Should the Assessment of Cruel and Unusual Punishment Be "Hypothetical"?[1]

If mathematical calculation could be applied to the obscure and infinite combinations of human actions, there might be a corresponding scale of punishments, descending from the greatest to the least; but it will be sufficient that the wise legislator mark the principal divisions, without disturbing the order, left to crimes of the first degree be assigned punishments of the last. If there were an exact and universal scale of crimes and punishments, we should there have a common measure of the degree of liberty and slavery, humanity and cruelty of different nations.

C. Beccaria*, An Essay on Crimes and Punishments,* trans., 2nd American Edition (Philadelphia: Philip H. Nicklin, 1819), at p. 30

When I was a little boy my father warned me never to enter fields where it was unnecessary to go. That advice, which I did not always follow as a child, takes on new meaning now as I consider a case in which the practical necessity of deciding the hypothetically important issue placed before us by counsel is extremely doubtful.

***W. (C.) v. Manitoba (Mental Health Review Board)*, [1994] M.J. No. 401 (Man. C.A.), at para. 1, leave to appeal refused, [1995] S.C.C.A. No. 151**

The use of the "reasonable hypothetical" in the assessment of cruel and unusual punishment in Canada continues to confound.

Consider three examples:

- Mr. Nur was standing outside a community centre when police arrived. He fled and a chase ensued, during which he threw a loaded .22 calibre semi-automatic handgun with an oversized ammunition clip under a car in a parking lot.

- Mr. Smickle was posing with a fully loaded Colt .25 calibre semi-automatic handgun, with the hammer fully cocked to fire, for the purposes of taking a "selfie"[2] when police entered the apartment to execute a search warrant.

- Mr. Sheck carried a loaded, 9 mm. Glock handgun with a shortened barrel in a man purse into a well known family restaurant in a large urban centre at approximately 7 p.m.

What do these three first-time offenders[3] have in common?

In each case, the offender was convicted of unauthorized possession of a loaded restricted or prohibited firearm contrary to s. 95 of the Canadian *Criminal Code*, R.S.C. 1985, c. C-5.

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[1] Prepared by Lesley Ruzicka, Crown Counsel, Crown Law Division (Prosecution Support), Criminal Justice Branch, Ministry of Justice, Victoria, B.C., for the 2014 International Society for the Reform of Criminal Law Conference "Crime and Punishment – Back to the Future for Sentencing and Corrections Reform". Any views and opinions expressed in this paper are solely those of the author and do not necessarily represent the views and opinions of the Attorney General of British Columbia or the B.C. Ministry of Justice, Criminal Justice Branch. The author gratefully acknowledges the assistance of her colleagues Trevor Shaw, Rod Garson and Gillian Parson in reviewing drafts of this paper.

[2] The Oxford English Dictionary defines a "selfie" as "a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and uploaded to a social media website": http://www.oxforddictionaries.com/definition/english/selfie?q=selfie

[3] *R. v. Sheck*, 2013 BCPC 105 (breach ruling), additional reasons at *R. v. Sheck* (24 February 2014), Surrey Registry No. 185663-2-C (B.C.P.C.) (s. 1 ruling); *R. v. Nur*, 2013 ONCA 677, leave to appeal granted April 10, 2014, [2014] S.C.C.A. No. 17 (S.C.C. No. 35678) (tentative hearing date December 11, 2014); *R. v. Smickle*, 2013 ONCA 678, additional reasons at 2014 ONCA 49.

In each case, the offender challenged the constitutionality of the three year mandatory minimum sentence in s. 95(2)(a)(i) of the *Code*, alleging that it constituted cruel and unusual punishment contrary to s. 12 of the *Canadian Charter of Rights and Freedoms*.[4]

In each case, the courts concluded that the three year mandatory minimum sentence did not constitute cruel and unusual punishment for the offender personally. However, the sentence was nevertheless held to violate s. 12 of the *Charter* and declared to be of no force and effect based on the assessment of what is referred to in Canada as "reasonable hypothetical" circumstances.

A recent surge in successful s. 12 challenges based on "reasonable hypothetical" circumstances[5] has caused at least one author to comment that "realistic hypotheticals are, in a practical sense, the most likely way in which to advance a section 12 claim".[6] However, the "methodological problems of reasonable hypotheticals" are widely acknowledged.[7]

While the issue of *how* to construct a "reasonable hypothetical", particularly in the context of a hybrid offence,[8] is very much a live issue in the Canadian criminal jurisprudence at the present time,[9] this paper asks: should there be a reasonable hypothetical analysis *at all*? Should a punishment be declared "cruel and unusual" based on hypothetical circumstances that are far removed from the offender's own case and create a scenario that may never actually arise in real life? Should a law that is constitutional as applied to a particular offender be struck down when, if the identified hypothetical circumstances ever actually do arise, that hypothetical offender can advance her own constitutional challenge?

This paper will review the s. 12 analytical framework and the development of the "reasonable hypothetical" in Canada before canvassing the Eighth Amendment jurisprudence in the United States. These two frameworks for assessing cruel and unusual punishment will then provide a backdrop against which to consider some critiques of the "reasonable hypothetical".

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[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[5] In addition to *Sheck, Nur* and *Smickle,* see also *R. v. Lewis*, 2012 ONCJ 413 (also indexed as *R. v. C. L.*), sentence appeal pending, where the Court held that the three year sentence for firearms trafficking in s. 99(2)(a) of the *Code* violated s. 12 based on reasonable hypothetical circumstances. In addition, in *R. v. Lloyd*, 2014 BCPC 8 (breach ruling), additional reasons at 2014 BCPC 11 (s. 1 ruling), Galati P.C.J. held that the one year mandatory minimum sentence for drug trafficking in s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA"*) violated s. 12 on the basis of reasonable hypothetical circumstances. The *Lloyd* decision was overturned on appeal (*R. v. Lloyd,* 2014 BCCA 224), in part because the mandatory minimum sentence did not increase the bottom end of the range for this offence. As a result, the mandatory minimum sentence had "no impact on Mr. Lloyd, and ... it is unnecessary and unwise to address the question of its constitutionality on this appeal" (para. 6).

[6] T. Quigley, "The Ontario Court of Appeal Gives New Life to Section 12 of the Charter" (2013), 5 C.R. (7th) 354.

[7] See, for example, A. Manson, "Arbitrary Disproportionality: A New Charter Standard for Measuring the Constitutionality of Mandatory Minimum Sentences" (2012), 57 S.C.L.R. (2d) 173, at p. 173 and P. Sankoff, "The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case" (2013), 21(3) Constitutional Forum constitutionnel 1.

[8] In Canada, a hybrid offence is one where the Crown can elect to proceed by summary conviction or by indictment.

[9] The Supreme Court of Canada has never engaged in the analysis of a "reasonable hypothetical" in the context of a hybrid offence. The pending appeals in *R. v. Nur* and *R. v. Charles* may present the Court with its first opportunity to provide guidance on how to construct a "reasonable hypothetical" in circumstances where the Crown can exercise its discretion to proceed either summarily or by indictment.

Overview of the s. 12 Analytical Framework[10]

In Canada, s. 12 of the *Charter* provides a guarantee against cruel and unusual punishment:

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The test for whether a particular sentence constitutes "cruel and unusual" punishment is whether the sentence is "grossly disproportionate". To be considered "grossly disproportionate", the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable".[11]

In determining whether a sentence meets the threshold of "gross disproportionality", the court must examine all relevant contextual factors.[12] This requires an examination of the gravity of the offence, the personal circumstances of the offender and the particular circumstances of the offence to determine whether the impugned sentence would appropriately address the applicable sentencing principles in s. 718 of the *Code*. In addition, the court must also consider the actual effect of the punishment on the offender; the penological goals and sentencing principles upon which the sentence is fashioned; the existence of valid alternatives to the punishment imposed; and a comparison of punishments imposed for other crimes. Not all of the factors will necessarily be relevant in each case, nor will the presence or absence of any one of them be determinative of the question of gross disproportionality.

