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Citation Information
https://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/15

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**R. v. Ferguson** and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12

Lisa Dufraimont*

I. INTRODUCTION

Among the difficult problems facing Canadian courts under the *Canadian Charter of Rights and Freedoms*¹ is the challenge of dealing with legislation that can be constitutionally applied in the great majority of cases but infringes Charter rights in a few cases. One potential solution to this problem, which has frequently been raised since the early days of the Charter, is a constitutional exemption.² Using this remedy, a court could uphold the legislation but exempt an individual from an application of the law that would violate his or her Charter rights.³ The possibility of a constitutional exemption has most often been raised in the context of the section 12 guarantee against “cruel and unusual treatment or punishment”. It is argued that mandatory sentencing provisions that apply validly in the general run of cases result in cruel and unusual punishment in the unique circumstances of certain offenders.⁴

For many years the status of such constitutional exemptions was uncertain. The Supreme Court of Canada endorsed a “narrow” version of the remedy exempting an individual Charter applicant from the

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⁴ For example, this argument for a constitutional exemption was raised unsuccessfully in *R. v. Latimer*, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.) [hereinafter “Latimer”], where the defence contended that the mandatory minimum sentence for second degree murder constituted cruel and unusual punishment in the circumstances.
application of a law that had been struck down during the period that the declaration of invalidity was suspended. Some argue that the Supreme Court occasionally, albeit implicitly, accepted constitutional exemptions in a broader form by upholding the validity of statutory provisions while declining to apply them or limiting their application in particular circumstances. Clearly, though, the Supreme Court never explicitly acknowledged that constitutional exemptions exist as a Charter remedy outside the discrete context of suspended declarations of invalidity. As controversy raged around this important remedial question, Canada’s highest Court repeatedly declined to decide the issue. Thus, the idea that a statutory provision could be upheld under the Charter but that exemptions could be granted to individuals whose rights were unconstitutionally affected found explicit approval only in the judgments of lower courts and in the minority positions of individual Supreme Court justices.


8 See, e.g., Latimer, supra, note 4 (finding that a constitutional exemption was unavailable to the accused, but leaving undecided whether such a remedy could be available in another case); Corbiere, supra, note 5, at para. 22; R. v. Seaboyer; R. v. Gayme, [1991] S.C.J. No. 62, 66 C.C.C. (3d) 321, at 404 (S.C.C.) [hereinafter “Seaboyer”].

Court judges. The Supreme Court’s long-standing reticence on this issue introduced an undesirable level of uncertainty into Charter adjudication.

Recently in *R. v. Ferguson*, a unanimous Supreme Court held that “a constitutional exemption is not an appropriate remedy for a s. 12 violation.” *Ferguson* has provided some long-awaited answers about the availability of constitutional exemptions. At the same time, one should not overestimate the extent to which *Ferguson* has resolved the deeper controversies animating the constitutional exemptions debate. The case concerned constitutional exemptions from mandatory minimum sentences. It is unclear to what extent it can be taken as authority that constitutional exemptions are unavailable as a remedy outside of section 12.

Even within the section 12 context, *Ferguson* has raised as many questions as it has answered. The judgment addressed the issue of constitutional exemptions in isolation from the larger section 12 analysis, when what is needed is an integrated and coherent approach to this Charter guarantee. By sidestepping the larger issues about the application of section 12 to mandatory minimum sentences, the Court left unresolved the basic problem presented in the case: how are courts to deal with sentencing provisions that operate constitutionally in most cases but have unconstitutional effects in rare cases? *Ferguson* has established that constitutional exemptions are not the answer, but what the answer might be is far from clear. I will argue that *Ferguson* raises the unsettling possibility that section 12 provides little protection to

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10 See *R. v. Morrisey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90, at para. 94 (S.C.C.) [hereinafter “Morrisey”], per Arbour J., concurring (“In cases of manslaughter involving the use of a firearm and arising from criminal negligence causing death, I believe that the better approach is to read the mandatory minimum as applicable in all cases save those in which it would be unconstitutional to do so.”), *Rose, supra*, note 6, at para. 66, per L’Heureux-Dubé J., concurring (“Section 24(1) of the Charter, however, enables a Court to grant a constitutional exemption from legislation that is constitutional in its general application if in the circumstances of a particular case an unconstitutional result would otherwise occur.”).


13 *Id.*, at para. 2.

14 See Stephen Coughlan, “The End of Constitutional Exemptions” 54 C.R. (6th) 220 (acknowledging that *Ferguson* is unclear on this point and arguing that the Supreme Court should decide that its rejection of constitutional exemptions applies outside of s. 12). On the need to address s. 12 in an integrated way, see Sankoff, “Swift Resolution”, supra, note 5, at 242-44; Allan Manson, “Morrisey: Observations on Criminal Negligence and s. 12 Methodology” (2000) 36 C.R. (5th) 121.
individuals whose exceptional circumstances render the application of a mandatory minimum sentence cruel and unusual.

