# "OVER THE *HILLS*: SECTION 12 OF THE CHARTER AT 40"

Colton Fehr[1]

*The longstanding framework for determining whether state conduct subjects an individual to cruel and unusual treatment or punishment contrary to section 12 of the Charter was recently challenged in R v Hills and R v Hilbach. While the Supreme Court defended its core jurisprudence, it also endeavoured 'to provide greater clarity and more guidance' for future challenges under the 'severity' track of section 12. While this afforded the Court an opportunity to take stock, several controversial features of its jurisprudence were left untouched. Three in particular warrant further consideration: (i) revising how courts should determine the 'low end' of the sentencing range when assessing whether a law meets the gross disproportionality standard; (ii) abandoning use of an existing case resulting in grossly disproportionate punishment where the case is considered 'marginal' and therefore would not qualify as a 'reasonable hypothetical'; and (iii) the Court's inconsistent reasons for including general deterrence as a factor when considering whether a mandatory minimum sentence is consistent with section 12 of the Charter.*

*Le cadre qui sert depuis longtemps à trancher la question de savoir si l'État inflige à un particulier des traitements ou peines cruels et inusités en violation de l'article 12 de la Charte a été dernièrement remis en question dans R c Hills et R c Hilbach. La Cour suprême a défendu le noyau de cette jurisprudence, mais elle s'est aussi attachée « à apporter plus de clarté et à fournir une meilleure orientation en la matière » pour les futures remises en question invoquant l'argument de la « sévérité » et l'article 12. La Cour avait là l'occasion d'en dresser l'inventaire, mais plusieurs éléments controversés de cette jurisprudence sont demeurés inchangés. Il y en a surtout trois qui méritent qu'on s'y attarde : i) revoir comment les tribunaux devraient déterminer la « peine minimale obligatoire » au moment de juger si une loi répond à la norme de la disproportion exagérée; ii) laisser tomber l'application d'une affaire s'étant soldée par une peine exagérément disproportionnée quand il s'agit d'un « cas limite » ne pouvant donc être qualifié de « cas hypothétique raisonnable »; iii) l'inconstance des motifs avancés par la Cour pour inclure la dissuasion générale comme facteur quand il s'agit de savoir si une peine minimale obligatoire est conforme à l'article 12 de la Charte.*

[1] Assistant Professor, University of Saskatchewan, College of Law.

## Contents



## Introduction

The prohibition against "cruel and unusual treatment or punishment" found in section 12 of the *Charter* has consistently prohibited grossly disproportionate state conduct, a standard which the Supreme Court of Canada recently affirmed is rooted in the concept of human dignity[2]. The Court also affirmed that there are two "tracks" for proving a section 12 violation[3]. The methods track assesses the permissible types of punishment that may be used, excluding punishments that are inherently incompatible with human dignity[4]. The severity track—implicated in the preponderance of the Court's jurisprudence—prohibits any punishment or treatment that is grossly disproportionate to the appropriate punishment in a given case[5]. The approach for determining whether state conduct violates this standard has consistently been determined by comparing the typically mandatory minimum sentence to the appropriate penalty for either the offender before the court or to a "reasonable hypothetical offender"[6].

Despite its longevity, this jurisprudence recently came under attack in two companion cases: *R v Hills*[7] and *R v Hilbach*[8]. The Supreme Court unsurprisingly affirmed its basic framework for assessing the constitutionality of sentencing laws. This was a welcome development for numerous reasons that I and others detailed leading up to the hearings[9]. But the Court also went further and sought "to provide greater clarity

2 See *R v Bissonnette*, 2022 SCC 23 [*Bissonette*].

3 *Ibid* at paras 60–70.

4 *Ibid* at para 66.

5 *Ibid* at para 61.

6 See e.g., *R v Nur*, 2015 SCC 15 [*Nur*].

7 2023 SCC 2 [*Hills*].

8 2023 SCC 3 [*Hilbach*].

9 See e.g., Colton Fehr, "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the *Charter*" (2021) 25:3 Can Crim L Rev 235 (reviewing the relevant

and more guidance" with respect to the severity track[10]. While these judgments are generally positive, their broader ambition also provided the Court with a unique opportunity to reconsider several other curious aspects of its section 12 jurisprudence. Three in particular stand out to me as in need of further reform.

First, it is difficult to accept the Supreme Court's method for determining what sentence constitutes the "low end" of the range as required at the first stage of the severity analysis[11]. The Court writes in *Hills* that "because the purpose of the reasonable hypothetical is to test the limits of the scope of application of a mandatory minimum, the lowest fit sentence that is reasonably foreseeable will figure prominently in the assessment"[12]. But this does not answer the question of *whose* lowest fit sentence ought to govern. The principles underlying the sentencing task may be interpreted by the provincial courts in ways that lead to very different sentences for identical offenders, and the Court has always shown such decisions deference[13]. Faced with inevitably disparate views on the low-end sentencing range for a particular offence, the Court should outline a method for determining this crucial starting point when conducting a section 12 analysis. I suggest that when faced with disparate provincial sentencing positions, the Court ought to average them to facilitate a more accurate gross disproportionality assessment.

Second, the *Hills* case affirmed its prior conclusion in *R v Nur*[14] that a grossly disproportionate sentence that was actually imposed upon an offender (i.e., absent a constitutional challenge) in a case where truth was stranger than fiction can result in a mandatory minimum sentence being inconsistent with section 12 of the *Charter*[15]. This rule inexplicably departed from the Court's prior holding in *R v Morrisey*,[16] wherein the majority required that actual cases also be "reasonably foreseeable" to form the basis of a constitutional challenge to a mandatory minimum sentence[17]. As I will explain, a return to the *Morrisey* rule is necessary to strike a proper balance between the twin purposes of section 12: allowing

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literature and contending that the basic structure for section 12 is consistent with broader purposes of judicial review).

10 See *Hills*, *supra* note 7 at para 49.

11 See *ibid* at para 40 citing *Bissonnette*, *supra* note 2 at para 63; *Nur*, *supra* note 6 at para 46; *R v Boudreault*, 2018 SCC 58 at para 46.

12 See *Hills*, *supra* note 7 at para 95.

13 See e.g., *R v Lacasse*, 2015 SCC 64 at paras 11–12.

14 *Nur*, *supra* note 6.

15 See *Hills*, *supra* note 7 at para 81 citing *Nur*, *supra* note 6 at para 72.

16 2000 SCC 39 [*Morrisey*].

17 *Ibid* at paras 33, 50.

Parliament to enforce its legitimate views on sentencing and the need to protect citizens from abuse of state power.

Finally, the implications of the *Hills* and *Hilbach* decisions for the permissible scope of mandatory minimum sentences is unclear. The judgments are particularly welcome because they re-affirmed the necessity of infusing equality considerations into the gross disproportionality analysis[18]. This is especially prudent in light of the Court's decision two months earlier in *R v Sharma*,[19] wherein it rejected an equality challenge to limitations on conditional sentence orders despite these provisions' adverse effects on minority groups[20]. While including equality considerations in the severity analysis does not ring the death knell for mandatory minimum sentences, *Hills* must be considered alongside the Court's earlier decision in *Nur*. The long shadow it cast over the efficacy of general deterrence as a sentencing principle should have stripped defenders of mandatory minimum sentences of a powerful policy argument supporting their constitutionality[21].