There are two aspects to the s. 12 analysis.[13] The first stage involves an individual or "particularized inquiry" which focuses on the individual circumstances of the offender. Where a sentence is grossly disproportionate for an individual offender, then a *prima facie* violation of s. 12 is established and the court should go on to consider whether the infringement can be justified under s. 1 of the *Charter*. The second stage arises where a sentence is not grossly disproportionate for the individual offender. In those circumstances, the court can nevertheless go on to consider whether a breach of s. 12 arises from "reasonable hypothetical circumstances". The "reasonable hypotheticals" must be examples that "could commonly arise in day-to-day life". They should not be "far-fetched", "marginally imaginable" or "remote or extreme examples". The Supreme Court of Canada has stressed that statutes should not be invalidated on the basis of remote or extreme examples. It "simply is not necessary that legislated punishments be perfectly suited to accommodate the moral nuances of every crime and every offender".[14]

The test under s. 12 is "stringent and demanding. A lesser test would tend to trivialize the *Charter*".[15] It is also deferential. It "will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*".[16] The "test is not one which is quick to

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[10] This section of the paper has been reproduced in part from R. Garson and L. Ruzicka, "Constitutionality of Mandatory Minimum Sentences", versions of which were prepared for both the TLABC Conference "Criminal Law Seminar: The Art of Criminal Law 2013" and the CLEBC Conference "Criminal Law and the *Charter* 2013". Some of the material may also appear in J. DeWitt-Van Oosten and J. Gordon, *Working Manual of Criminal Law* (Toronto: Carswell, 2005, looseleaf). The author of this paper is a contributing author to the *Working Manual of Criminal Law*, including to the chapter on s. 12 of the *Charter*.

[11] *R. v. Ferguson,* 2008 SCC 6, at para. 14.

[12] *R. v. Morrisey*, 2000 SCC 39, at paras. 27-28; *R. v. Stewart*, 2010 BCCA 153, at paras. 20-21.

[13] *R. v. Latimer*, 2001 SCC 1, at para. 78; *R. v. Morrisey,* at paras. 29-33.

[14] *R. v. Goltz*, [1991] 3 S.C.R. 485, at p. 519.

[15] *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417.

[16] *Steele*, at p. 1417.

invalidate sentences crafted by legislators. The means and purposes of legislative bodies are not to be easily upset in a challenge under s. 12".[17]

In weighing the s. 12 considerations, a court must consider and defer to the valid legislative objectives underlying the criminal law responsibilities of Parliament.[18] The Supreme Court of Canada has repeatedly adopted the following passage from *R. v. Guiller:*

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of the various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.[19]

The "Reasonable Hypothetical" Analysis

The genesis of the "reasonable hypothetical" in the s. 12 analysis is not entirely clear. In *R. v. Nur,* Doherty J.A. suggested that "[t]he reasonable hypothetical methodology first appeared, albeit unnamed and unexplained, in the seminal case of *Smith*".[20] However, some authors question whether the result in *Smith* was truly based on a reasonable hypothetical.[21]

In *R. v. Smith*,[22] the Court considered whether the seven year mandatory minimum sentence for importing a narcotic under then-s. 5(2) of the *Narcotic Control Act*[23] constituted cruel and unusual punishment contrary to s. 12 of the *Charter*. Mr. Smith returned to Canada from Bolivia with 7.5 ounces of 85 to 90% pure cocaine hidden on his body. It does not appear that he advanced a challenge based on his own personal circumstances. Rather, five justices agreed that Mr. Smith had standing to challenge a punishment based on circumstances other than his own. Ultimately, Lamer J., as he then was, writing for the majority, held that the punishment was cruel and unusual because there was the potential that the following person would receive a seven year sentence: "a young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let's postulate, his or her first 'joint of grass'".[24] Effectively, the Court considered whether the mandatory minimum sentence was cruel and unusual for what has come to

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[17] *R. v. Goltz*, at p. 501.
[18] *R. v. Latimer*, at para. 76.
[19] *R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238.
[20] *R. v. Nur*, at para. 112.
[21] Manson, at pp. 175-178. Manson writes at p. 175, "[b]y giving Mr. Smith standing to challenge the constitutionality of section 5(2), the majority of the Supreme Court held that the case could be argued by reference to the range of conduct which section 5(2) encompassed. While hypothetical examples were used to support the reasoning, the majority did not introduce the concept of a reasonable hypothetical as the requisite platform for a section 12 challenge not based on the particular circumstances of the litigant". Later, Manson observes that the conclusion in *Smith* was based on the range of conduct and culpability encompassed by the offence, not on a reasonable hypothetical (p. 178). See also J. McIntyre, "*R. v. Nur:* The Need for the Supreme Court to Clarify – *Charter* Standards for Mandatory Minimum Sentences" (2014), 7 C.R. (7th) 132 (at pp. 2-3 online).
[22] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[23] *Narcotic Control Act,* R.S.C. 1970, c. N-1.
[24] *R. v. Smith*, at pp. 1053-1054.

be referred as the “small offender”, the “best possible offender”, the “most innocent possible offender” or “that imaginary small offender”.[25]

Since *Smith,* the analytical framework for assessing reasonable hypotheticals has evolved and narrowed over time. In *R. v. Goltz,* Gonthier J., writing for the majority, acknowledged that the Supreme Court of Canada “has been vigilant, wherever possible, to ensure that a proper factual foundation exists before measuring legislation against the *Charter”.*[26] However, without elaborating as to why, Gonthier J. simply goes on to state that “the s. 12 jurisprudence does not contemplate a standard of review in which that kind of factual foundation is available in every instance”.[27] Despite that conclusion, Gonthier J. sounded a cautionary note about first selecting a relevant hypothetical, and second invalidating the statute on that basis. After stressing the difficulty of fashioning a reasonable and relevant hypothetical example of the offence, he pointed out that even if such an example were presented in that case, “it is doubtful that it would have overcome the strong indication of validity arising from the first particularized step of the s. 12 analysis”.[28] That is, “the particular facts of the [case before the court] provide an important benchmark for what is a reasonable example”.[29]

Following *Goltz*, the Court had occasion to again elaborate on reasonable hypotheticals in *R. v. Morrisey*, a case involving the offence of criminal negligence causing death involving the use of a firearm, which carried a mandatory minimum sentence of four years imprisonment. As Allan Manson has observed, in *Morrisey,* the “narrow lens of *Goltz* was made even smaller”.[30]

In *Morrisey,* Gonthier J., again writing for the majority, reiterated his conclusion in *Goltz* that hypotheticals must be "common" rather than "extreme" or "far-fetched".[31] He recognized the serious limitations of an unbounded approach to reasonable hypotheticals where an offence can be committed in a number of different ways that reflect widely divergent levels of moral culpability. Gonthier J. cautioned judges against relying on reported cases as reasonable hypotheticals.[32] Rather, the solution was found in limiting reasonable hypotheticals to scenarios that arise with a degree of generality appropriate to the particular offence.

Ultimately, Gonthier J. addressed reasonable hypotheticals constructed around two types of situations that commonly arise in relation to the offence in question, namely people playing with guns and hunting trips gone awry.[33] Neither hypothetical referred to any personal characteristics of the offender. In respect of both generalized reasonable hypotheticals, Gonthier J. concluded that the four year period of imprisonment

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[25] *R. v. Smith,* at p. 1078; *R. v. Nur*, at paras. 115, 121.
[26] *R. v. Goltz*, at pp. 515-516.
[27] *R. v. Goltz*, at pp. 515-516.
[28] *R. v. Goltz,* at pp. 516, 517, 519.
[29] *R. v. Goltz,* at p. 516 (emphasis added). In *R. v. Nur*, Doherty J.A. expressed confusion about this part of *Goltz*, stating “it is not clear to me why the facts of a given case are necessarily representative of available reasonable hypotheticals. On this approach, the two stages of the gross disproportionality inquiry begin to merge into one. However, after *Goltz*, the actual facts of the case have become an important “benchmark” in shaping reasonable hypotheticals” (para. 130).
[30] A. Manson, “*Morrisey*: Observations of Criminal Negligence and s. 12 Methodology” (2001), 36 C.R. (5th) 121 at 124. See also *R. v. Nur*, where Doherty J.A. observed that *Goltz* and *Morrisey* “narrowed the scope of the reasonable hypothetical as applied to s. 12 challenges to mandatory minimum sentences” (para. 116).
[31] *R. v. Morrisey*, at paras. 30-31, 33.
[32] *R. v. Morrisey*, at paras. 32, 33, 50.
[33] *R. v. Morrisey*, at paras. 51-52.

would not constitute cruel and unusual punishment because of the gravity of the offences and the importance of the punitive sentencing principles of deterrence, denunciation and retribution.[34]

In *R. v. Nur*, Doherty J.A. summarized the current state of the reasonable hypothetical:

> In my view, after *Morrisey* and *Goltz*, a reasonable hypothetical is one that operates at a general level to capture conduct that includes all the essential elements of the offence that trigger the mandatory minimum, but no more. Characteristics of individual offenders, be they aggravating or mitigating, are not part of the reasonable hypothetical analysis. It flows from *Morrisey* that the broader the description of the offence in the provision creating the offence, the wider the range of reasonable hypotheticals.[35]

The present confusion in the s. 12 jurisprudence arises in part from the fact that the Supreme Court of Canada has never conducted a s. 12 analysis in the context of a hybrid offence which captures a broad range of conduct, where Crown counsel can elect to proceed either by summary conviction or by indictment. As will be explored further below, in *Nur,* a five member division of the Ontario Court of Appeal considered all potential applications of the s. 95 offence and eventually crafted a "reasonable hypothetical" that fell at the "regulatory" end of the spectrum even though the hypothetical bore little relation to the facts of the case or the "true crime" examples commonly seen in the jurisprudence.

