expanding the section 12 analysis, by rejecting the use of Crown election in hybrid schemes as a way to immunize a mandatory minimum provision from *Charter* scrutiny. I suggest that this is prescient, given that in recent years, MMS have often been introduced in the context of hybrid schemes.<sup>88</sup> The particular provision engaged on the facts in *Lloyd* was not a hybrid scheme, and so a consideration of that case does not offer anything specific to the context of prosecutorial discretion. However, numerous other drug offences under the *CDSA* have hybrid schemes. Increasing challenges to MMS are likely to occur in the drug context, and *Nur* properly forecloses arguments that prosecutorial discretion in hybrid schemes can shield a provision from *Charter* scrutiny.

Nevertheless, while *Nur* dictates that the prosecutorial discretion in a hybrid scheme does not itself preclude section 12 challenges to MMS, the transfer of discretion from the judiciary to the prosecution as a result of MMS in general is troubling.<sup>89</sup> Parkes has identified this transfer as a central problem: “[a] very significant result of the move to mandatory minimum sentences is the wholesale transfer of discretion from judges to prosecutors.”<sup>90</sup> It signals a lack of trust in the judiciary and a concomitant increase of trust in prosecutors, whose decisions are “virtually unassailable” due to the high threshold for an abuse of process

---

83 *Ibid* at paras 148-150. Justice Moldaver suggested that Parliament’s decision to enact a hybrid scheme meant that the Crown could proceed summarily in less serious cases, where the mandatory minimum would not be appropriate. He set out an alternative scheme, consisting of two stages. First, a court must determine whether the hybrid scheme adequately protects against grossly disproportionate sentences in general. Second, a court must determine whether the Crown has exercised its discretion in a way that results in a grossly disproportionate sentence in the particular circumstances before the court. If so, a remedy would lie under section 24(1) of the *Charter*. Such a remedy would not violate the rejection of constitutional exemptions in *Ferguson* (as discussed later in this paper), since the state action (that is, the Crown’s discretion on how to proceed), and not the law itself, is at issue. Justice Moldaver noted that the remedy under section 24(1) would most likely come in the form of a sentence reduction below the mandatory minimum. The challenge to prosecutorial discretion in this circumstance would be for abuse of process, with the burden of proof on the offender. There would be no need to prove bad faith or malicious intent on the part of the Crown to establish an abuse of process but simply that the Crown’s decision to proceed by indictment undermined society’s expectations of fairness in the administration of justice.

84 *Smith*, *supra* note 18 at para 101.

85 *Nur*, *supra* note 2 at para 87.

86 *Ibid* at paras 95-96.

87 *Ibid* at para 94.

88 See, for example, *Safe Streets and Communities Act*, SC 2012 c 1 [SSCA].

89 In some cases, the prosecution has the discretion as to whether to give notice and seek a mandatory minimum sentence. See, for example, the impaired driving charges at issue in *R v Anderson* 2014 SCC 41 [*Anderson*]. Otherwise, the prosecution may also choose to lay inappropriate charges which do not have a mandatory minimum sentence, simply to avoid laying charges which, while appropriate, may carry a mandatory minimum which is not fit in the circumstances. Either way, the prosecution clearly holds a great deal of power in these cases.

90 Parkes, “From *Smith* to *Smickle*”, *supra* note 15 at 166.

challenge.<sup>91</sup> The recent decision in *R v Anderson* is pertinent.<sup>92</sup> Here, the Court refused to attach constitutional obligations to prosecutorial discretion in the sentencing context. Specifically, the Court rejected these arguments as inappropriately conflating the role of a prosecutor with that of a sentencing judge; courts cannot both supervise the exercise of prosecutorial discretion and at the same time act as impartial arbitrators.<sup>93</sup>

Palma Paciocco's criticisms of *Anderson* bear mentioning. She writes that the Court has failed to effectively enforce the principle of proportionality<sup>94</sup> and that given the key role played by prosecutors in deciding whether mandatory minimums will be invoked, the increasing number of MMS results in a huge increase in prosecutorial power.<sup>95</sup> Paciocco concludes that, given the division of powers in our adversarial system, it was defensible for the Court in *Anderson* to foreclose "a [section] 7 requirement that prosecutors consider proportionality when making discretionary decisions that limit the range of available sentences."<sup>96</sup> However, she suggests that prosecutors have an *ethical* obligation to consider proportionality when seeking MMS, even if this duty does not rise to the level of a constitutional obligation. Paciocco acknowledges that ethical obligations are difficult to enforce and that Crown charging decisions often lack transparency.<sup>97</sup> She recognizes that her argument, while theoretically palatable, seems in practice largely unworkable. Therefore, while the Court has properly foreclosed reliance on prosecutorial discretion as a way to cure constitutional defects in MMS, their use as a sentencing device in general demonstrates a problematic transfer of discretion in general from the judiciary to the prosecution. This concern must be borne in any consideration of Parliament's increasing legislative reliance on MMS.

#### D. What Remedy?

*Nur* raises questions about what meaningful remedy ought to be imposed when a violation of section 12 is made out. Holding that the impugned mandatory minimum sentence violated section 12 and could not be saved under section 1, the majority in *Nur* declared them to be of no force and effect under section 52 of the *Constitution Act, 1982*.<sup>98</sup> Similarly, in *Lloyd*, the majority determined the impugned provision to be inconsistent with section 12 of the *Charter* and declared it to be of no force and effect, despite the appellant having sought a remedy under section 24(1) of the *Charter*. This follows the ruling in *Ferguson*,<sup>99</sup> where the Court rejected the use of a constitutional exemption to cure an unconstitutional application of a mandatory minimum sentence. Prior to this decision, there had been extensive debate in the lower courts about the availability of constitutional exemptions as a remedy for section 12 violations.<sup>100</sup> The defendant in *Ferguson* argued that rather

---

91 *Ibid.*

92 *Anderson, supra* note 89. In this case, an Aboriginal offender argued that Crown counsel ought to be subject to certain constitutional obligations. Specifically, when using their discretion as to whether to seek a mandatory minimum sentence, prosecutors should be under a constitutional obligation to consider Aboriginal status, as directed in section 718.2(e) of the *Criminal Code*. The accused in this case suggested that since mandatory minimums prevent sentencing judges from taking these factors into consideration, the obligation should be shifted to the prosecution when deciding whether to seek a mandatory minimum sentence. However, the Court rejected these arguments and held that prosecutorial discretion is reviewable for abuse of process only; the duty to ensure sentences are proportionate rests with judges only, not Crown prosecutors.

93 *Ibid* at paras 25 and 32.

94 P Paciocco, *supra* note 58 at 248.

95 *Ibid* at 251.

96 *Ibid* at 252.

97 *Ibid* at 255.

98 *Nur, supra* note 2 at para 119.

99 *Ferguson, supra* note 23.

100 *Ibid* at para 33.

than invoking the usual remedy of striking down the impugned statutory provision in its entirety, a constitutional exemption should be granted under section 24(1).<sup>101</sup> However, the Court rejected this remedy for a number of reasons, including the need to prevent inappropriate intrusions on Parliament's role, since granting a constitutional exemption would directly undermine the legislative intent reflected in the passage of mandatory minimum sentencing legislation.<sup>102</sup> In the result, *Ferguson* precludes judges from effectively "[reading] in a discretion to a provision where Parliament clearly intended to exclude discretion."<sup>103</sup> Where a mandatory minimum violates section 12, the appropriate remedy is to invoke section 52 to strike it down.<sup>104</sup>

I argue that inserting legislative exemption clauses into MMS provisions would achieve the same results as constitutional exemptions, while avoiding the attendant problems regarding intrusions into Parliament's role. No matter what, a remedy—including the ability to depart from an unconstitutional application of a mandatory minimum sentence—must be meaningful.<sup>105</sup> A well-crafted legislative exemption clause would be a more meaningful and accessible remedy than requiring a challenge to the full provision in every case. I expand in detail on this argument below.