Despite affirming its empirical fragility,[22] the Supreme Court in *Hills* and *Hilbach* incorporated general deterrence into its framework when assessing whether the impugned sentences were consistent with section 12 of the *Charter*[23]. In my view, this hesitance to remove general deterrence as a reason in favour of upholding a mandatory minimum sentence is unsustainable in light of decades of research demonstrating that such sentences simply do not deter others from committing criminal offences[24]. If mandatory minimum sentences may only be defended based on their ability to denounce conduct, and the reasonable hypothetical offender must be constructed in light of substantive equality considerations, a significantly narrower range of mandatory minimums should survive constitutional scrutiny moving forward.

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18 See *Hills*, *supra* note 7 at para 67.

19 2022 SCC 39 at paras 31–33 [*Sharma*].

20 While I elsewhere defend the result in *Sharma*, I provide drastically different reasons for this conclusion. See Colton Fehr, "Reflections on the Supreme Court of Canada's Decision in *R v Sharma*" (2023) 60:4 Alta L Rev 933.

21 See *Nur*, *supra* note 6 at paras 114–115 citing Anthony Doob and Cheryl Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Justice 143; Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38:1 Crime & Justice 65; Anthony Doob and Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39:2 Osgoode Hall LJ 287 at 291.

22 See *Hills*, *supra* note 7 at para 137.

23 *Ibid* at para 139 citing *Bissonnette*, *supra* note 2 at paras 46–47, 49–50; *Hilbach*, *supra* note 8 at para 72.

24 The literature will be reviewed below.

The article unfolds in three sections. I begin in Part I by reviewing the Supreme Court's interpretation of section 12 of the *Charter* prior to the *Hills* and *Hilbach* decisions. In Part II, I then explain the Court's justification in the latter cases for preserving this structure and how it built upon its prior jurisprudence. In so doing, I also highlight some of the non-core but nevertheless controversial features of its interpretation of section 12 that the Court glossed over. I conclude by defending the three reforms highlighted above and contending that their application could have impacted the outcome of the constitutional challenge in *Hilbach*.

## I. Section 12 of the *Charter*

Section 12 of the *Charter* provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment." To engage the right, a state act must first constitute "punishment" or "treatment." An act will constitute punishment if "it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either … it is imposed in furtherance of the purpose and principles of sentencing, or … it has a significant impact on an offender's liberty or security interests"[25]. The term "treatment" expands the ambit of section 12, incorporating any "process or manner of behaving towards or dealing with a person or thing"[26]. However, merely prohibiting an act is insufficient. Instead, "there must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' under section 12"[27].

If state conduct constitutes punishment or treatment, then section 12 of the *Charter* requires that it not qualify as "cruel and unusual." The use of the conjunction "and" suggests that relevant state conduct must qualify as both cruel and unusual to violate the *Charter*. Interpreting the same phrase in the context of the *Canadian Bill of Rights*,[28] the Supreme Court originally endorsed this understanding in *R v Miller and Cockriell*[29]. Different methods for interpreting legislative and constitutional documents nevertheless resulted in the Court providing the phrase with a broader meaning under the *Charter*. Adopting the dissenting reasons of Justice Laskin (as he then was) in *Miller and Cockriell*, the Court concluded

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25 See e.g., *R v KRJ*, 2016 SCC 31 at para 41; *Bissonnette*, *supra* note 2 at para 57.

26 See *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711 at 735, 1992 CanLII 87 (SCC).

27 See *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 610, 1993 CanLII 75 (SCC).

28 SC 1960, c 44, s 2(b) [*CBR*].

29 [1977] 2 SCR 680, 1976 CanLII 12 (SCC).

in *R v Smith*[30] that the phrase "cruel and unusual" must be read as the adoption of a "compendious expression of a norm"[31].

This broader reading resulted in the Supreme Court explicitly adopting for the first time two separate "tracks" for proving a violation of section 12 of the *Charter*. The first and least contentious track concerns the method used for punishment. As mentioned earlier, there are certain types of punishment—such as the lash, lobotomy, and castration—which are inherently cruel and unusual[32]. As the Court explained in *R v Bissonnette*,[33] such state conduct is "intrinsically incompatible with human dignity" because of its "degrading" and "dehumanizing" nature[34]. Such conduct will always fail the gross disproportionality standard as "[a] degrading or dehumanizing punishment, by its very nature, outrages 'our standards of decency'"[35].

The broader reading of the phrase "cruel and unusual" adopted in *Smith* also made room for constitutionally challenging more common types of punishment such as incarceration[36] or ancillary orders[37]. As such sentences are not "unusual," a conjunctive reading of the phrase "cruel and unusual" would bar constitutional arguments relating to these punishments. Reading the "cruel and unusual" standard as a single norm nevertheless allows for consideration of whether the effect of a punishment is unduly severe when compared with its penological aims. This will occur where a mandated punishment is "so excessive as to be incompatible with human dignity"[38]. Numerous phrases have been used to describe this threshold, including those punishments which "outrage

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30 [1987] 1 SCR 1045,1987 CanLII 64 (SCC) [*Smith*].

31 *Ibid* at paras 54 (reasons of Justice Lamer), 83 (reasons of Justice McIntyre), and 112 (reasons of Justice Wilson).

32 The Court has identified other examples in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 51 (torture) and *Bissonnette*, *supra* note 2 (stacking periods of parole ineligibility that prevent any realistic prospect of rehabilitation).

33 *Supra* note 2.

34 *Ibid* at *para* 64 citing *Smith*, *supra* note 30 at 1073; *R v 9147-0732 Québec inc.*, 2020 SCC 32 at para 51.

35 See *Bissonnette*, *supra* note 2 at para 64 citing *R v Luxton*, [1990] 2 SCR 711 at 724, 1990 CanLII 83 (SCC) [*Luxton*].

36 See e.g., *Smith*, *supra* note 30; *Luxton*, *supra* note 35; *R v Goltz*, [1991] 3 SCR 485, 1991 CanLII 51 (SCC); *Morrisey*, *supra* note 16; *R v Latimer*, 2001 SCC 1; *R v Ferguson*, 2008 SCC 6 [*Ferguson*]; *Nur*, *supra* note 6; *R v Lloyd*, 2016 SCC 13 [*Llyod*].

37 See e.g., *R v Boudreault*, 2018 SCC 58 (victim surcharge); *R v Wiles*, 2005 SCC 84 (weapons prohibition) [*Wiles*].

38 See *Bissonnette*, *supra* note 2 at para 60.

standards of decency,"[39] are "abhorrent or intolerable,"[40] or "shock the conscience"[41]. Assessing whether this high threshold is met is a normative inquiry requiring that "the views of Canadian society on the appropriate punishment … be assessed through the values and objectives that underlie our sentencing and *Charter* jurisprudence"[42].

Given the inherent complexity of determining whether a punishment or treatment is unconstitutionally severe, the Supreme Court developed a two-staged approach to aid courts in making this determination. At the first stage, courts must determine "what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*"[43]. In so doing, courts are guided by a variety of well-known sentencing principles including the fundamental principle of sentencing requiring that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender"[44]. After determining the fit sentence, the court must then determine "whether the [typically] mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence"[45]. If so, then the law violates section 12 of the *Charter* and will be struck down absent any justification for the law under section 1[46].

A contentious issue nevertheless arose with respect to whether the wording of section 12 of the *Charter* limited its scope to the offender before the court or also permitted offenders to rely upon hypothetical offenders when challenging a mandatory minimum sentencing law's constitutionality. The textual basis for the restrictive approach derives from the word "subjected" which arguably requires that the person before the sentencing judge actually be exposed to the allegedly severe punishment or treatment. The Supreme Court rejected this argument

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39 *Ibid* at para 45; *Lloyd*, *supra* note 36 at para 24; *Morrisey*, *supra* note 16 at para 26; *Wiles*, *supra* note 37 at para 4; *Smith*, *supra* note 30 at 1072.

