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Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?

Venus Sayed
Osgoode Hall Law School of York University (Student Author)

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A BAND-AID SOLUTION TO THE ILLS OF MANDATORY MINIMUMS?

Venus Sayed

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Abstract

This work examines the Supreme Court of Canada's statutory safety valve proposal in the case of *R. v. Lloyd* as a solution to the problems presented by mandatory minimum sentences. The thesis develops a safety valve matrix which allows various valves to be plotted along broad-narrow and high-low discretion matrices. Following a review of the development of exemptions in Canadian jurisprudence, the paper then takes a comparative approach of analysis to look at three similarly placed jurisdictions – Australia, the United States and the United Kingdom. By examining the statutory safety valves in use in these jurisdictions, this work concludes that a broad, high-discretion safety valve may be most effective in the Canadian context.

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To my three sons and four brothers, may your intellectual pursuits never end.

To my husband, Marko, I dedicate this thesis to you, the light of my life.

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I. INTRODUCTION AND BACKGROUND

A. Introduction

Over the last century, mandatory minimum sentences (MMSs) have emerged across many jurisdictions as a common tool meant to deter and punish criminal behaviour. MMSs demand that, regardless of the facts or moral blameworthiness of an offender before a court, the sentencing judge must impose a minimum punishment set by the legislature for a particular offence.

A single mandatory minimum can apply equally to both ends of the range of moral blameworthiness imaginable for a single offence. For example, the professional drug trafficker who engages in drug dealing for profit, undoubtedly possessing a high degree of moral blameworthiness, can arguably receive the same sentence as the person with a drug dependency who cares a small amount with friends or family – though often a sentencing court would move up from a mandatory sentence when more aggravating circumstances present.

It can be argued that two extreme ends of a hypothetical scenario are reflective of the inherent problem of MMSs: minimum sentences apply to a range of offenders with different facts and moral blameworthiness, and there is no case in which a judge would be permitted to sentence an offender, who may be less blameworthy, below the predetermined floor.

As a result of this tension, a rich body of literature examining MMSs has emerged. Across the jurisdictions examined in this thesis, the arguments against MMSs share similar concerns: their disparate impact on certain populations, unbalanced power dynamics during the plea-bargaining process through increased prosecutorial discretion, and compromises to the separation of powers in a constitutional democracy. In response to these problems, scholars have suggested repealing MMSs. Given that outright repeal may be

politically difficult to accomplish, scholars, jurists and politicians have, over the years, suggested a legislative safety valve as a possible solution to the MMS problem. Most importantly for the purposes of this analysis, in *R v Lloyd,*[1] the Supreme Court of Canada (SCC) explicitly suggested a legislative safety valve as a solution to the problems presented by MMSs. Chief Justice McLachlin, explained:

> If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences. Another solution would be 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.[2]

While solutions to MMSs, such as legislated safety valves, are often discussed generally, they are rarely examined as critically as the MMSs themselves. This thesis considers the state of MMSs in Canada and the viability of the statutory exemption scheme proposed by the SCC. The analysis concludes that the "safety valve" considered by Chief Justice McLachlin[3] in *Lloyd* would undoubtedly address some of the difficulties presented by MMSs; however, its efficacy will be tied to the amount of discretion afforded to the trial judge, and ultimately, no matter its form, certain problems will persist. Ultimately, safety valves would give back some discretion to sentencing judges and allow for more individualized sentencing.[4]

The analysis will be presented in three parts. The thesis begins by briefly examining some of the difficulties with MMSs identified in Canadian scholarship. MMSs create challenges for the criminal justice system: disparate impacts on minority and marginalized groups, financial and physical strains on the prison system, reduced judicial discretion, and an unbalanced plea-bargaining process. These are real and practical problems felt daily by accused persons navigating through the criminal justice system, and their families.

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[1] *R v Lloyd*, 2016 SCC 13 [*Lloyd*].
[2] *Ibid* at para 35.
[3] Justice McLachlin uses the term "safety valve." This thesis will use the terms "safety valve" and "statutory exemption" interchangeably as referring to a legislated exception to a mandatory minimum sentence prescribed by law (i.e. not an exception to a mandatory minimum that is provided to an offender pursuant to a constitutional right or some other bill of rights).
[4] Safety valves are a potential solution which would operate within the current incarceration framework that the Canadian criminal justice system is based in, and accordingly would not disrupt the overall logic or functioning of this system. Furthermore, it is worth noting that this thesis assumes that incarceration is a valid starting premise and does not explore prison reform or alternatives to imprisonment for the purposes of this discussion.

Mandatory minimums also call into question the separation of the legislature and judiciary. This part as a whole pays particular attention to how these problems play out in Canada. Its aim is not to provide an exhaustive list of the issues facing MMSs, given that many of those issues are widely understood and accepted. Nor is the intent of this analysis to provide a critique of these issues. The purpose of this section will be to highlight that difficulties exist, and these difficulties serve as the backdrop for the proposed solution, the statutory safety valve. Whether the statutory safety valve is a solution to MMSs is the focus of this work.

Three subsections will make up the second part of this analysis. Section A begins with a detailed look at the Canadian legislative and political history surrounding exemptions to MMSs, with a focus on the development of judicial discretion and constitutional exemptions in SCC jurisprudence. This discussion then turns to more recent ideas of exemptions which have surfaced in discussions of statutory exemptions more specifically. This suggestion, as will be shown through the historical narrative, was born of the Supreme Court's final and emphatic rejection of constitutional exemptions to MMSs. The SCC's decisions in *Ferguson,*[5] *Nur,*[6] *Boudreault,*[7] and most specifically, *Lloyd*[8] are canvassed throughout. Section B introduces the topic of statutory exemptions to MMSs and discusses their potential benefits and risks. Section C presents the different forms safety valves take in other jurisdictions, which are in turn plotted on a matrix along two axes: broad versus narrow, and low discretion versus high discretion.

The third part of the analysis is a comparative analysis and a final assessment. Part III provides a comparative analysis of MMSs and the forms statutory exemptions take in three common law jurisdictions: the United States, the United Kingdom and Australia. The part explores the unique way in which these

[5] *R v Ferguson*, 2001 SCC 6 [*Ferguson*].
[6] *R v Nur*, 2015 SCC 15 [*Nur*].
[7] *R v Boudreault*, 2018 SCC 58 [*Boudreault*].
[8] *Lloyd*, *supra* note 1.

jurisdictions use safety valve provisions (which will range from broad to narrow, and low discretion to high discretion) alongside MMSs and provides possible working examples for Canada.

The methodology selected for this research has been a comparative method as it would provide reference points to situate Canadian developments, help the reader understand if Canada is going with or against developments in this area, and point to currents and developments that would not otherwise be visible if the assessment was done in a vacuum. This comparative work is useful in the Canadian context as it can guide MMS reform efforts. Other jurisdictions can provide different forms of safety valves for Canadian consideration.

The United Kingdom and Australia are comparable jurisdictions as they are English-speaking parliamentary democracies that function under a common-law system. The U.S., while not a parliamentary system, is nonetheless a useful comparison point because of the influence the U.S. legal system has on Canada and the generally comparable nature of the two democracies. The U.S., though a presidential system, has also had a significant impact on the development of Canadian criminal law. These three examples present a similar legal heritage to Canada's and make for accurate comparison points. From a research perspective, the accessibility of legal research and writing relating to these jurisdictions will allow for a cataloguing of their safety valve legislation including the public discourse leading to its implementation, and the form the safety valve legislation ultimately took.

The comparative method does have weaknesses. There will always be gaps in comparative studies like these that involve similar jurisdictions. No two jurisdictions are the same, and this examination does not have space to account for the social, political and legal differences within each jurisdiction that may account for its particular need or reaction to the safety valve legislation that was used. Second, the comparative method does not account for the unavailability of data. Each jurisdiction had its unique challenges, inevitably compounded by many variables not fully captured within this examination.

The analysis will conclude with Part IV which will briefly pull on some lessons learned from the comparative analysis, and map the safety valve from each jurisdiction along a matrix. Ultimately, despite their unique implementation in different contexts, this analysis will find that the comparative lens reveals the ability for safety valves to address some, but not all of the issues of MMSs. Nonetheless, lessons do emerge and are able to provide guidance for the Canadian landscape. The conclusion will evaluate whether statutory exemptions, as suggested by Chief Justice McLachlin in *Lloyd*, would cure the ills created by MMSs in Canada. The findings will be assessed, and recommendations will be made. Future areas for study, such as the use of sentencing councils and guidelines as a potential measure to ensure statutory exemptions operate as an effective counterbalance on MMSs will be recommended.

B. A Brief History of Mandatory Minimums in Canada

Canada has historically avoided the use of mandatory minimum sentences. Canada's original *Criminal Code*,[9] enacted in 1892, only carried six mandatory minimum sentences.[10] By 1969, after various repeals and overhauls of the *Code,* only one mandatory minimum remained.[11] By 1976 mandatory minimum sentences had been added (i) for the use of a firearm during the commission of an offence, (ii) for certain driving offences, and (iii) as a result of the abolition of the death penalty, for high treason and first and second degree murder.[12] There were six mandatory minimums on the books at that time, the highest the country had seen.

[9] *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*].
[10] Nicole Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2001) 44:3 Criminal Law Quarterly, 279 at 1 [Crutcher].
[11] Julian V. Roberts, Nicole Crutcher & Paul Verbrugge, "Public attitudes to sentencing in Canada: Exploring recent findings" (2007) Canadian Journal of Criminology and Criminal Justice 49:1, at 81 [Roberts, Crutcher & Verbrugge].
[12] Crutcher, *supra* note 10, at 8-11.

By 1995, following this gradual increase of the 1970s, the *Canadian Firearms Act* came into force.[13] Bill-68 introduced the most mandatory minimums per single piece of legislation until that point. It brought into force nineteen mandatory minimums in total, ten of which were for firearms offences that carried four-year minimums.[14]

From the *Charter*'s inception in 1982 until 1999, only 29 mandatory minimum offences existed in the *Criminal Code.* In these early *Charter* days, there was little political pressure pushing towards MMSs. There were no house governmental debates supporting minimum penalties at the time. All discussions were against such sentences.[15] The arguments against minimum sentences focused on the loss of judicial discretion, the financial costs of such sentences and the sentence ceilings that would be created.[16]

The year 2005 marked a turning point. The city of Toronto saw 80 homicides, 52 of which were shooting deaths.[17] In addition to the year seemingly being fraught by violence, the infamous "Creba shooting" took place on boxing day of that year. Canadian media heavily covered the death of the vibrant 15-year old high school student who was caught in the crossfires of a gun battle on the busy Yonge Street in Toronto. These images, in conjunction with the intense media coverage of the Creba shooting provided the Conservative party of Canada with a platform to address crime control and respond to the growing public anxiety over violence. Though the Liberals and New Democratic Party also toughened their stance on sentencing, the Conservatives called for sweeping increases in the number and severity of mandatory sentences and the

[13] *Firearms Act*, S.C. 1995, c. 39.
[14] Department of Justice Canada, "Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models" (2019) at 9, online (pdf): <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/rr05_10.pdf> [Department of Justice].
[15] Crutcher, *supra* note 10 at 10.
[16] *Ibid* at 11.
[17] Noreen Rasbach, "It's clear. Strict gun laws, fewer people shot." *The Globe and Mail,* (12 April 2008), online: <https://www.theglobeandmail.com/news/national/its-clear-strict-gun-laws-fewer-people-shot/article17983717/>

public generally responded positively. [18] The "year of the gun,"[19] as 2005 came to be known by police and media, played a significant role in securing a Conservative victory.

The Conservative Party's tough-on-crime approach was shaped by a year that came to be defined by crime. Upon being elected, the proposed reforms came swiftly. The years 2005 onwards saw the most concentrated increase in the number and severity of MMSs to date,[20] with penalties increased for firearms offences, sexual offences, driving offences, and drug offences. [21] By 2007, there were 42 *Criminal Code* offences in Canada that carried mandatory minimum sentences.[22] A historic change in Canadian criminal law was taking place.

The *Safe Streets and Communities Act* of 2012[23] introduced sweeping changes and the first mandatory minimum sentences to the *Controlled Drugs and Substances Act*.[24] As of the date of this thesis, the *Criminal Code* and *CDSA* together contain 147 mandatory minimums, some of which have been deemed unconstitutional at various levels of Court but still remain in place.[25] At no other point in Canadian history did the criminal law contain so many mandatory minimums. This new sentencing mechanism had expanded the Canadian approach to sentencing.

Mandatory minimums sit within a broader world of sentencing guidance, which historically, has been resisted in Canada. Unlike the United States and United Kingdom, Canada has resisted using sentencing guidelines to legislate the sentencing process and impose limits on judicial discretion. Studies from the

[18] Roberts, Crutcher & Verbrugge, *supra* note 11 at 78.
[19] Global News, "A look back to 2005: The Summer of the Gun" (June 8 2016), online: Global News < https://globalnews.ca/video/2750283/a-look-back-to-2005-the-summer-of-the-gun>.
[20] Mary Allen, "Mandatory minimum penalties: An analysis of criminal justice system outcomes for selected offences" Juristat: Canadian Centre for Justice Statistics (2017): 3 at 19.
[21] *Ibid.*
[22] Roberts, Crutcher & Verbrugge, supra note 11 at 81.
[23] *Safe Streets and Communities Act*, S.C. 2012 c. 1.
[24] *Controlled Drugs and Substances Act* S.C. 1996, c. 19 [*CDSA*].
[25] Matthew Oleynik, "MMS.watch," online: <https://mms.watch/#about>.

1970s and 1980s in Canada suggested that sentencing patterns that were appearing in Canada seemed to be predictable based on the identity of the judge[26] and that the public was concerned about such disparities in sentencing.[27] The federal government responded by suggesting the formation of a sentencing commission and sentencing guidelines. After delays and significant critique from members of the legal community, Parliament opted not to bring in sentencing guidelines.[28] Interestingly, research from the Department of Justice in 2018 found that most Canadians believe sentencing guidelines would ensure a fairer sentencing process.[29] This point will be readdressed in the assessment section at the conclusion of this paper, as a potential area for future research.

C. Difficulties with MMSs in Canada

Mandatory minimum sentences are a controversial sentencing tool in Canada especially given the total lack of discretion for sentencing judges - unlike Australia, the United States and the United Kingdom, which make use of MMSs together with statutory exemptions (though not all MMSs in these jurisdictions have access to a safety valve provision). This paper accepts that there is significant scholarship which states that MMSs are, at best, ineffective at reducing crime, and at worst, harmful to some of society's most vulnerable citizens.[30] It is beyond the scope of this thesis to evaluate whether that claim is true as it is concerned with a different question, namely whether statutory exemptions could, in whole or in part, solve some of the problems that MMSs create.

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[26] J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971) and T.S. Palys and S. Divorski, "Explaining Sentence Disparity" (1986) 28 Canadian Journal of Criminology 347.
[27] Anthony N. Doob and Julian V. Roberts, "Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys" in N. Walker and J. M. Hough (eds), *Public Attitudes to Sentencing: Surveys from Five Countries* (Aldershot: Gower, 1988).
[28] Julian V. Roberts, "Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions." *Criminal Law Forum* 23.4 (2012): 319-345 at 330-332.
[29] Justice Canada, Research and Statistics Division, "Research at a Glance: Sentencing Commissions and Guidelines" online: <https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar05.html>.
[30] Raji Mangat, "More Than We Can Afford: The Costs of Mandatory Minimum Sentencing." BC Civil Liberties Association (2014), 37-40 [Mangat]; Office of the Correctional Investigator, Annual Report of the Correctional Investigator 2009-2010 (Ottawa: Office of the Correctional Investigator, 2010), 10-12 and 31-34; Benjamin L. Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R v Ferguson", at 106.

The scholarship surrounding the use of MMSs in Canada has highlighted both the benefits of and problems with the sentencing tool. MMSs typically underscore a commitment to an anti-crime and anti-violence mandate by governments and ostensibly serve the objective of public protection. The political messaging that typically accompanies the introduction of minimum sentences is that deterrence will reduce crime and dangerous offenders will spend longer periods of time in custody, thereby keeping them off the streets and away from the public. In theory, this process is meant to reduce rates of recidivism. Ultimately, the optics of punishment and denunciation provide retribution for victims and society. Proponents of MMSs therefore often point to their ability to deter future commissions of crime, the removal of dangerous offenders from society for potentially longer periods of time, the homage to victims, the need for denunciation of reprehensible behaviour, and the clarity in sentencing which leads to more consistent and equitable punishments.

MMSs also present problems. Some of these include unjust and disproportionate sentences, increased demand on public resources to incarcerate more offenders for longer periods of time, and increased prosecutorial discretion which affects the plea-bargaining process. The difficulties with MMSs are well accepted and acknowledged by the Courts, as will be discussed below.

1. Disparate Impact

Although the disparate impact of MMSs are prevalent throughout the criminal justice system, they are perhaps most prevalent during the sentencing process when mandatory minimums are used. The impacts of mandatory minimum sentences on offenders is well established in legal literature.

These impacts affect both the length and proportionality of a particular sentence, as well as the individual being sentenced. The scholarship widely accepts that MMSs lead to an increase in sentence length. A

Statistics Canada analysis determined that MMS for certain firearms offences created a "notable increase in the length of custodial sentences" after MMSs were introduced.[31]

In October 2017, the Department of Justice Canada studied the impact of MMSs on racialized offenders.[32] The results of the study found that generally, the proportion of racialized offenders being subject to MMSs compared to non-racialized offenders is disproportionally high and increasing.[33] Over the ten-year period of the study, "the proportion of Indigenous offenders increased most dramatically, from 20% of admissions in 2007/08 to 25% in 2016/2017."[34] Further, though white offenders comprised the majority of offenders who were subject to MMSs and admitted into custody, the proportions of "Black (11%) and other visible minority offenders (13%) admitted with an MMP offence was higher than their overall representation in admissions to federal custody."[35]

These findings were despite the mechanisms put in place to limit the over-incarceration of racialized populations. Section 718.2 of the *Criminal Code,* for instance, requires particular attention to be given to the circumstances of an Aboriginal offender. Reporting mechanisms like Gladue Reports and Impact of Race and Culture Assessments (presentencing and bail hearing reports that Courts can request), meanwhile, provide more information on the circumstances of Indigenous and Black offenders, respectively, before a court.

The disproportionate impact of MMSs on Indigenous and racialized populations in Canada, and the resulting over-incarceration of these populations is also acknowledged by both government and civil society

[31] Statistics Canada "Mandatory Minimum Penalties: An analysis of criminal justice system outcomes for selected offences" online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54844-eng.htm>
[32] Department of Justice Canada, Research and Statistics Division "JustFacts The Impact of Mandatory Minimum Penalties on Indigenous, Black and Other Visible Minorities" online: <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/oct02.html>.
[33] *Ibid*.
[34] *Ibid* at 1.
[35] *Ibid* at 2.

advocates.[36] In February 2021, Bill C-22 introduced amendments which proposed removing 14 mandatory minimums from the *Criminal Code* and all MMSs in the *CDSA* (though Bill C-22 died when the 2021 Federal election was called, the proposed legislation has been reintroduced as Bill C-5). [37] The Department of Justice commented on the bill by pointing to "the disproportionate representation of Indigenous peoples, as well as Black Canadians in the criminal justice system"…and explaining that the amendments were meant to alleviate the disproportionate impact on these groups. The report specifically referred to these statistics as part of the reason for the amendments:[38]

> Between 2007-2008 and 2016-2017, Indigenous and Black offenders were more likely to be admitted to federal custody for an offence punishable by an MMP. In 2020, despite representing 5% of the Canadian adult population, Indigenous adults accounted for 30% of federally incarcerated inmates. The proportion of Indigenous offenders admitted with an offence punishable by an MMP has almost doubled between 2007-2008 and 2016-2017, from 14% to 26%... In 2018-2019, Black inmates represented 7.2% of the federal offender population but only 3% of the Canadian population.[39]

Bill C-5 has now passed the third reading in the House of Commons. The impact on racialized communities is one aspect of the disparate impact of MMSs, and again, much has been written about this topic. The discussion in this analysis is limited to a brief mention of the impacts on Black, Indigenous, and racialized minorities. But many other populations are impacted, including but not limited to individuals with mental health differences, women and gender-diverse offenders, members of the LGBTQ+ community, new Canadians, members of disadvantaged socioeconomic groups, etc. This snapshot simply serves to draw parallels to the discussions in other jurisdictions, as will be seen below.