### E. *Nur* and *Lloyd*: Success and Failure

*Nur* made the following changes to the landscape on section 12 and MMS. First, it expanded the reach of the reasonable hypothetical, while maintaining the high threshold of gross disproportionality to establish a section 12 violation. Second, it rejected prosecutorial discretion as a way to cure potentially unconstitutional applications of MMS in hybrid schemes. Third, it followed *Ferguson* in striking down the provision based on the section 12 violation, rather than using a constitutional exemption for individual circumstances.

The decision in *Lloyd* cemented the analytical changes established in *Nur* with regards to the section 12 analysis. Specifically, the Court relied on an expanded approach to reasonably foreseeable applications of the impugned MMS. The Court maintained the high bar of gross disproportionality to establish a section 12 violation. However, the Court did attenuate this high threshold somewhat by suggesting that gross disproportionality would more easily be established in mandatory minimum sentencing provisions which

---

101 *Ibid* at para 37.

102 *Ibid* at para 52.

103 *Ibid* at para 56.

104 It is worth mentioning that in *Nasogaluak*, *supra* note 2 at para 64, the Court also considered the availability of section 24(1) as a remedy to reduce a sentence in the context of a *Charter* breach. While the Court held that generally, section 24(1) cannot be used to reduce a sentence below a mandatory minimum, the Court then equivocated: "However, the remedial power of the court under [section] 24(1) is broad. I therefore do not foreclose the possibility that, in some exceptional cases, a sentence reduction outside statutory limits may be the sole effective remedy for some particularly egregious form of misconduct by state agents in relation to the offence and the offender" (*ibid* at para 6). Nevertheless, this would likely arise in the context of state misconduct rather than a challenge to the validity of a particular sentencing provision. Whatever is made of this *dictum*, it is unlikely to apply in the context of a challenge to a mandatory minimum sentencing scheme.

105 For example, in *R v Lloyd* 2014 BCPC 8 at para 55 [*Lloyd BCPC*], the trial judge held that a grossly disproportionate application of the mandatory minimum could not be saved by section 10(5) of the *CDSA*. This provision allows a sentencing judge to depart from the mandatory minimum if an offender successfully completes an approved drug treatment program. However, on further consideration, there were serious constraints to the availability of this option. The trial judge noted that there is only one such court in the entire province of British Columbia, the defendant must have pleaded guilty and given up the right to a fair trial in order to qualify, and the Crown can use its discretion to disqualify an applicant. This reasoning was endorsed by the majority in *Lloyd*, *supra* note 49 at para 34. Clearly, this is neither an equitable nor a meaningful alternative to the imposition of an otherwise unconstitutional mandatory minimum sentence.

capture a broad range of possible conduct. And the Court similarly followed the approach established in *Ferguson* by striking the provision down under section 52, rather than granting the sought-after remedy under section 24(1) of the *Charter*.

Certain comments between the majority and dissenting reasons in *Lloyd* are particularly thought-provoking in the context of determining whether there has been a decisive shift in the section 12 analysis. In dissent, Justices Gascon, Brown, and Wagner (as he then was) suggested a far more restrictive approach to the section 12 test. The dissent emphasized that the Court has only struck down mandatory minimums *twice* in the decades since the *Charter's* enactment: in the cases of *Smith* and *Nur*.<sup>106</sup> On this view, the dissent construed the decades of curial deference towards MMS as part and parcel of the rigorous approach which must be applied to any section 12 challenge. Indeed, the dissenting justices emphasized at length the cases, including *Goltz*, *Ferguson*, and *Morrissey*, where challenges to MMS repeatedly failed.<sup>107</sup> They asserted that this continued endorsement of the constitutionality of MMS underscores the necessarily restrictive approach taken to challenges under section 12, and that the new direction set by the majority in *Nur* and in *Lloyd* is in tension with the Court's earlier jurisprudence on section 12.<sup>108</sup>

First, as a matter of logic, this view ignores the fact that there were relatively few MMS in the *Criminal Code* at one point in time, meaning that it was less likely for them to be struck down for a period of time prior to their proliferation. However, I would also suggest that the dissenting interpretation is wrong in principle. On this view, *Nur* stands as an aberration in established section 12 jurisprudence. Conversely, I would argue that *Nur* sets a new direction for striking down MMS, rather than operating as an outlier case. I would agree that the Court's approach represents a departure from the established section 12 jurisprudence. However, I suggest that *Nur* represents a conscious and decisively new approach to section 12, in light of emerging understandings of the constitutional frailties of MMS, rather than a misinterpretation of earlier section 12 jurisprudence. *Nur* and *Lloyd* represent a more flexible analytical approach to account for the reality that MMS, unmitigated by legislative exemption clauses, are very likely to be unconstitutional in their applications.

For those advocating *against* the use of MMS, the analytical shift represented in these cases is a mixed victory. The loosening of the reasonable hypothetical analysis is likely to make it easier to demonstrate where imposing mandatory minimums would constitute cruel and unusual punishment. However, unmitigated by legislative exemption clauses, many of the problems inherent in MMS, such as shifts from judicial to prosecutorial discretion, endure.

Perhaps one of the greatest shortcomings in *Nur* is the limited attention given by the Court to the use of mandatory minimums as a sentencing device in general. Notwithstanding the limited deterrent effect of MMS and their disparate applications to marginalized groups, the Court engaged only marginally with the relevant social science,<sup>109</sup> despite the fact that such evidence was before the Court.<sup>110</sup> Professor Cairns Way commented on *Nur* that, despite the well-documented harms occasioned by MMS, the Court expended much of

106 *Lloyd*, *supra* note 49 at para 62.

107 *Ibid* at paras 63-68.

108 *Ibid* at para 106.

109 See *Nur*, *supra* note 2 at paras 113-114.

110 The Court did not respond meaningfully to many of the suggestions of interveners in *Nur*, such as the insertion of legislative exemption clauses. Nor did the Court engage with the evidence that MMS may perpetuate systemic disadvantage on certain racialized or marginalized groups. For example, see generally *Nur*, *supra* note 2 (Factum of the Intervener Canadian Bar Association) [CBA Factum].



its analytical energy looking at abstractions in the context of reasonable hypotheticals rather than seriously discussing the real impact of mandatory minimums.<sup>111</sup> Although the application of the reasonable hypothetical is somewhat expanded in *Nur*, Professor Cairns Way criticized the reasons for judgment as being restricted to a classical fault analysis rather than incorporating systemic and foreseeable characteristics “which relate to vulnerability, marginality, racialization, disability, and inequality.”<sup>112</sup> She condemned mandatory minimums as being “inconsistent with a commitment to substantive equality” and argued that they should be presumptively unconstitutional.<sup>113</sup>

Regardless of whether arguments on the presumptive unconstitutionality of MMS will ever take hold, the Court responded more explicitly to the criticisms calling for a reassessment of the increased use of MMS. Specifically, the majority emphasized throughout *Lloyd* that MMS are constitutionally vulnerable. The majority went on to make specific suggestions as to how Parliament might cure the constitutional defects of MMS—most notably, through the insertion of legislative exemption clauses to give sentencing judges a “safety valve” against unconstitutional applications of MMS. As I will explore below, I agree that legislative exemption clauses would be the most viable solution in this context. I will also canvass avenues beyond section 12 wherein parties can challenge the constitutionality of MMS. In particular, I note that section 15 challenges, though difficult in practice, would respond best to the as yet limited engagement with the underlying inequality and discriminatory impact of MMS.