Before turning to a consideration of some of the problems associated with the "reasonable hypothetical" analysis, the paper will engage in a comparative analysis of the American Eighth Amendment jurisprudence.

The Eighth Amendment[36]

The Eighth Amendment (Amendment VIII) to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> [Emphasis Added]

Similar to the s. 12 *Charter* analysis, "the concept of proportionality is central to the Eighth Amendment".[37] The Eighth Amendment contains a "'narrow proportionality principle' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are 'grossly disproportionate' to the crime'".[38]

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[34] *R. v. Morrisey*, at paras. 53-54.
[35] *R. v. Nur*, at para. 142.
[36] See R.B. Baker, "Proportionality in the Criminal Law: The Differing American and Canadian Approaches to Punishment" (2008), 39 U. Miami Inter-Am. L. Rev. 483 and J. Cameron, "The Death Penalty, Mandatory Prison Sentences and the Eighth Amendment's Rule Against Cruel and Unusual Punishment" (2001), 39 Osgoode Hall L.R. 427 for a general comparative overview of the Canadian and American approaches to assessing cruel and unusual punishment.
[37] *Graham v. Florida*, 130 S. Ct. 2011 (U.S. 2010), at 2021; *Miller v. Alabama*, 132 S.Ct. 2455 (U.S. 2012), at 2463.
[38] *Graham*, at 2021.

At first glance, it is difficult to tell whether the U.S. jurisprudence involves the equivalent of the Canadian "reasonable hypothetical", in part because different terminology is employed in the analysis. Further, the jurisprudence of the United States Supreme Court has historically involved an "as applied" analysis that is limited to an assessment of whether a mandatory minimum sentence (often referred to a "term-of-years sentence" in the U.S.) was cruel and unusual "as applied" to the facts of the particular case before the Court. However, the Eighth Amendment analytical framework appears to be evolving and recently the U.S. Supreme Court has considered categorical challenges to term-of-year sentences for non-capital offences. While not directly comparable to the "reasonable hypothetical", the application of categorical rules to term-of-year sentences has raised similar critiques to the use of "reasonable hypotheticals" in Canada.

By way of background, the U.S. Supreme Court's jurisprudence on the Eighth Amendment has historically addressed the proportionality of sentences within two general classifications: (1) categorical restrictions in death penalty cases; and (2) particularized inquiries in "term-of-years" (mandatory minimum) sentences.[39] While the approach in death penalty cases appears clear, the Court has, in the words of Chief Justice Roberts in a concurring judgment in *Graham v. Florida,* "struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes".[40]

In death penalty cases, the Court has "used categorical rules to define Eighth Amendment standards".[41] In those cases, the Court applies the following test:

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. *Roper, supra*, at 563, 125 S. Ct. 1183, 161 L. Ed. 2d 1. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose", *Kennedy,* 554 U.S., at 421, 128 S. Ct. 2541, 2650, 171 L. Ed. 2d 525, 540, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper, supra*, at 564, 125 S. Ct. 1183, 161 L. Ed. 2d 1. [42]

The categorical rules cases are further divided into "two subsets, one considering the nature of the offense, the other considering the characteristics of the offender".[43] When dealing with the nature of the offence, the Court has held that capital punishment is not permitted for non-homicide crimes against individuals.[44] In cases where the characteristics of the offender have been advanced, "the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18...or whose intellectual functioning is in a low range".[45]

In contrast, until recently in "term-of-years" cases, the Court has applied the analytical framework set out in *Harmelin v. Michigan*.[46] Under that test, which bears some resemblance to the test employed under s. 12 of the *Charter*, a court "considers all of the circumstances of the case to determine whether the sentence is

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[39] *Graham,* at 2021.
[40] *Graham*, at 2036.
[41] *Graham*, at 2022.
[42] *Graham*, at 2022.
[43] *Graham*, at 2022.
[44] *Graham*, at 2022.
[45] *Graham*, at 2022.
[46] *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Graham*, at 2022; *Miller*, at 2470.

unconstitutionally excessive".[47] The court begins by comparing the gravity of the offence and the severity or harshness of the penalty.[48] Then, as Justice Kennedy explained in *Graham*, "'[i]n the rare case in which [this] threshold comparison...leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences for the same crime in other jurisdictions...If this comparative analysis 'validate[s] an initial judgement that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual".[49]

This approach to assessing the constitutionality of term-of-years sentences appears to have shifted somewhat in *Graham* where the petitioner advanced a categorical challenge to a term-of-years sentence. The issue was whether the Eighth Amendment permitted a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime. This required the Court to consider "a particular type of sentence as it applie[d] to an entire class of offenders who have committed a range of crimes".[50] The majority's assessment was not confined solely to an assessment of the petitioner's circumstances. As a result, the majority concluded that the appropriate analytical framework was the one used in cases that involved the categorical approach.[51] The majority ultimately concluded that the Eighth Amendment prohibited the imposition of a life-without-parole sentence for a juvenile offender who committed a non-homicide crime.

A review of the majority decision in *Graham* suggests that this approach is not entirely dissimilar to the reasonable hypothetical analysis. For example, while the majority's analysis was grounded in the reduced moral culpability of juvenile offenders, in the course of his analysis, Justice Kennedy reflected at one point that under Florida Law, even a 5 year old could theoretically receive a life without parole sentence under the letter of the law.[52]

In a concurring opinion in *Graham*, Chief Justice Roberts stated that he "saw no need to invent a new constitutional rule of dubious provenance in reaching that conclusion".[53] He would have applied the traditional term-of-years approach to reach the same conclusion in the particular circumstances of Mr. Graham's case. As will be discussed below, Chief Justice Roberts also provided a critique of the application of the "categorical approach"[54] that could equally be applied to a critique of the "reasonable hypothetical" analysis. Similarly, in a dissenting opinion, Justice Thomas observed that the majority's approach departed from the traditional "death is different" distinction and from the Court's historical remedial approach to Eighth Amendment cases (i.e. that when the Court has found a violation of the Eighth Amendment in the past, it has done so only as applied to the facts of that case, not by the creation of categorical rules).[55]

More recently, in *Miller*, the majority held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders".[56] Although the majority declined to consider the petitioner's "alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 years and younger", the majority came close

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[47] *Graham*, at 2021.
[48] *Graham*, at 2022.
[49] *Graham*, at 2022.
[50] *Graham*, at 2022-2023.
[51] *Graham*, at 2022-2023.
[52] *Graham*, at 2025-2026.
[53] *Graham*, at 2036.
[54] *Graham*, at 2041-2042.
[55] *Graham*, at 2046-2047.
[56] *Miller*, at 2469.

to suggesting just that, observing that "we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon".[57]

Although the *Miller* majority expressly confirmed that the *Harmelin* term-of-years test still applies,[58] some of the concurring and dissenting Justices and legal commentators have expressed the view that *Miller* and *Graham* represent a shift in the Court's Eighth Amendment jurisprudence.[59]

Some of the ongoing dialogue between Justices of the U.S. Supreme Court on the applicable Eighth Amendment test is reminiscent of and/or reinforces some of the criticisms of the use of the "reasonable hypothetical" in Canada, to which this paper will now turn.

A critique of the reasonable hypothetical

The use of the reasonable hypothetical in the assessment of cruel and unusual punishment raises the following concerns: (1) it is inconsistent with the requirement that there be a factual matrix against which a *Charter* challenge can be assessed; (2) it is inconsistent with the principles of judicial restraint and mootness; (3) the hypotheticals often bear no resemblance to how the offence is actually committed; (4) the hypotheticals may not respect Parliamentary objectives when sentencing legislation has been enacted to respond to a real and pressing social problem; (5) there are no limits on who can advance a reasonable hypothetical; and (6) despite the fact that a mandatory minimum sentence may be struck down, courts nevertheless still impose sentences at or in excess of the mandatory minimum. Each of these concerns will be addressed in turn.

