THE CONSTITUTIONALITY OF REPEALING THE "FAINT HOPE" CLAUSE

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This article discusses the de facto repeal of the "faint hope" clause of the Criminal Code. *The clause was relevant to the Supreme Court of Canada's holding that the minimum sentence for first-degree murder did not violate the prohibition against cruel and unusual punishment protected under section 12 of the* Charter, *as it permitted offenders who demonstrated adequate personal reform to apply for parole after serving 15 years of their otherwise mandatory 25-year parole ineligibility period. In response to the de facto repeal of the clause, the British Columbia Supreme Court recently held that the minimum sentence for first-degree murder must violate section 12 of the* Charter. *This article argues that the temporal limitation of the clause could be declared unconstitutional on the basis that it provides an inadequate role for the rehabilitation principle within the* Charter *framework.*

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INTRODUCTION

The Supreme Court of Canada recently expanded upon the basic structure for challenging mandatory minimum sentences alleged to violate the prohibition against "cruel and unusual treatment or punishment" protected under section 12 of the *Canadian Charter of Rights and Freedoms*.[1] As a result of this jurisprudence,[2] it is likely that many more minimum sentencing provisions will be declared unconstitutional.[3] It is also likely that minimum sentences previously upheld by the apex court will be subject to rechallenge given the evolution of the governing framework by section 12 of the *Charter* and the developing social science

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1 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Hills*, 2023 SCC 2 [*Hills*]; *R v Hilbach*, 2023 SCC 3 [*Hilbach*]; *R v Bertrand Marchand*, 2023 SCC 26; *Quebec (Attorney General) v Senneville*, 2025 SCC 33 [*Senneville*].

3 For my initial discussion of why this jurisprudence brings into question more minimum sentences, see Colton Fehr, "Over the *Hills*: Section 12 of the *Charter* at Forty" (2024) 102:2 Can Bar Rev 393 [Fehr, "Over the *Hills*"]. This appears to have come to fruition. See *Senneville*, *supra* note 2 (declaring the possession and accessing child sex abuse materials minimum sentences unconstitutional under section 12).

evidence,[4] and in particular evidence detailing the impact of prison on offenders.[5] Among the first of these minimum sentences to be rechallenged applies to first-degree murder, arguably the most serious offence in the *Criminal Code*.[6] The relevant sentencing provision imposes a mandatory life sentence with no chance of parole for 25 years.[7] While this minimum sentence was upheld in 1990 by the Supreme Court in *R. v. Luxton*,[8] the British Columbia Supreme Court recently declared the provision violative of section 12 of the *Charter* in *Mariani*.[9] The Court in separate reasons subsequently rejected the Crown's argument under section 1 of the *Charter*. However, instead of striking down the minimum sentence the Court declared limitations on what is commonly known as the "faint hope clause" found in section 745.6 of the *Criminal Code* inoperative while leaving in tact the minimum sentence.[10]

At the heart of the *Mariani* case is the impact of Parliament's decision to effectively repeal the faint hope clause. While this provision is still in force in altered form for those who committed an eligible offence before 2 December 2011, the faint hope clause has been repealed for offenders (outside of British Columbia) whose crime occurred after that date.[11] The previous law effectively permitted offenders sentenced to life imprisonment and a period of parole ineligibility greater than 15 years to apply to a court to determine whether they should be eligible for parole after serving 15 years of their life sentence. While the repeal of the faint hope clause provided the impetus for declaring the minimum sentence for first-degree murder violative of section 12 in *Mariani*, it is not clear that the constitutionality of the faint hope clause and the minimum sentence for first-degree murder are so integrally connected that they must be assessed together as suggested by Justice Crossin.[12] In my view, a more nuanced development of the appropriate constitutional role of the rehabilitation principle can result in the repeal of the faint hope clause being unconstitutional while leaving for another day whether the 25-year minimum parole ineligibility period constitutes grossly disproportionate punishment.[13]

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4 See *Canada (AG) v Bedford*, 2013 SCC 72 at para 42 (explaining when courts may reconsider a past decision from a higher court due to changes in the law or relevant evidence) [*Bedford*]. For a review of potential challenges to various homicide minimum sentences, see Colton Fehr, *Rethinking Homicide: The Constitutional Case for Reform* (Montreal: McGill-Queens University Press, 2026) at chapter 7 [Fehr, *Rethinking Homicide*]; Colton Fehr, *Cruel and Unusual: Section 12 of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2026) at chapter 5 [Fehr, *Cruel and Unusual*].

5 See Part IV, below, where I review the relevant evidence concerning the impact of long-term prison on offenders in more detail. For some examples of minimum sentences already being rechallenged in the context of the murder offence, see e.g. *Fortier-Grenier c R*, 2021 QCCS 1930 [*Fortier-Grenier*]; *R v McKee*, 2024 ONSC 4934; *R v Mariani*, 2025 BCSC 129 (first-degree) [*Mariani*]; *R v Newborn*, 2020 ABCA 120 (second-degree) [*Newborn*]. See also Elizabeth A Sheehy, *Defending Battered Women on Trial: Lessons From the Transcripts* (Vancouver: UBC Press, 2014) at 298–301; Elizabeth Sheehy, "Battered Women and Mandatory Minimum Sentences" (2001) 39:2/3 Osgoode Hall LJ 529 (calling for a reconsideration of minimum sentences in the murder context).

6 RSC 1985, c C-46, s 231 [*Criminal Code*].

7 *Ibid*, ss 235, 745(a).

8 [1990] 2 SCR 711 [*Luxton*].

9 *Mariani*, *supra* note 5.

10 *Ibid* at para 325. See also *R v Mariani*, 2025 BCSC 1298 at para 38.

11 *An Act to Amend the Criminal Code and Another Act*, SC 2011, c 2.

12 *Mariani*, *supra* note 5 ("[t]he 2011 Amendment cannot coherently be considered without assessing the impact the amendments have on the sentence contained in s. 745(a) of the *Code*" at para 186).

13 For earlier commentary on that provision's constitutionality, see e.g. Isabel Grant, "Rethinking the Sentencing Regime for Murder" (2001) 39:2/3 Osgoode Hall LJ 655; Laura Metcalfe, "Reconsidering the Constitutionality of Mandatory Minimum Sentences Under Section 231(5)(e) Post-*Luxton*" (2016) 6:2 UWO J Leg Studies 2 at 4–8. See also Stacey M Purser, "Reconsidering *Luxton* in the Post-*Nur* Revolution: A Brief

It should be acknowledged at the outset that the approach I advocate for carves out a broader role for rehabilitation in section 12 jurisprudence than recognized in the Supreme Court's limited jurisprudence. As opposed to concluding that there must only be a "hope" of release,[14] I contend that rehabilitation should be required to play a role when the denunciatory portion of a punishment is served. The faint hope clause — as well as minimum sentences for murder in comparable jurisdictions — suggests that the 15-year mark is the relevant point at which most first-degree murders may be adequately denounced.[15] Any additional punishment must therefore derive from a different penal rationale, the most obvious of which is the state's interest in deterring both the offender and the general public from committing similar crimes. I generally agree with the Supreme Court's early jurisprudence — an opinion which it subsequently diverged from without providing any rationale for so doing — that whether deterrence should warrant upholding a sentence is an issue relevant only under section 1 of the *Charter*.[16] In cases where a faint hope application historically has been granted, I suggest that the state should have to (and cannot) justify this additional deterrence-based deprivation of liberty. Accordingly, a faint hope clause is necessary where long terms of parole ineligibility are imposed on an offender. The appropriate remedy should be to declare the portion of the faint hope clause limiting its temporal application unconstitutional. In so doing, the procedure available to those whose crime was committed before 2 December 2011 would become available to all such offenders.