### III. LEGISLATIVE EXEMPTION CLAUSES AND RESIDUAL CONSTITUTIONAL FRAILTIES

#### A. Legislative Exemption Clauses

A review of mandatory minimum sentencing in Canada reveals a tumultuous, controversial, and rapidly evolving state of affairs. Challenges to MMS are on the rise and, absent legislative change, are liable to continue. The widespread reaction against the use of MMS is indisputable. The path forward, though, is less clear. Some argue for the partial repeal of mandatory minimum sentencing provisions.<sup>114</sup> Others advocate for their outright abolition.<sup>115</sup> Still others acknowledge the infirmities of MMS but conclude that the *status quo* is nevertheless satisfactory and suggest various ways our judicial system can flex to absorb their negative impact.<sup>116</sup> With an unprecedented level of MMS provisions on the books, two recent strike-downs of MMS provisions from the Court, and whispers of legislative change regarding such provisions from the federal government,<sup>117</sup> the future of mandatory minimum sentencing is simply impossible to predict. Rather than speculating,

---

111 Cairns Way, “A Disappointing Silence”, *supra* note 32 at 2.

112 *Ibid.*

113 *Ibid* at 3.

114 Quigley, *supra* note 32 at 275.

115 *CSC*, *supra* note 12.

116 David Paciocco, “The Law of Minimum Sentences: Judicial Responses and Responsibility” (2015) 19 *Can Crim L Rev* 173 at 198. Here, Paciocco posits that judges appropriately use tools at their disposal—such as creative statutory interpretation and sentence reduction remedies—to constrain the impact of MMS. He argues that the existing state of affairs is satisfactory and focuses on legitimate means for judges to temper the harsh impact of MMS, rather than overhauling the system or challenging these provisions through the *Charter*.

117 See, for example, “Justin Trudeau Might Repeal Some Mandatory Minimums if Elected”, *Global News* (25 September 2015), online: < <http://globalnews.ca/news/2242259/justin-trudeau-might-repeal-mandatory-minimums-if-elected/> archived at <<https://perma.cc/VA9S-GHD3>>. See also “Liberals eye changes to mandatory minimum sentences”, *The Canadian Press* (7 May 2017), online: <<http://www.cbc.ca/news/politics/mandatory-minimum-sentences-liberal-trudeau-harper-government-1.4103855>> archived at <<https://perma.cc/VZT6-5VG8>>.

I will again assert that attaching legislative exemption clauses to mandatory minimum sentencing provisions would be a meaningful and politically viable remedy.

Legislative exemption clauses are not new. They have been endorsed in many different contexts<sup>118</sup> and frequently attach to MMS in other jurisdictions.<sup>119</sup> Canada would do well to follow suit. Legislative exemption clauses would cure many of the constitutional deficiencies plaguing MMS by maintaining generally constitutional sentencing schemes while allowing for departures from mandatory minimums where their imposition would be unconstitutional. In this sense, legislative exemption clauses would address the same concerns as constitutional exemptions without raising the issues addressed by the Court when rejecting this remedy in *Ferguson*. Specifically, in *Ferguson*, the Court rejected constitutional exemptions because they directly contradict legislative intent by injecting judicial discretion where Parliament clearly intended for there to be none.<sup>120</sup> The Court adverted to the possibility of legislative exemption clauses but concluded that because Parliament did not provide for any exceptions to the mandatory minimum, it would be wrong for courts to use a constitutional exemption to effect the same result. Therefore, the legislative insertion of exemption clauses would best respect the division of powers between Parliament and the Court.

In *Ferguson*, the Court also rejected constitutional exemptions due to rule of law concerns over certainty and predictability. However, such principles become illusory with unprecedented *Charter* challenges levied against MMS, which are only liable to increase. The lifetime of any mandatory minimum sentence becomes precarious and uncertain. Thus, in this sense legislative exemption clauses would arguably create, rather than undermine, certainty in mandatory minimum sentencing. Legislative exemption clauses would ensure that a mandatory minimum sentence applied in the majority of circumstances, while simultaneously ensuring that a sentencing judge could depart from the minimum in appropriate cases.

As a final comment on this point, *Ferguson* has been met with mixed reactions. Some scholars, such as Ben Berger, applaud the decision, calling it a “constitutional push-back on the politics of minimum sentences.”<sup>121</sup> Others see it as having a chilling effect on challenges to MMS, removing a more easily attainable remedy, given how historically difficult it has been to challenge an MMS provision in its entirety under section 12.<sup>122</sup> Legislative exemption clauses, on the other hand, would make a remedy for unconstitutional applications of MMS readily available to sentencing judges, rather than constitutional exemption clauses—which are precluded by the decision in *Ferguson*—or challenging the entire provision under section 12.

118 See, for example, the comments of the trial judge in *Smickle*, *supra* note 64 at paras 112 to 117; CBA Factum, *supra* note 110; Peter Sankoff, “The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case” (2013) 22:1 Constitutional Forum 3 at 11; the dissenting reasons of Justice Arbour in *Morrisey*, *supra* note 14 at para 94; and *Lloyd*, *supra* note 49 at paras 3, 36.

119 Indeed, in surveying the use of MMS of imprisonment in common law jurisdictions, Canada’s Department of Justice concluded that when MMS are imposed, courts in other countries are generally provided with the discretion to sentence below the legislated minimum, when extraordinary mitigating circumstances exist. See Canada, Department of Justice, Research and Statistics Division, *Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models*, report by Julian V. Roberts with the assistance of Rafal Morek and Michael Cole, November 2005 (online: [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05\\_10/rr05\\_10.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/rr05_10.pdf)) archived at <<https://perma.cc/J78Q-3BYL>>. See also G Ferguson and B Berger, “Recent Developments in Canadian Criminal Law”, (2013), 37 *Crim LJ* 315-317.

120 *Ferguson*, *supra* note 23 at para 54.

121 Parkes, “From Smith to Smickle”, *supra* note 15 at 157.

122 *Ibid* at 162.

Legislative exemption clauses would also strike an effective balance between Parliament communicating a strong denunciatory message for certain offences while ensuring that the regime is constitutional in its all of its applications. Suggestions that legislative exemption clauses would cure the constitutional defects of MMS trace back through the section 12 jurisprudence. For example, dissenting in the 2000 decision of *Morrissey*, Justice Arbour suggested that MMS should be read by judges as applicable in all cases *except* for those in which their application would be unconstitutional, based on the particular circumstances of the case. She justified her suggestion as being “more consistent with Parliament’s desire to see an increase in the rate and length of imprisonment for this type of offence, while giving effect to Parliament’s obligation to operate within the framework set out by the Constitution.”<sup>123</sup>

Despite jurisprudential and academic suggestions that Parliament legislate exemption clauses to accompany MMS, such clauses still do not feature in Canadian criminal legislation. Recently, in *Lloyd*, the Court offered its most forceful comment to date on the necessity of legislative exemption clauses. Writing for the majority, Chief Justice McLachlin set the tone in the very first paragraph of the reasons: while Parliament has the power to determine punishment for criminal conduct, individuals are constitutionally entitled to receive—and judges are constitutionally mandated to impose—sentences which reflect the particular circumstances of the case.<sup>124</sup> Chief Justice McLachlin drew on *Nur* to emphasize the reality that where offences can be committed in a wide variety of circumstances by a wide range of people, any mandatory punishment is constitutionally vulnerable.<sup>125</sup> As a side note, I suggest that even the more narrowly circumscribed offences in the *Criminal Code* could conceivably be committed in a wide variety of circumstances and by a wide variety of offenders. Her comment exposes the majority of MMS to the “reality” of constitutional infirmity.

As a remedy, Chief Justice McLachlin suggested either narrowing the reach of offences so that they only catch conduct deserving of the attendant mandatory minimum. Her other suggestion, and the area where she devoted the majority of the analysis, is the legislative permission of residual judicial discretion to “impose a fit and constitutional sentence in exceptional cases”: in other words, legislative exemption clauses.<sup>126</sup> First, she rejected the availability of a drug treatment program to cure the constitutional infirmity of the provision. In particular, the law provided that the mandatory sentence need not apply where the offender successfully completes an approved drug treatment program. Although this option is a “step in the right direction,” Chief Justice McLachlin considered it to provide illusory protection only against grossly disproportionate punishment.<sup>127</sup>

Chief Justice McLachlin then turned to her central suggestion, that is, “for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment.”<sup>128</sup> She noted that many countries use legislative exemptions to avoid injustice in MMS. She referenced other jurisdictions for the various approaches available, noting that judicial discretion would usually be confined

123 *Morrissey*, *supra* note 14 at para 94.