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[36] Mangat, *supra* note 30.
[37] Bill C-22, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, 43rd Parliament, 2nd Session, 2020; Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, 44th Parliament, 1st Session, 2021.
[38] Department of Justice Canada, Backgrounder, "Bill C-22: Mandatory Minimum Penalties to be repealed" online: <https://www.canada.ca/en/department-justice/news/2021/02/bill-c-22-mandatory-minimum-penalties-to-be-repealed.html>.
[39] *Ibid.*

2. Prosecutorial Discretion and Plea Bargaining

Mandatory minimums create largely unreviewable prosecutorial discretion and can exacerbate the power imbalances in the plea-bargaining process. It is accepted that the Crown's decision to prosecute a case summarily or by indictment is within the ambit of prosecutorial discretion. The Supreme Court of Canada has been clear that, "enforcement of the law and especially of the criminal law would be impossible unless someone in authority is vested with some measure of discretionary power."[40] It is important to note that the Courts accept that prosecutors are considered ministers of justice who are bound by duties of fairness, impartiality, and independence. This requires prosecutors to be accountable for their decisions to Parliament, the courts and the public. Further, some forms of prosecutorial discretion are subject to review, and offenders have recourse to malicious prosecution lawsuits and abuse of process applications, though these doctrines have been interpreted restrictively by the courts and carry a high burden of proof.[41]

Another argument against the use of MMSs is that the prospect of having to serve a minimum in-custody sentence can serve as strong incentive for an accused person to plead guilty, and this can create indirect pressures during plea-bargaining negotiations.[42] A prosecutor's discretion to not rely on an MMS or proceed on a lesser and included offence may create incentives for an accused person to admit guilt to a lesser offence in the hopes of avoiding what might be seen as a harsher MMS they could face if they proceed to trial.[43] In this way, a prosecutor's discretion to rightfully circumvent mandatory sentences and allow an

[40] *R v Smythe,* [1971] S.C.R. 680, at 686.
[41] *R v Anderson*, 2014 SCC 41 [*Anderson*]; *Anderson* discusses the standard of review for Crown decision making – the abuse of process doctrine is available when there's evidence of egregious conduct that compromises trial fairness or the integrity of the justice system; Kent Roach, "The Charter versus the Government's Crime Agenda" Supreme Court Law Review (2012) 58: 211.
[42] Kent Roach, "*Constitutional Remedies in Canada*" (Aurora, ON: Canada Law Book, 2006) at 382-83; Elizabeth Sheehy, "Battered Women and Mandatory Minimum Sentences" (2001) 39 Osgoode Hall L.J. 529 at 539; Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50 Crim. L.Q. 14 at 38. Di Luca explains that "the risk of convicting the innocent increases when the coercive elements surrounding plea bargaining are left unchecked."
[43] Lisa Dufraimont, "R v Ferguson and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12" (2008) 42 S.C.L.R. (2d) 459 at 477. Professor Dufraimont, writes that this phenomenon has been observed among battered women who kill; often such women forego legitimate self-defence claims and plead guilty to manslaughter for fear of the prospect of being imprisoned for life for murder

accused to access lesser or more lenient sentences can be seen as a form of unreviewable discretion. A similar form of prosecutorial discretion can surface when dealing with hybrid offences. A prosecutor can choose to proceed with a charged offence on a summary or indictable basis. Should the indictable offence carry a mandatory minimum sentence, the prosecutor is left with the decision to determine whether it would be appropriate given the circumstances before them, or whether the circumstances might warrant proceeding summarily and making a more lenient sentence available to an offender.

In *Nur*,[44] Justice Moldaver in dissent suggested a framework to offer protection against the disproportionate impacts that MMSs might impose, as a result of prosecutorial discretion. Chief Justice McLachlin, as she then was, responded to Justice Moldaver by reiterating the immunity that prosecutorial discretion has from meaningful review and explaining that the constitutionality of a provision cannot rest on an expectation that a prosecutor will always exercise discretion in a proper way.[45] The Chief Justice stated as follows:

> This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the "determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a party to the litigation"…We cannot ignore the increased possibility that wrongful convictions could occur under such conditions.

This difficulty with mandatory minimum sentences might be one that is easily alleviated by the imposition of a statutory safety valve. Though such a shift might raise a question of whether the problem of discretion is simply being shifted from prosecutors to a judge if safety valves are used. After all, MMSs are meant to curtail discretion in the first place. From the perspective of a proponent of MMSs, statutory exemptions simply re-introduce discretion in a different form.

[44] *Nur, supra* note 6.
[45] *Ibid* at para 94-95.

The above issues of transparency and power imbalances in the plea bargaining process can be resolved through use of a statutory safety valve. It can be argued that MMSs simply shift discretion from judges to prosecutors, albeit in a different form by giving a prosecutor an additional source of leverage in plea bargain negotiations. If, on the other hand, a statutory exemption is implemented and as a result, discretion is taken away from a prosecutor and given back to the judge, then while the "discretion problem" can arguably remain, two significant differences surface. The first is that judges give reviewable reasons for their decisions, and this allows for a level of reviewability. The power of discretion now rests with a sentencing judge whose decisions are public, and made on a reviewable record. In spite of internal mechanisms that may be in place at Crown's offices to oversee such discretion, prosecutors are not bound by the same principles and precedents as judicial officers, and their actions and discretion used during the course of plea negotiations are typically not reviewable through an open, public process as a judge's actions would be. When judges impose sentences, they are bound by legal principles and precedents, and give reasons for their decisions. A second, and more significant argument is that sentencing is an *inherently* judicial function. This is discussed below.

3. Separation of Powers

It is argued that MMSs infringe on the separation of powers between the legislature and the judiciary. The separation of powers is an important and recognized constitutional principle in Canada. Judicial independence, born of the separation of powers, has been described by the Supreme Court as the "complete liberty of individual judges to hear and decide the cases that come before them [...]."[46] Judicial discretion is an aspect of judicial independence.

[46] *Beauregard v. Canada*, [1986] 2 S.C.R. 56 at para 21.

The Supreme Court stated in *Nur* that "[s]entencing is inherently a judicial function."[47] This principal is true across all of the jurisdictions that will be examined in this analysis. In exercising this function, the Supreme Court describes the trial judge's role as finding "a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim."[48] Section 718 of the *Criminal Code* provides the court with the purpose and principles of sentencing that the legislature has deemed appropriate.

There are interesting arguments from Australian scholars on the subject of MMSs and the separation of powers. First, Australian scholar Anthony Gray argues that mandatory minimums offend the constitutional design. While the legislature has the power to declare that certain behaviour is criminal and punishable by law (subject to the constitution), the court has sentencing powers, at least in part, as a check on the government's power to punish people. Therefore, dividing the role of legislating crimes and determining how an individual ought to be punished for committing a crime, creates checks and balances between the legislature and the judiciary.[49] This separation of power is compromised when judges "are required to rubber stamp a pre-ordained decision by the legislature regarding penalty."[50] Without the court's check on the government's power to punish, the only other check is the fact that politicians are accountable to the public at the polls.

Rachel Barkow makes a similar argument in her criticism of *Booker,*[51] a leading decision on criminal sentencing in the United States, arguing that the court narrowly only focused on the defendant's individual rights without considering checks and balances:

> If the Court had instead viewed the relationship between the jury and the Sentencing Guidelines through the lens of the separation of powers, it would have seen that the danger

[47] *Nur, supra* note 6 at para 87.
[48] *R v Ipeelee* [2012] 1 SCR 433.
[49] Anthony Gray, "Mandatory Sentencing around the World and the Need for Reform" (2017) 20:3 New Criminal Law Review 391, at 429.
[50] *Ibid* at 429.
[51] *United States v Booker*, 543 US 220 (2005) [*Booker*].

> of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check.[52]

A second argument, advanced by Australian scholars Manderson and Sharp is that the power granted to a court to determine an offender's sentence is subverted if a court merely applies the punishment prescribed by parliament:

> …judicial power is impermissibly compromised by legislation which removes the elements of discretion which have always allowed those who preside over the judicial process - judges - to exercise judgment in the imposition of force…We argue that the ability of the judge to actually judge, often channelled but never extinguished, legitimates the coercion of the judicial office and gives it a proper gravity and respect. On this view, discretion is essential to judgment - it is what makes the process judicial; perhaps this is nowhere more important than in the act of sentencing. By requiring of judges that they condone the custodial violence of the State (as only they can) in a manner which is unrelated to their office, the legislature impermissibly interferes with the judicial process.[53]

Undermining the court's power in this way, Manderson and Sharp go on to argue, delegitimizes the court in the eyes of the wider community and the offender being sentenced.[54] This line of reasoning can be extended from Australia to Canada given sentencing is recognized by the Canadian courts as a quintessential function of the judiciary.

This second argument is important given that the judiciary is the branch of the government that is present "on the ground" and has the difficult task of determining the amount of freedom the state will take away from the individual. As such it is closest to the morally salient information that is needed to pronounce a just and fair sentence on the offender. Parliament can only require minimum sentences to be applied categorically to certain offences, without consideration of an individual offender's situation.

These arguments against MMSs rooted in the proper separation of powers are of course normative arguments about how our constitutional democracy *ought* to be organized. They are not legal arguments

[52] Rachel Barkow, "Separation of Powers and the Criminal Law" (2006) 58.4 Stanford Law Review at 1042.
[53] Desmond Manderson & Naomi Sharp, "Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process" (2000) 22:4 Sydney Law Rev 585, at 623.
[54] *Ibid*.

against MMSs. To that end, the Supreme Court has not objected to Parliament's ability to pass laws that limit judicial discretion by imposing mandatory minimums on the grounds of separation of powers.[55] Justice Doherty in *Nur* at the Court of Appeal, in confirming the gross disproportionality test as the standard for MMSs section 12 constitutionality, held that it reflected deference to Parliament's sovereignty, allowing pursuit of sentencing policies reflecting the electorate.[56] Going even further, the Court in *Babcock v Canada*, took the position that "it is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government."[57] Parliament has the right to pass mandatory minimums within the parameters of the *Constitution Act, 1982*, the constitutionality of which may be challenged using the disproportionality test under Section 12 of the *Charter*.

This criticism was taken up by two practitioners, Caylor and Beaulne, who argue that the role of Parliament is to monitor the country's laws and to ensure that they are connected "to Canada's evolving understanding of the moral gravity of a given offence."[58] In fact, they argue, the historical reason for most mandatory minimums is the government's response to public sentiments – for example, public anxiety about drinking and driving in the 1970s led to mandatory minimums for failure to provide a breath sample and blood alcohol levels.[59] They conclude that, as long as mandatory minimums remain within the boundaries of the *Constitution Act, 1982* (i.e. constitutional), Parliament does not overstep on the role of judges.

In any case, this analysis does not focus in on the proper arrangement of powers between the judiciary and legislative branch, except to say that there is a good argument to be made that MMSs disrupt the proper

[55] *Ferguson, supra* note 5 at para 54.
[56] *R v Nur,* [2013] OJ No 5120 at 71.
[57] *Babcock v. Canada*, 2002 SCC 57.
[58] Lincoln Caylor & Gannon G. Beaulne, "Parliamentary restrictions on judicial discretion in sentencing: Defence of mandatory minimum sentences" *Policy Commons* (2 August 2022), at 2, online: <https://policycommons.net/artifacts/1184302/parliamentary-restrictions-on-judicial-discretion-in-sentencing/1737425/>.
[59] *Ibid* at 9.

balance of power between the judiciary, on the one hand, and parliament and executive, on the other hand. As such, it is worth evaluating whether statutory exemptions to MMS could be a solution to this often asserted problem, especially on the view of sentencing that accepts that it is an inherently judicial function.

II. OVERVIEW OF SAFETY VALVES

The most basic feature lost in mandatory sentencing is judicial discretion. The SCC has discussed judicial discretion and exemptions as a solution to the loss of judicial discretion at length, as discussed above. It should be noted, however, that much of the discussion at the Supreme Court has focused specifically on constitutional exemptions, rather than statutory exemptions, as a solution to the problems of MMS. This history is worth reviewing, however, because it outlines the development of statutory exemptions as a viable solution to the problem of MMSs, helps distinguish them as distinct from constitutional exemptions, and makes clear the reasoning of the court in rejecting them. The two forms of exemptions are distinct, and though many argue that they elicit a similar tension between Parliament and the judiciary, a closer and more nuanced look reveals that in fact, statutory exemptions do not present the same issues that constitutional exemptions did.

Reviewing this history will also lead us to a discussion of the current state of the law and debates surrounding safety valve legislation, and the benefits and problems that may arise from such an exemption scheme.

A. History of Safety Valve Legislation and Judicial Discretion in Canada

1. Jurisprudential History of Constitutional Exemptions as a Solution to MMSs

The Supreme Court of Canada's approach to mandatory minimum sentences has been widely written about and discussed. However, there is little discussion around the exemptions to MMSs. Scholars like Kent Roach and Peter Sankoff have written about exemptions, which will be discussed below. However, the

conversation is often on what the state of law is, as opposed to what the solution to the problem of MMSs ought to be. Part of the reason for this gap in the scholarship is that until recently, the SCC has been hesitant to address the scope or permissibility of exemptions as a remedy in detail. The review below will focus on exemptions as a general category and will consider them generally in the curing of unconstitutional effects of laws. More specifically, though the focus of this part is largely on section 12 cases, there will be some discussion beyond this. At its core, the question being considered by this collection of cases is whether the curing of unconstitutional effects ought to be done at the level of the law, or the level of the individual.

Over the years there were two recourses available to the courts when faced with mandatory minimum sentences that would impose cruel and unusual punishments on the offender before them and thereby violate section 12 of the *Charter:* (1) section 24(1) of the *Charter* allows a court of competent jurisdiction to grant a remedy that is "just and appropriate" where an individual's *Charter* rights have been infringed (commonly referred to as a "constitutional exemption"); and (2) section 52(1) of the *Constitution Act, 1982*[60] allows a court of competent jurisdiction to declare any law that is inconsistent with the *Constitution* of "no force or effect." When a court uses the power under 24(1) to relieve an accused of being subject to an MMS, it is called a "constitutional exemption" – accordingly, when this paper refers to constitutional exemptions, it will be in reference to this specific remedy under section 24(1), following a limitation of a *Charter* right in the context of MMSs.

Justice Brian Dickson, as he then was, first floated the idea of a constitutional exemption in the 1985 case of *R v Big M Drug Mart Ltd.*,[61] a religious freedom case where the SCC briefly recognized a claim to constitutional exemptions from otherwise valid legislation.[62] However, constitutional exemptions were not

[60] Section 52(1), Part VII of the *Constitution Act, 1982.*
[61] *R v Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 [*Big M Drug Mart*].
[62] *Ibid* at 42.

otherwise directly addressed by the SCC until much later.[63] Through the development of the section 12 *Charter* test, and the cruel and unusual punishment standard, the Court's views towards exemptions and its reluctance to encroach upon Parliamentary became clear.[64]

The *Smith*[65] decision in 1987 was the first iteration of the two-prong section 12 *Charter* analysis, and the most significant striking down of a mandatory minimum until that time. The test for review under section 12 of the *Charter* was confirmed as being one of gross disproportionality and aimed at punishments that are more than merely excessive. The first step of the gross disproportionality test is a particularized inquiry that must assess the gravity of the offence, the personal characteristics of the offender, the circumstances of the case, the effect of the punishment on the offender, and the sentencing principles. This inquiry is followed by the second step of the test, which is an assessment of the hypothetical offender and the impact of a MMS on such a person.[66].

The dissenting decision in *Smith* has been reflected in numerous post-*Smith* cases, including *R v Latimer*[67] and *R v Morrisey*.[68] Justice McIntyre agreed with the Court of Appeal's decision, in stating that courts ought not consider whether political decisions are "wise or rational" or to "sit in judgment of legislation or the rationality of the process by which it is enacted."[69] In removing restraints from the trial judge's discretion, the minority of the Court suggested that this would unduly limit Parliament's power to determine general

[63] *R v Seaboyer, R v Gayme* [1991] 2 S.C.R. 577 [*Seaboyer* and *Gayme*]; The Ontario Court of Appeal addressed the issue of exemptions in *R v Seaboyer*, *R v Gayme*, 61 O.R. (2d) 290 (CA), a decision upholding the "rape-shield" provisions of the *Criminal Code*. The provisions restricted the ability of the defence to cross-examine or lead evidence of a complainant's prior sexual conduct. The Court of Appeal conceded that the provisions in question may have the effect of being too broad and might affect the section 7 rights of an accused in rare circumstances. The Court of Appeal, however, went no further in recommending how this hypothetical offender ought to be dealt with.
[64] In *R v Smith* [1987] 1 SCR 1045 [*Smith*], Justice Lamer clarified the section 12 test and acknowledged the reluctance on the part of the judiciary to interfere with Parliament's will.
[65] *Ibid*.
[66] In *Smith*, the hypothetical offender was a first time importer of a marijuana cigarette.
[67] *R v Latimer*, [2001] 1 S.C.R. 3 [*Latimer*].
[68] *R v Morrisey*, [2000] 2 S.C.R. 90 [*Morrisey*].
[69] *Smith, supra* note 64, at para 102.

policy and would in effect constitutionally entrench the absolute discretion of judges.[70] The decision in *Smith* was dismissive of constitutional exemptions and suggested that an impugned provision that is incompatible with the *Charter* must be struck down.

What followed these early years of the *Charter* was a period of fundamental shifts from the Court and discussion amongst constitutional scholars which centered on the dialogue between Parliament and the Court. The immediate post-*Smith* era reflected a shift toward stronger judicial deference to Parliamentary will when faced with constitutionally unsound provisions. This included the prioritization of protection for victims, denunciation, and retribution over the constitutional rights of the accused. Professor Kent Roach, in assessing the Supreme Court's post-*Smith* line of mandatory minimum cases, described it as an approach of "constitutional minimalism and corresponding reluctance to rely on hypothetical offenders and facial declarations of invalidity."[71] In the immediate post-*Smith* era of mandatory minimum cases (cases like *R v Luxton*,[72] *R v Goltz,*[73] *R v Morrisey*,[74] and *R v Latimer*[75]) the Court was largely silent on constitutional exemptions in these cases, with the exception of *Latimer* which is discussed below.[76]

The exemptions discussion was sparked again in 1991 when Justice Wilson, writing for the minority in *Osborne v. Canada (Treasury Board),* emphasized the need to strike down legislation that is

[70] *Ibid* at para 104.
[71] Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Sentences" (2001) 39:2&3 Osgoode Hall LJ at 367 [Roach].
[72] In R v *Luxton*, [1990] 2 S.C.R. 711 mandatory life imprisonment for first degree murder and ineligibility for parole for twenty-five years was upheld by the Court. The majority found that section 214(5)(e) (now s. 231(5)(e)) and 669 of the *Criminal Code* was deservedly severe as it provides for punishment of the most serious crime in the law. The Court in *Luxton*, in addition to emphasizing fault of the offender, focused strongly on society's condemnation of the accused (who in *Luxton* had forcibly confined a cab driver and stabbed her to death). The Court lauded Parliament's sensitivity and wisdom, and reiterated that it is not the Court's role to, "pass on the wisdom of Parliament", and courts should be "reluctant to interfere with the considered views of Parliament".
[73] *R v Goltz,* [1991] 3 SCR 485 [*Goltz*].
[74] *Morrisey, supra* note 68.
[75] *Latimer, supra* note 67.
[76] In this line of cases, the Court was faced with challenges to mandatory minimums, and dismissed the challenge every time. These cases, with the exception of *Latimer*, were largely silent on the constitutional exemption doctrine.

overinclusive.[77] In the minority judgment, the Court emphasized that they ought not be responsible for curing the over inclusiveness of legislation on a case-by-case basis, and "leaving the legislation in its pristine over-inclusive form outstanding on the books."[78] The majority of the Court in *Osborne* found that some situations may require a resort to constitutional exemptions.[79]

The messaging from the majority of the Court took a turn when it considered the "rape-shield" provisions of the *Criminal Code* in *Seaboyer and Gayme*, which the Court heard concurrently.[80] In spite of the Court majority's view in *Osborne,* when the "rape-shield" provisions of the *Criminal Code* were before the Supreme Court in *Seaboyer and Gayme* the Court took the opportunity to express its disapproval for the doctrine of constitutional exemptions. This was the first significant consideration of the constitutional exemption by the Supreme Court. Justice McLachlin, as she then was, wrote the majority decision. In addition to considering the sections 11(d) and 7 *Charter* challenges, the Court considered whether the constitutional exemption doctrine would apply if the legislation were found to be invalid. In determining that s. 276 of the *Criminal Code* violated sections 7 and 11(d) of the *Charter,* the Court declined to apply the doctrine of constitutional exemption to save the legislation. It would have been open to the Court, given the finding that the legislation suffers from overbreadth, to read it down and apply the exemption. The Court reasoned that though the exemption would appear to save the law in one sense, it would "dramatically alter" it in another way.[81] The intention of Parliament in enacting the law would not be upheld. Discretion would be given to the trial judge while the legislature's will would become "even more obscured with the addition of a host of judge-made procedures which have been proposed to effect this judicial amendment to the legislation."[82] Further, the Court stated that such an exemption would:

> …set up a regime based on discretion and common law notions of relevancy, which is

[77] *Osborne v. Canada (Treasury Board)*, [1991] 2 SCR 69.
[78] *Ibid* at para 77.
[79] *Ibid.*
[80] *Seaboyer and Gayme*, *supra* note 63. The "rape-shield" provisions of the *Criminal Code*, which had been previously upheld by the Ontario Court of Appeal, were struck down by the Supreme Court.
[81] *Ibid* at 628.
[82] *Ibid* at 583.