The article unfolds as follows. In Part I, I explain how the faint hope clause applied in its earlier iterations with a particular emphasis on how the minimum sentence for first-degree murder was impacted throughout the clause's history. In Part II, I detail the Supreme Court's reasons in *Luxton* for upholding the minimum parole ineligibility period for first-degree murder and the rationale put forward in *Mariani* for distinguishing *Luxton*. As this review makes clear, the availability of a "faint hope" application was important to the Supreme Court's initial decision to uphold the minimum sentence for first-degree murder. In Part III, I outline why an expanded role for the rehabilitation principle in sentencing under section 12 of the *Charter* should result in the temporal limitations of the faint hope clause being declared unconstitutional. In essence, I contend that retributive or desert-based considerations are relevant to the "gross disproportionality" assessment under section 12 of the *Charter* while deterrence-based considerations should only be considered under section 1. Rehabilitation as a sentencing principle can accordingly occupy the space between these other sentencing principles by requiring that due consideration be given to the offender's reformative steps after the offender serves the denunciatory element of their sentence. Imposing additional punishment on an offender solely to deter crime should be declared unconstitutional as it violates the offender's human dignity by using them as a means to achieve the state's crime control objective. I conclude in Part IV by considering how Parliament might respond to the possibility of the faint hope clause regime being constitutionally resuscitated.

Qualitative and Quantitative Analysis of Recent Challenges to Mandatory Minimums and Other Sentencing Provisions" (2021) 44:5 Man LJ 124.

14 See generally *R v Bissonnette*, 2022 SCC 23 [*Bissonnette*].

15 I make a similar suggestion elsewhere: Colton Fehr, "A Promising Piece of the Puzzle: Human Dignity and the Role of Section 1 of the *Charter*" (2024) 33:1 Const Forum Const 67 at 70 [Fehr, "Piece of the Puzzle"].

16 I discuss this jurisprudence in Part IV, below.

I. THE FAINT HOPE CLAUSE

The history of the faint hope clause is intricately connected to the minimum sentencing provision for first-degree murder. The adoption of the latter provision in turn has its origins in the political fallout of the decision to repeal the death penalty from the *Criminal Code*. As Allan Manson observes, "all the data, both Canadian and comparative, point[ed] to a period of between 10 and 15 years" as the appropriate sentence for a conviction for first-degree murder.[17] Parliament nevertheless imposed the much lengthier 25-year parole ineligibility period as a result of "politics and expedience."[18] Put differently, it was believed by some politicians to be unlikely that a more lenient position would be accepted by the public and influential political actors like the Canadian Association of Police Chiefs.[19] As the latter actors opined in their submissions to Parliament, "only a minimum sentence as severe as 25 years could conceivably be an alternative to the rope."[20] While Parliament ultimately acceded to this argument, the faint hope clause was also included as a means to alleviate the harsh minimum parole ineligibility period imposed for first-degree murder and other heinous offences.[21]

The inclusion of the faint hope clause did not go unnoticed when the minimum sentence for first-degree murder was initially subjected to constitutional challenge. As Chief Justice Lamer observed in *Luxton*, "[i]t is of some note that even in cases of first degree murder, section 672 [now 745] of the *Code* provides that after serving 15 years the offender can apply to the Chief Justice in the province for a reduction in the number of years of imprisonment without eligibility for parole."[22] The Chief Justice continued, specifically noting that the faint hope clause "indicates that even in the cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case."[23] He further reiterated later in the judgment that it is relevant to deciding the constitutionality of the minimum sentence that "Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for [the possibility of] early parole."[24]

The text of the faint hope clause initially provided a broad right to apply for consideration of reduced parole ineligibility. Section 672 (subsequently 745(6.1)) of the *Criminal Code* stated that "[w]here a person has served at least fifteen years of his sentence … in the case of a person who has been convicted of high treason or first degree murder … he may apply to the appropriate Chief Justice … for a reduction in his number of years of imprisonment without eligibility for parole."[25] Upon receipt of such an application, the relevant Chief

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17 Allan Manson, "The Easy Acceptance of Long Term Confinement in Canada" (1990) 79 CR (3d) 265. See also Carolyn Strange, "The Lottery of Death: Capital Punishment, 1867–1976" (1995) 23 Man LJ 594 at 600.

18 Manson, *supra* note 17.

19 *Ibid*.

20 *Ibid*, citing House of Commons, Standing Committee on Justice and Legal Affairs, *Bill C-84, Criminal Law Amendment Act (No. 2)*, *1976*, 30-1, No 72 (28 June 1976) (Hon Warren Allmand) at 61–62.

21 Robin MacKay, *Legislative Summary of Bill S-6: An Act to amend the Criminal Code and another Act* (Ottawa: Library of Parliament, 2011) at 3; *Criminal Law Amendment Act (No. 2), 1976*, SC 1974-75-76, c 105.

22 *Luxton*, *supra* note 8 at 720.

23 *Ibid*.

24 *Ibid* at 724–25.

25 *Criminal Law Amendment Act (No. 2), 1976*, *supra* note 21, s 672(1).

Justice would designate a superior court justice "to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced."[26] In so considering, the jury was required to consider a variety of factors including the offender's character, their conduct while imprisoned, the nature of the offence giving rise to their sentence, and any other considerations deemed relevant by the judge hearing the application.[27]

The faint hope clause regime was amended several times following *Luxton*. An early amendment required that juries also consider the views of victims when rendering their decision.[28] Other amendments arose in 1996 in response to the justice system's inability to screen out meritless applications.[29] These amendments enacted three main changes. First, Parliament added a judicial screening process wherein a judge must have found that the application had a "reasonable prospect of success" before it would be heard by a jury.[30] The aim of this process — which subsequently received mixed treatment as to whether it constituted a justifiable infringement of section 11(i) of the *Charter* as a result of its retroactive application[31] — was to avoid retraumatizing victim's families when the application was meritless.[32] Second, the amendments required that parole eligibility could be granted only if the jury unanimously concluded that the offender should be afforded that privilege. Previously, eligibility to apply for early parole under the faint hope clause regime was permitted if two-thirds of the jury members voted in favour of the offender's application.[33] Finally, these amendments prohibited an individual convicted of more than one murder from applying for any reduced parole ineligibility under the faint hope clause.[34]

Parliament adopted a further and more controversial set of amendments to the faint hope clause in 2011. Most notable among them was a bar to applying under the faint hope clause regime if the offence was committed on or after 2 December 2011.[35] This enactment had the effect of repealing the faint hope clause for all but a temporally narrow group of offenders.[36] In addition, these amendments made the faint hope clause more restrictive by raising the judicial threshold for permitting an application to be heard by the jury. While this threshold previously required only "a *reasonable prospect*" of success, the 2011 amendments required the applicant to demonstrate "a *substantial likelihood* that the application will succeed."[37] This increased burden is significant, requiring that "the likelihood the applicant will succeed approaches 50 percent … [based on] evidence that has sufficient cogency, materiality and

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26 *Ibid*, s 672(2).
27 *Luxton*, *supra* note 8 at 720.
28 See *R v Simmonds*, 2018 BCCA 205 at para 20 [*Simmonds*].
29 See *House of Commons Debates*, 35-2, No 58 (10 June 1996) at 3561; *House of Commons Debates*, 35-2, No 67 (16 September 1996) at 4241; *House of Commons Debates*, 35-2, No 68 (17 September 1996) at 4267; *House of Commons Debates*, 35-2, No 79 (2 October 1996) at 5000; Julian V Roberts "'Faint Hope' in the Firing Line: Repeal of Section 745.6?" (2009) 51:4 Can J Corr 537.
30 *Mariani*, *supra* note 5 at para 46.
31 See e.g. *Simmonds*, *supra* note 28; *R v Dell*, 2018 ONCA 674; *Bari c R*, 2022 NBCA 53.
32 *Simmonds*, *supra* note 28 at para 21 (noting that notorious multiple murderer Clifford Olson abused the faint hope clause process in this manner).
33 *Mariani*, *supra* note 5 at para 47.
34 *Ibid* at para 48.
35 *Criminal Code*, *supra* note 6, s 745.6(1)(a.1).
36 *Mariani*, *supra* note 5 at para 49.
37 *Ibid* [emphasis in original].

strength of influence."[38] Among a host of procedural changes, the window for making an application was also narrowed to certain 90-day periods prescribed by the relevant legislation.[39]

The data on success rates for faint hope applications suggests that the previous regimes served to both screen out applications that would be unlikely to succeed while also identifying many offenders who no longer posed a significant threat to public safety. In the two decades following the enactment of the faint hope clause, approximately a quarter of eligible offenders sought relief with over an 80 percent success rate.[40] A further study carried out between 1987 and 2013 by Correctional Services Canada similarly concluded that of the 827 offenders eligible to make such an application, only 198 applications were made to the judiciary thereby suggesting a substantial "self-screening" effect.[41] Moreover, 155 of those offenders who applied under the faint hope clause had their parole eligibility date expedited, and 151 of those offenders reached their revised parole eligibility date.[42] Notably, 138 of these offenders were released on early parole.[43] In *Mariani*, leading sentencing scholar Julian Roberts further explained in his testimony that as of 2021 "184 applicants (representing 76% of applications) were granted a reduction of the period which must be served before parole eligibility."[44]

Given this data, it can fairly be concluded that the faint hope clause struck a defensible balance between two competing interests: the need to protect the public from dangerous criminals, and the need to ensure that individuals who demonstrate a commitment to personal reform are integrated back into the community. While both interests are important, the latter interest was particularly urgent in light of the relative harshness of the 25-year minimum parole ineligibility period. In comparison, the average number of years served in comparable countries is approximately 15 years.[45] Even with the faint hope clause in place, however, Canada's minimum parole ineligibility period for first-degree murder has been noted to be among the harshest in Western countries.[46] This alone provides a legitimate policy rationale for preserving the faint hope clause. However, assessing whether the repeal of the clause is constitutional requires a closer examination of the principles underlying section 12 of the *Charter* and a more critical discussion of how those constitutional principles were applied in *Luxton* and *Mariani*.

