

MANDATORY MINIMUM SENTENCES OF IMPRISONMENT: EXPLORING THE CONSEQUENCES FOR THE SENTENCING PROCESS[©]

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In this article, the author discusses the nature and consequences of the mandatory sentences of imprisonment created by Bill C-68 in 1995. These mandatory sentences constitute the most comprehensive collection of mandatory minima in Canadian history, and will affect significant numbers of offenders. Unlike most mandatory minima created in other jurisdictions such as Australia, England, and Wales, the legislation which created the firearms offence minima offers no provision to be invoked in exceptional cases. In this article, the author addresses the effect that these new statutory minima are likely to have on sentencing patterns. It is argued that they should not have an inflationary effect on sentence lengths for all firearms offences, and certainly not for other, unrelated crimes. Allowing the new mandatory minima to inflate sentencing lengths would cause considerable damage to the architecture of the sentencing system. Such a change would also be inconsistent with the codified principles of sentencing. The article concludes by reiterating a proposal to promote a more rational and coherent sentencing policy development: creation of a Permanent Sentencing Commission.

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I. INTRODUCTION	

Almost all domestic and international sentencing scholars,¹ as well as commissions of inquiry in Canada,² have decried the existence of mandatory minimum sentences of imprisonment. Despite this consensus, Parliament has continued to legislate these penalties.³ In this article, I discuss the nature and some consequences of the latest wave of ten mandatory minimum sentences of imprisonment imposed on convicted

¹ See e.g. M.H. Tonry, *Sentencing Matters* (New York: Oxford University Press, 1996); A. Doob & C. Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39 *Osgoode Hall L.J.* [pg.#]; J.P. Brodeur, "Sentencing Reform: Ten Years after the Canadian Sentencing Commission" in J.V. Roberts & D.P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 332 [hereinafter *Making Sense*]. It is worth noting that scholarly commentary has not been merely negative with respect to minimum sentences. In testimony before the Parliamentary Committee, Doob, Jean-Paul Brodeur, and the author of this article offered a positive alternative to mandatory minima. The proposal entailed a *presumptive* minimum sentence of imprisonment, which would achieve the goal of the mandatory minimum penalty but without many of the drawbacks. The offender would be *presumed* to receive a four-year sentence unless the imposition of such a sentence would be inconsistent with the codified fundamental principle of sentencing. Needless to say, the proposal fell on deaf Parliamentary ears.

² For example, the 1969 Report of the Canadian Committee on Corrections recommended that "existing statutory provisions which require the imposition of minimum mandatory sentences of imprisonment upon conviction for certain offences other than murder be repealed"; see Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 210. Exactly the same recommendation was made by the CSC a generation later: see Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987) at 189 [hereinafter *Sentencing Reform*].

³ A chronology of legislative activity with respect to mandatory minimum sentences of imprisonment can be found in N. Crutcher, "Mandatory Minimum Penalties of Imprisonment: An Historical Analysis" (2001) 44 *Crim. L.Q.* 279.

offenders whose crimes have been committed with a firearm.⁴ These statutory minima were created by Bill C-68 in 1995.⁵

The ten offences, each carrying a four-year minimum sentence,⁶ warrant special attention from scholars for several reasons. First, they are the most recent manifestation of Parliament's resurgent appetite for mandatory penalties.⁷ Second, unlike some of the other mandatory penalties in the *Criminal Code*, the firearms offences carry relatively high minimum periods of imprisonment (four years).⁸ Third, they constitute the most comprehensive collection of mandatory minima in Canadian history; at no other point have so many been created by a single piece of legislation. Fourth, addressed below, unlike most other offences carrying a mandatory minimum term of imprisonment, the firearms offences can affect significant numbers of accused persons. Finally, unlike the mandatory sentences of imprisonment recently created in other jurisdictions such as Australia, England, and Wales, the legislation that created the firearms minima offers judges no "escape clause" or provision to invoke in exceptional cases where the imposition of a mandatory four-year imprisonment would lead to undue hardship for the offender.

One example of a mandatory minimum sentence combined with an escape clause is section 78A (1A) of the Australian Northern Territories' *Sentencing Act 1995*.⁹ This clause stipulates that where an offender has been found guilty of one or more property offences, the court must order the offender to serve a term of imprisonment of not less than fourteen days. However, section 78A (6B) states that "[a] court is not required to make an order under subsection (1) if exceptional circumstances for not doing so

⁴ A list of the offences can be found in Table 1 of this article: see *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Code*].

⁵ Bill C-68, *An Act respecting firearms and other weapons*, 1st session, 35th Parl., 1995, cl.19, (1st reading 15 February 1995) [hereinafter Bill C-68].

⁶ Bill C-68 also created eight other minimum sentences of imprisonment for other firearms offences. For example, an offender convicted for the second time under s. 92 (1) or (2) of the *Code*, possession of an unauthorized firearm, is subject to a minimum sentence of one year in prison.

⁷ For further information on the history of mandatory penalties, see Crutcher, *supra* note 3.

⁸ The median length of imprisonment in 1998–99 was forty-five days, and less than 4 per cent of sentences of imprisonment were longer than two years: see J.V. Roberts & C. Grimes, "Adult Criminal Court Statistics, 1998/99" (2000) 20:1 *Juristat* 1 at 13. A four-year sentence exceeds the 90th percentile for many very serious crimes. For example, 90 per cent of sentences imposed for aggravated sexual assault (an offence carrying a maximum penalty of life imprisonment) in 1998–99 were less than four years.

⁹ (NT), s.78. Section 78A was repealed 22 October 2001.

exist.” This provision permits judges some flexibility, even with respect to a mandatory term of imprisonment.

The government in the Northern Territories saw the merit in an escape clause even for a fourteen-day term of custody; no such freedom is accorded Canadian judges obliged to impose sentences of at least four years imprisonment. Similarly, section 111(2) of the *Powers of Criminal Courts (Sentencing) Act 2000*,¹⁰ applicable to England and Wales, states that for offenders convicted of domestic burglary for the third time, “[t]he court shall impose an appropriate custodial sentence for a term of at least three years except where the court is of the opinion that there are particular circumstances which – (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances.”