40 See e.g., *Morrisey*, *supra* note 16 at para 26; *Lloyd*, *supra* note 36 at para 33; *Ferguson*, *supra* note 36 at para 14.

41 *Ibid*.

42 See *Hills*, *supra* note 7 at para 110.

43 See *Nur*, *supra* note 5 at para 46.

44 *Ibid* at para 42 citing *Criminal Code of Canada*, RSC 1985, c C-46, s 718.1. For a review of these sentencing objectives, see paras 40–42.

45 See *Nur*, *supra* note 6 at para 46.

46 I am unaware of any section 12 infringements being upheld under section 1. It is difficult to imagine–but not impossible as I discuss below—how a sentence that is *grossly* disproportionate could satisfy the proportionality test under section 1 of the *Charter*. See *R v Oakes*, [1986] 1 SCR 103 at 135–42, 1986 CanLII 46 (SCC).

in its early jurisprudence[47]. Concern over the potentially unwieldy scope of "reasonable hypotheticals" nevertheless led the Court to more explicitly demarcate the permissible use of such scenarios. Summarizing the jurisprudence in *Nur*, Chief Justice McLachlin concluded that only "reasonable hypothetical scenarios" may be relied upon to constitutionally challenge a mandatory minimum punishment. While such an approach excludes cases that are "marginally imaginable" or "far-fetched,"[48] it does not require that any scenarios posited "are likely to arise in the general day-to-day application of the law"[49]. Instead, the focus is on whether the conduct might reasonably arise in light of the least blameworthy activity captured by the wording of the offence[50].

Chief Justice McLachlin in *Nur* further provided valuable guidance for determining which personal circumstances ought to be factored into the reasonable hypothetical offender analysis. As she wrote, "inquiry into reasonably foreseeable situations the law may capture may take into account personal characteristics relevant to people who may be caught by the mandatory minimum"[51]. In *R v Lloyd*,[52] the Court considered the circumstances of addicts who traffic drugs to support their addiction in support of its conclusion that the impugned mandatory minimum sentence caught conduct that was grossly disproportionate[53]. In *R v Boudreault*,[54] the Court similarly accepted that socio-economic, mental health, disability, and addiction concerns may permeate the reasonable hypothetical offender analysis, an approach that was imperative given that the offenders before the Court endured these and other disadvantages[55].

Finally, the Supreme Court has concluded that real cases are relevant to the constitutional analysis[56]. While the Court originally permitted their use only if the case met the definition of a reasonable hypothetical scenario,[57] it later abandoned this limitation. As Chief Justice McLachlin observed in *Nur*, "reported cases illustrate the range of real-life conduct

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47 See e.g., *Smith*, *supra* note 30 at para 2 (employing a hypothetical offender charged with importing drugs into Canada by bringing back a single marijuana joint from the United States).

48 See *Nur*, *supra* note 6 at para 56.

49 *Ibid* at para 68.

50 *Ibid*.

51 *Ibid* at para 76.

52 *Supra* note 36.

53 *Ibid* at para 33.

54 *Supra* note 37.

55 *Ibid* at paras 49–55.

56 See e.g., *Morrisey*, *supra* note 16 at para 33; *Nur*, *supra* note 6 at para 72.

57 See *Morrisey*, *supra* note 16 at paras 33, 50.

captured by the offence"[58]. In her view, there is "no principled reason to exclude them on the basis that they represent an uncommon application of the offence, provided that the relevant facts are sufficiently reported"[59]. Cases where counsel agree to the facts underlying sentencing to facilitate a guilty plea provides an example of the type of circumstance that may render the facts of a case less realistic as such cases are not subjected to the full rigour of the adversarial process[60].

## II. Revisiting the Jurisprudence

The appeals in *Hills* and *Hilbach* were heard due to several justices of the Alberta Court of Appeal endorsing a radically different interpretation of section 12 of the *Charter* than outlined in the relevant Supreme Court jurisprudence. In particular, Justice O'Ferrall was concerned with the "air of unreality" associated with the use of reasonable hypothetical offenders[61]. Justice Wakeling recited several of the criticisms identified earlier, including those relating to the impact of the conjunction "and" in the phrase "cruel and unusual" as well as the narrowing effect the term "subjected" might have on the reasonable hypothetical offender analysis. In his view, these criticisms meant that the text of section 12 required that the severity track be abandoned in its entirety or, alternatively, that the permissible circumstances under the severity track be limited to the actual offender before the court[62].

The Supreme Court readily dismissed these criticisms. Doctrinally, such an approach was contrary to the *stare decisis* principle. Reasonable hypotheticals have long been employed not only under section 12 but also many other provisions of the *Charter*[63]. Similarly, the Court's jurisprudence interpreting the phrase "cruel and unusual" as a singular norm is well-established[64]. As the Court elsewhere concludes, deciding whether to overturn a legal rule requires judges to balance certainty in application of the law against ensuring the law is "correct"[65]. As the Court held in *R v Henry*,[66] apex courts should be "careful before reversing

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58 See *Nur*, *supra* note 6 at para 72.

59 *Ibid*.

60 See e.g., *Morrisey*, *supra* note 16 at paras 32–33.

61 See *R v Hills*, 2020 ABCA 263 at paras 103, 112–113, 140–143, 197–212, 263.

62 *Ibid* at paras 136, 139.

63 See *Hills*, *supra* note 7 at paras 68–71. For a critique of the broader use of reasonable hypothetical scenarios under section 7 of the *Charter*, see Debra Haak, "The Case of the Reasonable Hypothetical Sex Worker" (2022) 60:1 Alta L Rev 205.

64 See e.g., *Hills*, *supra* note 7 at para 3.

65 See e.g., *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 47; *Canada v Craig*, 2012 SCC 43 at para 27.

66 2005 SCC 76.

a precedent where the effect is to diminish *Charter* protection"[67]. Particularly compelling reasons are therefore required to depart from clear and long-standing precedent with respect to constitutional protections[68]. The absence of such argument in the Alberta Court of Appeal's decision was palpable. As Justice Martin starkly observed, the appellate justices "employed a personal and idiosyncratic approach to sentencing instead of the legal requirements set out in the *Criminal Code* and in [the Supreme] Court's authoritative jurisprudence"[69].

Second, Justice Martin cited the Supreme Court's earlier decision in *Nur* to reiterate the normative arguments for preserving foundational aspects of its section 12 jurisprudence. As she observes, abandoning reasonable hypotheticals "would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order"[70]. The fact that it is the "nature of the law" at issue in a constitutional challenge—not the rights claimant's status—makes it sufficient "for a claimant to allege unconstitutional effects in their case or on third parties"[71]. If the only means for challenging "an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely"[72]. For these reasons, Justice Martin agreed that "allowing accused to employ reasonable hypothetical scenarios is more likely to further the purpose of the *Charter*: protecting citizens from abuse of state power"[73].

Given these reasons, the Supreme Court was not inclined to usher in "major methodological shifts" and instead sought to "provide greater clarity and more guidance" when litigating the constitutionality of sentencing laws under the severity track[74]. In considering the first stage of the gross disproportionality analysis, the Court affirmed that "[t]he goal should be to determine as specific a punishment as would emerge from a traditional sentencing hearing—especially because this is the

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67 *Ibid* at para 44.

68 *Ibid* citing *R v Salituro*, [1991] 3 SCR 654, 1991 CanLII 17 (SCC); *R v Chaulk*, [1990] 3 SCR 1303, 1990 CanLII 34 (SCC); *R v B(KG)*, [1993] 1 SCR 740 at 777–783, 1992 CanLII 116 (SCC); and *R v Robinson*, [1996] 1 SCR 683 at paras 16–46, 1996 CanLII 233 SCC.