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38 *R v Baker*, 2023 ABCA 136 at para 97.

39 *Mariani*, *supra* note 5 at para 49.

40 Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 303.

41 Public Safety Canada, *Corrections and Conditional Release Statistical Overview: 2013* (Ottawa: Public Works and Government Services Canada, 2013) at 101.

42 *Ibid*.

43 *Ibid*. See also Julian V Roberts, "Determining Parole Eligibility Dates for Life Prisoners: Lessons from Jury Hearings in Canada" (2002) 4:1 Punishment & Society 103; *R v Poitras*, 2012 ONSC 5147 at para 21.

44 *Mariani*, *supra* note 5 at para 120.

45 Department of Justice Canada, News Release, "Backgrounder: Fair and Effective Sentencing – A Canadian Approach to Sentencing Policy" (October 2005), online: [perma.cc/YN47-XN2S], cited in MacKay, *supra* note 21 at 2, 6–7; John Howard Societies of Canada and Ontario, *Bill S-6: The Unjustified Elimination of an Already Faint Hope*, Submission to the Standing Committee on Legal and Constitutional Affairs of the Canadian Senate (Toronto: John Howard Society of Ontario, 2010) at 3–4, online: [perma.cc/URL4-UXS3] [John Howard Societies, *Bill S-6*].

46 *Ibid*.

II. CHALLENGING THE MINIMUM SENTENCE

To understand the Supreme Court's rationale in *Luxton* for upholding the minimum sentence for first-degree murder, it is first necessary to understand the scope of that offence as this is a key consideration in determining whether any minimum sentence is constitutional.[47] The most readily accepted mode for committing first-degree murder requires proof that the murder was committed in a manner that was "planned and deliberate."[48] The Supreme Court defines a planned murder as "one that is committed as a result of a scheme or plan that has been *previously formulated* or *designed*" while a "deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of."[49] Such decisions are also "carefully thought out, not hasty or rash."[50] However, there is no temporal requirement to satisfy the planned and deliberate standard. Thus, even short reflection upon whether to commit murder can suffice to meet this element of the offence.[51] Moreover, while first-degree murders usually involve intentional killing, other forms of murder such as "reckless"[52] killings may be elevated to first-degree murder when the underlying conduct meets the aforementioned definition of planned and deliberate.[53]

Numerous other "constructive" forms of first-degree murder have also been adopted by Parliament. Murdering a peace officer during the course of their duty will result in the offender being convicted of first-degree murder, as will committing a murder "while committing or attempting to commit" a hijacking of an aircraft, various forms of sexual assault, kidnapping andforcible confinement, hostage taking, criminal harassment, terrorist activity, organized crime, or illegal intimidation.[54] While most of these crimes are serious indictable offences, it is important to note that some of the listed offences may be committed with widely different degrees of blameworthiness. This is implicitly acknowledged by the broad range of sentences available for the underlying offences. Forcible confinement, for instance, may result in a sentence ranging from a discharge to a ten-year penitentiary sentence.[55] Murders committed in less blameworthy circumstances may therefore provide a hypothetical circumstance that warrants reconsidering the minimum sentence's

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47 *Hills*, *supra* note 2 at paras 125–32.

48 *Criminal Code*, *supra* note 6, s 231(2). See also section 231(3) (contract killings, which are inherently planned and deliberated).

49 *R v Banwait*, 2010 ONCA 869 at paras 178–89 [emphasis in original], MacPherson JA, dissenting, cited with approval in 2011 SCC 55 [*Banwait*]. See also *More v The Queen*, 1963 CanLII 79 (SCC); *R v Underwood*, 2025 SCC 14.

50 *Banwait*, *supra* note 49.

51 See e.g. *R v Haevischer*, 2014 BCSC 1863 at paras 709–16; *R v Smith*, 1979 CanLII 2233 (SKCA); *R v Fraser*, 2016 BCCA 89; *R v Ruptash*, 1982 ABCA 165; *Droste v R*, 1984 CanLII 68 (SCC). But see also *R v Ching*, 2019 ONCA 619.

52 *R v Sansregret*, [1985] 1 SCR 570 ("recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur" at 584).

53 *R v Nygaard*, [1989] 2 SCR 1074 at 1088–89 (reckless killings may be planned and deliberate). Commentators disagree whether "unlawful object" murders under section 229(c) of the *Criminal Code* can be committed in a planned and deliberate manner: Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff — Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at 949–50, n 263; Don Stuart, *Canadian Criminal Law*, 8th ed (Toronto: Carswell, 2020) at 287, citing *R v Chabot* (1985), 16 CCC (3d) 483 (ONCA).

54 *Criminal Code*, *supra* note 6, ss 231(4)–(6.2).

55 *Ibid*, s 279(2).

constitutionality, especially in light of the absence of any reasonably foreseeable circumstances being considered in *Luxton*.[56]

Despite the breadth of these pathways for committing first-degree murder, Chief Justice Lamer provided a general rationale for upholding the minimum sentence for constructive first-degree murder in a companion case to *Luxton*. As he observed,

> Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power … accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender.[57]

Given the heightened blameworthiness inherent to the other modes of first-degree murder, a similar rationale is presumably applicable when sentencing those who are convicted of first-degree murder through the other available pathways.[58] While the high moral blameworthiness of anyone who commits murder provides a compelling reason to sentence that offender to a lengthy prison term, it bears repeating that the scope of the pathways for first-degree murder were not critically evaluated in *Luxton*. It is therefore questionable whether the additional 15 years of parole ineligibility vis-à-vis a conviction for second-degree murder necessarily strikes a constitutional balance for all forms of first-degree murder.[59] It is likely for this reason that Chief Justice Lamer bolstered his decision to uphold the minimum sentence by observing that an offender may not be required to serve the entire parole ineligibility period because they could apply under the faint hope clause to reduce that period.[60]

It is nevertheless unclear whether the repeal of the faint hope clause itself would have altered the Supreme Court's opinion as to the constitutionality of the minimum sentence for first-degree murder. As Justice Humphries of the British Columbia Supreme Court concludes in *R. v. Falkner*, "the constitutional analysis did not turn on [the presence of the faint hope clause], and a reading of the entire decision clearly shows that the existence of the section was unnecessary to upholding the ultimate validity of the impugned sections."[61] Justice Champagne of the Quebec Superior Court partially agreed by concluding that repealing the faint hope clause does not inherently render the minimum sentence for first-degree murder unconstitutional. He nevertheless also observed that the clause's repeal does provide a reason to reconsider the constitutionality of the minimum sentence.[62] The British Columbia Court of Appeal arrived at a similar conclusion and suggested that the faint hope clause formed a significant part of the reasoning for upholding the minimum sentence for first-degree

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56 I elsewhere contend that the minimum sentence is unconstitutional given its breadth under this provision: Fehr, *Rethinking Homicide*, *supra* note 4 at ch 7, citing *R v White*, 2014 ONCA 64 at paras 1–9, 107, leave to appeal to SCC refused, 36169 (19 Mar 2015) [*White*].

57 *R v Arkell*, [1990] 2 SCR 695 at 704.