This article consists of five parts. Part II provides an indication of the volume of cases affected by the firearms mandatory minima. Part III considers the impact that the mandatory minima will likely have on sentencing practices at the trial court level. Specifically, I address the question of whether the creation of a new, four-year minimum sentence should affect the range of sentence lengths for that offence and whether sentence ranges for other offences will be affected as well. This part of the article addresses concerns raised by Kent Roach in his contribution to this special issue. Roach argues that one of the adverse effects of the firearms mandatory minima will be an inflation of sentences imposed for other offences as judges attempt to adhere to the principle of proportionality in sentencing. Also included is a consideration of the mandatory minimum sentences in light of the statutory principles of sentencing contained in Part XXIII of the *Code*. Having addressed the question of how the mandatory minima will likely affect sentencing patterns, Part IV draws upon sentencing statistics to speculate about the way that these mandatory minima may actually be used by judges. Finally, in Part V, I outline a specific proposal to promote more rational sentencing policy development in Canada.

II. NUMBER OF INCIDENTS RECORDED BY POLICE: 1995–1999

It is difficult to provide a categorical estimate of the number of offenders who have been affected by the firearms mandatory minima because the national, police-reported crime statistics compiled and

¹⁰ (U.K.), 2000, c.3, s.111(2).

published annually by Statistics Canada do not record whether the criminal incident involved a firearm.¹¹ The aggregate Uniform Crime Reporting (UCR) database is therefore an unreliable guide to the number of criminal incidents across the country involving a firearm. However, there is an incident-based version of the UCR in which police officers record the presence of any firearm. The empirical weakness of this database is that it has yet to be implemented across the country; at present, approximately half of the police services are transmitting information to Statistics Canada using the incident-based form. The database does, however, provide some insight into the volume of incidents that can give rise to a criminal charge carrying the possibility, on conviction, of a four-year minimum term of imprisonment.

According to the UCR, Table 1 shows the number of incidents recorded by police in which a firearm was present. Significant numbers of accused are involved and these statistics represent less than half the volume of crime recorded by police across Canada. Moreover, due to plea bargaining and a myriad of other factors, only a fraction of these incidents will eventually result in the imposition of a sentence. However, the issue of plea bargaining has been repeatedly raised with respect to accused persons facing the possibility of a conviction carrying a mandatory sentence;¹² accordingly, it is important to consider more than simply the number of offenders eventually convicted of an offence carrying a mandatory term of imprisonment. In addition, the published sentencing statistics available from Statistics Canada do not distinguish between a manslaughter offence committed with a firearm (and therefore subject to a minimum sentence of four years imprisonment) and a manslaughter offence that does not involve the use of a firearm.¹³ One conclusion, however, is clear: unlike some other mandatory minimum sentences (such as living on the avails of prostitution

¹¹ For example, an incident of manslaughter will be recorded in the aggregate UCR as an offence under s. 236 of the *Code*, *supra* note 4, and not necessarily as an offence under s. 236(a), which defines the specific form of manslaughter involving a firearm and therefore subject to the mandatory minimum sentence of four years imprisonment.

¹² For discussion of this issue in the Canadian context, see Department of Justice Canada, *Research on the Application of Section 85 of the Criminal Code of Canada* by C. Meredith, B. Steinke & S. Palmer (Ottawa: Department of Justice, 1994).

¹³ As an illustration, see the most comprehensive, recent portrait of sentencing in adult criminal courts: A. Birkenmayer & S. Besserer, *Sentencing in Adult Provincial Courts* (Ottawa: Statistics Canada, 1997).

of a person under eighteen years of age),¹⁴ the firearms-related minimum sentences affect significant numbers of offenders.

¹⁴ Section 212(2.1) of the *Code*, *supra* note 4, carries a minimum punishment of five-years imprisonment. No cases under this section have been recorded within the last two years.

Table 1: Number of criminal incidents recorded by the police in which a firearm was present (1995-1999)

OFFENCE	SECTION	INCIDENTS INVOLVING A FIREARM
Robbery	344(a)	21226
Kidnapping	279(1.1)(a)	1000
Attempt to commit murder	239(a)	635
Extortion	346(1)	123
Sexual assault with a weapon	272(2)(a)	108
Causing bodily harm with intent - firearm	244	40
Hostage taking	279.1(2)(a)	17
Manslaughter	236(a)	9
Causing death by criminal negligence	220(a)	7
Aggravated sexual assault	273(2)(a)	6
Total		23171

Source: UCR2 (Incident-based database, which captured 41 per cent of national volume of criminal incidents reported to the police in 1999); data provided by Policing Services Program, Canadian Centre for Justice Statistics, Statistics Canada.

III. IMPACT OF MANDATORY MINIMUM SENTENCES ON SENTENCING PRACTICES

The mandatory minimum legislation has had one clear effect on sentencing patterns: all convictions under one of the designated sections will result in a term of incarceration of at least four years.¹⁵ However, a number of other questions about the general impact of the legislation need to be addressed.

In his thoughtful commentary on the evolution of appellate jurisprudence with respect to mandatory minima, Roach brings an important question to our attention: will the arrival of a series of mandatory minimum sentences have a general effect on sentencing patterns?¹⁶ Drawing upon the Supreme Court judgment in *R. v. Morrissey*,¹⁷ he suggests that the creation of a severe four-year mandatory minimum sentence will

¹⁵ In *R. v. Wust*, [2000] 1 S.C.R. 455 [hereinafter *Wust*], the Supreme Court held that consideration of “dead time” could reduce the sentence imposed below the mandatory four years.

¹⁶ K. Roach, “The Constitutionality of Mandatory Sentences: Searching for Smith and Finding Deference and Desert” (2001) 39 Osgoode Hall L.J. [pg #].