124 *Lloyd*, *supra* note 49 at para 1.

125 *Ibid* at para 3.

126 *Ibid* at para 3.

127 *Ibid* at para 34. Specifically, Chief Justice McLachlin noted the following problems with the drug treatment option as an exemption from the mandatory minimum sentence: first, it was confined to certain programs to which the particular offender may not have access; second, the offender must have pled guilty and forfeited his right to trial to attend; third, the requirement that the offender successfully complete the program prior to sentencing might be illusory for heavily addicted offenders; and finally, the Crown typically maintained discretion to disqualify an applicant to the program.

128 *Ibid* at para 36.

to exceptional cases and might require a judge to provide reasons justifying departure from a given MMS. However, she concluded that the parameters of any judicial discretion must be for Parliament to determine. To properly respect the division of powers, the sole direction given by the judiciary to Parliament is that residual discretion must provide for a lesser sentence where the legislated MMS would be unconstitutional.<sup>129</sup>

Considering Chief Justice McLachlin's two suggestions—either narrowing the scope of offences to which MMS attach, or legislating residual judicial discretion via exemption clauses—I suggest the latter is the preferable approach. In my view, as mentioned above, even more narrowly circumscribed offences can conceivably be committed in a variety of circumstances and by a broad range of offenders. This is particularly true in light of recent changes to the section 12 analysis, where the approach to the use of reasonable hypotheticals has relaxed. Such scenarios may now incorporate increasingly personal detail into the analysis, which will more easily illustrate unconstitutional applications of even more narrowly defined offences. It is more viable, in consideration of both principle and predictability, to insert legislative exemption clauses, rather than narrowly define offences and leave them open to continued constitutional attack.

Of course, the form and scope of these exemption clauses would need to be determined. Ultimately, as I have sought to demonstrate in this paper, the necessity of exemptions is tethered to constitutionality. A sentencing judge must be empowered to consider the offender, determine whether the MMS would impose cruel and unusual punishment—in other words, whether it would be grossly disproportionate—and, if so, depart from the mandatory sentence.<sup>130</sup> However, a general exemption clause would obviate the need for an offender to prove unconstitutionality every time an exemption is sought. Even with an arguably relaxed section 12 analysis following *Nur* and *Lloyd*, launching a constitutional challenge to a provision is an onerous task. Many offenders may have neither the resilience nor the resources to attempt to strike down a purportedly unconstitutional provision. And from the perspective of the criminal justice system as a whole, repeated constitutional challenges occupy vast amounts of court resources as such issues are litigated. Therefore, from the perspective of basic access to justice issues, as well as procedural and judicial autonomy, general exemption clauses are a far preferable avenue to depart from unconstitutional applications of MMS rather than seeking to strike down such provisions in their entirety. The language of the clause would need to reflect the necessary threshold and scope of the exemption, short of establishing a constitutional infringement.

#### i. General Exemption Clause

I turn now to several central suggestions regarding the legislation of exemption clauses in the context of MMS.

First, in my view, it would be preferable to have a single and general exemption clause to attach to every mandatory sentence in the *Criminal Code*, rather than separately defining exemption clauses depending on the category of offence.<sup>131</sup> Beyond being attractive for the obvious reasons of clarity and simplicity, both in legislative drafting and practical application, I suggest this approach is justified in principle. Specifically, I would argue that the constitutional necessity of building judicial discretion into mandatory sentencing is not premised on the seriousness of a given offence, but rather on whether the application

129 *Ibid.*

130 I note this central consideration follows suggestions in the jurisprudence: see *Morrissey*, *supra* note 14 at para 94 and *Lloyd*, *supra* note 49 at para 36.

131 This view is reflected in the academic commentary: see Levi Vandersteen, "Building a Safety Valve for Mandatory Minimums: How to Construct a Statutory Exemption Scheme", 27 CR (7th) 249 (2016) at 259-260.

of the punishment *attached* to that offence would be unconstitutional in the context of a particular offender. In other words, I would argue that a general exemption clause which directs judges to consider the particular offender and depart from mandatory sentences where necessary best reflects the principled reason for justifying legislative exemptions in the first place. In my view, this general approach is preferable to nuancing each exemption clause to the particular category of offence. And in any event, it would be harder to justify departure from a mandatory sentence in a more narrowly circumscribed offence or an offence which targets extremely serious conduct. This reality is implicit and need not be specifically set out in different exemption clauses in their applications to categories of offences based on degree of severity.

## ii. Threshold of “Substantial and Compelling Circumstances”

Second, the most central determination to be made regarding a constitutional exemption is the threshold at which such an exemption could be triggered. In my view, sentencing judges should be entitled to depart from a mandatory minimum sentence in “substantial and compelling” circumstances. In *Lloyd*, Chief Justice McLachlin suggested residual judicial discretion should typically be allowed in “exceptional” cases.<sup>132</sup> The threshold of “exceptional circumstances” has similarly been suggested in the academic commentary as well as being reflected in international settings,<sup>133</sup> and was recently endorsed by a working group of the Canadian Bar Association examining constitutional exemptions to MMS.<sup>134</sup>

However, while the language is quite similar, I would suggest a threshold triggered by “substantial and compelling” circumstances, rather than “exceptional” circumstances, or a lower standard based on an “unjust” sentence. In my view, such a threshold would require that a mandatory minimum sentence apply in the majority of cases, but would allow a sentencing judge to depart from the minimum penalty where substantial circumstances—in other words, strong reasons, drawn from all of the factors as a whole—compelled the sentencing judge to do so. The language suggests that the minimum penalty cannot be ignored in marginal cases. I suggest that “substantial and compelling circumstances” is the proper threshold, for the following reasons. First, a lower threshold—such as a varied sentence where the court considers it to be “just and reasonable,”<sup>135</sup> or an exemption to avoid an “unjust” sentence<sup>136</sup>—might simply be too vague or nebulous a threshold against which to measure a legislative exemption. One would hope that all sentences tend towards justice. Language of compelling and substantial circumstances is stronger because it is not loosely premised on the justice of the sentence, but rather focuses specifically on the *circumstances* that might require departure from a mandatory sentence, which is itself in the interests of justice. This would offer a more precise direction where courts can depart from MMS where there are substantial and compelling reasons to do so. I recommend defining “substantial and compelling circumstances”—since for the non-lawyer, it is more

132 *Lloyd*, *supra* note 49 at para 36.

133 See Vandersteen, *supra* note 131 at 262; Yvon Dandurand, Ruben Timmerman and Tracee Mathison-Midgley, *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries* (Ottawa: Department of Justice Canada, 2016) at 22-30, online: <[http://www.justice.gc.ca/eng/tp-pr/jjr/rr16\\_ex/rr16\\_ex.pdf](http://www.justice.gc.ca/eng/tp-pr/jjr/rr16_ex/rr16_ex.pdf)> archived at <<https://perma.cc/D8TA-YEWV>> [Dandurand Report]; Canadian Bar Association Working Group, *Statutory Exemptions to Mandatory Minimum Penalties: Final Report* (Victoria: Uniform Law Conference of Canada Criminal Section, 2013), paras 14-21, online: <[https://www.ulcc.ca/images/stories/2013\\_pdfs\\_en/2013ulcc0003.pdf](https://www.ulcc.ca/images/stories/2013_pdfs_en/2013ulcc0003.pdf)> archived at <<https://perma.cc/Y22C-LVC6>> [CBA Working Group].

134 CBA Working Group, *supra* note 133 at para 17.

135 Language suggested in Bill C-669, An Act to amend the Criminal Code (independence of the judiciary), 2nd Sess, 41st Parl, 2015, online: <<http://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C669&Language=E&Mode=1&Parl=41&Ses=2>> archived at <<https://perma.cc/J26A-UATE>>.