58 *Criminal Code*, *supra* note 6, s 231.

59 See e.g. Fehr, *Rethinking Homicide*, *supra* note 4.

60 *Luxton*, *supra* note 8 at 720, 724–25.

61 2004 BCSC 986 at para 16.

62 *Fortier-Grenier*, *supra* note 5 at paras 39–41. See also *Labrecque c R*, 2024 QCCA 104 at paras 48–53.

murder.[63] Its repeal therefore constituted a significant change to the sentence for first-degree murder that justifies reconsidering its constitutionality.

This conclusion strikes me as consistent with the prerequisites for reconsidering a prior Supreme Court precedent given that the faint hope clause's repeal has the potential to significantly impact the liberty interests of this category of offenders.[64] However, precisely how an offender may be subject to cruel and unusual punishment is not clearly articulated in the only decision to declare unconstitutional the minimum sentence for first-degree murder: *Mariani*. Justice Crossin contemplated whether the constitutional challenge in that case implicated both the severity and method tracks under section 12 of the *Charter*. The former track applies to unduly harsh punishments that impose a quantum of punishment that is "grossly disproportionate" to the appropriate sentence for the relevant offender.[65] The latter track applies to punishments that are grossly disproportionate because they intrinsically undermine an offender's human dignity.[66] These include penalties that are inherently degrading like "the infliction of corporal punishment, such as the lash, … the lobotomisation of certain dangerous offenders or the castration of sexual offenders."[67]

The initial confusion in *Mariani* arose from Justice Crossin's determination that the applicant's main target was the minimum parole ineligibility period.[68] If true, then the relevant track under section 12 of the *Charter* was clear, as cases challenging a minimum sentence need only apply the severity branch per the Supreme Court's recent jurisprudence.[69] The applicant's broader argument nevertheless suggests that something was missed in the framing of the application as the offender's main issue with the repeal of the faint hope clause was that it avoided requiring the judge to "individualize" sentencing.[70] It did so by unduly delaying any consideration of the rehabilitation principle in sentencing.[71] Whether absence of any consideration of the rehabilitation principle impacts the result under the severity track is nevertheless not obvious in circumstances where courts and Parliament emphasize that denunciation and deterrence must be prioritized. If those sentencing principles are considered to be primary, the question that necessarily must be answered is this: at what point does rehabilitation become an operative principle in the constitutional analysis?

The Quebec Superior Court was faced with a similar argument in *Fortier-Grenier*.[72] In response, Justice Champagne correctly observed that it is

> not enough to allege that the mandatory sentence for first degree murder fails to take into account certain sentencing objectives, such as rehabilitation … It must be demonstrated that this sentence is grossly

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63 *Simmonds*, *supra* note 28 at para 82. See also *Mariani*, *supra* note 5 at paras 133–36.

64 *Mariani*, *supra* note 5 at paras 133–34, citing amongst other cases *Bedford*, *supra* note 4 at para 42.

65 *Bissonnette*, *supra* note 14 at paras 60–62.

66 *Ibid* at para 64; *Hills*, *supra* note 2 at paras 31–42.

67 *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045 at 1074 [*Smith*].

68 *Mariani*, *supra* note 5 at para 3. The applicant's factum suggests that the main problem with the repeal of the faint hope clause is the lack of individualization in sentencing which inherently resulted from the repeal of the faint hope clause: *Mariani*, *supra* note 5 (Factum, Applicant) (on file with the author).

69 *Mariani*, *supra* note 5 at para 187; *Hills*, *supra* note 2 at para 37.

70 *Mariani*, *supra* note 5 at paras 53–55.

71 *Ibid* (Factum, Applicant) (on file with the author).

72 *Fortier-Grenier*, *supra* note 5 at paras 42–52.

> disproportionate [under the severity prong] to conclude that there has been a violation of section 12 of the *Charter*.[73]

There is nevertheless a chasm between what sentences are proportionate and those that run afoul of the gross disproportionality standard for being unduly severe thereby violating section 12 of the *Charter*. The fact that rehabilitation is not taken into account can only feasibly be one consideration weighing in favour of disproportionality under the severity track.

Justice Crossin's application of the severity track in *Mariani* also faced other challenges arising from the evidentiary record and unclear framing of the constitutional issue. For instance, Justice Crossin was presented with expert evidence that inadequately addressed the issue of whether the punishment was unduly severe. This occurred because one of the two main experts failed to provide reliable evidence on the effect of long-term imprisonment on offenders. Instead, they provided anecdotal evidence deriving from their experience working within a single correctional institution that tends not to contain first-degree murderers.[74] That expert was accordingly criticized by Justice Crossin for providing "opinions [which] rested on empirical foundations that were often irrelevant, undeveloped, nonexistent, or a combination of the above."[75] While the applicant also called leading sentencing law expert Julian Roberts, it was unclear how his evidence was relevant to the constitutional challenge. The applicant's decision to call Roberts "as an expert in the field of sentencing policy and public opinion on matters of sentencing" was held to be unhelpful to the court when deciding the constitutionality of a minimum sentence as it more resembled advocacy than expert evidence on the impact of minimum sentences on long-term prisoners.[76]

Justice Crossin nevertheless proceeded to consider the minimum punishment in accordance with the applicant's challenge under the severity prong of section 12 of the *Charter*. After rejecting the accused's proposed hypothetical scenarios, Justice Crossin decided to craft his own by building upon existing case law.[77] As an aside, Justice Crossin's suggestion that this approach is permitted by the Supreme Court's decision in *Hills* is questionable.[78] While, in *Hills*, Justice Martin does explicitly state that reported cases can be used to form the basis of a hypothetical circumstance when challenging a minimum sentence's constitutionality, this permission was developed alongside general guidance from the Supreme Court that reasonably foreseeable circumstances are preferably crafted via the adversarial process.[79] More problematic is the difficulty with a judge claiming to act judicially when they craft scenarios to strike down laws. Such a judge may be viewed by the

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73 *Ibid* at para 52 ("[i]l ne suffit donc pas d'alléguer que la peine mandatoire pour meurtre au premier degré ne prend pas en compte certains objectifs de détermination de la peine, comme la réhabilitation et la proportionnalité. Il faut démontrer que cette peine est exagérément disproportionnée pour conclure à une violation de l'article 12 de la Charte" [CanLII translation]).

74 *Mariani*, *supra* note 5 at paras 90–91.

75 *Ibid* at para 110.

76 *Ibid* at paras 111, 124.

77 *Ibid* at para 196–201, 211.

78 *Ibid* at paras 203, 221.

79 *Hills*, *supra* note 2 at paras 81, 93.

objective onlooker as having lost their sense of objectivity in deciding the constitutional issue.[80]

Regardless of whether the hypothetical scenario was appropriately relied upon, the scenario — derived from the case of *R. v. Sauve*[81] — is also of limited relevance under the severity track. The accused was a member of a biker gang. He entered a bar with several other members of his gang and began intimidating patrons and refused to leave when asked to do so. The members then surrounded an individual from a rival gang and shot him three times. The accused was present at the bar and participated in intimidating the victim but did not pull the trigger. As subjective fault with respect to death is now constitutionally required,[82] the hypothetical circumstance assumes that either as an aider or abettor, or as part of a common intention or conspiracy, the offender possessed the requisite subjective fault with respect to death.[83] Such a murder committed on behalf of a criminal organization is significantly more reprehensible and therefore is elevated to first-degree murder.[84] While these facts illustrate a high degree of moral blameworthiness that likely warrants a substantially elevated prison sentence, the case was relied upon in *Mariani* to illustrate the subsequent and admirable ability of the offender to reform while in custody and after release.[85] Parole was accordingly granted in *Sauve* 7.5 years early under the faint hope clause.[86]

After identifying the relevant sentencing principles, Justice Crossin asserted that the proportionate sentence for an offender in this hypothetical scenario is a life sentence with the ability to apply for parole eligibility after 15 years of imprisonment.[87] In so concluding, Justice Crossin was understandably perplexed as to how to devise a proportionate sentence given that only one sentence has been permitted since the first-degree murder offence was adopted: life imprisonment with a parole ineligibility period of 25 years with the possibility of a faint hope application after serving 15 years of their sentence. Justice Crossin relied on *Bissonette*, in which an individual who entered a place of worship, killed six people, and injured others was sentenced at the initial hearing to parole ineligibility for 40 years. The judge was only able to impose this sentence as he found that the then-applicable law permitting the stacking of parole ineligibility periods required that he impose a minimum 50-year parole ineligibility period — a provision discussed in more detail below — would violate section 12 of the *Charter*.[88] Given the substantially aggravating nature of the crime in

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80 See e.g. *Newborn*, *supra* note 5 at para 53, citing *R v Plange*, 2019 ONCA 646 at para 30:

> I do not agree that it is this court's function … to construct a hypothetical in order to declare the mandatory minimum unconstitutional. I say this for three related reasons: (i) the onus is on the party challenging the validity of the legislation to establish the hypothetical; (ii) the parties, particularly the Crown, should have the opportunity to fully address the hypothetical; and (iii) there is no prejudice because the issue remains to be determined on a proper record in the future.