> precisely what striking down would do. Finally, this solution would delegate to the trial judge the task of determining when the legislation should not be applied. This result has the effect of placing on the accused the burden of showing that the decision to exclude evidence is unconstitutional.[83]

However, the Court in *Seaboyer and Gayme* was clear that it was not foreclosing the possibility that the constitutional exemption may be appropriate "in some other case," and reaffirmed the words of Justice Dickson (as he then was) in *Big M Drug Mart Ltd,* that it was leaving open the "possibility that in certain circumstances a 'constitutional exemption' might be granted from otherwise valid legislation to particular individuals."[84]

In *Goltz*, the Court reiterated the importance of deference to legislators and Parliament.[85] The majority stressed that the section 12 analysis ought not be used to quickly invalidate sentences as crafted by legislators. Relying on *Luxton* and *Smith,* the Court stated that courts should find a sentence so grossly disproportionate that it violates section 12 only in rare cases. The issue of deference was addressed at length as the Court stated that the above line of cases signal a deference to legislated sentences and that though sentences are partly punitive in nature, their greater goal is the protection of the public. The court underscored the deterrent and protective aspects of a punishment.[86]

Justice McLachlin, who had written a strong majority decision in *Seaboyer and Gayme* calling for the protection of parliamentary will in refusing to apply an exemption, was part of the minority decision in *Goltz*. In the dissenting decision, Justice McLachlin maintained a disapproval of constitutional exemptions. The dissenting opinion of the Court found that the better course was to strike down the mandatory sentence

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[83] *Ibid*.
[84] *Ibid* at 629: The case concerned the constitutionality of a seven-day mandatory term of imprisonment and fine for the offence of driving without a license under the B.C. Motor Vehicle Act. Justice Gonthier, writing for the majority, found that the provision did not violate section 12. The Court also further delineated factors to be considered during a section 12 analysis.
[85] *Goltz, supra* note 73.
[86] *Ibid* at 503.

at issue, and to leave with the trial judge the full range of sentences that might be appropriate. Justice McLachlin referred back to Justice Lamer's decision in *Smith*, and stated that the suggestion in *Smith* was certainly not that every minimum seven-year sentence for trafficking would be unconstitutional, but rather, "because some of the sentences rendered under that provision would have been cruel and unusual, the entire section was held to be invalid."[87] The dissent in *Goltz* disagreed with the majority's characterization of the hypothetical scenario, and adopted the reasoning in *Smith*.

The Court's decision in *Schachter v. Canada* explicitly considered the issue of the constitutional exemption, once more, in the context of an impugned provision under the *Unemployment Insurance Act, 1971*.[88] The constitutional question the Court faced was whether section 52(1) of the *Constitution Act, 1982* required the impugned provision to be declared of no force and effect. As the Court allowed the appeal and struck the provision, it took a narrow approach to a constitutional exemption remedy under section 24(1) and stated as follows:

> Where s. 52 is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.
>
> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.[89]

Shortly after the *Schachter* decision, *Rodriguez v. British Columbia (Attorney-General)*[90] was released with a minority judgment written by Chief Justice Lamer which focused squarely on the constitutional exemption debate. The dissent of Chief Justice Lamer found that the *Charter* violations of s. 241(b) of the *Criminal*

[87] *Ibid* at 538.
[88] *Schachter v Canada*, [1992] 2 SCR 679.
[89] *Ibid* at 684; *Schachter v Canada* dealt with an impugned provision which provided unequal parental benefits contrary to section 15(1) of the *Charter*.
[90] *Rodriguez v. British Columbia (Attorney-General)*, [1993] 3 SCR 519.

Code were not saved by s. 1 of the *Charter.* This dissent solidified the concept of exemptions during periods of suspended declarations of invalidity.[91]

The minority in *Rodriguez* concurred with the opinion of Justice Wilson in *Osborne* about constitutional exemptions - that constitutional exemptions may only be granted during the period of a suspended declaration of invalidity due to practical necessity. The reasoning of the Court was two-fold: (1) the exemption is only available for a limited time, so that the Court is not put in the position of, in the words of Justice Wilson, curing "over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books"; and (2) the Court is not put in the position of appearing to save a blanket prohibition in one respect while "dramatically altering it" in another by granting exemptions from that prohibition.[92]

In spite of the above rulings, lower Courts following *Rodriguez* still made use of constitutional exemptions to provide relief to offenders without declaring the statutes in question invalid.[93] However, the theme of restricting the use of constitutional exemptions continued federally, as the Supreme Court continued to confirm its view of constitutional exemptions being used in a very limited way to protect the interests of a party in the face of a declaration of invalidity that has been suspended, and no broader use than that.[94]

The *Morrisey* and *Latimer* cases represented a shift by the court toward a narrow focus on the moral responsibility of the offender and a deference to Parliament. The deference to Parliament's prioritization of the principles of retribution and denunciation became clear. Furthermore, it echoed a silence from the Supreme Court on the constitutional exemption, as it did not merit consideration given the lack of *Charter*

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[91] *Ibid* at 577.
[92] *Ibid* at 574: The majority upheld the assisted suicide provisions of the *Criminal Code* and found that any *Charter* violations were justified, so the issue of constitutional exemptions was not addressed.
[93] Peter Sankoff, "Constitutional Exemptions: Myth or Reality?", (2000) 11:411 *National Journal of Constitutional Law*, at 12 [Sankoff].
[94] *Corbiere v. Canada,* (1999), 173 D.L.R. (4th) 1.

violation. The decisions of *Morrisey* and *Latimer* represented the Court's next major consideration of the viability of mandatory minimums under section 12 of the *Charter.*

In *Morrisey,* a four-year mandatory minimum sentence for criminal negligence causing death with a firearm was upheld. The case involved a first offender and recovering alcoholic who was remorseful and had suffered a significant trauma in his life. This had led him to unintentionally killing his friend with a firearm which discharged while he was drunk. The majority Court, led by Justice Gonthier, stressed Parliament's role and the high threshold that was required to be met in order to attract criminal liability under the section. The Court stated that there must be a wanton and reckless disregard for life and safety and that a minimum sentence, "forces the offender to acknowledge the harm that he has caused, and metes out a punishment commensurate with that harm."[95] The Court continued in its shift toward support of victims and retributive justice by emphasizing those factors. The dissenting opinion, written by Justice Arbour (with Chief Justice McLachlin concurring), refocused the analysis on the hypothetical offender and stated that given the "many varied circumstances" and the "requisite richness of factual details,"[96] it is impossible to canvass every hypothetical that might arise. Though the dissent maintained that the constitutionality of the section should be upheld generally, it concluded that it should not be applied in a future case if the minimum penalty is found to be grossly disproportionate for that future offender. There will "unavoidably be a case"[97] in which such a sentence would be grossly disproportionate.

At this point, the issue of exemptions continued to be unclear in its treatment, with the courts not having come to any clear decisions on their use. In *Latimer,*[98] the Court rejected the availability of a constitutional

[95] *Morrisey, supra* note 68 at para 48.
[96] *Ibid* at para 93.
[97] *Ibid* at para 95.
[98] *Latimer, supra* note 67: *Latimer* was a decision which involved a case that had made national headlines about a father who murdered his 12-year old daughter that was suffering from cerebral palsy. The murder was described as an act of mercy by the accused who used a defence of necessity during his trial to justify relieving his daughter of pain and suffering.

exemption to the accused which had been resorted to by the trial judge, and the s. 12 *Charter* application was dismissed. Latimer challenged the 10-year mandatory minimum sentence attached to second degree murder. The Supreme Court unanimously rejected the section 12 *Charter* claim[99] and gave significant deference to Parliament, stating that the choice of using minimum sentences is still Parliament's regardless of any differences of opinion.

Given that there was no violation found of the section 12 right, there was no basis for the Court to consider the constitutional exemption remedy pursuant to section 24(1) of the *Charter*. At the time of the *Latimer* decision, the area of constitutional exemptions was "shrouded in uncertainty," as put by Professor Sankoff.[100] Sankoff noted that Courts had not come to any decisive conclusions and the Supreme Court had only referred to the exemption in obiter dicta, and even there, sometimes in a contradictory manner.[101]

It is worth noting that in *Latimer* the jury recommended that the mandatory minimum sentence be sidestepped, and Mr. *Latimer* be eligible for parole after serving a one-year sentence. The trial judge in *Latimer,* bound by earlier Supreme Court of Canada jurisprudence on the constitutionality of the murder provisions considered the constitutional exemption on the basis that though the provision had withstood constitutional scrutiny, the special circumstances of the case before him would present a section 12 violation.

Professor Kent Roach, in examining the post-*Smith* line of cases and the Court's increasing restraint towards constitutional challenges and deference to legislatures, notes that the Court was deferring to Parliament's right to stress "denunciation, retribution and general deterrence over concerns about rehabilitation and

[99] The trial judge in the *Latimer* decision had granted a constitutional exemption from the mandatory minimum sentence, sentencing him to one year of imprisonment and one year on probation. This was overturned by the Court of Appeal and the issue of the constitutionality of the minimum made its way to the Supreme Court.
[100] Sankoff, *supra* note 93 at 3.
[101] *Ibid.*

deterrence of the particular offender," all of which are principles that drove the Court's decision in *Smith.*[102] Roach evaluates these section 12 cases in light of the "just desserts" principle of sentencing which includes an increased acceptance of retributive principles and focuses on sentencing as a response to an offender's fault. In 2001, Roach concluded that the "decision of whether to have mandatory sentences now appears to be almost exclusively in the hands of Parliament."[103] The activism of *Smith,* Roach argued, had been replaced by deference to a "legislative crime control agenda."[104]

2. Current State of the Law: *R v Ferguson* Onwards and the Introduction of the Statutory Safety Valve

The *Ferguson, Nur, Lloyd,* and *Morrison* line of cases is the most recent iteration of the Court's response to the availability of constitutional exemptions. These cases also are the first explicit iteration of *statutory* exemptions, or safety valves, as a possible recommendation to Parliament as a way of dealing with the problems posed by MMSs. Since *Ferguson*, the Supreme Court has been signaling – in clear terms – that remedying the infirmity of unconstitutional sentences is a task that must be undertaken by Parliament, and not left to trial courts.

Ferguson was the first clear and unequivocal rejection of constitutional exemptions by the Court as a remedy to section 12 *Charter* violations.[105] The line of cases which have followed have been in keeping with this message. It was also the first clear proposal from the Court of safety valve legislation as a potential solution to the problems of MMSs – a discussion the Court engaged in willingly (ultimately, the Court overturned the trial judge's finding of a section 12 violation).

[102] Roach, *supra* note 71 at 371.
[103] *Ibid* at 372.
[104] *Ibid* at 412.
[105] *Ferguson*, *supra* note 5.

The *Ferguson* decision involved an altercation between an RCMP officer and a detainee which resulted in the detainee being shot and killed. Section 236(a) of the *Criminal Code,* the offence of manslaughter with a firearm, carried a mandatory minimum sentence of four years of imprisonment and was at issue. The trial judge found a section 12 *Charter* violation and imposed a conditional sentence of two years less a day on the offender, finding that the sentence as statutorily prescribed would constitute cruel and unusual punishment if imposed. The majority of the Court of Appeal overturned the sentence, and imposed the mandatory minimum prescribed by law. The Supreme Court of Canada found that there was no section 12 violation and dismissed the appeal. Though prior cases had found the Court similarly overturning or upholding appellate decisions resulting in no section 12 violation, *Ferguson* marked the first time the Court dealt directly with constitutional exemptions for mandatory minimums as a section 24(1) remedy. The Court acknowledged in this decision that until then, it had not definitively ruled whether constitutional exemptions were available as a remedy for mandatory minimum sentences that produce unconstitutional sentences. In Ferguson, the "safety valve" exemption in section 24(1) was ultimately foreclosed by the Court.

The Court did, however, recognize the benefits of exemptions: some pieces of legislation only infrequently result in unconstitutional results; the bluntness of a section 52(1) remedy in declaring a law invalid can be overreaching; and granting an exemption to an unconstitutional sentence would remove any inconsistency with the *Charter* and thus would fit in well with the Court's practices of "severance, reading in, and reading out in order to preserve the law to the maximum extent possible."[106]

However, these arguments as they related to constitutional exemptions were undermined by several factors. First, the Court found that the availability of the section 24(1) exemption had not been conclusively decided. Second, Parliament's intention in removing judicial discretion by imposing mandatory minimums would be contradicted and so an unlegislated, constitutional exemption would be an inappropriate intrusion into

[106] *Ferguson*, *supra* note 5 at para 39.

the legislative sphere. Third, the Court found that while section 52(1) of the *Constitution Act, 1982,* provides a remedy for laws that violate the *Charter* either in purpose or in effect, section 24(1) of the *Charter* by contrast provides a remedy for government *acts* that violate *Charter* rights. Fourth, and arguably most significantly, the Court stated that constitutional exemptions for mandatory minimums buy flexibility for the courts, but ultimately undermine the rule of law and its accompanying values of certainty, accessibility, intelligibility, clarity and predictability.[107] Chief Justice McLachlin, writing for a unanimous Court, stated "[i]n granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances."[108]

As will be described in more detail later in this part, the Court also highlighted a rule of law problem of constitutional exemptions – that they leave the law uncertain and unpredictable, just as the Court had predicted in *Smith.* A divergence between the law on the books and the law as applied would result in uncertainty which would "exact a price paid in the coin of injustice."[109]

Ferguson had finally presented the emphatic rejection of constitutional exemptions to the problem of unconstitutional laws on the books that the Court had been hinting at for years. This rejection, and reasoning, by the Court is interesting when considering that *statutory* exemptions would come to be suggested by the court eight years later in *Lloyd* (discussed below) as an alternative. Some scholars argue that many of the rule of law difficulties of constitutional exemptions would seemingly follow statutory exemptions. However, a closer examination of this reveals that in fact statutory exemptions do not present the same rule of law difficulties that constitutional exemptions did.

[107] *Ibid* at para 69.
[108] *Ibid* at para 73.
[109] *Ibid* at para 72.

Some have argued that the Court's decision in *Nasogaluak*,[110] released two years after *Ferguson,* calls into question the impermeability of the mandatory minimum ceiling as it was set in *Ferguson.*[111] In Nasogaluak, the Court left open the possibility of resort to section 24(1) of the *Charter* for a reduction of sentence below a statutory minimum as a remedy for particularly egregious misconduct by state agents relating to the offence or the offender. [112] It can be argued that there are seemingly contrasting messages from the Court between *Ferguson* and *Nasogaluak* – in *Ferguson* the court seemed to foreclose the possibility of 24(1) exemptions as a remedy for *Charter* violations, but in *Nasogaluak*, the Court seemed to reopen that possibility.

What is, however, significant about the Court's approach in *Nasogaluak* is the efforts the Court took to distinguish among the types of remedies section 24(1) was able to provide. It specified that the section could have remedial powers for egregious state misconduct. This, however, is not in contrast to the Court's position in *Ferguson*, but rather, in keeping with it. In *Ferguson,* the Court stated that 24(1) as a constitutional exemption - a remedy to the finding of constitutional invalidity of a mandatory minimum found to impose cruel and unusual punishment - was not acceptable. This does not create tension as a section 12 analysis that might lead to a finding of invalidity is not concerned with the actions of state agents. An impugned act that constitutes a *Charter* breach and leads to a section 24(1) remedy is distinct from resort to section 24(1) to address not an impugned act of state actors, but an unconstitutional piece of legislation.

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[110] *R v Nasogaluak,* [2010] 1 S.C.R. 206: The decision involved an intoxicated driver of Inuit and Dene descent who resisted arrest, and was subsequently subject to a violent arrest which resulted in broken ribs and a collapsed lung. The offender brought a section 7 *Charter* challenge and sought a reduced sentence pursuant to section 24(1) of the *Charter* on the basis of state misconduct. Otherwise, he would have been subject to a mandatory minimum sentence.
[111] Justice Lebel, writing for a unanimous Court, reaffirmed the general rule, as affirmed in *Ferguson,* that judges "must" impose sentences that comply with mandatory minimums and that section 24(1) of the *Charter* should not be used to reduce a sentence to account for harm flowing from the unconstitutional acts of state actors. The case did not meet the requisite threshold for a reduction of the minimum sentence, in spite of the section 7 *Charter* violation that the Court affirmed given the conduct by police.
[112] *Nasogaluak*, *supra* note 110 para 64.

Some argue that there is a similar tension between the use of statutory and constitutional exemptions. The Court in *Ferguson* closed the door on the use of constitutional exemptions, and some years later, opened the door on what *looks* like a similar tool – the statutory exemption – in *Lloyd.* However, these sentencing tools are distinct. Most significantly, a statutory exemption would protect the separation of powers and not trample upon the will of Parliament as the SCC has been so careful not to do. This will be discussed in more detail later in this analysis.

Seven years after *Ferguson*, the Supreme Court of Canada in *R v Nur*[113] invalidated sections 95(2) (a)(i) and (ii) of the *Criminal Code*, finding that they violated section 12 of the *Charter.* The sections were declared of no force or effect pursuant to section 52 of the *Constitution Act, 1982*. In re-addressing the issue of the constitutional exemption pursuant to section 24(1), Chief Justice McLachlin, writing for the majority, stated as follows at paragraphs 72-73:

> …[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice…It deprives citizens of the right to know what the law is in advance and to govern their conduct accordingly, and it encourages the uneven and unequal application of the law. To paraphrase *Ferguson*, bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada…[114]

This reaffirmed the Court's position in *Ferguson,* and settled any doubts raised by *Nasogaluak.* The Court's position on constitutional exemptions was therefore clear. Bad law was not to remain on the books. However, with the proliferation of mandatory minimums from 2005 onwards, the Court continued to grapple with the problems they presented. In 2016, the Court would suggest a solution in *R v Lloyd* in the form of a statutory exemption, or safety valve to the problems of MMSs.

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[113] *Nasogaluak*, *supra* note 110, at para 91.

[114] *Nur, supra* note 6 at para 91: Justice Moldaver's dissenting decision in *Nur* is interesting as his qualification of the same offence if proceeded summarily by the Crown acts as a safety valve to the MMS. Justice Moldaver's argument is that the Crown's election under section 95 would essentially act as discretion that's been built into the legislation to act as a safety valve against what might be an unconstitutional sentence. McLachlin C.J.'s majority decision refers to this argument by her colleague and finds that prosecutorial discretion cannot be used to save unconstitutional sentences. It is an "illusory" protection against grossly disproportionate sentences given its immunity from meaningful review and its reliance on an "expectation that the Crown will act properly."

The *Lloyd* decision was released in 2016, with Chief Justice McLachlin writing for the majority and Justices Wagner (as he then was), Gascon, and Brown dissenting. It considered the constitutionality of the MMS that applied to the offence of trafficking or possession for the purpose of trafficking in a Schedule I or II drug, where the offender had an applicable prior conviction.[115] The Court acknowledged the exception to the one-year minimum that was available pursuant to section 10(5) of the *CDSA* – an offender who had completed drug treatment court or a similarly approved program pursuant to s. 720(2) of the *Criminal Code* could avoid the mandatory minimum. The majority states, emphatically, such an exception is not broad enough to cure the infirmity of the mandatory minimum in question. Other issues stipulated relating to the drug treatment court exception were the reliance on Crown discretion (the Crown has discretion to disqualify offenders from the program), the exclusion of offenders who suffer from more serious addictions, and the forfeiture of an accused's right to trial as the program requires a plea of guilt for admission.

In *Lloyd*, the Court's skepticism was aimed at MMSs which captured a broad range of conduct. In the *Lloyd* example, given the expansive definition of what it means to traffic, the MMS applied not only to people who sold drugs, but also to those who administered, gave, transferred, transported, sent or delivered the controlled substance. Given the wide net that this particular MMS cast, it could, in the Court's view, capture the conduct of someone who gave a small amount of a drug to a friend at one end, and the commercial trafficker who sells for profit at the other end. These types of mandatory sentences which capture such a wide range of offenders are vulnerable to constitutional challenge, and it is these laws which will almost inevitably include an acceptable reasonable hypothetical for which the MMS will be found unconstitutional. This thesis is most interested in this category of MMSs which are wide-reaching and constitutionally vulnerable, a category which many MMSs fall into. It could be argued that given the complex and unpredictable nature of criminal conduct, even more tailored MMSs could cast a wider net

[115] *Lloyd, supra* note 1 at para 3.

than many think; however, this consideration will not be a part of this discussion. As the Court stated in *Lloyd*, "such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."[116] The Court directly engaged with Parliament in *Lloyd* and offered two potential solutions to MMSs:

> One solution is for such laws to narrow their reach, so that they catch only conduct that merits the mandatory minimum sentence. Another option to preserve the constitutionality of offences that cast a wide net is to provide for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases. This approach, widely adopted in other countries, provides a way of resolving the tension between Parliament's right to choose the appropriate range of sentences for an offence, and the constitutional right to be free from cruel and unusual punishment.[117]

Chief Justice McLachlin explicitly asks Parliament to consider the safety valve as a solution in *Lloyd*. The Court acknowledged frankly that there is no "precise formula" to the crafting of a safety valve and the only requirement is some amount of residual discretion to allow for a lesser sentence below the MMS where appropriate.[118]

The 2018 decision of *Boudreault*[119] addressed the issue of judicial discretion. The case dealt with a mandatory victim fine surcharge which was at the time contained in section 737 of the *Criminal Code*. The amount of money to be paid by convicted accused persons was subject to a statutory minimum. In holding that s. 737 violated s. 12 of the *Charter* by imposing cruel and unusual punishment on a hypothetical offender, the majority of the court addressed judicial discretion which one of the applicants submitted was within the purview of the court to read back into the legislation (as it read in 2013). The Court rejected this proposition for two reasons: first, the Court stated that Parliament's removal of discretion in 2013 was intentional and any attempt by the Court to reinstate this would be intrusive on Parliament's role; second, Parliament "ought to be free" to implement the revisions as it sees fit.[120] This again supported the Court's

[116] *Lloyd*, supra note 1 at para 35.
[117] *Ibid* at para 3.
[118] *Ibid* at para 36.
[119] *Boudreault*, *supra* note 7.
[120] *Ibid* at para 101.

developing view that one-off fixes to problems of constitutional infirmity were not sufficient, and Parliament ought to implement more permanent legislative remedies to avoid these situations altogether.