136 Dandurand Report, *supra* note 133 at 30-36.

difficult to understand how circumstances can be substantial—and for the lawyer in other jurisdictions, it may have a slightly different meaning.

Additionally, as noted by the Canadian Bar Association, too low a threshold would eclipse the constitutional protection offered by section 12; the constitutional question would never arise where an exemption could be triggered at a much lower threshold than the “gross disproportionality” contemplated by section 12.<sup>137</sup> Accordingly, too low a threshold would impermissibly undermine the constitutional role of the courts. A threshold premised on “substantial and compelling circumstances” would hover below the high threshold for a constitutional remedy under section 12, but still above the lower threshold of “demonstrably unfit” required for ordinary sentence appeals.<sup>138</sup>

As a final note on the threshold, while the language of “substantial and compelling circumstances” and “exceptional circumstances” has been used interchangeably, I would suggest the former over the latter. In my view, “substantial and compelling circumstances” might be slightly less exacting a standard than “exceptional circumstances”. An exceptional circumstance will typically be substantial and compelling, but a substantial and compelling circumstance need not *necessarily* be exceptional. A threshold of “substantial and compelling” would thus impose a high standard while still keeping legislative exemptions in the available arsenal of sentencing judges. In my view, this would be more in line with the new approach taken to reasonable hypotheticals, in *Nur*, which contemplates that uncommon scenarios can still be reasonably foreseeable. Such uncommon but reasonably foreseeable scenarios may justify departure from a mandatory sentence based on substantial and compelling reasons, without necessarily being exceptional.

### iii. Written Reasons Requirement

I also suggest a requirement that a sentencing judge departing from a given mandatory minimum justify the departure with written reasons. This requirement would mitigate concerns about this kind of judicial discretion trenching inappropriately on Parliament’s decision to legislate standard penalties for serious offences. I would refrain from imposing any specific requirements on such reasons (in terms of length or factors to be considered, for example) but would simply direct trial judges to draw on established sentencing principles and the circumstances of the case before them to explain the substantial and compelling circumstances which require departure from the mandatory sentence.<sup>139</sup>

There are numerous residual concerns regarding the framing and implementation of legislative exemption clauses. I flag them for context only, as their full consideration is beyond the scope of this paper. However, if Parliament chooses to craft constitutional exemptions for MMS, policy experts will have to consider further questions, including:

---

137 CBA Working Group, *supra* note 133 at para 16.

138 *Ibid* at para 17.

139 I note the suggestion of written reasons is not a novel one: see private member’s bill, CBA Working Group, *supra* note 133 at para 27.

whether judges should be directed to consider certain factors in particular,<sup>140</sup> the interactions between legislative exemptions and the plea bargaining process,<sup>141</sup> the role of appellate review in this context,<sup>142</sup> and whether MMS for any particular offences—such as murder—should be left unmitigated by legislative exemption clauses.<sup>143</sup> I suggest as a starting point that a single general exemption clause be crafted to apply to all MMS, justified where there are substantial and compelling circumstances, and buttressed by written reasons from the sentencing judge explaining the departure.

## B. Constitutional Challenges: Section 15

In this paper, I have examined MMS in their historical and theoretical context as well as their treatment in the courts under the section 12 analysis. I have further suggested that the most constitutionally viable response to MMS would be the insertion, by Parliament, of legislative exemption clauses. However, even if Parliament addresses legislative exemption clauses—and particularly if they do not—certain problems remain. MMS are riddled with constitutional frailties. They particularly raise real concerns over substantive inequality, and their applications on already-marginalized populations. There must still be an avenue for constitutional challenges to MMS, particularly if these sentencing provisions continue to be unmitigated by legislative exemption clauses. I argue that protections offered by section 15 might best respond to the constitutional frailties of MMS and particularly their applications on already-marginalized populations. These concerns over substantive equality could either be addressed in a proper section 15 challenge, or might be seen to begin to infuse the section 12 analysis itself with the new life that has been breathed into the analysis by *Nur* and *Lloyd*.

We are in what has been called a “perfect storm,” where the proliferation of MMS and the rejection of individual constitutional exemptions will result in an unprecedented degree of *Charter* attacks to these sentencing provisions.<sup>144</sup> In British Columbia, MMS have frequently been challenged in the courts and they have on numerous occasions have been held to violate section 12, largely on the basis of the reasonable hypothetical analysis.<sup>145</sup>

140 It has been suggested that judges should be directed to consider certain particular factors when deciding whether to depart from the mandatory minimum sentence: see, for example, Vandersteen, *supra* note 131 at 262-263; see also CBA Working Group, *supra* note 133 at paras 22-24. In my view, existing sentencing principles which are set out in detail in section 718 of the *Criminal Code* are sufficient to guide a sentencing judge’s discretion in deciding whether circumstances are sufficiently compelling and substantial to depart from an established mandatory sentence. It might be helpful for Parliament to establish a set of factors—relating particularly to the degree of moral blameworthiness and the severity of the offence, since those will typically be the primary factors militating in favour of a sentence below the established minimum—but I would not argue that such a requirement is *necessary*. I note, also, that the utility of a set list of factors may be diminished by virtue of the fact that whatever circumstances are so compelling and substantial to justify departure from a mandatory sentence will typically be very specific to the circumstances of that particular case. In light of this, the utility of an established laundry list of factors diminishes.

141 In some jurisdictions, the prosecution offers legislative exemptions from mandatory minimums in exchange for a guilty plea. I echo concerns raised in the commentary on legislative exemption clauses that it would be highly problematic, particularly in the context of marginalized offenders, to offer legislative exemptions to mandatory minimums in exchange for guilty pleas. For further discussion of this point, see Vandersteen, *supra* note 131 at 262-263; Dandurand Report, *supra* note 133 at 13-17; CBA Working Group, *supra* note 133 at para 19.

142 For further discussion, see Vandersteen, *supra* note 131 at 263; CBA Working Group, *supra* note 133 at para 27.

143 For further discussion, see CBA Working Group, *supra* note 133 at paras 32-33.

144 Sankoff, *supra* note 118.

145 See generally *R v Dickey*, 2015 BCSC 191, where the court struck down a mandatory minimum based on section 12 and declined to rule on the section 7 issue; *Lloyd*, *supra* note 49; *R v Jackson-Bullshields* 2015 BCPC 411; *R v Oud* 2015 BCSC 1040; *R v Elliott* 2016 BCSC 393; *R v Holt*, 2014 BCSC 2170 [*Holt*].

Given the reinvigoration of the analysis in *Nur*, section 12 remains the most viable avenue for the testing of the constitutionality of MMS provisions.<sup>146</sup> Nevertheless, I briefly canvass section 15 of the *Charter* as an alternative avenue to challenge MMS, with its particular focus on equality concerns.<sup>147</sup> I also comment on the section 1 analysis and the proper role of deference and dialogue between the courts and Parliament.

i. Section 15: Substantive Inequality in MMS

Section 15 of the *Charter* governs equality rights in Canada,<sup>148</sup> with substantive equality as its animating norm.<sup>149</sup> It reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in

146 There is some argument that section 7 of the *Charter* might operate as a means to challenge MMS. Section 7 of the *Charter* provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Liberty interests are clearly engaged when a term of imprisonment due to a mandatory minimum is at stake. The section 7 violation will depend on whether this deprivation accords with the principles of fundamental justice, which operate mainly against arbitrariness, overbreadth, and gross disproportionality. These principles were explored by the Court exhaustively in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 93 to 123 [*Bedford*] and again, shortly afterwards, in *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 83 to 92 [*Carter*]. Arguments based on arbitrariness and overbreadth would likely be the most effective way to challenge MMS. If the empirical social science evidence establishes that MMS do not achieve deterrence to a greater extent than non-mandatory sentences, then there is a very real argument that such sentencing provisions are overbroad, arbitrary to their deterrent purpose, or both.