81 1979 CanLII 2914 (ONCJ) [*Sauve*]. Notably, the judgment is from a preliminary hearing which arguably brings the "reasonableness" of the hypothetical scenario into question. I am, however, unaware of any court considering that question.

82 See e.g. *R v Vaillancourt*, 1987 CanLII 2 (SCC); *R v Martineau*, 1990 CanLII 80 (SCC).

83 *Mariani*, *supra* note 5 at para 214.

84 *Criminal Code*, *supra* note 6, s 231(6.1). The offender was convicted under the now-repealed section 230.

85 *Mariani*, *supra* note 5 at paras 217–19.

86 *Ibid* at para 220.

87 *Ibid* at paras 242, 251.

88 *Bissonnette*, *supra* note 14 at paras 13–19, citing *R v Bissonnette*, 2019 QCCS 354.

Bissonnette, Justice Crossin held that the 15-year parole ineligibility period was, by comparison, proportionate in the hypothetical *Sauve*-based scenario.[89] In so concluding, Justice Crossin observed that this sentence "proportionately accounts for the moral blameworthiness of the accused, while also being a sufficient length to attain the sentencing objectives of denunciation and deterrence."[90] This conclusion followed because "the faint hope regime was able to proportionately respond to offenders' rehabilitative efforts in a way that the mandatory 25-year parole ineligibility does not."[91]

Justice Crossin's decision is reasonable in the sense that it allows more and less culpable offenders to receive sentences in line with the relative blameworthiness of their conduct.[92] His decision also illustrates how the faint hope clause can ensure a meaningful role for rehabilitation in the sentencing framework for first-degree murder. However, the judgment does not offer a theoretical justification for why the possibility that the offender will rehabilitate must be considered at the 15-year point. The unclear assertion is that the 15-year period is the point at which denunciation *and deterrence* have been spent. If that is true, then what penal purpose is the additional ten-year period of incarceration endured by the non-reformative offender serving? "Failure to rehabilitate" is not a legitimate reason to require someone to serve a longer prison sentence. However, the need to protect the public from the offender, specifically by deterring the offender from committing crimes, or generally deterring others from so doing are accepted principles of sentencing that could justify further incarceration. If Justice Crossin is correct — and I think this is true — that only those who demonstrate willingness to reform should be afforded the benefit of the faint hope clause, then the rationale for so doing should be recognized as a lack of need to denounce or deter the offender or others in light of the discovery that there is a significant potential for rehabilitation. Framed this way, I maintain below that a more robust role can be carved out for the rehabilitation principle in sentencing when applying section 12 of the *Charter*.

III. THE CONSTITUTIONAL ROLE OF REHABILITATION

The constitutional role for the rehabilitation principle has thus far received limited treatment in the Supreme Court's jurisprudence under section 12 of the *Charter*. While *Bissonnette* constitutes an important first consideration of the rehabilitation principle's constitutional role in sentencing, I suggest that a more active role for that principle can be developed when the broader sentencing principles are critically assessed for their appropriate role within the structure of the *Charter*. In what follows, I argue that proportionality in the retributive sense is relevant at the rights stage of the analysis while utilitarian-based considerations like deterrence and rehabilitation have a more distinct role: rehabilitation after the denunciatory portion of a sentence is served and deterrence at the section 1 stage of analysis.

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89 *Mariani*, *supra* note 5 at paras 240–42.
90 *Ibid* at para 243.
91 *Ibid* at para 249.
92 It nevertheless remains unclear that Justice Crossin appropriately balanced the substantial aggravating factors in *Mariani*. Resolving this question is both difficult in light of the lack of jurisprudence and unnecessary for the purposes of this article.

A. PROPORTIONALITY AND RETRIBUTIVE JUSTICE

In *Bissonnette*, the Supreme Court considered the constitutionality of section 745.51 of the *Criminal Code*. That section allowed judges to "stack" parole ineligibility periods in cases of multiple murders. In so doing, however, judges were not able to craft parole ineligibility periods for first-degree murders in anything other than 25-year increments. It followed that sentencing an offender to any punishment higher than the minimum sentence for first-degree murder required a minimum 50-year period of parole ineligibility. As the average life expectancy of a prisoner is 60 years, a youthful adult offender would be ineligible for parole until they turned 68 and therefore incapable of seeking release within their expected lifetime.[93] For Chief Justice Wagner, the stacking of 25-year blocks of parole ineligibility results in a sentence that "is intrinsically incompatible with human dignity … [because] it negates, in advance and irreversibly, the penological objective of rehabilitation."[94] The punishment is therefore "degrading in nature in that it presupposes at the time of its imposition … that the offender is beyond redemption and lacks the moral autonomy needed for rehabilitation. This alone justifies the conclusion that this punishment is cruel and unusual by nature."[95] It followed that the impugned provision violated the method track of section 12 of the *Charter*.[96]

In rendering its judgment, the Supreme Court in *Bissonnette* did not shut the door on the possibility of Parliament enacting an increased parole ineligibility period shorter than the 50-year period that it struck down.[97] Instead, the Supreme Court held that for a sentencing provision to be consistent with the purpose of section 12 of the *Charter* — respecting the human dignity interests of the offender[98] — it is necessary that "Parliament leave a door open for rehabilitation, even in cases where this objective is of secondary importance."[99] Importantly, this door need only be left open *after* the denunciatory part of the offender's sentence is served.[100] Chief Justice Wagner accordingly suggested that *Luxton* determined that the sentence for first-degree murder is "compatible with s. 12 of the *Charter*, since it is within the purview of Parliament to sanction the most heinous crime with a sentence that sufficiently denounces the gravity of the offence, but that does not exceed constitutional limits by depriving every offender of any possibility of parole from the outset."[101] Two paragraphs later, however, he further states that "[w]here the offence of first degree murder is concerned, rehabilitation is already subordinate to the objectives of denunciation *and deterrence*, as can be seen from the severity of the punishment."[102]

These statements fail to clearly articulate why an offender who is convicted of first-degree murder is sentenced to a 25-year parole ineligibility period. It is obvious that a substantial portion of a minimum sentence for murder is grounded in a desert-based or retributive

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93 *Bissonnette*, *supra* note 14 at para 76.
94 *Ibid* at para 8.
95 *Ibid* at para 81.
96 *Ibid*.
97 *Ibid* at para 71.
98 *Ibid* at para 59, citing *Quebec (AG) v 9147-0732 Québec inc*, 2020 SCC 32 at para 51 [*Québec inc*].
99 *Bissonnette*, *supra* note 14 at para 9.
100 *Ibid* at para 85.
101 *Ibid* at para 86.
102 *Ibid* at para 88 [emphasis added].

conception of justice. Those who commit murder should have their conduct severely denounced given the morally reprehensible nature of their conduct. It would nevertheless be surprising if Parliament was held to enact the minimum sentence without also seeking to deter the offender and others from committing murder. Indeed, deterrence is widely recognized as an animating purpose of minimum sentencing laws despite its questionable efficacy.[103] It follows that some duration of a minimum sentence should be accounted for by the deterrence principle. Whether rehabilitation should be subordinate to both of these principles under *Charter* analysis is nevertheless inconsistent with the Supreme Court's other jurisprudence. As it concluded in *Bissonnette*, "[o]ffenders who are by chance able to rehabilitate themselves must have access to a sentence review mechanism after having served a period of incarceration that is sufficiently long to *denounce* the gravity of their offence."[104]

The deterrence portion of any minimum sentence further strikes me as logically being an add-on to the sentence required to denounce the offender's conduct. This is because denunciation and deterrence serve different ends: the former is backward looking as it seeks to impose consequences for conduct based on its inherent wrongfulness, while the latter is prospective and seeks to achieve a public policy goal of crime reduction. Given these distinct purposes, the portion of any sentence attributed to each sentencing principle should be divisible in the way I suggest. Moreover, only denunciation seems morally necessary as a response to crime as many other policy objectives may be pursued to reduce criminal violations. Indeed, rehabilitation itself is one of those means to reduce crime as a reformed offender will necessarily have addressed criminogenic attitudes and behaviours. If rehabilitation must be given effect after the denunciatory portion of a sentence is satisfied as the Supreme Court says,[105] the question arises: how should the *Charter* analysis distinguish between the roles of deterrence and rehabilitation?