The 2019 case of *Morrison*[121] is the Court's most recent call for Parliament to consider building judicial discretion into the MMS legislation. Justice Karakatsanis, in her concurring decision, reiterates the reasoning from Lloyd and its predecessor cases that MMSs which capture a wide range of offences will more than likely "be found to be grossly disproportionate in certain circumstances and therefore inconsistent with s. 12 of the *Charter*."[122] These defects, Justice Karakatsanis reminds us, are avoidable by "building a safety valve – residual discretion – into mandatory minimums."[123]

3. Current Debates about Safety Valves

The Canadian legislative and jurisprudential landscape, as it stands, has opted for the solution of striking down mandatory minimums deemed unconstitutional as the case arises. However, given the Court's signaling that almost every mandatory minimum sentence will likely face a hypothetical scenario that would rule it unconstitutional, no large-scale solution has been proposed by Parliament to deal with this issue given the dozens of MMSs still active today. Though the Supreme Court has been clear, Parliament and the legislature have not yet formulated a wholesale solution, though individual actors in the system have made efforts, and proposed legislative changes by the Liberal government intend to abolish a significant number of MMSs that were in place.

In September 2020, Senator Kim Pate introduced Bill S-207, *An Act to amend the Criminal Code (Independence of the Judiciary)* which proposed the addition of judicial discretion for MMSs (this Bill has

[121] *R v Morrison,* [2019] 2 SCR 3.
[122] *Ibid* at para 193.
[123] *Ibid* at para 194.

been reintroduced by Senator Mobina Jaffer as Bill S-213 and is currently before committee).[124] This followed previous attempts by politicians to introduce similar legislation including former Minister of Justice Irwin Cotler in 2005 (during his term as the Liberal Minister of Justice under the Martin government), Leader of the Green Party Elizabeth May in 2016, and NDP MP Sheri Benson in 2018. Senator Pate had also introduced a previous version of the Bill in 2018 and the same version as the most recent proposal in early 2020.

The legislative amendments in Bill S-213 propose the insertion of a blanket judicial discretion to apply to all sentencing hearings which would allow the Court to forego minimums. It proposes surgical amendments to subsections 718.3(1) and (2) of the *Criminal Code* which deal with punishment generally and the degree of punishment. Senator Pate's proposed amendments would make any mandatory minimum sentence put before a court completely discretionary, without reference to an "unjust" threshold or other exceptional circumstances:

> (1) If an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, <u>despite</u> the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.
>
> (2) If an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, despite the limitations prescribed in the enactment, <u>including a punishment declared to be a minimum punishment,</u> in the discretion of the court that convicts a person who commits the offence.[125]

In the safety valve framework developed below, this thesis plots safety valve models along broad-narrow and high-discretion – low-discretion axes. The proposed safety valve in Bill S-213 can be categorized as a broad, high-discretion safety valve.

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[124] Bill S-207, *An Act to amend the Criminal Code (Independence of the Judiciary)*, 2nd Session, 43rd Parliament (Second Reading in the Senate 25 May 2021); reintroduced as Bill S-213, An Act to amend the Criminal Code (Independence of the Judiciary), 1st Session, 44th Parliament (Second Reading in the Senate 26 April, 2022, currently at consideration in committee).
[125] *Ibid* [emphasis added].

When the Liberal government was elected on November 4, 2015, overhaul of the criminal justice system was a large part of their justice mandate. The Prime Minister repeatedly expressed concern about the use of MMSs[126] and the party's commitment to implementing the Truth and Reconciliation Commission's 94 calls to action.[127] In Prime Minister Trudeau's mandate letter to then Justice Minister Wilson-Raybould, her fourth priority listed was a review of the criminal justice system and sentencing reform with a mandate to "increase the use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians."[128] Justice Minister Wilson-Raybould began her tenure with significant publicity about her department's commitment to revisit the MMSs in the *Criminal Code,* stating to media that judges should be able to determine sentences.[129] What followed were several years of stagnant criminal justice reform,[130] and a jarring political scandal that resulted with the minister's ouster and replacement by current Justice Minister Lametti.

Minister Lametti's tenure has seen some significant criminal justice reform and proposals for reform. Mostly significantly, Bill C-5, *An Act to amend the Criminal Code and Controlled Drugs and Substances Act* proposes significant changes to criminal legislation. Specifically, it repeals 20 mandatory minimum

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[126] Global News, "Justin Trudeau might repeal some mandatory minimums if elected", *Global News*, (25 September 2015), online: < https://globalnews.ca/news/2242259/justin-trudeau-might-repeal-mandatory-minimums-if-elected/>.

[127] Rt. Hon. Justin Trudeau, P.C., M.P., "Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission," December 15 12, 2015, online: < https://pm.gc.ca/en/news/statements/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation>. See also the Truth and Reconciliation Commission of Canada, "Honouring the truth, reconciling for the future", online (pdf): < https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf >. In item # 32 of calls for action from the aforementioned report, the Truth and Reconciliation Commission of Canada calls upon the federal government to give judges discretion to depart from MMS with reasons.

[128] Rt. Hon. Justin Trudeau, P.C., M.P., "Mandate Letter - Minister of Justice and Attorney General of Canada", November 12, 2015, online: <https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-justice-and-attorney-general-canada-mandate-letter>.

[129] Alison Crawford, "Liberals looking to eliminate many mandatory minimum sentences, justice minister says", *CBC News,* online: <https://www.cbc.ca/news/politics/mandatory-minimum-sentences-justice-1.3976205>.

[130] Daniel Brown and Michael Lacy, "Wilson-Raybould's regrettable legacy as justice minister", *Toronto Star*, online: <https://www.thestar.com/opinion/contributors/2019/01/16/wilson-rayboulds-regrettable-legacy-as-justice-minister.html>.

sentences, allows for conditional sentence orders to be expanded, and increases discretion for police officers and prosecutors to consider alternatives to prosecution such as diversion and addiction treatment. Much of the motivation behind the Bill had been about responding to the overincarceration of Indigenous, Black, and marginalized Canadians, as well as the ongoing drug overdose crisis. Bill C-5 has passed third reading in the House of Commons.

B. Benefits and Risks of Safety Valve Legislation

1. Expected Benefits

Sentencing safety valves were explicitly recommended by the Supreme Court as a solution to the difficulties of MMSs in *Lloyd*. The Court cited a number of reasons this solution might appeal.

First, and most importantly, it would allow courts to avoid injustice and constitutional infirmity. Sentences that would amount to cruel and unusual punishment absent a declaration of unconstitutionality could be avoided. This would allow the courts to avoid imposing punishments which might otherwise be abhorrent or intolerable, and avoid the legislature having to deal with provisions being declared of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982.*

Second, mandatory minimum sentences would continue to remain in effect, as Parliament intended. Safety valves would allow the legislature to continue to impose severe sentences for abhorrent crimes, while leaving room for exceptional cases to avoid unconstitutionally disproportionate sentences. Unlike findings of unconstitutionality at the federal level which can make a provision infirm across the country and often requires an immediate response from the legislature, safety valves would likely avoid these situations and make such findings rarer.

Third, legislated safety valves would allow the legislature to determine the parameters of such discretion – the form and magnitude would be questions of policy that would be within the domain of Parliament. Findings of unconstitutionality by a court of a mandatory minimum leave it open to the court to determine an appropriate sentence. If the legislature built in safety valves that would catch exceptional cases, they would have a level of control in determining the parameters of such jurisdiction – as will be discussed below, safety valves can be narrow, or broad, and apply to specific crimes or types of offenders.

Fourth, safety valves would be an effective response to the lack of individualization in the current sentencing regime for offences that carry mandatory minimum sentences. There is significant discussion in the Canadian context about the overrepresentation and over incarceration of Indigenous, Black and minority populations in the criminal justice system. Factors that might mitigate an otherwise harsh sentence cannot be considered by a sentencing judge under the current regime. The use of safety valves would allow for consideration of widely-accepted mitigating factors such as race and socioeconomic status. It might be argued that the particularized inquiry portion of the gross disproportionality test for findings of unconstitutionality of an MMS pursuant to section 12 can capture such cases. However, there is no doubt that those cases are limited to those that are so abhorrent, so intolerable that they offend standards of decency. This is a high bar to meet, that often excludes on the basis of these mitigating factors alone. Furthermore, a sentence may be extremely punitive while falling short of being unconstitutional.

Finally, safety valves will inevitably result in shorter and fewer custodial sentences, and this in turn will lead to decreased strain on the public purse. It would inevitably lead to decreased court and corrections costs. On the court costs front, as fewer people are captured by an MMS, there will be a reduction in the number of people who opt for a trial over resolution in hopes of avoiding a lengthy sentence. There is evidence to suggest that people are more likely to go to trial rather than resolve a matter given the stakes

involved with MMSs. On the corrections side, as the applications of MMSs decrease, fewer people would be incarcerated, and for shorter amounts of time.[131] Further, cases could resolve more quickly.[132]

2. Expected Risks

a. Increased Judicial Discretion

Safety valves have been proposed by the SCC as a means of inserting judicial discretion where there is none. Inevitably, this will increase the amount of discretion a judge wields when faced with an MMS. While there is a decrease in the prosecutorial discretion that has been written about widely as an effect of MMSs, the use of safety valve will shift some of that discretion to the judiciary as courts will be positioned to determine if an offender qualifies for an exception. In this way, MMSs may continue to exert the negative pressures that they did because the safety valves may not be used – the shift in discretion that might lead to reduced prosecutorial discretion may create inequitable applications and disparities because of extreme judicial discretion.

b. Efficacy Tied to Breadth or Inconsistency

Another risk of statutory exemptions is their efficacy – will they make a difference? As discussed below in the typology, and will be discussed in the comparative, safety valves can take many forms, and the Supreme Court in *Lloyd* did not provide guidance on the form a safety valve might take. In fact it explicitly stated that it is for parliament to determine the form of a statutory exemption. A risk therefore is that a valve may be too narrow in its reach and efficacy and would not alleviate the difficulties brought about by MMSs.

[131] Thomas Gabor and Nicole Crutcher, "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures", *Department of Justice Canada, Research and Statistics Division (2002)*, at 25, online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr02_1/rr02_1.pdf>.
[132] Thomas Gabor, "Mandatory minimum sentences: A utilitarian perspective" (2001) (43):3 *Canadian Journal of Criminology*, 385; Michael Tonry "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) (38):1 *Crime & Justice*, 65–114.

Parliament may argue, in response, that exemption was built in, and accordingly, the court has discretion, but it might effectively be limited to have very little meaningful role based on how wide its reach is.

c. Increased Use of MMSs

Central to Parliament's discussion around the use of safety valves may be the justification for increased mandatory minimum sentences. Though this is unlikely given the public discourse around mandatory minimums, and the efforts made by the current government to abolish many MMSs by way of Bill C-5. Future Parliaments might nonetheless reason that increased use of mandatory minimum sentences can be justified because judges always have an escape route available to them (despite how narrow that discretion might be). The rigidity of an MMS structure without the relief of a safety valve might have in some sense disciplined Parliament's use of the mechanism. If judges have no recourse, and if the only solution to an unconstitutional sentence as a result of an MMS is a broad finding of unconstitutionality striking down the legislation, then understandably, Parliament might be less inclined to use this mechanism given the risks. Ironically, it could be that by curing MMSs' problems of unconstitutionality, safety valve provisions might lead to increased actual (and rhetorical) use of MMSs, which could in turn exacerbate the problems identified with minimums above. One solution to this might be to opt for more rigid or structured valves, rather than large-scale high discretion valves, as a way to temper Parliament's use of MMSs.

d. Rule of Law Problems

Hogg and Zwibel propose the following definition of the rule of law:

> (1) a body of laws that are publicly available, generally obeyed, and generally enforced;
> (2) the subjection of government to those laws (constitutionalism); and
> (3) an independent judiciary and legal profession to resolve disputes about those laws.[133]

[133] Peter Hogg and Cara F. Zwibel, "The rule of law in the Supreme Court of Canada." *University of Toronto Law Journal* (2005) at 718.

On the first prong, it is clear that rule of law requires laws that are clear, accessible, predictable and that the society has a culture of respecting the laws and a justice system (including police, administrative bodies, etc.) to enforce those laws. The second prong is simply the constitutionalism principle contained in section 52(1) of the *Constitution Act, 1982*, which states that, "any law that is inconsistent with the provisions of the Constitution, is, to the extent of the inconsistency, of no force or effect."[134] The last prong recognizes that there cannot be a rule of law (or a culture of a rule of law) without an independent judiciary and a legal profession.

Though on their face statutory exemptions might appear to have a rule of law problem, it is important to consider this more fully to understand whether this is a possible risk. It can be argued that the rule of law problem of constitutional exemptions presented by Chief Justice McLachlin's reasoning in *Ferguson* can apply to statutory exemptions. One interpretation might suggest that the same reasoning can arguably apply to statutory exemptions. With respect to constitutional exemptions specifically, Chief Justice McLachlin's reasons can be summarized as violations of the prongs described above: first, exemptions create uncertainty, and second, bad laws, or laws that are inconsistent with the provisions of the Constitution, stay on the books.

In considering the issue of certainty, of course, the starting point is that in Canadian law, the starting point of the sentencing regime is that an accused person can never truly know what their sentence will be if the matter proceeds to that stage. This is even more so for sentences with no legislated ceilings or floors, and exacerbated in situations where judges are able to rely on a residual section 24(1) remedy which is not legislated. Legislated discretion on the other hand, does not carry this same uncertainty. The use of a 24(1) remedy is open to criticism and can be subject to accusations of inherent bias and discrimination, or what is sometimes referred to as the judge factor. Individual judges will determine whether or not an exceptional

[134] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.

circumstance may apply to an offender, and the same set of facts and circumstances may, arguably, lead to different results based on who the judge is. The problem of bias and discrimination is a problem of mandatory minimum sentences that can also therefore reappear as a problem of constitutional exemptions. The more overarching question of uncertainty of constitutional exemptions is that an offender does not know if the legislation is *constitutional*. Through the use of a legislated safety valve, an accused person who comes before the court knows that the law is sound, and in fact, may not apply to them for a defined set of reasons.

The second issue with exemptions highlighted by the Court in *Lloyd* was that unconstitutional laws stay on the books. To expand on this, the continuation of laws that are constitutionally unsound by reliance on an exemption is concerning. Fewer defendants would challenge constitutionally unsound laws and simply rely on an exception. It would be rare to have a defendant with a global view of the criminal justice system who might be more concerned with ensuring the constitutionality of a law is challenged rather than opting for a guaranteed, more lenient sentence if an exemption were to apply. With respect to statutory exemptions, some might argue that courts might similarly be more hesitant to strike a law if a less disruptive alternative is available. This might decrease the pressure on Parliament to ensure that legislation is able to withhold constitutional scrutiny, by building exemptions into the provision. Of course the counter argument to this might be that there will be defendants who do not qualify for the safety valve and choose to proceed with an application to challenge the constitutionality of a provision, and alternatively, judges who do not grant access to an exemption but agree that an MMS is unconstitutional. Furthermore, by introducing a safety valve, the core rule of law problem as described in *Ferguson* would vanish – the issue of there being a law on the books that is constitutionally deficient and cured on a case-by-case basis would be alleviated. A safety valve would be designed by Parliament, would be predictable, and would be settled. It goes without saying that the problem of uncertainty and unpredictability is one of the sentencing process as a default.

The website mms.watch tracks the constitutionality of Canadian MMSs.[135] It lists when a Canadian or provincial court strikes down or upholds an MMS, providing, among other things, the date it was struck down or upheld, the relevant section in the *Code* and the case citation. Although it is not a comprehensive list, it is a very helpful tool in understanding how the MMSs have been dealt with in section 52 rulings.

The patterns are what one would expect. First, there is geographic variance. Some MMSs are treated differently across provinces, and some are even treated differently at the trial level within the same province. Further confusion is created by the fact that, while some MMSs have been struck down or upheld by the Supreme Court which is thus binding across Canada, some have only been struck down or upheld by a provincial appellate court, which is only persuasive, not binding in other provinces and territories. Some challenges have only been decided by a trial court, and lastly, some MMSs remain unchallenged despite the likelihood that they are regularly imposed. It is worth noting that the use of safety valves would likely further muddy an already unclear and inconsistent application of MMSs across the country.

It is also worth remembering that the Supreme Court has stated, on a number of occasions, that the use of MMSs of a certain kind – those which are committed under a broad array of circumstances by a wide range of people - will almost inevitably include an imaginable hypothetical which will make the sentence unconstitutional. As the Chief Justice in *Lloyd* stated:

> …the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence.[136]

This problem is compounded by the realities of the court system: challenges are rare, and the practical impacts of MMSs are felt long before a case reaches the stage of a challenge. When cases do reach the sentencing stage, most offenders do not have the legal resources to mount such a challenge. As a result, bad

[135] MMS.watch, *supra* note 25.
[136] *Lloyd*, *supra* note 1 at para 3.

laws stay on the books until someone is able to mount a constitutional challenge. The use of safety valves would mitigate these challenges – the constitutionality of an MMS would be assessed in light of a safety valve. A safety valve, an expressly legislated scheme from Parliament, would be the curing of the unconstitutionality of an MMS. This would inevitably lead to fewer challenges, and more confidence for an accused person that the law they face is constitutionality sound, and clarity about whether an exception would apply to them.

C. Typology of Safety Valve Legislation

The crafting of a safety valve is, of course, only limited by a lawmaker's imagination. However, an overview of safety valves that exist in other countries will help inform this paper's analysis of whether statutory exemptions can resolve some of the issues created by MMSs. This paper categorizes safety valves along two axes: (1) *broad* versus *narrow,* and (2) *high discretion* versus *low discretion*. Each axis is more of a spectrum than strict category.

The broad/narrow spectrum is indicative of how many offenders could pass through a legislative safety valve. Narrow safety valves by their nature are designed to only allow a small number of offenders through – almost all of the offenders would be precluded from even applying. They can be based on a type of offender (e.g. juvenile) or a stringent set of criteria. Broad safety valves, on the other hand, can be taken advantage of by a diverse population of offenders (e.g. if the criteria is pleading guilty) - even if in practice only a few offenders are able to avail themselves of it.

The high/low discretion spectrum speaks to how much space a sentencing judge has to make evaluative judgments of the offender before them. High discretion safety valves return a lot of the discretion back to the sentencing judge, arguably making the MMS a guide as opposed to a requirement. On the other end of this spectrum, low discretion safety valves put little discretion, if any, back into the hands of the sentencing

judge. For these legislative safety valves, the role of the judge is merely to check off whether an offender meets a set of pre-defined criteria set out by a sentencing commission, in legislation or through crown discretion (for example, the U.S. Federal Safety Valve which will be discussed below).

Lastly, and importantly, the safety valves this paper addresses are those put in place by legislatures through validly passed statutes. It does not refer to safety valves that may be opened through the finding of unconstitutionality of an MMS. As discussed above, this type of judicially crafted safety valve was closed off in Canada with the Supreme Court of Canada's rulings that constitutional exemptions granted under section 24(1) of the *Charter* cannot be used to invalidate the individual application of an MMS.

The Department of Justice published a report categorizing legislative safety valves from around the world by type: (1) juvenile exemptions, (2) reduction of an MMS for early guilty pleas, (3) exemptions for offenders that cooperate and provide assistance to the government, (4) list of mitigating factors, (5) exceptional circumstances exemptions, (6) relief given in the interest of justice, and (7) presumptive MMS.[137] Categories 6 and 7 relate to the treatment of the offender after sentencing or during sentencing; therefore, they cannot remedy the problems created by MMSs and, other than a brief explanation below, this paper will not consider them further. The categories are not mutually exclusive. The following analysis will provide an overview of types of safety valves and place them within the matrix developed above.

1. Juvenile

Safety valves tied to age are narrow and low discretion. They permit a sentencing judge to waive an MMS if an offender falls below a statutorily prescribed age (usually 18) at the time of the offence. In the United States, this exemption exists at the state-level. The Montana *Criminal Code* has a blanket exception to

[137] Yvon Dandurand, "Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries" (2017) Department of Justice Canada, 12 [Dandurand].

MMSs for those offenders who were under 18 when the offence was committed.[138] In the United Kingdom, most mandatory minimums do not apply to youth, though there are some that apply to offenders who were between the ages of 16 and 18 at the time the offence was committed.[139]

2. Guilty Pleas

Most sentence reductions that are connected to a guilty plea are typically grouped within the realm of prosecutorial discretion, as will be discussed later in this analysis. Prosecutors will typically offer reduced sentences or charges in exchange for a guilty plea. Some jurisdictions, however, have this plea-related discretion tied to the sentencing court. This is a form of legislated incentive for an accused person. This is seen in the United States federal MMS laws that were described earlier. In England and Wales, as will be discussed, this exemption is seen explicitly in section 152 of the *Powers of the Criminal Court*[140] which allows for a 20 percent reduction in sentence for certain drug and burglary offences.[141] Along the matrix set out above, the guilty plea safety valve is a broad, low discretion valve.