II. **OVERVIEW OF ** **R. v. FERGUSON**

_Ferguson_ involved the shooting death of a detainee by an Alberta RCMP officer. Moments after escorting him into a cell, the officer shot the victim twice, once in the abdomen and a second time, fatally, in the head. The victim was intoxicated and there was a scuffle between the two men before the two shots were fired at an interval of up to three seconds. The officer was charged with second degree murder but a jury convicted him of manslaughter. Though manslaughter with a firearm carries a mandatory minimum sentence of four years’ imprisonment, the sentencing judge found that that sentence would be cruel and unusual in the circumstances and granted a constitutional exemption, imposing a conditional sentence of two years less a day. The Court of Appeal allowed the appeal and imposed the mandatory four-year sentence.

Before the Supreme Court, the defence did not argue that the mandatory minimum sentence for manslaughter with a firearm should be struck down, but only that the accused should be exempted from its application. The defence contended that the four-year minimum was constitutional in most applications, but that courts should decline to apply it in those rare cases where it would lead to an unconstitutional punishment. Writing for the unanimous court, McLachlin C.J.C. rejected this argument and dismissed the appeal. She found that the mandatory minimum sentence was not cruel and unusual in the circumstances. The trial judge’s finding that the sentence was grossly disproportionate was based on errors underlying his view of the facts.

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16 Supra, note 12.

17 *Criminal Code*, R.S.C. 1985, c. C-46, s. 236(a) [hereinafter “*Criminal Code*”].

18 Such an argument would have encountered the difficulty that the Supreme Court upheld the same minimum sentence for the closely related offence of criminal negligence causing death with a firearm in *Morrisey*, supra, note 10. See *Ferguson*, supra, note 12, at para. 11.

19 In making this claim, the defence adopted reasoning from the concurring judgment of Arbour J. in *Morrisey*, supra, note 10, at paras. 66, 94.

20 Because the jury convicted the accused of manslaughter, the trial judge properly concluded the jury must have rejected both the defence claim that the officer shot the victim in self-defence and the Crown’s contention that the officer acted with the requisite intent for murder. However, according to McLachlin C.J.C., the trial judge erred when he tried to reconstruct the jury’s reasoning process and when he found facts inconsistent with the jury’s verdict and contrary to the evidence. According to the trial judge, the jury must have concluded that the accused officer fired the first shot in self-defence and that the second shot was an instantaneous and instinctive
and once these errors were set aside there was no basis for such a finding.

Although it was not necessary to resolve the issue, McLachlin C.J.C. went on to hold that constitutional exemptions are not available to remedy violations of section 12. The Chief Justice presented four reasons. First, after reviewing the conflicting case law on constitutional exemptions, she concluded that the weight of authority lies against them. Second, she reasoned that to grant a constitutional exemption from a mandatory minimum sentence would intrude into the legislative sphere by effectively giving sentencing judges discretion in the face of mandatory legislation aimed specifically at supplanting judicial discretion. Third, she argued that constitutional exemptions are inconsistent with the remedial scheme laid out in sections 24(1) and 52(1) of the Charter, under which unconstitutional laws must be struck down pursuant to section 52(1) and not “left on the books subject to discretionary case-by-case remedies”. Finally, McLachlin C.J.C. reasoned that to grant constitutional exemptions from mandatory sentencing provisions would undermine the rule of law by introducing uncertainty about whether statutory law applies in a given case. Having rejected the option of constitutional exemptions, the Court concluded that any mandatory minimum sentence that creates an unconstitutional result under section 12 should be struck down.

III. MANDATORY MINIMUM SENTENCES AND THE CHARTER

The constitutional exemptions question resolved in Ferguson engages some larger questions about section 12. Since Ferguson leaves striking down as the only remedy for mandatory sentences that violate section 12, one can hardly grasp the implications of the decision without some appreciation of the phenomenon of mandatory minimum sentences and their relationship to the Charter guarantee against cruel and unusual

\textsuperscript{21} Section 24(1) of the Charter provides: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” Section 52(1) provides: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

\textsuperscript{22} Ferguson, supra, note 12, at para. 65.
punishment. To provide the necessary context, I will review, first, the status of minimum sentences in Canada and, second, the broader contours of the section 12 analysis.

1. Mandatory Minimum Sentences in Canada

By imposing a mandatory minimum sentence, the legislator reduces or eliminates the role of judicial discretion in sentencing for a particular offence. A mandatory minimum sentence establishes a floor that limits the options of the sentencing judge, who may be entitled to impose a harsher penalty than that stipulated in the statute, but is precluded from imposing a lighter one. Minimum sentences are the exception to the rule in Canada, where the vast majority of offences carry no minimum penalty and sentencing is typically individualized. Still, there are dozens of minimum sentences in the Criminal Code and their numbers have been increasing rapidly in recent years. As of 2006, about 40 Criminal Code offences carried minimum terms of imprisonment, including first and second degree murder, numerous firearms and weapons offences, various sexual offences involving children and a few impaired driving offences. Most of the minimum sentences attached to firearms offences and sexual offences involving children were introduced in 1995 and 2005, respectively. The federal Tackling Violent Crime Act, which passed into law in February 2008, increases existing minimum sentences for firearms and impaired driving offences and introduces escalating minimum penalties for repeat firearms offences.