¹⁷ [2000] 2 S.C.R. 90 [hereinafter *Morrissey*].

have an inflationary effect on sentencing patterns¹⁸ as judges attempt to incorporate the new mandatory minima into the existing sentencing framework, in which proportionality is designated as the fundamental sentencing principle.

Roach argues that adherence to the principle of proportionality, combined with the advent of mandatory minimum sentences of imprisonment, will cause an inflation of sentence severity in two ways. First, the creation of a new, high “floor” sentence (of four years) will result in the entire range of sentences for that offence being shifted upwards in order to retain proportionality in the face of the new minimum sentence. Thus, if the effective range of sentence lengths for robberies committed with a firearm before 1995 had been, for example, two to eight years, the sentence range might thereafter rise to four to sixteen years, with the most severe sentence remaining four times longer than the least severe. In this way, the entire distribution of sentences is shifted upward, comparable to the way that university professors occasionally shift the distribution of university grades. Roach writes that “the increased emphasis on proportionality will require sentences to be ratcheted up to account for the hard fact that the best offender and least serious version of the crime is caught by the mandatory minimum penalty.”¹⁹ And further, “[a] concern about preserving proportionality means that mandatory sentences that have been upheld as constitutional by the Court may ratchet up all sentences.”²⁰ His analysis suggests that an inflation of sentence severity is a natural consequence of two developments. First, an “increased emphasis on proportionality” as a result of the sentencing reforms of 1996, when proportionality was codified as the fundamental principle of sentencing. Second, the decision of the Supreme Court in *Morrissey*, where the Court upheld as constitutional the imposition of a mandatory minimum sentence.

There is also a second, more pernicious way in which the mandatory minima may influence sentencing patterns. In addition to inflating

¹⁸ In an earlier article, Professor H el ene Dumont expresses similar views with respect to minimum penalties in general. She writes: “Les peines minimales, de fa on g en erale, influencent   la hausse toutes les autres sentences et cr eent une escalade dans la rigueur r epressive.” See H. Dumont, “D esarmons les Canadiens et armons-nous de tol erance: Bannir les armes   feu, bannir les peines minimales dans le contr ole de la criminalit e violente, essai sur une contradiction apparente” (1997) 2 Can. Crim. L. Rev. 43 at 62.

¹⁹ Roach, *supra* note 16. On this point, see also H. Dumont, “De la Loi C-41   la Loi C-55: la d etermination de la peine avec une main de fer dans un gant de velours” in P. Healy & H. Dumont, eds., *Dawn or Dusk in Sentencing* (Montr eal: Les  ditions Th emis, 1997).

²⁰ Roach, *ibid.*

sentences imposed for the specific enumerated offence (e.g., robbery with a firearm), the new minima may inflate the severity of sentences imposed for *other* offences as well. Thus, “[a] concern about preserving proportionality means that mandatory sentences that have been upheld as constitutional by the Court may ratchet up all sentences.”²¹

The cause of Roach’s apprehension in this matter results from the language used by Madam Justice Arbour in *Morrisey*²² and *Wust*.²³ In *Wust*, Justice Arbour writes that “[i]t is important to interpret legislation which deals, directly or indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing.”²⁴ In *Morrisey*, she first notes that “[t]o the extent possible, mandatory minimum sentences must be read consistently with the general principles of sentencing expressed ... Parliament has not repudiated completely the principle of proportionality.”²⁵

Having established a link between the mandatory minima and the general sentencing framework, Justice Arbour then specifies the nature of the effect that the minima should have on sentencing practices: “Therefore, in my view, the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called “best” offender whose conduct is caught by these provisions.”²⁶ Later in the judgment, her language is even more explicit: “... the inflationary effect of the mandatory floor is likely to increase all penalties for this offence”²⁷

The larger question then is whether mandatory sentences should influence sentencing patterns in general. In this article, I argue that allowing mandatory minimum penalties to affect the range of sentences for a specific offence, or worse, to influence sentencing patterns for *other* offences, ignores the core tenets of Canadian sentencing policy. The mandatory sentences of four-years imprisonment are inconsistent with the principle of proportionality and indeed with a sentencing system based on

²¹ *Ibid.*

²² *Supra* note 17.

²³ *Supra* note 15.

²⁴ *Ibid.* at para. 22.

²⁵ *Supra* note 17 at para. 75.

²⁶ *Ibid.*

²⁷ *Ibid.* at para. 82.

the “just deserts” philosophy.²⁸ Adjusting the desert-based sentencing process to “accommodate” the mandatory sentencing provisions created by Bill C-68 will have disastrous consequences for the coherence of the sentencing process in Canada. Aside from the impropriety of allowing mandatory sentences to drive other sentencing patterns, I argue that experience to date with other mandatory sentences suggests that this tendency will be resisted by trial judges. First, however, it is necessary to consider the relationship between mandatory minimum sentences of imprisonment and the principles of sentencing that were codified in 1996.

A. *Relationship Between the Firearms Mandatory Minima and Statutory Principles of Sentencing*

The unfounded assumption underlying the position that mandatory sentences should affect sentencing patterns is that the mandatory minima were conceived and constructed with a clear consideration of their relationship to the codified principles of sentencing. There seems little evidence for this; rather, the mandatory minima simply represent an attempt by Parliament to denounce and deter²⁹ the use of firearms for criminal purposes as part of an overall firearms policy to which the sentencing provisions make a largely symbolic contribution. Although there are several factors leading to this conclusion, the high mandatory sentences of imprisonment violate several elements of the statutory statement of the purpose and principles of sentencing.

²⁸ Sentencing based on a “just deserts” rationale follows a principle of proportionality between the seriousness of the individual offence and the severity of the punishment imposed. Just deserts is a retributive theory of sentencing.

²⁹ In his first appearance before the House of Commons Committee on Justice and Legal Affairs, the Committee that was reviewing Bill C-68, Minister of Justice Allan Rock cited deterrence no fewer than nine times, and indeed made no reference to any other sentencing purpose; see testimony by the Minister of Justice, 24 April 1995. It is curious that deterrence seemed so pressing an objective, as the volume of firearms offences had been declining steadily prior to the creation of the firearms mandatory minima. For example, the number of robberies with a firearm declined 39 per cent (from 8995 to 6646 incidents) over the period 1991–97 (UCR data table available from the author).