3. Cooperation and Government Assistance

The substantial assistance safety valves, which will be examined in Part III at the United States federal level, generally require disclosure from the offender to the state with respect to the circumstances surrounding the commission of the offence (and often beyond the specific offence). In the matrix outlined above, this is a broad low discretion safety valve because any offender in theory can avail themselves of it and judges (if they are responsible for applying it) cannot consider any other factors other than degree of cooperation.

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[138] *Ibid* at 14.
[139] *Ibid.*
[140] *Powers of the Criminal Courts (Sentencing) Act 2000*, United Kingdom, 2000, c. 6, U.K. Public General Acts, s 152.
[141] Dandurand, *supra* note 137 at 16.

Some forms of this exemption are tied entirely to prosecutorial discretion and can only be triggered by the state at the sentencing-stage, whereas others are built into legislation for consideration by a sentencing court. This safety valve is dependent on an offender's ability or willingness to disclose information. It easily excludes those offenders who are low-level players in a criminal enterprise who through fear of retaliation or simple lack of access would not be able to satisfy this requirement – it essentially turns an offender into an informant. Not surprisingly, there is significant research to suggest that the prosecutorial discretion that is relied upon in the use of substantial assistance safety valves leads to disparate impact among offenders.[142]

4. Mitigating Factors

The mitigating factors exemption, depending on the specificity of the factor, can be restrictive (narrow and low discretion) or sweeping (broad and high discretion) in its nature. It is a legislated list of factors that, if present, will trigger a safety valve that allows a court to exercise its discretion in setting a sentence. Typically, these are tightly controlled exemptions that require an offender to meet or fulfil multiple steps before the MMS can be avoided. There are numerous examples of this type of mitigating factor approach. In South Australia, the mitigating factors safety valve, once applicable, can be sweeping in nature. Section 17 of the *Criminal Law Sentencing Act 1986* allow reductions of penalty for any acts with a minimum in consideration of an offender's personal characteristics, the nature of the offence, or extenuating circumstances – what must exist for the court essentially is a "good reason" to reduce.[143] The mitigating factors exemption at the United States federal level will be discussed in detail below. It applies to only certain drug offences and requires five factors to be met, this is an example of a restrictive form of this exemption. Even after the five factors are met and the offender qualifies for the exemption, the court must sentence within the confines of the federal *Sentencing Guidelines.*[144]

[142] Dandurand, *supra* note 137 at 18.
[143] *Criminal Law (Sentencing Act)* (SA) 1988, s 17.
[144] Dandurand, *supra* note 137 at 20.

5. Exceptional Circumstances

The exceptional circumstances safety valves typically present as strict legislated tests that an offender must meet. The legislator's intent is that they apply only in rare cases and that most offenders be subject to the minimum. As a result, it provides relief that is narrow but arguably medium to high discretion since the judge has to make the determination. Australia has a few examples of exceptional circumstance safety valves. In the Northern Territory of Australia, strict exceptional circumstances relief was introduced and later amended for adult property offences.[145] In Victoria, the approach the government took to apply the exceptional circumstances safety valve was interesting. It consulted the Sentencing Advisory Council and sought advice on the implementation of an exceptional circumstances clause that would allow a court to impose below the MMS for crimes of serious violence.[146] What resulted was a meaningful response from the Council, which took a position against MMSs, and suggested that a non-exhaustive list of special reasons for foregoing the minimum be prescribed in the legislation. These reasons include assistance from the offender to the government, the offender's age and maturity, the offender's level of mental culpability, required treatment, and so on.[147] Similar valves exist in the United Kingdom and South Africa.[148]

6. Unjust Sentences

In New Zealand, several MMSs have "manifestly unfair" exemptions available to them, which if triggered, require written reasons from the court.[149] Similarly, in the United Kingdom, as discussed in greater detail below, mandatory minimums for certain drug and burglary offences can be avoided if the sentence would be unjust.[150] The courts in the U.K. have also provided examples of the types of scenarios that might be

[145] *Sentencing Act 1995* (NT) s. 78A(6B)-(6C), (6E), enacted by the *Sentencing Amendment Act 1999*.
[146] Dandurand, *supra* note 137 at 23.
[147] *Ibid.*
[148] *Ibid* at 24-30.
[149] *Ibid* at 30-37; *Sentencing Act 2002,* Public Act 2002 No 9, New Zealand.
[150] *Ibid* at 37; *Sentencing Act 2020,* Public General Acts, 2020 c. 17, Group 3, Part 10, Chapter 7, sections 313-314, online: <https://www.legislation.gov.uk/ukpga/2020/17/part/10/chapter/7/crossheading/minimum-sentence-for-repeat-offences>.

caught by these tests – they include offenders whose previous offences may have occurred many years before, or offenders who engaged in recreational drug sharing with a group of friends.[151]

This is arguably the most offender-friendly relief because it is both broad and high discretion – anyone can qualify for it and the judge must exercise a lot of discretion to determine whether a sentence would be unjust. Unlike the exceptional circumstances category, there are often no listed prerequisites for these exemptions and they can be determined based on legal definitions tests by the presiding judge.

7. Presumptive Minimums

Presumptive MMSs are broad and high discretion safety valves. They work by legislating the MMS such that it also stipulates terms on which the presumption can be rebutted by the offender, to therefore have the MMS not apply. There are multiple examples of these safety valves including in the U.K., United States, and Australia. In the United Kingdom, there are a series of "presumptively binding sentencing guidelines" which only require a court to "have regard to" them and allow them to depart by giving reasons.[152] In the United States, presumptive minimums are seen at the state-level. In the state of Connecticut, by way of example, MMSs exist either as strict, or as presumptive. Mitigating factors would not apply to strict MMSs which are fixed, but presumptive MMSs provide the court with discretion to depart with reasons.[153] In New South Wales, Australia, standard non-parole periods were set in the legislation and treated as a middle of the range for the offence.[154] Courts could legitimately depart from these periods with reasons.

[151] *R v Mcdonagh,* [2006] 1 Cr. App. R. (S.) 111; *R v Turner,* [2006] 1 Cr App R (S) 95; Dandurand, *supra* note 137 at 36-37.
[152] Dandurand, *supra* note 137 at 37.
[153] *Ibid* at 38.
[154] *Ibid* at 39; *Crimes (Sentencing Procedure) Act*, s 54A (1) and (2).

8. Other Safety Valves

The "other" category of safety valves includes those which do not have an impact on the problems associated with mandatory minimums directly. They are nonetheless included below for consideration as they provide some relief to offenders serving mandatory sentences.

a. Treatment of the Offender

Treatment-based safety valves are narrow in their scope. They are largely unable to remedy most of the issues associated with MMSs and are exemplary when they are applied. The state of Montana in the United States makes effective use of treatment-based safety valves. Section 46-18-222 of the *Montana Code* provides relief to an offender for specific offences for pursuit of rehabilitation of the offender.[155] The court makes an evaluation to determine whether a residential treatment facility, or a local community setting might provide better opportunities for rehabilitation of the offender and ultimately protection of the victim and society.[156]

Interestingly, in the Supreme Court of Canada decision in *Lloyd,* Chief Justice McLachlin rejected this treatment-based safety valve. The legislative provision available to the offender in *Nur* for completing a drug treatment program was deemed unviable and only illusory in remedying the ills of what was an unconstitutional mandatory minimum sentence.[157] Admission into the program required a plea of guilt, the program was not accessible to all offenders, and the Crown still retained jurisdiction over admission into the program.[158]

[155] Dandurand, *supra* note 137 at 36-37.
[156] *Ibid*.
[157] *Nur, supra* note 6 at para 34-38.
[158] *Ibid* at para 34.

b. Post-Sentencing Reviews

Post-sentencing reviews are also a possible form of safety valve. These involve the review of sentences while they are actually being served in custody. Examples include the United States' Bureau of Prosecution which can petition a court to review a sentence for: "extraordinary and compelling reasons", the age of the offender, and over 30 years of a sentence being served, among other reasons.[159]

[159] Dandurand, *supra* note 137 at 42.

III. COMPARATIVE ANALYSIS OF SAFETY VALVE MODELS

Comparatively analyzing safety valve legislation in similar jurisdictions is useful. Canada has been grappling with the problems of mandatory minimum sentencing for many years, and jurists, academics and politicians largely agree on what those issue are. Two of the three jurisdictions that form part of this comparative analysis are common-law constitutional democracies that make use of MMSs – and grapple with many of the same issues dealt with in Canada. By placing Canada's example against those of other systems, this analysis shows how the same problem is being dealt with in other places. More specifically, these jurisdictions make use of statutory exemptions to MMSs, and therefore serve as working examples of what a Canadian model safety valve might look like. This comparative discussion will attempt to determine what some of the issues facing other jurisdictions that make use of MMSs are, including the kind of discussion which surrounded the implementation of the safety valve. Most significantly however, the intent of this comparative analysis will be to examine how safety valves are designed and drafted. The analysis will extract the model of the safety valve from each jurisdiction. In Part 4 of this analysis, the model safety valve will be discussed in more detail and assessed in terms of level of discretion and breadth, and ultimately considered for the Canadian landscape.

A. United States

The American example of the use of safety valves follows the narrative of the war on drugs which the country has pursued since the 1970s. What began as the introduction of severe penal policy led to incredible difficulties for its population. In spite of the introduction of safety valve legislation, these corrections failed to ameliorate those harms. Today, though many agree that the war on drugs was lost, prominent advocacy groups such as Families Against Mandatory Minimums and politicians have recently started to shift the conversation.

1. A Brief Overview of Federal MMS in the U.S.

In the United States, unlike in Canada, the criminal law is administered federally in the Federal Courts system as well as at a state and local level. There is significant variation by jurisdiction, although the U.S. constitution holds criminal laws at all levels of government to the same constitutional standards.[160]

The U.S. history with MMSs is a complex one. Mandatory minimums in the United States date back to the 1790s when mandatory sentences applied to capital offences.[161] They were only occasionally used until the *Narcotic Control Act of 1956* when a significant number of MMSs were implemented for whole groups of offences (for example, long mandatory sentences were imposed for importing and distributing drugs offences).[162] This Act, while ushering in increased sentences, did not improve rates of recidivism.[163] Accordingly, in 1970, Congress passed the *Comprehensive Drug Abuse Prevention and Control Act of 1970,*[164] and most mandatory minimum sentences for drug offences were repealed. This shift in political attitudes was due to decreased judicial discretion, the alienating effect the sentencing regime had on youth, the lack of rehabilitation, and reduced deterrent effects.[165]

However, public attitudes towards sentencing again changed in the 1980s as the war on drugs was well underway. Instead of decreased judicial discretion and alienation of youth, political rhetoric focused on crime and public safety. This shift in the public conversation fueled growing voter concerns with crime levels, which translated to significant legislative changes including the passing of the *Sentencing Reform*

[160] US Const art III, § 2, cl 3.; US Const amend V, VI, VIII.; *Barron v. Baltimore*, 32 US (7 Pet.) 243 (1833).
[161] United States Sentencing Commission, "Mandatory Minimum Penalties in the Federal Criminal Justice System", (1991) Washington, D.C. at 5, online (pdf): <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf> [United States Sentencing Commission].
[162] *Narcotic Control Act*, Pub L No 84-728, 70 Stat 651 (1956).
[163] United States Sentencing Commission, *supra* note 161, at 6.
[164] *Comprehensive Drug Abuse Prevention and Control Act of 1970*, Pub L No 91-513, 84 Stat 1236 (1970).
[165] United States Sentencing Commission, *supra* note 161, at 6-7.

Act (SRA)[166] which ushered in many MMSs. By 1983, 49 out of 50 states had also passed mandatory minimum legislation.[167]

The most significant legislation during this time of mandatory minimum sentence proliferation was the *Anti–Drug Abuse Act of 1986*.[168] Introduced by President Reagan, the Act assigned mandatory minimums to federal drug offences based on drug amount and type. One of the most controversial provisions allowed first-time, non-violent offenders convicted of a drug trafficking offence to face mandatory minimums ranging from 5 to 10 years in prison.[169]

By 1988, more MMSs had come. Congress had introduced penalties of five years for simple possession of more than five grams of crack cocaine, and doubled the already present ten-year minimum sentence for drug enterprise offences.[170] These minimum sentences were tied to the amount of the drugs at issue in each case (rather than any personal circumstances of the offender).

In the public arena, politicians were being pressured to enact stricter laws and forms of punishment.[171] According to one academic, the government's logic was simple: "if all drug users and dealers were locked in jail, crime and drug use would no longer be an issue."[172] What the country saw instead was not only mass

[166] *Sentencing Reform Act of 1984*, 18 USC 3551 [*SRA*]. The *SRA* further implemented changes such as establishing minimums for offences committed near schools, mandating custodial sentences for serious offences, and 1 year minimums for less serious offences, and allowing for mandatory sentencing 'add-ons' when aggravating factors were present.
[167] United States Sentencing Commission, *supra* note 161, at 8.
[168] *Anti–Drug Abuse Act of 1986,* 1986, 100 Stat. 3207, 99-570.
[169] David Bjerk, "Mandatory Minimums and the sentencing of federal drug crimes", (2017) 46:1 J Leg Stud at 93-128 [Bjerk].
[170] United States Sentencing Commission, *supra* note 161, at 9.
[171] Matthew C. Lamb, "A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration" (2014) 41:1 J Legis at 126 [Lamb]. See also Natasha Bronn, "Unlucky Enough to Be Innocent: Burden-Shifting and the Fate of the Modern Drug Mule under the 18 U.S.C Sec. 3553(f) Statutory Safety Valve" (2013) 46:4 Colum JL & Soc Probs at 475 [Bronn].
[172] *Ibid* at 127.

incarceration, but mass incarceration that had particularly devastating disparate impacts on its most poor and vulnerable populations.[173]

This period of proliferation of mandatory minimum sentences during the war on drugs resulted in an inflated prison population, with the general population of offenders going up by 116% and the percentage of drug offenders in prison increasing by 532%.[174] The imposition of sentencing laws targeting disproportionately small amounts of crack cocaine compared to cocaine during this period also led to significant sentencing disparity and had social impacts felt most strongly by Black Americans.[119] The United States continues to deal with the impacts of sentencing laws from this period.

Today, twenty-five percent of all U.S. federal convictions carry a mandatory minimum and accompanying custodial sentence.[175] Of the hundreds of legislated mandatory minimums, drug trafficking offences account for over two-thirds of federal convictions, many of them still in effect from the 1970-80s.[176] Typically, offences which carry a mandatory minimum will have a corresponding sentencing guideline that provides a range.

2. The Formation of Federal Sentencing Guidelines

In response to the problems created by MMSs, the U.S. government started looking at federal sentencing disparity in the 1980s. Research showed that similarly situated offenders were being sentenced to unjustifiable ranges of punishments, with little guiding practice in the courts. In response, the United States Sentencing Commission (USSC) was established in 1984 as a branch of the judiciary. Commission

[173] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Tenth Anniversary Edition (New York: New Press, 2020), at 97-100 and 140-145.
[174] Lamb, *supra* note 171 at 128.
[175] *Ibid* at 133-134.
[176] Charles Doyle, "Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions", Congressional Research Service at 1 [Doyle].

members are Presidential appointments that are confirmed by the Senate and include judges. This system of a sentencing commission (or council, as it is referred to in the U.K. context) is something that is missing from the Canadian landscape. Many of the functions of such a system could be beneficial, especially in respect of data collection and sentencing policy recommendations.

Congress gave the USSC three mandates: (1) to create and regularly amend the federal sentencing guidelines, (2) to recommend changes to sentencing by way of reports to Congress, and (3) to take part in data collection, research and training related to sentencing issues.[177] The SRA's specific directives to the USSC significantly narrowed the discretion previously available to sentencing judges. The stated purpose of the directives was greater certainty and fairness in the sentencing process and avoiding unwarranted disparities.[178] In the early stages of the federal guidelines, courts were required to sentence individuals within the guideline ranges provided and could only depart from the range if there were certain aggravating or mitigating circumstances. At this point in time, no exemptions existed for judges to depart from MMSs generally. As time went on, with further directives from Congress, ranges became narrower, offence minimums increased, and the guidelines became mandatory.

In 2005, the Supreme Court of the United States finally dealt with the increasing lack of discretion given to judges in sentencing guidelines. The case of *United States v. Booker* ruled that the mandatory nature of the guidelines was unconstitutional, and the guidelines were made "effectively advisory."[179] The cases of

[177] United States, Office of General Counsel and the Office of Education and Sentencing Practice, *Federal Sentencing: The Basics* (Washington: US Sentencing Commission, 2020) at 2, online (pdf): <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf>.
[178] *Ibid* at 2.
[179] *Booker*, *supra* note 51, at 245-46.

Rita v United States,[180] *Gall v United States*,[181] and *Kimborough v United States*,[182] followed and further clarified a judge's ability to depart from guidelines.

Today, the guidelines remain a starting point for sentencing judges, and sentencing data continues to point to average sentences closely tracking the guideline ranges, even post-*Booker*.[183] Typically, the process followed by sentencing judges involves a determination of an offender's criminal history category (which has an attributed point-scale) and various other factors, all of which will determine the appropriate range.[184]

Despite the statutory guidelines, there are hundreds of federal offences punishable by mandatory minimums. As noted earlier, the proliferation of MMSs overlapped with the establishment of the federal guidelines. This reflects one of the potential areas of risk highlighted in our own analysis with respect to the use of safety valves. A risk that as discretion is built in for courts, governments would feel more comfortable legislating additional MMSs. In the American example, the guidelines were initially mandatory ranges that judges *could* depart from in exceptional circumstances, and with their development came the legislation of many additional MMSs.

3. Relief from Mandatory Minimums: Substantial Assistance and the Federal Safety Valve

Today, offenders tried under U.S. federal mandatory minimums have two prescribed routes of relief available to them for select offences.[185] The first relief route is based on prosecutorial discretion. Upon application by the prosecutor to the court, offenders who provide substantial assistance to the government

[180] *Rita v United States*, 551 US 338 (2007).
[181] *Gall v United States*, 552 US 38 (2007).
[182] Kimborough v United States, 552 US 85 (2007).
[183] United States Sentencing Commission, "Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing." (2013) Federal Sentencing Reporter 25.5, at 60.
[184] Bjerk, *supra* note 169.
[185] Doyle, *supra* note 176.

can side-step the applicable mandatory minimum sentence.[186] The information provided must be both new and useful. The prosecutor is then able to make an assessment about whether to depart from the minimum based on how satisfied they are with the disclosure. Further, the information must be in relation to the drug conspiracy offence itself – it is foreseeable that some lower-level participants of a drug conspiracy (like drug mules) would possess less information than more highly-placed conspirators. This often leads to less criminally culpable offenders serving significantly more time (and bound by the mandatory minimums) than more highly ranked players given their access to information and what they could provide the government with.[187] The second, and only other exception to MMSs, is a statutory safety valve exemption for specific offences, under specific circumstances. This analysis will refer to this exception as the "Federal Safety Valve".

a. What led to the Federal Safety Valve?

In 1991, the USSC presented a report to Congress entitled, "Mandatory Minimum Penalties in the Federal Criminal Justice System."[188] This report warned that low-level offenders were serving disproportionately long sentences.[189] In response, federal safety valve legislation was passed by Congress in 1994. The report also highlighted concerns with MMSs: increased prosecutorial discretion, increased numbers of guilty pleas, decreased proportionality in sentencing and decreased deterrence of crime.[190] Significantly, it also concluded that MMSs have disparate impact as the application of MMSs appeared "to be related to the race of the offender – white offenders were more likely than non-white offenders to be sentenced below the

[186] *Crimes And Criminal Procedure*, 18 USC. §3553(e) [*CCP*]. See also *Federal Rules of Criminal Procedure for the United States District Courts*, Pub L No 116-9 at Rule 35(b) (codified as amended in scattered sections of 18 USC (2020)).
[187] Jane L Froyd, "Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines" (2000) 94:4 Nw UL Rev at 1483.
[188] United States Sentencing Commission, *supra* note 161.
[189] *Ibid* at 16-17.
[190] *Ibid*.

minimum."[191] Similar difficulties with MMSs are cited by scholars writing about these issues in the Canadian context.

The problems with MMSs identified in the 1991 USSC Report were further underscored by judges, scholars, and various commissions, all of which called for change. One common and recurring concern is referred to as the "cliff effect,"[192] whereby small changes in the facts of a case can lead to significant changes in sentencing. An offender who falls below the mandatory minimum cliff can be considered for mitigation and a lower sentence pursuant to the federal sentencing guidelines. A similarly placed offender, however, by virtue of a few grams of a controlled substance may fall over the steep MMS cliff. An example provided by Natasha Bronn is an offender who sells 500 grams of cocaine and is subject to a 5-year mandatory minimum, whereas a similarly placed offender who sells 5 grams less would fall below the 500-gram threshold and would likely receive a sentence closer to two years.[193]

Some judges became publicly vocal about their discomfort in sentencing low-level offenders to mandatory minimum sentences. As one said, "I simply cannot sentence another impoverished person whose destruction has no discernable effect on the drug trade."[194] The American Bar Association and the Judicial Conference of the United States both took stances in opposition to these MMSs. [195] Furthermore, 100 federal judges publicly refused to preside over trials that prosecuted low-level drug offences.[196] Judges of the Seventh Circuit like Judge Frank Easterbrook provided heavy obiter in cases on the discriminatory effects of mandatory minimums on low-level offenders:

> They lack the contacts and trust necessary to set up big deals, and they have little information of value. Whatever tales they have to tell, their bosses will have related. Offenders unlucky enough to be innocent have no information at all…meting out the

[191] *Ibid* at ii.
[192] Philip Oliss, "Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines" (1995) 63 U Cin L Rev 1851 at 1859.
[193] Bronn, *supra* note 171, at 479.
[194] *Ibid*.
[195] *Ibid*.
[196] *Ibid*.

