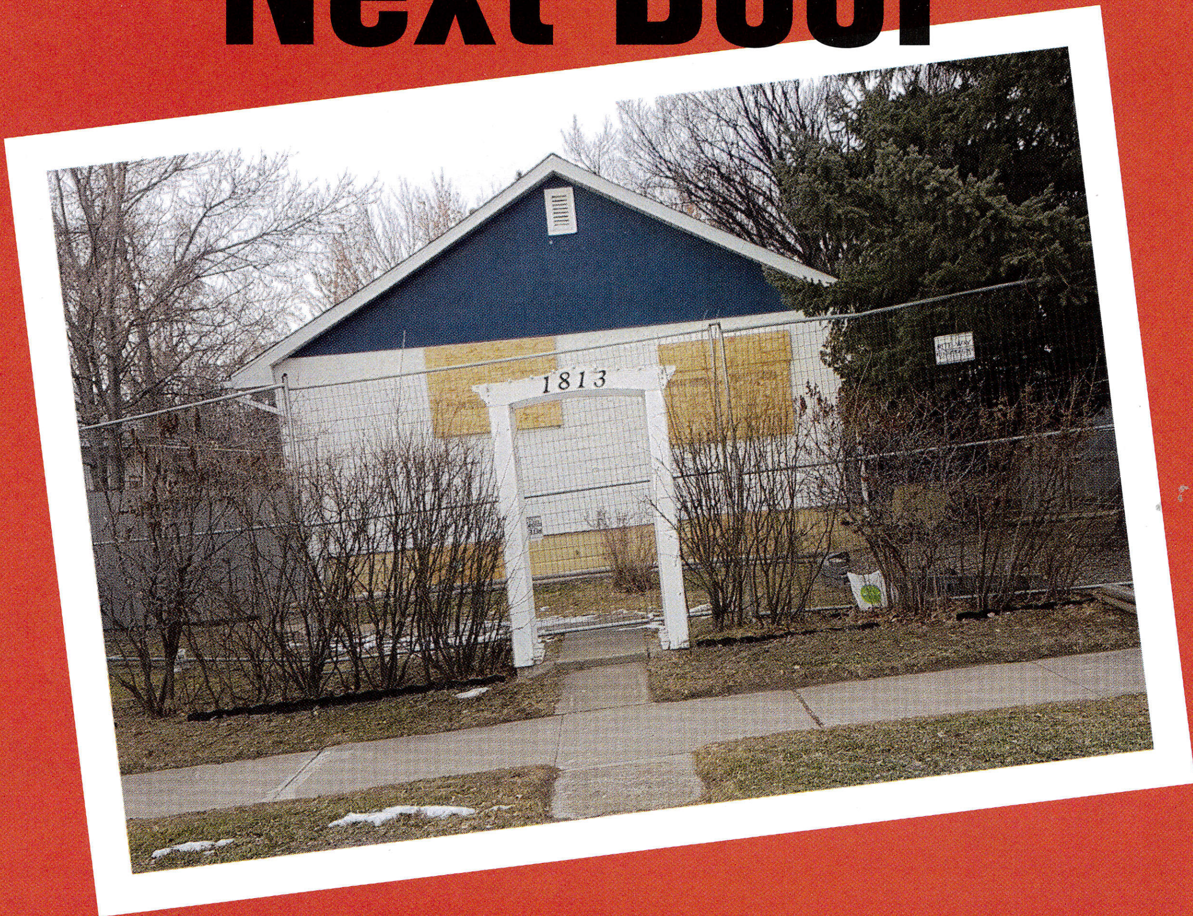
MANDATORY MINIMUM SENTENCES: PRO VS CON | **4-H ENDURES AS AGRICULTURE CHANGES** | **LOCAL TRAVEL: WHERE TO GO, WHAT TO EAT**

albertaviews

NEW PERSPECTIVES FOR ENGAGED CITIZENS // JUNE 2019

The Drug House Next Door



Too easy to shut down?

PM40024877

LISA SILVER
The U of C assistant professor of law

SAYS NO

OUR LEGAL SYSTEM IS A REFLECTION OF WHO WE are as a society. The values at the core of that system promote fairness and justice. These may be lofty terms, but they engage deep personal feelings in us. Our community sense of justice and fairness is a cornerstone of our democracy. These values anchor us and give our daily lives meaning. Without a fair and just legal system, our moral compass may be at risk. Mandatory minimum sentences run contrary to these core values, as their use does not promote justice. Rather, it leads to injustice.