69 See *Hills*, *supra* note 7 at para 99.

70 *Ibid* at para 72 citing *Nur*, *supra* note 6 at para 63.

71 See *Hills*, *supra* note 7 at para 72 citing *Nur*, *supra* note 6 at para 51; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 314, 1985 CanLII 69 (SCC) [*Big M*].

72 See *Hills*, *supra* note 7 at para 72 citing *Nur*, *supra* note 6 at para 51.

73 See *Hills*, *supra* note 7 at paras 68–74 citing Fehr, "Tying Down the Tracks", *supra* note 9 at 236.

74 See *Hills*, *supra* note 7 at para 49.

penalty that would be served if the mandatory minimum were declared unconstitutional"[75]. Confusion nevertheless arose from the majority judgment in *Nur*. Therein, Chief Justice McLachlin observed that "[t]he court must determine what constitutes a proportionate sentence *for the offence* having regard to the objectives and principles of sentencing in the *Criminal Code*"[76]. The italicized portion of this quote arguably suggests that only the offence, and not the offender's circumstances, are meant to be considered in the reasonable hypothetical offender analysis[77].

In rejecting this argument, Justice Martin found that "this narrow reading is incomplete and suggests that McLachlin C.J. chose, without any explanation, to only reference half of the wellknown whole of proportionality"[78]. She continued, observing that "[i]t is more sensible to read her reference to a 'proportionate sentence' as incorporating both the gravity of the offence and the moral blameworthiness of the offender"[79]. For Justice Martin, this approach is consistent with Chief Justice McLachlin's conclusion that "the sentence be assessed according to the objectives and principles of sentencing in the *Criminal Code* [which] expressly acknowledges and incorporates the offender's personal characteristics and circumstances"[80]. For these reasons, she reasonably concluded that *Nur* required considering both the offence and the offender's personal circumstances when determining the appropriate sentence at the first stage of the gross disproportionality analysis.

Justice Martin also observed that it is necessary at the first stage of the analysis to come to a definitive conclusion with respect to the quantum of sentence appropriate for the real or hypothetical offender[81]. This task should cause sentencing judges little trouble given their broad expertise in criminal sentencing[82]. However, Justice Martin also recognized that there will often be more than one "correct" solution to the appropriate sentence, variation which is expected across provincial jurisdictions[83]. She nevertheless suggests that the constitutional analysis proceed on the basis of the particular provincial jurisdiction's sentencing norms. This intent

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75 *Ibid* at para 50.

76 *Ibid* at para 60 citing *Nur*, *supra* note 6 at para 46 (emphasis added).

77 *Ibid*.

78 See *Hills*, *supra* note 7 at para 61.

79 *Ibid*.

80 *Ibid*.

81 *Ibid* at paras 50–51.

82 *Ibid*.

83 *Ibid* at para 64 citing *R v Hamilton*, 241 DLR (4th) 490 (ONCA) at paras 85, 156, 2004 CanLII 5549; Clayton Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at §2.5; *R v Shropshire*, [1995] 4 SCR 227 at para 48, 1995 CanLII 47 (SCC); *R v Muise*, 1994 NSCA 198 at 123–124.

is apparent from her suggestion that "if the mandatory minimum falls, the sentence affixed by the judge at the first stage … will be applied to the offender"[84].

With these revisions in place, Justice Martin further categorized the parameters for determining what constitutes a "reasonable hypothetical scenario." While much of this discussion repeated prior holdings,[85] Justice Martin responded to a particularly unprincipled argument by several of the state interveners suggesting that personal circumstances, such as Indigeneity, are irrelevant to the construction of a reasonable hypothetical offender[86]. While the Supreme Court's jurisprudence permitted use of some circumstances, it had yet to address the question of whether immutable circumstances like race may be factored into the analysis[87]. Building upon its jurisprudence, Justice Martin wrote that "characteristics that are reasonably foreseeable for offenders in Canadian courtrooms, like age, poverty, race, Indigeneity, mental health issues and addiction, should not be excluded from consideration"[88]. As Justice Martin affirmed in *Hilbach*, Indigeneity in particular must permeate all stages of the section 12 analysis, including the determination of a fit sentence, the characteristics of a reasonable hypothetical offender, and whether the punishment is grossly disproportionate in its effect[89]. To deny the "reasonableness" of such scenarios is to deny the gross overrepresentation of Indigenous peoples in the Canadian criminal justice system[90].

This conclusion was especially salient given the Supreme Court's decision two months earlier in *Sharma*. The Court faced a challenge to limitations on the availability of conditional sentence orders, provisions of the *Criminal Code* which permit offenders to serve jail sentences in the community[91]. While a conditional sentence was widely available when first enacted,[92] subsequent legislation significantly reduced their availability for a host of offences[93]. This in turn served as a legislative

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84 See *Hills*, *supra* note 7 at para 65. See also paras 50, 95.

85 *Ibid* at paras 77–83, 93.

86 *Ibid* at para 84.

87 For a review and critique, see e.g., Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 Appeal 89.

88 See *Hills*, *supra* note 7 at para 86.

89 See *Hilbach*, *supra* note 8 at paras 41–45.

90 See e.g., *R v Gladue*, [1999] 1 SCR 688 at para 64, 1999 CanLII 679 (SCC); *R v Ipeelee*, 2012 SCC 13 at para 62; *Sharma*, *supra* note 19 at para 142 (citing various sources detailing the impact of the criminal law on Indigenous peoples in Canada).

91 See *Criminal Code*, *supra* note 44, s 742.1.

92 For a review, see *R v Proulx*, 2000 SCC 5 at para 127.

93 See *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, SC 2007, c 12; *Safe Streets and Communities Act*, SC 2012, c 1.

barrier for Sharma—an Indigenous woman who was a "prime candidate for a conditional sentence"[94]—avoiding incarceration[95]. She argued that the adverse effects of narrowing the previously wide availability of conditional sentences is disproportionately felt by Indigenous peoples in particular and therefore violated the right to equality. A narrow majority rejected this argument on suspect evidentiary grounds[96] and because of its impact on Parliament's wide constitutional discretion when crafting sentencing laws[97].

As section 12 could not realistically be pleaded in *Sharma*, I have argued in detail elsewhere that it would be curious if a general right like equality could circumvent the standard specifically included in the *Charter* to govern punishment[98]. This conclusion follows from the Supreme Court's "purposive approach" to constitutional interpretation which requires that all rights be interpreted consistently with "the meaning and purpose of the other specific rights and freedoms with which [a right] is associated within the text of the *Charter*"[99]. If the quantum of sentence imposed in a case could be challenged despite not constituting cruel and unusual punishment, section 12 of the *Charter* and the deference it was meant to afford Parliament's sentencing legislation would become significantly diluted. Indeed, similar reasons were employed by the Court to limit the ability of the other broadest concept in the *Charter* from treading upon the constitutional space carved out for sentencing: the "principles of fundamental justice"[100]. If this argument is persuasive,[101] then the results in the Court's recent sentencing decisions sit comfortably together. While equality as a *right* should not be used to undermine the significant deference to legislative decision-making inherent in section 12,

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94 See *Sharma*, *supra* note 19 at para 141 citing *R v Sharma*, 2020 ONCA 478 at para 88.

95 Sharma pleaded guilty to importing a substantial amount of cocaine which barred her for several reasons from receiving a conditional sentence order.

96 See *Sharma*, *supra* note 19 at para 67 citing *R v Sharma*, 2018 ONSC 1141 at para 257. I elsewhere express my disagreement with this conclusion. See Fehr, "Reflections", *supra* note 20 at 943–944. See also Mackenzie Claggett, "The *Fraser* Era: Remaining Impediments to Equality Claims against Criminal Sentencing Laws" (2023) 71:3 Crim LQ 312.