> harshest penalties to those least culpable is troubling, because it accords with no one's theory of appropriate punishment.[197]

In response to the many criticisms of mandatory minimums, the *Violent Crime Control and Law Enforcement Act*[198] was passed by Congress in 1994 and signed by then President Bill Clinton. The bill was largely authored by then Senator Joe Biden, who was then chairman of the Senate Judiciary Committee. The crime bill meant to address decades of increasing crime, especially narcotic use and the "crack cocaine epidemic." However, while it was part and parcel with other legislative efforts in the U.S. throughout the 80s and 90s which led to mass incarceration of its citizenry,[199] the Bill did introduce the Federal Safety Valve as a response to the criticisms of MMSs. Like Australia which will be discussed below, the valve was borne of mounting public pressure relating to the harms of MMSs.

b. Implementation of the Federal Safety Valve

The Federal Safety Valve applies to low-level, nonviolent, cooperative offenders with minimal prior criminal history, who have been convicted under specific drug-related offences. Five criteria must be met in order for a court to be able to bypass an MMS during sentencing.[200] The safety valve is available to

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[197] *Ibid*.
[198] *Ibid* at 480. See also *Violent Crime Control and Law Enforcement Act*, Pub L No 103-322, 108 Stat 1796 (1994) [*Violent Crime Control and Law Enforcement Act*].
[199] James Cullen, "Sentencing Laws and How They Contribute to Mass Incarceration," *The Brennan Center for Justice,* online: https://www.brennancenter.org/blog/sentencing-laws-and-how-they-contribute-mass-incarceration-0.
[200] The full text of the safety valve provision (18 U.S.C. s. 3553(f)) reads as follows:
(f)Limitation on Applicability of Statutory Minimums in Certain Cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—
(1) the offender does not have—
(A)more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
(B)a prior 3-point offense, as determined under the sentencing guidelines; and
(C)a prior 2-point violent offense, as determined under the sentencing guidelines;
(2) the offender did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
(3) the offense did not result in death or serious bodily injury to any person;

offenders who are convicted of drug trafficking, simple possession, and attempt or conspiracy provisions of the *Controlled Substances or Controlled Substances Import and Export Acts*.[201] Some of the MMS-carrying offences ineligible for safety valve relief include those drug trafficking offences which occur near schools or playgrounds.

The burden of proving the elements of the safety valve features lies on the offender. The court must be satisfied by a "preponderance of the evidence" that each of the five requirements are met.[202] The safety valve also functions on a points-based system. Prior to the *First Step Act*, the first requirement of the safety valve provisions was that the offender not have more than one criminal history point (as determined under the sentencing guidelines). After the 2018 amendments under the *First Step Act*, offenders are now entitled to have up to but not more than four criminal history points.

The sentencing guidelines provide six available criminal history categories to which offenders can be assigned. Past convictions are assigned one to three points, based on the seriousness of the offence. An offender's status at the time that the offence was committed can also increase history points – for example, being on probation at the time or within two years of release from imprisonment at the time of an offence can add points to an offender.[203] Some offences might be entirely excluded from the points calculation, such as very old offences or minor misdemeanors.

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(4)the offender was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
(5)not later than the time of the sentencing hearing, the offender has truthfully provided to the Government all information and evidence the offender has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the offender has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the offender has complied with this requirement.
Information disclosed by an offender under this subsection may not be used to enhance the sentence of the offender unless the information relates to a violent offense.

[201] Doyle, *supra* note 176 at 2.
[202] *Ibid*.
[203] U.S. Sentencing Commission, "Impact of Prior Minor Offenses on Eligibility for Safety Valve" (2002) online (pdf): *U.S. Sentencing Commission* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2009/20090316_Safety_Valve.pdf>

The remaining factors require that: offenders not use violence or credible threats of violence, or possess a dangerous weapon during the commission of the offence; that the offence did not result in serious bodily injury or death; that the offender was not in a senior position or a continuing criminal enterprise during the execution of the offence; and finally, that the offender truthfully provide all information and evidence they have concerning the offence (the lack of information will not preclude an offender from the safety valve, though this contentious fifth factor is discussed further below).

Once an offender meets all five criteria, they are eligible to receive a sentence below the mandatory minimum sentence. Although judges may hear input from the prosecutor on whether an offender has met the burden under the safety valve requirements, ultimately the court makes the determination. The reduced sentence is then based on factors set out in the federal sentencing guidelines.

Though complex, for the purposes of this analysis, what is most relevant is that the safety valve carries many conditions that must be met before an offender qualifies. There is no clear exigent circumstances exemption built in like is seen in the jurisdictions that will be discussed below, where judges can base their reliance on a safety valve solely on their discretion. This type of safety valve might address some of the concerns of unfettered judicial discretion that were raised earlier as a possible risk of safety valve provisions. But it is nonetheless a cumbersome safety valve, narrow in its reach, which has sparked issues of its own as will be discussed below.

c. Continuing Problems with the Fifth Factor (the Tell-All Requirement of the Safety Valve)

An interesting development in the American example of safety valve legislation, is the amount of litigation and scholarly critique the safety valve's prerequisites have received. While the initial research on the

efficacy of the federal safety valve as a whole was promising, the courts' interpretations of the fifth factor of the valve have been mixed and problematic. It is the most heavily litigated requirement of the provision.

The intent of this fifth factor is to mitigate the sentencing of low-level offenders. According to the provision, if an offender has little to no information to provide, they cannot be excluded from the safety valve. However, it does require *full disclosure* from the offender and like the first four factors, the offender bears the burden of proving this element. The fifth factor states that the offender has to provide information on their own committed crime and on other crimes that were "part of the same course of conduct or of a common scheme or plan," including any conduct that is related to the offence but not charged.[204] Further, an offender must "not later than the time of the sentencing hearing…truthfully provide to the Government all information and evidence the offender has concerning the offense or offenses."[205] This is a very cumbersome process that narrows the potential benefit and availability of the safety valve.

There is no consensus on the nature and extent of this disclosure amongst U.S. court circuits. Further, the crime bill[206] does not elaborate on the disclosure requirement. Offenders typically provide statements in person or in writing to the government.[207] The circuit courts vary on the circumstances under which disclosure must be made to satisfy the fifth factor – some put an offender through intensive questioning while others simply treat it as a formal check-box requirement. Further, while some courts require that offenders provide the disclosure to the government before the sentencing hearing, others are content with the disclosure being done *at* the sentencing hearing. Others still will not reach the sentencing stage unless

[204] *CCP*, *supra* note 186, § 3553(f)(5).
[205] *Ibid*.
[206] *Violent Crime Control and Law Enforcement Act*, *supra* note 198.
[207] Adrienne N. Kitchen, "Don't Break the Safety Valve's Heart: How the Seventh Circuit Superimposes Substantial Assistance on the Mandatory Minimum Safety Valve's Complete Truthful Disclosure Requirement" (2014) 9:2 Seventh Cir Rev, at 335.

full disclosure is made at the very first debriefing.[208] There is also no agreement between the circuits on where the burden of proof lies if the truthfulness of an offender's disclosure is challenged.

d. Legislative Developments

In 2010, the United States Sentencing Commission surveyed stakeholders within the federal criminal justice system, including federal court judges. It was, significantly, the first survey of federal judges after the sentencing regime had become advisory (i.e. post-*Booker*). The second question of the report which was eventually presented to Congress was put to district court judges on whether the statutory safety valve should be expanded to include certain provisions. Sixty-six percent of respondents agreed or somewhat agreed that those drug trafficking offenders that have 2 or 3 criminal history points should be included under the legislation; 69 percent of respondents were of the view that all offences with a mandatory minimum should be included in the safety valve legislation; and, significantly, 76 percent were of the view that drug trafficking offences should be subject to the Federal Safety Valve. Ultimately, the results of the survey suggested that most federal sentencing judges supported amendments being made to the safety valve. The results of the survey were put to Congress in 2011 and a recommendation was made that the safety valve be expanded to include additional offences and to apply to a wider range of offenders (with a more extensive criminal history) – these changes have yet to be implemented other than those discussed above as part of the *First Step Act*.[209]

In 2013, Pennsylvania State Senator Stewart Greenleaf, the chairman of the Senate Judiciary Committee, wrote a forward for an article published by Molly Gill, the Government Affairs Counsel for Families

[208] *Ibid* at 336.
[209] U.S. Sentencing Commission, "Results of Survey of United States District Judges January 2010 through March 2010," (June 2010) online (pdf): *U.S. Sentencing Commission* <http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_20106.pdf>.

Against Mandatory Minimums (or FAMM).[210] In it, he described himself as having been a well-intentioned law maker who voted for MMSs to reduce crime. In addition to acknowledging the work done by FAMM in providing valuable insight towards fairer sentencing across the country, Senator Greenleaf also praised the 1994 Federal Safety Valve:

> Since that time nearly 80,000 federal drug offenders facing mandatory minimum sentences have received the benefit of the safety valve, saving the federal government an estimated $25,000 per prisoner, per year for each year shaved off of the sentence. About one-third of states have enacted some type of safety valve statute, with considerable cost savings and without a reduction in public safety.[211]

Senator Greenleaf was a Republican Senator who was tough on crime for most of his tenure after a career as a prosecutor. He self-described as someone who had pushed for harsh sentencing but now found himself "at the forefront of the movement to balance our criminal justice system in favor of more rehabilitation and judicial discretion."[212]

The Federal Safety Valve was accordingly expanded, as noted above. The most significant amendment came from the *First Step Act* which was signed into law on December 21, 2018 by President Donald Trump with the support of a bipartisan coalition. A significant amount of fanfare followed the FSA and its accompanying criminal reforms. The bulk of the changes implemented by the FSA were focused on conditions of imprisonment and release. Some mandatory minimum sentences were also shortened, leading to the release of 3,100 inmates and 1,691 sentence reductions.[213] Significantly, the FSA allowed for an expansion of the safety valve criteria. Although the expansions were not retroactive, they allowed for defendants with up to four criminal history points (compared to one point, under the previous rules) to be

[210] Molly Gill, "Turning off the spigot: How sentencing safety valves can help states protect public safety and save money." (25) Federal Sentencing Report, 349 [Gill].
[211] *Ibid* at 349.
[212] *Ibid*.
[213] Office of Public Affairs, "Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk And Needs Assessment System," (19 July 2019), online: *The Department of Justice* <https:// www.justice.gov/opa/pr/department-justice-announces-release-3100-in- mates-under-first-step-act-publishes-risk-and>.

considered under the first factor. In spite of this expansion, the argument is still made that the changes are not sufficient, and that MMSs should be repealed.

4. Overview of State Level Safety Valves

Though the focus of this section of the thesis has been the model of safety valve legislation passed at the federal level, it is worth noting that many states have passed their own safety valve legislation. State-level valves vary in their design and in the inter-governmental dialogue they require, both across states and with the federal government. The use of safety valves at the state level is borne from sentencing reform initiatives which respond to many of the same problems seen at the federal level. Notable examples which draw interesting distinctions from the federal safety valve are discussed below.

Like at the federal level, state-level U.S. research speaks to similar persistent issues with mandatory minimums. For example, in Pennsylvania during the late 1990s, an examination was done of prosecutorial discretion in applying mandatory minimum sentences. Studies found that MMSs continued to be used as leverage by the prosecution to negotiate guilty pleas.[214]

In the state of Maine, a court may bypass an MMS for certain drug offences if the court determines that (1) the sentence will result in "substantial injustice," (2) there will be no "adverse effect on public safety," and (3) the deterrent effect of the sentence will not be impaired.[215] Courts that bypass a mandatory minimum pursuant to this section are required to give reasons in writing or on the record for doing so. This is an example of a broad and high discretion safety valve that is significantly less cumbersome for a defendant. It is far broader in its reach than its federal counterpart given its generally applicable prerequisites and its

[214] Celesta A. Albonetti, "Mandatory minimum penalties: Evidence-based consequences and recommendations for policy and legal reform" in Thomas Bloomberg, ed, *Advancing Criminology and Criminal Justice Policy* (London: Routledge, 2016) 155, at 160.
[215] Section 1125, *Maine Criminal Code*, Chapter 45 online: <http://www.mainelegislature.org/legis/statutes/17-A/title17-Asec1125.html>

use of an *injustice* standard (similar to the "exceptional circumstances" and "unjust sentences" safety valves discussed in Part II above).

Similarly, Maryland passed legislation in 2016 which allows courts to bypass the mandatory minimum sentence for drug offences where the sentence would result in a *substantial injustice* to the offender and would not be necessary to protect the public interest.[216] The legislation was described by Senator Michael Hough as striking "a balance by maintaining tough penalties for drug dealers, who must be behind bars to protect our communities, providing judicial discretion to depart from overly harsh mandatory penalties in egregious circumstances and increasing drug treatment."[217] Like the Maine safety valve, this is also a broad and high discretion safety valve with parallels to the "exceptional circumstances" and "unjust sentences" categories of safety valves.

The American example is an evolving one, with cautionary tales and wisdom Canada can draw from. The U.S. safety valve ecosystem shows that MMSs have certainly led to difficulties, many of them similar to the ones seen in the Canadian criminal justice system. Though triggered by the war on drugs and the incredible harm communities faced as a result of substance abuse, those harms have been exacerbated over the years as the war raged on. Recently, the narrative has begun to shift. The introduction of sentencing guidelines, though at first restrictive, have now relaxed and seem to be continually shifting and subject to ongoing research and consultation with experts. The U.S. safety valve itself has been subject to ongoing legislative reform and consideration.

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[216] *Justice Reinvestment Act*, Maryland General Assembly, Senate Bill 1005, 6lr2751.

[217] Gregory Newburn, "The State Factor" (2016) at 7*,* online (pdf): *American Legislative Exchange Council* <https://www.alec.org/app/uploads/2016/03/2016-March-ALEC-CJR-State-Factor-Mandatory-Minimum-Sentencing-Reform-Saves-States-Money-and-Reduces-Crime-Rates.pdf>. Oklahoma passed similar legislation to Maine and Maryland's because, according to State Representatives, "prison-bed space [was] being taken up with people who don't need to be there".

B. United Kingdom

1. A Brief Overview of Select MMSs in the U.K.

The United Kingdom has a relatively short history with mandatory minimums. Compared to the U.S. and Canada, it also has far fewer. In the U.K. comparison, this analysis will focus on the *Powers of Criminal Courts (Sentencing) Act 2000*[218] which established two mandatory minimums (which have more recently been legislated into the *Sentencing Code*).[219] Section 313 of the *Sentencing Code* prescribes a seven-year minimum sentence for a convicted person's third class A drug trafficking offence.[220] Section 314 of the *Sentencing Code* imposes a minimum sentence of three years for a third domestic burglary conviction.[221]

The U.K. sentencing regime went through a roller coaster ride in the early 1990s. In 1991, a government white paper resulted in the creation of the *Criminal Justice Act 1991*.[222] The main purpose of this act "was to install the principle of proportionality as the primary rationale for sentencing and to bring about a reduction in the use of imprisonment."[223] Canadian jurists will recognize this principle as fundamental to our own approach to sentencing, which highlights proportionality as a fundamental principle of sentencing in section 718 of the *Criminal Code of Canada*. In the U.K. context, however, it specifically only allowed judges to look at a convicted person's two most recent convictions in determining sentencing.[224] This was soon reversed – the *Criminal Justice Act 1993* amended the former act because "it had become apparent

[218] *Sentencing Act 2020* (U.K.), s 313-314.
[219] *Powers of Criminal Courts (Sentencing) Act 2000* (U.K.), s 109 [*PCCA*], the predecessor to the Sentencing Act, technically created a third minimum sentence – an automatic life sentence for the second serious sexual or violent offense – but it was struck down by the England and Wales Court of Appeal in *R v Offen* (2000), [2001] 2 All ER 154.
[220] *PCCA, supra* note 219218 at s 313(1).
[221] *Ibid* s 314(1).
[222] *Criminal Justice Act 1991* (U.K.).
[223] Andrew Ashworth, "Prisons, Proportionality and Recent Penal History" (2017) 80:3 Mod L Rev, at 473.
[224] It also created "unit fines" which convicted persons had to pay in an amount determined by looking at the seriousness of the offence and the persons' ability to pay

that putting blinkers on judges and prohibiting them from taking into account previous convictions was leading to widespread public concern at the sentences which resulted."[225]

The flurry of sentencing changes culminated in a 1996 white paper produced by the U.K. Home Office,[226] which, among other things, oversees police and security. It generally proposed "tough on crime" legislative changes, including the drug and domestic burglary mandatory minimums which are the focus of this analysis.

The changes to sentencing repeat drug and burglary offenders were driven by the Conservative government in power at the time and led by its Home Secretary, Michael Howard. The government responded with three reasons: general deterrence of criminal activity, excessive judicial leniency, and public demand for increased crime control measures. Mr. Howard believed that "the minimum term of imprisonment…must be served for purposes of retribution and deterrence"[227] and that the proposed minimums were part of a response "to public concern about crime," and as a result he was "determined to hit serious, dangerous and persistent offenders hard."[228] The same argument was echoed in the House of Lords where Conservative politician Baroness Blatch argued that mandatory sentences are needed to protect the public from dangerous repeat offenders[229] by acting as a deterrent.[230] Baroness Blatch also argued that the courts were not using the maximum sentences enough so the government wanted to at least impose "a floor" on sentences that are given to offenders.[231]

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[225] Lord Taylor, "Continuity and Change in the Criminal Law" (1996) 7 King's College LJ, at 3. Even more changes came in 1994 with the passing of the *Criminal Justice and Public Order Act 1994* (U.K.) and in 1995 with the *Criminal Appeal Act 1995* (U.K.). Given the volume of changes, and the speed with which they were enacted, Lord Taylor quipped that "if you walk into a Crown Court, you are as likely to meet a management consultant as a judge."
[226] U.K. Home Office, "Protecting the Public: the Government's Strategy on Crime in England and Wales" (London HMSO, 1996).
[227] U.K., HL Deb (4 November 1996), vol 284, col 911 (Michael Howard).
[228] Lord Chief Justice Taylor, "Howard's production line justice," *The Times* (23 May 1996), online: <https://archive.org/details/NewsUK1996UKEnglish/May%2023%201996%2C%20The%20Times%2C%20%2365587%2C%20UK%20%28en%29/page/n19/mode/2up>
[229] U.K., HL Deb (13 February 1997), vol 578 (Baroness Blatch).
[230] U.K., HL Deb (27 January 1997), vol 577 (Baroness Blatch).
[231] U.K. HL Deb *supra* note 227.

The mandatory minimums proposed in the 1996 white Paper were met with wide criticism from lawyers, judges and prison officials.[232] The most vocal critic was the Chief Justice of England at the time, Lord Taylor, who opposed mandatory minimums on the grounds that they would result in injustice, discourage guilty pleas, create undesirable incentives for the criminal (such as murdering a witness to their burglary) and will not have the desired effect of deterrence.[233] Many of these difficulties cited by Lord Taylor are similar to the difficulties with MMSs in both the Canadian and American jurisdictions discussed.

Much to the dismay of its critics, the government did not offer any evidence for the need for the drug offence minimum,[234] but it did cite statistics in support of the domestic burglary minimum.[235] First time domestic burglary offenders received an average sentence of 16.2 months between 1993 to 1994 but offenders with three or more convictions received 18.9 months for the same time period. Offenders with seven or more convictions received only 0.5 months more at 19.4 months.[236] Furthermore, 28% of domestic burglary offenders with seven or more convictions did not receive a prison sentence. [237]

As a result of this sentencing pattern in burglary offences only, Howard argued that "[w]e need to change the terms of trade against such career criminals."[238] In an article in the *Times*, Lord Taylor responded to Mr. Howard's use of these statistics as "wholly unjustifiable" because some of the data came from a period in time when judges were only able to take into account an offender's two previous convictions for sentencing as a result of legislation. [239] A judicial response by way of a newspaper spoke to the level of tension these measures had created. Some scholars argued that there were already significant penalties for class A drug

[232] Lord Taylor, *supra* note 225.
[233] Lord Taylor, *supra* note 228, at 10.
[234] U.K. Home Office, *supra* note 226.
[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*.
[238] Michael Howard, *supra* note 227.
[239] Lord Taylor, *supra* note 228.

trafficking available under guidance from the Court of Appeal in effect at the time, and so they believed there was little justification for the proposed increases.[240] It was argued that there was little basis for the claim that public worry about burglary had increased but there was reason to believe that the public was in fact worried about serious drug offences such as large-scale importation and distribution.[241]

There were also concerns around over incarceration – a widely accepted criticism of MMSs across jurisdictions. In the U.K., the concern was that the mandatory minimums would drastically increase the prison population and create a "bonanza scheme for prison architects."[242]

Lastly, it was argued that the mandatory minimums were proposed for political reasons. Professor Henham argues that the minimums in part represented the "final abandonment of a bifurcated sentencing policy for reasons of political populism or the triumph of short-term political consideration over informed and reasoned argument."[243]

Though initial proposals of the bill did not propose statutory exemptions to the MMSs, the significant pushback these proposals received led to revisions of the bill that contained statutory exemption provisions. Ultimately, although the resistance to the minimums was significant, they were legislated with safety valves built in.