However, the section 12 analysis itself already captures concerns over arbitrariness and overbreadth. It is axiomatic that a mandatory sentence which is grossly disproportionate to the particular circumstances of a given offender is arbitrary in that there is an insufficient connection between the effect and objective the law, since it captures offending which is insufficiently blameworthy to mandate the minimum sentence. A mandatory sentence found to violate section 12 is also clearly overbroad, in that the law clearly goes too far and captures conduct which is unrelated to the law's purpose.

Similarly, the principle against gross disproportionality is unlikely to gain much traction in the courts through section 7 arguments. Because gross disproportionality features specifically in section 12, claimants will likely be required to rely on that provision, rather than advancing gross disproportionality under the umbrella of section 7. Therefore, while the door is not closed to the possibility of a successful section 7 challenge in the context of MMS—and was explicitly referred to as a possible way to challenge the constitutionality of MMS in *Nur*, *supra* note 2 at para 109, I would argue that this possibility is highly unlikely. In my view, the expanded section 12 analysis responds to many of the same concerns and will likely be the most viable mechanism through which to strike down MMS.

147 Section 9 of the *Charter* might also be relevant in the context of MMS. This provision reads: “Everyone has the right not to be arbitrarily detained or imprisoned,” *Charter*, *supra* note 36, s 9. However, this provision is not raised as frequently as sections 7 or 12 in the context of MMS. Section 9 was recently raised in *Holt*, *supra* note 145 at para 150. The defendant had advanced an arbitrariness argument under both sections 7 and 9 but did not make any submissions as to whether a different standard should apply as between the two *Charter* rights. The trial judge held that it made no difference, since the Court had established in earlier jurisprudence that if a law authorizing detention is not arbitrary contrary to section 7, then it cannot offend section 9. The section 9 argument was also rejected in *Lloyd*, *supra* note 49 at para 61, where the trial judge held that “a mandatory minimum sentence authorized by a law that is only engaged upon the conviction of particular offenders for particular offences cannot be said to constitute arbitrary detention or imprisonment.” In light of this, I focus instead in this section on more promising *Charter* arguments under sections 12 and 15.

148 The jurisprudence in section 15 cases has established a two-part test for measuring a section 15 violation: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?” See *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2.

149 *R v Kapp*, 2008 SCC 41 at para 16.



particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>150</sup>

The Court has emphasized that legislation which appears neutral on its face may still have discriminatory effects.<sup>151</sup> MMS, which apply uniformly to all offenders regardless of personal circumstances or moral blameworthiness, exemplify this possibility. Evidence that MMS disproportionately affect certain populations, such as women, youth, Aboriginal, or drug-addicted offenders, demand consideration as to whether these sentencing provisions violate substantive equality. Pivot Legal Society published a report in 2013 which presents evidence from Canada's Correctional Investigator that "nearly all of the population growth in Canada's jails over the last decade has been from Canada's marginalized populations," specifically Aboriginal peoples, visible minorities, people struggling with drug dependency and the mentally ill.<sup>152</sup> In light of this sad reality, it is not difficult to imagine the discriminatory impacts that MMS are ever more likely to inflict, particularly in the context of drug-related offences.

The Pivot Legal Society Report elucidates potential channels for novel *Charter* arguments in the context of MMS.<sup>153</sup> Bill C-10, the *Safe Streets and Communities Act* ("SSCA"), received royal assent in March 2012 and, among other things, introduced numerous new mandatory minimum provisions for drug offences.<sup>154</sup> The Pivot Report summarizes findings from a study seeking to measure the effects of the SSCA on low-income drug users.<sup>155</sup> The Pivot Report demonstrates how section 15 of the *Charter* might found unprecedented challenges to the constitutional validity of mandatory minimum sentencing. The authors asserted that MMS are very likely to have unconstitutional applications, particularly when viewed "contextually through the lens of marginalized, drug-dependent offenders—often people with other characteristics that compound their marginalization, such as poverty or mental health issues [...]"<sup>156</sup>

Although the SSCA was touted as a legislative initiative to target serious offenders and organized crime, Pivot's research predicted that the burden of these MMS would be borne primarily by the most marginalized, and least serious, offenders.<sup>157</sup> A law that purports to target "drug kingpins"<sup>158</sup> and yet predominantly catches low-income, drug dependent offenders is seemingly arbitrary. Such a law also arguably furthers substantive inequality: while appearing non-discriminatory in its application, it in effect indirectly impacts marginalized populations to a higher degree and thus inherently furthers systemic discrimination. Particularly, the study highlighted the way in which higher level drug traffickers often use severely addicted individuals to engage in street-based drug dealing. These individuals, who sell to support their own drug dependencies, are the most likely to be caught by the legislation and sentenced to mandatory minimums, while the more serious drug traffickers are not caught. Such a scheme has constitutional frailties.

The academic commentary reveals concerns over substantive equality in the context of MMS. Parkes raises equality concerns about race-based discrimination against Canada's Aboriginal peoples. She points specifically to the over-policing of Aboriginal communities

---

150 *Charter*, *supra* note 36, s 15.

151 *Quebec (Attorney General) v A*, 2013 SCC 5 at para 198.

152 Pivot Report, *supra* note 32 at 33.

153 *Ibid.*

154 SSCA, *supra* note 88.

155 Pivot Report, *supra* note 32 at v.

156 *Ibid* at vi.

157 *Ibid* at 38.

158 *Ibid.*

and the limitations on judges' abilities to consider unique Aboriginal circumstances.<sup>159</sup> Such consequences flow directly from the steady bleed of discretion from the judiciary to the prosecution. David Paciocco, now a judge of the Court of Appeal for Ontario, has similarly offered comments on the potential of MMS to be a source of substantive inequality, particularly in the context of Aboriginal offenders.<sup>160</sup> Professor Cairns Way has also written extensively on this issue. In her view, "mandatory minimum sentences are in and of themselves inconsistent with a commitment to substantive equality."<sup>161</sup> She emphasizes the need to engage with evidence demonstrating the disproportionate effect of MMS on marginalized populations. She calls for decisions which heed empirical bases and vehemently denounces continued reliance on a neo-liberal ideology, which simplifies the complicated criminal landscape into a free market view of free actors, rational choices, and personal responsibility.<sup>162</sup>

In light of these concerns, arguments have been made to prefer using section 15 rather than sections 7 and 12 in challenging discriminatory criminal legislation, particularly in the context of disproportionality in sentencing, due to its particular impact on vulnerable minorities.<sup>163</sup> Making this argument in a recent article, Jonathan Rudin writes that the *Charter's* equality provision has typically been invoked in response to under-inclusive equality legislation, rather than over-inclusive criminal legislation. Centrally, Rudin asserts that "the problem with relying on section 7 and section 12 to address the constitutional infirmities of criminal laws is that it masks the reality of the disparate impact of criminal law on vulnerable groups."<sup>164</sup> He posits that while section 15 would be a better approach to challenge discriminatory criminal law, recourse is typically made instead to sections 7 and 12, for structural as well as practical reasons.<sup>165</sup> Rudin concludes that section 15 is the preferred approach as it would force Parliament, following the striking down of an unconstitutional law, to address the underlying unequal impact of the law in question, rather than re-writing the legislation to fit within the confines set by section 7. He also lauds section 15 as leading to a more honest public debate about criminal law reform and the systemic inequality effected by certain criminal laws, rather than obfuscating the issue through the complex categories and internal tests of section 7.<sup>166</sup>

Section 15 arguments can emerge in various ways. The authors of the Pivot Report, for example, suggest the recognition of drug dependence as either a specific analogous ground of discrimination, or within the enumerated ground of physical disability.<sup>167</sup> They point to data demonstrating that drug-dependent individuals are jailed at a higher rate for *CDSA* offences than those who are not drug-dependent, particularly because these individuals often sell drugs to finance their dependence.<sup>168</sup> This fact establishes a framework for equality arguments to the effect that MMS adversely affect drug-dependent populations and perpetuate disadvantage through increased incarceration. The authors also propose section 15 arguments in the context of Aboriginal people. It is widely acknowledged that Aboriginal offenders are over-represented in Canadian prisons. MMS can limit the discretion of sentencing judges in varying a sentence based on the unique circumstances

159 Parkes, "From Smith to Smickle", *supra* note 15 at 168.

160 D Paciocco, *supra* note 116 at 9-10.

161 Cairns Way, "A Disappointing Silence", *supra* note 32 at 3.

162 Rosemary Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2015), University of Ottawa – Working Paper Series, WP 2015 – 19 at 465.