B. *Mandatory Sentences for Firearms Offences and the Principle of Proportionality*³⁰

In 1996, as part of a general sentencing reform, Parliament codified a fundamental principle of sentencing: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”³¹ The very nature of a mandatory penalty is contrary to a sentencing system that privileges proportionality (by designating it as “fundamental”).³² A mandatory sentence prevents judges from modulating the severity of the sentence to reflect the seriousness of the offence and the degree of blameworthiness of the offender. This is why the Canadian Sentencing Commission (CSC) recommended the abolition of all mandatory sentences of imprisonment, with the exception of the sentence for murder.³³ The Commission noted in its report that

... each criminal offence is uniquely defined by its own set of circumstances and the notion of a judge pre-determining a sentence before hearing the facts seems abhorrent to our notions of justice. If the punishment is to fit the crime, then there can be no pre-determined sentences since criminal events are not themselves pre-determined.³⁴

The concept of ordinal proportionality is central to proportional sentencing.³⁵ According to ordinal proportionality, the severity of penalties must correspond to the relative seriousness of the crimes for which they are imposed. If offences of variable seriousness are punished with equal

³⁰ It is important to note that in this article I deal with the relationship between the mandatory sentence of four-years imprisonment and the fundamental principle of sentencing now codified as s. 718.1 of the *Code*, *supra* note 4. I do not explore the question of the constitutionality of a mandatory minimum sentence of four-years imprisonment. This latter question was the subject of the appeal in *Morrisey*, *supra* note 17, wherein the Supreme Court of Canada upheld the constitutionality of the sentence. Thus, I will argue that a mandatory minimum sentence can represent a major affront to the principle of proportionality in sentencing without being sufficiently disproportionate so as to be unconstitutional.

³¹ *Code*, *ibid.*

³² *Ibid.*

³³ The Commission avoided the issue of the mandatory sentence of life for murder by taking a policy decision “not to deal with the issue of capital punishment and to retain the mandatory life sentence for first- and second-degree murder and high treason”; see *Sentencing Reform*, *supra* note 2 at 261. However, the mandatory life sentence is clearly inconsistent with the statement of purpose and principle advocated by the Commission; see *Sentencing Reform*, *ibid* at c.6.

³⁴ *Ibid.* at 186.

³⁵ See A. von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).

severity, then ordinal proportionality is violated.³⁶ How does a mandatory minimum sentence subvert ordinal proportionality? Consider the example of two cases of robbery, both committed with a firearm prior to the passage of Bill C-68, but of differing levels of seriousness. The less serious case of offender A might have resulted in a term of imprisonment of eighteen months, while the more serious offender, B, might have received a sentence of three years. In light of Bill C-68, both offenders must now receive a minimum sentence of at least four years in prison. Ordinal proportionality has been violated by the mandatory minimum sentence; although the offences are of variable seriousness, the two offenders are nevertheless punished with the same degree of severity.

What about a third offender, C, who would have received a sentence of four years? Should this offender now receive an eight-year sentence in order to establish some proportionality and to create distance between this case and the less serious case which now is punished by four-years imprisonment? Following this principle requires the imposition of a disproportionately severe sentence on offender C as a response to the disproportionate statutory minimum sentence imposed on offenders A and B, in order to maintain the principle of proportionality! Once proportionality has been violated by the intrusion of a raft of severe, mandatory sentences of imprisonment, it cannot be re-established in the manner suggested.

There is another way in which the mandatory minima undermine the fundamental principle of sentencing. By imposing the same sentence (at least four years in prison) upon all offenders convicted of one of these offences, the legislation overrides any judicial consideration of the relative seriousness of the specific crimes. The seriousness of an offence committed with a firearm involves two components: the seriousness of the predicate or base offence (*e.g.*, robbery, manslaughter), and the additional harm threatened or inflicted as a result of the use of the firearm. The degree of aggravation represented by the use of a firearm may be constant across offences, but the seriousness of the predicate offences varies widely.³⁷ This can be demonstrated by reference to the sentence length statistics for the various offences.

³⁶ Ordinal proportionality is also violated if offences of comparable seriousness are punished with variable severity.

³⁷ This analysis suggests an alternate way for Parliament to recognize the additional harm of using a firearm during the commission of an offence: to designate such behaviour as representing an aggravating (codified) circumstance at sentencing. This eminently sensible proposal was advanced by Dumont, *supra* note 18 at 60. Needless to say, this suggestion also fell on deaf ears.

A reasonable index of the seriousness of a particular offence is the average term of imprisonment imposed.³⁸ Table 2 presents three indices of sentence length: the tenth percentile,³⁹ the median (the 50th percentile), and the 90th percentile.⁴⁰ As can be seen, regardless of the index, the range of sentence lengths imposed for these offences is very broad. For example, the tenth percentile sentence ranges from one month for kidnapping to eighteen months for manslaughter.⁴¹ Yet as a result of Bill C-68, these offences are now defined by Parliamentary fiat as requiring exactly the same minimum sentence: at least four years imprisonment (if they are committed with a firearm). In effect, Parliament is leveling the same degree of denunciatory or deterrent power at a very heterogeneous collection of offences. The distinctions in culpability made by judges and apparent in the sentence length statistics are effectively swept away by the mandatory penalty.