Mandatory minimum sentences are counterintuitive. The basic principle of a just and fair sentence is that the punishment must fit the crime. This concept of proportionality—that the punishment reflect the gravity of the offence and the responsibility of the offender—is at risk when mandatory minimum penalties are used. Minimum sentences are fixed and immovable. They cannot respond to an offender who is less blameworthy or a crime which has mitigating circumstances.

Another solemn aspect of our legal system is judges who not only know the law but dispense it carefully, taking into account the nuances of the particular case. They hear witnesses, listen to lawyers' submissions, read sentencing reports and can best determine the just outcome. Sentencing judges use all their craft to delicately balance all the various sentencing factors, including the public interest, to arrive at a fair sentence. Without the exercise of this discretion, sentencing devolves into a mathematical exercise. Mandatory minimums don't allow for the personal factor. They don't give the judge full rein of their abilities to impose a fit and just sentence. Rather, the mandatory imposition of a minimum sentence permits an unduly harsh sentence without a judge's considered input.

Our cherished fundamental principle of justice, the presumption of innocence, is undermined by mandatory minimum sentences. Such sentences mar our legal system by creating an incentive for improper guilty pleas. Faced with an offence carrying a mandatory minimum punishment, an otherwise innocent person might agree to enter a plea of guilty to a lesser offence which does not carry such a harsh penalty. Better to take the known than run the risk of the unknown. Yet such an occurrence defeats the very purpose of justice.

Winston Churchill noted that "the mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country." Meaningful punishment can't be imposed in a vacuum nor by a push of a button. What our justice system needs is not more contrived responses to pressing concerns. What it needs is sentencing that responds to the specific offence and the specific offender by applying the appropriate sentencing principles. What our system does not need is a mechanical application of justice without thought or logic. We need a touch of humanity in sentencing. That is the true test of our democratic ideals.

DIALOGUE

People who disagree engage in a respectful exchange

Should there minimum

e mandatory entences?

LINCOLN CAYLOR
The partner at Bennett Jones LLP

SAYS YES

THE SEPARATION OF GOVERNMENTAL POWERS into legislative, executive and judicial branches has safeguarded against state abuses more effectively than perhaps any other political doctrine. But a side effect is fractious boundary disputes. Among the most hotly contested such skirmishes in recent Canadian history is Parliament's increased reliance on mandatory criminal sentencing tools (most notably, mandatory minimum sentences) and some judges' inventive, bold and arbitrary manoeuvering to avoid applying them.

Parliament is authorized to enact sentencing laws, such as mandatory floors or ceilings. Historically it has left most day-to-day sentencing decisions to judges. In the 1990s, however, the Chrétien government spearheaded one of the largest-ever enactments of mandatory minimums. Then, starting in 2008, the Harper government toughened mandatory penalties on the books and imposed escalating minimums for some repeat offenders. The result was well-publicized inter-branch friction.

Courts can strike down any law that violates the Charter; s. 12 guarantees citizens the right "not to be subjected to any cruel and unusual treatment or punishment." The courts have held that sentencing laws will violate that right if they're "so excessive as to outrage standards of decency" or "grossly disproportionate to what would have been appropriate." That nebulous language defines the fragile boundary between Parliament and the judiciary on sentencing law.

The rule of law requires that all laws be certain, accessible, intelligible, clear and predictable. A rule of law problem arises every time a judge ignores a law on the books without striking it down as unconstitutional, or distorts section 12 to carve out more judicial discretion. Judges are legally and ethically bound to apply Acts of Parliament and uphold the rule of law.

Mandatory minimums are merely Parliament's answer to the question "What sentence is appropriate for the least morally culpable person whose behaviour satisfies an offence's elements?" Parliament is neither omniscient nor infallible. It can, and has, imposed inappropriately severe sentences. That is not a frailty of mandatory minimums—judges regularly mete out inappropriately severe (or, more often, lax) sentences. If mandatory minimums remain within the constitution's boundaries, they create a stable sentencing range in which judicial discretion can be exercised. Equally, judges must act within the proper scope of their powers. The will of Parliament, within its constitutional bounds, must be respected.