97 See *Sharma*, *supra* note 19 at para 82.

98 See Fehr, "Reflections", *supra* note 20 at 945–950.

99 See *Big M*, *supra* note 71 at 344 (describing the Court's "purposive approach" to constitutional interpretation).

100 See Fehr, "Reflections", *supra* note 20 at 950–953 citing *R v Malmo-Levine*, 2003 SCC 74 at para 160; *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 68–73. See also *Lloyd*, *supra* note 36 at paras 41–47.

101 For a more detailed overview, see Fehr, "Reflections", *supra* note 20 at 945–953.

any analysis of whether a sentencing law violates section 12 ought to be informed by the role equality plays in *Charter* litigation as a *value*[102].

Finally, Justice Martin's decision in *Hills* sought to bring greater clarity to the second stage of the gross disproportionality analysis. She observed that there are three components that must be assessed to determine whether a mandatory minimum sentence is consistent with section 12[103]. First, a mandatory minimum will be more likely to succumb to constitutional challenge the broader the conduct it catches[104]. In measuring the offence's reach, "a court may consider whether the offence necessarily involves harm to a person or simply the risk of harm, whether there are ways of committing the offence that pose relatively little danger, and to what degree the offence's *mens rea* requires an elevated degree of culpability of the offender"[105]. In characterizing the offence, however, Justice Martin also cautions that "s. 12 is not so exacting a standard that it requires a sentence to be perfectly tailored to every moral nuance of an offender's circumstance"[106].

Second, the sentencing judge must consider all of the effects of the impugned punishment on the actual or hypothetical offender "both generally and based on their specific characteristics and qualities"[107]. This approach must be viewed in light of the fundamental principle of sentencing which implies that "where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate"[108]. Employing this approach, courts have concluded that offenders who worked in law enforcement, suffer from disabilities, or experience harsher conditions by virtue of systemic racism must be considered in the analysis[109]. It is also necessary to consider the conditions under which a sentence is served, as harsher conditions necessarily increase the overall

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102 *Ibid*. For a review of equality's role as a value, see Peter Hogg, "Equality as a *Charter* Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113.

103 See *Hills*, *supra* note 7 at para 122.

104 *Ibid* at para 125.

105 *Ibid* at para 129.

106 *Ibid* citing *R v Lyons*, [1987] 2 SCR 309 at 344–345, 1987 CanLII 25 (SCC).

107 See *Hills*, *supra* note 7 at para 133.

108 *Ibid* at para 135 citing *R v Suter*, 2018 SCC 34 at para 48; Benjamin Berger, "Proportionality and the Experience of Punishment" in David Cole and Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 368 at 368. For a similar intriguing critique, see Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2019) 69:1 UTLJ 85.

109 See *Hills*, *supra* note 7 at para 135 citing numerous cases supporting this application of the proportionality principle. See also Lisa Kerr and Benjamin Berger, "Methods and Severity: The Two Tracks of Section 12" (2020) 94 SCLR (2d) 235 at 238, 244–245.

severity of a sentence[110]. Considerations such as the availability of parole are nevertheless excluded from the analysis because of their discretionary application[111].

Third, the gross disproportionality analysis considers whether the punishment is necessary to achieve its legitimate sentencing aims[112]. The need to denounce and deter criminal conduct drives the rationale for enacting mandatory minimum sentences. While Justice Martin mentions the Supreme Court's prior finding that general deterrence is of dubious efficacy,[113] she nevertheless maintains that both specific and general deterrence may be invoked within the gross disproportionality analysis[114]. The Court reiterates, however, that "[g]eneral deterrence cannot … justify a mandatory minimum alone: no person can be made to suffer a sentence that is grossly disproportionate to what they deserve in order to deter others"[115]. Other sentencing principles must therefore be considered alongside denunciation and deterrence, especially the need to rehabilitate offenders[116]. Viewed through these principles, courts must assess if the mandatory minimum sentence is too harsh in light of other proportionate sentencing alternatives[117].

## III. Further Reforms

While the Supreme Court's reasons in *Hills* and *Hilbach* go a significant distance in clarifying the framework for section 12 analysis, a judgment considering the foundations of a *Charter* provision also provides an opportunity to defend or revise other contentious aspects of the jurisprudence. In my view, three areas are in further need of reform: refining the method for determining the "low end" of the sentencing range; excluding the use of real but "marginal" cases in considering whether a sentence is grossly disproportionate; and abandoning consideration of general deterrence at any point in the severity analysis.

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110 See *Hills*, *supra* note 7 at para 136. See also Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 CJLS 187 at 201.

111 See *Hills*, *supra* note 7 at paras 103–105. Notably, this statement confirmed that the Court was overturning the majority judgment in *Morrisey*, *supra* note 16 at para 41.

112 See *Hills*, *supra* note 7 at para 138.

113 *Ibid* at para 137 citing *Nur*, *supra* note 6 at paras 114–115.

114 See *Hills*, *supra* note 7 at para 139 citing *Bissonnette*, *supra* note 2 at paras 46–47, 49–50.

115 See *Hills*, *supra* note 7 at para 139 citing *Nur*, *supra* note 6 at para 45; *Bissonnette*, *supra* note 2 at para 51.

116 See *Hills*, *supra* note 7 at para 142.

117 *Ibid* at para 143–45.

### A) Defining the 'Low End'

The Supreme Court's suggestion that courts considering a constitutional challenge to a mandatory minimum sentence ought to rely upon the lowest fit sentence at the first stage of the severity analysis is sensible in one sense. Litigating mandatory minimum sentences inherently involves consideration of the least blameworthy conduct the impugned legislation can reasonably encompass. But this does not resolve the tension underlying which court's understanding of the low-end ought to be employed when considering whether the mandatory minimum leads to unconstitutionally severe punishment. It is no secret that sentencing ranges can differ markedly from province to province and that the Court shows these differences significant deference[118]. It follows in my view that apex courts ought not simply adopt the trial judge's determination of a fit sentence as this conclusion will invariably be dictated by the sentencing jurisprudence in that particular province. A declaration of unconstitutionality by the Supreme Court implicates *all* jurisdictions. It is therefore imperative that determining the low end take into consideration the views of each jurisdiction, especially where they differ significantly from the jurisdiction wherein the constitutional challenge arose. The most reasonable approach in such a scenario is to average the disparate sentences to derive a better-informed bottom range sentence.

This methodological proposal no doubt increases the complexity of the first stage of the severity analysis. In particular, it assumes that there is clear precedent on how a similar "reasonable hypothetical offender" would be sentenced in each jurisdiction. This tension may be mitigated in some cases as mandatory minimum sentences will often be challenged in multiple jurisdictions before a case reaches the Supreme Court. Actual sentencing judges' views may therefore be available with respect to similar low-end hypothetical cases when the impugned legislation's constitutionality is finally decided. In other instances, comparable real cases may be available in the sentencing jurisprudence of numerous jurisdictions. Yet it is likely that many, if not most, jurisdictions will not have such authority readily available. While this is not ideal, the answer cannot be to ignore jurisdictions that provide differing sentencing ranges in comparable cases or constitutional challenges. In this scenario, it is still preferable to average the existing sentencing ranges to arrive at a more accurate low range sentence for constitutional analysis.

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118 See e.g., *R v Gardiner*, [1982] 2 SCR 368 at 404, 1982 CanLII 30 (SCC); *Proulx*, *supra* note 92 at para 2; *R v RNS*, 2000 SCC 7 at para 23; *R v Parranto*, 2021 SCC 46 at paras 4, 15, 47.