Before considering that question, it is worth responding to a potential objection to my proposed division of labour when assessing the constitutionality of a sentencing provision. It is likely true that the vast majority of judges do not divide the retributive and utilitarian parts of the sentences they impose in the manner that I suggest in the normal course of sentencing. This is unsurprising given the absence of such a requirement in the *Criminal Code* and the heavy workload of sentencing judges more generally. However, when assessing a law's constitutionality, the *Charter* requires that some types of reasons fit under the rights stage of the analysis and others under section 1 of the *Charter*. As I explain below, not only is the idea of deterrence incompatible with the purpose underlying section 12, deterrence-based reasoning is precisely the types of means-ends policy argument that ought to be proven by the *state* if it wishes to deprive a person of liberty. This is especially important, I maintain, in light of the questionable efficacy of the general deterrence principle.

B. DETERRENCE AND SECTION 1

In the Supreme Court's seminal decision in *Smith*, Justice Lamer (as he then was) concluded that distinct purposes are served at the rights and justificatory stages of analysis

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[103] See e.g. *R v Nur*, 2015 SCC 15 at paras 112–15 [*Nur*].
[104] *Bissonnette*, *supra* note 14 at para 85 [emphasis added].
[105] *Ibid*.

when considering the constitutionality of a punishment provision under the *Charter*.[106] "In assessing whether a sentence is grossly disproportionate," Justice Lamer wrote,

> the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.[107]

While this means that "[t]he other purposes which may be pursued by the imposition of punishment … [are] thus not relevant at [the section 12] stage of the inquiry," it does not follow that "the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence."[108] Instead, "[i]f a grossly disproportionate sentence is 'prescribed by law', then the purpose which it seeks to attain will fall to be assessed under s. 1."[109]

The Supreme Court subsequently abandoned this rough division of labour between retributive-based and deterrence-based sentencing considerations under the *Charter*.[110] As Kent Roach observes, it is unfortunate that no reasons were given for this change in position.[111] I elsewhere agree and suggest that the Supreme Court's switch in analytical method is mistaken for two reasons.[112] First, placing deterrence at the section 1 stage of analysis makes sense logically as increasing a sentence beyond what is deserved based on the offender's conduct and personal circumstances as a means to deter the offender or other potential offenders from committing crime uses the offender as a means to an end. The section 1 test is concerned with precisely these types of questions as the analysis "is specifically tailored to consider policy reasons for violating individual rights, including (and perhaps most commonly) arguments pertaining to whether the state is able to use the criminal law as a means to achieve its ultimate aim of crime reduction."[113] Second, considering deterrence at the section 1 stage ensures a comprehensible role for section 1 of the *Charter* in section 12 cases. Indeed, the Supreme Court has long struggled to identify a role for section 1 in the section 12 context despite consistently maintaining that such a role may exist.[114]

This position is bolstered by considering why deterrence itself is difficult to cohere with the purpose of section 12 of the *Charter*: respecting the dignity interests of those subjected to state sanction.[115] In essence, legislatures and courts that rely on the deterrence principle to justify increasing punishments violate the categorical imperative that Immanuel Kant famously outlined: it is impermissible to use people as a means to an end.[116] People instead

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106 *Smith*, *supra* note 67.
107 *Ibid* at 1073.
108 *Ibid*.
109 *Ibid*.
110 See Fehr, "Piece of the Puzzle", *supra* note 15 at 71–72, citing *R v Morrisey*, 2000 SCC 39 at para 45; *Nur*, *supra* note 103 at para 45; *Hills*, *supra* note 2 at para 161; *Hilbach*, *supra* note 2 at para 72. See also *R v Latimer*, 2001 SCC 1 at para 86 [*Latimer*].
111 Kent Roach, "Crime and Punishment in the *Latimer* Case" (2001) 64:2 Sask L Rev 469 at 483.
112 Fehr, "Piece of the Puzzle", *supra* note 15 at 70–74; Fehr, "Over the *Hills*", *supra* note 3 at 414–18.
113 Fehr, "Piece of the Puzzle", *supra* note 15 at 71.
114 See e.g. *Nur*, *supra* note 103 at para 111; *Hills*, *supra* note 2 at para 121.
115 *Bissonnette*, *supra* note 14 at para 59, citing *Québec inc*, *supra* note 98 at para 51.
116 Immanuel Kant, *Groundwork of the Metaphysics of Morals: A German-English Edition*, revised ed by Jens Timmerman, translated by Mary Gregor (Cambridge: Cambridge University Press, 2011).

must be treated as ends in themselves. To do otherwise fails to treat them as individuals worthy of respect. Put differently, it fails to recognize their dignity as human beings. This inherent difficulty with deterrence has not gone unnoticed by sentencing scholars. Allan Manson and his co-authors, for instance, criticize deterrence for having "little regard for human dignity or autonomy in that it permits using individuals as a means to more collectivist ends."[117] If use of deterrence itself violates an offender's dignity interests by sentencing them to more time than deserved — thereby violating section 12 of the *Charter* — this can only reinforce the argument that the appropriate role for deterrence is at the section 1 stage of the analysis.

This point is perhaps most intuitive with the use of the general deterrence principle. Sentencing an offender to an increased sentence purely as a means to deter others instrumentalizes that offender in a way that fails to treat them as an individual worthy of respect. A similar occurrence nevertheless also arises with use of specific deterrence.[118] In these cases, something about the individual offender's personal circumstances results in the judge seeing a need to ramp up the punishment to persuade the offender not to commit crime in the future. However, the same unsavoury features about the offender giving rise to the desire to invoke the specific deterrence principle are also relevant to assessing the deserved punishment for an offender. Put differently, these factors are accounted for when imposing the denunciatory portion of an offender's sentence pertaining to the offender's personal circumstances but are given an additional, secondary weight when they are relied upon to specifically deter the offender from committing future crime. It follows in my view that the offender is still being sentenced beyond what they deserve and therefore are being impermissibly treated as a means to achieve the state's crime control end.

C. A BROADER ROLE FOR REHABILITATION

Courts and scholars have not yet attached constitutional significance to the problems with using deterrence as a sentencing principle. For present purposes, however, relegating deterrence to the section 1 stage of analysis can reveal something about the appropriate role of rehabilitation in the constitutional analysis. If rehabilitation is to serve a role under section 12 of the *Charter*, it would appear to operate — at least with respect to serious crimes like first-degree murder — somewhere between the need to denounce the offender's conduct and the state's interest in deterring crime. This follows for two reasons. First, an emphasis on rehabilitation is clearly in the offender's interest and will serve as a means to reduce the harshest component of a sentence. Rehabilitation therefore does not seem relevant under section 1 as the state under that section will in all imaginable scenarios be trying to justify harsher sanctions. Second, the Supreme Court held in *Bissonnette* that courts and legislatures may prioritize denunciation over other sentencing principles like rehabilitation.[119] This is prudent especially with respect to serious crimes like murder as justice properly demands a serious consequence for such offences. In these cases, the rehabilitation principle should therefore arise in the analysis after the offender's conduct is adequately denounced but be subject to any proven need to deter the offender or other individuals from committing the

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[117] Allan Manson et al, *Sentencing and Penal Policy in Canada: Cases, Materials, and Commentary*, 4th ed (Toronto: Emond Montgomery, 2024) at 5.

[118] For a definition of specific and general deterrence, see *R v BWP*, 2006 SCC 27 at para 2.

[119] *Bissonnette*, *supra* note 14 at para 88.

offence at issue. This is precisely the reasoned balance struck by Parliament's initial decision to enact the faint hope clause regime.