1. The use of reasonable hypotheticals is irreconcilable with the need for a factual foundation

The use of the reasonable hypothetical reveals a fundamental irreconcilability between two principles of Canadian constitutional law: (1) the requirement that there be a factual matrix for the assessment and adjudication of constitutional issues; and (2) the question of standing (often colloquially referred to as the *Big M Drug Mart*[60] principle that "any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid").

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[57] *Miller,* at 2469.

[58] *Miller*, at 2470. At 2471, Justice Kagan, writing for the majority, expressly stated "our decision does not categorically bar a penalty for a class of offenders or type of crime - - as, for example, we did in *Roper* or *Graham*. Instead it mandates only that a sentence follow a certain process - - considering an offender's youth and attendant characteristics - - before imposing a particular penalty". She later continued, "we are breaking no new ground in these cases" (2472).

[59] At least one author has expressed the view that *Miller* represents "a fundamental shift in the Court's Eighth Amendment methodology – specifically, a move away from using "objective indicia" to determine society's evolving standards": I.P. Farrell, "Abandoning Objective Indicia" (2013), 122 Yale L.J. ONLINE 303, http://yalelawjournal.org/2013/03/14/farrell.html. See also M. Berkeiser, "Inside America's Criminal Justice System: The Supreme Court on the Rights of the Accused and the Incarcerated: Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court's "Kid's Are Different" Eighth Amendment Jurisprudence Down a Blind Alley" (2013), 46 Akron L. Rev. 489; and W.W. Berry III, "The Mandate of Miller" (2014), 51 Am. Crim. L. Rev. 327. Alternatively, the novel approach adopted in these cases could simply be explained by the fact that they dealt with the circumstances of juvenile offenders (referred to as "young persons" in Canada). As Berry notes "the outcomes in these cases rest upon the notion that, as a class, juvenile offenders are unique" (p. 328). To that end, the principles established in *Miller* and *Graham* are consistent with the Supreme Court of Canada's decision in *R. v. D.B.*, 2008 SCC 25, where the majority held that young persons are entitled to a presumption of diminished moral blameworthiness or culpability and that a presumptive adult sentence violates that principle of fundamental justice.

[60] *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at pp. 313-314.

The "fact that a party has standing to make a constitutional argument...does not compel a court to rule on that argument".[61] Even where an accused has standing, the Supreme Court of Canada has consistently held that *Charter* arguments require a proper factual foundation.[62] Absent an appropriate factual foundation to provide a concrete context for assessment and adjudication of the constitutional issue, courts should decline to decide such questions. Although not a s. 12 case, this approach is illustrated in *Moysa v. Alberta (Labour Relations Board)* where the Supreme Court of Canada dismissed an appeal on the basis that there was not a sufficient factual foundation to address a constitutional question:

> If the facts of the case do not require that constitutional questions be answered, the Court will ordinarily not do so. This policy of the Court not to deal with abstract questions is of particular importance in constitutional matters. See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 363-65.
>
> I am of the opinion that the facts of this case do not warrant an answer to these broad and important constitutional questions. To address the questions would require that this Court make pronouncements well beyond the issues presented in the actual appeal. The adjudication of the actual dispute does not require the resolution of the abstract questions of law raised in the constitutional questions.[63]

One of the obvious practical difficulties with the use of the reasonable hypothetical is that any violation found by a Court involves only a *risk* of adverse impact on individual offenders that will not come to fruition unless there is a crystallization of certain events in the future - namely, an established factual foundation where a charge of that nature is actually approved by the Crown, and the factual foundation demonstrates gross disproportionality. If the foreseeable hypothetical circumstances actually arise in a given case, that potential offender can bring his or her own s. 12 constitutional challenge. If the punishment is found to constitute cruel and unusual punishment for that future offender, that person will have access to a constitutional remedy.

The importance of making a determination of constitutionality on the basis of the individual circumstances of an actual offender is reflected in some of the critiques of the reasonable hypothetical. For example, in *R. v. Smith*, McIntyre J. "wrote a forceful dissent, disagreeing with the use of reasonable hypotheticals in a constitutional challenge of a sentence under s. 12":[64]

> As a preliminary matter, I would point out that there is an air of unreality about this appeal because the question of cruel and unusual punishment, under s. 12 of the Charter, does not appear to arise on the facts of the case....The judges who have considered the case, then, are unanimously of the view that a long sentence of imprisonment is appropriate and no one has suggested that the appellant has been sentenced to cruel and unusual punishment. Recognizing this fact, the appellant does not attack s. 5(2) of the Narcotic Control Act on the ground that it violates s. 12 of the Charter in general, but rather on the ground that the imposition of "a

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[61] *R. v. Lloyd* (BCCA), at para. 42.

[62] *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.); *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; see also *R. v. Levkovic*, 2010 ONCA 830, at paras. 28-29, affirmed 2013 SCC 25; *Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, at paras. 47-51.

[63] *Moysa*, at p. 1580

[64] This was the phrase used by Justice Arbour in *R. v. Morrisey* at paragraph 90 to describe Justice McIntyre's dissent in *R. v. Smith*.

mandatory minimum sentence of seven years" on a hypothetical "first time importer of a single marijuana cigarette" would constitute cruel and unusual punishment. In effect, the appellant is stating that while the law is not unconstitutional in its application to him, it may be unconstitutional in its application to a third party and, therefore, should be declared of no force or effect. In my view, this is not a sound approach to the application of s. 12. Under s. 12 of the Charter, individuals should be confined to arguing that *their* punishment is cruel and unusual and not be heard to argue that the punishment is cruel and unusual for some hypothetical third party.

This is not to say, as a general proposition, that parties can only challenge laws on constitutional grounds if they can show that their individual rights have been violated....individuals may also challenge enactments on the ground that their effect is to infringe the religious rights of third parties (see *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713). The reason for allowing parties to challenge legislation which does not directly infringe their constitutional rights but which does infringe the rights of others, is simply that there may never be a better party. Third parties whose rights are violated or threatened by legislation may never be in a position to challenge the legislation because they are deterred from engaging in the prohibited activity and do not find themselves before the courts, or they are simply unable to incur the expense of launching a constitutional challenge. Since it is essential that individuals be free to exercise their constitutional rights as far as is reasonably possible without being forced to incur the expense of litigation or to run the risk of violating the law, parties who have run afoul of a statute may on occasion be permitted to invoke the rights of others in order to challenge the overall validity of the law. In my opinion, however, this rationale should apply in general only to laws which could be said -- to adopt a term known in American constitutional usage -- to have a "chilling effect" upon the exercise by others of their constitutional rights. The chilling effect will be present in respect of any law or practice which has the effect of seriously discouraging the exercise of a constitutional right: see *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Gooding v. Wilson*, 405 U.S. 518 (1971), at p. 521. If the impugned law or practice does not prohibit any individual from engaging in a constitutionally protected activity, there is no basis for allowing parties before the court to invoke the rights of hypothetical third parties in support of their challenge. But that is precisely what has occurred in this case. The appellant does not allege that any individual has a right to import narcotics into Canada. The importation of narcotics is not a constitutionally protected activity. There would be no risk of an individual being unable to exercise lawfully the full scope of his or her constitutional rights or being deterred from engaging in a constitutionally protected activity if the appellant were denied status in this case. There is therefore no basis for allowing the appellant to invoke in the present appeal the rights of a hypothetical third party in order to challenge the validity of legislation.... [65]

[65] *R. v. Smith*, at pp. 1084-1085 (emphasis added). In concurring reasons, Justice LeDain admitted that the reasonable hypothetical analysis had also given him “considerable difficulty” and that he had “considerable misgivings about determining the issue of the constitutional validity, on its face, of the mandatory minimum sentence in s. 5(2) on the basis of hypothesis” (at p.1112). However, he ultimately concluded that a s. 12 analysis based on the particularized inquiry alone “would not be a sound approach to the validity and application of a mandatory minimum sentence provisions which applies to a wide range of conduct, if only because of the uncertainty it would create and the prejudicial effects which the assumed validity or application of the provision might have in particular cases” (p. 1112). He continued at p. 1113, “I am of the opinion that an accused should be recognized as having standing to challenge the constitutional validity of a mandatory minimum sentence, whether or not, as applied to his case, it would result in cruel and unusual punishment. In such a case the accused has an interest in having the sentence considered without regard to a constitutionally invalid mandatory minimum sentence provision”.