More onerously, provinces—especially those choosing to intervene in a constitutional challenge to a mandatory minimum sentence—may explicitly seek an advisory opinion on the constitutionality of the impugned legislation[119]. More pointedly, they may seek an opinion on what sentence would be appropriate based on a set of reasonable hypothetical offenders. While this would require effort on behalf of the provincial legislatures, the availability of such an option mitigates any criticism that some provinces' views on sentences will be excluded by virtue of the proposed procedure only considering the sentencing ranges inferable from existing case law. Moreover, the availability of reference opinions mitigates the fact that relevant jurisprudence is statistically more likely to arise in larger jurisdictions. Smaller jurisdictions can still influence the constitutionality of mandatory minimum sentences by employing the reference procedure.

Finding a more precise method for determining a "fit" sentence that takes into account differing provincial views is important as what is determined to be a fit sentence can increase the chances of a law being declared violative of section 12 of the *Charter*. To be sure, my methodological proposal is unlikely to impact all cases. In *Hills*, for instance, the offender was convicted of discharging a firearm at a home contrary to section 244.2(1)(a) of the *Criminal Code*, which at the time of the offence came with a mandatory minimum sentence of four years imprisonment[120]. A majority of the Court found as a matter of fact that a variety of weapons meeting the definition of a "firearm" could not perforate the wall of a typical residence[121]. It followed, the majority concluded, that a person firing a paintball gun at a residence would be subjected to a lengthy prison term, a result which it concluded constituted cruel and unusual punishment[122]. Given this factual finding, it would be surprising if any jurisdiction considered imposing a custodial sentence for such an offender, let alone a lengthy penitentiary sentence.

The *Hilbach* case nevertheless illustrates why taking into consideration broader provincial sentencing jurisprudence could impact the determination of a mandatory minimum sentence's constitutionality. The offenders in that case challenged two mandatory minimum sentences:

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119 Such "reference" opinions are widely available at both the federal and provincial levels. For an excellent overview, see Leah McDaniel, "The Reference Procedure: The Government's Ability to Ask the Court's Opinion", Centre for Constitutional Studies, online: <https://tinyurl.com/4mzy9aav> [perma.cc/463C-2J9F].

120 See *Criminal Code*, *supra* note 44, s 244.2(3)(b). Notably, the provision was repealed before the Supreme Court hearing. See *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15 [*Amendment Act*].

121 Justice Cote dissented on this point and would have upheld the laws as a result.

122 See *Hills*, *supra* note 7 at para 5.

the first for robbery with a prohibited or restricted firearm;[123] and the second for robbery with a regular firearm[124]. Before their repeal,[125] these sentencing provisions proscribed a five-year and four-year sentence for each respective offence. Unlike the offences in *Hills*, however, a majority of the Court rejected that either provision violated section 12 of the *Charter*. Hilbach, relying upon his own circumstances,[126] committed a robbery with a young teenager while wielding an unloaded sawed-off shotgun[127]. He demanded money while pointing the gun, and his accomplice used physical force against the store clerks[128]. Hills was 19 years old, on probation, and subject to a weapon ban at the time of the offence[129]. He was sentenced to the mandatory minimum five-year period of incarceration which was upheld by a majority of the Court as it would not be grossly disproportionate to a "fit and proportionate sentence" of three years[130].

In a case heard alongside *Hilbach*,[131] another offender offered a series of hypothetical scenarios to challenge the four-year minimum sentence for robbery with a regular firearm. The Supreme Court accepted two of these scenarios as "reasonable." In both scenarios, a young Indigenous man with addictions and cognitive/mental health issues committed a relatively "non-serious" robbery wherein a "BB" or "airsoft" gun—unloaded in one of the hypothetical scenarios—was used to threaten the victim. The offender thereafter departs with a small amount of goods[132]. In each case, the Court concluded that two- to two-and-a-half years' imprisonment would be a fit and proportionate sentence in the jurisdiction within which the constitutional challenge arose[133]. The Court also considered two lower court cases wherein similar offences committed by slightly more sympathetic accused resulted in lower sentences being fit—ranging from 18 months to two-years[134]. While one of these cases was from the same

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123 See *Criminal Code*, *supra* note 44, s 344(1)(a)(i).

124 *Ibid*, s 344(1)(a.1).

125 See *Amendment Act*, *supra* note 120.

126 See *Hilbach*, *supra* note 8 at para 49.

127 *Ibid* at para 21.

128 *Ibid*.

129 *Ibid*.

130 *Ibid* at paras 49–51.

131 See *R v Zwozdesky*, 2019 ABQB 322.

132 *Ibid* at paras 85–86. The scenarios are slightly more detailed, but the above description captures their essence.

133 *Ibid* at para 91.

134 See *R v Link*, 2012 MBPC 25; *R v Johnas*, 1982 ABCA 331 (describing a sentence for a co-accused named Lobdoen).

jurisdiction as *Hilbach* (Alberta) the more lenient 18-month sentence originated in Manitoba[135].

The hypothetical scenarios and cases raised in *Hilbach* were found to be "close to the line" by Justice Martin in her majority decision[136]. Put differently, it would not take much more downward pressure on the fit sentence before the Supreme Court would strike down each of the mandatory minimum sentences at issue. Without generalizing about the sentencing trends in various jurisdictions,[137] it notable that the sentences at issue in *Hilbach* were taken primarily from Alberta, with one outlier decision deriving from the Manitoba Provincial Court. In my view, it is not a stretch to think that other jurisdictions would view the types of real cases and reasonable hypothetical scenarios raised in *Hilbach* as warranting lower sentences. If true, the "fit" sentence would be pushed down potentially to the point that the mandatory minimum sentence would become grossly disproportionate. At the least, in these "close to the line" cases such an analysis should be undertaken as any other conclusion allows one narrow jurisdiction's conception of a "fit" sentence to dominate the analysis, a result that could either unduly result in a mandatory minimum sentence being upheld or declared violative of section 12 of the *Charter*.

Finally, it is notable that other members of the panel in *Hilbach* were convinced that the constitutional threshold was passed. In their dissenting reasons, Justices Karakatsanis and Jamal wrote that "a sentence that is double or nearly double a fit sentence is grossly disproportionate in violation of s. 12 of the *Charter*"[138]. In their view, "[i]t is hard to fathom how a sentence nearly double the amount of a proportionate sentence would not shock the conscience of Canadians"[139]. With great respect,

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135 While the 18-month sentence was actually served as a conditional sentence in *Links*, *supra* note 134, this was not found by the Supreme Court to be a fit case for a conditional sentence. See *Hilbach*, *supra* note 8 at para 93.

136 See *Hilbach*, *supra* note 8 at para 51.

137 It is notable, however, that the prairie provinces and the territories (where the Alberta Court of Appeal serves as the appellate court), along with Prince Edward Island, have the highest incarceration rates in Canada. See Jamil Malakieh, "Adult and Youth Correctional Statistics in Canada" *Statistics Canada* (2018/19), online: <https://tinyurl.com/y59kb6jh> [perma.cc/4XV8-YXYX]. As one scholar observes, the harsher approach to sentencing is also apparent from these jurisdictions' endorsement of "starting point" sentencing. See Tim Quigley, "Sadly, No RIP for Starting-Point Sentences" (2022) 75 CR (7th) 306 ("it is no coincidence that the jurisdictions using starting point methodology also have the highest incarceration rates and the most disproportionate imprisonment of Indigenous offenders").