In fact, the creation of a mandatory sentence of imprisonment can be interpreted as Parliament assuming a freedom unavailable to the judiciary. Judges wishing to pursue one of the utilitarian sentencing objectives (such as deterrence) are constrained, in determining the sentence, by consideration of the fundamental principle of sentencing: proportionality. Thus a judge would be prevented from imposing a three-year sentence in order to deter other like-minded individuals if a proportionate sanction would be in the range of six to nine months. By creating severe mandatory sentences of imprisonment that violate proportionality, Parliament has arrogated to itself a liberty that it denied

³⁸ In fact the federal United States sentencing guidelines employ the severity of the sanctions previously imposed, rather than the nature of the previous convictions as the measure of the seriousness of an offender's criminal history. See J.V. Roberts, "The Role of Criminal Record in the Sentencing Process" in M. Tonry, ed., *Crime and Justice: A Review of Research*, vol. 22 (Chicago: University of Chicago Press, 1997) at 323.

³⁹ Ten per cent of the sentences of imprisonment are shorter than this value; 90 per cent are longer.

⁴⁰ The 90th percentile is the sentence length that encompasses 90 per cent of sentences; only 10 per cent are longer: *Adult Criminal Court Survey Shelf Tables* [hereinafter *Shelf Tables*], available from the author.

⁴¹ The data cited in the text come from 1998-99, and therefore reflect the presence of the mandatory minima, but the same finding emerges from sentencing trends from an earlier period. For example, data collected by the CSC from the mid-1980s reveals a median sentence for extortion of one year, compared to five years for manslaughter and attempted murder. The variability among the 90th percentiles during this period is even more striking, ranging from three years for extortion to fourteen years for aggravated sexual assault and attempted murder.

judges when, in 1996, it codified the principle of proportionality and designated it as “fundamental.”

Table 2: Sentence length statistics, selected offences (in months), 1998–99

OFFENCE	90 TH PERCENTILE	MEDIAN	10 TH PERCENTILE
Aggravated sexual assault	170	46	1
Manslaughter	128	61	18
Attempted murder	122	36	6
Robbery	97	49	24
Kidnapping	34	9	1
Sexual assault with a weapon	62	24	6

Source: *Adult Criminal Court Survey shelf tables*, provided by Statistics Canada and available from the author.

The second weakness with imposing the same mandatory minimum sentence on a number of offences is that whatever period of custody is chosen, it will “fit” some crimes better than others. In terms of previous sentencing practices, the minimum sentence of four years is high and reflects the punishment level of the most serious crime among the offences. Thus the penalties imposed for other less serious crimes are being raised to the level of seriousness for manslaughter. A more reasonable proposal, one that would have acknowledged the existence of the codified principle of proportionality, would have been to assign the ten offences different bands of mandatory minima, reflecting their relative seriousness as reflected in existing sentencing practices.⁴² The fact that this tiered approach was not adopted suggests that Parliament saw no need to consider the nature of the mandatory sentences in relation to the fundamental principle of sentencing; rather, it simply wanted to make a punitive statement about the criminal use of a firearm.

Another way in which the mandatory minimum sentences of imprisonment impede the application of the principle of proportionality is by imposing categorical judgements as to the seriousness of crimes. This creates artificial gradations between offences of comparable seriousness. Manslaughter is an offence that best illustrates this problem. By creating a four-year minimum term of custody for manslaughter perpetrated with a firearm, Parliament has deemed this form of unintentional homicide to be more serious and more worthy of denunciation than manslaughter committed by other means. A graphic contrast can be made by example of an Ontario case of manslaughter.

⁴² For example, Parliament could have created mandatory minimum sentences of eighteen months, two years, three years, and four years with only the most serious offence(s) assigned to the highest band.

In *R. v. Turcotte*,⁴³ the offender was convicted of manslaughter. He had used two telephone cords to strangle his frail, septuagenarian mother. A community-based sanction was imposed by the trial judge and subsequently upheld by the Ontario Court of Appeal. Had the offender used a firearm, he would have been sentenced to at least four years in prison. But is manslaughter committed by means of strangulation less worthy of denunciation than one involving a firearm?

Contrast the *Turcotte* case with *Morrisey*, where the offender was convicted of criminal negligence causing death that, like manslaughter, carries a maximum penalty of life imprisonment.⁴⁴ While in a state of inebriation, Mr. Morrisey caused the death of his friend when the gun that he was carrying discharged unexpectedly. Why is the need for a harsh, denunciatory sentence so pressing in *Morrisey* and yet absent in *Turcotte*?⁴⁵

Finally, it is worth making a comparison between offences that are less similar than those giving rise to the *Turcotte* and *Morrisey* appeals. Consider a comparison between a case of robbery involving a firearm and a non-firearm manslaughter such as *Turcotte*. The former offence now carries a four-year mandatory minimum sentence, while the latter can be punished by a community-based sanction. Is robbery with a firearm that much more serious and worthy of denunciation and deterrence than homicide?

Denunciation is a sentencing goal that falls within the category of communicative theories (unlike other sentencing goals such as rehabilitation that aim to reduce crime by changing offenders).⁴⁶ Denunciatory sentences convey a message of social disapprobation, with the will of society expressed through the severity of the legal punishment.

⁴³ (2000), 32 C.R. (5th) 296 (Ont. C.A.) [hereinafter *Turcotte*].

⁴⁴ *Morrisey*, *supra* note 17. The offences of which the two offenders were convicted are more comparable than may be apparent at first glance. In comparing these two cases, it is worth recalling that according to s. 222(5)(b) of the *Code*, *supra* note 4, one of the categories of culpable homicide is causing the death of a human being “by criminal negligence,” and that “culpable homicide that is not murder or infanticide is manslaughter” (s. 234). In *Morrisey*, criminal negligence causing death and manslaughter are characterized as “totally interchangeable” (at para. 62).

⁴⁵ It also seems hard to argue that the statutory sentencing objective of deterrence is promoted by the imposition of a four-year mandatory sentence; individuals in circumstances such as those in which *Morrisey* found himself are seldom inclined to, or even capable of, considering the legal penalties that may ensue. For a review of recent research on the relationship between general deterrence and sentence severity, see A. von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity* (Oxford: Hart, 1999).