2. The United Kingdom's Built-In Safety Valves

The section 313 and 314 mandatory minimums contain a broad safety valve: the minimum sentence can be disregarded by the court if there are "particular circumstances which (a) relate to any of the offences or to

[240] Ralph Henham, "Back to the Future on Sentencing: The 1996 White Paper Report" (1996) 59 Mod L Rev at 869.
[241] U.K. Sentencing Council, "Public attitudes to the sentencing of drug offences" online (pdf): *U.K. Sentencing Council* <https://www.sentencingcouncil.org.uk/wp-content/uploads/Drugs_research_report.pdf>, at 13.
[242] Lord Taylor, *supra* note 228.
[243] Henham, *supra* note 240, at 875.

the offender; and (b) would make it unjust to do so in all the circumstances."[244] Unlike in the U.S. and Australia (discussed below), the safety valves were legislated at the same time as the mandatory minimums, and did not come about later due to amendments. Though not the focus of this analysis, the U.K. similarly makes use of safety valves connected to an offender's plea of guilt – there are MMS exceptions available which would allow a court to reduce the mandatory minimum sentence by up to 20% if an offender pleads guilty.[245]

In addition to safety valve legislation, it is important to note that the U.K. makes use of a Sentencing Council which is an independent body that was established in April 2010 to develop sentencing guidelines. The intent of the Sentencing Council is to promote transparent and consistent sentencing. In January 2020, the U.K. Sentencing Council proposed guidance to judges in applying the safety valve attached to the Section 313 mandatory minimums.[246] The proposal came into effect on April 1, 2021 and instructed the court to interpret "unjust in all the circumstances" relating to the offender by considering the following factors: strong personal mitigation, prospect of rehabilitation, and whether custody will significantly impact others.[247] With respect to the offence, "unjust in all the circumstances" asks the court to consider the seriousness of the current offence, seriousness of past offences and the length of time between the offences.[248]

The U.K. developed sentencing guidelines on departing from MMSs in part to address inconsistent use of the built-in safety valve. This is interesting to compare to the reasoning used by the USSC to develop

[244] Sentencing Act, *supra* note 218, ss 313(2) and 314(2).
[245] *Criminal Justice Act 2004* (U.K.) 2004, s 144.
[246] *Coroners and Justice Act* (U.K.) 2009 s 125(1).
[247] U.K. Sentencing Council, "Drug Offence Consultation" (2020), online (pdf): *U.K. Sentencing Council* <https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-consultation-web.pdf>, at 27.
[248] U.K. Sentencing Council, "Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply it to another" (2021), online (pdf): *U.K. Sentencing Council* <https://www.sentencingcouncil.org.uk/offences/crown-court/item/supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/>

sentencing guidelines in the U.S. As discussed, the American federal guidelines were meant to address social problems created by MMSs (the federal safety valve in the U.S. was only legislated into existence 10 years after Congress established the USSC). This can be explained, in part, by the fact that the U.K. built-in safety valve is a broad and high discretion exemption to MMSs – in contrast to the U.S. example. A judge can apply the unjust exemption to any offender before the court that is subject to a mandatory minimum, unlike the cumbersome U.S. safety valve system. Accordingly, the U.K. government felt obliged to pare down the discretion afforded to judges through the use of guidelines, whereas the USSC worked to relax the U.S. exemption over time given its restrictive nature.

The political background to the drug and domestic burglary safety valves are worth comparing to the U.S. example. Whereas the American federal safety valves came into play many years after the devastating effects of mandatory minimum sentencing policy were realized, the U.K. put measures in place in anticipation of those difficulties as a result of robust political pressure. The safety valves were proposed by the Labour party in the House of Lords. The wording was hotly debated in both chambers. Lord McIntosh of Haringey (Labour) pushed for the safety valve amendment in the House of Lords. He argued that the safety valves are "not wrecking amendments," because of Chief Justice Taylor's argument that the safety valves "ensure that judicial discretion is preserved while retaining a presumption in favour of mandatory sentences."[249]

In keeping with the robust and public discussion, Home Secretary Michael Howard, went on a morning television show to say that the "safety valve" amendment proposed in the House of Lords would "drive a coach and horses" through mandatory minimums.[250] Baroness Blatch argued that the safety valve is too broad and would allow a court to set aside a mandatory minimum to simply impose a different sentence

[249] U.K. HL Deb *supra* note 229.
[250] Richard Ford, "Fixed terms for repeat offenders become law," *The Times* (22 March 1997), online: <https://archive.org/stream/newsuk1997ukenglish/Mar%2022%201997%2C%20The%20Times%2C%20%2365844%2C%20UK%20%28en%29_djvu.txt>

which would "make a nonsense of the whole concept of mandatory penalties."[251] Several years later, in 2005, Michael Howard tried again to "restore public confidence in the sentencing system" by proposing a bill to remove the built-in safety valve.[252] Nonetheless, the safety valve was built into the MMS legislation.

C. Australia

1. The First Wave of Mandatory Minimums in Australia's Northern Territory (1997-2012)

a. Introduction of Mandatory Minimums

Mandatory minimums are widely used in the Australian territories and states. As in the U.S. and Canadian experiences with MMSs, sentencing minimums have come about as political responses to the public's concerns that offenders are given lenient sentences, and are implemented alongside crime control, and consistency in sentencing objectives. The types of offences that are subject to mandatory sentences vary across the region, and range from terrorism and murder to burglary and assault.[253]

Australia's Northern Territory has had a difficult experience with MMSs. It is the smallest of the Australian territories and states by population, but it has the largest proportion of Indigenous citizens (Aboriginal and Torres Strait Islanders). The Northern Territory is governed by the national Constitution and, while it does not have legislative independence, it can self-legislate in all areas that do not conflict with Commonwealth laws. Accordingly, criminal acts are governed by the Northern Territory's *Criminal Code Act 1983*.[254]

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[251] U.K. HL Deb *supra* note 230.
[252] George Jones, "Three strikes will mean automatic jail, says Howard", *The Telegraph*, (08 February 2005), online: < https://www.telegraph.co.uk/news/uknews/1483044/Three-strikes-will-mean-automatic-jail-says-Howard.html >
[253] Law Council of Australia, "Policy Discussion Paper on Mandatory Sentencing", (2014) at 9, online (pdf): < https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf> [Policy Discussion Paper].
[254] *Criminal Code Act 1983* (NT), 1983.

Mandatory minimums in the Northern Territory of Australia were first implemented in 1997. The minimums came by way of amendments to the *Sentencing Act 1995*[255] and the *Juvenile Justice Act 1993*.[256] This legislation primarily targeted property offences, including theft, criminal damage, and unlawful entry, without distinguishing between the amount or nature of the goods in question. The minimums operated on a three-strikes regime (similar to the U.S.' points-based system, and the U.K.'s repeat offender requirements), where each repetition of an offence resulted in an increase in the mandatory minimum (sentences range from 14 days for a first offence, up to 12 months for a third offence) for adult offenders. Similarly, juvenile offenders between the ages of 15 to 18 received a 28-day minimum for certain property offences if they had previous convictions for such an offence.[257]

The statistics surrounding Indigenous rates of incarceration in Australia, like in Canada, are staggering. In 1999, a significant year for sentencing in the Northern Territories (as explained below), the prison population of the territory was comprised of 67% Indigenous people.[258] The introduction of mandatory minimums in the territory led to a 40% increase in the adult prison population between 1996 and 1999 and even more dramatic increases in the female prison population.[259] Australia's Senate Legal and Constitutional References Committee reported that the imposition of mandatory minimums in the Northern Territory increased the number of Aboriginal people in custody from 388 per month to 430 per month within a year.[260] The rates of incarceration were found to be 10-times higher than non-Aboriginal offenders.[261]

[255] *Criminal Code Act 1995* (NT), *1995*.
[256] *Juvenile Justice Act* (NT), 1997, s 53Ae.
[257] *Ibid* at s 53Ae.
[258] Leonie Howe, "Mandatory Sentencing: A Death Sentence in the Northern Territory?" (2001) 12(3) Current Issues in Criminal Justice, at 377.
[259] *Ibid*.
[260] Larry Chartrand, "Aboriginal Peoples and Mandatory Sentencing", 39 Osgoode Hall LJ, at 454.
[261] *Ibid*.

These increases following the imposition of mandatory minimums saw corresponding increases in the incidence of deaths of prisoners while in custody – ironically, deaths in custody were the impetus of a report conducted by the Royal Commission into Aboriginal Deaths in Custody that was launched a decade prior. The Australian Institute of Criminology found that since the time of publishing the Commission's report, both rates of incarceration and the number of deaths in custody of Indigenous Australians were on the rise.[262] The mandatory minimums in the Northern Territory had, and continue to have, a disastrous impact on Indigenous people in Australia.

b. 1999 Amendments Introducing a Narrow Safety Valve

The Northern Territory's MMSs were met with significant outrage by the public and media. Several cases received national attention. A 28-year-old woman who threw water onto a cash register in anger over a hot dog she was unhappy with received a 14-day mandatory minimum sentence.[263] In other cases, a female Aboriginal first-offender stole a can of beer and a young offender who stole a game, also received 14-day mandatory minimums.[264] Following these stories, among others, the Territory Labor party (in opposition in the Northern Territory at the time), took aim at the MMSs.

Sydney Stirling, the Labor member for the Nhulunbuy electoral division, pointed to the increased monetary costs, the increased incarceration for trivial matters, and the disproportionate impact on juveniles. This mimicked much of the conversation that was had in the U.K. Parliament when MMSs were being debated (much of the debate between Justice Taylor and Howard was about statistics failing to justify MMSs). The

[262] Carlos Carcach, A. Grant & R. Conroy "Australian Corrections: The Imprisonment of Indigenous People" (1999) 137 Trends and Issues in Crime and Criminal Justice, Australian Institute of Criminology, November 1999, at 6.
[263] Zdenkowski, George, "Mandatory Imprisonment of Property Offenders in the Northern Territory" (1999) UNSW Law Journal at 307.
[264] *Ibid* at 307.

Territory Labor party criticized the lack of transparency in the government's release of statistics and figures collected regarding the impact of the policy.

> The government of the former Chief Minister and the Attorney-General have consistently failed to prove their case and we can only assume in the face of a complete lack of evidence, that there is, in fact, insufficient evidence available to make a case. The imposition of mandatory imprisonment was never about crime rates in any case as much as it was about populist politics and winning the law and order vote.[265]

Following the criticism of the proposed MMSs, on June 1, 1999, the government tabled the *Sentencing Amendment Bill* which introduced an "exceptional circumstances" exemption to the MMSs for property offences. Referring to "the endless variety of fact situations that may come before the courts," (similar language to that used by CJ McLachlin in *Lloyd*) the Deputy Chief Minister of the Northern Territory said that "it is desirable, within the limits set by the baseline of mandatory minimum sentencing, to give some discretion back to the courts to determine the appropriate sentence."[266] The government insisted that these cases would be narrow and clearly defined.

The exemption is, in fact, narrow in scope. In order to qualify, an offender would have to: (1) make efforts towards full restitution, (2) be of good character, (3) show mitigating circumstances which reduce their culpability, (4) cooperate with the police, and (5) have committed the act in an aberrant one-off manner.[267] This exemption excludes offences committed under intoxication due to alcohol or illicit drug (some parts of Australia have specifically legislated MMSs to target alcohol-fueled offences). There are similarities to the five-factored U.S. federal safety valve, especially in requiring cooperation with the police (which mimics the fifth factor disclosure requirements seen there).

The opposition decried the exemption as cumbersome. The government agreed, saying that their intention was in fact that very few people would be able to access these exceptions. It was meant to only apply to the

[265] Austl, Northern Territory, Legislative Assembly, *Parliamentary Debates* (17 February 1999) at 2804.
[266] Austl, Northern Territory, Legislative Assembly, *Parliamentary Debates* (1 June 1999) at 3426.
[267] *Sentencing Act 1999* (NT), 1999/162 s 78A(6B).

egregious examples which had caught the attention of the public – the "genuine first offender who is of good repute."[268] On June 3, 1999, the *Sentencing Amendment Bill 1999* passed as the *Sentencing Act 1999* but these amendments did not apply to juvenile offenders.[269]

Then, on February 9, 2000, 15-year-old Johnno Johnson Wurramarrba hung himself in custody. The Aboriginal boy was serving a 28-day prison sentence for a second property offence (which involved stealing stationery items worth less than fifty dollars).[270] Sentenced under legislation for youth offenders, he had not been eligible for the exceptional circumstances exception. Wurramarrba's death further eroded public support for MMSs.

c. 2001 Repeal of Certain Mandatory Minimums

In 2001, the mandatory minimum sentences for property crime that came into effect in 1997 were repealed.[271] The Aboriginal and Torres Strait Islander Social Justice Commissioner at the time, Dr. William Jonas, described the repeal of the minimum sentences as follows:

> Mandatory sentencing laws in the Northern Territory have been a focal point across the country and internationally for the past few years due to their callous and unjust nature. These laws targeted Indigenous people and have been costly and ineffective in deterring crime. The Northern Territory government is to be congratulated for its efforts in repealing these laws.[272]

Though this repeal did not see the full reinstatement of judicial discretion in the legislation, it allowed judges to bypass minimum sentences. What remained however were certain aggravated property offences

[268] Austl, Northern Territory, Legislative Assembly, *Parliamentary Debates* (3 June 1999) at 3567.
[269] *Sentencing Act 1999*, *supra* note 267.
[270] Chartrand, *supra* note 260 at 452.
[271] *Juvenile Justice Amendment Act (No.2) 2001* (NT), 2001/53.
[272] Australian Human Rights Commission, "Commission Welcomes Repeal of Mandatory Sentencing Laws in NT", (19 October 2001), online: <https://www.humanrights.gov.au/about/news/media-releases/commission-welcomes-repeal-mandatory-sentencing-laws-nt>.

which required a sentence of imprisonment or a community work order, though no minimum was given.[273] It did allow for exceptional circumstances to apply for these offences.[274]

2. The Second Wave of Mandatory Minimums in Australia's Northern Territory

In 2012, the Labor Party government was defeated in the elections after an 11-year reign and replaced by the more conservative Country Liberal Party, led by Prime Minister Terry Mills. Prime Minister Mills ran on a platform that included increasing mandatory minimum penalties and reducing judicial discretion in sentencing. In an article written in the Press Reader by Meaghan Dillon, Mills was quoted as saying, "We set the laws and the judiciary works within the frame of the law that's set by parliament."[275] The party campaigned on a "crackdown" approach to sentencing laws that would act as a deterrent for all manner of offences. Following their success at the polls, they did just that.

The Country Liberal Party government introduced the *Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012*[276] on November 29, 2012. This bill included three major provisions: (1) mandatory minimums for assaults, (2) exemptions for mandatory minimums where exceptional circumstances apply and where the offender was a youth at the time of committing the offence, and (3) amendments to the *Alcohol Reform Act*. The bill introduced a slew of new mandatory minimum sentences – namely, five new levels of violent offences and their corresponding mandatory minimum sentences.

[273] *Ibid*.
[274] Mandatory sentencing was re-introduced in 2008. Though this did not include mandatory minimums prescribed to offences, it did require under section 78BA of the *Sentencing Act* that mandatory sentences of imprisonment must be served for certain violent offences.
[275] Megan Dillon, "CLP Plans to Bring Back Mandatory Sentencing," *Press Reader* (11 July 2012), online: <https://www.pressreader.com/australia/nt-news/20120711/282634619724415>.
[276] *Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012* (NT) 2012/12.

3. Exceptional Circumstances – Analysis and Response

In the government's explanatory statement, they described the new section 78DI of the proposed bill as applying to those requirements that impose a minimum sentence of a specified period of actual imprisonment for an offence.[277] The section allowed a court to bypass the imposition of a mandatory sentence if it was convinced that "circumstances of the case are exceptional," but if an offender was to be sentenced to imprisonment, then that sentence could only be reduced in part. This is an interesting approach to a statutory exemption – the Court was given discretion to avoid part of a prison sentence, but some amount of actual prison time was required to be imposed.

Similar to its predecessor version, the new NT 2012 Bill specified that intoxication does not constitute exceptional circumstances. It further stated that the existence of another offender who (i) was involved in the commission of the offence; or (ii) coerced the person to commit the offence precluded use of the exemption. Nonetheless the exemption under the NT 2012 Bill was far broader than the exceptional category introduced in its early version in 1999.

The *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* was passed on February 14, 2013. The amended act commenced on May 1, 2013. To this date, the exceptional circumstances category of the *Sentencing Act 1995* remains in place. The government, in introducing the bill, lauded its previous actions in being first to introduce mandatory sentencing for assaults in the *Sentencing Act (No 2) 1999.* It also highlighted that its own party in 2008, which was then the official opposition to the Labour Party, had introduced the bill[278] which took the position that legislation which required that sentences of imprisonment that could be partially suspended by a court were inadequate as the discretion left with the court allowed it

[277] Austl, Northern Territory, Attorney-General and Minister for Justice, *Sentencing Amendment (Mandatory Minimum Sentences) Bill 2012 Serial No. 12* (Explanatory Statement), online (pdf): <https://legislation.nt.gov.au/api/sitecore/Bill/SC_OtherDoc?itemId=4c64d7aa-f425-41fb-b6af-55f4c5a6244b&type=ExplanatoryStatementBody>

[278] *Sentencing Amendment (Violent Offences) Bill 2008*, (NT) 2008/7.

to bypass part of an offender's sentence. Responding to the public sentiment at the time, the Attorney General stated clearly that the "public does not expect actual imprisonment to mean that the offender can be released immediately; the public expects it to mean genuine jail time as punishment for the violent offence committed."[279]

Though the previous Labour government had introduced a form of mandatory sentencing for assaults under section 78BA(1)(a) of the *Sentencing Act*, the new and current Liberal government took issue with it as it allowed for any periods of imprisonment an offender was sentenced to, to be suspended by the court. The mandatory sentences introduced by the previous Labour government applied to the offences of causing serious harm, causing harm, common assault or aggravated assault and assaulting a police officer, where the victim suffers physical harm that interferes with the victim's health. The CLP introduced mandatory minimum sentences for these offences and further clarified this section by adding at subsection 78DH that where a court is required to impose a minimum sentence in custody for an offence, no part of that period can then be suspended – the minimum period of time in custody must be served.

An unexpected source of discretion in the Northern Territory's use of safety valves has been from victims of crime. As part of this safety valve, the victim's input at sentencing is specifically listed as something the judge can consider in deciding whether to vary a minimum sentence. The victim's wishes with respect to the type of sentence an offender receives is considered and to be given appropriate weight during the sentencing process. This can amount to the exceptional circumstances required to forego a mandatory minimum sentence (though, arguably, could also serve the opposite effect).[280]

This seems to add a level of discretion that was not anticipated in our initial consideration of risks of safety valves. Though many jurisdictions, including Canada, will allow for a consideration of the impact an

[279] Austl, Northern Territory, Legislative Assembly, *Parliamentary Debates* (29 November 2012) at 636.
[280] *Ibid* at 637.

offence has had on a victim, it is rarer to see a victim weigh in on the type of sentence an offender receives. It should be noted though that this is the only specific category listed. Otherwise the judge can consider "any other matter the court considers relevant."[281] Furthermore, the judge would not be bound by a victim's recommendation like they might be under the fifth factor of the U.S. federal safety valve (where without a prosecutor's sign-off, some jurisdictions would not allow for the exemption to be used). This type of safety valve seems to lie in the middle between the U.S. and U.K. examples discussed above.

[281] *Ibid*.

IV. ASSESSMENT

As discussed earlier in this analysis, a statutory exemption in the form of safety valves was suggested by Chief Justice McLachlan in *Lloyd* as a solution to the problems of MMSs. In light of *Nur,* the Chief Justice stated in *Lloyd* that given the expansive reach of those MMSs, which apply to offences "committed in various ways, under a broad array of circumstances and by a wide range of people,"[282] there will inevitably be a reasonable hypothetical for which almost every MMS will be found unconstitutional. It is important to note that the Court's skepticism in *Lloyd* was directed at those MMSs which are wide-reaching in the conduct that they capture. It might be argued that even narrow MMSs that seem to apply to a small subset of offenders could theoretically capture conduct that is wider in scope than might be thought – human behaviour is complex and unpredictable. However, MMSs that are narrowly tailored have not been the focus of this paper. Rather, the thesis has focused on those MMSs identified by the Courts as being broad and wide-reaching. After a review of jurisprudential developments in the Canadian landscape, this thesis presented a typology of safety valves based on level of discretion and breadth of applicability. Following this, the thesis focused on three comparable jurisdictions which provided different forms of safety valves used to remedy problems of MMSs specific to each jurisdiction.

This analysis now turns to a central question: can safety valves be viable in Canada, and if so, what is a feasible model? Though imperfect, safety valves can be beneficial and viable in the Canadian context. Because MMSs are a (relatively) new norm within the Canadian criminal justice landscape, incremental improvement matters, and even small increases in judicial discretion can help. As the political history and development of MMSs have shown, this sentencing instrument is here to stay and has, over the last 20 years, permanently changed the Canadian criminal justice system. Legal reformers and policy decision makers must now acknowledge the changed paradigm within the system and efforts can either be directed towards transforming it or incrementally reforming it. Incremental reform matters and is preferred. Given

[282] *Lloyd, supra* note 1, at para 35.

the lack of consensus and political will to carry out more wholesale changes, safety valve legislation would be a strong and effective compromise.