Similar concerns were expressed seven years after *Smith*. In *R. v. Kumar*,[66] Lambert J.A., dissenting in part, noted that "[t]he task of the court in applying the second aspect of the *Goltz* test is a difficult one. Judges of the United States Supreme Court have stated in memorable phrases their reluctance to base constitutional conclusions on hypothetical foundations".[67] After citing from that U.S. jurisprudence, Lambert J.A. continued, "these seem to me persuasive judicial statements favouring the application, in some circumstances, of the role of "constitutional exemption" in individual cases, in preference to using hypothetical cases as a basis on which to decide a "facial challenge" to the validity of the legislation itself. The long experience of the law serves as a stern caution to us of the frailty of human foresight when predicting in an evidentiary vacuum the situations in which people may one day find themselves".[68]

The need for a factual foundation upon which to assess gross disproportionality was also stressed in *R. v. Morrisey* by Arbour J., writing concurring reasons for herself and McLachlin J. (as she then was). At the time it was believed that Arbour J. was endorsing the use of a constitutional exemption, even though that phrase is not used in her judgment. However, an argument could be made that Arbour J. was in fact implicitly adopting McIntyre J.'s critique of the reasonable hypothetical in *R. v. Smith*.[69] Arbour J. acknowledged that, at some point in the future, there would unavoidably be a case in which the mandatory minimum sentence would be grossly disproportionate.[70] She proposed a "more individualized approach to s. 12 challenges"[71] whereby courts would "give effect to Parliament's direction that a threshold be applied as the minimum penalty for the offence, save in cases where such penalty is grossly disproportionate punishment for the particular offender".[72] Arbour J. would have upheld the constitutionality of the mandatory sentence "generally, while declining to apply it in a future case if the minimum penalty is found to be grossly disproportionate for that future offender".[73] She saw "little purpose in attempting to tailor a [hypothetical] factual scenario that would illustrate this point of gross disproportionality. It could only be done by injecting a high degree of specificity to the hypothetical, which stretches the use of that jurisprudential technique beyond the purpose for which it was originally designed".[74]

The concerns expressed by Justices McIntyre, Arbour and Lambert may be equally applicable today. Without a proper factual foundation, it could be argued that courts are engaging in complex constitutional analysis in an evidentiary vacuum and potentially making judicial pronouncements about hypothetical offences and offenders that may never materialize. This may run afoul of the principles of judicial restraint and mootness which are addressed in the next section.

2. Use of the reasonable hypothetical is inconsistent with the principles of judicial restraint and mootness

There is an equally well-established principle that courts should not decide issues of law, particularly constitutional issues, that are not necessary to the resolution of the matter before the court.[75] It could be

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[66] *R. v. Kumar* (1993), 36 B.C.A.C. 81 (B.C.C.A.).
[67] *R. v. Kumar*, at para. 54 (emphasis added).
[68] *R. v. Kumar*, at para. 54 (emphasis added).
[69] *R. v. Morrisey*, at para. 90.
[70] *R. v. Morrisey*, at para. 82.
[71] *R. v. Morrisey*, at para. 66.
[72] *R. v. Morrisey*, at para. 92 (emphasis added); see also para. 94.
[73] *R. v. Morrisey*, at para. 66 (emphasis added).
[74] *R. v. Morrisey*, at para. 82.
[75] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at pp. 112-114; *R. v. Banks*, 2007 ONCA 19, at para. 25, leave to appeal refused, [2007] S.C.C.A. No. 139 (S.C.C.). See also McIntyre, at pp. 8-9.

argued that this was the principle that informed Justice McIntyre's dissenting reasons in *R. v. Smith*. However, the principle of judicial restraint cannot necessarily be given effect in the s. 12 context where a court is mandated to go on to consider reasonable hypotheticals at the second stage of the s. 12 test even if the sentence is not cruel and unusual for the actual offender before the court.[76]

The principle of judicial restraint in constitutional analysis has recently found expression in the Eighth Amendment jurisprudence. In *Graham*, Chief Justice Roberts, in concurring reasons, provided a critique of the majority's adoption of the "categorical approach" to determine the constitutionality of a term-of-years sentence when the issue could have been determined solely on the petitioner's own facts:

> So much for Graham. But what about Milagro Cunnigham, a 17-year-old who beat and raped an 8-year-old before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill....Or Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son?...The fact that Graham cannot be sentenced to life without parole for his conduct says nothing whatever about these offenders, or others like them who commit nonhomicide crimes far more reprehensible than the conduct at issue here. The Court uses Graham's case as a vehicle to proclaim a new constitutional rule - - applicable well beyond the facts of Graham's case – that a sentence of life without parole imposed on *any* juvenile for *any* nonhomicide case is unconstitutional. This categorical conclusion is as unnecessary as it is unwise.
>
> A holding this broad is unnecessary because the particular conduct and circumstances at issue in the case before us are not serious enough to justify Graham's sentence. In reaching this conclusion, there is no need for the Court to decide whether that same sentence would be constitutional if imposed for other more heinous nonhomicide crimes.
>
> A more restrained approach is especially appropriate in light of the Court's apparent recognition that it is perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder. This means that there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather, the constitutionality of such sentences depends on the particular crimes for which they are imposed. But if the constitutionality of the sentence turns on the particular crime being punished, then the Court should limit its holding to the particular offenses that Graham committed here, and should decline to consider other hypothetical crimes not presented by this case.[77]

Recently, a number of Canadian courts have endorsed the principles of judicial restraint and mootness in the s. 12 context. Judges have concluded that it is not necessary to engage in the s. 12 analysis if the court ultimately concludes that, without regard to the mandatory minimum sentence, a fit sentence would equal or

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[76] In his article, McIntyre suggests that the concept of mootness is "rarely appropriate when challenging a mandatory sentence" because it is impossible to separate the mandatory minimum sentence and the inflationary impact it has had on sentencing jurisprudence (p. 8 online). Given the impact of the "inflationary floor", McIntrye asserts that "no *Charter* challenge of an MMS would be found moot. A limited exception would exist where an MMS was established to codify a minimum that already existed at common law. In such a case, a judge could reasonably give the same sentence either way" (online at p. 8).

[77] *Graham*, at 2041 (underlined emphasis added).

exceed the mandatory minimum sentence.[78] These courts have declined to engage in the s. 12 constitutional analysis on the basis that resolution of the issue would have no effect on the disposition of the case and would therefore be academic.

In *R. v. Lloyd*,[79] for example, the trial judge held that the one year mandatory minimum sentence for drug trafficking in s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* ("*CDSA"*)[80] violated s. 12 on the basis of reasonable hypothetical circumstances. However, the British Columbia Court of Appeal[81] recently allowed the Crown's appeal and held, in part, that the trial judge erred in engaging in the s. 12 analysis. While Mr. Lloyd had standing to challenge the constitutional validity of the sentence, "the court was not obliged to determine that issue unless that section would have an impact on the appropriate sentence for Mr. Lloyd".[82] Given that the trial judge ultimately imposed a sentence of one year imprisonment (equivalent to the mandatory minimum), "it was unnecessary and unwise to address the question of its constitutionality" on appeal.[83] As Groberman J.A., writing for the Court, explained:

> The fact that a party has standing to make a constitutional argument, however, does not compel a court to rule on that argument. There is a general (though not invariable) principle that courts avoid making constitutional pronouncements when cases can be decided on less esoteric bases. Professor Hogg puts it this way:
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> > A case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of judicial restraint is to decide the case on the non-constitutional ground. That way, the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided. For the same reason, if a case can be decided on a narrow constitutional ground or a wide ground, the narrow ground is to be preferred. If a case can be decided on a rule of federalism or under the *Charter*, the federalism ground is the narrower one, because it leaves the other level of government free to act, whereas a *Charter* decision striking down a law does not. The general idea is that a proper deference to the other branches of government makes it wise for the courts, as far as possible, to frame their decisions in ways that do not intrude gratuitously on the powers of the other branches.