163 See generally Jonathan Rudin, "Tell It Like It Is – An Argument for the Use of Section 15 over Section 7 to Challenge Discriminatory Criminal Legislation", 64 *Crim LQ* (3-4th) 317 (2017).

164 *Ibid* at 3.

165 *Ibid* at 5.

166 *Ibid* at 7.

167 *Ibid*.

168 *Ibid*.

of Aboriginal offenders. This is contrary to the statutory direction in section 718.2(e).<sup>169</sup> Rather than furthering the objectives of rehabilitation and reconciliation, the increased number of MMS in the *SSCA* are likely to perpetuate the over-incarceration of Aboriginal people in Canada and potentially violate their equality rights.<sup>170</sup>

The case of *R v Adamo*<sup>171</sup> illustrates how MMS can violate section 15 rights on the basis of mental disorder. Justice Suche found a violation under section 15 in the context of a severely brain injured person whose mental disorder was directly connected to his offending behaviour.<sup>172</sup> Justice Suche concluded that the impugned mandatory minimum sentence violated section 15 because it entirely foreclosed a sentence which would account for the offender's mental disorder and his diminished moral blameworthiness. To this extent the impugned mandatory minimum sentence perpetuated systemic disadvantage of the mentally ill.<sup>173</sup> The suggestions made in the Pivot Report and the conclusions in *Adamo* illustrate how section 15 arguments potentially or actually play out in the context of MMS. Such equality arguments demand reconsideration of deeply-held presumptions about free will, individual responsibility and rational actors which underpin our criminal justice system.

Although substantive equality is assuming a central focus in academic commentary on the use of MMS, section 15 has yet to be argued before the Court in this context. It is a complex test and will likely prove difficult to establish. Section 15 arguments have seen little success in parties' attempts in lower courts to challenge MMS.<sup>174</sup> The lower court decisions in *Nur* illustrate the difficulties in establishing a section 15 violation. There, the accused relied on expert evidence, and was supported by an intervener, to argue that the impugned MMS disproportionately affected black males and thus breached the section 15 equality guarantee. Specifically, the accused pointed to the various intersecting factors such as poverty, unemployment, and biased policing and justice system practices which all perpetuated the disadvantage of the black community. However, the trial judge summarily rejected all of the equality arguments put forward by the accused.<sup>175</sup> The trial judge accepted that anti-black discrimination contributed to many of the underlying societal causes emphasized by the accused, but he rejected that the impugned *law itself* had a

169 *Criminal Code*, *supra* note 4, s 718.2(e).

170 Pivot Report, *supra* note 32 at 35.

171 *R v Adamo*, 2013 MBQB 225 [*Adamo*]. In addition to a section 7 violation, the court also held that the impugned mandatory minimum sentence violated section 15 of the *Charter* based on the accused's mental disability. As Justice Suche held: "I conclude that the mandatory minimum sentence [...] has a much greater impact on mentally disabled persons because it does not take into account their reduced moral blameworthiness" (*ibid* at para 139). In reaching this conclusion, Justice Suche demonstrated curial receptivity to equality arguments in the context of MMS, while also moving away from the premise of the Canadian justice system that all offenders are autonomous, free actors. Judgments like *Adamo* signal an increased acceptance of equality arguments and a shifting understanding about the role of free choice and rationality in criminal conduct.

172 *Ibid* at para 133.

173 *Ibid* at para 135.

174 Section 15 arguments seem either to be rejected outright, or are not considered in light of a parallel section 12 argument succeeding. See, for example, *R v JED*, 2017 MBPC 33 at para 77, where the trial judge rejected the section 15 arguments of an offender on the autism spectrum facing a mandatory sentence. The judge emphasized that not all offenders on the autism spectrum would be disproportionately affected by the mandatory minimum sentence, and thus the section 15 argument had to fail. See also *R v O'Neil Harriott*, 2017 ONSC 3393 at para 46, where the trial judge accepted that the mandatory sentence breached section 12 and thus deemed it unnecessary to consider the section 15 argument advanced by the accused. Similarly, see *R v SJP*, 2016 NSPC 50, where the trial judge found the impugned mandatory minimum sentence violated section 12 but refused to consider the accused's section 15 arguments, holding they were lacking in proper support (see para 17).

175 *R v Nur*, 2011 ONSC 4874 at paras 74-82, 275 CCC (3d) 330.

discriminatory effect.<sup>176</sup> The trial judge's acceptance of the systemic discrimination faced by black offenders, coupled with his refusal to attribute any of that discrimination to the impacts of the impugned MMS in particular, demonstrate the difficulty of establishing a section 15 breach in this context.<sup>177</sup>

I argue that section 15 is a preferred method to strike down over-inclusive criminal laws, the precise problem which inheres in MMS. In my view, section 15 targets the core harm caused by such mandatory penalties: substantive inequality. Section 15 challenges would mandate a focus on the inequality wrought by MMS and provide a better avenue for meaningful change. Nevertheless, in light of the general lack of success in section 15 challenges to MMS and a judicial reticence to engage with section 15 in this context, I would argue that section 12 is likely to remain the most fruitful avenue to challenge MMS. However, this does not mean that equality considerations have no place in the analysis. Instead, I would argue that concerns around substantive equality may increasingly infuse the section 12 analysis post-*Nur*. With the loosening of the reasonable hypothetical analysis, we may yet see the increased incorporation of characteristics which are "systemic and foreseeable"<sup>178</sup> based on such factors as race, mental disorder, drug dependency, and the like. In this way, even if section 15 challenges are not taken up in the context of discriminatory criminal legislation, an expanded section 12 analysis may accommodate equality concerns by demonstrating how MMS disproportionately impact certain minorities.<sup>179</sup>

The decision in *Lloyd* is telling on this point. As Parkes noted, *Lloyd* constitutes the first time since *Smith* that the Court has considered a mandatory minimum provision in the context of a drug offence.<sup>180</sup> On the appeal, numerous interveners highlighted the extent to which MMS for drug possession disproportionately impact low-level, drug-dependent offenders who sell drugs to fuel their habits. Since section 15 was not raised in *Lloyd*, substantive equality was instead addressed in the ambit of section 12, and interveners crafted reasonable hypotheticals to reflect the disproportionate effects of the impugned provisions on poor and drug dependent offenders.<sup>181</sup>

Notably, in the trial decision in *Lloyd*, the sentencing judge accepted the proposed hypothetical of an addict who possesses a small amount of a Schedule 1 substance and shares it with a friend. The trial judge recognized that "this happens daily in the downtown east side of Vancouver and is in no way a far-fetched or extreme example."<sup>182</sup> The majority of the Court in *Lloyd* accepted the trial judge's articulation of the hypothetical and was receptive to the substantive equality arguments made by the interveners and the appellant in the section 12 analysis. The majority explicitly endorsed the hypothetical of an addict charged with sharing a small amount of a drug with a friend, as well as an offender who trafficked in order to support an addiction and was making efforts to rehabilitate.<sup>183</sup>

---

176 *Ibid* at para 79.

177 I note that the Court of Appeal for Ontario accepted the trial judge's reasoning in *Nur*: see *R v Nur*, 2013 ONCA 677 at paras 3, 182.