138 See *Hilbach*, *supra* note 8 at para 131.

139 *Ibid* at para 145.

this statement strikes me as imprudent. It is simply unclear why "nearly double" the sentence that is determined to be appropriate is the mark for gross disproportionality. Such an approach undermines the *highly* deferential standard the Supreme Court has consistently inferred from the phrase "cruel and unusual." Parliament is a legitimate player in defining sentences for crimes, and the dissent's approach dismisses out of hand Parliament's ability to modify jurisprudence based on increasing social problems like use of firearms during robberies. Courts are simply unlikely to move at the desirable speed in denouncing this type of conduct given the molasses pace of the common law. A legislative jolt in the sentencing framework would become very difficult if the standard were set as low as the dissent would have set it. For these reasons, Justice Martin's decision not to quantitatively opine upon when a sentence becomes grossly disproportionate is prudent.

Before leaving this issue, I suspect that some commentators may not be persuaded that averaging low-end sentences from the various available provincial court judgments is necessary when conducting a constitutional analysis[140]. They may object that jurisdictions that tend to impose lower sentences will have their views on the appropriate application of section 12 of the *Charter* unduly thwarted. This rebuttal should nevertheless be viewed in light of the inverse consequence of only using a single jurisdiction's jurisprudence in arriving at a constitutional conclusion. It goes without saying that a constitutional conclusion by the Supreme Court impacts *all* provinces equally. If the provincial appellate courts are legitimately divided on what is an appropriate sentence, the constitutional issue should not be unduly impacted by which jurisdiction's case was ultimately appealed to the apex court. With that said, I do not mean to imply that disproportionate weight should be attached to a truly outlier jurisdiction. If the vast majority of provinces have a similarly low range for a particular offence, it is nevertheless notable that the existence of one jurisdiction with a substantially higher range would be minimally impactful when averaging low-end sentences.

## B) Existing Precedent

It is also necessary to consider whether existing case law that would not constitute a reasonable hypothetical scenario should form the basis for striking down a law[141]. While all agree that the actual offender in such a case can invoke their own circumstances to strike down a mandatory

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140 I greatly appreciate one of the reviewer's candid objection to this effect.

141 See *Nur*, *supra* note 6 at para 72.

minimum sentence,[142] it is less clear that some other offender should be able to rely upon such a case when constitutionally challenging the same minimum sentence. It should be acknowledged at the outset that such a circumstance would require an unlikely convergence of events. First, a mandatory minimum sentence must have imposed grossly disproportionate punishment in a real but "marginal" case. Second, the offender in that case must not have successfully challenged the law's constitutionality at the Supreme Court. If they had done so, then the law would have been struck down thereby preventing the need to re-challenge the law. Finally, there must not be any other reasonable hypothetical circumstance that could substitute for the marginal case in challenging the constitutionality of the mandatory minimum sentence.

The controversy over this issue traces back to *Morrisey* wherein the majority of the Supreme Court originally concluded that "reported cases can be used with caution as a starting point" but that "additional circumstances can be added to the scenario to construct an appropriate model against which to test the severity of the punishment"[143]. Adding such "additional circumstances" was necessary to ensure that the case qualifies as one that could "commonly arise with a degree of generality appropriate to the particular offence"[144]. The dissenting justices in *Morrisey* were troubled by this approach. In their view, the majority's limitation "makes the constitutionality of the provision dependent essentially on timing"[145]. As Justice Arbour observed, the mandatory minimum "will be upheld until it is challenged in a 'marginal' case, or at least one that was viewed as too marginal to constitute a reasonable hypothetical, but when that case arises, the section will be struck down under the first branch of the [section 12] test … for the benefit, presumably, of all subsequent cases"[146].

The concern raised in Justice Arbour's dissent in *Morrisey* is understandable given the narrow description and application of reasonable hypothetical scenarios by the majority. At issue was a four-year mandatory minimum sentence for the offence of criminal negligence causing death in cases where a firearm was used[147]. Writing for the majority, Justice Gonthier concluded that only two subsets of cases constituted reasonable hypothetical scenarios: instances where an individual is "playing around with a gun" and "hunting accidents"[148]. In so doing, however, Justice

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142 To conclude otherwise would result in the court specifically sanctioning the imposition of cruel and unusual punishment on that offender.

143 See *Morrisey*, *supra* note 16 at para 33.

144 *Ibid* at para 50.

145 *Ibid* at para 89.

146 *Ibid*.

147 See *Criminal Code*, *supra* note 44, s 220(a).

148 See *Morrisey*, *supra* note 16 at paras 50–54.

Gonthier tersely dismissed Justice Arbour's observation that a variety of actual cases imposed very lenient sentences in the exact hypothetical scenarios contemplated by the majority[149]. These sentences included a fine,[150] probation orders,[151] and relatively short periods of incarceration[152]. A strong case could therefore be made that a four year minimum prison sentence would constitute grossly disproportionate punishment.

While I agree that the types of cases raised by Justice Arbour ought not be excluded from the constitutional analysis, this is because I see no difficulty fitting them into the Supreme Court's subsequently broader conception of reasonable hypothetical scenarios. But she went further and would incorporate any remote but real case in the constitutional analysis, a decision that was later adopted by the majority in *Nur*[153]. In my view, this was imprudent as it ignores the middle-ground struck by the use of reasonable hypothetical scenarios in challenging mandatory minimum sentencing laws. At the heart of that balance are two considerations: the need to protect citizens from grossly disproportionate treatments/punishments and affording Parliament sufficient constitutional space to influence the law of sentencing[154]. Allowing the actual offender in a remote case to challenge the constitutionality of the law accomplishes the former end. But allowing real cases that are truly marginal to subsequently form the basis of striking down a law places almost no weight on Parliament's legitimate role in governing sentencing. In my view, a real but remote scenario—should it arise—therefore ought to be ignored in the constitutional analysis.

## C) General Deterrence

In considering the constitutionality of the impugned mandatory minimum sentences in *Hills*, the majority cites Chief Justice McLachlin's analysis in *Nur* under section 1 of the *Charter* considering whether there is any "rational connection" between increased sentences and lower levels of crime. Her comments are worth citing in full:

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149 *Ibid* at paras 77–81, 86–87. She also considered a variety of other scenarios relating more to the offence of unlawful act manslaughter, in particular in the spousal abuse context. See paras 83–85.

150 See *R v McCrea*, [1970] 3 CCC 77, 1969 CanLII 1030 (SKCA).

151 See *R v Lefthand*, 1981 CarswellAlta 355, 31 AR 459 (ABPC); *R v Ball*, [1993] OJ No 3207, 22 WCB (2d) 334 (ONCJ (GD)); *R v Yun Ying Lee*, 1981 CarswellOnt 3599, 6 WCB 344 (summarized in *Saswirsky*, *infra* note 146).

152 See *R v Weber*, [1973] 1 WWR 262, 1972 CanLII 1292 (BCCA) (9 months); *R v Saswirsky* (1981), 6 WCB 344, 1984 CanLII 3551 (ONSC) (12 months); *R v Bell* (1992), 17 BCAC 36 (BCCA) (18 months).

153 See *Nur*, *supra* note 6 at para 72.

154 See *Hills*, *supra* note 7 at paras 73, 113.

> Empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes … The empirical evidence "is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences." Despite the frailty of the connection between deterrence and mandatory minimum sentence provisions, a rational connection exists between mandatory minimum terms of imprisonment and the goals of denunciation and retribution. Therefore, this requirement of the s. 1 test is met[155].

Put differently, the evidence supporting the view that a uniform increase in sentence quantum will deter others from committing crime is not supported by the empirical evidence. The only reason the impugned sentence in *Nur* survived the "rational connection" stage of the test under section 1 of the *Charter* is because the offence served a denunciatory function.