In *R. v. Ferguson* the Supreme Court stressed the importance of protecting the jurisdictional boundary between Parliament and the judiciary on sentencing laws. The rule of law must remain paramount. Neither Parliament nor judges should have absolute discretion on sentencing. Each branch must hold the other to account. Canadians cannot let political expediency or instrumentalist partiality erode the separation of powers.

SAMANTHA LUCY

LISA SILVER RESPONDS TO LINCOLN CAYLOR

FORMER CHIEF JUSTICE OF THE SUPREME COURT OF Canada Antonio Lamer remarked in the 1987 *Vaillancourt* decision that "the courts have the jurisdiction and, more important, the duty" to review legislation to ensure it is consistent with our principles of fundamental justice as enshrined in the Charter. In short, no one, not even our lawmakers, is above the law. As past experience has taught us, we need judicial oversight to ensure a safe, just and democratic society. Tyranny knows no boundaries, and our judges, through their exercise of judicial oversight, ensure every citizen can live their life free of unreasonable state intrusion.

Judges, as independent and impartial protectors of the law, fulfill an important function in Canadian society. Our legally trained decision-makers swear an oath to uphold and apply our laws, even if their decisions are unpopular. Law should not bend to public opinion or parliamentary favour. Law should not be taken lightly, nor should it be characterized as a turf war.

A judge should be free to fashion a just and appropriate sentence with no mandated minimum.

The real issue here is whether mandated minimum sentences have any place in our justice system. Sentencing is, as Chief Justice Lamer later described in 1996's *C.A.M.* case, "a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community." Thus, sentencing requires a balancing of well-regarded legal principles which take into account the entire field of sentencing considerations involving the circumstances of the offence and the offender as well as objectives of sentencing such as denunciation, deterrence, rehabilitation and retribution. In this principled approach there is room for mandatory minimum penalties, but to be used sparingly and only for those crimes that society deems exceptionally egregious and blameworthy, such as murder.

A person convicted of murder receives an automatic life sentence. This sentence, however, is legally and constitutionally justified, as the punishment is proportionate to the high moral blameworthiness of a person who intentionally kills another. Additionally, the stigma attached to that crime is very high. There is no person more reviled than a murderer. The same cannot be said for a person who produces marijuana, yet, until a judge found it unconstitutional, that offence, in certain circumstances, attracted a mandated minimum sentence. Of course, Parliament, as it has the right to do, reconsidered the entire premise of our marijuana laws and revised them to better reflect societal mores and attitudes. Nevertheless, this very real mandatory sentencing scenario is a stark reminder of the chilling effect mandatory minimum penalties can have when attached to crimes that should not attract such a disproportionate response.

The sentencing judge applies a framework derived from s. 12 of the Charter, which considers whether the mandatory minimum sentence is grossly disproportionate to the offence. This test is clearly described in case law and easily applied. The consideration is whether such a sentence would be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable." The judge considers reasonable hypotheticals or other factual scenarios, which may be subject to the mandated sentence. For instance, in the case of producing marijuana, the *Elliott* appeal court, in striking down a mandated minimum sentence of six months, considered the unfairness in imposing such a sentence for a 19-year-old university student with no criminal record who grows six marijuana plants in his basement apartment for use by him and his friends. In that factual scenario, the mandatory sentence cannot be tolerated in a right-minded society. Such a sentence properly fails as constitutionally invalid.

With no mandated minimum the sentencing judge is free to fashion a just and appropriate sentence based on long-held sentencing principles as enshrined in our Criminal Code and as constrained by common law. Even this discretionary sentence is subject to further judicial oversight by our appeal courts. Sentences must not only be proportionate but must be consistent with the range of sentences imposed for similar offences. In this way, discretion is bounded by the rule of law but not fabricated artificially from unsupportable and arbitrary lines drawn by our elected lawmakers. Mandatory minimum sentences, except for those most serious offences, are simply unnecessary.

Winston Churchill made an impassioned plea for offenders' rights in the House of Commons when he was Home Secretary: "A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it."

Indeed, the mark of humanity is not the rigid application of unacceptable laws, but our fundamental and unwavering belief that every person has value and worth.

LINCOLN CAYLOR RESPONDS TO LISA SILVER

AN IMPARTIAL OBSERVER OF THE DEBATE IN Canada over mandatory sentencing tools may reasonably be perplexed by the absolute—and apparently irreconcilable—claims to the moral high ground made by both sides. Do restrictions imposed by Parliament on judicial discretion in sentencing create more certain and predictable sentencing ranges, fostering the rule of law—a fundamental postulate of our legal order? Or do those restrictions run contrary to our legal order's core values of justice and fairness by preventing judges from appropriately integrating mitigating circumstances into the sentencing equation?

Mandatory minimum sentences have been in the Criminal Code since its inception. Governments across the political spectrum have passed them, with one of the largest-ever enactments of mandatory minimums occurring under the Chrétien government. Yet the debate today has the appearance of two ships passing in the night. Parliament wrong—judges right. Parliament tough-on-crime—judges lenient. Conservatives versus Liberals. One must look beyond today's politically interested false dialogue and consider with clear eyes whether there is something about mandatory sentencing tools that is intrinsically contrary to justice and fairness.

A mandatory sentencing tool is any Parliamentary rule affecting the exercise of decision-making discretion by sentencing judges. These tools restrict judicial discretion by defining the extreme ends of the range of possible sentences. A mandatory maximum sentence creates a ceiling—the most severe penalty the most morally culpable convicted wrongdoer can receive for committing an offence. A mandatory minimum sentence creates a floor—the least severe penalty the least culpable convict can receive. These tools do not preclude judicial discretion. They merely establish at the outset the continuum along which mitigating factors can move sentencing judges towards more or less severe penalties.

Parliament has the authority to pass sentencing laws, including by setting the poles defining the continuum of reasonable sentences for an offence. That continuum exists because there is a variety of ways to commit most offences, with varying degrees of gravity and responsibility attached to the underlying behaviour.

Parliament can get the poles wrong. Human institutions, like humans, are neither infallible nor omniscient. They can be biased or act in error. Judges are equally susceptible to these frailties, but their mistakes are naturally case-by-case, potentially producing a highly problematic gap between the law as it exists on the books and the law as it is applied by the courts (and, in particular, by the courts in different parts of the country). In contrast, Parliament speaks with a single voice, so even its mistakes may possess the accidental rule-of-law virtues of clarity, certainty and predictability.

Deciding the moral culpability of a hypothetical offender who has committed the least grave version of an offence with the lowest degree of personal responsibility, as must Parliament in passing a mandatory minimum sentence, is not a mathematical process. Reasonable people can disagree. Most Canadians may accept that anyone who has committed first-degree murder should receive a life sentence (now the maximum sentence available, as Parliament has limited judicial discretion by removing capital punishment from the range of available sentences), but we may quibble, for any number of philosophical or informational reasons, about how long that offender should be denied the right to apply for parole.

Parliament has been granted the constitutional authority to wade into this murky territory and, if it so chooses, to set stakes in the ground concerning where the sentencing analysis must begin and end. If Parliament sets a stake perceived by enough people to be unreasonable, new parliamentarians may be elected to correct the issue. But our courts are only empowered to strike down a sentencing law if it violates the Constitution.

Even Parliament's mistakes may possess the accidental virtues of clarity, certainty and predictability.

Section 12 of the Charter recognizes an individual's right to be free from "cruel and unusual punishment." This nebulous but evocative phrase draws the constitutional line between Parliament and the courts on sentencing. It has been interpreted as requiring a sentencing law to be not merely disproportionate, but grossly disproportionate, before a court has jurisdiction to strike down the offending provision. This recognizes both Parliament's authority to pass sentencing laws and the nuanced, multifaceted policy analysis Parliament must undertake in setting a range of fit sentences.

Mandatory sentencing tools can and should be scrutinized for gross disproportionality, but they should otherwise be respected. The existence of degrees of gravity and responsibility for particular offenders or offences does not render arbitrary any restriction on judicial discretion. Sentencing laws must be certain, accessible, intelligible, clear and predictable. Mandatory sentencing tools promote those criteria. Sentencing has to consider what punishment our society deems adequate for the criminal behaviour in question, along with the circumstances of the convicted wrongdoer.

A mandatory minimum must generate sentences well outside a reasonable range before the rule of law and Parliament can be displaced. Critics who reject mandatory sentencing tools due to their opposition to a particular mandatory minimum—or, often, to the government that passed it—are allowing political expediency or instrumentalist partiality to subvert a valuable sentencing tool in use in Canada since Confederation.

(Caylor acknowledges the assistance of Gannon Beaulne.) ■