Politicians appear to support mandatory minimum sentences because they send a tough crime control message that appeals to voters. More principled arguments have also been advanced in favour of mandatory

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24 See Nicole Crutcher, “The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada” (2001) 39 Osgoode Hall L.J. 273 (reviewing the minimum sentences of imprisonment introduced in Canada until 2001, and noting that such sentences have progressively become more common).
26 Id.
minimum sentences: they are said to contribute to crime control by deterring or incapacitating offenders, and to reduce disparities in sentencing. But the available evidence indicates that mandatory minimum sentences are generally ineffective in controlling crime. Moreover, mandatory minimum sentences that involve substantial terms of imprisonment are known to invite evasion by justice system officials, to shift sentencing discretion from judges to prosecutors, to increase incarceration rates and result in the unnecessary incarceration of offenders who pose no threat to society, to exacerbate systemic discrimination when they are imposed disproportionately on racialized accused, and to cause a host of other ill effects in the criminal justice system. Consequently, mandatory minimum sentences have been widely condemned by academic commentators and policy commissions.

There are a number of reasons to conclude that mandatory minimum sentences represent an unwise policy choice, but it is their potential to result in grossly disproportionate sentences that raises Charter concerns. The Criminal Code identifies proportionality as the fundamental principle of sentencing: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Because they preclude individualized consideration of these matters, mandatory sentences strain against this overarching principle. An overview of the leading Supreme Court judgments on section 12 will

29 Department of Justice Canada, Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures by Thomas Gabor & Nicole Crutcher (Ottawa: Research and Statistics Division, 2002) at 1, online at: <http://justice.gc.ca/eng/pi/rs/rep-2002/rr02_1/rr02_1.pdf> [hereinafter “Department of Justice Canada”].

30 See Doob & Cesaroni, supra, note 28, at 291 (“[M]andatory minimum sentences do not deter more than less harsh, proportionate, sentences.”); Department of Justice Canada, id., at 29-32 (reviewing research on mandatory minimum sentences in various offence categories and finding little evidence that any of them were effective in controlling crime). But see Thomas Gabor, “Mandatory Minimum Sentences: A Utilitarian Perspective” (2001) Can. J. Crim. 384, at 389 [hereinafter “Gabor”] (cautioning against generalizing about the effects of mandatory minimum sentences, which apply to various types of offences and range in severity from temporary licence suspensions to life imprisonment).


32 Sheehy, supra, note 23, at 262-64 (noting the dearth of academic literature supporting mandatory minimum sentences and the strong critiques of such sentences from the Canadian Sentencing Commission, the Law Reform Commission of Canada, and other policymaking bodies).

33 Criminal Code, s. 718.1.

reveal the constitutional implications of this potential for disproportionality in sentencing.35

2. Section 12 Jurisprudence

The foundational case on section 12 is R. v. Smith,36 which struck down a minimum sentence of seven years’ imprisonment for importing any amount of narcotics as a violation of section 12 that could not be saved under section 1. Significantly, it was not argued that the minimum sentence would be cruel and unusual in the circumstances of the accused, a repeat offender who had imported a large amount of cocaine. Instead, the section 12 argument was based on the notion that the minimum sentence was overly broad and would capture a sympathetic hypothetical offender for whom the punishment would be cruel and unusual: a youthful first-time offender caught importing a single marijuana joint. Writing for a plurality of judges, Lamer J. held that section 12 prohibits “grossly disproportionate” punishments that are “so excessive as to outrage the standards of decency”.37 Since Smith, gross disproportionality has been the hallmark of the section 12 analysis.

In R. v. Goltz,38 the Supreme Court elaborated on how hypothetical circumstances could be considered in the section 12 analysis. Goltz concerned a constitutional challenge to a provision in a provincial statute that imposed a mandatory minimum sentence of seven days’ imprisonment for knowingly driving while prohibited. Writing for a majority of the Court, Gonthier J. divided the section 12 analysis into two steps. First, a court should consider whether the challenged penalty would be grossly disproportionate for the offender before it, given the circumstances of the offence and the offender. Second, if the punishment would not be grossly disproportionate on the facts of the case, the court should consider whether the challenged penalty would be grossly disproportionate in “reasonable hypothetical circumstances, as opposed to far-fetched or marginally imaginable cases”.39 Applying this two-step analysis to the penalty and the offence before it, the majority found that mandatory minimum sentence did not infringe section 12.