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[78] *R. v. Christensen*, 2012 BCPC 374, at paras. 13 and 47-48, appeal from sentence pending; *R. v. Faria,* 2013 ONCJ 119, at paras. 3-4, 74-75*; R. v. Neault,* 2013 SKPC 174, at paras. 6, 14, 32, 49; *R. v. Curry,* 2013 ONCA 420, at para. 21; *R. v. Craig,* 2013 BCSC 2098, at paras. 13-18; *R. v. Chambers,* 2013 ONCA 680, at para. 46; *R. v. Ball*, 2013 BCSC 2372, at paras. 24-32, sentence varied on other grounds, 2014 BCCA 120; *R. v. Gladish*, 2014 BCSC 977, at paras. 25-30; *R. v. Lloyd* (BCCA), at paras. 39-47. See also *R. v. Cater,* 2012 NSPC 37 where the Court summarily dismissed the accused's s. 12 challenge to the mandatory minimum sentences in ss. 95, 99 and 100 of the *Code*. To the contrary, see *R. v. Nur*, at paras. 104 (FN11) and 110 (FN12). However, once the sentencing judge has concluded that a fit sentence equals or exceeds the mandatory minimum sentence, the sentencing judge must then apply the inflationary principle and the principles of sentence accordingly: *R. v. Ball* (BCCA).

[79] *R. v. Lloyd*, 2014 BCPC 8 and 2014 BCPC 11.

[80] *Controlled Drugs and Substances Act,* S.C. 1996, c. 19.

[81] *R. v. Lloyd* (BCCA). The Court gave oral reasons on June 6, 2014 and the Oral Reasons for Judgment were published on the Court's website on June 17, 2014.

[82] *R. v. Lloyd* (BCCA)*,* at para. 43.

[83] *R. v. Lloyd* (BCCA)*,* at para. 6.

> Peter W. Hogg, *Constitutional Law of Canada* (5th ed. supplemented) (looseleaf) Toronto: Thomson Carswell, 2007 (updated to 2013), §59.5, p. 59-22

> In short, while Mr. Lloyd clearly had standing to challenge the validity of s. 5(3)(a)(i)(D) of the *CDSA*, the court was not obliged to determine that issue unless that section would have an impact on the appropriate sentence for Mr. Lloyd.
>
> Mr. Lloyd contends that the court is required to determine the constitutionality of s. 5(3)(a)(i)(D), because "no one may be sentenced under an unconstitutional law". While there is some merit in that contention, I do not think that it can be said that Mr. Lloyd would be "sentenced under an unconstitutional law" unless that law in some way affects his sentence. Before embarking on the constitutional inquiry, therefore, the court should consider whether the impugned provision would have any effect on the sentence to be imposed.[84]

The Court also considered, and rejected, one of the intervenor's arguments that the Court should nevertheless consider the constitutionality of the mandatory minimum sentence "because others whose sentences might be affected may ultimately not have the wherewithal to bring constitutional challenges to the section".[85] Groberman J.A. held that while that kind of argument may have force in "free-standing challenges to legislative regimes outside of criminal prosecutions...it is much less forceful within the context of a criminal prosecution against a person who is not affected by the impugned legislation".[86] He went on to observe that determining the constitutional issue in this case would only be an advantage to those individuals if the s. 12 challenge were ultimately successful. If the Court were to allow the Crown's appeal on the merits, "it would mean that people who are potentially much more directly affected by the issue than is Mr. Lloyd would be effectively precluded from raising challenges to the legislation short of an appeal to the Supreme Court of Canada".[87]

Justice Groberman's observations appear to be consistent with the approach suggested by Justice McIntyre in his dissenting reasons in *R. v. Smith*. Following *Lloyd*, it appears (at least in British Columbia) that a sentencing judge should only engage in the s. 12 analysis if the new or enhanced mandatory minimum sentence has an impact on the appropriate sentence for the offender. Justice Groberman suggests that in order to determine whether an offender is affected by the minimum sentence provision, the sentencing judge "should analyse the case law, to determine what the range of sentence was prior to the enactment of the [mandatory minimum sentence], and to determine whether the enactment has any appreciable effect on that range".[88] While the ultimate s. 12 analysis would still involve a reasonable hypothetical at the present time, the threshold approach set out in *Lloyd* respects the principle of judicial restraint and arguably allows a court to keep the circumstances of the offence at the forefront of the analysis.

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[84] *R. v. Lloyd* (BCCA), at paras. 42-44 (emphasis added).
[85] *R. v. Lloyd* (BCCA), at para. 45.
[86] *R. v. Lloyd* (BCCA), at para. 46.
[87] *R. v. Lloyd* (BCCA), at para. 47.
[88] *R. v. Lloyd* (BCCA), at para. 58. This determination involves consideration of the "inflationary floor". Where a mandatory minimum "dramatically increases the severity of sentences at the low end of the range", the new minimum will have an inflationary impact on sentencing (para. 54). However, "where a minimum sentence provision does not serve to dramatically increase the severity of sentences that are actually handed out", the provision will not have an inflationary effect (para. 56). That is, if the enactment of the minimum sentence "did not result in any significant change to the low end of the sentencing range" then the concept of an "inflationary floor" is not applicable (para. 64). Therefore, "[a]part from the exceptional situation of an offender who would, but for the minimum sentence, have received a sentence well below the normal range, the new minimum should have no effect at all" (para. 56).

3. The hypotheticals often bear no resemblance to how the offence is actually committed

As Justice Gonthier said in both *Goltz* and *Morrisey,* "reasonable hypotheticals" should be based on circumstances that "could commonly arise in day-to-day life". They should not be "far-fetched", "marginally imaginable" or "remote or extreme examples". As noted above, the Supreme Court of Canada has repeatedly stressed that statutes should not be invalidated on the basis of remote or extreme examples. It "simply is not necessary that legislated punishments be perfectly suited to accommodate the moral nuances of every crime and every offender".[89]

One significant concern with the use of the reasonable hypothetical is that the "circumstances" of the hypothetical often bear no relation to how the offence is actually committed in real life. As early as 1984, Watt J. (as he then was) observed: "[i]n assessing *Charter* applications, it is generally socially unrealistic to consider only the possible worst case where such case is not before the Court. Indeed it is only too easy for the creative legal imagination to concoct bizarre examples that never come to court. [90] Even in *R. v. Morrisey*, Gonthier J. himself acknowledged that "it is unquestionable that there is an 'air of unreality' about employing creative energy in crafting reasonable hypotheticals".[91]

This "air of unreality" is seen in *R. v. Nur*. In that case, Doherty J.A. constructed a hypothetical for a s. 95 offence (unauthorized possession of a restricted or prohibited firearm, either loaded or with readily accessible ammunition) at the "regulatory" end of the spectrum, despite acknowledging that the vast majority of s. 95 cases occur at the "true crime" end of the spectrum and pose a risk of harm to others.[92] Justice Doherty acknowledged the difficulty in trying to construct a reasonable hypothetical for an offence that captures a broad range of conduct:

> I was initially attracted to the idea of considering the constitutionality of the mandatory minimum as applied to cases where the gun was actually loaded and the offender had no authorization to have the gun under any circumstances in any place. Cases with those features fall more toward the true crime end of the spectrum. The mandatory minimum would more easily meet constitutional norms if those features existed.[93]

However, even though the facts of *Nur* involved a young man concealing a loaded handgun in his pants outside a community centre and then running from police and throwing the firearm during the chase, Justice Doherty considered all potential applications of s. 95 and crafted the following hypothetical[94] which lies at the far "regulatory" end of the spectrum:

- the accused is knowingly in possession of an unloaded restricted or prohibited firearm with useable ammunition stored nearby and readily accessible;

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[89] *R. v. Goltz*, at p. 519.
[90] *R. v. Moore* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.), at 312.
[91] *R. v. Morrisey*, at para. 32.
[92] *R. v. Nur*, at paras. 85, 92, 144, 165, 167.
[93] *R. v. Nur*, at para. 144.
[94] *R. v. Nur*, at para. 150.

- the accused has an authorization to possess the firearm and has registered the firearm, but to his or her knowledge the authorization does not permit possession of the firearm at the place or in the manner in which the accused has possession;[95] and

- the possession of the firearm is not connected to any unlawful purpose or activity and the offender is not engaged in any dangerous activity with the firearm.

The Ontario Court of Appeal appears to acknowledge that there are no reported cases that share the characteristics of the above hypothetical and that the hypothetical "is far removed from the facts of this appeal or any of the other appeals that were heard with [the *Nur*] appeal".[96] However, the Court nonetheless held that the three year mandatory minimum sentence constituted cruel and unusual punishment in reasonable hypothetical circumstances and declared the provision to be of no force and effect.