It should nevertheless be acknowledged at the outset that the conclusion that a 15-year sentence adequately denounces a first-degree murder is difficult to establish given the unsurprisingly limited sentencing jurisprudence for first-degree murder.[120] Justice Crossin's support for this conclusion in *Mariani* is nevertheless not unreasonable based on international experience, at least with respect to the least blameworthy first-degree murderer.[121] Similarly, subjecting such an offender to serve an additional ten years of prison for reasons pertaining to deterrence does not seem unreasonable if the offender has not reformed and poses a reasoned risk of reoffending. The need to specifically deter that offender by way of continued penal sanction may justify this position with respect to at least some offenders. Those who successfully apply for early release under the faint hope clause are nevertheless by definition reformed enough that it is difficult to comprehend how specific deterrence is relevant to their circumstances. Similarly, it is unclear how any general deterrent effect would accrue by continuing to imprison such an offender.[122]

If these suggestions are persuasive, I suggest that the *Mariani* court was on the wrong "track" when considering the constitutional effect of Parliament's decision to *de facto* repeal the faint hope clause. This follows because the severity of the sentence being unconstitutional based on principles of just deserts is far from evident in the hypothetical scenario relied upon by Justice Crossin. Indeed, there is no attempt to apply all the relevant principles of sentencing to that offender to determine the deserved sentence despite the fact that the offender aided a murder on behalf of a criminal organization, a substantial aggravating factor by any measure.[123] Instead, use of deterrence should constitute unconstitutional punishment because it instrumentalizes the individual for the purpose of forwarding the state's crime control objective. As such an increased deprivation of liberty treats the individual as a means to an end, it should be inconsistent with the second category prohibiting punishments that are "intrinsically incompatible with human dignity."[124] Understood this way, any use of a sentencing objective that totally denies the offender's human dignity should for that reason alone be declared violative of section 12 of the *Charter*.

This is not the first time that I have suggested that there is a constitutional flaw with the use of deterrence in the criminal law. In a previous article in the *Alberta Law Review*, I contended that the inclusion of general deterrence as a sentencing principle in section 718(b) of the *Criminal Code* violated the arbitrariness principle of fundamental justice constitutionalized under section 7 of the *Charter*.[125] In essence, I unpacked the Supreme Court's sound observation that "[e]mpirical evidence suggests that mandatory minimum

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120 The presence of a minimum sentence that was upheld by the Supreme Court attenuated any consideration of what the proportionate sentence would be for first-degree murders if subjected to the principles of sentencing.

121 MacKay, *supra* note 21 at 2, 6–7; John Howard Societies, *Bill S-6*, *supra* note 45 at 3–4.

122 I expand upon the substantial limitations of general deterrence below.

123 *Criminal Code*, *supra* note 6, s 718.2(a)(iv).

124 *Bissonnette*, *supra* note 14 at para 60.

125 Colton Fehr, "Instrumental Rationality and General Deterrence" (2019) 57:1 Alta L Rev 53 [Fehr, "General Deterrence"].

sentences do not, in fact, deter crimes"[126] and applied the same rationale to judges applying the general deterrence principle on a case-by-case basis.[127] I found no persuasive evidence that a judge attempting to use general deterrence in a courtroom would be any more efficacious than Parliament invoking the principle by virtue of passing a minimum sentence. It follows that section 718(b) of the *Criminal Code* arbitrarily permits judges to deny liberty by increasing a sentence without any evidence that they will achieve their aim of crime reduction. I stand by the empirical review in that article and suggest that general deterrence should only be given weight at the section 1 stage of analysis if evidence establishes that it is reasonable to believe increasing an offender's sentence will actually deter the specific crime at issue. I remain pessimistic about that prospect, but empirical study could well prove a general deterrent effect in some contexts.[128] It is certainly not intuitive that the offence of murder would so qualify.[129]

The sentencing principle of specific deterrence is more clearly relevant when considering a faint hope clause application despite scholars raising similar questions about the empirical efficacy of that sentencing principle.[130] If an offender has not made substantial attempts at personal reform by the 15-year point of their sentence, it strikes me as legitimate to require further prison to be served as a means to send a message to the offender that the risk of them committing further offences must be better addressed if they wish to receive parole. The intuitive fact that this public safety concern is best achieved by the offender taking the necessary rehabilitative steps demonstrates a logical link between specific deterrence and rehabilitation that figured prominently in prior faint hope applications. This was evident from the factors that juries were required to balance when deciding whether to grant the offender's application. In particular, the offender's character and conduct while imprisoned were central considerations in determining whether a faint hope application ought to be awarded.[131] It is nevertheless notable that the nature of the offence giving rise to their sentence was also a relevant factor as were the views of victims.[132] As I suggest below, however, it is unclear whether these factors should be considered by the jury determining the faint hope application.

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126 *Nur*, *supra* note 103 at para 114, citing Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Justice 143; Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings" (2009) 38:1 Crime & Justice 65; Anthony N Doob & Carla Cesaroni, "The Political Attractiveness of Mandatory Minimum Sentences" (2001) 39:2/3 Osgoode Hall LJ 287 at 291.

127 For a review, see Fehr, "General Deterrence", *supra* note 125 at 56–60; Fehr, "Piece of the Puzzle", *supra* note 15 ("[t]hese [empirical] concerns relate to whether offenders are aware of increased punishments for targeted crimes, factor distant punishments into account the same way as immediate costs, and whether deterrent effects inherent to the prospect of being caught committing a crime can be satisfactorily separated from those alleged to accrue from increased punishments" at 73).

128 It is notable that courts have held that certain offences may be more susceptible to a general deterrent effect: see e.g. *R v Gray*, 1995 CanLII 18 at 22; *R v Drabinsky*, 2011 ONCA 582 at paras 159–60; *R v Fulcher*, 2007 ABCA 381 at para 44 (large-scale frauds); *R v Proulx*, 2000 SCC 5 at para 129 (drinking and driving); *R v D(D)*, 2002 CanLII 44915 at para 34 (ONCA) (sexual abuse of children); *R v Mantha*, 2001 CanLII 12056 (QCCA) (certain types of drug traffickers); *Latimer*, *supra* note 110 at para 86 (highly publicized crimes).

129 Fehr, "Piece of the Puzzle", *supra* note 15 at 73–74 (considering whether a certain type of offender — the "elderly offender" — might be deterred by the minimum sentence for first-degree murder).

130 See e.g. Clayton C Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis, 2020) at §1.39 ("[t]he rationale for deterrent sentencing is equally weak when applied to the offender as it is when applied to potential offenders, or to society at large"); Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 44.

131 *Luxton*, *supra* note 8 at 720.

132 *Simmonds*, *supra* note 28 at para 20.

The means to address these concerns, I suggest, can be more rationally dealt with by amending other aspects of the faint hope clause regime.

IV. REMEDYING THE BREACH

If the *de facto* repeal of the faint hope clause is unconstitutional, remedying the breach does not necessarily require that courts strike down the minimum sentence for first-degree murder. Instead, the faint hope clause regime may be constitutionally resuscitated by striking down the two provisions of the 2011 amendments that resulted in its *de facto* repeal. The first is section 745.6(1)(a.1) of the *Criminal Code* which states that any offence of "murder or high treason" to which the faint hope clause applies must have been "committed … before the day on which this paragraph comes into force." Second, section 745.01(2) of the *Criminal Code* provides that the faint hope clause regime "does not apply if the offender is convicted of an offence committed on or after the day on which this subsection comes into force." If those sections are inoperative, it is far from evident, in light of the reasoning in *Luxton*, that the minimum parole ineligibility period for first-degree murder results in a grossly disproportionate sentence.