⁴⁶ For a recent discussion of communicative theories of sentencing, see R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

The seriousness of the crime is central to denunciation; there is little need to denounce shoplifting (although there may be a need to prevent such behaviour) but great necessity to denounce the intentional taking of human life (hence the mandatory sentence of life imprisonment for murder). Community perceptions of the seriousness of crimes must therefore play an important role in determining the need for denunciation. While it remains an unanswered empirical question, it seems unlikely that the public would see a greater need to denounce the criminal conduct in *Morrissey* than that in *Turcotte*.⁴⁷

C. *Mandatory Sentences of Imprisonment and the Principle of Restraint*

Mandatory sentences of imprisonment also violate the codified principle of restraint with respect to the use of incarceration.⁴⁸ The principle of restraint is expressed in two elements of the statutory statement of purpose and principle. Section 718.2(d) of the *Code* affirms that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;” section 718.2(e) states that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” By requiring the imprisonment of all offenders, and for a term of custody near the top of the effective range for these offences, the mandatory minima must violate, in some cases, the principle of moderation with respect to incarceration.

If the mandatory minima are so clearly at odds with the statutory principles of sentencing (and in particular the principle designated by Parliament as “fundamental”), it can only distort the sentencing process if the minima are allowed to drive the range of sentences upward. Allowing the mandatory minima to affect sentencing patterns for other offences will

⁴⁷ The absence of media commentary following the *Morrissey* decision and the heated public debate in the wake of the *Turcotte* decision suggests that the public viewed the latter as more worthy of a denunciatory sentence than the former. As well, the limited evidence with respect to public attitudes suggests that severe, mandatory sentences of imprisonment attract little public support; for a review, see J.V. Roberts, *Public Opinion and Mandatory Sentences of Imprisonment: A Review of International Findings* (2001) [unpublished, archived at Department of Criminology, University of Ottawa].

⁴⁸ Writing for the majority in *Morrissey*, *supra* note 17 at para. 44, Justice Gonthier discusses the minimum sentencing regime in relation to the statutory sentencing principles. It is curious however, that no mention is made of the principle of restraint in the use of incarceration.

therefore undermine two of the principles of sentencing, and weaken the reforms introduced by Bill C-41⁴⁹ in 1995.

Finally, the illogic of the inflationary position is exposed when one considers sentences at the high end of the range. How should a judge now sentence an offender convicted of one of the ten firearm offences and who would have merited a six-year term (three times the “tariff” or average sentence) prior to the creation of the mandatory minima? Does adherence to proportionality and the desire to denunciate and deter necessitate a tripling of the six-year sentence? Surely these goals are achieved (if they are achievable) by the new four-year threshold. Consider an analogy with a minimum wage reform in which the statutory minimum hourly wage is decreed to double from five to ten dollars, to reflect the inadequacy of the former rate. Surely no one would argue that the hourly rate paid to practising lawyers should also be doubled. If the minimum annual salary paid to medical residents is raised by 25 per cent, the previous level having been considered inadequate, should the annual salaries of specialists rise by a similar percentage?

How then should judges sentence offenders following the creation of these mandatory minimum sentences? Judges should continue to sentence offenders convicted of these offences as they had before 1995, with the necessary change that all offences that would have resulted in a sentence under four years must now carry four-year sentences to comply with the statutory requirement. Offences that would have resulted in, for example, six-year terms in the pre-minima period should continue to receive a sentence in this range.

D. *Should the Mandatory Minima Affect Sentencing Patterns for Other Offences?*

If the sentence ranges for the specific offences carrying mandatory minima will not be inflated, what of the sentencing patterns for other crimes? To return to Roach’s text: “It is possible to argue that a constitutional mandatory minimum of four-years imprisonment for an unintentional killing with a firearm should increase the punishment tariff, not only for that crime, but other crimes.”⁵⁰ It is important to note that there is no support in Justice Arbour’s judgment in *Morrissey* for this more

⁴⁹ Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*, 1st Sess., 35th Parl., 1995 (assented to 13 July 1995, S.C. 1995, c.22) [hereinafter Bill C-41].

⁵⁰ *Supra* note 16.

generalized form of inflationary sentencing feared by Roach. The judgment clearly states that “the inflationary effect of the mandatory floor is likely to increase all penalties *for this offence*.”⁵¹ Nor is there any evidence that the Department of Justice or Parliament intended the firearms mandatory minima to provoke this kind of “inflationary ripple,” with sentences for other crimes being affected. Therefore, there is even less justification for this kind of inflation.⁵² The problems created by allowing arbitrarily created minimum sentences to affect sentencing patterns for other offences can be most clearly illustrated by considering the argument in the context of another mandatory minimum sentence, in this case one proposed by the House of Commons Standing Committee on Justice and the Solicitor General in 1988.

The House of Commons Standing Committee and the Solicitor General conducted a review of sentencing and conditional release, producing a report with ninety-seven recommendations.⁵³ Although many of the recommendations were thoughtful and consistent with the ethos of more liberal sentencing,⁵⁴ one very punitive recommendation emerged. The Committee recommended the creation of a minimum sentence of ten years in prison *without parole* for all offenders convicted of “the second or subsequent offence for sexual assault involving violence.”⁵⁵ What would be the effect of allowing such a minimum sentence to affect the sentencing of other offences? First, sentences for the aggravated forms of sexual aggression would have to rise dramatically. At present, the average sentence for aggravated sexual assault is in the range of three years.⁵⁶

⁵¹ *Supra* note 17 at para. 82 [emphasis added]. This suggests that the judgment contemplates an inflationary effect within sentences for an offence carrying a mandatory minimum penalty but not between such an offence and the sentences imposed for other crimes.

⁵² It is perhaps significant that there is no mention in any communication from the Department of Justice or Parliament about any wider impact of the mandatory sentence of imprisonment on sentencing practices in general.

⁵³ Standing Committee on Justice and Solicitor General, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Queen’s, 1988).

⁵⁴ For example, it may be said that the Committee was responsible for drawing attention to the restorative principles of reparation and reconciliation; see Department of Justice, *supra* note 12 at 5.