178 Cairns Way, "A Disappointing Silence", *supra* note 32 at 2.

179 Professor Cairns Way is not optimistic in this regard (see her concerns generally at *supra* note 32). However, there is room for optimism; while mandatory minimums by their nature raise serious concerns over systemic discrimination, *Nur* at least sets us on a path that is more sensitive to substantive equality concerns than was previously the case.

180 Parkes, "The Punishment Agenda", *supra* note 46 at 603.

181 See, for example, *Lloyd BCPC*, *supra* note 105 (Factum of Pivot Legal Society).

182 *Lloyd BCPC*, *supra* note 105 at paras 48-49.

183 *Lloyd*, *supra* note 49 at paras 32-33.

Therefore, I argue that despite the difficulty in establishing a section 15 breach on its own, the Court seems willing to consider equality considerations through the use of reasonable hypotheticals in section 12. An expanded section 12 analysis following *Nur* and *Lloyd* provides more scope for section 15 concerns to infuse the section 12 analysis in the context of MMS. The Court has been receptive to the understanding of drug addiction as an illness<sup>184</sup> and is willing to consider the differential and disproportionately harsh effect of MMS on marginalized minorities. This presents a way to address how MMS disproportionately impact these populations without recourse to the more complex and challenging analysis under section 15.

## ii. Section 1: Deference and Dialogue

If a *Charter* violation were made out under sections 7, 12, or 15, it would fall to the government to justify the intrusion under section 1.<sup>185</sup> A full examination of the justificatory analysis in the *Oakes* test is beyond the scope of this paper.<sup>186</sup> However, a few comments are warranted on both the level of deference owed to Parliament in this area and the nature of the dialogue between the Court and Parliament. As we have seen, it has been argued that courts should generally defer to Parliament's decision to legislate MMS. Until *Nur*, the Court was exceedingly deferential to Parliament in the context of MMS. However, deference is not a uniform concept and can manifest in varying degrees. Accordingly, before embarking on an examination of section 1, we must identify the level of deference which animates the analysis. Parkes has distinguished *naked* deference from *principled* deference, arguing that curial deference to Parliament in the legislative context must be principled and evidence-based, particularly if fundamental rights are at stake.<sup>187</sup> This includes deference to Parliament in the context of MMS. The Court ought to take heed of the significant body of evidence challenging both the efficacy and constitutionality of MMS.<sup>188</sup> Rather than nakedly deferring to legislative intent here, the Court should adopt a principled position and send a clear message to Parliament that the constitutional infirmities in mandatory minimum sentencing must be addressed. The Court would not be overstepping its role. Rather, such a message would properly consist of what has been called a "robust and democratic dialogue" between the courts and the legislature.<sup>189</sup>

184 See generally *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

185 *Charter*, *supra* note 36, s 1.

186 It should be noted that any violation of sections 7 or 12 will be hard to justify. In *Bedford*, *supra* note 146 at para 129, the Court commented that a section 7 violation has never been justified under section 1, and that while such an outcome is possible, it is unlikely. Similarly, in *Nur*, *supra* note 2 at para 111, Chief Justice McLachlin said the following concerning section 1: "It will be difficult to show that a mandatory minimum sentence that has been found to be grossly disproportionate under [section] 12 is proportionate as between the deleterious and salutary effects of the law under [section] 1." It is difficult to conceive of a scenario where a provision which breaches the terrifically high threshold of gross disproportionality can be demonstrably justified as a reasonable limitation on *Charter* rights.

187 Email from Debra Parkes to Sarah Chaster (March 11, 2016). Parkes referred to the work of Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40:4 3-4 Osgoode Hall LJ 337. In this article, Moon discusses three different ways that a court might defer, with the third being a general lowering of the standard of deference (as opposed to deferring to findings of fact by legislators, or deferring to the accommodation of competing interests). Parkes has termed this third approach to be *naked*, rather than *principled* deference.

188 Doob et al, *supra* note 34 at 28: "Deterrence-based sentencing makes false promises to the community. As long as the public believes that crime can be reduced by legislatures or judges through harsh sentences, there is no need to consider other approaches to crime reduction." Therefore, only by seriously questioning the foundation of MMS and relaxing our reliance on these devices do we create space for more nuanced, sophisticated initiatives in criminal justice policy.

189 Parkes, "From Smith to Smickle", *supra* note 15 at 161.

Further, as the Court held in *Carter v Canada*, the type of legislation at issue can impact the appropriate level of deference. For example, a “complex regulatory response to a social ill will garner a higher degree of deference” than an absolute prohibition.<sup>190</sup> A mandatory minimum sentencing provision can hardly be called a complex regulatory response to the social ill of criminal conduct. I suggest that, as was the case in *Carter*, the level of deference owed to Parliament here should be accordingly reduced. While the level of judicial activism in *Nur* was a welcome change from the previous decades of minimalism on the part of the Court, the decision fell markedly short in terms of fully engaging with the evidence on MMS. Nevertheless, the Court took a further step in the right direction on this front in *Lloyd*. After finding a section 12 violation, the majority concluded that the breach could not be saved under section 1 of the *Charter*. Specifically, the majority held that the law was not minimally impairing, and that the Crown had not established that less harmful means would achieve Parliament’s objectives, either by narrowing the scope of the offence or establishing legislative exemption clauses.<sup>191</sup> These comments in the context of section 1 demonstrate that the Court is taking a stance of more principled deference to Parliament, explicitly directing that legislative changes are necessary to attenuate the constitutional frailties of MMS, rather than nakedly deferring to Parliament’s decisions in this regard. This is a clear message sent in the Court’s dialogue with Parliament: mandatory minimums will continue to violate the *Charter* unless there is judicial discretion to depart from these sentencing provisions in certain circumstances.

## CONCLUSION

In this paper, I have situated MMS in their historical context and sought to demonstrate their constitutional infirmities. I have argued that the Court’s decisions in *Nur* and *Lloyd* have breathed new life into section 12, particularly in expanding the availability of the reasonable hypothetical analysis. Nevertheless, given that gross disproportionality will likely remain the high standard in the section 12 analysis, and that MMS severely constrain a sentencing judge’s ability to ensure proportionality, which is the fulcrum of the sentencing process, the state of affairs is deeply problematic. I echo the suggestion urged on Parliament by the majority in *Lloyd*: MMS must be accompanied by a codified legislative exemption clause to cure their inherent constitutional infirmities. I suggest that a single exemption clause could be legislated to apply to any mandatory minimum in the *Criminal Code*, allowing judges to depart from a given mandatory minimum sentence in substantial and compelling circumstances, and requiring written reasons to justify the departure.

Since mandatory minimums inherently result in a transfer of discretion to prosecutors, who carry no collateral constitutional obligation to uphold proportionality as a principle of sentencing, a legislative exemption clause would effectively transfer some discretion *back* to the judiciary. It would allow a sentencing judge to depart from the mandatory minimum when to impose it would seriously compromise proportionality. Such an outcome would also respect the different roles of the prosecutor and the sentencing judge. Legislative exemption clauses would thus address some of the deep issues concerning MMS in the context of untrammelled prosecutorial discretion.

Legislative exemption clauses would clearly be more politically viable than a full repeal of all MMS. This legislative change would steer us away from the punishment-based narrative which has dominated Canadian criminal justice for too long and would perhaps abate the distrust of judicial discretion in Canada. Whether Parliament is open to this suggestion remains to be seen. Either way, this paper has attempted to show that there is a new sense

---

190 *Carter*, *supra* note 146 at paras 83-92.

191 *Lloyd*, *supra* note 49 at para 49.

of optimism for future *Charter* challenges to mandatory minimum sentencing provisions, either in a revived section 12 analysis or through novel section 15 arguments. Hopefully, the rapid proliferation of MMS in our criminal justice system has come to an end, and *Nur* and *Lloyd* have definitively set us on a path towards a time where MMS cease to feature prominently—or perhaps one day, at all—in the Canadian criminal justice landscape.