37 Id., at 139.
39 Id., at 497.
A final case that sheds light on the method of analyzing mandatory minimum sentences under section 12 is *R. v. Morrisey*.\(^{40}\) The accused, a remorseful first-time offender, was convicted of criminal negligence causing death after he jumped onto a bunk bed while intoxicated and holding a loaded rifle, fell, and accidentally discharged the rifle at a friend who was lying on the top bunk. Because the offence was committed with a firearm, a mandatory minimum sentence of four years’ imprisonment applied.\(^{41}\) Despite sympathetic facts, the defence conceded that the minimum sentence would not be grossly disproportionate as applied to the particular offender, so the section 12 challenge turned on the hypothetical analysis laid out in *Goltz*.\(^{42}\) Once again, Gonthier J. wrote for a majority of the Supreme Court, upholding the mandatory minimum sentence under section 12. Gonthier J. emphasized that “courts are to consider only those hypotheticals that could reasonably arise”,\(^{43}\) explained that the hypotheticals considered should be “common”\(^{44}\) and dismissed various reported cases as “marginal” situations that should be excluded from the analysis.\(^{45}\) Despite having conceded that criminal negligence causing death “can be committed in an almost infinite variety of ways”,\(^{46}\) Gonthier J. considered that there were only two types of common situations meriting consideration as reasonable hypotheticals: individuals playing with firearms and hunting accidents. In neither case, the majority held, would the four-year minimum sentence be grossly disproportionate.

Justice Arbour delivered a concurring judgment in *Morrisey* disagreeing with the majority’s analysis of hypothetical cases. In the view of Arbour J., to limit the analysis to “two generic situations” conflicted with the nature of the offence of criminal negligence causing death, which could be committed in a wide variety of ways.\(^{47}\) Moreover, she argued that real past cases should not be excluded from the reasonable hypotheticals analysis, even if their facts seemed unusual. In light of the range of circumstances in which the offence had arisen in the past, Arbour J. considered it inevitable that cases would arise in which

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\(^{41}\) *Criminal Code*, s. 220(a).
\(^{42}\) *Supra*, note 38.
\(^{43}\) *Morrisey*, *supra*, note 40, at para. 33 (emphasis in original).
\(^{44}\) *Id.*, at para. 33.
\(^{45}\) *Id.*, at paras. 32 and 50.
\(^{46}\) *Id.*, at para. 31.
\(^{47}\) *Id.*, at para. 64.
the four-year minimum sentence would be grossly disproportionate. However, instead of striking down the mandatory minimum, Arbour J. would have upheld the sentencing provision “generally, while declining to apply it in a future case” where the sentence would be grossly disproportionate. In essence, Arbour J. endorsed the use of a constitutional exemption in an exceptional future case. Of course, Ferguson has now ruled out this proposed solution to the problem of the exceptional case.

IV. THE CONTINUING PROBLEM OF THE EXCEPTIONAL CASE

What, then, is to be done about exceptional cases? The problem requires resolution if we accept, as did Arbour J. in Morrisey, that unusual cases will occasionally arise where mandatory minimum sentences that generally apply in a constitutional manner produce cruel and unusual punishments for particular individuals. This potential to create grossly disproportionate sentences inheres in mandatory minimums, which by their nature efface distinctions between cases, and increases with the range of conduct covered by the offence and the harshness of the minimum penalty. It is, of course, impossible to predict the future circumstances of offenders and offences within which mandatory minimum sentences will give rise to instances of gross disproportionality. Yet one can easily imagine cases in which some of Canada’s mandatory minimum sentencing laws would impose cruel and unusual punishments.

Compassionate homicides provide an obvious example. A loving spouse or adult child who kills a terminally ill and suffering family member could, if the killing was planned and deliberate, be guilty of first degree murder and be subjected to a mandatory sentence of life in prison without the possibility of parole for 25 years. The consent of the

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48 Id., at para. 66.
50 Supra, note 40, at para. 82.
51 See Allan Manson, “Motivation, the Supreme Court and Mandatory Sentencing for Murder” (2001) 39 C.R. (5th) 65, at 71 (“By submerging individual characteristics and the infinite circumstances in which offences can be committed into a uniform mould, the mandated sentence will inevitably produce at least some unfair and inordinately harsh responses.”).
53 The mandatory sentencing provisions appear in ss. 235(1) and 745 of the Criminal Code. Several real Canadian cases of compassionate killings, some with the victim’s consent, are discussed in the dissenting reasons of Bayda C.J.S. in R. v. Latimer, [1995] S.J. No. 402, 99 C.C.C. (3d) 481, at 531-39 (Sask. C.A.). In all these cases the accused pleaded guilty to lesser offences and non-custodial sentences were imposed.
victim, which seems important to the killer’s moral culpability, would provide no legal excuse. The mandatory punishment appears grossly disproportionate in these foreseeable circumstances, but the Supreme Court has held that these sentencing provisions are consistent with section 12.