⁵⁵ See Recommendation 10, *ibid.* at 71. I am assuming that any offence of sexual aggression involves violence, and that accordingly the mandatory sentence would have affected all offenders convicted of sexual assault for the second or subsequent time

⁵⁶ The median sentence in 1998–99 was under four years for this offence: *Shelf Tables*, *supra* note 40.

Setting a ten-year, flat-time sentence for sexual assault would, according to the inflationary logic, affect many other offences as well. Second-degree murder carries a mandatory sentence of life imprisonment with no possibility of parole until at least ten years have been served in custody.⁵⁷ Although the trial judge can impose any period of parole ineligibility between ten and twenty-five years, a ten-year sentence without the possibility of parole is the outcome of almost all convictions for second-degree murder, which is the same sentence that would have been imposed on offenders convicted of sexual assault a second time, had this mandatory minimum sentence been created.

Since murder is a much more serious crime than sexual assault, sentencing patterns for second-degree murder would have to move upwards, perhaps to an average of twenty years imprisonment in order to preserve some degree of ordinal proportionality. This increase would be necessary to distinguish the more serious crime (second-degree murder) from the less serious offence (sexual assault). Of course, once sentences for second-degree murder had been inflated in this way, the sentence for the more serious form of murder (first-degree murder) would need to be revised upward as well, in order to distinguish it from second-degree murder. In this way, observing the remorseless inflationary logic would make a shambles of the current sentencing system, resulting in much longer terms of imprisonment. If rigorously followed by judges, the inflationary interpretation of the impact of a mandatory minimum carries the potential to wreck the current architecture of the sentencing process.

At this point I move from theory to practice, and address the following question: what is the nature of judicial reaction to minimum penalties in general and to the firearms minima in particular? Is there any evidence that judges inflate the entire range of sentence for a mandatory minimum offence—as feared by Roach and advocated by Justice Arbour—or do they adopt some other strategy in response to a mandatory minimum term of imprisonment? The analysis must perforce be preliminary in nature, as the requisite statistical information is simply not available at present (a problem to which I shall return later in this article).

⁵⁷ See *Code*, *supra* note 4, ss.745(c), 745.4.

IV. JUDICIAL REACTION TO MANDATORY MINIMUM SENTENCES OF IMPRISONMENT

Mandatory minima find little support among members of the judiciary, who tend to regard them as an unwelcome intrusion into the discretion of the trial judge. The CSC conducted the only national survey of judges in Canada with respect to sentencing, and one of the questions examined judicial reaction to minimum sentences.⁵⁸ Judges were asked whether minimum sentences restricted the court's ability to "give out a just sentence." Over half (57 per cent) of the judges answering the survey responded that their ability in this respect was restricted by a minimum sentence.⁵⁹ If the survey were conducted today, it is likely that an even greater percentage of judges would regard their discretion as being restricted, since there has been a significant increase in the number of offenders affected by the statutory minima created over the past decade.

Evidence of judicial antipathy can be found in the reaction to pre-existing mandatory minimum terms of imprisonment. An instructive example is the one-year minimum sentence of imprisonment for using a firearm during the commission of an offence,⁶⁰ created in 1976.⁶¹ It is not a mandatory sentence, but rather a mandatory *minimum* sentence; judges are supposed to use the range of penalties possible up to the maximum sentence of fourteen-years imprisonment. However, in reality, judicial reaction to the sentence means that the mandatory minimum has become the de facto mandatory sentence.

Data collected by the CSC reveals that of 1307 sentences imposed for this offence in 1983–84, only five exceeded the minimum of one year.⁶² A similar pattern of clustering around the minimum penalty emerges from sentencing statistics for this offence pertaining to the year before the creation, in Bill C-68, of the mandatory minimum penalties (1993–94). Over 90 per cent of offences were punished with terms of imprisonment of

⁵⁸ See Canadian Sentencing Commission, *Views of Sentencing: A Survey of Judges in Canada* (Ottawa: Department of Justice Canada, 1988).

⁵⁹ *Ibid* at 16.

⁶⁰ *Code*, *supra* note 4, s.85(1).

⁶¹ Bill C-83, *The Criminal Law Amendment Act*, 1st Sess., 30th Parl., 1976; see Crutcher, *supra* note 3.

⁶² *Sentencing Reform*, *supra* note 2 at 191.

less than two years, and this includes cases with previous convictions for this offence which carry a five-year minimum sentence of imprisonment.⁶³

Detailed sentencing statistics are not available for the ten offences that now carry a minimum sentence of four years if committed with a firearm; indeed, this empirical lacuna is one the principal impediments to rational policy-making with respect to mandatory sentencing. However, an analysis of the limited information available suggests that a similar trend exists for these offences as well. For the year 1998–99, almost two-thirds of sentences imposed were exactly four years in length.⁶⁴ While this pattern is not as clear-cut as the statistics relating to section 85(1) of the *Act*, it is consistent with the interpretation that judges are inflating only the low end of the range of sentences, and inconsistent with the general inflationary position.

Another way of determining whether judges are simply observing the minimum four-year requirement, or are inflating the entire range of sentences is by examining the 50th and 90th percentiles. If the entire range for a firearms minimum offence has been shifted upward as a result of the mandatory minima, this will be seen in changes to these statistics following the creation of the mandatory minima. This kind of “pre-post” analysis is only possible for certain offences. With respect to manslaughter, the average⁶⁵ sentence in 1993–94 was sixty months. In 1998–99, it was only slightly higher (sixty-nine months), suggesting that although all sentences below four years must have risen to four, the overall distribution of sentence lengths was relatively unaffected; *the lengths of sentences above four years were largely unchanged*. Similarly, for sexual assault with a weapon and aggravated sexual assault, the combined (weighted) average sentence length was forty-three months prior to the creation of the mandatory minima, and actually declined to thirty-eight months in the most recent year (1998–99).⁶⁶ Once again, there is no evidence that the entire range of

⁶³ *Code*, *supra* note 4 at s. 86(3)(a).

⁶⁴ I would like to thank Mr. Craig Grimes from Statistics Canada for providing this statistic. At this time, no statistics are available on the distribution of sentence lengths longer than four years, itself a lamentable shortcoming of the sentencing statistics in Canada.

⁶⁵ It is important to use the mean in these analyses, although Statistics Canada usually reports the median. The average (or mean) is a statistic which measures central tendency that is very sensitive to extreme scores. For example, if the longest sentence had risen from, say six to twelve years (as would be predicted by the inflationary hypothesis) the mean would jump appreciably. Other measures of central tendency such as the median or the mode would remain largely unaffected.

⁶⁶ These statistics are derived from the *Shelf Tables*, *supra* note 40.

sentences has been shifted upwards, as advocated by Justice Arbour in *Morrissey* and feared by Roach and Dumont.⁶⁷

On the basis of these admittedly limited statistics, it appears that when a mandatory minimum sentence is introduced, it has the effect not of moving the entire range upwards, but rather of constraining the distribution by raising all sentences to a new artificial floor. To summarize, using mandatory minimum sentences introduced for a specific purpose, and applicable to a limited number of offences, in order to justify harsher sentences for other crimes makes little sense from the perspective of penal theory. Moreover, there is convincing evidence that judges reject such a practice and have not subscribed to the inflationary logic advocated in *Morrissey*. Rather, the judiciary has raised sentences that would have been below the new “floor” sentence of four years, and sentenced offenders convicted of more serious offences much as they have in the past, before Parliament created the mandatory minima applicable to certain offences when committed with a firearm.

V. THE WAY FORWARD: THE ROLE OF A PERMANENT SENTENCING COMMISSION

There is a better way of reforming the sentencing process, one that generates more coherent policy development and which also ensures that the ultimate decision makers are still elected members of the bicameral legislature, and not appointed commissioners or judges. The creation of a permanent sentencing commission for Canada was first debated in the mid-1980s. This proposal is not new, but is simple enough. A detailed blueprint for such a commission was developed by the CSC⁶⁸ and subsequently endorsed by the House of Commons Standing Committee on Justice and Solicitor General⁶⁹ (the Daubney Committee) in its report. Most leading sentencing scholars have also repeatedly endorsed the creation of a permanent sentencing commission in Canada.⁷⁰

⁶⁷ Since the sentencing statistics are not separated according to whether a firearm was used or not, these are aggregate means; still, if judges were moving the whole range upwards, some shifting should be apparent on the statistics.

⁶⁸ *Sentencing Reform*, *supra* note 2 at c. 14.

⁶⁹ See *ibid.* at Recommendation 9 of the Committee’s report.

⁷⁰ See, for example, A. Doob, “Sentencing Reform: Learning from Other Jurisdictions” in L. Samuelson & B. Schissel, eds., *Criminal Justice: Sentencing Issues and Reform* (Toronto: Garamond Press, 1991) at 121; A. Manson, “The Role of Sentencing in Canada” in R. Stuart, R. DeLisle & A. Manson, eds., *Towards a Clear and Just Criminal Law* (Toronto: Carswell, 1999) at 493.

The federal government initially supported the creation of such a commission in its response to these two landmark reports. In 1990, then Minister of Justice Kim Campbell announced that an integrated Sentencing and Parole Commission would be a central part of the federal government's sentencing reform initiative. Minister Campbell wrote that the proposed sentencing commission would serve "as a vehicle for the development of policies within a coherent and consistent criminal justice policy framework."⁷¹ Unfortunately, the proposed commission was sunk by a wave of fiscal cuts that also swept away the Law Reform Commission of Canada. That important body was revived by the current federal government, but there appeared to be little interest in revisiting the proposal of a permanent sentencing commission. Subsequent appeals for the creation of a permanent sentencing commission have fallen on deaf ears.

The CSC (and later the Daubney Committee) listed a number of critical functions that could be performed by a permanent sentencing commission in relation to mandatory minima.

First, it could provide the federal Department of Justice and Parliament with an *objective* examination of the results of research into the effectiveness (and disadvantages) of mandatory sentencing in general; since almost all academics oppose the use of mandatory sentences of imprisonment, parliamentarians may be wary of their evaluation of the mandatory sentencing research. A permanent sentencing commission could conduct original research into the functioning of the existing mandatory penalties of imprisonment. It is most regrettable that almost no research has been conducted on the impact of these new mandatory minima.

Second, Parliament needs to know how its mandatory minimum sentence legislation is being implemented. If it is the case—and the evidence points strongly in this direction—that judges are raising the floor but also sentencing as before in more serious cases, legislators need to know this.

Third, in the event that Parliament is set on creating a new series of mandatory minima, a permanent sentencing commission could provide models for ways in which to structure such penalties. Since it has a myriad of criminal law policy questions to address, the federal Department of Justice does not have the resources to conduct the necessary research into many sentencing-related issues. Numerous questions—only some of which have been raised in this article—need to be addressed.

⁷¹ K. Campbell, "Sentencing Reform in Canada" (1990) 32 Can. J. of Crim. 391.

Finally, legislative developments in the field of sentencing over the past few years suggest a purpose for a permanent sentencing commission that was overlooked by both the CSC and the Daubney Committee. Perhaps the most important contribution that could be made by a permanent sentencing commission would be to remind Parliamentarians when legislative proposals come into conflict with the statutory framework for sentencing established by Parliament itself in 1996.⁷² This service alone would result in a more coherent development of sentencing reforms. The present way of legislating mandatory sentences on an *ad hoc* basis represents a less than optimal way to reform sentencing.⁷³

⁷² For a discussion of the 1996 reforms, see A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001); D. Daubney & G. Parry, "An Overview of Bill C-41 (The Sentencing Reform Act)" in *Making Sense*, *supra* note 1 at 31.

⁷³ For a discussion of the recent *ad hoc* evolution of sentencing policy in Canada, see J.P. Brodeur, "Sentencing Reform: Ten Years after the Canadian Sentencing Commission" in *Making Sense*, *ibid.* at 343.