Resuscitation of the faint hope clause nevertheless would not necessarily mean that the first-degree murder minimum parole ineligibility period is no longer constitutionally vulnerable. It would still be necessary to consider the actual scope of both the constructive modes of first-degree murder considered in *Luxton* and other modes since added to the *Criminal Code*.[133] It is also notable that no reasonable hypothetical circumstances were deployed in *Luxton* and no consideration was given to the social science evidence now demonstrating the profound impact of long-term incarceration on individual offenders.[134] As Marieke Liem and Maarten Kunst observe in their seminal study, these effects are similar to those associated with post-traumatic stress disorder. Equally important, they observe other effects including "institutionalized personality traits (distrusting others, difficulty engaging in relationships, hampered decision-making), social-sensory disorientation (spatial disorientation, difficulty in social interactions) and social and temporal alienation (the idea of 'not belonging' in social and temporal setting)."[135]

These impacts of long-term sentences should also be considered alongside another important factor that went unanalyzed in *Luxton*: the application of section 718.2(e) of the *Criminal Code*. Often referred to as the *Gladue* principle,[136] the provision states that "all available sanctions, other than imprisonment, that are reasonable in the circumstances …

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133 *Criminal Code*, *supra* note 6, s 231.

134 *Mariani*, *supra* note 5 at paras 77–124. It is particularly notable that early research dismissed any significant impact of long-term imprisonment on individuals but research from the twentieth century has found profoundly negative effects: see e.g. Susie Hulley, Ben Crewe & Serena Wright, "Re-Examining the Problems of Long-Term Imprisonment" (2016) 56:4 Brit J Crim 769 at 774; Craig Haney, "The Psychological Impact of Incarceration: Implications for Postprison Adjustment" in Jeremy Travis & Michelle Waul, eds, *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families, and Communities* (Washington: Urban Institute Press, 2003) 33; Adrian T Grounds, "Understanding the Effects of Wrongful Imprisonment" (2005) 32 Crime & Justice 1; Marieke Liem & Maarten Kunst, "Is there a Recognizable Post-Incarceration Syndrome Among Released 'Lifers'" (2013) 36 Intl JL & Psychiatry 333.

135 Liem & Kunst, *supra* note 134 at 336.

136 *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*].

should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[137] The Supreme Court first interpreted this provision in *Gladue* and then later in *R. v. Ipeelee*.[138] In so doing, the Supreme Court affirmed that section 718.2(e) is a response to the history of colonialism and the resulting gross disparity between incarceration rates of Indigenous people and other demographic groups. As the Supreme Court affirmed, "[f]ailing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*."[139] As colonialism regularly provides context for understanding why many Indigenous people commit criminal offences, the *Gladue* provision can be expected to apply in murder cases as a means to attenuate the offender's moral blameworthiness and thereby place downward pressure on the appropriate sentence. This in turn could widen the gap between the applicable minimum sentence and the proportionate sentence. As I argue in detail elsewhere, the failure to consider the *Gladue* principle alongside the harsh effects of long-term imprisonment revealed by social science research raises a strong case for declaring the minimum sentence for first-degree murder unconstitutional.[140]

In my view, however, it is preferable to adopt a more restrained approach to judicial review in cases like *Mariani* where a fulsome evidentiary record to bolster these arguments was not available to the sentencing judge. Indeed, the type of evidence that I referred to earlier would likely require substantial resources be devoted to expert witnesses which some offenders simply may be unable to afford. It is also prudent to consider specific arguments about the constitutionality of the faint hope clause amendments in light of the fact that some scholars view the Supreme Court's decision in *Bissonnette* as rendering any challenge to the minimum sentences for murder unlikely to succeed.[141] While I think these provisions ought to be declared unconstitutional, Lisa Kerr has notably maintained that the *Bissonnette* decision in particular "makes it much more difficult to conceive of a successful challenge to the 25-year period of parole ineligibility that now applies, once again, in all cases of first-degree murder."[142]

It may nevertheless be objected that my proposed conclusion will force the courts to continue faint hope applications contrary to Parliament's clear intent. While a legitimate concern, it is mitigated by the fact that Parliament is capable of responding in a manner that provides a more nuanced balancing of the relevant penal interests.[143] For instance, it may be prudent to discontinue setting a bright line period for when a faint hope application can first be brought by all offenders. While a minimum period might be set, sentencing judges could be allowed to explicitly decide both the length of the parole ineligibility period and when the offender should be permitted to apply for a faint hope application based on the gravity of the

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137 *Criminal Code*, *supra* note 6, s 718.2(e).

138 2012 SCC 13.

139 *Ibid* at para 73 [emphasis in original].

140 Fehr, *Rethinking Homicide*, *supra* note 4 at ch 7. In so doing, I build on the work of, among others, Grant, *supra* note 13, Metcalfe, *supra* note 13, and Purser, *supra* note 13.

141 Lisa Kerr, "Dignity Cannot be Totally Denied: The Limits of Bissonnette" (2022) 81 CR (7th) 330; Archibald Kaiser, "*Bissonnette*: Another Step Forward, After the Harper Decade of Regression in Sentencing" (2022) 81 CR (7th) 343.

142 Kerr, *supra* note 141 at 331.

143 I do not think a suspended declaration of invalidity is appropriate following the Supreme Court's most recent jurisprudence on point: *Ontario (AG) v G*, 2020 SCC 38 at paras 117–39.

offence. The sentencing judge will be in the best position to determine this date as they can explicitly determine when the denunciatory portion of the offender's sentence is served. After that point, the offender should be able to apply for a faint hope application with any rehabilitative steps taken being given primary consideration in determining whether the offender should be permitted to apply for early parole.

The point at which a faint hope application is permitted should be relatively flexible to account for the broad range of circumstances that currently come within the scope of the first-degree murder offence. An illustrative case is the Ontario Court of Appeal's decision in *White*.[144] The 18-year-old offender and an accomplice decided to rob the victim. During an ensuing chase, the accomplice placed the victim in a "bear hug" and the offender proceeded to stab the victim twice resulting in his death.[145] In convicting the offender of first-degree murder, the Ontario Court of Appeal observed that "[b]y means of the bear hug, [the accomplice] dominated [the victim] and rendered him defenceless as [the victim] attempted to escape. It was only after [the accomplice] restrained and controlled [the victim] that [the offender] proceeded to stab him."[146] In these circumstances, Justice Simmons held for a unanimous bench that "the bear hug and the killing were patently distinct criminal acts."[147] It followed that the murder occurred "while committing" the offence of forcible confinement which raised the murder from second-degree to first-degree under section 231(5)(e) of the *Criminal Code*. Permitting an earlier faint hope clause application, perhaps at the ten-year mark, may prevent cases like *White* being used to bolster a constitutional challenge to the current minimum sentence for first-degree murder.

My approach to reconstructing the faint hope clause regime is also prudent because it avoids conflating the task of determining whether an offender can be safely released in the community with the task of determining the point at which the offender's conduct has been sufficiently denounced. As is implicitly recognized in the Canadian justice system, determining the appropriate punishment for an offender is a task that jurors are not well equipped to undertake. While the *Criminal Code* allows juries to recommend an increased period of parole ineligibility for an offender convicted of second-degree murder, this provision is both exceptional, in that it does not apply to any other offences, and is of minimal impact, in that any recommendation need not be followed by the sentencing judge.[148] Allowing the judge to determine the faint hope application date therefore removes from the jury a consideration that they are not well-placed to make: determining the point at which an offender's conduct is adequately denounced so that the rehabilitation principle ought to begin to impact the way in which the offender's sentence is served. At the same time, a judge will be ill-equipped to determine whether an individual will rehabilitate at any point during a long-term sentence. Leaving that consideration to the jury and parole board who will have the benefit of hindsight when making the decision strikes me as eminently reasonable.

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144 *White*, *supra* note 56.
145 *Ibid* at paras 1–9.
146 *Ibid* at para 107.
147 *Ibid*.
148 *Criminal Code*, *supra* note 6, s 745.2.

V. CONCLUSION

The repeal of the faint hope clause in 2011 provides one of many reasons to reconsider the constitutionality of the minimum sentence for first-degree murder. Before addressing that question, however, it may be necessary to consider whether the faint hope regime can be constitutionally resuscitated. Such an approach is prudent in a case like *Mariani* wherein the available evidence did not adequately speak to the factors relevant to determining whether the minimum sentence for first-degree murder is unduly severe. By challenging the constitutionality of the faint hope clause's *de facto* repeal, I have offered a more moderate pathway for addressing any injustice arising from the application of the minimum sentence. Such a challenge further allows for a broader consideration of the appropriate role of denunciation, rehabilitation, and deterrence within the *Charter* framework. By clearly identifying each principle's relevant place, it is possible to develop a further challenge to the role of deterrence in sentencing while also ensuring a more robust role for the rehabilitation principle when applying section 12 of the *Charter*.