Clearly inherent limits remain, as explored in Part II above and as will be touched on briefly below as we examine the cross-jurisdictional models in light of the safety valve matrix. Risks such as the actual efficacy of the valve, inherent bias in judicial discretion, and the risk of the proliferation of MMSs may remain. Yet, as Chief Justice McLachlin has explained in *Lloyd*, there are significant constitutional risks to the status quo of MMSs. [283]

A. The Safety Valve Matrix

This analysis has categorized safety valves along two spectrums: (1) broad versus narrow, and (2) high discretion versus low discretion, and has also introduced the *Dandurand*[284] descriptions of safety valves according to type (juvenile, guilty plea, cooperation and government assistance, mitigating factors, exceptional circumstances, unjust sentences, treatment of the offender, post-sentencing).

The discretion-based spectrum of the matrix plots safety valves based on the amount of discretion a sentencing judge has to determine the sentence and side-step an MMS. A low-discretion safety valve might put strict boundaries around the type of sentence a judge might impose on an offender and the determination of whether a safety valve applies, whereas a high-discretion safety valve, once triggered, may have none. The breadth-based spectrum on the other hand is concerned with the reach of the safety valve and how many offenders are caught by the safety valve. Valves that are narrow in their breadth would apply to a small number of offenders, whereas a broad safety valve may be triggered by many or most offenders being sentenced under that provision (for example, safety valves that are triggered if an offender pleads guilty).

[283] *Lloyd, supra* note 1, at para 35.
[284] Dandurand, *supra* note 137, at 14.

The international models of safety valves from similar jurisdictions, as discussed in Part 3, can be plotted along this matrix, and categorized further according to the *Dandurand*[285] classification.

B. Jurisdictional Lessons for Possible Models

1. United States of America

The American federal safety valve falls into both the 'cooperation and government assistance' and 'exemption' categories. As one of its five requirements, the American safety valve requires disclosure with respect to the commission of the offence by the offender to the prosecution. The valve is further compounded by a strict points-based system. Although the research suggests that in the American example the amount and place of the disclosure (and to whom it is made) can vary, this type of valve remains dependent on an offender's ability to disclose. Such a limitation can exclude low-level offenders in a criminal enterprise, and relies heavily at times on prosecutorial discretion. On the axis system, this safety valve can be described as narrow in its reach to potential offenders, with low discretion afforded to a sentencing judge.

A major challenge with the U.S. federal safety valve is the application of the fifth factor, as discussed above. It is a cumbersome exemption that puts the burden of proof on an offender for every step. The fifth requirement relating to disclosure of circumstances of an offence is one that has flipped the discretion problem back from the judiciary to the prosecution. The research suggests that the fifth factor, given the above, often increases judicial reliance on the prosecution.[286] This is a contentious development in the use

[285] *Ibid*.
[286] Virginia Villa, "Retooling Mandatory Minimum Sentencing: Fixing the Federal statutory safety valve to Act as an Effective Mechanism for Clemency in Appropriate Cases" (1997) 21 Hamline L Rev 109, at 124.

of this safety valve. A cumbersome safety valve with numerous conditions, while trying to minimize unfettered judicial discretion, shifts more discretion onto the prosecution. It can be argued that this has the effect of retriggering a problem of mandatory minimum sentences themselves – unreviewable prosecutorial discretion which was meant to be remedied through the use of a safety valve provision. Though in the American example Congress clearly had the intent of providing access to low-level offenders who do not qualify for the substantial assistance provisions, this accessibility has been thwarted. Furthermore, the issues above switch the burden of proof and undermine the safety valve as a tool to ensure fair sentencing for low-level offenders.[287] The guidance on the requirements of this fifth factor is also vague and varies by jurisdiction, and its sufficiency is assessed by both sentencing judges and prosecutors. This suggests that onerous safety valves, with exceptional requirements including disclosure relating to the circumstances of a case, reduces judicial discretion beyond its legislative intent. This leads to uneven impacts.[288]

Within the framework of possible legislated safety valves, the federal safety valve is a relatively narrow, low discretion regime. It is relatively narrow because it only applies to certain offenses, but it is not quite as narrow as, for example, a safety valve that only applies to juveniles or offenders who plead guilty. Furthermore, it is also low discretion since a judge cannot forego to apply an MMS for an offence that doesn't fall under the federal safety valve regime. Judges *do* demonstrate discretion in how it is applied. For example, as discussed above, some judges are more lenient than others in applying the disclosure requirement. However, given the difficulties presented especially by the fifth factor, much of this discretion tends to shift to the prosecution, or forecloses the exemption's application entirely. The legislation leaves very little room for judges to use their discretion in applying an MMS to the accused before them.

The introduction of safety valves has nonetheless been beneficial - between 1994 and 2013, about 80,000 offenders received relief from the federal safety valve, which was estimated to have saved the government

[287] Bronn, *supra* note 193, at 24.
[288] Dandurand, *supra* note 137, at 16.

about $25,000 per prisoner per year for each year a sentence was reduced by.[289] Furthermore, the American government and the United States Sentencing Commission are clearly actively involved in the monitoring and data collection related to MMSs. This monitoring has seen the safety valve relaxed over time (2018 amendments discussed in Part 3), and organizations like Families Against Mandatory Minimums and others actively advocate for these issues. The safety valve, while still used in its relatively cumbersome form, is one that appears to be continually evolving as the country continues to grapple with the significant problems that have resulted from mandatory sentencing policy. Scholars also suggest that the country is moving away from its tough on crime approach, and trending more towards increased judicial discretion - this will continue to be an area of research and policy change to watch.[290]

2. United Kingdom

The U.K. example of safety valves contrasts the American approach. It falls within the 'unjust sentences' category. The safety valve requires that the circumstances of an offence or an offender make it unjust to apply the MMSs in question. This exemption was further qualified through sentencing guidelines established by the U.K.'s Sentencing Council, which require the consideration of mitigating factors, rehabilitative prospect, impact of custody on others, seriousness of the offence, seriousness of past offences, and the length of time between offences to all be considered when determining whether a sentence would be *unjust.*

There are no bright line tests associated with the U.K. approach, as is seen in the American examples. The guidance from the Sentencing Council is not binding and many of the considerations highlighted in the

[289] Gill, *supra* note 210 at 349.
[290] Megan C. Kurlychek, and John H. Kramer. "The Transformation of Sentencing in the 21st Century" in Cassia Spohn & Pauline Brennan, eds, *Handbook on Sentencing Policies and Practices in the 21st Century* (Routledge, 2019) at 19-42.

guidelines are ordinarily considered by sentencing judges in their pursuit of a fit sentence for an offender. The U.K. approach is thus the broadest. Its safety valve is the most lenient example observed other than a blanket exemption based purely on unqualified judicial discretion. This type of safety valve is both broad in its application (anyone can apply) and high in its discretion (the sentencing judge is not bound by any factors such as a points system or a post-charge action on the part of the offender).

The U.K. safety valves are both broad (since they can apply to any offender charged with an offence carrying a minimum) and high discretion (since the open nature of the test allows the judge to use their discretion to make the final determination sentence). However, the recent changes in the U.K. sentencing guidelines have sought to take away some of a judge's discretion by prescribing what a judge may consider as "unjust" as it relates to an offender and offence. The U.K. system makes for a more efficient dialogue between courts and legislators because the latter has delegated the hard work of tracking, studying, updating and reporting on sentencing practices to a dedicated sentencing body. At the expense of some public accountability, since the Sentencing Council is not accountable to the public in the way that lawmakers are, the U.K. has stumbled upon a more efficient way to implement, respond to and tweak mandatory minimums and their safety valves.

A more cynical view of the U.K. safety valve is that the discretion afforded to judges has upended the mandatory sentencing regime for those offences entirely. In doing so, it has effectively turned the minimums into guides, given their broad and high-discretion nature. The sentencing guidelines that came about more recently, however, were clearly responding to a relatively broad amount of discretion afforded to judges when faced with MMSs. Though not reaching the level of requirements of the U.S. federal safety valve, they create some boundaries and expectations for judges.

In September 2020, the Ministry of Justice presented a report to Parliament titled, "A Smarter Approach to Sentencing." The report set out the government's proposals for reforms to the sentencing regime. The

government's comments are interesting and provide insight into a problem the safety valve had created for the U.K. parliament – excessive judicial discretion. The analysis of the mandatory minimum for the burglary offences expressed a shift in sentiment towards these offences: "Concerns have been raised that offenders are receiving sentences for repeat offences…that fail to provide an appropriate level of punishment and deterrence."[291] The report further stated at paragraphs 82-87:

> Our evidence shows that there is still a large proportion of repeat offenders who do not receive the minimum custodial sentence. In 2018, of all offenders sentenced to immediate custody for third strike domestic burglary, 71% of offenders received a sentence below the minimum…We will seek to reduce the occasions in which the court would depart from the minimum custodial sentence, with the aim of reducing the prospect that the court would depart from the minimum term…Whilst we are raising the bar for courts to depart from giving the minimum sentence for these serious crimes, they retain the ability to do so where the circumstances warrant it.[292]

What can be gleaned from the 2020 proposals is that clearly there are efforts to reduce and reign in the discretion afforded to judges when sentencing MMS offences. The U.K. government released a policy paper, updated May 2022, discussing the equality impacts of some of the changes to the minimum sentence provision guidelines and acknowledged that, "…we recognize that some individuals with protected characteristics are likely to be over-represented," but that in spite of any impacts from such over-representations, the government's overall assessment was that they were justified given that "the legitimate aims of the policy…is to ensure that offenders receive custodial sentences that reflect the severity of their crime and offending history."[293] This shift in the U.K. sentiment towards increased regulation of safety valves and the accompany judicial discretion seems to be responding to a more aggressive approach to crime-control and deterrence (though one that remains fairly lenient compared to the U.S. example).

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[291] U.K. Ministry of Justice, "A Smarter Approach to Sentencing", (2020) at 81, online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918187/a-smarter-approach-to-sentencing.pdf>.
[292] *Ibid* at 82-87.
[293] U.K. Home Office, "Minimum terms for repeat offences in the Police, Crime, Sentencing & Courts Bill: Equalities Impact Assessment", online: <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-equality-statements/minimum-terms-for-repeat-offences-in-the-police-crime-sentencing-courts-bill-equalities-impact-assessment>.

It is worth nothing that the U.K. more generally is somewhat of an outlier jurisdiction given the country's minimal use of mandatory minimums. Because MMSs apply to very few offences, there is generally no significant data analyzing the specific effects these sentences have on specific groups such as racialized minorities. The same is true for the greater sentencing process. This means that there are many questions to be answered regarding the impacts of the U.K. approach. That said, the U.K. openly acknowledges that issues like racial discrimination exist in its legal system. MP David Lammy wrote to the Prime Minister in 2017 on the results of review of racial bias in the criminal justice system, that racial disparity does, undoubtedly, exist in the U.K. criminal justice system. Arrest rates are described as being higher among racialized communities, as is the likelihood that a racialized offender will be subject to a prison sentence and face general bias.[294] Despite this, no impact analyses have been done by the U.K. Home Office on MMSs.

As discussed in Part 3, the U.K. government believes the safety valves in use are generally too lenient. This explains the guidelines that were issued in 2020 which provided more context to factors a judge should consider when relying on the exemption. Furthermore, Justice Canada, in its own governmental research of other jurisdictions which use MMSs, has concluded that it is "unlikely that mandatory sentences have had a significant impact on the prison population in England and Wales."[295] More information is needed locally, however, to properly understand the impact of the regime in the U.K.

Nonetheless, the U.K. safety valve is a strong example of how a safety valve might work effectively. The valve pairs strongly in the U.K. example with the Sentencing Council which helps mitigate the effects of

[294] MP David Lammy, "An Independent review of the treatment of, and outcomes for Black, Asian and Minority Ethnic Individuals within the Criminal Justice System and Wales" (7 September 2017) online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643002/david-lammy-open-letter-to-prime-minister.pdf>.
[295] Department of Justice, *supra* note 14, at 15.

MMSs and respond more quickly than legislatures might to changing political concerns through both research and ongoing data collection. As discussed above, a similar sentencing body was discussed for some time in the Canadian context, but did not ultimately form. The flexibility of the U.K. valve clearly allows it to respond to data of social impact and accordingly tweak its function through use of guidelines which in turn affects the interplay of MMSs and its safety valve.

3. Australia

The Australian example of a safety valve falls within *Dandurand*'s *"*exceptional circumstances" category. Interestingly, it is a safety valve that was legislated to supplement a U.S. style strict test safety valve, and to revert some more discretion back to judges. As discussed above, it allows a sentencing judge to ignore a mandatory sentence if there are exceptional circumstances, but it comes with some legislated limits. First, if a minimum sentence requires some time in custody, the offender cannot avoid some jail time. Second, there is an enumerated list of situations which are deemed to not be exceptional (i.e., intoxication and the existence of multiple defendants).

In examining Australia, we can observe two sides to the safety valve debate. On the one hand, low discretion and narrowly applicable safety valves are not useful enough to make a meaningful impact on unjust sentences because they are too restrictive by design. For example, if they only apply to youth or a defendant who cooperates. In their best form, safety valves have a high level of discretion and broad applicability. Safety valves of this nature are able to make an impact but handing power back to judges doesn't necessarily take the problem away.

The Australian model is interesting because it incorporates aspects of the U.K. and U.S. safety valves. As discussed above, the U.K. model is high discretion with broad applicability because it applies to any offender before the court, and it gives the judge a lot of room to make evaluative judgments. The federal

safety valve in the U.S., on the other hand, gives some power back to the judge, but it is a bright line test which makes it low discretion. The Australian "exceptional circumstances" evolved from a U.S. style bright-line test to a U.K.-style principle-based test.

In May 2014, the Law Council of Australia published a policy discussion paper on mandatory sentencing in Australia. The Council's main objective was to provide advice to governments, courts and federal agencies on ways to improve the justice system based on rule of law principles and Australia's human rights obligations.[296] In summary, the Council concluded that evidence against the use of mandatory sentencing was mounting. Not only within Australia but in other jurisdictions as well. Accordingly, the Law Council of Australia recommended that Australia move away from mandatory sentencing and look to alternatives.[297] These alternatives included things such as justice reinvestment strategies and diversionary non-custodial options. The policy paper also addressed the use of the exceptional circumstances scheme in the Northern Territory. It described the threshold as "limited and rarely made out."[298] In a similar analysis of mandatory minimums that carry an exceptional circumstances category in South Australia, the Council described the threshold as being "high and means that the majority of the offenders…are likely to be given mandatory jail terms."[299]

Though the difficulties with MMSs continue in the Northern Territory, across the country, similar problems persist. The statutory safety valve in use in the Northern Territory has been subject to changing political tides which have in turn seen it change form.

C. Features of a Model Safety Valve

[296] Policy Discussion Paper, *supra* note 253 at 7.
[297] *Ibid* at 5.
[298] *Ibid* at 51.
[299] *Ibid* at 53.

On the discretion-breadth matrix, a model safety valve in the Canadian example would most closely mimic the U.K. model. It would be a high-discretion, broad safety valve. It would have few (or no) triggering factors, therefore allowing a sentencing judge to make a determination as to its applicability. For example, it would be unlike the exceptional circumstances valves which typically have strictly legislated tests that need to be met before their application. This would allow a jurist to execute on an inherently judicial function and consider mitigating factors and circumstances unique to the case, and only known by a presiding judge.

On the *Dandurand* categorization, like the U.K. example, the Canadian model would similarly benefit from an unjust circumstances-type valve. By way of reminder, the U.K. test allows a court to disregard an MMS if there are particular circumstances which relate to any of the offences or to the offender, which would make it unjust to do so in all the circumstances. After the implementation of this safety valve, the U.K. determined that it was appropriate to give courts some guidance on the unjustness test, by recommending various factors relating to the offender and the offence that the court could consider. A model Canadian safety valve would benefit from a similar test which allows a standard of unfairness or unjustness to determine whether an MMS ought to be sidestepped. Judges may benefit (and likely would welcome) well-researched recommendations on factors that could be considered in determining whether an unjust or unfair sentence might result. Though sentencing councils or commissions were not meant to be the focus of this thesis, they have surfaced as a potential aid in the area of mandatory sentencing – the comparative analysis suggests that a safety valve may benefit from the expert guidance of a sentencing commission or council in the Canadian context. A council would collect correctional data, and sentencing data, respond to political changes, and make recommendations from legal scholars and experts in the field for legislative changes (including narrowing or expanding a safety valve as needed).

Lastly, a model safety valve in the Canadian context would be broad in its reach. Unlike the U.K. which applies to specific offences (by way of reminder, to only two provisions: a convicted person's third class A

drug trafficking offence and a third domestic burglary conviction), the Canadian model would benefit from a valve that is broader in its reach. Given the Supreme Court of Canada's signaling that almost every MMS in Canada could face a hypothetical scenario that would render it unconstitutional, this suggests that Parliament must remedy this constitutional infirmity of MMSs on a wider scale. It may be that safety valves are divided by offence type, or even apply to all MMSs to the exclusion of specific, serious offences. Disqualifiers as opposed to qualifiers would also be preferred – for example, as opposed to requiring a set of factors to be met for qualification, offenders can be excluded based on type and number of convictions within a period of time, or the ways in which an offence is committed (e.g. when weapons are used in the commission of an offence).

The two general lessons that surfaced from the comparative analysis were that first, low discretion and/or narrow valves are unlikely to make a significant dent in addressing the deleterious effects of MMSs. In Australia, narrow valves were eventually expanded into broad and high discretion exemptions to address public and scholarly concerns. The U.S. still suffers from an overly narrow exemption. The U.K., while dealing with its own set of challenges within its criminal justice system, seems to have struck a workable balance between MMSs and statutory exemptions – with any recommended tweaks coming from by a sentencing council that is able to respond more swiftly than legislatures and courts.

The second lesson that the use of sentencing councils as a way to impose discipline on safety valves may be helpful. Though this analysis has not studied or considered sentencing councils, future studies of MMSs would do well to explore the subject in the Canadian context. In the United Kingdom, when the statutory exemption scheme appeared to be too lenient, and the public/political opinion was that the judiciary was imposing sentences that were inconsistent or too low, the sentencing council stepped in to provide guidelines the legislature felt were appropriate. This fulfilled the legislature's intent as the guidelines were changed to prescribe what a judge may consider in relying on exemptions when faced with a mandatory sentencing scheme. In this way, the sentencing council interestingly added a negotiating intermediary

between the judiciary and the legislature, and one that was more rapid and responsive in its execution than perhaps legislative change may have been. It is important to keep in mind as well that the U.S. example of sentencing guidelines, when first implemented, had particularly restrictive effects. When the USSC was established, it allowed judges to depart from ranges where aggravating or mitigating factors were present. However, with time (pre-*Booker*), the guidelines became narrower and more restrictive. The USSC, established to guide, eventually implemented mandatory guidelines (of course this changed after *Booker*). This serves as an example of a sentencing body that has played a strong role in the development of sentencing regimes.

D. Conclusion

Statutory exemptions, or safety valves, can be beneficial to Canada's criminal justice system. A statutory exemption would deal directly with the problem of unconstitutional punishments being imposed on offenders. Furthermore, safety valves would allow Parliament to retain mandatory minimum sentencing regimes, which is within the scope and mandate of Parliament's work. Safety valves would also allow Parliament to avoid national or province-wide findings of unconstitutionality. These situations create inconsistencies in the applications of MMSs and encroach upon Parliament's will. Instead, Parliament could control the extent of discretion that is legislated into those offences which are serious enough to necessitate an MMS floor.

Sentencing guidelines can effectively shape the exercise of judicial discretion and the application of statutory safety valves. The U.K.'s use of a sentencing council and the American USSC provide compelling evidence that guidelines can effect MMSs, be responsive to changing public opinion, and serve as a venue for voicing the concerns of a changing electorate. Such data can be useful for determining guidelines as well as departures and reforms to them over time.

Finally, safety valves could allow for more immediate benefits to be realized by society and offenders. The disparate impact of MMSs such as their exacerbated effects on Black, Indigenous and minority populations could be avoided through increased use of exemptions for these populations. Safety valves can meaningfully reduce the strain on public resources and the criminal justice system as custodial sentences decrease.

Despite their benefits, safety valves have drawbacks. Not all exemption risks can be entirely alleviated. Safety valves are not able to adequately address all the problems presented by MMSs and they do present issues of their own. While safety valves typically decrease prosecutorial discretion, a much-discussed problem of MMSs, they shift some of that discretion back to the judiciary. This may lead to inequitable applications and disparities in the use of this discretion. However, as discussed in Part II, sentencing is a reviewable, transparent, and inherently judicial function. Therefore, the concerns that apply to prosecutorial discretion may not apply to judicial discretion. A further potential drawback of safety valves is that their effectiveness can vary based on their form. Safety valves that are narrow in their reach and limit the discretion afforded to courts appear to be less effective. Lastly, the use of safety valves could encourage an increased use of MMSs – the discretionary function of the valves could remove any restraint Parliaments may have towards the use of these sentencing floors.

Ultimately, however, as the comparative approach has shown, international jurisdictions are making effective use of a variety of safety valve models. Though the U.K. example is imperfect, it nonetheless remains the best example of a working safety valve and shows a level of breadth and flexibility. Accordingly, a valve that is high discretion and broad in its application, yet also subject to guidance and ongoing reform would be the recommended model for the Canadian landscape.

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