Editorial

Mandatory Sentences

Mandatory sentences have been universally condemned by law reform bodies, but remain politically attractive. As an article in this special issue on sentencing points out, we now have more mandatory sentences than at any time in our history. Recent cases suggest that the Supreme Court is not likely to strike these mandatory sentences down as an unjustified form of cruel and unusual punishment.

Major changes in sentencing and constitutional law explain the difference between the Supreme Court’s 1987 decision in *R. v. Smith* (1987), 34 C.C.C. (3d) 97 to strike down the seven-year mandatory minimum penalty for importing narcotics and its recent decision in *R. v. Morrisey* (2000), 148 C.C.C. (3d) 1 to uphold a four-year mandatory minimum for criminal negligence causing death with a firearm.

The court is now less inclined to strike down mandatory sentences on the basis that they could impose cruel and unusual punishment on reasonable hypothetical examples. In *Smith*, the court invalidated the importing minimum primarily on the basis that it could be applied to a young person bringing a joint of marijuana back from spring break. Now, even reported cases may be too far-fetched and extreme to be hypothetical examples. The court limited itself in *Morrisey* to commonly occurring examples such as deaths resulting from hunting trips and gun play without much attention to the different personal characteristics of offenders and their relation to the need to deter and rehabilitate those offenders — factors that played crucial roles in *Smith*.

The court’s increased attraction to American-style constitutional minimalism — deciding one case at a time — can also be seen in Justice Arbour’s concurrence where she suggested that while the mandatory penalty should be upheld, it may be unconstitutional on the facts of future cases. This is as-applied analysis commonly used in American courts. Although it did not reach the issue of constitutional exemptions, the court also defined the issue in *R. v. Latimer* (2001), 150 C.C.C. (3d) 129 on an as-applied basis. The court was not moved by mitigating factors in either *Morrisey* or *Latimer*, underlining that actual offenders will rarely be as sympathetic as the hypothetical teenager in *Smith*.
The broader and bolder approach in *Smith* can be defended because it still leaves Parliament plenty of options. Parliament could have re-tailored the mandatory penalty in *Smith* to apply only to big-time drug importers. A decision striking down the mandatory penalty for second degree murder would have allowed Parliament to construct a third degree of murder or simply allow departures from mandatory sentences in exceptional cases as is done in England. A decision striking down a mandatory penalty of four years for the unintentional causing of death in *Morrisey* would have left room to justify the penalty for intentional and malevolent crimes committed with a firearm.

The court has also become more deferential to Parliament when reviewing mandatory sentences. Its judgment in *Morrisey* resembles Justice McIntyre’s dissent in *Smith* to the extent that it defers to Parliament’s choice to stress some penal objectives (denunciation, retribution and even, in tension with *Smith*, general deterrence) over others and its reliance on the availability of parole to mitigate the seriousness of the penalty. In contrast, Justice Lamer in *Smith* held that general deterrence could not justify a mandatory sentence under s. 12 and did not rely on the availability of parole, perhaps in recognition that many who apply for it are not granted it.

*Smith* is a vintage example of an individualized approach to sentencing that determines what is cruel and unusual not only on the basis of what is necessary to punish, but what is necessary to deter and rehabilitate the offender. *Morrisey* at para. 54 reflects a more “just deserts” approach that focuses on denunciation of the crime and the provision of “retributive justice to the family of the victim and the community in general”. This is unfortunate because the Canadian Sentencing Commission opposed mandatory sentences other than for murder on the basis that they were insufficiently tailored to ensure a fit sentence that was deserved for the particular crime. When proportionality is recognized in *Morrisey*, it is in the form of Justice Arbour’s suggestion that all punishments should be ratcheted up in order to maintain proportionality in relation to the best offender caught by the minimum.

The court is also relying on *mens rea* as a measure of deserved punishment. The court takes pains to stress that a person will not be convicted of criminal negligence for accidentally causing death with a firearm. A marked departure that shows (but does not involve the accused’s advertence to) wanton and reckless disregard for either the life or safety of others is required. But the facts of the case — Morrisey’s gun discharges as he falls — suggest something closer to a careless accident. In any event, the fact that criminal negligence can justify a mandatory four years in the penitentiary suggests that just deserts may not serve as an effective limit on mandatory penalties for crimes short of absolute liability.

The court’s decision sits in tension to the promise made in *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 at p. 375 that a non-individuated standard of negligence not related to the prohibited act of causing death would be tempered by the wide sentencing discretion that comes with no
minimum penalty. "Near accident" manslaughter caused by firearms will be punished by four years' imprisonment. Hunters beware.

Morrisey suggests that the court is unlikely to stand in the way if Parliament continues to increase its use of mandatory sentences. It also suggests that Parliament can de-emphasize judicial concerns about the restorative aims of sentences — including concerns about rehabilitation and specific deterrence in relation to the personal characteristics of the offender — by the political expedient of adopting mandatory sentences. This will not only preclude the use of conditional sentences for the crime, it will also send a strong signal to the court that it is more important to deter and denounce and seek retribution for the crime than to be concerned about whether the mandatory sentence is necessary to punish, deter or rehabilitate the particular offender on the particular facts of the case.

The easiest and quickest way to Americanize our criminal justice system would be for Parliament to enact a raft of minimum sentence laws. Hopefully this is not a current political priority, but someday it might be. Smith stands as a testament to a distinctively Canadian and individualized approach to punishment — the seven-year minimum for importing struck down in that case would be a very lenient sentence south of the border. Morrisey, however, suggests that the court may well defer to a legislative crime control agenda that imposes mandatory sentences without regard to the particular circumstances of offenders and the facts of the particular case.

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