Similarly, in *R. v. Charles*,[97] the Ontario Court of Appeal considered the constitutionality of the five year mandatory minimum sentence in s. 95(2)(a)(ii) of the *Code*, where an offender is being sentenced for a second or subsequent enumerated offence. Cronk J.A., writing for the Court, used the same "regulatory" reasonable hypothetical employed in *Nur*, with the modification that the reasonable hypothetical offender had a conviction in the prior 10 years for any of the offences listed in s. 84(5)(a) of the *Code*. She utilized this hypothetical despite acknowledging that the facts of Mr. Charles' case also fell at the "true crime" end of the spectrum,[98] and that the facts of the reasonable hypothetical bore no relation to the facts of either *Charles* or *Nur*.[99]

While the Supreme Court of Canada will ultimately determine whether the approach adopted by the Ontario Court of Appeal was correct, it can be argued that the Court erred in its characterization of the scope and seriousness of the s. 95 offence and erred by failing to limit its consideration of reasonable hypotheticals to scenarios that would actually warrant an indictable election. It could also be asserted that the posited hypotheticals are fundamentally divorced from the reality that the vast majority of s. 95 offences pose a real and imminent risk to public safety[100] and warrant an indictable election. The decision is arguably also not consistent with Justice Gonthier's direction in *Goltz* that "the particular facts [of the case before the court] provide an important benchmark for what is a reasonable example". Moreover, the hypothetical does not fully account for the fact that the Crown may exercise its prosecutorial discretion to (1) elect to proceed summarily in these circumstances; or (2) to approve equally applicable alternative charges under other sections (such as ss. 91(1), 92(1) and 93 of the *Code*). Finally, one author[101] has suggested that the hypothetical runs afoul of the clear direction provided in *R. v. Goltz* and *R. v. Brown*[102] that a s. 12 analysis

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[95] The facts outlined in this second bullet could properly be the subject of a charge under s. 93 of the *Code* which prohibits possession at a place other than authorized by the licence.
[96] *R. v. Nur*, at paras. 151-152.
[97] *R. v. Charles*, 2013 ONCA 681, leave to appeal granted, [2014] S.C.C.A. No. 18 (S.C.C. No. 35684) (tentative hearing date December 11, 2014).
[98] *R. v. Charles*, at para. 56.
[99] *R. v. Charles*, at para. 61.
[100] For example, in *R. v. Felawka*, [1993] 4 S.C.R. 199, Cory J. said a firearm "always presents the ultimate threat of death to those in its presence" (at p. 211). Similarly, in *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, the Court observed that "[g]uns cannot be divided neatly into two categories – those that are dangerous and those that are not dangerous. All guns are capable of being used in crime. All guns are capable of killing and maiming. It follows that all guns pose a threat to public safety" (para. 45).
[101] McIntyre, at p. 5.
[102] *R. v. Brown,* [1994] 3 S.C.R. 749.

must focus on the particular offence with which the offender is charged. While s. 95 refers to both loaded and unloaded with readily accessible ammunition, the Ontario Court of Appeal has also held that s. 95(1) creates two offences: possession of a loaded firearm, whether prohibited or restricted, and possession of an unloaded firearm, together with readily accessible ammunition.[103] Therefore, where an accused is charged with possession of a loaded firearm, the hypothetical should arguably involve those same circumstances.[104]

4. <u>The reasonable hypothetical does not contribute to respect for Parliamentary objectives</u>

When Parliament enacts sentencing legislation to respond to an actual pressing social problem based on clear real-life examples, and courts strike down the provision on hypothetical circumstances that may never arise, that has the potential to undermine rather than respect Parliamentary objectives.

There are some legal commentators who argue that the reasonable hypothetical contributes to both finality and certainty in that courts do not have to wait for an exceptional case,[105] or an offender with adequate resources[106], before the constitutionality of a mandatory minimum sentence can be fully assessed. As Lisa Dufraimont explains:

> 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 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.[107]

However, as noted above, there is an equally compelling argument that when Parliament enacts sentencing legislation to respond to an actual pressing social problem based on alarming real-life examples (as in the firearms context), Parliamentary intent is undermined when courts strike down the provision based on hypothetical circumstances that are remote or extreme and may never actually arise. As Peter Sankoff has observed:

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[103] *R. v. Williams*, 2009 ONCA 342, at para. 16 and footnote 3.

[104] McIntyre, at p. 5.

[105] L. Dufraimont, "Constitutional Cases 2007: *R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences under Section 12" (2008), 42 S.C.L.R. (2d) 459, at para. 33. See also *R. v. Morrisey*, at para. 89, where Arbour J., writing in dissent, observed that under the approach proposed by Gonthier J., a mandatory minimum sentence "will be upheld until it is challenged in a "marginal" case, or at least one that was viewed as too marginal to constitute a reasonable hypothetical, but when that case arises, the section will be struck down under the first branch of the test in *Smith* and *Goltz*, for the benefit, presumably, of all subsequent cases. Under that approach, it is also unclear whether a person should be precluded from re-challenging the constitutionality of the section on the basis that his or her case, or a variant thereof, was considered a reasonable hypothetical by an appellate court or by this Court, and said not to amount to a violation of s. 12. Of additional concern, the precedential value of the decision for all the types of cases that were simply not canvassed as reasonable hypotheticals is uncertain".

[106] As noted above, in *R. v. Lloyd*, the B.C. Court of Appeal rejected a submission made by an intervenor that the Court should consider the constitutionality of the mandatory minimum sentence "because others whose sentences might be affected may ultimately not have the wherewithal to bring constitutional challenges to the section" (para. 45); see also paragraphs 46-47.

[107] Dufraimont, at para. 33.

> In rejecting exemptions, McLachlin CJC made a number of comments [about the use of constitutional exemptions in *R. v. Ferguson*] that are worthy of further consideration:
>
> > Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm...Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.
>
> It is an eloquent and forceful position, and a strong reason for rejecting case-by-case solutions to the unconstitutionality of legislation. <u>But, with respect, it is impossible to read this and not recognize that the exact same criticism can be levelled at the Court's current approach to reasonable hypotheticals. In contrast to other types of constitutional decision-making, it is virtually impossible to ever pronounce that a sentencing provision's fate is secure. By deferring tough decisions to a future occasion, Parliament is left with no guidance about how sound its legislation actually is.</u> [108]

Legislated punishments are necessarily directed to a broad range of criminal conduct which can naturally occur in an extraordinarily wide range of circumstances reflecting divergent levels of moral culpability. Such schemes should not be invalidated based on remote hypotheticals that Parliament could have never anticipated, as opposed to an actual constitutional violation. Invalidation based on hypotheticals too far removed from reality tends to undermine rather than respect Parliamentary objectives. This is particularly the case because, as will be seen below, there are no limits on who can advance a reasonable hypothetical.

5. <u>There are no limits on who can advance or construct a reasonable hypothetical</u>

At the present time, there is no clarity in the jurisprudence about who can advance a reasonable hypothetical.

In *R. v. Goltz*, Justice Gonthier held that the onus of establishing a "reasonable hypothetical" is on "the party challenging the provision's validity".[109] That approach appears to have been followed in *R. v. Latimer*,[110] *R. v. Ferguson*,[111] and *R. v. Stewart*,[112] where the courts declined to engage in a reasonable hypothetical analysis where no hypothetical was advanced by the offender. However, in *R. v. Morrisey*, Justice Gonthier rejected the hypotheticals considered in the courts below, which were based largely on reported cases, and instead crafted his own hypotheticals based on two types of situations that commonly arise in relation to the offence in question. More recently, in *R. v. Nur*, Justice Doherty considered, but did not adopt, the hypotheticals proposed by the sentencing judge and counsel, and instead constructed his own. These latter decisions may be inconsistent with Gonthier J.'s direction in *Goltz* that the accused bears the onus of advancing a "reasonable" hypothetical.

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[108] Sankoff, at p. 10 (emphasis added).
[109] *R. v. Goltz*, at p. 520.
[110] *R. v. Latimer*, at para. 79.
[111] *R. v. Ferguson*, at para. 30.
[112] *R. v. Stewart*, at para. 23.