As I have summarized in detail elsewhere,[156] the general deterrence effect has come under increased skepticism for three main reasons. First, it is difficult for social scientists to separate any deterrent effect arising from getting caught from any effect resulting from increased punishment[157]. Without such knowledge, it cannot be said with any degree of confidence that increasing sentences are responsible for any subsequent drop in a particular type of crime. Second, it is empirically unclear that offenders are aware of any increased sentences, even those that passed via the legislative process[158]. Finally, the time between commission of a crime and the resulting punishment is often significant. The low celerity of punishment results in offenders weighing immediate punishment much more heavily than a distant punishment thereby rendering it likely that offenders would misapprehend the cost of any increased penalty[159]. These three empirical challenges at the heart of the criminological literature together provide ample reason to doubt that general deterrence is efficacious as a sentencing principle[160]. Indeed, they support the conclusion in *Nur* that insufficient proof exists for general deterrence to meet the most basic step

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155 See *Nur*, *supra* note 6 at paras 114–115 (citations omitted).

156 See Colton Fehr, "Instrumental Rationality and General Deterrence" (2019) 57:1 Alta L Rev 53 at 56–60 [Fehr, "General Deterrence"]; Colton Fehr, "Criminal Law in Canada" in Neil Boyd, ed, *Understanding Crime in Canada: An Introduction to Criminology*, 3rd ed (Toronto: Emond, 2023) (forthcoming). See also the social science sources cited *supra* note 21.

157 *Ibid*.

158 *Ibid*. Notably, it strikes me as even more unlikely that potential criminals will be aware of a judge employing general deterrence under *Criminal Code*, *supra* note 44, s 718(b), when passing sentence in a courtroom. See Fehr, "General Deterrence", *supra* note 156 at 59.

159 *Ibid*.

160 See the literature cited *supra* note 21.

of the section 1 proportionality analysis: rational connection between a law's means and ends[161].

Despite acknowledging these critiques, the Supreme Court in *Hills* concluded that "general deterrence should play a limited role in crafting a fit sentence" at the first stage of the severity analysis[162]. It also reiterated this position in *Hilbach*[163]. Citing its pre-*Nur* decision in *Morrisey*, the majority agrees that "general deterrence has a role, as '[i]t cannot be disputed that there is a need for general deterrence' when a person endangers the safety of others in wielding a firearm"[164]. Lost in its analysis—from *Morrisey* in the year 2000 up until *Hills* and *Hilbach* in 2023—is the conclusion in *Nur* that no reliable empirical evidence exists to support a general deterrence effect.

The implications of departing from this empirically sound conclusion are important as the *Nur* decision had the potential to impact the constitutional viability of *all* mandatory minimum sentences moving forward. This follows given the logic of accepting general deterrence as a relevant consideration in the constitutional analysis. Adding a mandatory minimum sentence's general deterrence effect to the factors relevant to determining whether the low-end range of cases is constitutional should render imposing minimum sentences on less blameworthy offenders more likely to survive constitutional scrutiny. But if these reasons are taken away then the corollary should be true, and what is tolerable at the low-end should be more strictly scrutinized as the appropriate sentence will be determined only by the need to denounce and deter the specific (real or hypothetical) offender before the sentencing judge.

Such an analysis nevertheless gives rise to a final question: what role, if any, should there be for general deterrence in the constitutional analysis? The current sentencing scheme provides that general deterrence is relevant to devising a sentence, and the Supreme Court has suggested that general deterrence should play a role at both the rights and justificatory stages of

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161 See *Nur*, *supra* note 6 at paras 114–115.

162 See *Hills*, *supra* note 7 at para 161.

163 See *Hilbach*, *supra* note 8 at paras 72, 107.

164 *Ibid* at para 107 citing *Morrisey*, *supra* note 16 at para 46. Justice Martin does, however, recognize that "it is true that Parliament's prioritization of general deterrence departs more seriously from sentencing norms in the case of offenders … who suffer from mental disorders, because these types of offenders are inappropriate mediums by which to discourage others" (*ibid* citing Clayton Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at §5.316; *R v Dedeckere*, 2017 ONCA 799 at para 14; *R v Batisse*, 2009 ONCA 114 at para 38).

the analysis[165]. In light of *Nur*, however, it seems odd to permit general deterrence to play any role at the rights stage. Absent broad evidence that the general deterrence principle can ever achieve its objective, it is simply unfair to grant the state this assumption when considering if a rights infringement occurred[166]. To conclude otherwise would require courts to place irrational upward pressure on the tolerable boundaries of mandatory minimum sentences.

The structure of justification-based reasoning is also better capable of accounting for the *raison d'etre* of the general deterrence principle. When conducting constitutional analysis, section 1 justifications engage in a utilitarian balancing of some external policy objective against a deprivation of an accused's rights. This is precisely the function of the general deterrence principle in relation to the appropriate punishment for an offence. Put differently, the general deterrence principle cannot reasonably purport to increase the offender's punishment to account for their individual blameworthiness or the gravity of the offence. Instead, the general deterrence principle allows courts to impose increased sanctions "for the purpose of discouraging … others from engaging in criminal conduct"[167]. If the offence's gravity and offender's person dictate what sentence is deserved and thus proportionate,[168] then any determination of whether the individual punishment is grossly disproportionate contrary to section 12 of the *Charter* ought to be limited to those considerations. The state's desire to instrumentalize individuals to achieve its broader crime reduction objective would thus fall to the section 1 stage of analysis.

This is an admittedly retributivist understanding of proportionality. But that is how Parliament defined proportionality in section 718.1 of the *Criminal Code*. Parliament's conception and description of that principle as the "fundamental" principle of sentencing is therefore a logical proxy for defining what is relevant to determining whether a mandatory minimum sentence is grossly *disproportionate* under section 12 of the *Charter*. While the Supreme Court has more recently blurred retributive and utilitarian conceptions of proportionality, I agree with Marie Manikis that these conceptions ought to be kept separate[169]. While utilitarian considerations may be relevant to whether a punishment is "fit," or otherwise takes into account relevant collateral consequences, a consideration like general

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165 The Supreme Court has acknowledged that general deterrence may play a role at both the section 12 and section 1 stage. See *Morrisey*, *supra* note 16 at para 45.

166 The state is granted this assumption because defendants are the ones required to prove that a punishment imposes an unconstitutionally severe effect.

167 See *R v BWP*, 2006 SCC 27 at para 2.

168 As provided in the *Criminal Code*, *supra* note 44, s 718.1.

169 See generally Marie Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions" (2022) 59:3 Osgoode Hall LJ 587.

deterrence is irrelevant to whether a punishment is proportionate[170]. This rationale should be tracked in the constitutional context given the relationship between proportionality in the desert sense at the rights stage of the analysis and utilitarian conceptions of proportionality fitting neatly into the section 1 stage of analysis.

## Conclusion

The Supreme Court's decisions in *Hills* and *Hilbach* laudably solidified the basic framework for conducting constitutional challenges to mandatory minimum sentences under the severity track of section 12 of the *Charter*. These decisions are particularly welcome for their extension of reasonable hypothetical scenarios to allow for personal circumstances relating to substantive equality to be factored into the constitutional analysis. Such an approach mitigates concerns arising from limitations placed on the equality right affirmed by the majority in *Sharma*. But difficulties remain with the finer points of the Court's constitutional punishment jurisprudence. My aim has been to identify and make reform proposals in areas relating to determining the appropriate low-end sentence, whether to consider real but "marginal" cases, and the role of general deterrence in the constitutional analysis. Adopting my proposed reforms, I suggest, will only serve to improve the Court's already rich and thoughtful section 12 jurisprudence.

170 *Ibid* at 621–623.