Existing mandatory sentences for offences involving firearms and other weapons also seem apt to create occasional injustices. For example, a youthful and naïve martial arts enthusiast who returned from vacation with a souvenir set of nunchucks could be subjected to the one-year mandatory minimum term of imprisonment for knowingly importing a prohibited weapon. And as the discussion of Morrisey revealed, the offence of criminal negligence causing death can be committed in circumstances approximating a tragic accident, but when it is committed with a firearm it attracts a mandatory minimum sentence of four years’ imprisonment. In sum, mandatory minimum sentences raise a possibility of grossly disproportionate sentences in a variety of factual circumstances.

Accepting, then, that exceptional cases present a problem in the context of mandatory minimum sentences, I will now consider whether and how Ferguson contributes to a solution. First, it is argued that the Court lost an opportunity in Ferguson to craft a sensible solution by recognizing constitutional exemptions. Second, the problem of the exceptional case is identified as a matter of overbreadth, and the competing approaches to remedying overbreadth are discussed. Finally, I

54 Coupled with the fact that the victim was the accused’s vulnerable disabled child, the absence of the victim’s consent weighed in favour of the Supreme Court’s conclusion that the mandatory minimum sentence for second degree murder was not grossly disproportionate in the difficult circumstances of R. v. Latimer, [2001] S.C.J. No. 1, [2001] 1 S.C.R. 3 (S.C.C.). For commentary, see H. Archibald Kaiser, “Latimer: The End of Judicial Involvement and an Unsatisfactory De Facto Beginning of the Clemency Process” (2001) 39 C.R. (5th) 42 (arguing that the sentence was appropriate); Don Stuart, “A Hard Case Makes for Too Harsh Law” (2001) 39 C.R. (5th) 58, at 63-64 (arguing that the sentence was grossly disproportionate).

55 Criminal Code, s. 14.


57 See Criminal Code, s. 103. Of course, the accused would have had to know that this importation was unauthorized.

58 Supra, note 40.

59 See Criminal Code, s. 220(a). See also Rouch, supra, note 35, at 411 (suggesting that this mandatory minimum sentence should have been struck down in Morrisey, supra, note 40).


61 Ferguson, supra, note 49.
will argue that, in the context of the section 12 jurisprudence, Ferguson creates a gap in the protection offered by this Charter guarantee.

1. The Lost Opportunity of Constitutional Exemptions

By rejecting constitutional exemptions in Ferguson, the Supreme Court of Canada has foreclosed a workable solution to the problem of the exceptional case. As McLachlin C.J.C. pointed out, the primary benefits of a constitutional exemption remedy are that exemptions introduce some desirable flexibility into the constitutional analysis and offer courts a way to preserve legislation that is constitutional in its general application. On examination, these benefits undercut some of the criticisms levelled at constitutional exemptions in Ferguson.

The Chief Justice reasoned that recognizing constitutional exemptions within the context of mandatory minimum sentences would undermine the legislative intent underlying such provisions, which is to exclude judicial discretion. This argument suffers from two weaknesses. First, it relies on the dubious assumption that blind rigidity in sentencing constitutes a constitutionally valid legislative objective to which courts must defer. Second, this legislative deference argument reflects an implausible and uncharitable reading of Parliament’s intent.

The Court’s reasons suggest that Parliament’s primary objective in enacting mandatory minimum sentences is to exclude judicial discretion in every case without exception: to ensure that, for sentencing purposes, exceptional cases receive the same treatment as ordinary cases. On this view, catching cases with unusual facts becomes a central feature of the legislative intent.

Would it not be more reasonable to conclude that Parliament’s main objective in passing a mandatory minimum sentence is to set a new, tougher standard of punishment for the offence as a whole? Related aims that can reasonably be attributed to Parliament include creating a new level of certainty about that punishment and reducing disparities in sentencing.

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64 Related aims that can reasonably be attributed to Parliament include creating a new level of certainty about that punishment and reducing disparities in sentencing.
public safety by “getting tough” on crime.\footnote{For example, in announcing the passage of the recent \textit{Tackling Violent Crime Act}, S.C. 2008, c. 6, Justice Minister Rob Nicholson declared that “today, we can say goodbye to the days of soft, lenient penalties for violent criminals”. Department of Justice Canada, News Release, “Canadian Communities Now Safer as \textit{Tackling Violent Crime Act} Receives Royal Assent” (February 28, 2008) online at: \url{http://canada.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32226.html}. As noted above, it is doubtful that such “tough on crime” policies are effective in enhancing public safety. Nevertheless, that is the stated goal with which they are generally pursued.} Understood thus, the legislative intent driving mandatory minimums seems congruent with the possibility of constitutional exemptions, which could vindicate the aims of the legislation by ensuring that tough minimum sentences would be applied in the great majority of cases. Arguably, then, the course of legislative deference lies not in rejecting constitutional exemptions but in embracing them as a mechanism for preserving legislation.\footnote{See Allan Manson, “The Charter and Declarations of Invalidity” (1990) 74 C.R. (3d) 95, at 99; Kent Roach, \textit{Constitutional Remedies in Canada} (Aurora, ON: Canada Law Book, 2006), at paras. 14.630, 14.660.}

Chief Justice McLachlin’s claim that constitutional exemptions are inconsistent with the remedial scheme of the Charter\footnote{Ferguson, supra, note 49, at paras. 58-66.} is also questionable. Admittedly there has been some confusion about whether constitutional exemptions (if they existed) should be grounded in section 52(1) or section 24(1) of the Charter.\footnote{Peter Sankoff, “Constitutional Exemptions: Myth or Reality?” (1999-2000) 11 N.C.J.L. 411, at 434-41; Kent Roach, supra, note 66, at para. 14.570.} Laying aside that complex and technical issue, however, constitutional exemptions appear consistent with the flexible approach to remedies that has developed under the Charter. In \textit{Schachter v. Canada},\footnote{[1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).} the Supreme Court discussed the constitutional remedies of severance and reading in, explaining that their purpose “is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature.”\footnote{Id., at 700.} The same argument applies to constitutional exemptions, which as explained above can be used to preserve legislation. The mere fact that constitutional exemptions change or mitigate the effects of the legislation is no reason to rule out the remedy. Any change goes only so far as to ensure compliance with Charter standards.\footnote{Roach, supra, note 66, at para. 14.890.}
2. Approaches to Overbreadth

The implications of Ferguson 72 must be considered in the context of the evolving section 12 jurisprudence. Since the early days of the Charter, the Supreme Court has consistently held that mandatory minimum sentences are not inherently cruel and unusual, 73 but its approach to the problem has shifted over time. As Kent Roach has observed, the Supreme Court has become progressively more deferential to legislative choices imposing mandatory minimum sentences. 74 The Court’s willingness to find violations of section 12 in hypothetical cases — once robust in Smith 75 — has been winnowed down in Goltz 76 and Morrisey 77 to the extent that it now provides little scope to challenge the constitutionality of these punishments. 78 And like the narrowing of the reasonable hypotheticals analysis, the rejection of constitutional exemptions in Ferguson forms a part of this larger deferential trend. Thus, these two movements in the section 12 jurisprudence — the narrowing of the reasonable hypotheticals analysis and the elimination of constitutional exemptions — appear broadly consistent.

Unfortunately, taken together, these two movements create a problem in the section 12 analysis. Properly understood, constitutional exemptions and the reasonable hypotheticals analysis represent competing approaches to controlling legislative overbreadth. 79 Commentators have frequently observed that the availability of constitutional exemptions makes it seem unnecessary to strike down laws under the reasonable hypotheticals

72 Supra, note 49.
75 Supra, note 73.
76 Supra, note 73.
79 See Robert Frater, “The Sharpe Edge of the Crozier Wedge: Are ‘Reasonable Hypotheticals’ Still Reasonable?” (1999) 25 C.R. (5th) 307, at 308. Mandatory minimum sentences can be overly broad in the sense that, even when they generally produce proportionate results, they can operate in exceptional cases to produce grossly disproportionate sentences. This notion of overbreadth under s. 12 is distinct from the issue of overly broad offence provisions, which can give rise to violations of s. 7 of the Charter (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”); R. v. Heywood, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) (striking down an overly broad offence provision under s. 7).
analysis, while a robust approach to reasonable hypotheticals reduces the attraction of constitutional exemptions.\textsuperscript{80} This complementarity arises because reasonable hypotheticals analysis and constitutional exemptions have the same function: to provide a remedy for the exceptional case. After Ferguson,\textsuperscript{81} the pressing question is what to do with exceptional cases when neither remedy is available.

Commentators have pointed out that constitutional exemptions seem consistent with an American approach to constitutional review that holds laws to be invalid “as applied” to individual claimants; reasonable hypotheticals analysis, by contrast, conforms to the Canadian approach under which the normal remedy is to strike down unconstitutional laws.\textsuperscript{82} Thus, some have argued that constitutional exemptions are both inconsistent with the approach to judicial review under the Charter and, in light of the availability hypothetical analysis, unnecessary:

In Canada, … extensive use of reasonable hypotheticals, unfettered by issues of standing, allows for a fulsome scrutiny of a provision’s validity in light of a myriad possible applications.\textsuperscript{83}

The logic of the argument is undeniable, but there is an obvious problem: under section 12, “extensive use of reasonable hypotheticals” is no longer permitted. After Goltz\textsuperscript{84} and Morrissey,\textsuperscript{85} reasonable hypotheticals must be common, which seems to rule out any consideration of exceptional circumstances.\textsuperscript{86}

An example from the case law might prove instructive. In \textit{R. v. Kumar},\textsuperscript{87} the British Columbia Court of Appeal considered a section 12 challenge to the 14-day mandatory minimum term of imprisonment that attaches to a second drinking and driving offence.\textsuperscript{88} For a majority of the court, Taylor J.A. held that the provision could not be struck down using the reasonable hypotheticals analysis because the situations in which the

\begin{itemize}
  \item \textsuperscript{81} [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.).
  \item \textsuperscript{82} Rosenberg & Perrault, \textit{supra}, note 80, at 377-89.
  \item \textsuperscript{83} \textit{Id.}, at 382.
  \item \textsuperscript{84} \textit{Supra}, note 73.
  \item \textsuperscript{86} See Roach, “Searching for Smith”, \textit{supra}, note 74, at 386 (“Exceptional circumstances relating to particular offenders are, unfortunately, not caught by the generic notion of commonly occurring examples”).
  \item \textsuperscript{88} \textit{Criminal Code}, s. 255(1)(a)(ii).
\end{itemize}
punishment would be grossly disproportionate, though they existed, would be “rare”. However, Taylor J.A. found comfort in the fact that a constitutional exemption would be available if and when such a rare case arose. However, that source of comfort is no longer available. Now that the Supreme Court has ruled out the constitutional exemptions under section 12, the problem of the exceptional case is more perplexing than ever.

3. The Gap in Section 12 Protection

Peter Sankoff has explained that, if constitutional exemptions are not available, courts have three options when confronted with a law that is constitutional in most applications but infringes section 12 in rare instances: first, to offer no remedy to those rare individuals whose Charter rights are infringed; second, to broaden the reasonable hypotheticals analysis to encompass exceptional cases; or third, to permit reconsideration of precedents upholding the constitutionality of the law and thereby allow the law to be struck down when an exceptional case emerges. The first option — providing no remedy — seems unacceptable because it would leave individuals without any way of enforcing their Charter rights. For this reason, Sankoff considered it “virtually inconceivable that this approach would be adopted”.

Certainly no court in Canada would ever explicitly endorse this option, but one cannot ignore the possibility that, in practice, Charter claimants may be left without a remedy when their section 12 rights are violated in exceptional cases. When the obstacles facing the other options are considered, the disturbing possibility emerges that offering no remedy to the exceptional section 12 claimant represents the path of least resistance.

The second option — broadening the reasonable hypotheticals analysis to encompass exceptional cases — appears unavailable until such time as the Supreme Court opts to reconsider its analysis in Goltz.

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89 Kumar, supra, note 87, at para. 56.
90 Id., at para. 59: “… I am persuaded that there is ample justification for the application of a ‘constitutional exemption’ in those particular, perhaps very unusual, cases in which a breach of Section 12 could be shown ….”.
92 Id., at 244.
93 Supra, note 73.
Such reconsideration seems unlikely in light of the fact that the unanimous Court relies extensively on these cases in Ferguson. Since there is clear authority from the Supreme Court of Canada that hypotheticals must be common, it is not open to a lower court to broaden the analysis.

The third option — permitting courts to reconsider prior cases upholding the constitutionality of the law in light of new facts — seems to be the only real choice. This option would require a judge to strike down a mandatory minimum sentence, even one that has previously survived a section 12 challenge, when the accused before the court would otherwise be subjected to a grossly disproportionate sentence. There is language in Ferguson to support this result. The Chief Justice rejected the suggestion that

no remedy is available in the case of a mandatory minimum sentence that brings about an unconstitutional result — for instance, in circumstances not previously considered as part of a reasonable hypotheticals analysis. If a mandatory minimum sentence would create an unconstitutional result in a particular case, the minimum sentence must be struck down.

At first blush, this simple statement seems to answer all possible objections, but serious problems emerge on closer examination.

On the basis of this brief passage, can we really expect lower court judges faced with exceptional cases to disregard prior decisions on the constitutionality of mandatory minimum sentences? The Supreme Court of Canada has upheld the mandatory minimum sentences for murder and criminal negligence causing death with a firearm, even though there are imaginable circumstances where these penalties would be cruel and unusual. In the face of these apparently binding precedents, is it realistic to think a judge will strike down those mandatory minimum

94 Supra, note 85.
95 Supra, note 81.
96 Sankoff, “Swift Resolution”, supra, note 91, at 244 (suggesting that this option represents the most likely course).
97 Supra, note 81.
98 Id., at para. 13 (emphasis added).
100 Morrisey, supra, note 85.
punishments when a uniquely sympathetic case comes to court?\textsuperscript{101} Ultimately, the suggestion that the constitutionality of mandatory minimum sentences can be reconsidered in light of new facts represents a more radical challenge to the principle of \textit{stare decisis} than the Supreme Court appears to have appreciated. More than a passing reference from the Court is needed to ensure that claimants in exceptional cases have a remedy when a mandatory minimum sentence imposes cruel and unusual punishment.

To complicate matters further, certain parts of the judgment in \textit{Ferguson} contradict the idea that decisions on section 12 issues are open to re-examination in novel circumstances. One reason the Chief Justice offered for rejecting constitutional exemptions is that “[t]he matter of constitutionality would not be resolved once and for all as under s. 52(1)”.\textsuperscript{102} This passage implies that rulings on the constitutionality of mandatory minimum sentences under section 12 are final and binding. But if we accept that a minimum sentence can be struck down if it would be cruel and unusual punishment on the facts, then section 12 rulings are only final in the rare cases when they strike the law down. Decisions upholding mandatory minimums, on the other hand, should always be open to reconsideration in light of novel circumstances. The Chief Justice’s reference to resolving section 12 issues “once and for all” draws no apparent distinction between successful and unsuccessful Charter challenges, and arguably undermines the notion that decisions upholding mandatory sentences can be reconsidered. Moreover, the Court referred elsewhere in \textit{Ferguson} to the precedential value of \textit{Morrisey} on the constitutionality of the minimum sentence for manslaughter with a firearm;\textsuperscript{103} \textit{Morrisey} upheld the constitutionality of a mandatory minimum sentence, yet the Court in \textit{Ferguson} treated it as a binding precedent. Thus, \textit{Ferguson} sends mixed messages about whether section 12 rulings can be reconsidered and how judges should respond to exceptional cases.

Quite apart from the question of finality, there are problems with leaving section 12 cases perpetually open for reconsideration. If courts must wait for the exceptional case before striking down a mandatory minimum that has unconstitutional effects, then overly broad mandatory

\textsuperscript{101} See Sankoff, “Swift Resolution”, \textit{supra}, note 91, at 243 (considering the possibility that a real person whose circumstances were not considered under the reasonable hypotheticals analysis might be “trapped by a binding precedent”).

\textsuperscript{102} \textit{Ferguson}, \textit{supra}, note 81, at para. 72.

\textsuperscript{103} \textit{Id.}, at para. 11.
sentences may stay on the books indefinitely. And leaving overly broad laws on the books has important costs. Of course, the exercise of prosecutorial discretion may mean that the most sympathetic offenders are likely never to be charged. But unfettered prosecutorial discretion hardly constitutes an adequate guarantee of constitutional rights. Moreover, if courts must wait until the exceptional claimant appears before them to strike down overly broad mandatory minimum sentences, then prosecutors have the power to insulate laws from constitutional scrutiny by declining to press exceptional cases.

The fundamental problem is that the persistence of an invalid mandatory minimum sentence has distorting effects. Accused persons may feel pressure to plead guilty to lesser offences to avoid the possible application of an overly broad mandatory minimum. In embracing a robust approach to the analysis of hypotheticals in Smith, the Supreme Court suggested that an accused is entitled to have the sentencing issue decided without regard to a mandatory minimum sentence that isconstitutionally infirm. This objection merits consideration before Sankoff’s third option (permitting courts to reconsider the constitutionality of sentencing laws in light of new fact situations) is clearly and finally adopted.

Taken together, the Supreme Court’s section 12 judgments leave a potential gap in the protection offered by this Charter guarantee. Given the strict limits on the reasonable hypotheticals analysis and the unavailability of constitutional exemptions, a possibility exists that a Charter applicant will be left without a remedy when a mandatory minimum sentence that is generally constitutional has unconstitutional effects. Recognizing this possibility as unacceptable does not make it any less real.

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105 See, e.g., Kent Roach, Constitutional Remedies in Canada (Aurora, ON: Canada Law Book, 2006), at 382-83. 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. See Elizabeth Sheehy, “Battered Women and Mandatory Minimum Sentences” (2001) 39 Osgoode Hall L.J. 529, at 539.
106 Smith, supra, note 104.
107 See especially Smith, id., at 150, per LeDain J., concurring.
108 The potential for this gap in s. 12 protection has been noted before. See Allan Manson, "Morrisey: Observations on Criminal Negligence and s. 12 Methodology" (2006) 36 C.R. (5th) 121, at 128 ("What is essential is to ensure that courts are not forced by methodological precedent to stand passive in the face of s. 12 violations."); Don Stuart, Charter Justice in Canadian Criminal Law, 4th ed. (Toronto: Thomson Carswell, 2005), at 454, arguing that the Supreme Court in Morrisey was "pre-empting challenges in worse cases arising in the future."
V. CONCLUSION

Ferguson\(^{109}\) creates problems by hiving off the constitutional exemption question from the broader section 12 analysis. Once the case is considered in its jurisprudential context, it becomes clear that the problem of the exceptional case demands further guidance from the Supreme Court. If the Court envisions lower courts striking down mandatory minimum sentences despite higher court decisions upholding them, then that expectation should be made explicit. If, on the other hand, the Court considers that exceptional cases are best incorporated into the reasonable hypotheticals analysis, then the narrow approach laid out in \textit{Goltz}\(^{110}\) and \textit{Morrisey}\(^{111}\) must be discarded and a more generous section 12 methodology adopted. My own view is that the latter course is preferable, but clear guidance in either direction would be preferable to the current state of uncertainty. As the law stands, section 12 may fail to protect individuals in exceptional circumstances.

\(^{109}\) \textit{Supra}, note 81.


\(^{111}\) \textit{Supra}, note 85.