The recent appeal in *R. v. Lloyd*[113] also illustrates how an unrestrained approach to reasonable hypotheticals is potentially getting out of hand. As noted above, in that case, Galati P.C.J. considered the constitutionality of the one year mandatory minimum sentence in s. 5(3)(a)(i)(D) of the *CDSA*.[114] That section provides that anyone convicted of a trafficking offence involving a Schedule 1 substance, who has been convicted of or served a term of imprisonment for a designated drug offence in the preceding ten years, is liable to a maximum sentence of imprisonment for life and a minimum sentence of one year in jail. Judge Galati held that the one year sentence was not cruel and unusual for Mr. Lloyd personally. However, he held that the sentence would violate s. 12 based on the following hypothetical example advanced by Mr. Lloyd: an addict who has in his or her possession a small amount of a Schedule 1 substance, which he or she intends to share or does share with a spouse or friend.[115]

On appeal, both the British Columbia Civil Liberties Association and the Pivot Legal Society were granted intervenor status. While the B.C. Civil Liberties Association did not seek to make submissions on the facts, it advanced five additional complex reasonable hypotheticals in its factum "to demonstrate that the impugned legislation violates s. 12 of the *Charter*".[116] Pivot Legal Society submitted that Galati P.C.J. had erred in his conclusion that individual or personal characteristics were not relevant to the assessment of a reasonable hypothetical.[117] It suggested that "certain central, recurring personal characteristics of addicts who traffic in small amounts of drugs" should be considered in the assessment of the reasonable hypothetical (including aboriginal offenders; long-term, hard to treat, addicts; addicted women; and sex workers).[118] Counsel for the Public Prosecution Service of Canada responded that the intervenors should not be permitted to expand the record, raise new issues that could not be properly adjudicated on the record, or take the litigation away from the parties.[119]

Ultimately, it was not necessary for the British Columbia Court of Appeal to resolve the issue of *who* can properly advance a reasonable hypothetical as that ground of appeal was dismissed as moot. However, the appeal nevertheless stands as a stark example of the potentially unrestricted limits of creative legal imagination where reasonable hypotheticals are concerned. As Doherty J.A. aptly observed in *R. v. Nur,* "the virtues of the hypothetical offender and the mitigating factors relevant to the commission of the offence seem limited only by the imaginations of counsel and judges".[120] Further, assuming for a moment that the Court of Appeal *had* allowed the intervenors to advance the additional hypotheticals, there was no evidentiary record before the Court with respect to these other classes of offenders. Moreover those groups cannot be approached as homogeneous entities. The individual characteristics of offenders may vary widely within those groups, thus the constitutional analysis would not only have been conducted in a factual vacuum, but on the basis of generalized assumptions.

When viewed in this context, the s. 12 reasonable hypothetical analysis arguably does not provide a benchmark against which Parliament (or counsel faced with the task) can gauge the constitutionality of a mandatory minimum sentence. Rather it is a constantly shifting target subject to the outer limits of legal imagination.

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[113] *R. v. Lloyd* (BCCA).
[114] *Controlled Drugs and Substances Act,* S.C. 1996, c. 19.
[115] *R. v. Lloyd*, 2014 BCPC 8, at para. 48.
[116] Factum of the Intervenor British Columbia Civil Liberties Association, at para. 11.
[117] Factum of the Intervenor Pivot Legal Society, at Opening Statement and paras. 19-20, 21-25.
[118] Factum of the Intervenor Pivot Legal Society, at paras. 21-45.
[119] Reply Factum of the Public Prosecution Service of Canada (Reply to the Intervenors), at paras. 1-4.
[120] *R. v. Nur*, at para. 115.

6. Despite striking the provision, sentences at or in excess of the mandatory minimum are imposed

One of the ironies about the reasonable hypothetical analysis is that it may permit an offender to avoid a mandatory minimum sentence that might otherwise be fit in the circumstances of that offender and offence. This concern grounds Peter Hogg's criticism about the use of reasonable hypotheticals:

> By using the hypothetical case to measure gross proportionality, the majority enabled an offender to escape from a sentence that for him was not grossly disproportionate. That was the result of the majority's decision. After the decision in *Smith*, the accused was re-sentenced in the British Columbia Court of Appeal and his eight-year sentence was reduced to six years on the basis that the original sentence had probably been influenced by the unconstitutional seven-year minimum. The decision thus had the effect of lightening sentences for hardened offenders in defiance of Parliament's manifest contrary intention. This result was accomplished, not to protect any actual offender from cruel and unusual punishment, but to preserve judicial discretion for a hypothetical offender who was unlikely to ever come before the court.
>
> ...
>
> The test employed in *Smith* was the test of the most innocent possible offender: is it possible to imagine a hypothetical case for which the minimum sentence would be grossly disproportionate? It does not matter that the minimum sentence is appropriate (or too low) for the offender actually before the Court.... [121]

On the flip side, some courts have struck the mandatory minimum sentence on the basis of reasonable hypothetical circumstances but nevertheless still gone on to impose (or uphold) sentences at or in excess of the mandatory minimum sentence. Such results lead full circle back to the question of how the mandatory minimum sentence could have been considered grossly disproportionate in the first place?

For example, in *Nur*, even though Justice Doherty held that the three year mandatory minimum sentence constituted cruel and unusual punishment, he nevertheless upheld a 40 month sentence as fit for Mr. Nur. In so doing, he acknowledged that his constitutional analysis would likely have little impact on the very offenders that Parliament intended to target:

> Nor do my reasons have any significant impact on the determination of the appropriate sentence for those s. 95 offences at what I have described as the true crime end of the s. 95 spectrum. Individuals who have loaded restricted or prohibited firearms that they have no business possessing anywhere or at any time, and who are engaged in criminal conduct or conduct that poses a danger to others should continue to receive exemplary sentences that will emphasize deterrence and denunciation. Thus, as outlined earlier, and regardless of the three-year minimum penalty, this appellant, despite the mitigating factors, could well have received a sentence of three years.[122]

Similarly, in *Charles*, even though the Court struck down the five year mandatory minimum sentence for a second or subsequent offence, it upheld the seven year sentence imposed by the sentencing judge.[123]

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[121] P.W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007, looseleaf), at pp. 53-4 to 53-7.
[122] *R. v. Nur*, at para. 206.
[123] *R. v. Charles*, at paras. 6, 108.

The Ontario Court of Appeal's conclusion that Mr. Nur's and Mr. Charles' sentences were fit raises two questions which also relate to some of the other factors discussed above: (1) why was it necessary for the Court to go through the complex analysis in the first place if the end result was that the offenders would receive the same sentences; and (2) how is the "regulatory" hypothetical selected by the Court justifiable in light of the recognition that the respective mandatory minimum sentences were fit for the very examples that "commonly arise in day-to-day life"?

Finally, in *R. v. Lloyd,* the sentencing judge imposed a 12 month sentence after striking down the one year mandatory minimum sentence.[124] In contrast to the Ontario Court of Appeal's approach, the B.C. Court of Appeal held that the trial judge erred in assuming that the minimum sentence created an "inflationary floor" and in engaging in the s. 12 analysis in light of his conclusion that a one year sentence was fit. The Court ultimately increased the sentence to 18 months.[125] This approach, which implicitly respects both the need for a factual foundation and the principles of judicial restraint and mootness, is arguably a preferable method of approaching s. 12 litigation.

7. Conclusion

The recent enactment of a large number of new or enhanced mandatory minimum sentences has resulted in a large volume of s. 12 litigation which has consumed a significant amount of legal and judicial resources to date. There is much confusion in the trial courts about whether and when to engage in the s. 12 analysis and about how to both construct and assess a reasonable hypothetical. Clarification is needed on several fronts. To borrow the words of Peter Sankoff:

> When this storm finally reaches the Supreme Court, there remains the possibility that the judges will recognize the failures that the existing analytical approach has created. In rejecting the seductive remedy of the constitutional exemption, the Court stressed a need for consistency and finality. One can only hope that the Court will see the wisdom of this approach in respect of section 12 as well, and re-address the mode of analysis that continues to dominate in that area.[126]

The continued use of reasonable hypotheticals raises broad concerns about certainty, intelligibility, clarity and predictability[127] in the constitutional analysis of cruel and unusual punishment.

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[124] *R. v. Lloyd*, 2014 BCPC 8, at paras. 30-35.
[125] *R. v. Lloyd* (BCCA), at paras. 65-70.
[126] Sankoff, at pp. 11-12.
[127] In *R. v. Ferguson*, McLachlin C.J., writing for the Court, used some of the same words to describe the problems associated with the proposed use of constitutional exemptions. Writing at paragraph 69, she said "constitutional exemptions for mandatory minimum sentence laws raise concerns related to the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability".