Hope for Murderers?  Lifelong Incarceration in Canada

by

Matthew Derek Spencer
B.A. University of Saskatchewan, 2009
J.D. University of Saskatchewan, 2014

A Thesis Submitted in Partial Fulfillment of the
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Supervisory Committee

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Abstract

This thesis explores the issue of lifelong incarceration in the Canadian context. Lifelong incarceration, defined as a criminal sentence which forecloses hope of prospective release from its outset, is a new sentencing option in Canada, only possible after legislative amendments enacted in 2011. Sentencing for murder in Canada is examined from a historical and comparative point of view to contextualize the issue of lifelong incarceration. An interdisciplinary approach is also used, drawing on the field of psychology to explore the meaning and importance of hope. I argue that all sentences in Canada should leave an offender with hope of prospective release. My argument situates hope within the principles of sentencing law codified in s. 718 of the Criminal Code as well as the Charter of Rights and Freedoms.
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervisory Committee</td>
<td>ii</td>
</tr>
<tr>
<td>Abstract</td>
<td>iii</td>
</tr>
<tr>
<td>List of Figures</td>
<td>viii</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>ix</td>
</tr>
<tr>
<td>Chapter One - Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Chapter Two - Methodologies and Theories</td>
<td>8</td>
</tr>
<tr>
<td>1. Introduction</td>
<td>8</td>
</tr>
<tr>
<td>2. Methodologies</td>
<td>8</td>
</tr>
<tr>
<td>a. Comparative Law</td>
<td>8</td>
</tr>
<tr>
<td>b. Law and Psychology</td>
<td>11</td>
</tr>
<tr>
<td>c. Criminology</td>
<td>13</td>
</tr>
<tr>
<td>3. Hope Theory</td>
<td>15</td>
</tr>
<tr>
<td>i. Goals</td>
<td>16</td>
</tr>
<tr>
<td>ii. Pathways</td>
<td>17</td>
</tr>
<tr>
<td>iii. Agency</td>
<td>18</td>
</tr>
<tr>
<td>iv. Barriers</td>
<td>19</td>
</tr>
<tr>
<td>v. The Risks of Hopelessness</td>
<td>20</td>
</tr>
<tr>
<td>4. Conclusion</td>
<td>21</td>
</tr>
<tr>
<td>Chapter Three – History of Murder Sentencing in Canada</td>
<td>22</td>
</tr>
<tr>
<td>1. Introduction</td>
<td>22</td>
</tr>
<tr>
<td>2. Murder Sentencing in Canada</td>
<td>23</td>
</tr>
<tr>
<td>a. The Royal Prerogative of Mercy</td>
<td>27</td>
</tr>
<tr>
<td>b. Questioning Capital Punishment</td>
<td>33</td>
</tr>
<tr>
<td>a. The Faint Hope Clause</td>
<td>41</td>
</tr>
<tr>
<td>b. <em>R. v. Luxton</em> – A Constitutional Challenge</td>
<td>45</td>
</tr>
<tr>
<td>6. Homicide Rates and Length of Time Spent in Custody</td>
<td>47</td>
</tr>
<tr>
<td>7. Changes to the Sentencing of Murderers Since 2011</td>
<td>48</td>
</tr>
</tbody>
</table>
Chapter Four – Emerging Jurisprudence under the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act* ................................................................. 51
1. Introduction........................................................................................................ 51
2. Elements of a Sentence under the *Multiple Murders Act* ................................. 51
3. Cases under the Multiple Murders Act .............................................................. 54
   a. *R. v. Baumgartner* ...................................................................................... 54
   b. *R. v. Bourque* .......................................................................................... 57
   c. *R. v. Vuozzo* ......................................................................................... 60
   d. *R. v. Husbands* ...................................................................................... 62
   e. *R. v. W.G.C.* .......................................................................................... 64
   f. *R. v. Bains* ............................................................................................. 64
   g. *R. v Koopmans* ...................................................................................... 66
   h. *R. v. O’Hagan and Another* ................................................................... 67
4. Conclusion ......................................................................................................... 68

Chapter Five – International Experiences with Lifelong Incarceration .................... 73
1. Introduction ....................................................................................................... 73
2. Benefits and Drawbacks of Lifelong Incarceration ........................................... 73
3. Lifelong Incarceration - A Global Overview .................................................... 76
   a. Life Sentences in Germany ......................................................................... 78
   b. Juvenile Life Without Parole in the United States .................................... 81
   c. Whole-Life Tariffs in the United Kingdom ................................................ 91
4. Conclusion ......................................................................................................... 100

Chapter Six – What is Hope? Lessons from Psychology ......................................... 102
1. Introduction ....................................................................................................... 102
2. The Legal Study of Hope .................................................................................. 102
   a. Law in the Cultivation of Hope ................................................................ 103
   b. Hope, Imprisonment, and the Constitution .............................................. 106
   c. Sentencing and the Salience of Pain and Hope ......................................... 108
3. The Importance of Freedom ............................................................................... 111
4. The Psychology of Hope .................................................................................. 114
   a. The Risks of Hopelessness ..................................................................... 114
5. What Should Hope of Prospective Release Look Like? .................................................. 123

Chapter Seven - Hope’s Location within the Sentencing Principles ........................................... 128
1. Introduction .......................................................................................................................... 128
3. Hope and the Section 718 Sentencing Principles ................................................................. 131
   a. Hope and Parity .................................................................................................................. 131
   ii. Hope and Parity - Future Directions .............................................................................. 134
   b. Hope and Rehabilitation ................................................................................................. 137
   c. Hope and Proportionality and Totality ......................................................................... 141
4. Conclusion .......................................................................................................................... 148

Chapter Eight – Hope as a Constitutional Principle ................................................................. 149
1. Introduction .......................................................................................................................... 149
2. The Charter and Sentencing Law .......................................................................................... 150
3. The Value of Considering Hope of Prospective Release under the Charter ......................... 151
   a. Aiding in Statutory Interpretation of the Multiple Murders Act ..................................... 151
   b. Impact on Extradition Cases ......................................................................................... 152
   c. Drawing on International Experiences ......................................................................... 153
4. Constitutional Challenges to Lifelong Incarceration ............................................................ 155
5. Lifelong Incarceration and Section 7 .................................................................................... 157
   a. The Contentions in Muhammad ‘Isa .............................................................................. 158
   b. R. v. Husbands – Lifelong Incarceration and Section 7 ................................................... 163
6. Lifelong Incarceration and Section 12 .................................................................................. 167
   a. Lifelong Incarceration and Maximum Sentencing Protection ....................................... 169
   b. Lifelong Incarceration and Minimum Sentencing ......................................................... 171
7. Conclusion .......................................................................................................................... 176

Chapter Nine - Moving Forward with Hope ............................................................................ 178
1. Proposed Legislative Reforms .............................................................................................. 178
   a. Renewal of the Faint Hope Clause ................................................................................. 179
   b. Codification of the Right to Hope ................................................................................. 182
   c. Alteration of Mandatory Minimum for Second and Subsequent Murders .................. 182
2. Concluding Thoughts............................................................................................................. 185
Bibliography ............................................................................................................................ 187
List of Figures
Figure 1 - Pathways ........................................................................................................... 17
Figure 2 - Barriers ........................................................................................................... 19
Figure 3 - Murder Sentencing in Canada ........................................................................... 25
Figure 4 - Homicide Rate in Canada 1963-2013 .............................................................. 47
Figure 5 - Average Time Spent in Custody Internationally ............................................. 48
Figure 6 - Multiple Murders Act Cases ............................................................................ 69
Figure 7 - Institutional Charges and Segregation for Murder and Non-Murder Inmates .... 120
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I dedicate this thesis to my brother, Michael and uncle, Kevin - while you left this earth too soon your presence in my life continues to be felt.

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October 2016
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Chapter One - Introduction
On June 4th, 2014, shortly after 7 p.m., 24 year old Justin Bourque began a walk through Moncton, New Brunswick. While ordinarily there is nothing unusual about seeing a young man walking on a warm summer evening, multiple residents called 911 after seeing Mr. Bourque. Camo-clad, armed with two guns and a hunting knife, it was clear he was not out for an evening stroll. Police officers began to arrive in response to the 911 calls. This was Mr. Bourque’s intention. Leaving civilians alone, Mr. Bourque ambushed the officers. In shootings spanning just 20 minutes, he left three dead and two more wounded before fleeing into nearby woods.

Canada stood on edge as Moncton sat still. Nearly 1,000 Royal Canadian Mounted Police (R.C.M.P.) officers converged as the city went into lockdown knowing a killer was on the loose. Twenty-eight hours later Mr. Bourque emerged from the woods to drink water from a backyard hose. After being spotted by a resident, a Transport Canada aircraft with infrared detection zeroed in on Mr. Bourque. Mr. Bourque was surrounded by a tactical unit with night vision goggles. Outnumbered, out-gunned and out of steam, Mr. Bourque threw down his weapons and surrendered.1

No one can dispute Mr. Bourque’s crime deserves a severe punishment as denunciation and retribution for his acts. The question that emerges is how serve can this punishment be? Chief Justice Smith sentenced Mr. Bourque to the maximum punishment available - life imprisonment with no parole eligibility for 75 years, a sentence Mr. Bourque has appealed. The sentence is the longest in Canadian history and if upheld Mr. Bourque will die before ever being eligible for a parole hearing.

Should Mr. Bourque’s crime condemn him to a life of incarceration, confining not only his physical body in the concrete and steel of a federal penitentiary but also binding his mind with the knowledge that he is left without promise of one day rejoining society, without a chance of redemption, without hope? Or should his sentence reflect the fundamental worth of the human person, recognizing that even perpetrators of the most abhorrent crimes deserve hope of one day being released from incarceration and regaining some meaningful autonomy in their lives? The decision of the New Brunswick Court of Appeal, and potentially the Supreme Court of Canada will answer this question. In providing this answer, the courts are addressing fundamental issues of how Canadian society views punishment.

The courts will also be considering the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act (Multiple Murders Act). The Multiple Murders Act was enacted in the midst of a Tough on Crime agenda trumpeted by the Conservative Government from 2006 until 2015. During this time the government enacted numerous crime bills which had effects such as creating mandatory minimum sentences, restricting credit for pre-trial detention and eliminating a form of early parole eligibility. Given the symbolic status of murder as the most serious crime, it comes as no surprise that while taking measures to increase the length of incarceration for other crimes the Government also passed legislation to make the

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2 Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, SC 2011, c 5 [Multiple Murders Act].
3 Several scholars have been critical of the Tough on Crime approach. Paula Mallea writes “[w]hen all the evidence is in, it is hard not to conclude that the Conservative approach to crime is at best misguided, and at worst likely to produce the opposite result from the intended one.” See Paula Mallea, Fearmonger - Stephen Harper’s Tough on Crime Agenda (Toronto: James Lorimer & Company, 2011) at 11. See also Benjamin Berger, “A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson” (2009) 47 Supreme Court Law Review (2d) 101; Debra Parkes, “The Punishment Agenda in the Courts” (2014) 67 Supreme Court Law Review (2d) 589.
sentence for murder longer and harsher. The *Multiple Murders Act* amended the *Criminal Code* to give sentencing judges’ discretion to make parole ineligibility periods consecutive in cases of multiple murders, up to 25 years per victim with no upper limit. Of nine offenders sentenced under this *Act*, Mr. Bourque is the only to receive the maximum sentence available and the only to receive a natural life sentence, a form of lifelong incarceration.

Lifelong incarceration is defined in this thesis as a criminal sentence which precludes realistic hope of prospective release from its outset. Lifelong incarceration comes in various forms with a variety of names – life without parole (often abbreviated LWOP), whole-life tariff or whole-life order, and natural or cumulative life sentence where an offender receives a determinant period of parole ineligibility that exceeds their natural lifespan, such as the sentence imposed in *Bourque*. When considering what is a natural life sentence, this thesis relies on data from the World Health Organization that finds the life expectancy at birth in 2015 for Canadian males is 80.2 years and females is 84.1 years. This measure must be interpreted in light of growing data showing that the experience of incarceration significantly reduces one’s lifespan. Kouyoumdjian et al. studied life expectancy of inmates who were admitted into provincial custody in Ontario, a sample size of 49,470, finding life expectancy for those who experienced incarceration in 2000 was 73.4 years for men and 72.3 years for women. The researchers found

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4 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
5 World Health Organization, *Life Expectancy - Data by Country*: online: <http://apps.who.int/gho/data/node.main.688>. Statistics Canada indicates that life expectancy at birth from 2007-09 was 78.8 years for males and 83.3 years for females nationally. The data also notes regional differences, with life expectancy in the territories (75.1 years) being lower than each province, where life expectancy for both sexes ranged from 78.9 years in Newfoundland and Labrador to 81.7 years in British Columbia. See Canada, Statistics Canada, “Life expectancy, at birth and at age 65, by sex and by province and territory” (31 May 2012) online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/health72a-eng.htm>. 
“[m]ortality was high for people who experienced incarceration, and life expectancy was 4.2 years less for men and 10.6 years less for women compared with the general population.”  

Behavioral risk factors such as alcohol and drug related diseases and preventable and treatable causes of death such as overdose, heart disease and suicide were major factors in explaining the difference of life expectancy.

Regardless of the terminology, there is a growing backlash against lifelong incarceration. This thesis addresses how lifelong incarceration accords with Canadian law and the role hope prospective release should have in the Canadian criminal justice system. There are several unique features of the debate of lifelong incarceration in Canada. First, lifelong incarceration is a new legal issue in Canada. Prior to 2011, sentencing provisions did not allow for such a sentence; now at a time when many countries are forbidding such a practice, Canada has taken a step towards allowing it. Secondly, no Canadian law makes lifelong incarceration mandatory although such a law was proposed during the Tough on Crime era. Rather, sentencing judges in cases of multiple murder are given discretion to make parole ineligibility periods consecutive which could lead to lifelong incarceration through the creation of a natural life sentence.

Thirdly, Canada must also consider lifelong incarceration in extradition decisions, cases that balance Charter rights with international cooperation. A 2014 decision of the Alberta Court of

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7 Ibid at 157. Stewart et al. found similar health issues reported by males who were newly admitted inmates in Canadian federal penitentiaries. See Lynn Stewart et al., “Chronic health conditions reported by male inmates newly admitted to Canadian federal penitentiaries” (2016) 3(1) CMAJ Open 97.  
8 In 2015 the then Conservative government proposed a Life Means Life Act seeking to create mandatory life without parole for certain murder offences. The bill did not pass before the 2015 election which saw the Conservatives lose power. See Canada, Department of Justice, Backgrounder - Life Means Life Act, (3 March 2015) online: <http://news.gc.ca/web/article-en.do?nid=947319>.
Appeal allowed extradition of an accused that potentially faced life without parole in the United States, holding that the constitutional arguments raised against this possible sentence were “without merit.”

In deciding whether sentences precluding hope of release should be allowed, one must consider what hope is and why it is important. The legal system has yet to consider the meaning of hope. In this thesis, I suggest that the perspectives on hope drawn from the field of psychology are helpful and should be considered by Canadian courts when the issue arises.

Chapter two outlines how a law and psychology approach is used in this thesis to gain insights about the meaning and importance of hope, utilizing hope theory as developed by psychologist C.R. Snyder. Chapter two also discusses the use of comparative law and criminological classifications of murder.

Chapter three provides a historical account of murder sentencing in Canada from Confederation in 1867 to 2011, when the most recent legislative changes came into force. The chapter explores how murder sentencing in Canada evolved from a mandatory sentence of capital punishment, through a hybrid era and then to abolition of capital punishment. The chapter ends with a discussion of the 2011 amendments.

Chapter four outlines the early jurisprudence from the Multiple Murders Act, a total of nine cases as of May 31st, 2015. The chapter notes that it is promising that, apart from Bourque, sentencing judges have not utilized the Act to create lifelong sentences. However, the seemingly automatic practice of elevating a sentence above the mandatory minimum - either by increasing

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9 *United States v Muhammad ‘Isa*, 2014 ABCA 256, leave to appeal to SCC refused, 36072 (January 15, 2015) at para 74 [*Muhammad ‘Isa*].
the parole ineligibility for a second degree count above 10 years, making parole ineligibility periods consecutive or both - is questioned.

Chapter five is a comparative law study on lifelong incarceration. The chapter discusses academic literature and outlines numerous countries that have barred lifelong incarceration. Next, the chapter examines lifelong incarceration in Germany, the United States and the United Kingdom. The German position begins with the 1977 decision of the Life Imprisonment Case, a case that has been influential across Europe. The section on the United States discusses a tetralogy of cases before the Supreme Court of the United States which lessened the penalties that could be imposed on juvenile offenders, culminating in a ban against juvenile life without parole. That ban was made retroactive thereby forcing a review of all lifelong sentences previously imposed on juveniles. Decisions from the European Court of Human Rights on the issue of whole-life tariffs in the United Kingdom (a sentence akin to life without parole) are then explored, highlighting how hope of eventual release has been judicially considered.

Chapter six explores the meaning of hope from the psychological perspective of hope theory. The chapter begins reviewing articles addressing hope in the law. Next, the importance of hope in an incarceral setting is explored, connecting hope with freedom and autonomy. Following this is a discussion of how hope theory may inform better correctional management practices. The chapter concludes using hope theory to construct the elements that must be present for an inmate to be said to truly have hope of prospective release.

Chapter seven and eight discuss where the concept of hope of eventual release may be situated in the context of the Canadian criminal justice system. Chapter seven examines the principles of sentencing outlined in s. 718 of the Criminal Code, specifically parity,
rehabilitation and totality and explores how hope may be situated within these principles. It is proposed that within parity hope exists as a condition of the sentence by which similarity can be measured; that rehabilitation and hope have a symbiotic relationship, with hope acting as the motivating factor for rehabilitation and rehabilitation being the object of hope; and lastly that hope serves as a guidepost to the totality principle setting an upper limit to a sentence.

Chapter eight discusses lifelong incarceration under the *Charter of Rights and Freedoms* (*Charter*). After discussing the increased role of the *Charter* in sentencing law, the chapter addresses the possibility of considering hope of prospective release under the *Charter*. Hope is explored within ss. 7 and 12 of the *Charter* in the contexts of extradition and domestic law.

Chapter nine concludes the thesis by suggesting legislative reforms, including reintroducing a revised faint hope clause, codifying the right to hope and eliminating the minimum sentence for murder as it applies to second and subsequent cases. The thesis concludes by returning to the *Bourque* case, outlining why the appeal may lead to a sentence reduction and suggesting that while any reduction may not actually lead to Mr. Bourque being released prior to his natural death, the allowance of hope reflects important values in the Canadian criminal justice system and society.
Chapter Two - Methodologies and Theories

1. Introduction
This thesis addresses the new legal issue of lifelong incarceration in Canada and the role hope of prospective release ought to play in sentencing. To approach these issues, this thesis includes a comparative law study as well as a law and psychology approach. This chapter first discusses these two methodologies and then outlines the criminological definitions of murder that are used in the thesis and how these classifications may assist in the sentencing process. The chapter concludes by discussing how a theoretical construct of hope developed by psychologist C.R. Snyder is used in this thesis.

2. Methodologies
   a. Comparative Law
Lifelong incarceration is a global issue. Many counties that impose some form of lifelong incarceration are questioning the utility and ethics of this punishment due to academic, legislative and legal debate on this issue. Countries that do not impose lifelong incarceration domestically still must confront this punishment in cases of extradition. The global debate on lifelong incarceration is important to understanding this issue in a Canadian context.

International jurisprudence has been key in the development of several areas of the *Charter of Rights and Freedoms*\(^\text{10}\) (the *Charter*), particularly when asked the question of what a justice system “founded upon the belief in the dignity and worth of the human person and the rule of law”\(^\text{11}\) should look like.

\(^{10}\) *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

Comparative law approaches are used in chapters five and eight of this thesis, with chapter five exploring lifelong incarceration in various countries and chapter eight discussing how these findings can be applied in interpreting the Charter. Chapter five specifically discuss lifelong incarceration in Germany, the United States and the United Kingdom.

Germany was chosen as a comparator due to its significant contributions to the debate on lifelong incarceration globally. The *Life Imprisonment Case*, a 1977 decision of the German Federal Constitutional Court, is a watershed decision influential to many European nations. Further judgments rendered in 1986 and 2010 add nuance to the German position on lifelong incarceration. The German decisions have also considered the issue of rehabilitation for offenders with life sentences, a factor Canada ought to pay attention to when applying the rehabilitation principle.\(^\text{12}\)

The United Kingdom and United States of America were chosen as comparators due to Canada’s ties to these countries as well as recent court challenges to lifelong incarceration in both countries. As a former British colony, Canada’s common law traditions evolved from practices adopted from the United Kingdom making it a fruitful ground for comparison to Canada. As discussed in chapter five, a new law enacted in 2003 brought in the whole-life tariff, a form of lifelong incarceration that has been subject to recent, on-going litigation at the European Court of Human Rights.

Caution must be used in comparing the Canadian and American justice systems as the countries have different political systems and historical and social backgrounds. However, Canada’s close proximity leads to Canadians being aware of the United States criminal justice

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\(^{12}\) The *Criminal Code* lists the objective of assisting in rehabilitation offenders as one of objectives of sentencing. See *Criminal Code, supra* note 4 at s. 718(d).
system. While Canada has not been shy about making substantial departures from practices in the United States such as abolishing capital punishment, in Canada’s Tough on Crime era there was significant policy transfer from the United States, in part due to their political popularity.\textsuperscript{13} Laws such as Truth in Sentencing\textsuperscript{14} mirrored approaches taken previously in the United States. The knowledge of the American criminal justice system held by the general Canadian public may influence the societal values that underpin concepts of fundamental justice. While the United States continues to use lifelong incarceration for adult offenders, often in the form of life without parole, significant progress has been made in the past decade leading to outlawing such a sentence for juveniles. The Supreme Court of the United States decisions on juvenile life without parole provide meaningful insight into the role and importance of hope in criminal sentencing.

Many countries have experiences with lifelong incarceration that Canada does not, providing a source of debates and judicial decisions to learn from. Drawing on experiences from Germany, the United States and the United Kingdom help identify existing and emerging trends across the world that illuminate expectations of a justice system grounded in the rule of law and respect for human dignity.

\textsuperscript{13} Political scientists define policy transfer as a “a similar process in which knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political setting.” See David Dolowitz & David Marsh, “Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making” (2000) 13 Governance 5 at 5.

\textsuperscript{14} The Truth in Sentencing Act, SC 2009 c 29, limited credit for pre-trial detention to 1.5 days for everyone 1 day served. Previously individuals remanded into custody regularly received 2 days credit for every 1 days served. The name and goal of the Act borrows from similarly named laws enacted throughout the United States that reduce parole eligibility and early release for offenders. See United States, Department of Justice, \textit{Truth in Sentencing in State Prisons}, (CNJ 170032, 1999) (authors Paula Ditton & Doris Wilson).
b. Law and Psychology

Chapters four and five show that many courts in Canada and across the world have, in various words, found that hope of prospective release should be maintained when sentencing offenders. However, the courts have given little analysis and clarity to the meaning of hope within the law. Chapter six of this thesis uses a law and psychology approach to begin forming a definition of hope that can be utilized by legal decision-makers.

The academic study of hope is a relatively recent endeavour. Darren Webb writes that until the mid-20th-century little attention was paid to the question “what is it to hope?” but in the past half-century literature on hope has proliferated, noting two recent papers identified 25 theories and 54 definitions of hope. As Webb states, “[f]rom a dearth of studies it appears we now have a glut.” Anthropology, education, literature, theology, philosophy, psychology, sociology and medicine are among the fields that have studied hope and its impact on human beings. However, the law has yet to give much consideration to the study of hope. In a 2007 article Kathryn Abrams and Hila Keren suggest that hope is “an emotion not yet addressed by legal analysis.” Since that publication, few articles have addressed hope in a legal context. Providing a definition of hope is helpful to understanding why hope is important in the justice system, particularly looking to principles of fundamental justice.

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16 Ibid at 66.
17 Ibid at 66.
18 Hope Studies Central, a research unit hosted at the University of Alberta, provides a database of nearly 4,500 articles and books on hope. See Hope-Lit Database Directory, online: <http://www.hope-lit.ualberta.ca/DB_Homepage.htm>.
The law can turn to a number of other academic disciplines and gain valuable insight on the meaning of hope. Chapter six is designed as a first step in bringing the concepts, ideas and knowledge of hope from psychology into the legal context. Hope is explored from a psychological perspective due to the commonalities of the fields. Law and psychology often interact together as both the core of both disciplines seeks to address human behaviour. Regina Schuller and James Ogloff identify the commonalities of the disciplines, stating:

The discipline of psychology, very broadly defined as the scientific study of behaviour and mental processes attempts to understand, predict, and, in some cases, control human behaviour. The legal system, comprised of a body of laws and procedures, is designed to govern, regulate, and control human behaviour. Given the similar focus of the two disciplines, the interface between law and psychology is perhaps not surprising.20

There are at least three ways that the fields of law and psychology interact. Craig Haney identifies these three interactions as “psychology in the law”, “psychology of the law” and “psychology and the law.”21 This thesis relies upon psychology and the law, which uses psychology to make critical evaluation of assumptions made within the law.22 The psychological perspective of hope provides a fruitful starting ground in both defining hope and illustrating its importance as a factor in sentencing law. The definition of hope used in this thesis is drawn from hope theory as developed by C.R. Snyder.

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22 Psychology in the law involves the explicit use of psychology in the legal field, such as information about fitness to stand trial or the reliability of eye-witness evidence; psychology of the law uses psychology to study the law, such as why people obey law or why laws developed. See ibid at 153-56.
c. Criminology

This thesis also utilizes the field of criminology as a starting point for distinguishing between multiple murderers. Canadian law distinguishes murder into two general categories based on culpability: first and second degree murder. Individuals who have committed more than one murder, regardless of degree are classified as multiple murderers. Since 1996 multiple murderers have been ineligible for faint hope applications, a form of sentence reprieve discussed in chapter three and since 2011 multiple murderers may receive consecutive periods of parole ineligibility.\(^{23}\) While the law makes these distinctions between a murderer and multiple murderer, neither statute nor common law has formally made any distinction among multiple murderers. This thesis draws on the field of criminology to provide a starting point for making such classifications.

This classification is not done for the sake of onomastics, but rather to demonstrate different types of murders may be a result of differing underlying factors. In chapter seven I note how this classification aids in the application of the parity principle. While there may be offenders that are difficult to classify or fit into more than one typology, the benefits of using such typologies outweigh these drawbacks. Through some classification, the law can begin to distinguish between moral culpability and potential for rehabilitation, factors that should be examined in both sentencing and parole decisions. The following five definitions are used in this thesis:

1) Multiple murder - the murder of more than one victim by the same offender(s).

2) Mass murder - a multiple murder where the victims are killed in a short time period at one location.

\(^{23}\) Murderers who killed a single victim prior to December 2\(^{nd}\), 2011, are eligible to make faint hope applications; however, those who offended on or past this date are not. See Criminal Code, supra note 4 at s. 745.6(1).
3) Spree murder - a multiple murder where the victims are killed in a short period of time in different locations but without a cooling-off period.

4) Serial murder - a multiple murder where the victims are killed over an extended period of time with a cooling-off period between the murders.

5) Recidivist murder - a multiple murder where the second murder is committed after the offender is in the thralls of the justice system having being charged, convicted or paroled for the first murder.

These definitions use two as the threshold number of victims for a crime to be a multiple murder. While the threshold of two victims is not agreed on by all criminologists, it is consistent with the United States Federal Bureau of Investigation (FBI) definition that was born out of a five day symposium with 135 experts from different fields in an effort to bridge the gap on different views of serial murder. Moreover, the threshold of two victims is consistent with how Canadian law defines multiple murders.

The distinction between mass, spree and serial murder follows the criminological method of distinguishing multiple murders by the number of locations an event occurred in and the presence or absence of a cooling off period. As Fox and Levin write, “[m]ultiple homicide includes cases in which victims are slain either at once (mass), over a short period of time (spree), or over an extended period of time (serial).” Spree murder involves the killing of

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24 The FBI defines serial murder as “[t]he unlawful killing of two or more victims by the same offender(s) in separate events.” See United States, Department of Justice, Federal Bureau of Investigation “Serial Murder - Multi-Disciplinary Perspectives for Investigators” (2005) at part II, 9.

multiple victims in different locations but within one event. What distinguishes a serial murderer from a mass or spree murderer is a “cooling off” period between the murders.

In addition to the criminological definitions, this thesis makes use of another categorization with legal significance - the recidivist murderer. Criminological definitions would classify such an offender as a serial murderer, this may not always be the case. This is illustrated by the case of Douglas Vinter discussed in chapter five. Mr. Vinter was sentenced for murder in 1996 and, after his release from custody, committed a second murder in 1998. While this would meet some definitions of serial murder due to the cooling off period, the circumstances fall outside of the traits seen of a typical serial murderer as the murders had different motives.

Certain offenders may be difficult to categorize and others offenders meet the criteria of more than one category. However, having some form of classification assists to distinguish between underlying factors of the murders and has utility when applying the parity principle.

3. **Hope Theory**
The perspective of psychology and the law is used to provide an understanding of the elements and importance of hope. To do this, this thesis relies on hope theory as developed by C.R. Snyder. Prior to his death C.R. Snyder was a leading researcher on hope in the field of psychology, writing six books on the theory of hope and 262 articles analyzing hope in various

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26 *Case of Vinter and Others v. The United Kingdom*, (2013) Applications nos 66069/09, 130/10, 3896/10, European Court of Human Rights [Vinter].
aspects of life. Many of his books and articles have been cited in hundreds, some in thousands, of other publications.

Snyder defines hope “as the perceived capability to derive pathways to desired goals, and motivate oneself via agency thinking to use those pathways.” This definition has three components, a) goals, b) pathways, and c) agency. Snyder also discusses barriers that block a hoper from achieving their goal and what happens with the loss of hope, a path he calls the hope to apathy tragedy.

i. Goals
The goals component of hope theory serves as “the endpoints or anchors of mental action sequences; they are anchors of hope theory.” Snyder writes that “[g]oals need to be of sufficient value to occupy our conscious thought.” A student in school may have a goal to achieve a good grade. An employee may hope for a raise in pay. For a prison inmate, the ultimate goal is achieving freedom from incarceration, atoning for their crime and rehabilitating to the point they can re-enter society and regain their freedom, the essential component of civil society deprived from them as inmates.

28 As of November 17th, 2015, a search of Google Scholar indicates Snyder’s articles “The will and the ways: development and validation of an individual-differences measure of hope” (with C Harris and JR Anderson, 1991 Journal and Personality) has been cited 2102 times and his article “Hope Theory: Rainbows in the Mind” has been cited 1330 times; his book “Handbook of Hope: Theory, Measures, and Applications” has been cited 921 times.
31 Ibid at 9.
Snyder argues that the achievement of goals does not need to be certain for hope to be present. Snyder writes that absolute certainty or 100% probability of achievement do not necessitate hope. At the other end of the spectrum, Snyder suggests that “the pursuance of truly untenable goals (0% probability of attainment) typically is counterproductive rather than useful.” A goal that is unachievable also eliminates agency, the third component of hope. Therefore, sentences that preclude hope of release, setting the potential of achieving freedom at 0%, leave an inmate without hope.

**ii. Pathways**

Snyder argues that “[r]outes to the desired goals are absolutely essential for successful hopeful thought…. Pathway thinking taps the perceived ability to provide plausible routes to goals.”

Snyder demonstrates pathway thinking with this simple image:

**Figure 1 - Pathways**

![Diagram](image)

**Source:** C.R. Snyder - *Handbook of Hope*

For a student with the goal of a good grade, pathways may include attending class, doing homework and studying. An employee seeking a raise may utilize pathways including

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33 In this regard for offenders with fixed term sentences, whose eventual freedom is almost guaranteed at some point, eventual release also is not a goal as it is too certain. However, these offenders can receive shortened sentences, by years or sometimes decades, by being paroled at the earliest parole eligibility date. For these offenders, the goal is not to achieve parole, but to achieve parole at the earliest possible date, a goal that is attainable but not guaranteed.


35 *Ibid* at 10.
performing their job effectively, furthering education and taking on new projects. We see in these two examples the importance of hope in producing behaviours seen as positive. For a prison inmate with the goal of regaining a civil life through freedom, the pathway involves achieving parole, clemency or re-sentencing. Good behaviour and rehabilitation serve as pathways in and of themselves as well as pre-conditions to the pathways formally granting release.

iii. Agency
Having a goal and possible pathways is insufficient to have hope. A third component, agency, is also required. As Snyder explains “[a]gency is the motivational component to propel people along their imagined routes to goals. Agency reflects the person’s perception that he or she can begin movement along the pathways to goals; agency also can reflect one’s appraisal of the capability to persevere in the goal journey.” \(^{36}\) Agency involves the subjective belief that one can control, in whole or in part, one’s own fate.

For a student in a course, believing they are capable of achieving a good grade can propel them to engage in the pathway behaviours such as attending class and studying. However, if the student believes their grade is predetermined by their teacher’s opinions of them or their innate ability, agency and thus hope is removed. Likewise, if an employee believes whether or not they will receive a raise is controlled by external factors such as company policy they do not have agency over this goal. This lack of agency removes hope, and alongside the pathway, thoughts and behaviours are likely to falter. For an inmate to have true hope of prospective release they must have agency in achieving this goal through their own actions. Sentences that preclude hope

\(^{36}\) Ibid at 10.
of eventual release remove agency. Inmates in such circumstances are stripped of hope knowing nothing they can do can impact their ability to achieve freedom in the future.

iv. Barriers

The pursuit of goals does not occur without failure. Snyder ends his analysis of hope with a discussion of barriers, stating:

[L]ife does not allow a simple pursuit of our goals – it throws blockages into our path. What happens then, according to hope theory? Most people perceive that they can produce at least one principal route to their goals, but it also is fairly common that people will perceive themselves as being able to think of multiple routes.\textsuperscript{37}

\textbf{Figure 2 - Barriers}

Source: C.R. Snyder - \textit{Handbook of Hope}\textsuperscript{38}

Perhaps a hopeful student receives a poor grade on the first assignment, creating a barrier to their goal of a good final grade. This student can create alternative pathways to a good final grade, seeking to perform better on subsequent assignments and tests or retaking the course. Likewise, an employee desiring a raise may not get one. A hopeful employee in this position could find

\textsuperscript{37} \textit{Ibid} at 10.
\textsuperscript{38} \textit{Ibid} at 11.
alternative routes to their goal of receiving a raise such as applying for a new position or seeking to improve their chances when the next opportunity arises.

The concepts of barriers and alternative pathways is important to an inmate as well. The impact of alternative pathways is seen in *R. v. Swietlinkski*, a case further discussed in Chapter three. Mr. Swietlinski committed a murder of “unspeakable brutality” in 1976, stabbing the victim 132 times with 5 knives. At the outset of his sentence, Mr. Swietlinski “committed various disciplinary offences connected with smuggling and an attempted escape.” These disciplinary offences, coupled with the brutality of his initial offence, were barriers standing in the way of eventual parole. Nonetheless, Mr. Swietlinski retained hope of eventual release. The Supreme Court of Canada stated he “underwent a complete change of heart and became a ‘model prisoner,’” eventually being transferred to a medium security and then minimum security institution. Mr. Swietlinski remained hopeful and despite his disciplinary infractions being a barrier to his eventual freedom, found an alternative pathway in pursuit of his goal.

v. **The Risks of Hopelessness**

Snyder describes the process of the loss of hope as the “hope to apathy tragedy.” Snyder writes that “perceived goal blockages can produce negative emotional responses. One of these responses is disappointment, which the person experiences in different ways in successive states.” The stages of hopelessness are rage, despair and apathy.

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40 *Ibid* at para 3.
41 *Ibid* at para 3.
43 *Ibid* at 41.
Snyder writes that while in rage, “[p]eople often commit misguided, impulsive, and self-defeating acts while enraged.”\textsuperscript{44} In despair “the individual is still focused on the blocked goal, but feelings an overwhelming sense of futility about overcoming the related obstacle.”\textsuperscript{45} In apathy, people “become apathetic when they acknowledge defeat and cease all goal pursuits."\textsuperscript{46} Chapter six discusses the hope to apathy tragedy within the context of a prison, identifying how this theory may explain and help better understand the “super predator” debate and prison suicide.

\textbf{4. Conclusion}

The methodological and theoretical frameworks used in this thesis all assist in exploring the meaning of hope in the legal context. Comparative law is used to examine how other countries have treated the role of hope in respect to lifelong incarceration. Criminology is used to provide a more specific classification of murderers. Hope theory is used to draw on psychology to explore the meaning of hope and how this can assist in sentencing and corrections practices. All three perspectives should be helpful to legislators and courts in deciding how the new legal issue of lifelong incarceration should be dealt with in Canada.

\textsuperscript{44} Ibid at 41.
\textsuperscript{45} Ibid at 41-42.
\textsuperscript{46} Ibid at 42.
Chapter Three – History of Murder Sentencing in Canada

1. Introduction
While murder has always been one of the most serious offences in Canada, the sentence has changed over time and it can be divided into four time periods.\(^{47}\) This chapter tracks the sentence for murder in Canada from Confederation in 1867 to the present day. This outline describes two mechanisms used to alleviate harsh sentences - the Royal Prerogative of Mercy and the faint hope clause. Also discussed are two key Supreme Court of Canada decisions, \(R. \ v. \) \textit{Luxton}, a 1990 decision that upheld the 25 year mandatory minimum sentence for first degree murder and \textit{United States of America v. Burns}, a 2001 decision that discusses capital punishment under the \textit{Charter}. The chapter concludes by highlighting significant changes to the murder sentencing laws as a result of two legislative amendments enacted in 2011 - the removal of the faint hope clause through the \textit{Serious Time for the Most Serious Crime Act}\(^{48}\) and the creation of judicial discretion to make parole ineligibility periods consecutive in cases of multiple murders through the \textit{Protecting Canadians by Ending Sentence Discounts for Multiple Murderers}\(^{49}\), the latter \textit{Act} creating the possibility of lifelong incarceration.

\(^{47}\) The first three periods are defined as used by Robin MacKay. See Canada, Legal and Legislative Affairs Division, \textit{Legislative Summary of Bill C-36: An Act to amend the Criminal Code (Serious Time for the Most Serious Crime Act)}, (11 September 2009) (author: Robin MacKay) online: <http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?lang=F&ls=c36&Parl=40&Ses=2&source=library_prb> at 7 [MacKay].
\(^{48}\) \textit{An Act to Amend the Criminal Code and Another Act}, SC 2011 c 2 [\textit{Faint Hope Act}].
\(^{49}\) \textit{Multiple Murders Act}, \textit{supra} note 2.
2. Murder Sentencing in Canada
The first and longest era of murder sentencing in Canada began at Confederation in 1867 and went until 1961. During this period all individuals convicted of murder were sentenced to death. Under the Royal Prerogative of Mercy, a power discussed in greater detail further in this chapter death sentences were commutable to life in prison, something done in around half of all cases. Offenders whose sentences were commuted to life imprisonment were eligible for release under the Ticket of Leave Act which came into force in 1899 and later the Parole Act which came into effect in 1959.

In the second time period, 1961-1976, murder was broken into designations of capital murder and non-capital murder. The death penalty was mandatory for capital murder; non-capital murderers received a sentence of life imprisonment with no parole eligibility for a minimum of 10 years. Death sentences remained commutable and those who had their sentences commuted to life imprisonment were eligible for parole. All death sentences in this era were commuted.

50 The official change came on September 1st, 1961. See Canada, Minister of Justice, Capital Punishment: Material Relating to its Purpose and Value (Ottawa, 1965), at forward (author Guy Favreau) [Favreau].
51 Criminal Code, supra note 4 at s. 231.
52 MacKay, supra note 47 at 7.
53 Ibid at 7-8.
54 Ibid at 7. See also Allan Manson, “The Easy Acceptance of Long Term Confinement in Canada” (1990) 79:3 Criminal Reports 265 at 265 [Manson (1990)]. As stated by Manson, “[c]apital murder consisted of a killing that was planned or deliberate, a killing resulting from the direct intervention or counselling by the accused in the course of stipulated crimes, or the killing of a police officer or prison guard. All other murder was characterized as non-capital” ibid at 256-66. In 1967 culpable homicide was redefined and restrict to the killing or counselling to kill a police officer or prison guard, see Manson 1990 at 255.
The third time period began in 1976 when Parliament abolished the death penalty and imposed the now familiar structure of murder being separated into designations of first and second degree. Offenders convicted of first degree murder receive life in prison with no possibly of parole for 25 years. At first, all murderers could apply for a reduction of parole eligibility after 15 years under s. 745.6 of the *Criminal Code*, a section proverbially known as the faint hope clause; in 1996 multiple murderers were barred from making faint hope applications. Offenders convicted of second degree murder received life imprisonment with no parole eligibility set by the sentence judge between 10 and 25 years. Faint hope applications were also available for second degree murderers with parole ineligibility periods beyond 15 years.

Two legislative changes in 2011 ushered in the fourth period. First *An Act to Amend the Criminal Code and Another Act* closed the possibility of faint hope applications for offenders whose crimes occurred on or after December 2\textsuperscript{nd}, 2011.\textsuperscript{56} The second, the *Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act*\textsuperscript{57} gave sentencing judges the discretion to make parole ineligibility periods consecutive for multiple murderers.

\textsuperscript{56} *Faint Hope Act, supra* note 48.
\textsuperscript{57} *Multiple Murders Act, supra* note 2.
3. **Mandatory, Commutable Death Sentences - Murder Sentencing from 1867-1961**

Capital punishment was used widely by early settlers in pre-Confederation Canada. Frank Anderson writes that “[n]o one will ever know how many men, women and children in Canada...
have ever heard the deadly verdict ‘guilty’ pronounced in capital offences.” Upon Confederation in 1867 and the creation of a Department of Justice, systematic efforts were made to keep records of death penalty cases. From Confederation to 1978 when the death penalty was abolished, a total of 1,481 people were sentenced to death. Over half of the sentences to death were commuted, leaving a total of 710 individuals executed, 697 men and 13 women. With the exception of Louis Riel, who was hanged for treason, all executions were for the offence of murder.

58 Anderson, supra note 55 at 5.
59 Ibid at 5.
61 Ibid. Slightly conflicting data is presented by Leyton-Brown who writes that 1,531 persons were sentenced to death by judges while Canada had the death penalty in place, see Kenneth Leyton-Brown, The practice of execution in Canada (Vancouver: UBC Press, 2010) at 163 [Leyton-Brown].
62 Leyton-Brown notes the passing of a death sentence was a carefully stage exercised. A break of proceedings followed the verdict of guilt and the rendering of the death sentence. The break was logically unnecessary given the inevitability of the death penalty, however, remained in place as it had been in England. One thing the break allowed was for the judge to don a black cap and black gloves, another tradition held-over from England. As Leyton-Brown writes, “[s]entencing was a special moment, and it allowed much of what a murder trial was about to be crystalized and communicated to the society that watched, reinforcing messages about the power of the law and the state, reconstructing society by identifying and prescribing the removal of the individual who had threatened it” See ibid at 24. The Supreme Court of Canada also marked the solemn affair of a death penalty case by wearing red robes which were otherwise reserved for special ceremonial occasions such as swearing in new justices. See Antonio Lamer, PC, “A Brief History of the Court” in The Supreme Court of Canada and its Justices 1875-2000 (Ottawa: Dundurn Group/Supreme Court of Canada, 2000) 11 at 14.
63 Leyton-Brown, supra note 61 at 12, 157.
a. The Royal Prerogative of Mercy

In Canada, all criminal sentences are reviewable by the Executive branch of government that has the power to reduce sentences or pardon offenders through the Royal Prerogative of Mercy.\textsuperscript{64}

The Parole Board of Canada explains the royal prerogative of mercy in the following terms:

The Royal Prerogative of Mercy originates in the ancient power vested in the British monarch who had the absolute right to exercise mercy on any subject. In Canada, similar powers of executive clemency have been given to the Governor General who, as the Queen’s representative, may exercise the Royal Prerogative of Mercy. It is largely an unfettered discretionary power to apply exceptional remedies, under exceptional circumstances, to deserving cases.\textsuperscript{65}

In \textit{Hinse v. Canada (Attorney General)} the Supreme Court of Canada stated there are two strands and objectives of the Royal Prerogative of Mercy, one to show compassion and one to correct miscarriages of justice.\textsuperscript{66} The Court stated the Royal Prerogative “begins where the law ends.”\textsuperscript{67}

While the Royal Prerogative of Mercy remains in place to this day, its use was more prevalent when the death penalty was in force.\textsuperscript{68} Every death sentence was considered by the

\begin{footnotesize}
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\item \textsuperscript{64} Carolyn Strange, “Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy” (2001) 64 Saskatchewan Law Review 559 at 560 [Strange]. The Executive’s power stems from section 749 of the \textit{Criminal Code} that states “[n]othing in this Act in any matter limits or affects Her Majesty’s royal prerogative of mercy.” See \textit{Criminal Code, supra} note 4 at s 749.
\item \textsuperscript{65} The Parole board goes on to explain the six guiding principles for reviewing clemency applications which are, \textit{inter alia}, “clear and strong evidence of injustice or undue hardship”, case by case evaluation, exhaustion of all of avenues, respect for the independence of the judiciary, intention for “rare cases in which considerations of justice, humanity and compassion override the normal administration of justice”, and the decision not increasing the penalty. See Canada, Parole Board of Canada, “Royal Prerogative of Mercy - Fact Sheet” (4 November 2008) online: <http://www.pbc-clcc.gc.ca/infocntnt/factsh/man_14-eng.shtml>.
\item \textsuperscript{66} \textit{Hinse v Canada (Attorney General)}, 2015 SCC 35 at para 28.
\item \textsuperscript{67} \textit{Ibid} para 42, citing \textit{Bilodeau v Canada (Ministre de la Justice)}, 2009 QCCA 746 at para 14.
\item \textsuperscript{68} The Canadian Legal Resource Centre reports that between 2002 and 2010, between 11 and 37 requests for the royal prerogative of mercy were made annually; in five of those nine years no requests were granted, in three years a single request was granted and in 2007 two requests were granted. See Debbie Ward, “Royal Prerogative of Mercy in Canada” online: <http://canadianlegal.org/royal-prerogative-of-mercy-in-canada>. The most recent data available
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Minister of Justice and the Cabinet. Carolyn Strange notes the Remissions Branch staff who processed death penalty files sometimes handled 2-3 such cases a month. Following the passing of a death penalty, the Cabinet was given a wide range of materials on which to base their decisions whether or not to commute the death sentence. The package sent by the trial judge was hundreds, sometimes thousands of pages. Abbreviated versions of the material were prepared and presented to the entire Cabinet.

As Strange outlines, the materials that were considered by the Remissions staff and cabinet in death penalty cases:

- [I]ncluded, at minimum, the full trial transcript and the judge's trial report (including his and the jury's recommendation for or against mercy). However, Remissions staff and cabinet members rarely considered legal documents exclusively. Most capital case files also contained correspondence from concerned citizens, petitions for mercy (informal as well as legally sophisticated ones), news clippings, and imploring letters from family members and advocacy groups, such as churches, unions, or ethnic organizations.

A 1956 report on Capital Punishment by a Joint Committee of the Senate and House of Commons (Joint Committee Report), notes that “[w]here there is the slightest question of mental

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69 Strange, supra note 64 at 562.
70 Leyton-Brown, supra note 61 at 34.
71 Strange, supra note 64 at 564.

from the parole board of Canada indicates from 2010-2014, 14 clemency requests were allowed, four denied and 111 discontinued. See Canada, Parole Board of Canada, “PBC QuickStats - Parole, Pardons and Clemency” (23 October 2015) online: <http://www.pbc-clcc.gc.ca/infocnt/factsh/parole_stats-eng.shtml>. While the application numbers vary year by year, the sharp increase can be tied to a bill that placed restrictions on criminal record suspensions (formerly known as pardons), see Jim Bronskill & Bruce Cheadle, “Requests for Royal Prerogative of Mercy on the rise as Ottawa restricts pardons” MacLeans (20 January 2013) online <http://www.macleans.ca/general/requests-for-royal-prerogative-of-mercy-on-the-rise-as-ottawa-restricts-pardons>.
abnormality, special psychiatric reports are obtained from consulting psychiatrists employed by the Remission Service.”

Robin MacKay writes that “[h]istorical evidence indicates that the royal prerogative was exercised frequently and operated flexibly…. Decisions to execute or spare were made on a case-by-case basis, not according to formal rules of evaluation.” The Joint Committee Report states “[t]he only safe and fair generalization that can be made is that commutation occurs in all cases when extenuating circumstances of a substantial nature exist or the degree of moral culpability is not sufficient to warrant the supreme penalty.” While the process was conducted in secret with the reasons never divulged, the decisions occurred frequently enough for patterns to emerge.

As Strange writes, mercy applications becoming routine “led bureaucrats and politicians to frame individual cases in terms of ‘types’ of murders and ‘types’ of murderers. Some, such as men who murdered for gain or killed police officers, were considered appropriate subjects for severity; others, such as husbands who killed adulterous wives or women who killed abusive partners, were usually candidates for mercy.”

As most murder trials in Canada were conducted with a jury, it was important to ensure that the jurors’ duty in finding a verdict was not influenced by death sentence that would inevitably follow a verdict of guilt. One way of doing this was to frame the verdict as a

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72 Canada, Joint Committee of the Senate and House of Commons, Reports of the Joint Committee of the Senate and House of Commons on Capital Punishment, June 27, 1956; Corporal Punishment, July 11, 1956; Lotteries, July 31, 1956 (Ottawa: Queen’s Printer, 1956) (chairs Salter Hayden & Don Brown) [Joint Committee Report].
73 MacKay, supra note 47 at 7.
74 Joint Committee Report, supra note 72 at 5.
75 Strange, supra note 64 at 562.
76 A jury trial was mandatory for murder trials in all provinces except for Alberta where the accused could elect to trial by a superior court judge alone. See Joint Committee Report, supra note 72 at 3.
preliminary decision, with the ultimate pronouncement to be decided by Parliament. Jurors were therefore given the power to “attach a recommendation for mercy to their verdict, which would be passed along by the judge and considered by the authorities in Ottawa before any final decision was taken.”

Jury recommendations suggest that the death penalty was less palpable to the general public than it was to the judiciary. Leyton-Brown indicates juries made “recommendations for mercy in a wide number of circumstances, not all of them appropriate.”

Recommendations for mercy were often given for youthful offenders, women and offenders who had a family. Leyton-Brown states it was common knowledge that “juries did not like to see two (or more) people killed if there was only one victim.”

Statistically, jurors’ recommendations for mercy appear to have been a significant factor in whether the sentence was ultimately commuted. The Joint Committee Report notes that from 1920-49, mercy was recommended in 135 of 597 sentences. Of the 135 cases where the jurors recommend mercy, 42 cases were disposed of by appeal, leaving 93 before Parliament and the Remissions Branch. In 69 of these 93 cases (74%) the Cabinet accepted the recommendation for mercy and commuted the death sentence.

Where the jury did not make a recommendation for mercy, less than 25% of death sentences were commuted.

77 Leyton-Brown, supra note 61 at 19.
78 Ibid at 20-21.
79 Ibid at 21.
80 Ibid at 22.
81 Joint Committee Report, supra note 72 at 5-6. The correlation between jury recommendations and Cabinet decisions may be in part due to similar mindsets regarding who should receive mercy. The Joint Commute Report notes that, like juries, Parliament appeared to have reservations about the death penalty for young offenders and often granted mercy in these cases. In the Joint Committee Report it was noted that only three persons who were under the age of 18 when they committed the offence had been executed in Canada and since 1947, and only one person who was between 18 and 20 when the offence was committed had been executed. Parliament also shared jurors’ view that women were more often candidates for mercy and
Evidence falling somewhat short of a defence also had a role in deciding whether or not to commute a sentence. The Joint Committee Report noted “[m]ental abnormality falling short of the legal defence of insanity is a frequent factor in commutation, and to a lesser extent drunkenness falling short of a legal defence.” The Report further states that, while reluctant to “override a jury’s finding on a specific defence such as provocation,” there was some mitigation for provocation, carrying more weight “if it is coupled with factors like youth, instability, intoxication, or if the provocation itself has persisted over a long period.” Mercy killings and “genuine suicide pacts” also generally led to commutation.

Politics also had a role in deciding whether a death sentence would be commuted. For instance, commuted sentences were more frequent from 1957 to 1963 when John Diefenbaker, an opponent of capital punishment, was Prime Minister. Diefenbaker’s misgivings about the death penalty stemmed from his practice as a criminal lawyer, as Leyton-Brown writes, “he had defended clients charged with murder who were convicted and subsequently hanged; appalled by this, Diefenbaker had said publically that, should he become prime minister, he would never sign a ‘death warrant.’” While Orders-in-Council authorized hangings during Diefenbaker’s time as Prime Minister, 52 of 66 death sentences were commuted. Leyton-Brown suggests the vast number of commuted sentences shows “Diefenbaker remained deeply troubled about the imposition of the death penalty and did whatever he could to ensure that each case was discussed

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82 Ibid at 5.
83 Ibid at 5.
84 Ibid at 5.
85 Ibid at 5.
86 Leyton-Brown, supra note 61 at 35.
as thoroughly as possible in Cabinet and that, if the evidence prompted any doubts, the case
would be commuted.” Diefenbaker notably commuted the death sentence of Steven Truscott,
who at the age of 14 was convicted for the rape and murder of a classmate. Truscott’s conviction
was overturned in 2007 and in 2008 he was awarded $6.5 million in compensation from the
Ontario government.

Decisions regarding mercy also had an impact on the substantive law. For example, from
Confederation until 1958, 10 women were sentenced to death for murdering their own babies,
one of whom were ultimately executed. However, for politicians, the ability to commute
these sentences to life imprisonment was only a partial comfort, leaving them “questioning the
appropriateness of mandatory sentences for this type of murder.” This discomfort eventually
led to an amendment in 1948 which made infanticide a non-capital crime. Conversely, the
murder of a police officer, a crime the Cabinet often saw as deserving the severity of death, is
now codified as being first degree murder irrespective of whether the murder was planned or
deliberate.

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88 Leyton-Brown, supra note 61 at 35.
89 “Steven Truscott to get $6.5M for wrongful conviction” CBC News (7 July 2008) online:
<http://www.cbc.ca/news/canada/steven-truscott-to-get-6-5m-for-wrongful-conviction-1.742381>. The province also made an ex gratia payment of $100,000 to Steve’s wife, Marlene Truscott, to compensate for lost earnings due to the work she did to fight for his exoneration, see Ontario, Ministry of the Attorney General “Compensation for Marlene Truscott” online:
90 Strange, supra note 64 at 562.
91 Ibid at 563.
92 Ibid at 562. In 2016, the Supreme Court of Canada clarified interpretation of infanticide,
finding the phrase “her mind is then disturbed” not a medical or legal term of art and found the
disturbance does not need to be a defined psychological condition. See R v Borowiec, 2016 SCC
11 at para 35.
93 Criminal Code, supra note 4 at ss. 233, 237
When a death sentence was commuted, the offender received life in prison. These offenders were eligible for release under the Ticket of Leave Act from 1899 to 1959 and the Parole Act from 1959 onwards. Under the Parole Act, an inmate could be released once they had “derived the maximum benefit from imprisonment….the reform and rehabilitation of the inmate will be aided by parole…. [and when] release would not be an undue risk to society.”

Correctional Service of Canada indicates that prior to 1961 the average length of incarceration for offenders convicted of murder was 19.6 years.

b. Questioning Capital Punishment
Over one hundred years before Canada became a nation, questions about the use of capital punishment were already being raised internationally. Cesare Beccaria’s 1764 treatise On Crimes and Punishments is associated with the beginning of the abolition movement. In Canada, M.P. Robert Bickerdike brought forward bills to abolish the death penalty annually from 1914-1917, all of which were defeated. Further bills to abolish the death penalty by William Irvine in 1924 and by Ross Thatcher in 1950, both of which were defeated.

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94 Parole Act, RSC 1958 c 58 s 2.
95 MacKay, supra note 47 at 10, citing Nafefkh and Flight (November 2002).
98 Robert Bickerdike served as an MP from the St. Lawrence, QB riding as a Liberal from 1900-1917.
99 Anderson, supra note 55 at 78.
100 William Irvine served as M.P. in the East Calgary Riding for the Labour Party from 1921-25. He subsequently served as M.P. for Wetaskiwin, AB from 1926-1935 as a member of the United Farmers of Alberta and from 1946-1949 in the Cariboo, BC riding as a member of the Co-operative Commonwealth Federation.
101 Ross Thatcher served as M.P. for Moose Jaw, SK from 1945-1957 as a member of the CCF (1945-55) and an Independent (1955-57) and served as premier of Saskatchewan from 1964-71. Paradoxically, in 1984 Thatcher’s son, Colin, was convicted of first-degree murder for the death of his ex-wife. Colin Thatcher has continually denied the crime in one of the most infamous
The mid-1900’s saw a surge of reports, studies and debates on the death penalty globally and in Canada. The United Kingdom had a Royal Commission on Capital Punishment from 1949 to 1953, leading to 1957 amendments that redefined murder into classifications of capital and non-capital. The United Kingdom subsequently abolished the death penalty in 1969. In 1959 the United Nations initiated a report on capital punishment that was published in 1962, stating the inquiry “confirms the now generally held opinion that the abolition or (which is perhaps even more significant) the suspension of the death penalty does not have the immediate effect of appreciably increasing the incident of crime.”

In Canada, the 1956 Joint Committee Report concluded that, subject to periodic review, the death penalty should remain the mandatory sentence for murder. The Joint Committee rejected placing discretion in the hands of judges, citing placing the onerous responsibly on the judge and the danger of inconsistency as rational for not having judicial discretion in whether or not cases in Saskatchewan legal history. For perspective on the Thatcher case written following the trial see Garrett Wilson, Deny, Deny, Deny - The Rise and Fall of Colin Thatcher, (Toronto: Lorimer, 1985). Colin Thatcher has also written a book on the case, see Colin Thatcher, Final Appeal - Anatomy of a Frame, (Toronto: ECW Press, 2009). In Saskatchewan (Minister of Justice) v Thatcher, 2010 SKQB 109, Zarzeczny J. found the Profits of Criminal Notoriety Act required Mr. Thatcher to direct payments received from the book to the Minister of Justice. In 2016 it was reported the government has collected just under $14,000 from the book, directing the money to victims of crime, see Barb Pacholik, “Saskatchewan government used profits from book by convicted killer Colin Thatcher to help victims” Leader-Post (24 February 2016) online: <http://leaderpost.com/news/local-news/province-used-profits-of-colin-thatcher-book-to-help-victims>.

102 Anderson, supra note 55 at 78.
106 Joint Committee Report, supra note 72 at 16.
not to impose the death penalty. Inconsistency and the traditional function of the jury were cited as reasons for not granting juries’ discretion.

The Committee’s primary view was to leave matters the way that they were, accepting that the death penalty applied to too broad a range of cases but finding this overbreadth could be fixed by the Cabinet on a case by case basis. The Committee saw the Royal Prerogative of Mercy as “a necessary and indispensable feature of the mandatory sentence of capital punishment.” This approach is a stark contrast to the modern view that “[b]ad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.”

The Committee also rejected any attempts to reclassify murder stating “any attempt to break murder down into degrees may lead to the creation of technical and confusing distinctions without, at the same time, creating any precise delineation between murders of differing degrees of moral culpability.” The Committee did note that any redefinition should “conform closely to the present practice in commuting sentences of capital punishment.”

The following list in the Joint Committee Report is a summary of the recommendations:

1. Retention of Capital Punishment as Mandatory Penalty for Murder (paragraph 63).
3. No Change in Definition of Murder (paragraph 69).

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107 Ibid at 18.
108 Ibid at 18.
109 R v Ferguson, 2008 SCC 6 at para 73. This case held that constitutional exemptions are not permissible for mandatory minimum sentences and that the law must either be applied or struck down.
110 Joint Committee Report, supra note 72 at 17.
111 Ibid at 17.
(4) No “degrees of murder” (paragraphs 70-71).

(5) No Special Provision for Women (paragraph 75).

(6) Abolition of Capital Punishment for Offenders under 18 and Restrictions for Offenders under 21 (paragraph 76).

(7) Full Disclosure of Crown’s Case to the Accused (paragraph 79).

(8) Provision of Competent Counsel and Assistance in Producing Evidence (paragraph 80).

(9) Mandatory Plea of “not guilty” in Capital Cases (paragraph 81).

(10) Automatic Appeal to the Provincial Court of Appeal in all Capital Cases (paragraph 83).

(11) Appeal as Right by a Convicted Person to Supreme Court of Canada (paragraph 84).

(12) Centralized Places of Execution in each Province (paragraph 88).

(13) Abolition of Hanging – Replacement by Electrocution with alternative of the Gas Chamber (paragraphs 91-94).\textsuperscript{112}

While the Joint Committee Report did not favour redefining murder, Parliament took this course, introducing new classifications of murder in 1961 that classified homicide as capital and non-capital. Allan Manson writes:

Capital murder consisted of a killing that was planned or deliberate, a killing resulting from the direct intervention or counselling by the accused in the course of stipulated crimes, or the killing of a police officer or prison guard. All other murder was characterized as non-capital.\textsuperscript{113}

\textsuperscript{112} *Ibid* at 23.

\textsuperscript{113} *Manson (1990), supra* note 54 at 265-66.
Capital murder remained punishable by the death penalty while non-capital murder carried a sentence of life imprisonment. All death sentences were commuted in this era.  

Manson writes that:

> During this semi-moratorium, persons who had been sentenced to death but whose sentences had been commuted could not be released from confinement without the approval of the Governor in Council. Persons who were sentenced to life imprisonment for murder could be released on parole after serving ten years, unless the trial judge increased the period of parole eligibility.  

Under the *1973-1974 Criminal Law Amendment (Capital Punishment) Act*, sentencing judges were empowered to increase the period of parole ineligibility up to 20 years.  

While the death penalty remained in place until 1976, the last two executions occurred on December 11, 1962. Part of the reason the death penalty went unused was a further amendment to the *Criminal Code* in 1967 restricting capital punishment to murder where the accused, by his or her own act, caused or assisted in causing the death of a police officer or prison officer, or counselled or procured that death. That restriction was originally intended to last 5 years but was extended for a further 5 years in 1972. From 1967 to 1970 three individuals were convicted of capital murder, and each of them had their death penalties commuted.  

Both Parliamentarians and citizens in Canada were divided on the issue of capital punishment. Guy Favreau, then Minister of Justice, wrote a report in 1965 and summed up the nation’s mood in the following terms:

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114 *Anderson, supra* note 55 at 79.  
115 *Manson (1990), supra* note 54 at 266.  
117 *Anderson, supra* note 55 at 78.  
118 *Manson (1990), supra* note 54 at 266.  
119 *Anderson, supra* note 55 at 79.
The question shortly to come before Parliament is whether the death penalty, as prescribed by the Criminal Code, should be entirely abolished, whether it should be further restricted, or whether the present situation should be retained. It is not only a very controversial issue: it is also a very subjective issue. It affects every man’s conscience to such a degree that it is more appropriate that it be left to a free vote than that it should be dealt with by the ordinary legislative procedure which is likely to bring about voting along Party lines.\footnote{Favreau, supra note 50 at forward.}

In 1976, Bill C-84 was put before the House and Common and passed by a narrow margin, 130-124.\footnote{“Capital Punishment in Canada” CBC News (16 March 2009) online: <http://www.cbc.ca/news/canada/capital-punishment-in-canada-1.795391>}. A vote to reinstate the death penalty was held a decade later and was only narrowly defeated by a vote of 148 to 127.\footnote{Ibid.}

While capital punishment was abolished before the enactment of the \textit{Charter of Rights and Freedoms}, cases of extradition involving capital murder in the country requesting extradition have called for the Canadian courts to grapple with capital punishment in the context of the \textit{Charter}. In the \textit{United States of America v. Burns}, the United States sought the extradition of Mr. Burns and a co-accused, Mr. Rafay, to be tried for the murders of Mr. Rafay’s father, mother and sister that occurred in 1994 in Washington State. Both accused were Canadian citizens. The Minister of Justice signed an order to extradite the accused without assurances that the death penalty would not be imposed.\footnote{United States v Burns, 2001 SCC 7 at para 13 [Burns].} The Supreme Court of Canada ultimately ruled that the Minister of Justice had a constitutional obligation to obtain assurance that capital punishment would not be imposed on the accused. The Court held that such assurances “are constitutionally
required in all but exceptional cases.”¹²⁴ This decision reversed the Courts position from a
decade prior when it decided the companion cases of Kindler v. Canada (Minister of Justice)¹²⁵
and Reference re Ng Extradition (Can),¹²⁶ allowing two offenders who faced capital punishment
to be extradited. Mr. Kindler had been convicted of murder in Pennsylvania with the jury
recommending capital punishment. He escaped prior to sentencing and was apprehended in
Canada. Mr. Ng was arrested in Calgary for shoplifting and identified as the accused in multiple
murders in California, crimes for which he was ultimately convicted and sentenced to death. Mr.
Burns and Mr. Rafay were also convicted of murder, both receiving a sentence of life
imprisonment with no eligibility of parole for 99 years.¹²⁷

The second era saw capital punishment phased out, through re-defining murder making
capital punishment apply in fewer cases and greater use of the Royal Prerogative of Mercy. The
average time served in custody also dropped significantly in this era. From 1961 to 1974, those
convicted of capital murder who had their sentences commuted served, on average, under 15.8
years, and those convicted or non-capital murder served 14.6 years on average, down from 19.6
years prior to 1961.¹²⁸

¹²⁴ Ibid at para 8.
¹²⁶ Reference re Ng Extradition (Can), [1991] 2 SCR 858, [1991] SCJ No 64.
¹²⁷ Mr. Burns and Mr. Rafay continue to appeal their convictions. The Washington State
Supreme Court rejected the pair’s appeal in 2013. The pair continues to appeal, hoping the
Supreme Court of Canada’s decision R v Hart, 2014 SCC 52, which ruled evidence gathered
during a Mr. Big sting, a controversial police tactic that Mr. Burns and Mr. Rafay were subjected
to, is presumptively inadmissible. “Atif Rafay, family killer targeted in ‘Mr. Big’ sting, wants
case reopened” CBC News (16 January 2015) online: <http://www.cbc.ca/news/canada/atif-
¹²⁸ MacKay, supra note 46 at 9.
A New Sentencing Regime – Murder Sentencing from 1976-2011

The abolition of the death penalty introduced a new sentencing regime, bringing in the now familiar categories of first and second degree murder. First degree murder incorporated many of the elements of the Capital Murder definition from 1961 and carried a mandatory sentence of life in prison with parole eligibility after 25 years. All murder that was not first degree murder was second degree and punished by life in prison with parole eligibility set at between 10 and 25 years.

During the 1976 abolition debate, members of Parliament were presented with data from both Canada and internationally regarding the sentences given to convicted murderer. As stated by Manson, “[a] United Nations group of experts had only a few years earlier observed that, in countries which employed life imprisonment as an alternative to capital punishment, the most common median length of term served was between 10 and 15 years.”

Manson asks why with all of the data from both Canada and comparative sources pointing to a minimum term between 10 and 15 years did Canada choose a minimum term of 25 years? He answers his own question, stating:

The answer is simple: politics and expedience. Warren Allmand, the Solicitor General, who had been given the responsibility of steering the struggle to abolish capital punishment, had been told by the Canadian Association of Police Chiefs, who supported the death penalty, that only a minimum sentence as severe as 25 years could conceivably be an alternative to the rope.

In recognition that 25 years might still be too great a punishment in certain cases, and with data from both Canada and other nations showing a lesser penalty was often given, Parliament put in place a provision for possible release after 15 years, the faint hope clause.

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129 Manson (1990), supra note 54 at 267.
130 Ibid at 267.
a. The Faint Hope Clause

The faint hope clause, the proverbial name for s. 745.6 of the Criminal Code, provided a convicted murderer the opportunity to apply for early release after 15 years. These applications are now restricted to murderers who killed a single victim on or before December 2\textsuperscript{nd}, 2011.

The faint hope clause was originally enacted when the death penalty was abolished. Speaking in favour of adopting the faint hope clause in 1976, then solicitor general Warren Allmand stated:

I disagree with those who argue that a life sentence with no parole eligibility for 25 years is worse than death. A period of incarceration, with hope of parole and with the built-in additional incentive for the inmate, and protection for the guards, of a review of that parole eligibility after 15 years is necessarily better than a sentence of death because it removes the possibility of an irreversible error of execution.\textsuperscript{131}

MacKay states that the faint hope clause was added as a means of providing incentive for murderers to rehabilitate themselves and thereby offer more protection for prison guards, as well as recognition of Parliament’s awareness of parole ineligibility periods for convicted murderers in other countries.\textsuperscript{132} In \textit{R. v. Swietlinkski} the Supreme Court of Canada stated:

\begin{quote}
[T]he primary purpose of a s. 745 hearing is to call attention to changes which have occurred in the applicant's situation and which might justify imposing a less harsh penalty upon the applicant. Accordingly, the jury's decision is not essentially different from the ordinary decision regarding length of a sentence. It is similar to that taken by a judge pursuant to s. 744 of the \textit{Code} as to the period of ineligibility in cases of second-degree murder.\textsuperscript{133} [underlining in the original]
\end{quote}

\textsuperscript{131} Canada, House of Commons, \textit{ Debates}, 1\textsuperscript{st} Session, 30\textsuperscript{th} Parliament, 3 May 1976, p. 13091.
\textsuperscript{132} MacKay, supra note 47 at 5.
\textsuperscript{133} Swietlinski, supra note 39 at para 12.
The jury’s discretion does not extend to whether they feel s. 745 is bad law or decide if penalties imposed by Parliament are too severe or not severe enough. Likewise, juries were not to try cases on whether the system of parole is effective.

The faint hope clause has been modified throughout its existence. In the first iteration, an offender could make an application to the Chief Justice who would designate a judge to empanel a jury to hear the application. This format remained in place until 1996 when a judicial screening was put in place, adding a step whereby the Chief Justice would first consider whether the hearing had a reasonable prospect to proceed. The 1996 amendment also made multiple murders ineligible for faint hope applications.

The timing of the alteration of the law was no coincidence. Understandably public outrage was extremely high when Clifford Olson, one of Canada’s most notorious serial killers, made a faint hope application. In 1997 Olson had a faint hope hearing, a jury dismissed Olson’s application in 15 minutes. Before his death in 2011, Olson made three parole applications which were dismissed. John Hill, a lawyer for Olson during the 1980’s and 1990’s has stated “Clifford Olson, I would say, is singularly responsible for defeating most lifers’ chances for early release by way of the 15-year faint-hope clause.”

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134 Ibid at para 22.
136 The judicial screening was enacted by adding s. 745.1(1) (now s. 745.61(1) to the Criminal Code. See An Act to Amend the Criminal Code (Judicial Review of Parole Ineligibility) and Another Act, SC 1996, c 34.
The faint hope process now begins with a superior court judge in the province where the conviction occurred, usually the Chief Justice, first determining if the application has a substantial likelihood of success based on the following criteria: 1) the character of the applicant, 2) the applicant’s conduct while serving the sentence, 3) the nature of the offence for which the applicant was convicted, 4) any information provided by a victim at the time of the imposition of the sentence or at the time of the hearing under this section; and, 5) any other matters that the judge considers relevant in the circumstances. 139 If the judge dismisses the application he or she can set the next earliest date for another application not less than five years after the dismissal, or declare that the offender is not entitled to make another faint hope application, with the offender remaining eligible for the parole date set at sentencing. 140

If the judge determines the application has a substantial likelihood of success, a second judge is appointed to hear the matter with a jury. The jury considers the same five factors to decide whether the parole eligibility period should be reduced. 141 If permission to apply for parole is granted, the offender may then apply to the National Parole Board which decides whether the murderer should be released on parole. The Board’s decision is based on a risk assessment, with protection of the public as the foremost consideration.

Faint hope applications presented a unique function for juries who traditionally did not have a role in deciding sentences in Canada. Manson outlines the decision to create the legislation in this fashion stating:

139 *Criminal Code, supra* note 4 at s. 745.63.
140 *Ibid* at s. 745.51(3)(4).
141 Jury unanimity is required if the parole eligibility date is to be reduced. If the jury unanimously agrees a reduction is merited, a two-thirds majority is needed to substitute the new parole ineligibility period. Similarly, if the jury dismisses the application, a two-thirds majority can either set a time for a new application, not earlier than two years after the determination, or decide that the offender is not entitled to make further applications. See *ibid* at s. 745.63(3).
The original proposal suggested that the review would be conducted by a panel of three superior court judges. In committee a member who had previously been a trial lawyer persuaded his colleagues to amend the scheme and employ a jury. Ordinarily, Canadian juries have no decision-making role in sentencing, but this suggestion struck a responsive chord, since it would put the responsibly for reducing the minimum period of confinement in the hands of representatives of the community in which the offence occurred.\textsuperscript{142}

The Supreme Court of Canada discussed the unique way that a jury for a faint hope hearing functioned in comparison to a trial jury, noting the discretionary decision requires a different analytical approach than that of a trial jury, namely to arrive at a conclusion factors must be weighed as a whole without rigid logic.\textsuperscript{143}

As of 2009, 991 offenders were eligible to make a faint hope application. Somewhat surprisingly, only 173, or 17.45\% of those eligible, made an application for early release. Of these applicants, 143 received some reduction, an 82.6\% success rate.\textsuperscript{144} Manson suggests the low application rate is for a few reasons: 1) the contemporary media attention generated and that some offenders may prefer their case remain dormant and out of the public eye, 2) a concern that unsuccessful applications may prejudice a future parole application, and 3) self-selection and a recognition that one needs to show some good evidence of progress, therefore some prisoners prefer to wait until they have receive a lower security status.\textsuperscript{145} Manson states “[w]hatever the reasons, most cases that have gone forward have proven to be good cases,”\textsuperscript{146} suggesting “[s]ince the decision maker is a 12-person jury made of ordinary Canadians, the degree of successful applications across the entire country, including in highly conservative provinces, suggests a

\begin{footnotesize}
\begin{tabular}{ll}
\item[143] Swietlinski, \textit{supra} note 39 at 14.
\item[144] \textit{Manson (2012)}, \textit{supra} note 142 at 61.
\item[145] \textit{Ibid} at 61-62.
\item[146] \textit{Ibid} at para 62.
\end{tabular}
\end{footnotesize}
high degree of social acceptability.”\textsuperscript{147} Despite the low use, high success and social acceptability of faint hope applications, the faint hope clause was repealed for all murders committed on or after December 2\textsuperscript{nd}, 2011.

\textbf{b. R. v. Luxton – A Constitutional Challenge}

The removal of the faint hope clause could impact a future decision on the constitutionality of the mandatory 25 year period of parole ineligibility for first degree murder. This is because the faint hope clause was a factor the Supreme Court of Canada considered in upholding the punishment in \textit{R. v. Luxton}. The offender, Robert Luxton, had a cab driver take him to his motel room. He went into the motel and returned to the cab with a knife.\textsuperscript{148} As stated by the Court, Mr. Luxton “remembered being in a field and wanting the cab driver’s money. When he took her money, he had the knife displayed.”\textsuperscript{149} Charmayne Manke, the cab driver, was found dead in a field, having suffered 15 stab wounds.\textsuperscript{150}

Mr. Luxton advanced several grounds of appeal including challenging the substantive law arguing, \textit{inter alia}, that then s. 214(5)(e) of the \textit{Criminal Code} which elevated murder to first degree if it was done while committing or attempting to commit kidnapping or forcible confinement was unconstitutional.\textsuperscript{151} The decision regarding the substantive law issue bore a direct relation to the issue of sentencing, as the murder was elevated to first degree, carrying a sentence of life imprisonment with no parole eligibility for 25 years. Mr. Luxton submitted “that the principles of fundamental justice require that differing degrees of moral blameworthiness in

\textsuperscript{147} \textit{Ibid} at para 62.
\textsuperscript{149} \textit{Ibid} at para 2.
\textsuperscript{150} \textit{Ibid} at para 2.
\textsuperscript{151} \textit{Ibid} at para 11.
different offences be reflected in differential sentences, and that sentences be individualized.”\textsuperscript{152}

The Court upheld both the substantive law and the sentence of life with no parole eligibility for 25 years.\textsuperscript{153}

In upholding the sentence, the Court noted that the faint hope clause gave the ability for reprieve of the lengthy 25 year period of imprisonment without parole eligibility, stating the faint hope clause indicated “that even in cases of our most serious offenders, Parliament has provided for some sensitivity to the individual circumstances of each case when it comes to sentencing.”\textsuperscript{154} Following \textit{Luxton}, Manson wrote that the 25 year period of parole ineligibility that began as a political compromise was now “a constitutional benchmark.”\textsuperscript{155} In the 2001 decision \textit{R. v. Latimer} the Supreme Court upheld the 10 year mandatory minimum period of parole ineligibility for second degree murder.\textsuperscript{156}

After the abolition of the death penalty, the average period of incarceration for first degree murder was 22.4 years, an increase of periods of incarceration served for commuted capital murder.\textsuperscript{157}

\begin{flushright}
\textsuperscript{152} \textit{Ibid} at para 9.
\textsuperscript{153} \textit{Ibid} at para 20. The Court held that the decision to elevate murders done in the course of forcible confinement is consistent with the principle of proportionality between blameworthiness and the punishment. The court stated Parliaments decision to attach a minimum 25 year sentence cannot be said to be arbitrary as it is statutorily authorized and narrowly defined. See \textit{ibid} at para 11. The court went on to state “the policy decision of Parliament to classify these murders as first degree murders accords with the broader objectives of a sentencing scheme. The elevation of murder while committing a forcible confinement to first degree reflects a societal denunciation of those offenders who choose to exploit their position of dominance and power to the point of murder.” See \textit{ibid} at para 9.
\textsuperscript{154} \textit{Ibid} at para 9.
\textsuperscript{155} \textit{Manson} (1990), \textit{supra} note 54 at 268
\textsuperscript{156} \textit{R v Latimer}, 2001 SCC 1.
\textsuperscript{157} \textit{MacKay}, \textit{supra} note 47 at 9.
\end{flushright}
6. Homicide Rates and Length of Time Spent in Custody

Almost thirty years of experience since the death penalty was formally abolished have demonstrated that concerns that the absence of the death penalty would produce an increase in the occurrences of homicide were unfounded. In 2013, there were 505 homicides, a rate of 1.44 per 100,000 population. This rate marks the lowest homicide rate since 1968. While year-to-year rates differ, the homicide rate has been generally decreasing since the mid-1970’s when it was as high as 3.0 per 100,000 population.\(^{158}\)

Figure 4 - Homicide Rate in Canada 1963-2013

![Homicide Rate Graph](image)

Source: Statistics Canada\(^{159}\)

While murder rates were dropping, the average time spent in prison for murder was increasing. In 1999 the average time served for first degree murder was 28.4 years.\(^{160}\) This made the


\(^{159}\) Ibid.

\(^{160}\) Ibid.
average time in custody for murder in Canada higher that many countries as noted in figure five below.

**Figure 5 - Average Time Spent in Custody Internationally**

<table>
<thead>
<tr>
<th>Country</th>
<th>Time Served (Years)</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Zealand</td>
<td>11.0</td>
</tr>
<tr>
<td>Scotland</td>
<td>11.2</td>
</tr>
<tr>
<td>Sweden</td>
<td>12.0</td>
</tr>
<tr>
<td>Belgium</td>
<td>12.7</td>
</tr>
<tr>
<td>Australia</td>
<td>14.8</td>
</tr>
<tr>
<td>United States</td>
<td></td>
</tr>
<tr>
<td>Life sentence with parole</td>
<td>18.5</td>
</tr>
<tr>
<td>United States</td>
<td></td>
</tr>
<tr>
<td>Life sentence without parole</td>
<td>29.0</td>
</tr>
</tbody>
</table>

**Source:** Robin MacKay\(^{161}\)

7. **Changes to the Sentencing of Murderers Since 2011**

Despite the declining homicide rate, in 2011 Parliament proclaimed into force two laws that provide longer, harsher sentences for convicted murders. *An Act to Amend the Criminal Code and Another Act* repealed the faint hope clause contained in s. 745.6 of the *Criminal Code* for all offenders who commit a murder on or after December 2\(^{nd}\), 2011.\(^{162}\) The *Multiple Murders Act* gives a sentencing judge a discretionary power to make sentences for homicide consecutive rather than concurrent. This power comes from s. 745.51 of the *Criminal Code* which states:

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\(^{161}\) *Ibid* at 10.

\(^{162}\) The Act accomplished this by adding s 745.6(1)(a.1) to the *Criminal Code*. This section means that only those offenders who committed a murder prior to the date the paragraph comes into force will be eligible for a faint hope application. See *Criminal Code, supra* note 4 at 745.6(1).
745.51 (1) At the time of the sentencing under section 745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made pursuant to section 745.21, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively.

Reasons

(2) The judge shall give, either orally or in writing, reasons for the decision to make or not to make an order under subsection (1).

Application

(3) Subsections (1) and (2) apply to an offender who is convicted of murders committed on a day after the day on which this section comes into force and for which the offender is sentenced under this Act, the *National Defence Act* or the *Crimes Against Humanity and War Crimes Act*.

The section came into force on December 2nd, 2011. Offenders who commit multiple murders after this date can now receive consecutive parole ineligibility periods. An offender convicted of ten counts of murder theoretically could receive a sentence of life with no parole eligibility for 250 years. For each additional second degree murder conviction, the offender can receive an additional parole ineligibility period of 10 to 25 years. As will be discussed in chapter four, early jurisprudence under the *Act* shows that having at least one conviction for second degree murder adds greater flexibility in crafting a plea bargain or sentence.

The *Act* also requires a trial judge to ask the jury for a recommendation of the parole ineligibility period. The jury is not required to make a recommendation; however, if they do make a recommendation the trial judge will consider the jurors’ recommendation in his or her
ultimate determination of sentence.¹⁶³ This recommendation bears similarities to the discretionary power to suggest mercy that was given to jurors in the era of capital punishment.

The Multiple Murders Act presents the possibility that an offender may be given a sentence so lengthy that their natural life is almost certain to be over before their earliest parole eligibility date, a sentence previously unknown in Canada. Only one individual, Justin Bourque, has been given a natural life sentence; Mr. Bourque is appealing his sentence.

As chapter five will discuss many countries have no provision for sentences that preclude hope of prospective release. In some instances a legislative choice was made to never have such a condition, some countries have constitutionalized their prohibition against life sentences and others have had the practice barred by courts. While Canada was in line with the international community in abolishing capital punishment and took the international perspective into account creating the new sentencing structure in 1976, the harsher, more retributive sentences introduced in 2011 now put Canada out of step with the global trend on sentencing. As more cases make their way to the courts, the judiciary will be required to reflect upon societal values in respect to how hope of prospective release and decide fundamental questions of the values of our Canadian criminal justice system and society.

¹⁶³ See ibid at s. 745.21.
Chapter Four – Emerging Jurisprudence under the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act

1. Introduction
As discussed in chapter three, the Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act came into force December 2nd, 2011 creating, for the first time in Canadian history, the possibility that an offender could be sentenced to incarceration without hope of prospective release. The power to increase parole ineligibility past the mandatory minimum sentence is discretionary. In every case that has considered the Act the sentencing judge has extended parole ineligibility beyond the mandatory minimum - either by making parole ineligibility terms consecutive, extending parole ineligibility for a second degree murder beyond 10 years, or using both measures. However, parole ineligibility was extended so far that it precluded all hope of prospective release in only one case, R. v. Bourque. This chapter first discusses the three components of a sentence under the Act before offering a description of the first nine cases which have considered the Act.

2. Elements of a Sentence under the Multiple Murders Act
Sentences under the Multiple Murders Act consist of three components – a mandatory life sentence, a mandatory minimum period of parole ineligibility, and the discretionary power to make the parole ineligibility period for second and subsequent murders consecutive which could create an additional period of incarceration and parole ineligibility. The first two components are the same features of a murder sentence that have been in place since the abolition of the death penalty and apply to all murderers; the third component was introduced by the Act and only applies to multiple murderers.

Section 235(1) of the Criminal Code mandates that everyone convicted of first or second degree murder is sentenced to imprisonment for life. This mandatory life sentence means that if
an offender is granted parole, he or she still remains under the supervision of the Parole Board of Canada for the rest of their lives. A parolee must abide by conditions set by the Parole Board, the violation of which may lead to them returning to prison.

The mandatory period of parole ineligibility is the same mandatory minimum sentence that applies to all convicted murders. For an offender who is convicted of first degree murder, the minimum period of parole ineligibility is 25 years, for second degree murder the minimum is 10 years. In cases of multiple murders, the starting point of parole ineligibility is determined by the most serious murder offence.

The discretionary period of additional incarceration without parole eligibility is the new feature added by the *Multiple Murders Act*. Prior to the *Act*, all offenders were entitled to parole eligibility after 25 years at most. Under the discretionary incarceration component, the judge has the discretion to make periods of parole ineligibility consecutive in cases of repeat homicide offenders or multiple murders arising from a single transaction.

It should be kept in mind that while offenders become eligible to apply, parole is not guaranteed. Justice Campbell provides this stark reminder:

In Canada, like virtually every other free and democratic society, we have a system of parole. It is administered by what used to be called the National Parole Board, and is now simply called the Parole Board of Canada. After a substantial portion of a sentence has been served, the Board is required to consider the sentence imposed by a Court and, subject to their own statute and regulations, may determine that an offender can serve a portion of their sentence in an environment other than a prison. Of all of the applications made for parole, fewer than 30% of inmates are ever granted full parole. The more serious the crime, and the worse the character of the accused, the less likelihood there is of a person ever getting parole. It is a gross misconception to think that people automatically get out of jail once they have served 25 years of their life sentence. Parole for someone committing multiple murder
is rare. Being eligible to apply for parole and getting parole are two entirely different things. Experience shows that multiple murders such as Clifford Olsen are never paroled, remaining in custody until their natural deaths. While it will be decades before an offender sentenced under the Multiple Murders Act applies for parole, due to the seriousness of their offences these offenders face an uphill battle to achieve parole.

A strict reading of the Criminal Code suggests that while imposing the discretionary period of incarceration, the judge is still bound by the mandatory minimum periods of parole ineligibility for first and second degree murder, namely 10 or 25 years, and cannot impose discretionary consecutive periods in integers of less than the minimum of 10 or 25 years. This leaves a sentencing judge greater ability to tailor to sentence where there is at least one conviction for second degree murder. If an offender is convicted of two counts of first degree murder the sentencing judge may only have two sentencing options, life imprisonment with no eligibility of parole for 25 years, or life imprisonment with no eligibility of parole for 50 years. However, if an offender is convicted of two counts of murder, one being first degree and the other being second degree, the sentencing judge has a greater range of options. The minimum period of parole ineligibility remains 25 years, and the maximum remains 50 years, but the judge also has options in between. A sentence of 25 years, 35 years, or any number of years between 36 and 50 are all options in this circumstance. The more flexible range of sentences available where there is at least one count of second degree murder may be a factor in plea negotiations. In six of the nine cases under the Act, the Crown reduced at least one count charged as first degree murder to second degree murder. In chapter eight I discuss whether, in the case of two

\[164\] \textbf{R v Vuozzo}, 2015 PESC 14 at para 9 [Vuozzo].
first degree murder convictions, statutory interpretation reflective of Charter values would allow a judge to impose a sentence of over 25 but less than 50 years of parole ineligibility.

3. Cases under the Multiple Murders Act
   
a. R. v. Baumgartner

R. v. Baumgartner is the first case to consider the Act. The offender, then 21, received a sentence of life imprisonment with no parole eligibility for 40 years for one count of first degree murder and two counts of second degree murder. The facts of the case, as stated by Rooke J. are as follows:

On June 15, 2012, while a G4S Cash Solutions (Canada) Ltd. ("G4S") armoured car security guard, with four others, at the HUB Mall at the University of Alberta campus, the Offender executed two of his fellow armoured car security guards in cold blood by pistol shots to the back of their heads and caused massive injuries to the third by three shots. With intent and planning to kill the fourth guard, he did so by ambushing him in the cab of the armoured car in which he was sitting outside the HUB. He then proceeded to steal from that armoured car over $400,000 (in round figures) of the money they were carrying, took steps later to avoid detection, and travelled to B.C. to the American border south of Langley, B.C., where he was arrested.165

Mr. Baumgartner was originally charged with three counts of first degree murder along with a charge of attempted murder. He entered into a plea agreement with the Crown whereby two of the counts of first degree murder were reduced to second degree murder. As explained in the sentencing reasons, the reduced charges were put forward on the basis that the Crown may have not been able to prove the Mr. Baumgartner intended to kill the first two guards, Brian Ilesic and Michelle Shegelski.166

165 R v Baumgartner, 2013 ABQB 761 at para 3 [Baumgartner].
166 As stated by Rooke J., “[i]ndeed, the joint submission, which I expressly accept on this point, is that there may be doubt about the Crown's ability to prove the Offender's prior intent to kill the two guards and wound the third in the vestibule. He clearly had that intent when he shot them, but there may be doubt of the ability to prove that it was planned and deliberate in advance as is required for first degree murder as it relates to those deceased persons. There seems clear
As the sentencing took place by way of a joint submission, the foremost issue for Rooke J. was “whether the total of 40 years of parole ineligibility, as jointly submitted by experienced Counsel, is contrary to the principles of joint submissions which require that they be ‘contrary to the public interest’ or that they ‘bring the administration of justice into disrepute.’”

Justice Rooke ultimately determined that the proposed sentence was fit and accepted the joint submission; however, he did not arrive at this decision lightly, proceeding through a lengthy sentencing judgment considering a number of factors.

One of the factors Rooke J. considered at length was the social utility in leaving Mr. Baumgartner with hope of release. In considering this utility, Rooke J. quoted a portion of the Crown’s sentencing brief, which in turn quoted the *Fauteux Report* (1956), an influential document in Canadian corrections policy. The Crown’s brief stated:

There is social utility in a prisoner having the potential of one day facing the possibility of parole. This is an incentive for good behaviour and rehabilitation. The *Fauteux Report* (1956) [Gerald Fauteur, Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice Canada, Ottawa, April 30, 1956] was a comprehensive analysis of Canada’s parole system and recommended how it should evolve. At page 49 the report remarks:

> At no time should any prisoner have reason to feel that he is a forgotten man. ... Prisoners should have some hope that imprisonment will end and thereby have some incentive for reformation and rehabilitation.¹⁶⁸

planning and deliberation of the robbery and, albeit brief and maybe not sophisticated, planning of the subsequent shooting of Eddie, however, Counsel have relied upon, and it seems reasonable, as to the doubt as to the planning and deliberation, and the ability of the Crown to prove that beyond a reasonable doubt, of *that planning and deliberation of the killings* in advance of the murders of Brian and Michelle.” See *ibid* at para 56 [italics in the original].

¹⁶⁷ *Ibid* at para 46 citing Canada, *Report of a Committee Appointed to Inquire Into the Principles and Procedures Followed in the Remission Service of The Department of Justice of Canada* (Ottawa, ad hoc committee, 1956) at 48-49 [*Fauteux*]. This report was widely influential on Canadian correctional policy, leading to the establishment of the National Parole Board.

¹⁶⁸ *Baumgartner, supra* note 165 at para 87.
Justice Rooke also considered how Mr. Baumgartner’s hope of future release would serve to protect the prison guards and inmates, stating in a seminal paragraph:

This offender is sentenced to life imprisonment and may never get parole. There are no guarantees. Rather, he only has a right to apply, under the joint submission, if accepted, after he serves 40 years -- ending long after many of us in this room are gone. Some prospect for freedom in the future will help to ensure that he does not commit crimes against prison guards or other inmates. That is because any serious offence he were to commit while in prison would significantly lessen his chances to parole, perhaps down to zero. If the sentence were so long that he had no incentive not to commit crimes, he might be prone, or more prone, to do so. However, if he survives prison and does get parole after many years, 40 or more, he will have little, if any, time outside prison at which to be a risk to anyone, and at the time he will be over 61 years of age. But even then, if that happens, the sentence he gets today must ensure that he is specifically deterred from ever taking the life of or injuring any citizen inside or outside prison again, because any breach of his parole, either inside [or] outside, puts him back in prison or extends his life sentence, that is, a sentence that only ends in law with his death, even without further sentencing for any new crime. Thus, paradoxically, in this unique case and in this unique sense, some possible (but by no means sure) prospect for freedom under parole conditions with a life sentence remaining if he breaches any conditions of parole -- which is for the parole board to ultimately determine after many years of parole ineligibility, and albeit at a very advanced age -- will serve as a specific deterrent to him, thereby enhancing one of the principles of sentence, specific deterrence against further crime by this Offender, either inside or outside prison. Simply put, he has no choice, because if he is not specifically deterred from further crime, his chances of any parole at any time go downhill.\textsuperscript{169} [emphasis added]

Justice Rooke considered how the sentence passed would impact Mr. Baumgartner’s behaviour, both in custody and in the community should he ever attain parole, leaving hope of release, in part to provide protection to the inmates and correctional staff around Mr. Baumgartner. The sentence reflected not only the principles of general deterrence and denunciation but also factored in specific deterrence and rehabilitation.

\textsuperscript{169} Ibid at para 84.
Even with hope of prospective release, Mr. Baumgartner’s sentence was, at the time of its passing, the harshest sentence since the abolition of the death penalty. Had the murders occurred on or before December 2\textsuperscript{nd}, 2011 the most severe sentence would have been life imprisonment with no parole eligibility for 25 years. Just over a year later Mr. Baumgartner’s sentence was surpassed by the sentence of Justin Bourque who received life in prison with no parole eligibility for 75 years.

b. \textit{R. v. Bourque}

Justin Bourque, 24 at the time of his offence, pled guilty, amongst other charges, to the first degree murders of three R.C.M.P. officers in Moncton, New Brunswick. Mr. Bourque received a life sentence with no parole eligibility for 75 years. He has appealed his sentence and the appeal has yet to be heard. The facts of the case are explained Smith C.J. as follows:

On June 4th, 2014, shortly after 7 p.m., Justin Bourque left his residence at 13 Pioneer Avenue, in Northwest Moncton, dressed in camouflage with a bandana on his head, two firearms strapped criss-cross on his back, a knife on his leg, a supply of ammunition, and proceeded to walk through a subdivision. Codiac RCMP were dispatched to investigate 911 calls placed by residents of the subdivision. During Justin Bourque's walk, he ignored civilians and targeted only the police officers who had responded. In a period of approximately one hour from leaving his residence, he shot and killed Fabrice Gevaudan; shot and killed Dave Ross; shot and wounded Darlene Goguen; shot and wounded Éric Dubois, and shot and killed Douglas Larche, all being police officers and members of the Royal Canadian Mounted Police acting in the line of duty. Each shooting occurred in various locations in proximity to one another in a period of approximately 20 minutes. An extensive manhunt involving hundreds of police personnel ended with Mr. Bourque's capture some twenty-eight hours after the rampage began.\footnote{170 \textit{Bourque, supra} note 1 at para 3.}

Less than four months after the offence, Mr. Bourque pled guilty to three counts of first degree murder and two counts of attempted murder. A contested sentencing hearing took place with the Crown seeking the maximum period available, life imprisonment with no parole ineligibility for
75 years while the defence sought for parole ineligibility to be set at 50 years.\textsuperscript{171} Smith C.J. agreed with the Crown, taking the view that “[t]here must be an understanding that crimes similar to that of the offender will result in life-long incarceration.”\textsuperscript{172}

Justice Smith took notice of the parity principle codified in s. 718.2(b) of the \textit{Criminal Code} that states “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.”\textsuperscript{173} Despite \textit{Baumgartner} being factually similar to \textit{Bourque} in a number of regards, such as the offenders being young and the same number of victims murdered, Smith C.J. dismissed the precedential value of \textit{Baumgartner} stating: “[i]n \textit{Baumgartner}, there was only one first degree murder conviction and the motivation was greed. In other words, this principle cannot be applied in the case before the Court.”\textsuperscript{174}

Little more was stated about the \textit{Baumgartner} decision, including any discussion about the social utility of hope of release. The sentences of Mr. Baumgartner and Mr. Bourque therefore set up a troubling dichotomy. In \textit{Baumgartner}, it was recognized that a lengthy prison sentence is necessary but hope of prospective release should not be denied while in \textit{Bourque} the social utility of providing some prospect of freedom was set aside to emphasise the necessity for punishment and general deterrence.

The sentence imposed on Mr. Bourque was quickly criticized by members of the public, media and legal system. One of the most poignant critics has been Jean-Claude Hérbert, a well-known defence lawyer from Quebec. Mr. Hérbert wrote an article in the \textit{Journal of the Quebec

\textsuperscript{171} \textit{Ibid} at para 26.
\textsuperscript{172} \textit{Ibid} at para 32.
\textsuperscript{173} \textit{Ibid} at para 42.
\textsuperscript{174} \textit{Ibid} at para 43.
Bar critical of the sentencing judge, defence attorney and justice minister. The criticisms ranged from the trial judge using language amounting to “devastating rhetoric,” the defence counsel failing to advance defences related to Mr. Bourque’s troubled mentality that may have shown criminal irresponsibly or that may have reduced the murders to second degree and Justice Minister Peter MacKay for breaching separation of powers by applauding the sentence. Mr. Hérbert called for the New Brunswick bar to appoint a seasoned lawyer to appeal Mr. Bourque’s sentence, something that the bar declined to do. Mr. Bourque’s attorney, David Lutz, Q.C., himself a respected, seasoned attorney, stated he was following the instructions of his client in seeking the 50 year sentence and that he was never instructed to appeal. In R. v. Vuozzo Campbell J., the next judge to sentence an offender under the Act added his voice to the concerns about the sentence given to Mr. Bourque. On October 31, 2015, several media outlets reported Mr. Bourque was appealing his sentence.

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176 The New Brunswick bar declined to appoint a lawyer. Law Society Executive Director Marc Michar stated “[w]hy should we accept Mr. Hebert’s position over Mr. Lutz’s position? We can’t do that. It’s not our role. For us to start questioning it, it means that we’re questioning the job that was done by a lawyer and we don’t have the tools to evaluate whether he did a proper job or not. It’s not our role to do that.” See Aly Thomson, “Law Society rejects lawyer’s bid for appeal of Justin Bourque sentence” (21 March 2015) Macleans online: <http://www.macleans.ca/news/law-society-rejects-lawyers-bid-for-appeal-of-justin-bourque-sentence>.

177 Ibid.

c. R. v. Vuozzo

Alfred Vuozzo was 46 years old when he committed one first degree murder and one second degree murder on August 20th, 2014, in Prince Edward Island, a crime for which he received a life sentence with 35 years of parole ineligibility. The murders were an act of revenge precipitated by lifelong torment caused by the death of his sister decades prior. In 1970, when Mr. Vuozzo was two years old, his family was in a vehicle that was struck by a drunk driver, Herbert McGuigan. Mr. Vuozzo’s nine year old sister Kathy died in the crash. The trial judgment notes that Herbert McGuigan was charged but only served a short period in prison.\(^{179}\) Herbert McGuigan died in 1975. The death of Kathy was said to have ruined the Vuozzo family, causing Mr. Vuozzo’s parents to develop depression and begin to drink heavily.\(^{180}\) Mr. Vuozzo contemplated getting revenge for years. On August 14th, 2014, Mr. Vuozzo broke into the home of Brent McGuigan and shot and killed Brent and Brendon McGuigan, the son and grandson of Herbert. Early media reports indicate Mr. Vuozzo was charged with two counts of first degree murder\(^{181}\) but at sentencing he pled guilty to the first degree murder of Brent McGuigan and second degree murder of Brendon McGuigan.\(^{182}\)


\(^{180}\) See Vuozzo, supra note 164 at para 46.


\(^{182}\) The distinguishing feature between the murders appears to be that Mr. Vuozzo went into the home with the intent to kill Brent McGuigan without knowing Brendon would be present, however, the sentencing judgment notes that prior to entering the residence he saw Brendan through a window, see Vuozzo, supra note 164 at para 50.
In a contested sentencing hearing, the Crown sought the maximum punishment available, life imprisonment with no parole eligibility for 50 years, at which point Mr. Vuozzo would be 96. The defence sought the minimum, life with no parole eligibility for 25 years which would make Mr. Vuozzo eligible for parole at age 71; alternatively, the defence sought 35 years of parole ineligibility. Had both convictions been for first degree murder, the defence’s alternative perspective may have been unavailable and Campbell J. may have had decide on a parole ineligibility period of either 25 or 50 years with no junctures in between.

One feature distinguishing Vuozzo from Baumgartner and Bourque is the fact that Mr. Vuozzo is over 20 years older than the other two offenders. Mr. Vuozzo’s age meant a sentence that may otherwise be appropriate based on his culpability may violate the principle of totality as it results in a “crushing sentence” that precludes hope of prospective release. As Campbell J. stated:

I have considered whether a 50 year period of parole ineligibility, until the offender is age 96, would be unduly long or harsh. Apart from the unlikelihood the offender will live to that age, in my opinion, the prohibition on even applying for parole until then virtually eliminates any hope. Such a sentence would go beyond retribution and become vengeful, and that would not be just. In my view, it would be unduly long or harsh. 

Likewise, Campbell J. found that a 25 year parole ineligibility period would fail to “fully acknowledge the loss of two lives and the brutality and callousness of the offender’s actions.”

The 35 years of parole ineligibility acknowledged the loss of two lives, following the emerging precedent that sees multiple murderers receive more than the minimum parole ineligibility periods while still allowing Mr. Vuozzo some hope of prospective release.

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183 Ibid at paras 105-110.
184 Ibid at 114.
185 Ibid at 115.
In considering the weight of previous precedents under the Act, Campbell J. added his voice to the concerns of the sentence imposed in Bourque stating:

In arriving at that sentence, Smith C.J., reviewed the facts and various principles set out in the Criminal Code. However, with respect, when it came to consideration of the totality principle referred to in s.718.2 (c), he failed to address whether such a sentence would be "unduly long or harsh". While it may not be necessary to specifically address each principle in each sentencing exercise, in applying s.745.51 of the Criminal Code, the question of whether the total sentence is unduly long or harsh is of utmost importance. Smith C.J. merely stated that s. 718.2 (c) must be considered with s. 718.1. (See para. 44 of Bourque). The two sections are separate and distinct, and each requires consideration.

Notwithstanding these are the gravest of offences and the offender is solely and completely responsible for their occurrence (s. 718.1), the Court is statutorily bound to apply each of the relevant principles. Lumping the two together and simply declaring the crime to be the "worst" does not constitute consideration under s. 718.2 (c). As a result of that failure, in my view, Bourque does not constitute an appropriate precedent when it comes to applying the totality principle to the overall sentence to be imposed.¹⁸⁶

Further judicial criticism of the Bourque decision was levied by Ewaschuk J., the sentencing judge in the case of R. v. Husbands.

d. R. v. Husbands

The next case to consider the Act was R. v. Husbands. While on bail and under house arrest, Christopher Husbands, 25, opened fire at the food court of the Toronto Eaton Centre, killing two men and injuring several other individuals. A jury found Mr. Husbands guilty of two counts of second degree murder and a host of other charges;¹⁸⁷ he was sentenced to life imprisonment with

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¹⁸⁶ Ibid at 68-69.
¹⁸⁷ Mr. Husbands was convicted of 5 counts of aggravated assault, once count of criminal negligence causing bodily harm and one count of intentional and reckless discharge of a firearm. See R v Husbands, [2015] OJ No 2674 at paras 24-30 [Husbands].
no eligibility of parole for 30 years. The conviction is under appeal in respect to an issue of jury selection.188

Justice Ewaschuk wrote two separate sentencing decisions, one discussing a *Charter* argument and one discussing the sentencing hearing. The *Charter* argument advanced by Mr. Husbands, discussed in greater detail in chapter 8, sought a constitutional declaration that s. 745.51 of the *Criminal Code* was null and void.189 After rejecting the *Charter* argument, Ewaschuk J. wrote a short decision as to the sentence. As Mr. Husbands was tried by jury, the Court was obligated to ask the jury for their recommendations on the period of parole ineligibility. Three jurors recommended 25 years parole ineligibility, three recommended 15 years, one recommended 20 years and the remaining five made no recommendation.190 Justice Ewaschuk ultimately sentenced Mr. Husbands to life in prison with no parole eligibility for 30 years. While considering Mr. Husbands “a person of generally bad character” and “highly manipulative,” Ewaschuk J. noted “[n]onetheless the accused has a realistic prospect of future rehabilitation should he avail himself of the opportunity to do so,”191 recognizing the capacity for change and the role agency plays in such rehabilitative efforts.

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188 Jacques Gallant, “Murder trials may be retried due to judge’s errors” *The Toronto Star* (22 February 2016) online: <https://www.thestar.com/news/gta/2016/02/21/murder-trials-may-be-retried-due-to-judges-errors.html>. The issue at play is the trial judge using static triers rather than rotating triers during jury selection.

189 Section 745.51 of the *Criminal Code* states: "At the time of sentencing under s.745 of an offender who is convicted of murder and who has already been convicted of one or more other murders, the judge who presided at the trial of the offender... may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission and the recommendation of the jury, by order, decide that the periods without eligibility for parole for each murder conviction are to be served consecutively." See *Criminal Code, supra* note 4 at s. 745.51.

190 *Husbands, supra* note 187 at para 15.

e. **R. v. W.G.C.**
The fifth case which considered the Act was *R. v. W.G.C.*, in which a 26 year old offender received life imprisonment with no parole ineligibility for 35 years for one first degree murder and one second degree murder.\(^{192}\) Mr. C. came to Canada as a live-in caregiver for his cousin. Mr. C. lived with his cousin, EM, his cousin’s wife, CM, and their three children, ECM, KM and GM. Mr. C. began sexually abusing ECM in 2009, impregnating her in 2013. On May 16\(^{th}\), 2013, while the two older children were at school, Mr. C. had a confrontation with CM and stabbed her several times, killing her. The youngest child, GM, five years old, was home and saw part of his mother’s murder. Mr. C. then killed GM as a means of eliminating him as a witness. At first, Mr. C. tried to stage the crime scene to show he was not the killer but he eventually pled guilty to the first degree murder of GM and the second degree murder of CM.\(^{193}\)

The result of *W.G.C.* is comparable to *Baumgartner* in the sense that Mr. C was initially charged with two counts of first degree murder, one of which was reduced to second degree presumably as a result of plea negotiations. While the plea bargain was likely arranged before the cases of *Vuozzo* and *Husbands* were decided, the sentencing judge in *W.G.C.* took notice of these decisions. In a brief sentencing decision, Eidsvik J. noted that the sentence proposed fell within the parameters of the existing jurisprudence and accepted the joint submission, imposing a sentence of life imprisonment with no parole eligibility for 35 years.\(^{194}\)

f. **R. v. Bains**
In *R. v. Bains*, the offender, Sarbjit Bains, 33, pled guilty to two counts of second degree murder as well as one count of manslaughter. The sentence judge accepted a joint submission of life

\(^{193}\) *Ibid* at paras 6-16, 61. Mr. W.G.C. was initially charged with two counts of second degree murder, but the Crown upgraded both charges to first degree murder before reducing one count back to second degree.
\(^{194}\) *Ibid* at paras 57-58.
imprisonment with no parole eligibility for 18 years for each murder, to be served concurrently to one another as well as a 10 year sentence for the manslaughter. With 18 years of parole ineligibility, Mr. Bains will be 51 before he is first eligible for parole.195

The manslaughter occurred February 23, 2013, in Surrey, BC. The victim, Amritpal Saran, was drinking and using cocaine with Mr. Bains and Evelina Urbaniak, a woman with whom Mr. Bains resided. Early in the morning Mr. Saran entered the bedroom and was entering the bed where Ms. Urbaniak was sleeping. Mr. Bains put Mr. Saran in a choke hold to drag him from the bedroom, killing him in the process. Mr. Bains did not remember how long he put him in the choke hold but believes he used too much force. The manslaughter demonstrated Mr. Bains knew his chokehold could dispense lethal force.196

The murders of Jill Lyons and Karen Nabors occurred in New Westminster, BC on August 9th, 2013 and August 23rd, 2013, respectively. Both women worked as escorts. Mr. Bains obtained their telephone numbers from a newspaper and set up meetings with the intention of robbing the women. In a police interview, Mr. Bains stated that when he gained entry into Ms. Lyons apartment he tried to intimidate her and when she began to scream he put her in a chokehold, eventually killing her. He then robbed her, claiming he did not realize at the time that he had killed her. The murder of Ms. Nabors occurred in a similar fashion.197

In sentencing Mr. Bains, Mainsonville J. noted “[t]he issue for me to determine simply is whether the period of 18 years of parole ineligibility as jointly submitted by experienced counsel is contrary to the principles of joint submissions which require that they not be contrary to the

195 R v Bains, 2015 BCSC 2145 at para 99 [Bains].
196 Ibid at para 6-8, 69.
197 Ibid at paras 17-48.
public interest based on the cases to which I would refer.”\textsuperscript{198} Justice Mainsonville set out the sentencing principles codified in s. 718 but only specifically addressed parity. Considering previous jurisprudence under the \textit{Multiple Murders Act}, Mainsonville J. noted that aside from \textit{Husbands}, each of the other cases had a conviction for first degree murder, starting this as “an important distinction.”\textsuperscript{199} Justice Mainsonville ultimately accepted the joint submission for a life sentence with a total of 18 years parole ineligibility.

\textbf{g. R. v Koopmans}

A jury found John Koopmans, 51, guilty of two counts of second degree murder for the deaths of Robert Wharton and Rosemary Fox and the attempted murder of Bradley Martin. Mr. Koopmans was sentenced to life imprisonment with no parole eligibility for 22 years.\textsuperscript{200}

The offence took place in Princeton, BC on March 20, 2013. According to the facts found by the jury, Mr. Koopmans property had been robbed earlier in the year and he believed Mr. Wharton was involved with the robbery. Mr. Koopmans went to see Mr. Wharton’s who had his girlfriend, Ms. Fox, and friend, Mr. Martin, staying with him. Mr. Martin was watching television when he went to calm an argument that had grown heated. Mr. Koopmans shot Mr. Martin from a few feet away, causing Mr. Martin to flee. Mr. Koopmans then shot, in unknown order, both Mr. Wharton and Ms. Fox.\textsuperscript{201}

For the murder of Mr. Wharton, seven jurors made a recommendation of 15 years of parole ineligibility while five had no recommendation.\textsuperscript{202} The same recommendation was made

\textsuperscript{198} \textit{Ibid} at para 87.
\textsuperscript{199} \textit{Ibid} at para 86.
\textsuperscript{200} \textit{R v Koopmans}, 2015 BCSC 2120 at para 1 [\textit{Koopmans}].
\textsuperscript{201} \textit{Ibid} at paras 6-26.
\textsuperscript{202} \textit{Ibid} at 28.
for the murder of Ms. Fox.\textsuperscript{203} Nine jurors recommended consecutive sentencing, one recommended concurrent and two had no recommendation.\textsuperscript{204} The defence took the position that the sentence should be life imprisonment with no parole eligibility for 17-1/2 years. The Crown sought for parole eligibility to be set at 30 years, two 15 year sentences served consecutively.

Justice Maisonville found the case of Husbands to be a helpful precedent, noting the other cases under the Act involved convictions for both first and second degree murder.\textsuperscript{205} Justice Maisonville considered the jurors recommendation of life with 30 years of parole ineligibility inappropriate but interpreted as a finding that the crime was very serious. Maisonville J. imposed a sentence of life imprisonment with no parole eligibility for 22 years for each murder with the sentences to be concurrent. Mr. Koopmans will be eligible for parole at the age of 73.

\textbf{h. R. v. O’Hagan and Another}

A series of gang-related murders in Saskatchewan and Alberta resulted in two more individuals receiving sentences under the \textit{Multiple Murders Act}. Randy O’Hagan, 22, and another individual whose identity is protected were convicted of a first-degree murder in Saskatoon and pled guilty to a second-degree murder in Alberta. Mr. O’Hagan, 22, received life imprisonment with a total parole ineligibility of 36 years, the second offender received a total parole ineligibility of 38 years. A third co-accused remains before the courts.\textsuperscript{206}

\begin{flushright}
\textsuperscript{203} Ibid at 29. \\
\textsuperscript{204} Ibid at 30. \\
\textsuperscript{205} Ibid at para 74. Sentencing for Koopmans had been argued but not decided prior to the Bains decision, nonetheless both cases were before Maisonville J. \\
\end{flushright}
The first murder occurred September 12, 2012, in Saskatoon, Saskatchewan. The murderers intended to kill a man who had left their gang. Unfortunately, they went to the wrong address. The victim, Lorry Santos, was shot as she looked through her blinds seeing who was at her door. Mr. O’Hagan and another individual were convicted of Mrs. Santos murder, both were sentenced to the mandatory minimum of life imprisonment with no parole eligibility for 25 years.\(^{207}\)

The second victim, Bryan Gower, was killed near Kitscoty, Alberta on September 25, 2012. At the outset of his trial, Mr. O’Hagan pled guilty to second degree murder and received a sentence of life imprisonment with 11 years of parole ineligibility. The parole ineligibility period was made consecutive to his sentence for the murder of Mrs. Santos. The total of 36 years parole ineligibility means that Mr. O’Hagan will be 58 before his first parole eligibility date. Mr. O’Hagan is expected to be tried for a third murder in December 2016. The second offender received a total of 38 years of parole ineligibility for his roles in the murders of Mrs. Santos and Mr. Gower.

4. Conclusion
The following table summarizes the early jurisprudence under the *Multiple Murders Act*:

Figure 6 - *Multiple Murders Act* Cases\textsuperscript{208}  

<table>
<thead>
<tr>
<th>Case and offenders age</th>
<th>Key Facts</th>
<th>Convictions (murder offences only)</th>
<th>Sentencing Process</th>
<th>Parole ineligibility</th>
<th>Parole eligibility age</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>R. v. Baumgartner</em> 2013 ABQB 761 21 years old</td>
<td>Shot 4 co-workers killing three, fled with approximately $400,000 cash, apprehended at border.</td>
<td>One count first degree, two counts second degree.</td>
<td>Joint submission.</td>
<td>40 years.</td>
<td>61</td>
</tr>
<tr>
<td><em>R. v. Bourque</em> 2014 NBQB 237 24 years old</td>
<td>Shot and killed three police officers, attempting to kill two more, apprehended after manhunt.</td>
<td>Three counts of first degree.</td>
<td>Contested sentencing.</td>
<td>75 years.*</td>
<td>99*</td>
</tr>
<tr>
<td><em>R. v. Vuozzo</em>, 2015 PESC 14 46 years old</td>
<td>Sister died as a result of a drunk driver, decades later killed the driver’s son and grandson.</td>
<td>One count of first degree, one count of second degree.</td>
<td>Contested sentencing.</td>
<td>35 years.</td>
<td>81</td>
</tr>
<tr>
<td><em>R. v. Husbands</em> [2015] OJ No 2674 25 years old</td>
<td>While on bail and house arrest, opened fire on group of men at Toronto’s Eaton’s mall.</td>
<td>Two counts of second degree murder.**</td>
<td>Jury trial, contested sentencing.</td>
<td>30 years.</td>
<td>55</td>
</tr>
<tr>
<td><em>R. v. W.G.C.</em> 2015 ABQB 252 26 years old</td>
<td>After an altercation with his cousin’s wife, killed her as well as one of her children.</td>
<td>One count of first degree, one count of second degree.</td>
<td>Joint submission.</td>
<td>35 years.</td>
<td>63</td>
</tr>
<tr>
<td><em>R. v. Koopmans</em> 2015 BCSC 2120 51 years old</td>
<td>Believing one victim robbed his property, went to victim’s home killing him and his girlfriend.</td>
<td>Two counts of second degree murder.</td>
<td>Jury trial, contested sentencing.</td>
<td>22 years.</td>
<td>71</td>
</tr>
<tr>
<td><em>R. v Bains</em> 2015 BCSC 2145 33 years old</td>
<td>In two separate incidents set up meetings with escorts with intent of robbing them, killed both by manual strangulation.</td>
<td>Two counts of second degree murder, one additional manslaughter.</td>
<td>Guilty plea, joint submission.</td>
<td>18 years.</td>
<td>51</td>
</tr>
</tbody>
</table>

\textsuperscript{208} Table excludes co-accused in offender who received 38 years of parole ineligibility for a first degree murder and second degree murder, the name, age and role of that offender is unknown. The sentence in *R v Bourque* and conviction in *R v Husbands* are under appeal.
| R. v. O'Hagan | First murder - shot woman through blinds believing her to be ex-gang member. Second murder facts unclear. | One count of first degree murder, one count of second degree murder. | First - trial by judge alone. Second - guilty plea. | 36 years. | 58 |

The early jurisprudence under the *Multiple Murders Act* establishes precedent that consecutive sentences will be the rule and not the exception in cases where there is at least one first degree murder conviction. In cases of multiple second degree murders, the offender may not receive consecutive sentences but the parole ineligibility period will be raised above the 10 year mandatory minimum.

The nearly automatic increase of parole ineligibility raises doubts as to whether the *Multiple Murders Act* is meeting its stated purposes. Parliamentary debates indicate three purposes of the Act. Mr. Daniel Petit, Parliamentary Secretary to the Minister of Justice, speaking to the *Multiple Murders Bill* at the third reading in the House of Commons, stated:

> The measures proposed in Bill C-48 will accomplish three things. First, they will better reflect the tragedy of multiple murders by enabling a judge to acknowledge each and every life lost.

> …

> The second thing that Bill C-48 would do is reinforce the denunciatory and retributive functions of the parole ineligibility period attached to a sentence of life imprisonment.

> …

> This leads me naturally to the third thing that Bill C-48 will do, namely, to enhance the protection of society by permitting judges to keep the most incorrigible multiple murderers in custody for longer periods of time that better correspond to their crimes, which is only normal.²⁰⁹

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²⁰⁹ Canada, House of Commons, Hansard, 40ᵗʰ Parl, 3ʳᵈ Sess, (1 February 2011) at 1015 (speaker Daniel Petit).
The third of these stated objectives raises questions whether the way the *Multiple Murders Act* has been applied is appropriate in all cases. By making parole ineligibility periods consecutive, judges have focused on acknowledging the additional lives lost in a case of multiple murder and reinforcing the denunciatory and retributive functions of the parole ineligibility periods. However, the facts of the specific cases, and moreover the nearly automatic use of consecutive sentences, raises questions whether the *Act* is only targeting the most incorrigible murderers.

Judges are directed to consider “the character of the offender, the nature of the offence and the circumstances surrounding its commission”210 when deciding whether to make parole ineligibility periods consecutive. In the debates, Mr. Petit stated “judges will therefore look to the protection of society in making their decisions.”211

The question raised is whether a 25 year period of parole ineligibility does not adequately protect society. First, it must be remembered that the parole ineligibility period does not guarantee release, only the opportunity to apply for parole to a board whose primary objective is the protection of society. Secondly, for multiple murderers there are no deductions. Federal offenders serving non-life sentences are eligible to apply for parole at the lesser of one-third of their sentence or 7 years unless enhanced parole eligibility is applied; in the latter circumstance, parole eligibility comes at the lesser of one-half of the sentence of 10 years. For murderers with a single victim who offended on or before December 2nd, 2011212 the faint hope clause can reduce a sentence after 15 years have been served. Even before the *Multiple Murders Act* multiple murders already served longer sentences than other offenders. It should be remembered that the 25 year period of parole ineligibility for first degree murder is not a magical number. As

212 *Criminal Code, supra* note 4 at s. 746.6(1).
Manson notes, this sentence was reached as a political compromise. At the time this sentence was set it was recognized that this may be too harsh for certain offenders, leading to the highly successful faint hope clause being introduced. Jurisprudence under the *Multiple Murders Act* seems to readily accept that 25 years is the benchmark for a single murder conviction and therefore must be exceeded in cases of multiple murders.

Keeping these three things in mind the question should be raised whether in cases of multiple murder judges should assume parole eligibility ought to exceed 25 years. Cases of serial killers such as Clifford Olson and Robert Picton come to mind as the type of incorrigible offender where parole ineligibility periods should be made consecutive. In other cases it should be reconsidered whether this needs to be done, or whether a 25 year ineligibility period without reduction reflects the denunciation and retributive aspects of sentencing, at which point the parole system can then operate to determine whether continued detention is needed for the protection of society.

One positive sign from the emerging jurisprudence is an indication that even in the gravest of offences, the offender should be left with some hope of prospective release, with the case of *Bourque* standing as an outlier holding that “no leniency may be expected” in similar circumstances. By leaving offenders with hope, judges have allowed the objective of rehabilitation to remain present. It remains to be seen whether trial judges, appellate courts, and potentially the Supreme Court of Canada will hold that hope of prospective release should be given to all offenders will have an impact on future laws and reflect our societal attitudes towards criminal sentencing.

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213 *Bourque*, supra note 1 at para 52.
Chapter Five – International Experiences with Lifelong Incarceration

1. Introduction
While Canada is just beginning the process of considering how lifelong incarceration accords with our sentencing principles, Charter rights and fundamental beliefs and values as a society, numerous other countries have already confronted the same issue. This chapter begins with a snapshot of the academic debate outlining the benefits and drawbacks of lifelong incarceration and an overview of countries that do not impose lifelong incarceration, either by lack of legislative provision or explicit bans written in the constitution or ruled on by the judiciary. The chapter then examines the situation in three countries with greater detail: 1) Germany, where the issue of life imprisonment was considered by its Constitutional Court in 1977, a decision that has been influential across much of Europe, 2) the United States of America, a country that makes prolific use of life without parole on adults but recently prohibited life without parole for juvenile offenders, and 3) the United Kingdom where the debate on whole life tariffs is ongoing, being actively litigated before the European Court of Human Rights.

2. Benefits and Drawbacks of Lifelong Incarceration
Hugo Bedau writes that “perhaps the oldest of all the issues raised by the two-century struggle in western civilization to end the death penalty”214 is what punishment to use if capital punishment is abolished. A common response to the abolition of the death penalty is to substitute life imprisonment.

While the death penalty is always a controversial issue, life imprisonment often remains unquestioned. Dirk van Zyl Smit states that the ambiguity about what life imprisonment actually

entails is a primary reason for it failing to be a highly controversial issue. While life imprisonment may not necessarily mean the offender will serve the remainder of his or her natural life in prison, one subset of life imprisonment is designed to incarcerate the offender until their death, removing hope of release at the outset of the sentence. Catherine Appleton and Bent Grøver outline various terms describing such a sentence including a natural life sentence, whole life tariff, life without the possibility of release and life without parole, often abbreviated as LWOP. This thesis uses the term lifelong incarceration for these sentences which share the common feature of denying the offender hope of prospective release from the outset of their sentence.

Appleton & Grøver also provide a succinct outline of the benefits and drawbacks of life without parole, the most common form of lifelong incarceration. The authors’ write that “[p]ublic protection, retribution and deterrence have been commonly identified among abolitionists of the death penalty as the foremost benefits of LWOP.” Life without parole provides a guarantee of incapacitation without the risk of a wrongful execution. Life without parole also provides a significant retributive response that is “undeniably tough, pleasing both politicians and prosecutors, but also satisfying some opponents of the death penalty.” Under rational choice theory, the severity of life without parole is seen by some as a general deterrent dissuading others from committing future murders, although others disagree with this

217 Ibid at 603.
218 Ibid at 603.
219 Ibid at 605.
argument.\textsuperscript{221} This dispute aligns closely with the debate as to whether capital punishment prevents crime where numerous studies have produced conflicting results.\textsuperscript{222}

Drawbacks of sentences of life without parole include economic factors and the impact on human rights and human dignity. Appleton and Grøver note that while fiscal costs should not be a main factor in penal policy, they should be considered. Lifelong incarceration does not come cheaply, especially as it creates a “geriatric prison population with far greater costs for health care and other social services.”\textsuperscript{223} Canada’s aging prison population has yet to be addressed in a meaningful way. As Howard Sapers, Canada’s Correctional Investigator, states in his Annual Report (2013-2014):

One in five inmates is now 50 years of age or older. With one-quarter of the incarcerated population serving a life or indeterminate sentence, issues involving the care and treatment of elderly people including chronic disease management and palliative care will increasingly define federal incarceration. I first called for an action plan to address the needs of elderly offenders ten years ago. There is still no national correctional strategy to manage this growing demographic several years later.\textsuperscript{224}

\begin{flushleft}
\textsuperscript{221} Appleton & Grøver, \textit{supra} note 216 at 607.  \\
\textsuperscript{222} Michael Radelet & Traci Lacook wrote that “[e]ver since a young Edwin Sutherland first published research on the issue in 1925, criminologists have been interested in the question of whether the death penalty is a more effective deterrent to criminal homicide than long-term imprisonment” see: Michael Radelet & Traci Lacook, “Recent Developments – Do Executions Lower Homicide Rates: The Views of Leading Criminologists” (2009) 99 The Journal of Criminal Law & Criminology 489 at 490. Radelet & Lacook found there was no significant deterrence of the death penalty. This appears to be the majority view; however there are conflicting studies: see Hashem Dezhbakhsh et al., “Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data” (2003) 5 American law and Economic Review 344, where the authors conclude there are substantial costs in not using capital punishment.  \\
\textsuperscript{223} Appleton & Grøver, \textit{supra} note 216 at 611.  \\
\end{flushleft}
In the Annual Report 2014-15, it is noted the proportion of inmates age 50 or older is now just under 25%, an increase of one-third in the last 5 years. The Multiple Murders Act significantly increases the length of imprisonment for those convicted of murder, adding to the numbers of inmates in their 50’s, 60’s or beyond. That increase is problematic in a criminal justice system that lags behind in addressing the issues faced by elderly inmates.

Lifelong incarceration also brings forward concerns about human rights and human dignity. While lifelong incarceration is seen by some as preferable to the death penalty, the sentences have some similar aspects. Lord Justice Laws of the United Kingdom High Court of Justice wrote:

> [A] prisoner’s incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is *lex talionis*.\(^{226}\)

The inability for an offender whose sentence precludes hope of eventual release to ever atone for his or her offence, regardless of their rehabilitative efforts, repentance or current risk to society is one of the primary reasons opponents of life-long imprisonment see such sentences as inhumane. Lifelong incarceration also inflicts additional psychological punishment through the denial of hope.

### 3. Lifelong Incarceration - A Global Overview

Due to concerns such as these against life without parole, life without parole is not without controversy and has been banned in many countries. Zyl Smit writes that the historical roots of

\(^{226}\) *R (Wellington) v Secretary of State for the Home Department* [2009] EWKC 1109 (Admin) at para 39 [*Wellington*].
prohibitions against life without parole “can be traced to a humanitarian view of punishment that has its roots in 19\textsuperscript{th} century Portuguese criminal law theory.”\textsuperscript{227} Portugal itself outlawed life imprisonment as early as 1884 and later constitutionalized this ban.\textsuperscript{228} As of 2005, constitutional bans also exist in Brazil, Costa Rica, Columbia and El Salvador.\textsuperscript{229} Other countries such as Mexico and Peru have had life imprisonment declared unconstitutional by the judiciary.\textsuperscript{230} In countries including Spain and Norway, the legislature chose “without direct constitutional compulsion to not provide for life imprisonment in the criminal code.”\textsuperscript{231} The European Court of Human Rights has provided a summary of the use of life sentences in its 47 contracting countries as of 2013. In nine no life imprisonment exists\textsuperscript{232} while thirty-two countries use a system similar to Canada where life imprisonment is imposed alongside a mechanism for release.\textsuperscript{233}

\textsuperscript{227} Zyl Smit (2006), supra note 21 at 411.
\textsuperscript{228} Ibid at 411.
\textsuperscript{229} Ibid at 410.
\textsuperscript{230} Ibid at 410.
\textsuperscript{231} Ibid at 411.
\textsuperscript{232} Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum term of imprisonment in these countries ranges from twenty-one years in Norway to forty-five years in Bosnia and Herzegovina. In Croatia in a case of cumulative offences, a fifty-year sentence can be imposed. See Vinter, supra note 26 at para 68.
\textsuperscript{233} The 32 countries are as follows, with maximum parole ineligibility period in brackets: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium (15 with an extension to 19 or 23 years for recidivists), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (normally 18 but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20 unless the court orders otherwise), Ireland (an initial review by the Parole Board after 7 years except for certain types of murders), Italy (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25), Sweden (10), Switzerland (15 years reducible to 10 years), the former Yugoslav Republic of Macedonia (15), and Turkey (24 years, 30 for aggravated life imprisonment and 36 for aggregate sentences of aggravated life imprisonment). See ibid at para 68.
a. Life Sentences in Germany
The current murder sentencing structure in Germany imposes life sentences with a minimum term of imprisonment of 15 years. The German *Prison Act* allows for relaxations of the sentence “when it is not to be feared that the prisoners will escape or will abuse the opportunities granted them in order to commit further crimes.”\textsuperscript{234} Relaxations of the sentence include being detained in open sections of prison, permission to work outside the prison without supervision, unsupervised leave for a few hours a day or more extensive furloughs. Zyl Smit notes these “relaxations of the prison regime are particularly important for lifers as they enable them to demonstrate that they have been resocialised and thus are good candidates for release.”\textsuperscript{235}

The issue of the constitutional legitimacy of life sentences in Germany was decided in 1977 by German Federal Constitutional Court in the *Life Imprisonment Case*, a decision of continued influence across Europe. The case involved a drug dealer charged with the murder of a customer who threatened to expose the defendant for selling drugs. While the victim was injecting drugs, the defendant killed him by shooting him in the head three times at close range.\textsuperscript{236} As Zyl Smit states, “the Court was asked to rule on the fundamental question, namely whether a life sentence *per se* was constitutional. The bald conclusion to which the Federal Constitutional Court came was that the sentence of life imprisonment for murder was not inherently unconstitutional.”\textsuperscript{237} What the Court required was meaningful treatment towards


\textsuperscript{235} *Ibid* at 235.


\textsuperscript{237} Zyl Smit (2006), *supra* note 215 at 408.
resocialization and “a concrete and fundamentally realisable expectation of eventually being released.”

The Court’s analysis began with the proposition that “the free person and his [or her] dignity are the highest values of the constitutional order.” Regarding the constitutionally required access to rehabilitation, the Court stated:

The threat of life imprisonment is complemented, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes that go with it. The task that is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the Grundgesetz.

The Court went on to make the dangers of long term incarceration more explicit, starting the “essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of regaining his freedom.” The Court did not mandate eventual release if the offender remained a threat to society, only that the offender be left with a legitimate hope of regaining freedom.

Two subsequent decisions have further clarified Germany’s position on life imprisonment. In 1986, the German Federal Constitutional Court considered the War Criminal case. The petitioner had served 20 years of a life sentence for sending 50 people to gas chambers.

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238 Ibid at 409.
240 Life Imprisonment Case, as cited in Zyl Smit 2006, supra note 215 at 408.
241 Ibid at 409.
during the Holocaust. In Vinter, the European Court of Human Rights commented on the War

*Criminal Case*, stating the German Court:

considered that the gravity of a person’s crime could weigh upon whether he or she could be required to serve his or her life sentence. However, a judicial balancing of these factors should not place too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner’s request for release would be required to weigh more heavily than before the petitioner’s personality, age and prison record. This was because the negative effects of sentence became stronger and stronger after an unusually long period of imprisonment.

The Basic Law did not exclude in principle that a life sentence be served in full, especially when the seriousness of the offence required a sentence that was longer than the minimum term for murder. However, even in these cases, it would not be compatible with the Basic Law if release could only be considered in cases of mental or physical infirmity or closeness to death. Release on these grounds would not be compatible with human dignity, or with the need for every prisoner to have a concrete and realistic chance of regaining his freedom, whatever the nature of his crime.\(^2\)

Like the *Life Imprisonment Case*, this decision places an emphasis on rehabilitative efforts made by the inmate.

The German position on what constitutes a concrete and realistic chance of regaining freedom was clarified in a 2010 extradition decision. The Federal Constitutional Court refused to extradite an offender who faced “aggravated life imprisonment until death” in Turkey. As the European Court of Human Rights summarizes:

The German government had sought assurances that he would be considered for release and had received the reply that the President of Turkey had the power to remit sentences on grounds of chronic illness, disability, or old age. The court refused to allow extradition, finding that this power of release offered only a vague hope of release and was thus insufficient. Notwithstanding the need to respect foreign legal orders, if someone had no practical prospect of release such a sentence would be cruel and degrading

\(^2\) *Vinter, supra* note 26 at para 70.
The German position on life imprisonment emphasizes freedom as central to human dignity. While freedom can be taken away, an offender must be left with hope of an opportunity to rehabilitate him or herself and rejoin society. That hope must be more than a vague executive power to grant compassionate release but a review focusing on the offender’s personality, age and prison record. The *Life Imprisonment Case* and subsequent decisions from Germany have been influential in European jurisprudence and were discussed at length by the European Court of Human Rights in *Vinter and Others v. The United Kingdom*, a case discussed in the conclusion of this chapter. These principles are also relevant in examining sentences under the *Multiple Murders Act*.

**b. Juvenile Life Without Parole in the United States**
Despite some controversy, life without parole remains entrenched as a sentencing option in the United States for adult offenders, allowed in all states except Alaska and imposed on nearly 50,000 individuals. However, seeds of change may have been planted in the juvenile justice system. A tetralogy of cases decided between 2005 and 2016 reigned in the ability to pass harsh penalties on juveniles, culminating in juvenile life without parole being banned in the United States and this ban being made retroactive.

The United States of America uses the sentence of life without parole widely for adult offenders, including for non-homicide offences. The Sentencing Project outlines that, as of

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243 *Ibid* at 71.
2012, there were 159,250 adults serving life sentences in the United States. Of the offenders serving life sentences, 49,081 were serving life without parole, a nearly four-fold increase from 1992 when 12,453 offenders were serving life without parole. Life without parole is imposed unevenly by the various states. Five states account for 57.7% (25,969) of life without parole sentences imposed by states. These states are Michigan (3,635), California (4,603), Louisiana (4,637), Pennsylvania (5,102) and Florida (7,992). A further 4,058 individual are serving life without parole sentences imposed federally. Among states with life without parole, New Mexico (0), Vermont (14), Kansas (21), North Dakota (27), and Wyoming (28) have imposed life without parole on the fewest number of individuals.

In 2005 Amnesty International reported least 2, 225 people in the United States were sentenced to life without parole for crimes committed as children. Worldwide, only four of 158 countries data could be collected from imposed juvenile life without parole and only a dozen individuals outside the United States were serving such a sentence.

Like adult life without parole, juvenile life without parole was imposed disproportionately by certain states with Pennsylvania (332), Louisiana (317), Michigan (306), Florida (273), and

246 Ibid at 1.
247 Ibid at 413.
248 Ibid at 6.
249 Ibid at 6.
251 Ibid at 106.
California (180) being states that most frequently imposed life without parole on juveniles.\textsuperscript{252} Seven states, Alaska, Kansas, Kentucky, Maine, New Mexico, New York, West Virginia as well as the District of Columbia prohibited life without parole for juveniles.\textsuperscript{253} Among states that allowed juvenile life without parole, New Jersey (0), Utah (0), Montana (1), North Dakota (1) and Ohio (1) made the least use of juvenile life without parole.\textsuperscript{254}

Juvenile life without parole was found unconstitutional in the United States following a series of Supreme Court decisions. In a 2005 decision, \textit{Roper v. Simmons}, the Supreme Court of the United States barred the death penalty for juveniles. In 2010 the case of \textit{Graham v. Florida} barred juveniles convicted of non-homicide offences from receiving life without parole and in 2012 \textit{Miller v. Alabama} extended the ban on life without parole to juveniles convicted of homicide. Lastly, in 2016, the decision of \textit{Montgomery v. Louisiana} made the ban against juvenile life without parole retroactive.

\textbf{i. \textit{Roper v. Simmons}}

In the 2005 decision \textit{Roper v. Simmons}, the Supreme Court barred the imposition of the death penalty on juveniles in a 5-4 decision which planted seeds of change for the ban of life without parole on juveniles. Christopher Simmons was sentenced to death for homicide committed when he was 17.\textsuperscript{255} While a 1989 decision sanctioned the use of the death penalty for offenders at least 16 years old, in \textit{Roper v. Simmons} the use of the death penalty was barred on all juveniles.\textsuperscript{256}

\begin{itemize}
\item \textsuperscript{252} \textit{Amnesty International, supra} note 250 at 123-24.
\item \textsuperscript{253} \textit{Ibid} at 2.
\item \textsuperscript{254} \textit{Ibid} at 123-24.
\item \textsuperscript{255} \textit{Ibid} at 1.
\item \textsuperscript{256} \textit{Roper v Simmons} (2005) 543 US 551 (Supreme Court of the United States), Opinion of the Court at 1 [\textit{Roper}].
\end{itemize}
The majority opinion focused on the growing national consensus against the death penalty for juveniles on the basis of the diminished moral culpability of youth. The majority also recognized the global movement against the death penalty for juveniles, stating:

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.\textsuperscript{257}

As Zyl Smit notes, the majority judgment “did not mention that article 37 of the United Nations Convention on the Rights of the Child not only outlaws capital punishment but also life imprisonment without the prospect of release.”\textsuperscript{258} This omission was incongruously pointed out in dissent where Scalia J. satirised the majority stating “[i]f we are truly going to get in line with the international community, then the Court’s reassurance that the death penalty is really not needed, since ‘the punishment of life imprisonment without the possibility of parole is itself a severe sanction’, gives little comfort.”\textsuperscript{259} Just five years later the Court decided \textit{Graham v. Florida} and in barring life without parole for juveniles convicted of non-homicide offences moved closer in line with international standards.

\textsuperscript{257} \textit{Ibid} at 24.
\textsuperscript{258} Zyl Smit (2006), \textit{supra} note 215 at 406.
\textsuperscript{259} \textit{Roper, supra} note 256, dissenting judgment of Justice Scalia at 17. As Zyl Smit state “Justice Scalia’s criticism was part of a vigorous and fundamental denial of the idea that American law should look for guidance to the laws of other countries or to international law. His position is categorically rejected by all who recognise the universality of human rights and the related ‘evolving standards of decency’ test that underpins claims to a right to human dignity. However, Justice Scalia was correct to challenge the majority, who hoisted their standard on international law territory, to at least engage with the challenge inherent in the fact that the international instrument to which they refer lays down further restrictions than they themselves do.” See Zyl Smit (2006), \textit{supra} note 215 at 407.
ii. *Graham v. Florida*

The offender in *Graham v. Florida*, Terrance Graham, was raised in difficult circumstances. Terrance’s parents were addicted to crack cocaine and he was diagnosed with attention deficit hyperactivity disorder in elementary school. Terrance began drinking and smoking at age 9 and using marijuana at age 13.\(^{260}\) In July 2003, at age 16, he committed armed burglary with assault or battery and attempted armed robbery, receiving three years of probation after pleading guilty to these offences.\(^{261}\) Terrance violated his probation on December 2\(^{nd}\), 2004, allegedly committing an armed home invasion. While he denied participating in the home invasion, he admitted a probation violation for fleeing the police. The trial court held a sentencing hearing on the original burglary and attempted armed robbery. Despite the pre-sentence report recommending a sentence of 4 years at the most, the sentencing judge imposed the maximum sentence available, life imprisonment.\(^{262}\) As Florida abolished parole, the life sentence gave no possibility of release absent executive clemency.\(^{263}\)

In a 6-3 decision, the Supreme Court of the United States overturned the sentence, finding the Constitution “prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”\(^{264}\) In a re-sentencing, Terrance was sentenced to 25

\(^{260}\) *Graham v Florida*, (2010) 982 So 2d 43 (Supreme Court of the United States), Opinion of the court at 1 [*Graham*].

\(^{261}\) Ibid at 2. Terrence was required to spend the first 12 months of his probation in the county jail, but he received credit for the time he had served awaiting trial, and was released on June 25, 2004, *ibid* at 2.

\(^{262}\) *Ibid* at 4. The defence asked for a sentence of 5 years imprisonment, the minimum sentence available absent a downward departure. The State recommended 30 years for the armed burglary and 15 years for the attempted robbery.

\(^{263}\) *Ibid* at 6.

\(^{264}\) *Ibid* at 31.
years in prison. His lawyer stated he may be released by 2025, at which time he will be 38 years old.

The majority opinion of the Supreme Court emphasized the growing national consensus against juvenile life without parole for non-homicide offences, finding that even though these sentences are available they are infrequent, with only 109 offenders serving such a sentence nation-wide. The Court found that compared to an adult murderer, a juvenile who did not kill has “a twice diminished moral capacity.” The Court went on to consider penological justifications of sentencing practices and found that retribution, deterrence, incapacitation and rehabilitation all failed to support life without parole.

The majority judgment also recognized that life without parole denies an individual hope, stating: “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” The Court did not rule that eventual freedom needs to be guaranteed, but rather that offenders must be given “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The Court provided little guidance on what this meaningful opportunity should look like. Alice Ristroph writes “the details of parole review are arguably the province of state governments, and

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266 Ibid.
267 Graham, supra note 260 at 11.
268 Ibid at 18.
269 Ibid at 28.
270 Ibid at 24.
the Court may wish to reserve judgment on such details until they are the target of specific constitutional challenges.”

iii. *Miller v. Alabama*

Juvenile life without parole was barred for all offences includes murder two years later in *Miller v. Alabama*, a 5-4 decision. The offenders in *Miller* and a companion case were both 14 when they committed separate murders; both received a mandatory sentence of life without parole.

The offender in the companion case, Kuntrell Jackson, was a party to a store robbery along with two other boys. On the way to the store, he learned one of the other boys, Derrick Shields, had a gun. Kuntrell waited outside the store but came in during the robbery. At trial it was disputed whether he told the store clerk, Laurie Troup “we ain’t playin’” or whether he told his friends “I thought you all was playin’.” Mr. Shields shot and killed Ms. Troup. A jury found Kuntrell guilty of capital felony murder and aggravated robbery. As the prosecutor exercised his discretion to charge Kuntrell as an adult, the trial judge had no discretion on sentencing.

In regard to Evan Miller the Supreme Court stated he had “been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Evan, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old.”

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272 *Miller v Alabama*, (2012) 63 So 3d 676 (Supreme Court of the United States), Opinion of the Court at 2.

273 *Ibid* at 3.

One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller’s mother. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon’s pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon’s head, told him ‘I am God, I’ve come to take your life,’ and delivered one more blow.). The boys then retreated to Miller’s trailer, but soon decided to return to Cannon’s to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation.

The District Attorney sought to try Evan as an adult which was agreed to by the juvenile court.

Mr. Smith pled guilty to a lesser offence and was sentenced to life with the possibility of parole. He testified for the state against Evan, his testimony being significant for convicting Evan of murder in the course of arson, a crime that carries a minimum punishment of life without parole.

The majority of the Supreme Court followed their reasoning established in *Graham* and *Roper* regarding the diminished moral capacity of youth. The majority concluded stating:

*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

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275 *Ibid* at 4-5.  
277 *Ibid* at 27.
The majority in *Miller v. Alabama* did not expand on the Courts early thoughts in *Graham* regarding the cruelty of denying an offender, particularly a young offender, hope of eventual release. A short concurrence by Justice Stevens, joined by Ginsburg and Sotomayor, criticized the dissenting judges’ originalist interpretation of the Constitution noting standards of decency have and continue to evolve, stating:

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.\(^{278}\)

The evolving standards of decency was used in this tetralogy, albeit timidly and with strong criticism by the dissenting judges, to examine the international standards regarding the treatment of young offenders.

### iv. *Montgomery v. Louisiana*

After *Graham* and *Miller* were decided, federal and state courts divided on whether the bar against juvenile life without parole should apply retroactively. On January 25, 2016 the Supreme Court of the United States decided *Montgomery v. Louisiana* and held that the ban against juvenile life without parole should apply retroactively. The Petitioner, Henry Montgomery, killed a sheriff’s deputy at age 17. In 1963 Mr. Montgomery was sentenced to life without parole for the murder. By the time of the Supreme Court’s 2016 decision, the 69 year old had more than 5 decades in prison as a well-behaved inmate.

A six-justice majority found that “prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope

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\(^{278}\) *Graham*, *supra* note 260, concurrence of Justice Stevens at 1.
for some years of life outside prison walls must be restored.” The Court left the process by which this is to be achieved open to the states, stating this does not require States to relitigate sentences in every case but could be achieved by allowing offenders parole hearings.

While the United States may still be a long way off from outlawing the death penalty in all states as well as federally, the tetralogy demonstrates that the tides can shift swiftly. It took just seven years for the United States to go from allowing capital punishment for young offenders to barring life without parole on all young offenders past, present and future.

The short period of time in which both capital punishment and the next most severe sanction, life without parole, were held unconstitutional for juveniles may suggest a similar pattern of not seeing life without parole to be a viable alternative to capital punishment may occur for adults as well. While life without parole may seem like a default position for states as they abolish the death penalty for adults, if the viscerally repugnant punishment of death was not a sentencing option, life without parole may not seem like an acceptable alternative.

If the United States continues to take notice of evolving standards of decency and takes into account international standards in evaluating their own practices, the results of the juvenile tetralogy could be repeated for adult offenders. Michael O’Hear posits that while dramatic changes to life without parole for adults may not be near “it is possible that LWOP will undergo a period of slow, long-term decline, much as has occurred with the death penalty.” While the United States has over 50,000 adults serving a sentence without hope of release, the steps to give

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279 Montgomery v Louisiana, 577 US (2016) (Supreme Court of the United States), opinion of the Court at 22.
280 Ibid at 21-22.
hope to the 2,225 individuals who had been given life without parole as juveniles marks the beginning of a long road recognizing the importance of hope as a fundamental component of human dignity and the denial of hope as a punishment gone too far.

c. Whole-Life Tariffs in the United Kingdom

While the United States has only barred juveniles from being sentenced to life without parole, the European Court of Human Rights has recently considered a number of cases that call into question the use of life without parole for any offender. Cases from the United Kingdom have contested the role hope of eventual release should play in sentencing.\(^\text{282}\)

As a result of the previous sentencing mechanism for life sentences being struck down by the European Court of Human Rights, the United Kingdom introduced a new regime of

\(^{282}\) The European Court of Human Rights emerged in the wake of an international human rights movement following World War II. The then newly formed council of Europe drafted the European convention on human rights in 1950, this convention came into force in 1953. The European Court of Human rights was set up in 1959 to implement the convention. Currently, 47 states within the Council of Europe are Contracting States to the Court, each of which nominates 3 judges, one of who is selected for a 9 year term. Despite the United Kingdom’s central role in drafting the convention, spearheaded in large part by Conservative Prime Minister Winston Churchill, support for the Court is currently low in the United Kingdom. Former Prime Minister David Cameron was committed to breaking the link between the UK and the European Court of Human Rights. See Aisha Gani, “What is the European convention on human rights?” \(\text{The Guardian}\) (3 October 2014) online: <http://www.theguardian.com/law/2014/oct/03/what-is-european-convention-on-human-rights-echr>, Nicholas Watt & Rowena Mason “Cameron ‘committed to breaking link with European court of human rights’” \(\text{The Guardian}\) (1 June 2015) online: <http://www.theguardian.com/law/2015/jun/01/david-cameron-european-court-of-human-rights>. In an 8 page proposal put forward by the Conservative Party seeks to repeal the Human Rights Act meaning the UK courts can treat the UCHR decisions as advisory and not binding. The proposal criticized the ECKHR, stating the court has developed “‘mission creep’” and “expanded Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up for it.” See “Conservatives plan to scrap Human Rights Act - read the full document” \(\text{The Guardian}\) (3 October 2014) online: <http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>.
sentencing in the Criminal Justice Act 2003.\textsuperscript{283} The Criminal Justice Act 2003 introduced a system with starting points for tariffs. For adult offenders the starting point is between 15-30 years depending on the circumstances of the murder, the final tariff is reached considering the aggravating and mitigating factors. Homicide offenders receive a life sentence and have their sentenced reviewed at the end of their tariff period. However, certain offenders are given a whole life tariff (also called a whole life order) meaning their tariff ends with their death, making them never eligible for release. Schedule 21 of the Act stated the appropriate starting point is a whole life order in the following cases:

a) the murder of two or more persons, where each murder involves any of the following—
   (i) a substantial degree of premeditation or planning,
   (ii) the abduction of the victim, or
   (iii) sexual or sadistic conduct,

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,

(c) a murder done for the purpose of advancing a political, religious, radical or ideological cause, or

(d) a murder by an offender previously convicted of murder.\textsuperscript{284}

Offenders given whole life tariffs are eligible to apply to the Secretary of State for

\textsuperscript{283} As Zyl Smit, Weatherby and Creighton explain, the former release system in the UK involved the Secretary of State, trial court, Lord Chief Justice and the Parole Board. The Secretary of State sought advice from the trial judge and Lord Chief Justice as to the minimum period of incarceration (the tariff). After this period was reached, the Secretary of State, with advice from the Parole Board, would decide whether the offender would be released. The European Court of Human Rights ruled sentencing someone to life imprisonment is a judicial function and release decisions should be made by an independent body. Dirk van Zyl Smit, Pete Weatherby & Simon Creighton, “Whole Life Sentences and the Tide of European Jurisprudence: What is to be Done?” (2014) 14 Human Rights Law Review 59 at 62 [Zyl Smit et al].

\textsuperscript{284} \textit{Criminal Justice Act 2003}, (UK) c 44 s 21. This starting point only applies to offenders aged 21 or over at the time of the offence.
compassionate release.\footnote{This power is vested by the Crime (Sentences) Act 1997, (UK) c 43 at s. 30(1).} As set out in Chapter 12 of the Prison Order 4700 (the “Lifer’s Manual) the criteria for compassionate release on medical grounds for indeterminate sentences are as follows:

- the prisoner is suffering from a terminal illness and death is likely to occur very shortly (\textit{although there are no set time limits, 3 months may be considered to be an appropriate period for an application to be made to Public Protection Casework Section [PPCS]}, or the ISP is bedridden or similarly incapacitated, for example, those paralysed or suffering from a severe stroke; 

- The risk of re-offending (particularly of a sexual or violent nature) is minimal;

- further imprisonment would reduce the prisoner’s life expectancy;

- there are adequate arrangements for the prisoner’s care and treatment outside prison;

- early release will bring some significant benefit to the prisoner or his/her family.\footnote{Prison Service Order, PSO 4700 indeterminate sentence manual (UK) at 12.2.1.} [bolding in the original]

The rigid requirements for prospective release led to the legality of whole life orders being challenged before the European Court of Human Rights in \textit{Vinter and others v. The United Kingdom}.

\textbf{i. \textit{Vinter and Others v. The United Kingdom}}

At the time \textit{Vinter} was decided, 2013, 41 prisoners were serving whole life orders.\footnote{Vinter, supra note 26 at para 44.} The Court noted that since 2000, no whole life order had been reduced on compassionate grounds.\footnote{Ibid at para 44.} The three applicants were British nationals who had been given whole life orders for multiple
murders. Douglas Vinter, a recidivist murderer, was sentenced in 1996 to life imprisonment with a minimum of ten years the murder of a work colleague. Mr. Vinter was released in 2005 and married in 2006.²⁸⁹ In 2008, Mr. Vinter, then 39, murdered his estranged wife. He turned himself into the police the following day and pleaded guilty less than two months after the offence.²⁹⁰ Jeremey Bamber was found guilty in 1986 of the White House Farm murders, the mass murder of his adoptive parents, adoptive sister and her two children. The murders were motivated by a large inheritance. Mr. Bamber, 24 at the time of the killings, maintains his innocence for the crimes.²⁹¹ Peter Howard Moore, a serial murderer dubbed “the man in black” was convicted of the murders of four men between September and December 1995. Mr. Moore was 49 at the time of the murders, the alleged motive of which was sexual gratification.²⁹²

The applicants challenged the legality of their whole life tariffs alleging the sentences violated Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”²⁹³ The European Court of Human Rights reviewed these claims pursuant to its limited scope of review that it outlines in the following terms:

It is well-established in the Court’s case-law that a State’s choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the

²⁸⁹ Ibid at para 15.
²⁹² Vinter, supra note 26 at para 26.
²⁹³ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 (Council of Europe) at Article 3.
European level, provided that the system does not contravene the principles set forth in the Convention.\textsuperscript{294}

Despite the limited scope of review, the Court found the whole life orders, coupled with the restrictive mechanism for release, violated Article 3 of the Convention. The Court was critical of the release conditions, finding these “highly restrictive”\textsuperscript{295} and going on to say:

Even assuming that [the conditions] could be met by a prisoner serving a whole life order, the Court considers that the Chamber was correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather behind prison walls. Indeed, in the Court’s view, compassionate release of this kind was not what was meant by a ‘prospect of release.’\textsuperscript{296}

The Court was also critical of the fact the conditions do not permit “whole life prisoners to seek release on legitimate penological grounds some time into the service of their sentence”\textsuperscript{297} thereby eliminating hope of release on grounds of rehabilitation. The Court stated that whole life orders run the risk that a prisoner “can never atone for his offence”\textsuperscript{298} and, as the sentence becomes longer the longer the prisoner stays alive, the whole life order can become a “poor guarantee of just and proportionate punishment.”\textsuperscript{299} The Court found there to be “clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved”\textsuperscript{300} and went on to state “while punishment remains one of the aims of imprisonment,

\textsuperscript{294} Vinter, supra note 26 at para 104.
\textsuperscript{295} Ibid at para 127.
\textsuperscript{296} Ibid at para 127.
\textsuperscript{297} Ibid at para 128.
\textsuperscript{298} Ibid at para 54 citing Wellington, supra note 226 at para 39.
\textsuperscript{299} Ibid at para 112.
\textsuperscript{300} Ibid at para 114.
the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence.”

Despite the Court finding the United Kingdom’s system of whole life orders violated Article 3 of the Convention, the Court was clear that Contracting States remained free to impose life sentences on adult offenders. Life sentences are not *per se* incompatible with Article 3, particularly if they are not mandatory but imposed by a judge having considered all factors of the case. The Court noted a life sentence is not irreducible because it may be served in full, finding that “no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society.” What is required is hope of release, not a guarantee.

In determining if a sentence is irreducible, a court’s job is to ascertain whether the “prisoner can be said to have any prospect of release.” Indeed the Court noted that none of the applicants before the Court sought to argue that their continued imprisonment was no longer justified, each accepted that even if punishment and deterrence were fulfilled they may still be detained due to their risk to public safety. As the Court states, “[t]he finding of a violation in their cases cannot therefore be understood as giving them the prospect of imminent release.”

Judge Power-Forde wrote a short but powerful concurring opinion. The entire concurrence by Judge Power-Forde states:

I voted with the majority in this case and wish to add the following.

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301 *Ibid* at para 115.
I understand and share many of the views expressed by Judge Villiger in his partly dissenting opinion. However, what tipped the balance for me in voting with the majority was the Court’s confirmation, in this judgment, that Article 3 encompasses what might be described as “the right to hope”. It goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.  

Zyl Smit, Weatherby and Creighton write that Vinter establishes two principles, that the opportunity for rehabilitation is implicit in the right to prospective release and that review of continued enforcement must meet standards of due process. The authors further state that for a sentence review to meet the standards set by Vinter “all penological justifications for the original sentence – including the seriousness of the offence – must be reviewed to determine whether the balance between them has changed and continued detention is justified.”

The principles in Vinter were applied in the context of extradition in the Case of Trabelsi v. Belgium. In Trabelsi European Court of Human Rights found that the extradition of an alleged terrorist from Belgium to the United States where he faced life without parole to be a violation of Article 3 of the Convention.

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305 Ibid at 54.
306 Zyl Smit et al, supra note 283 at 59.
307 Ibid at 59.
308 Case of Trabelsi v Belgium, (2014) Application no. 140/10, European Court of Human Rights [Trabelsi]. Further application of the principles in Vinter can be found in the Grand Chamber decision Case of Murray v. The Netherlands (2016) Application no. 10511/10. The Court found a life sentence imposed by the Netherlands to be an Article 3 violation. Zyl Smit notes that following Murray, the Hoge Raad, the Supreme Court of the Netherlands ordered legislative
ii. *Hutchinson v. The United Kingdom*

To whatever extent *Vinter* can be seen as a breakthrough for human rights, it was dampened with the European Court of Human Rights 2015 judgment *Hutchinson v. The United Kingdom*. In 1983 Mr. Hutchinson, then 43, was sentenced to a whole life order following convictions of aggravated burglary, rape and three counts of murder occurring in a single transaction. Mr. Hutchinson argued his case was undistinguished from the case of *Vinter* and therefore his sentence contravened Article 3 of the Convention;\(^{309}\) the government argued the law had changed since *Vinter*.\(^{310}\)

The change of law the government referenced was not legislative or policy based, rather the government saw the case of *R v. Newell; R v. McLoughlin* as a legal change.\(^{311}\) As the Court in Hutchinson explains, following *Vinter*, the United Kingdom constituted a special composition Court of Appeal to hear three other cases involving whole life orders, penning the *Newell/McLoughlin* judgment to clarify the law in respect to whole life orders.\(^{312}\)


\(^{309}\) *Case of Hutchinson v The United Kingdom*, Application no. 57592/08, European Court of Human Rights Forth Section at para 3 [*Hutchinson*].

\(^{310}\) *Ibid* at para 16.

\(^{311}\) *R v Newell; R v McLoughlin*, [2014] EWCA Crim 188, (UK Court of Appeal, Criminal Division).

\(^{312}\) The special composition of the court consisted of the Lord Chief Justice of England and Wales, the President of the Queen’s Bench Division, the Vice-President of the Court of Appeal Criminal Division, a Lord Justice of Appeal and a senior High Court judge, see *Hutchinson*, *supra* note 309 at para 3.

\(^{313}\) *Ibid* at para 29.
the fact the policy was unaltered is of no real consequence. The Court stated, “[i]t is important, therefore, that we make clear what the law of England and Wales is.” In explaining the law, the Court stated that the grounds for compassionate release must be read in a manner compatible with Article 3 of the Convention on Human Rights. As such, the Secretary of State for the Home Office is not restricted to what is set out in the Lifer Manual, rather, can interpret compassionate release “with a wide meaning that can be elucidated, as is the way the common law develops, on a case by case basis.” The Court found hope of release is provided when the original punishment is no longer justified and that an application for review can be triggered by exceptional circumstances, without defining what would or would not fall under this category. While the written guidelines for release remain highly restrictive, the Secretary of State must consider all circumstances relevant on compassionate grounds and that compassionate grounds must be understood in a manner compatible with the prohibition against torture, inhumane or degrading treatment of punishment, a decision subject to judicial review.

Hutchinson was decided primarily on the European Court of Human Rights scope of review. On its face, the law as written remained the same as in Vinter and therefore would contravene Article 3 of the Convention. However, the Government’s position that Newell/McLoughlin clarified the law was accepted by the Court which acknowledged “the Court must accept the national court’s interpretation of domestic law.” As the domestic court reviewed the law, explicitly considering Vinter, and found their law did meet the standards of Vinter, the European Court of Human Rights saw no violation of Article 3.

314 Ibid at para 30.
315 Ibid at para 30.
316 Ibid at para 33.
317 Ibid at para 35.
318 Ibid at para 25.
Judge Kalaydjieva, then the Court’s representative from Bulgaria, dissented in *Hutchinson*, questioning why a violation was found in *Vinter* if the Secretary of State had always been obligated to interpret the Lifer Manual in a manner consistent with Article 3 of the convention. Judge Kalaydjieva stated:

I do not deem myself competent to determine whether the Court of Appeal expressed an *ex tunc* [from the outset] trust or an *ex nunc* [from now and on] hope that, even though to date the Secretary of State for Justice has not amended the content of the Lifers Manual after Vinter, he was, is and always will be “bound to exercise his power ... in a manner compatible with Article 3” (see paragraph 23). I have no doubt that the Grand Chamber was informed as to the scope of his discretion and the manner of its exercise in reaching their conclusions in Vinter. In this regard, and in so far as the Court of Appeal’s part in the admirable post-Vinter judicial dialogue said “Repent!” I wonder whom it meant.\(^3\)

*Hutchinson* was referred to the Grand Chamber of the European Court of Human Rights and was heard before a panel of 17 judges on October 21, 2015. Requests to have a Grand Chamber hearing are accepted on an “exceptional basis.”\(^4\) The re-hearing of the case leaves the present situation of whole life orders in the United Kingdom uncertain. The decision of the Grand Chamber will provide clarity to the United Kingdom as well as the other contracting State’s regarding the requirements for the treatment of offenders sentenced to life imprisonment. Given the Court’s influential position, the reverberations of the *Hutchinson* decision may be felt as far away as Canada.

4. **Conclusion**

Germany, the United States and the United Kingdom have approached the issue of lifelong incarceration in different ways, each reflective of the era of the decisions, the country’s historical

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\(^3\) *Ibid* at 14.

and current attitudes in respect to use of incarceration and a multitude of other factors. Underlying tensions such as the divided approach to constitutional interpretation in the United States and the role a transnational court should play in deciding the laws of the United Kingdom are present in the decisions. Nonetheless, all three countries have recognized the importance that hope of eventual release plays in maintaining respect and dignity of the human person. While the United States has only extended this protection to juveniles and the processes by which hope is maintained in the United Kingdom are in flux, all three countries have joined the international conversation that has and continues to recognize the importance of hope.
Chapter Six – What is Hope? Lessons from Psychology*

1. Introduction
While Canadian and international courts have found criminal sentences should leave an offender with hope of release, there is little clarity as to what this means in practice. This disconnect stems in part from the limited attention hope has received in legal studies. This chapter draws on a law and psychology approach to define hope in the context of incarceration. The chapter starts with a review of the literature on law and hope and a discussion of the importance of freedom as an aspect of human autonomy. This is followed with an analysis of how Snyder’s hope theory may assist in forming better sentencing and overall correctional practices considering what hope theory may suggest about prison suicide and the debate that inmates sentenced to lifelong incarceration will become “super predators” with nothing to lose. The chapter concludes with a discussion of what hope theory can reveal about how a provision providing realistic hope of release should be designed. I propose that for a sentence to allow for hope of prospective release there must be a mechanism of release present at the outset of the sentence which has a proven record of success or reasonable prospect for success, made transparent through clear, pre-determined criteria and formal, potentially reviewable decisions that place primary consideration on the prisoner’s efforts at reform and current risk to society, with a right to re-apply if unsuccessful.

2. The Legal Study of Hope
Writing in 2007, Kathryn Abrams and Hila Keren found that hope is “an emotion not yet addressed by legal analysis.”321 While work on law and emotion continues to grow, the literature connecting hope and law remains in-situ. This section reviews three articles on law and hope:

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* An early version of this chapter was presented at the 2016 Osgoode Hall Graduate Law Student Conference on February 19th, 2016 in Toronto, Ontario. Thank you to the organizers and attendees of this conference and panel chair Professor Lisa Dufraimont.
321 Abrams & Keren, supra note 19 at 321.
Abrams and Keren’s article on cultivating hope that sees hope as an action capable of being nurtured; Alice Ristroph’s article that discusses the role of hope in *Graham v. Florida*, framing hope as a negative right; and Benjamin Berger’s analysis of hope in the context of Canadian sentencing law that sees hope as a condition of a sentence subject to manipulation.

a. **Law in the Cultivation of Hope**

Kathryn Abrams and Helen Keren use a definition of hope provided by St. Thomas Aquinas that states “hope takes as its object ‘a future good that is arduous and difficult but nevertheless possible to obtain.’” This definition is similar to Snyder’s definition discussed in chapter two, connecting hope to a goal that is possible but not guaranteed. Like Snyder, Abrams and Keren connect the process of cultivating hope to supporting the prospective hoper’s agency.

Abrams and Keren use case studies to examine the cultivation of hope in others, identifying a six-step process: 1) the precondition of having the capacity to cultivate hope in others, 2) communicating recognition and vision, 3) introducing an activity that allows for individuation, 4) providing resources, 5) supporting agency and 6) fostering solidarity.

The authors state that the precondition of having “the capacity to cultivate hope in others requires one to have this kind of resilient individual hope as well as an eagerness to share it with those who have less of it.” This connects with the second requirement of communicating recognition and vision. There “cultivators must share two kinds of vision with prospective

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322 *Ibid* at 324.
323 *Ibid* at 363.
324 *Ibid* at 345. A similar sentiment was found by Keri Flesaker and Denise Larsen who studied reintegration counsellors of women on parole and probation and found maintaining a hope seeking orientation was of great importance for individuals doing this emotionally draining work. See Keri Flesaker & Denise Larsen, “To Offer Hope You Must Have Hope” (2010) 11: 1 Qualitative Social Work 61.
hopers,"\textsuperscript{325} first the cultivator “must make clear that they see the prospective hoper as a fully human subject…. Second, the cultivator must be able to communicate to the prospective hoper that the prospective hoper’s world could be potentially different.”\textsuperscript{326} Introducing an activity that allows for individuation requires “an activity which takes the prospective hopers beyond their usual routines and capabilities and makes tangible new avenues for expression, participation and vision.”\textsuperscript{327} The authors add that the activities “should be open-ended enough to allow the hopers to shape them to their own individual talents and needs.”\textsuperscript{328} This ties into the fourth step, providing resources, which can be physical objects such as cameras or money, or skill based such as legal acumen and institutional connections. Step five, supporting agency, is important because of its empowering effects which permits the perspective hopers to see themselves leading their own lives.\textsuperscript{329} The final step, fostering solidarity, is important as it allows prospective hopers to break through isolation by connecting to others and fuels emotional energy by having hopers cooperate.\textsuperscript{330}

This six-step process shows how hope can take the form of a virtue that can be nurtured. Abrams and Keren identify the way prison re-entry programs may be used to cultivate hope in inmates being released from custody. Discussing Ready4Work, a US program seeking to help inmates secure employment and moreover create a self-supporting life outside prison, the authors identify the inmate’s case manager as the direct cultivator of hope.\textsuperscript{331} While this process of

\textsuperscript{325} Abrams & Keren, supra note 19 at 346.
\textsuperscript{326} Ibid at 346 [italics in the original].
\textsuperscript{327} Ibid at 348.
\textsuperscript{328} Ibid at 349.
\textsuperscript{329} Ibid at 352.
\textsuperscript{330} Ibid at 353.
\textsuperscript{331} Ibid at 378.
cultivating hope may apply to prison release programs, features of their theory may be difficult to apply in a prison setting due to the “inmate code.”

In 2014 Rose Ricciardelli published an examination of the inmate code in Canadian penitentiaries after conducting semi-structured interviews with 56 men who had served time in Canadian penitentiaries.\(^{332}\) The inmate code reveals that at least two aspects of cultivating hope would be more difficult in a custodial setting. First, the cultivator’s ability to communicate may be hindered by the unwillingness of the prospective hopers, the inmates, to communicate with the cultivators, the prison staff. Ricciardelli states, “if a prisoner was overly friendly or talkative with an officer or staff member, it could lead others to suspect he was an informant”\(^{333}\) a low, possibly the lowest and most vulnerable position in prison.\(^{334}\) The interview respondents described going as far to avoid “interactions with correctional officers to demonstrate they were not informants.”\(^{335}\) While inmates hold values against informing on one another, the parolees interviewed “believed that it was not loyalty or solidarity that prevented prisoners from snitching.”\(^{336}\) Thus the norm against not snitching is not based on solidarity, the sixth aspect of cultivating hope. Solidarity actually runs counter to a key tenant of the inmate code - doing your own time. One of the key findings by Ricciardelli is that solidarity among inmates is less prevalent that previous research may have indicated, writing “[t]he modern inmate code suggests

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\(^{333}\) Ibid at 244.

\(^{334}\) Ibid at 250.

\(^{335}\) Ibid at 250.

\(^{336}\) Ibid at 243.
that, although prisoners should not rat on each other, they are far from loyal to each another. Indeed, inmate solidarity appears to be less prevalent than previous noted by scholars.”

Abrams and Keren’s theory illustrates steps that can be taken by individuals and institutions to cultivate hope in others. While there may be difficulties in importing this model into a prison environment, some programs have found ways to overcome these programs. One example of this is the now defunct LifeLine program which began in Canada in 1991 before being de-funded in 2012. This program used life sentenced parolees as cultivators of hope acting as mentors for other life inmates throughout their sentences and parole process, illustrates a model that allow hope to be cultivated behind bars.

b. Hope, Imprisonment, and the Constitution
Alice Ristroph examines the role of hope in *Graham v. Florida*, the 2010 Supreme Court of the United States judgment that barred juvenile life without parole for non-homicide offenders. Ristroph begins her article stating: “[a]bove the entrance to hell, according to Dante, is a directive to abandon all hope. If hell is a place devoid of hope, it may not be surprising to learn that the denial of hope is a form of cruelty. So teaches *Graham v. Florida*.” While referring to *Graham* as “hope’s debut in federal sentencing jurisprudence” Ristroph acknowledges “if

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337 *Ibid* at 243.
338 “Prison rehab program axed due to budget cuts” *CBC News* (16 April 2012) online: [http://www.cbc.ca/news/canada/prison-rehab-program-axed-due-to-budget-cuts-1.1179484](http://www.cbc.ca/news/canada/prison-rehab-program-axed-due-to-budget-cuts-1.1179484). The article notes that while a spokeswomen for then Public Safety Minister Vic Toews said research found no significant results from the program, officials in Colorado were impressed by LifeLine and setting up a similar program.
340 *Ristroph, supra* note 271 at 75.
341 *Ibid* at 75.
Graham is a case about hope, it is narrowly and tentatively so342 noting the Court does not guarantee release, only its possibility and furthermore that the majority judgment offers “almost no guidance on the issue of what makes an opportunity for parole into a realistic one.”343

Ristroph frames Graham as a case about hope, and in doing so challenges the Court’s assessment that what distinguishes death and life without parole from other sentences is irrevocability, suggesting the absence of hope actually distinguishes life without parole and other prison sentences. Ristroph sees “irrevocability is a poor basis for distinction”344 as “[o]nce defendant has spent a year, a month, or even a day in prison, that time cannot be restored to him if his conviction is later overturned.”345 Instead, Ristoph sees life without parole distinguishable from other sentences as it “deprives the prisoner of any possibility of future freedom.”346 With this distinction, the connection is then drawn that the elimination of life without parole as a legal effort to cultivate hope.347 Ristroph notes that hope in Graham is framed as a negative right, a prohibition of the denial of hope, rather than a positive right or obligation to cultivate hope.348 While this negative right does require some actions by the state, such as making just parole hearings available and likely offering some form of rehabilitative programming, Ristroph conceptualizes the right to hope conceptualized as a negative right, a conceptualization followed in this thesis.

Ristroph writes that “the impact of the United States Supreme Court 2010 decision of Graham will depend on how much attention courts, legislatures, and other decision makers give

342 Ibid at 75.
343 Ibid at 75.
344 Ibid at 75.
345 Ibid at 75.
346 Ibid at 75.
347 Ibid at 76.
348 Ibid at 76.
to the conception of hope, and how seriously they take the claim that a denial of hope can be a form of cruelty.”

Noting that hope presently does not “enjoy much prominence as a legal category” Ristroph writes Graham “should inspire legal scholars and sentencing experts to reflect on hope, and to learn from the many discussions of hope in other disciplines.” This chapter is intended to be a starting place in the discussion of what law can learn about hope from other disciplines, namely psychology.

c. Sentencing and the Salience of Pain and Hope
Benjamin Berger examines the question of how criminal sentencing is calibrated to the experience of punishment, specifically examining the role of hope in R. v. Zinck, a 2003 Supreme Court of Canada decision he notes is “a relatively low-profile decision that attracted little media attention and has gathered no significant academic interest” The key issue in Zinck was the application of s. 743.6 of the Criminal Code, a section giving sentencing judge’s discretion to increase parole ineligibility to the lesser of half of the offender’s sentence or 10 years rather than the usual, the lesser of one-third of the sentence or 7 years.

Thomas Zinck was in his mid-50’s and had an extensive criminal record. Mr. Zinck pled guilty to manslaughter in the death of Stéphane Cassie. The facts, as stated by the Court are as follows:

The victim was a neighbour of the accused. Based on the evidence, it seems that they got along well. At the time, Zinck drank heavily. He was also fond of firearms and kept a number of them in his house. Before the shooting, three successive break-ins had occurred at the Caissie house. It appears that Zinck took it on himself to watch for burglars. This plan led to Caissie’s tragic death. On the day of the shooting, Zinck had been drinking heavily. It seems

349 Ibid at 76.
350 Ibid at 76.
351 Ibid at 76.
that he thought he had noticed burglars. So he went to Caissie's house, where the victim was in bed. Zinck was carrying a loaded gun. He started banging on the door. Stéphane Caissie went to the door to check what was going on. He opened the door. The gun went off. Caissie was killed instantly.  

The sentencing judge imposed a sentence of 12 years of incarceration and in light of the circumstances of the offence and character of offender increased parole ineligibility to six years, a sentence upheld by the Supreme Court. The crux of the appeal was whether delayed parole eligibility required special or extraordinary circumstances. The majority of the Court of Appeal of New Brunswick found no special circumstances were required while the dissent saw a more demanding standard required. Other provinces differed in applying this section, with Alberta following the broad interpretation used by the majority and Ontario and Quebec following the dissent’s narrow approach.

At the Supreme Court, Lebel J. found that courts should use a “two-step intellectual process when decided whether to delay parole.” The first step involves arriving at an appropriate sentence for the crime. At the second step, the prosecution bears the burden of proving that “additional punishment is required” with Lebel J. adding delayed parole eligibility should not be used routinely or without necessity. In what Berger calls the “orientating idea” of the second stage of this test, Lebel J. states “the sentencing decision must remain alive to the nature and position of delayed parole in criminal law as a special, additional form of punishment.”

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353 R v Zinck, 2003 SCC 6 at para 3 [Zinck].
354 Ibid at para 7, 42.
355 Berger, supra note 352 at 351.
356 Zinck, supra note 353 at para 29
357 Ibid at para 31.
358 Berger, supra note 352 at 353.
359 Zinck, supra note 353 at para 31 [emphasis added].
Justice Lebel stated delaying parole eligibility “may almost entirely extinguish any hope of early freedom... it brings a new element of truth, but also harshness, to sentencing.”\(^{360}\) Berger finds this statement crucial in “unlocking a deeper significance of the Zinck decision”\(^{361}\) finding that the delaying of parole is a form of “manipulation of hope.”\(^{362}\) While Berger does not provide a definition of hope, he states that “[h]ope is one of the conditions that inflects the nature of a sentence. It gives flavour, character, and existential texture to the experience of punishment.”\(^{363}\) For Berger, delayed parole eligibility:

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\text{[I]s motivated by a desire to limit hope and, thereby, to increase harshness by inflicting greater emotional suffering from the predicative distance of the sentencing hearing, without the ability to gauge how the offender in fact changes and reacts to punishment. In this, it turns its back on the potential of hope – the motivating, productive, and (to indulge in raw pragmatism) even behaviour-controlling influences of hope.}\(^{364}\) [emphasis added]
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Berger’s conceptualization of hope connects directly to the goal of released from incarceration. He views Zinck as offering a “message of caution and restraint about delayed parole as, in part, sensitivity to this need for a sentencing judge to be alive to the way that a sentence is lived and, specifically, to the harshness involved in the extinguishment of hope.”\(^{365}\)

Berger’s analysis of Zinck being viewed as examining the lived experience of incarceration is compelling. While delayed parole eligibility may not actually lead to more time in prison, particularly where significant rehabilitative efforts are required, the character and nature of the sentence is still manipulated through delayed parole eligibility, thus increasing the harshness of the sentence.

\(^{360}\) Ibid at para 24.
\(^{361}\) Berger, supra note 352 at 353.
\(^{362}\) Ibid at 353.
\(^{363}\) Ibid at 355.
\(^{364}\) Ibid at 355.
\(^{365}\) Ibid at 356.
3. The Importance of Freedom
This chapter is premised on the belief that freedom, and moreover the autonomous choices that are not possible in a carceral setting, make up a core component of humanity. This notion is expressed by both Ristroph and Berger, both of whom focus on release from incarceration as the object of hope.

While the death penalty is seen as the ultimate penalty, an awareness of the harshness of sentences that preclude hope of release is starting to form. Some researchers have begun to consider lifelong incarceration as a sentence equally as harsh, if not harsher, than the death penalty. Robert Johnson and Sandra McGunigall-Smith write that a better name for life without parole may be “death by incarceration.” The authors write:

Offenders sentenced to death by incarceration suffer a “civil death.” Their freedom—the essential feature of our civil society—has come to a permanent end. These prisoners are physically alive, of course, but they live only in prison. It might be better to say they “exist” in prison, as prison life is but a pale shadow of life in the free world. Their lives are steeped in suffering. The prison is their cemetery, a cell their tomb.

The notion that incarceration results in a civil death was vested in correctional policies in early Canada. Writing on the effects of the writ of habeas corpus, Debra Parkes states:

As a practical reality, for people imprisoned in Canadian penitentiaries and jails from the 19th century and most of the 20th century, habeas corpus offered little protection from rights abuses and other illegal treatment. Vestiges of the common law concept of "civil death" (the loss of civil and proprietary rights upon criminal conviction) led courts to adopt a deferential, "hands off" approach to correctional decision-making such that abuses and

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367 Ibid at 329.
illegalities went unremedied.\footnote{368} Parkes writes that after a series of riots and other violent incidents in Canadian penitentiaries in the 1970’s the courts moved away from their “hands-off approach.”\footnote{369} Over time, often as a result of judicial decisions, inmates have gained rights such as procedural fairness and the right to vote.\footnote{370}

While inmates are entitled to forms of procedural fairness and retain key rights, prison still results in a civil death. Inmates remain deprived of small choices as simple as when to wake up and go to bed or when to eat a meal. As Johnson and McGunigall-Smith write, every day in prison “brings mortifications that remind prisoners of their helplessness and the sheer loss of dignity they suffer in a world in which no one recognizes their inherent worth as human being.”\footnote{371} The authors provide “a mundane but telling example”\footnote{372} offered by an inmate who stated: “[h]aving to ask a guard for toilet paper. You could ask ten times in a period of three to four hours for such an item. Things like this amount to cruel punishment.”\footnote{373} The authors posit this experience may be felt differently by lifers, stating: “[l]ifers are perhaps especially sensitive to such slights because they are experiencing the cumulative effects of lack of autonomy. Their

\footnote{369}Ibid at 353.
\footnote{370}As Parkes notes, in \textit{Martineau v Matsqui Institution Disciplinary Board}, [1980] 1 SCR 602, [1979] SCJ No 121, the Supreme Court of Canada “held that prisoners were entitled to procedural fairness and could seek judicial review of decisions by prison officials that deprived them of their "residual liberty" (i.e., through placement in segregation), stating that ‘[t]he rule of law must run within penitentiary walls.’” See ibid at 353. In the years since, often as a result of litigation, inmates have gained several other key rights. In 1993 the Supreme Court struck down a provision of the \textit{Elections Act} hat disenfranchised inmates and in 2002 the Supreme Court found that a provision denying voting rights to federal inmates was an unjustifiable infringement of the inmates voting rights. See \textit{Sauvé v Canada (Attorney General)}, [1993] 2 SCR 438, [1993] SCJ No 59; \textit{Sauvé v Canada (Chief Electoral Officer)} 2002 SCC 68.
\footnote{371}Johnson & McGunigall-Smith, supra note 366 at 338.
\footnote{372}Ibid at 338.
\footnote{373}Ibid at 338.
dignity as self-determining human beings has been taken from them, and they, unlike other inmates, cannot look forward to a time when they will leave prison and perhaps regain their status as full-fledged human beings.”

This connects to Berger’s view that the removal of hope adds greater emotional suffering to the lived experience of incarceration.

Johnson and McGunnigall-Smith relate accounts of incarceration from inmates serving life without parole sentences in Utah State Prison, stating “[t]o fully appreciate the pains of life imprisonment, one has to look at the prison as it is experienced by the inmates who must live each and every day of their lives in confinement.” Prisoners discussed unremitting loneliness, knowing their family ties are apt to wither and family members likely to die while they remain in prison, the lack of life, the repetition of prison creating a “lifetime of endless boredom,” the loss of choice and deprivations that come with incarceration. The research shows the pains of imprisonment in a profound way, asking life sentenced inmates whether they would prefer life without parole or the death penalty? While the sample size was limited to 22 inmates, the responses clearly demonstrate the pains of lifelong imprisonment. Eight of the inmates stated they would choose the death penalty, eight would choose life without parole, and six were ambivalent, sometimes preferring death and other times life without parole. For the six ambivalent inmates, their answer was framed “as a struggle with two more or less equally unappealing options.”

The pains of imprisonment are made starker by the rationale of inmates who chose life without parole. Their answer was not formed due to the preference of prison but rather because of an extrinsic goal – freedom. As the authors write, “[p]risoners who chose life sentences did

374 Ibid at 338-39.
375 Ibid at 337.
376 Ibid at 338.
377 Ibid at 336.
so, to paraphrase a common view, because where there is life, there is hope—for release. Nothing about prison life offered any intrinsic appeal; the goal of choosing life in prison was to achieve the extrinsic goal of release from prison."^378

While some offenders may remain too great a risk to society to ever be released from prison, it is difficult to predict the effect a long period of incarceration may have on an offender. Given the importance of freedom to human life, criminal sentences should not deny inmates hope, but rather should afford them the opportunity for reform.

4. The Psychology of Hope
As outlined in chapter two, Snyder defines hope “as the perceived capability to derive pathways to desired goals, and motivate oneself via agency thinking to use those pathways.”^379 For there to be hope, there must be three components—goals, pathways and agency. Goals must be achievable but not certain. Pathways, the routes to reach the goal, must be present. Lastly, the hoper must have agency, the belief that they have the power to achieve their goal. Sentences that preclude hope of prospective release eliminate the most important goal as freedom is set at 0% probability, leaving the inmates without pathways to achieve freedom or agency to influence whether they will ever be released. This presents clear problems in the context of corrections, provides safety and security for inmates and staff members.

a. The Risks of Hopelessness
Snyder describes the process of the loss of hope as the “hope to apathy tragedy.”^380 Snyder writes that “perceived goal blockages can produce negative emotional responses. One of these

^378 Ibid at 336.
^379 Snyder (20002), supra note 29 at 249.
^380 Snyder (2000), supra note 30 at 40.
responses is disappointment, which the person experiences in different ways in successive states.”381 The stages of hopelessness are rage, despair and apathy.

In respect to rage, Snyder writes that, “[p]eople often commit misguided, impulsive, and self-defeating acts while enraged.”382 In respect to despair he states “the individual is still focused on the blocked goal, but feelings an overwhelming sense of futility about overcoming the related obstacle.”383 In respect to apathy, he states that people “become apathetic when they acknowledge defeat and cease all goal pursuits.”384

Rage presents a dangerous situation in the confines of prison. While the risk of harming another inmate or staff member may be mitigated through security classification, the ultimate self-defeating act, suicide, remains present.385

i. Hope and Prison Suicide
Daniel Antonowicz and Jon Winterdyk write that “[w]hen a person is deprived of his/her liberty, under law, the state assumes responsibility for protecting that person’s human rights as well as ensuring his or her safety.”386 This makes the findings of a recent three year review of federal inmate suicides (2011-14) by the office of the Correctional Investigator of Canada deeply

381 Ibid at 40.
382 Ibid at 41.
383 Ibid at 41.
384 Ibid at 42.
385 As seriousness of the offence is considered in assigning an offender a security classification, it is likely that at the outset of the offence an individual convicted of a serious offence will be placed in a maximum security institution where movement is highly regulated and supervised. See Corrections and Conditional Release Act RSC 1992, c 20 at s 30. The placement in segregation creates a greater risk of suicide, the Correctional Investigator notes that “a disproportionate number of inmates take their lives in segregating as opposed to general population cells.” Canada, Office of the Correctional Investigator “A Three Year Review of Federal Inmate Suicides (2011-2014) - Final Report” (Ottawa: 10 September 2014) at 7 [Federal Inmate Suicides].
troubling. The Report begins: “[s]adly, we have come to expect about ten suicide deaths each year in federal penitentiaries.”\textsuperscript{387} The suicide rate in prison is approximately seven times higher than in the general population.\textsuperscript{388} The Report indicates several factors lead to the increased risk of suicide in prison:

By its nature, incarceration entails loss of autonomy and personal control. Deprivation, isolation and separation from loved ones can produce feelings of helplessness and/or despair. In particular, long periods of physical isolation in segregation can intensify such feelings leading one to the conclusion that life is no longer worth living.\textsuperscript{389}

While prison may be an environment that makes one prone to suicide, the state bears a responsibility to proactively prevent these occurrences. Unsurprisingly, prisoners serving life sentences are one of the two most likely groups to commit suicide.\textsuperscript{390} The Report indicates the initial phase of incarceration is the time an offender is most likely to commit suicide and notes “a life sentence often results in feelings of despair and hopelessness, which can increase the risk of suicide.”\textsuperscript{391} Hope theory provides insights as to why suicide may be prevalent at the outset of the sentence and why there is an increased risk of suicide for those serving a life sentence.

Within the hope to apathy tragedy, lifers are exposed to two periods of risk of suicide, rage and apathy. In the phase of rage, which may be felt by lifers and shorter term offenders

\begin{footnotes}
\item[387] \textit{Federal Inmate Suicides, supra} note 385 at 3.
\item[388] \textit{Ibid} at 3. Fazel et al. examined prison suicides of male inmates in 12 countries from 2003-2007. The authors found Canada’s rates of suicide to be 21 per 100,000 in the general population and 72 per 100,000 prisons. See Seena Fazel et al., “Prison Suicide in 12 Countries: An Ecological Study of 861 Suicides During 2003-2007” (2001) 46 Social Psychiatry and Psychiatric Epidemiology 191 at 193 [Fazel et al].
\item[389] \textit{Federal Inmate Suicides, supra} note 385 at 6.
\item[390] The other group were inmates serving a sentence of less than five years. The most vulnerable period for suicide is the initial period of incarceration, the first 90 days or within one year of the start of a sentence. See \textit{Ibid} at 7.
\item[391] \textit{Ibid} at 7.
\end{footnotes}
alike, the inmates may be prone to “misguided, impulsive, self-defeating acts”\textsuperscript{392} such as suicide. While shorter term inmates may find new forms of hope, including turning their attention to their eventual release date, individuals with lengthy or lifelong sentences will not have the same goal to look forward to. Seeing the goal of freedom, arguably the most important goal to an autonomous human being, blocked, the lifer may progress from rage to despair and into apathy, a phase in which inmate is once again prone to suicide.

Prison suicide cannot be explained by hope alone. Existing literature demonstrates a number of risk factors and warning signs that can be watched for to identify inmates at risk of suicide and put in place appropriate interventions.\textsuperscript{393} However, further empirical research could help demonstrate how a better understanding of hope can contribute to the prevention of prison suicide. Finding ways to cultivate hope for all inmates, particularly attuned to the circumstances of offenders with life sentences, will help the state meet its moral obligation of protecting rights and ensuring safety.

\textbf{ii. Hope and the “Super Predator” Debate}

Apart from concerns relating to human rights, lifelong incarceration has been criticized, generally by those supporting the death penalty, as creating a new class of “super predator” inmates with nothing to lose. Johnson and McGunigall-Smith sum up this debate in the following terms:

\begin{itemize}
\item \textsuperscript{392} Snyder (2000), \textit{supra} note 30 at 41.
\item \textsuperscript{393} Factors such as mental disorders, addiction (particularly opiate-dependency), previous life trauma and suicide attempts are all recognized as increasing the risk of inmates committing suicide. Individuals who are released from prison remain at a greater risk of suicide than the general population. See \textit{Fazel et al., supra} note 388, Marc Daigle & Hélène Naud “Risk of Dying by Suicide Inside or Outside Prison: The Shortened Lives of Male Offenders” (2012) 54:4 Canadian Journal of Criminology and Criminal Justice 511, Lisa Marzano et al., “Near-lethal self-harm in women prisoners: contributing factors and psychological processes” (2011) 22: 6 The Journal of Forensic Psychiatry & Psychology 863.
\end{itemize}
Some proponents of the death penalty warn us that lifers have nothing to lose and therefore will be uncontrollably violent, injuring or killing officers and inmates at will. In the absence of the death penalty, the speculation goes, “What more can we do to deter them from violence?” As plausible as this scenario may seem, it is dead wrong. In fact, the opposite is true. A substantial body of empirical research supports the claim that lifers are less likely, often much less likely, than the average inmate to break prison rules, including prison rules prohibiting violence.  

Johnson and McGunigall-Smith’s empirical research shows that none of the 22 life without parole sentenced inmates in Utah State Prison had a serious discipline problem or violent confrontation with staff. The staff were as comfortable with the lifers as any other inmates, and some staff felt more comfortable with the lifers.

Mark Cunningham, Thomas Reidy and Jon Sorsensen studied violent misconduct among 3,403 inmates who were sentenced to either capital punishment, life without parole, or life with parole. The research examined Potosi Correctional Center in Missouri, a facility where, unlike most other United States correctional facilities, death sentenced inmates are “mainstreamed” into the general prison population until a warrant with an established execution date is received. Controlling for predictor variables such as age, education and prior imprisonment, the authors found inmates sentenced to death and life without parole were “half as

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394 *Johnson & McGunigall-Smith, supra* note 366 at 330. A similar sentiment was expressed in the 1987 debates to restore capital punishment in Canada, as Jaywardene writes, “[t]he police claimed that the penal institutions were being converted into cess pits by these prisoners while the prison officials claimed that these prisoners were being converted into men without any hope. Both were concerned about an increase in prison violence.” See *Jaywardene, supra* note 122 at 98.

395 *Johnson & McGunigall-Smith, supra* note 366 at 330.

396 *Ibid* at 330.

397 The inmates sentences were death (n=149), life without parole (n=1,054) and parole eligible (n=2,199).

likely to engaged in violent misconduct” as parole eligible offenders housed under similar conditions.\textsuperscript{399}

Cunningham and Sorsensen also studied inmates with a high-security classification in the Florida Department of Corrections, comparing 1,867 life without parole inmates to 7,147 long-term inmates who were sentenced to parolable terms of longer than 10 years. The study found “rates of potentially violent misconduct among LWOP inmates were similar to other long-term inmates held at the same custody level.”\textsuperscript{400} The authors also noted that only 0.6% of life without parole inmates committed assault causing serious bodily injury during the 6-year study period. These findings led the authors to conclude life without parole inmates in Florida did not pose a major threat to inmates or staff.\textsuperscript{401}

A Correctional Service of Canada report in 2009 evaluated institutional charges and involuntary segregating admissions of offenders convicted of murder compared to offenders not convicted of murder. As the charts below indicate, in both criteria murderers, who will typically be serving longer sentences and not have fixed parole eligibility dates, were less likely than non-murders to be given an institutional charge or be involuntarily admitted into segregation.

\textsuperscript{399} Ibid at 316. The full list of predictor variables controlled for includes: age, rage, marital status, education, prison imprisonment and years served in Potosi. See ibid at 315.
\textsuperscript{401} Ibid at 699-704.
Despite the apparent reasonableness of the belief that inmates sentenced to lifelong incarceration would be difficult to manage in prisons, empirical data challenges this belief. How can this be explained? Two components of hope theory present some suggestions why this is the case. Both the hope to apathy tragedy and compensatory goals provide some possible explanations.

SOURCE: Correctional Service Canada

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Despite the apparent reasonableness of the belief that inmates sentenced to lifelong incarceration would be difficult to manage in prisons, empirical data challenges this belief. How can this be explained? Two components of hope theory present some suggestions why this is the case. Both the hope to apathy tragedy and compensatory goals provide some possible explanations.
The hope to apathy tragedy proposes three stages of hopelessness, rage followed by despair and finally apathy. Snyder states rage “is the very first reaction when profoundly blocked, that person still has energy and drive to pursue alternative goals.” It is in this stage that an individual will commit “misguided, impulsive, and self-defeating acts.” In the context of prison, these acts may include suicide, escapes, and violence.

The super predator argument is based on the assumption that inmates sentenced to lifelong incarceration remain enraged throughout their incarceration, posing a risk of violence to staff and fellow inmates. The hope to apathy tragedy meanwhile proposes that as inmates lose hope, rage is only the first of three phrases, followed by despair and apathy. As hope is taken away from the inmates, they may be prone to violence in the first stage of losing hope, rage. However, rather than permanently remain enraged, the inmates move to apathy and despair.

It should also be kept in mind that inmates sentenced to lifelong incarceration are not the only inmates who experience a blockage towards an important goal. Offenders receiving any prison sentences experience the losses of employment, professional and social status, friends and family as a collateral consequence in their sentencing. These offenders may experience a significant life change and loss of hope in many important areas that may be temporarily or permanently.

Future empirical research should examine the hope to apathy tragedy in the context of long-term inmates. If this hypothesis proves correct, prison management could take into account the offender’s stage on the hope to apathy tragedy to assist in informing practices relating to security level.

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403 Snyder (2000), supra note 30 at 41.
404 Ibid at 41.
Low levels of infractions committed by inmates serving lifelong incarceration may also be explained in part by the compensatory goals component of hope theory. Compensatory goals serve to replace unattainable goals. For inmates serving life incarceration, with the important goal of prospective release being permanently blocked, they may replace this goal with a compensatory goal such as making prison as bearable as possible. As Johnson and McGunigall-Smith state:

Most lifers begin their prison sentence in maximum, and very often supermaximum, facilities; the very bleakest of prison existence. This experience often proves to be a profoundly painful immersion into the “belly of the beast” that dramatically highlights how much lifers have to lose and how hard prison life can be if they get into trouble. As a general matter, then, self-interest guides lifers to avoid trouble because trouble jeopardizes the few privileges they can secure in the prison world and, moreover, can land them in very grim living environments. 

Lifers understand the pain of imprisonment, and while this cannot be eliminated with the prospect of freedom, good behaviour may make this more tolerable. In this circumstance, the goals of receiving a low-security classification and earning certain privileges may be compensatory to the permanently blocked goal of release.

While compensatory goals provide some form of hope, Jen Cheavens outlines the risks of choosing unsatisfying goals. Cheavens writes that setting goals that are almost certain to be achieved “may enhance the likelihood of a depressive experience” and further that hope theorists have suggested “the associated lack of challenge in the goal setting largely undermines the benefits related to goal achievement. Related to this point, researchers have reported that

\[^{405}\text{Johnson & McGunigall-Smith, supra note 366 at 331.}\]

\[^{406}\text{Jen Cheavens, "Hope and Depression: Light Through the Shadows" in Snyder 2000, supra note 19, 321 at 327.}\]
dysphoria is associated with setting minimal goals under success conditions. The ability to set compensatory goals and attempt to make prison more bearable provides a plausible explanation why inmates with lifelong sentences do not become high-risk super predators. However, under this theory, inmates may choose unsatisfying, readily achievable compensatory goals, placing them at risk to depression and dysphoria.

5. What Should Hope of Prospective Release Look Like?
As outlined in chapter five, the United States Supreme Court guaranteed that juveniles must be given “some realistic opportunity to obtain release” while offering, as Ristroph states, “almost no guidance on the issue of what makes an opportunity for parole a realistic one.” Similarly, while finding lifelong incarceration in violation of the prohibition against inhumane or degrading treatment, the European Court of Human Rights found life sentences permissible if the courts determine the “prisoner can be said to have any prospect of release” without providing clear guidance on what this prospect of release should look like. An examination of hope theory can provide the courts with an understanding of what hope of prospective release should look like, setting standards to be applied to domestic legislation and extradition decisions.

In applying hope theory to prospective release from prison, I suggest for a sentence to leave an offender with hope from the outset there must be a mechanism of release with a proven record of success or reasonable ability for success, made transparent through clear, predetermined criteria and formal, potentially reviewable decisions that place primary consideration on the prisoner’s efforts of reform and current risk to society, with a right to re-apply if unsuccessful.

407 Ibid at 327.
408 Graham, supra note 260 at 32.
409 Ristroph, supra note 271 at 75.
410 Vinter, supra note 26 at para 109.
The goal component of hope theory is easily applied in the context of prospective release. Freedom from incarceration serves as the goal. The goal is not guaranteed, however, it must be attainable. What determines whether or not the goal is attainable is the presence or absence of pathways or agency.

Pathways that allow for hope of release take three forms - parole, clemency and resentencing provisions such as the faint hope clause. Whether these pathways allow for hope is determined on the prospect of release and if the offender is aware of the routes he or she must take towards prospective release. Under certain circumstances, executive clemency can constitute a valid pathway while in others it may be applied in an *ad hoc* way with little chance of success.\(^{411}\) Currently in Canada, the low probability of success and limited amount of agency make the Royal Prerogative of Mercy appear to no longer be a sufficiently hope producing pathway.

Executive clemency comes in many forms, varying from one jurisdiction to another.\(^{412}\) As courts look at clemency provisions, both within their own country and those set by countries

\(^{411}\) Canada’s first two eras of murder sentencing, the high rate of success for applicants from 1867-1961 and 1961-1976 show executive clemency was a valid pathway for having a death sentence commuted, although agency may not have been present. In these eras, the executive reviewed every capital case and ultimately exercised clemency in over half of all cases. Once the death sentence was commuted the offender was also given hope of prospective release from incarceration through a ticket of leave or parole. In other circumstances executive clemency is not a valid pathway. As chapter five notes, the German Federal Constitutional Court refused extradition of an offender to Turkey finding their Presidential remission offering only “a vague hope of release.” See *ibid* at para 71.

\(^{412}\) Andrew Novak provides an overview of executive clemency provisions, noting the structure of decision making varies from executive acting alone, executive acting with a designated minister, executive acting with a cabinet, executive acting with a general advisory body, executive requires recommendation by a clemency committee, a board or committee acting alone and executive acting with the legislature, clemency powers, death-penalty specific provisions, actual innocence claims, automatic pardons, interim or transitional pardons, and posthumous
requesting extradition, attention should be paid to how often executive clemency is actually granted, whether there are set requirements for clemency and whether reasons for the dismissal or granting of clemency are provided. If clemency is never granted, or only granted in an extremely rare number of cases, this cannot be seen as a pathway as the goal of freedom is virtually unattainable. In *Trabelsi v. Belgium*, the European Court of Human Rights found the Presidential pardon power in the United States does not meet criteria for making a life sentence reducible. 413

Set requirements for clemency help make the pathway the offender must travel clear. If the requirements for clemency are highly restrictive they may eliminate the goal and/or the agency component of hope. The requirements from the United Kingdom’s lifer manual demonstrate this dilemma. First, the chances of an offender meeting all five requirements were minimal. More troublesome is the lack of agency, while the offender could have agency over the risk of re-offending, little to no control as exercised on the requirements of a reduced life expectancy and whether adequate arrangements for care outside prison were made. Conversely, the criteria set forth by the faint hope clause in Canada shows inmates how their cases will be evaluated; as Manson notes, this has led to good self-selection of cases and high rates of success for applicants.

Whether reasons are provided for clemency decisions also serves to provide pathways for future offenders and demonstrate whether or not agency is present. If a jurisdiction requires reasons for clemency decisions, other offenders could see the standards required to achieve release. Furthermore, having reasons provided for clemency would assist in determining if the pardons. See Andrew Novak, *Comparative Executive Clemency - The Constitutional Pardon Power and the Prerogative of Mercy in the Global Perspective* (New York: Routledge, 2016).

413 *Trabelsi, supra* note 308 at para 138.
goal and agency components are present. The ability for judicial review further promotes transparency and provides clarity on how the pathway of clemency operates. If it can be seen that inmates’ pleas for clemency are rejected due to the circumstances of the crime, absent considerations of rehabilitative efforts and current risk, then hope is not truly present.

Parole can be seen generally as providing a valid pathway towards the goal of prospective release. The caveats applying to executive clemency apply equally to parole – is parole actually given to inmates, particularly those convicted of one or more murders, are requirements for parole pre-determined and known and whether reasons for denial or granting of parole provided. The case of Bourque adds another question in the context of parole – is the date of eligibility attainable? As noted, unless his sentence is overturned on appeal, Mr. Bourque will have to live to be 99 years old before being eligible to apply for parole. As the probability of him living to this age is extremely low, the chance of freedom through parole is set near 0%, thereby eliminating hope. Furthermore, inmates possess limited agency whether or not they will live to an advanced age. For parole to be a hope producing pathway, an inmate must have the opportunity to apply for parole at an age they can realistically live until.

Hope theory can inform the legal system as to what hope of prospective release should look like. The goal, freedom from incarceration, needs to be truly attainable. The typical pathways to this goal are parole, clemency and re-sentencing. For these pathways to be hope producing, an inmate must have the agency to control whether or not their application is potentially successful. To this end, there must be some demonstrated success or potential for success in achieving release, ensuring the goal component of hope theory is present. Agency must also be present. If decisions on release are dominated by a consideration of the seriousness of the offence, hope may not be present. Transparency, through pre-set criteria and formal,
potentially reviewable decisions, bolsters the ability of clemency or parole as a hope producing pathway as it demonstrates to the inmate in question and others what must be done to achieve release, ensuring inmates have agency. Taken together, release through clemency or parole that has a demonstrated record of success with clear criteria and transparent reasoning ensures that offenders maintain hope of prospective release.
Chapter Seven - Hope’s Location within the Sentencing Principles*

1. Introduction

As indicated in chapter five, hope of prospective release has been protected by legislation, constitutions and courts around the world. Early jurisprudence under the *Multiple Murders Act* has begun to recognize hope of prospective release as a relevant factor in Canadian sentencing law. If hope is, or should be, considered in sentencing law in Canada, where is or should it be located? This chapter situates hope within the principles of sentencing codified in the *Criminal Code*. Chapter eight continues this discussion by addressing how hope is or should be protected by the *Charter of Rights and Freedoms*.

Since 1996, the objectives and principles of sentencing, along with a number of sentencing rules, have been codified in the *Criminal Code*. These objectives, principles and rules are interpreted and applied by the courts and, where gaps exist, are supplemented by the common law. Like all legislation in Canada, these principles are applied in accordance with Charter values. Hope is not a codified sentencing principle but as this chapter highlights, jurisprudence shows that hope is still a factor considered in sentencing. The importance of hope has been heightened by the *Multiple Murders Act* that creates a discretionary sentencing power that could remove all hope of prospective release.

This chapter begins with a discussion of the first two cases under the *Multiple Murders Act*, arguing that the disparate sentences imposed in these cases can be explained by analyzing the different treatment of hope. The chapter then explores how hope operates in conjunction with three sentencing principles - parity, rehabilitation and totality. Within the parity principle, hope

* An early version of this chapter was presented at the 2016 University of Victoria Cultural Social Political Thought Conference on April 23rd, 2016 in Victoria, BC. I am grateful for the feedback received at this event from the attendees and panel chair Professor James Rowe.
exists as a condition of the sentence; as judges look to prescribe sentences that are similar to other sentences, the existence of hope should be one of the similar features. Hope and rehabilitation have a symbiotic relationship, with hope acting as the motivating factor of rehabilitation and rehabilitation as the object of hope. Within the totality principle, hope serves as a guidepost prescribing an absolute upper limit to a criminal sentence.


As outlined in chapter four, the first two cases under the *Multiple Murders Act* took divergent approaches to sentencing and arrived at disparate sentences. The different sentences given in *Baumgartner* and *Bourque* are not explained simply by suggesting Mr. Bourque committed a more serious crime. Both men were responsible for the murders of three innocent people in highly culpable crimes. Despite the offenders being of similar ages and both using firearms to murder three victims, vastly different sentences were given. The first offender, Travis Baumgartner, received life imprisonment with no parole eligibility for 40 years at which point he will be 61 years of age. The second offender, Justin Bourque, received life imprisonment with no parole eligibility for 75 years at which point he will be 99 years of age. Quantitatively the sentences have a gap of 35 years but perhaps the bigger distinguishing feature is the qualitative difference - while Mr. Baumgartner is left with hope that he may at some point be able to atone for his crimes and rejoin society, Mr. Bourque’s current sentence forecloses this possibility and ensures that the sentence will not end with parole but rather with his death. How then does one explain one man receiving a parole ineligibility period 35 years less than the other? In this section I suggest that the fundamental difference in the two sentences is the court’s the treatment of hope.
In sentencing Mr. Bourque, Smith C.J. distinguished the *Baumgartner* case on the basis of the formal charges, with Mr. Baumgartner having pled guilty to a single count of first degree murder and two counts of second degree murder whereas Mr. Bourque pled guilty to three counts of first degree murder. An examination of the facts of the cases reveals flaws in this distinction.

There is no question, as Smith C.J. stated, that Mr. Bourque’s crime “is one of the worst in Canadian history.”414 The ambush of police officers, those charged with the protection of society, leading to three murders, two attempted murders and a community paralyzed in fear for over 24 hours shook the fabric of our nation. However, it is arguable that Mr. Baumgartner’s crime was of equal moral culpability.

Mr. Baumgartner was given a lethal firearm in the course of his employment and placed in a position of trust. This breach of trust is a highly aggravating factor, as Rooke J. states:

> I will talk about this further under breach of trust, but they each relied upon that trust common to soldiers, to peace officers, to armoured car security guards and others in such positions to make themselves vulnerable by their operations to *one who is supposed to "have their back"*, as the saying goes, *not shooting them in the back of the head at point-blank range and ambushing them at short range.*415 [emphasis added]

Like Mr. Bourque, Mr. Baumgartner also fled and was subject to a manhunt. While Mr. Bourque eventually surrendered to police and readily confessed to his crime, Mr. Baumgartner was captured attempting to flee the country and “[w]hen apprehended he launched into a preposterous but prolonged charade involving amnesia and a blackmailer.”416 While the Crown accepted guilty pleas for one count of first degree murder and two counts of second degree, explaining there may have been doubt whether Mr. Baumgartner had the prior intent to kill the

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414 *Bourque, supra* note 1 at para 38.
415 *Baumgartner, supra* note 165 at para 8.
416 *Ibid* at para 165.
first two victims, all murders remained highly culpable. Had the first two victims been the only individuals murdered by Mr. Baumgartner it is possible that the Crown would not have agreed to a plea to the reduced charge; even if Mr. Baumgartner pled or was found guilty of second degree murder only for these counts he would have received a substantial period of parole ineligibility.

The difference in the sentences given to Mr. Baumgartner and Mr. Bourque is a difference in the application of the parity principle and in the relative importance of rehabilitation, proportionality and totality. Underlying all these differences is a different understanding of the relevance of hope. In Baumgartner, Rooke J. implicitly noted the importance of hope, whereas Smith C.J. rejected this in Bourque. The following section examines the sentencing principles of parity, rehabilitation and totality, outlining how they were treated differently in Baumgartner and Bourque and other cases under the Multiple Murders Act. This section also suggests future directions for how these principles can be interpreted in a manner that recognizes hope as an important factor in sentencing.

3. Hope and the Section 718 Sentencing Principles

a. Hope and Parity
Codified in s. 718.2(b) of the Criminal Code, the parity principle states that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.” This principle codifies the importance of precedent and seeks to bring greater uniformity to sentencing, serving the important purposes of upholding the administration of justice and contributing to public confidence in the judicial system. As stated by Cameron J.A.:

[I]t falls to all of us -- meaning all of the judges of all the courts in the Province -- to strive to achieve a reasonable degree of consistency in the application of these provisions, however inherently difficult this may be on occasion because of the inevitable variation in circumstances. But, unless we treat like cases more or less alike, we run the risk of undermining the integrity
of the administration of justice and, hence, public confidence in the administration of the criminal law.417

While the parity principle may be used to look at a sentence type, for example, whether similar offenders have been sentenced to discharges, probation orders or conditional sentences, parity most often examines the length of a sentence. Although the parity principle received little attention in the early cases under the *Multiple Murders Act*, the use of this principle will grow as more multiple murders come before the case and sentencing ranges begin to emerge. Under the parity principle judges should look to preserve the sentencing similarity by preserving hope of prospective release

i. **Parity under the *Multiple Murders Act***

Given the inevitable task of rendering the first sentence under the *Multiple Murders Act* in *Baumgartner*, Rooke J. acknowledged “a limit to the usefulness of the comparison to other cases.”418 Prior to the *Multiple Murders Act*, sentencing for first degree murder was relatively straightforward as the sentence of life with no eligibility of parole for 25 years served as both the minimum and maximum. The burdensome task presented to Rooke J. was lessened to a degree by a joint submission submitted by experience counsel. The submission took into account the gravity of the offence but still left Mr. Baumgartner hope of eventual release. The acceptance of this joint submission and sentence imposed, life imprisonment with no chance of parole for 40 years, created a standard by which similarity could be measured for future multiple murderers.

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417 *R v Bethke*, 2013 SKCA 135 at para 46. In this case, the offender was given a conditional sentence order for a fraud that involved taking $178,000 in 60 transactions over 5 years. Despite the deference given to a sentencing judge, the Saskatchewan Court of Appeal could not reconcile the imposition of a conditional sentence with several previous decisions of similar frauds leading to incarceration. For a brief discussion on this point see Sarah Burningham, “The Judgments of the Saskatchewan Court of Appeal, 2013” (2014) 77 Saskatchewan Law Review 231 at 233-234.

418 *Baumgartner*, supra note 165 at para 109, see also para 110.
In *Bourque*, Smith C.J. gave little consideration to the parity principle based on the sentence in *Baumgartner* despite the apparent similarities in the two cases. Smith C.J. stated:

There are no similar cases other than *Baumgartner, supra*, which have considered the relatively new section 745.51. In *Baumgartner*, there was only one first degree murder conviction and the motivation was greed. In other words, *this principle cannot be applied in the case before the Court.*

As discussed above, Smith C.J.’s analysis ignores the fact the Mr. Baumgartner was also convicted of two counts of second degree murder in circumstances that, at trial, may have led to convictions for first degree murder and were otherwise highly culpable.

While one wishes that cases falling under the *Act* will be few and far between, as these cases do come to the courts a more clarified parity principle will develop. While each case will turn on its own factual nuances, the parity principle will assist counsel and judges in coming up with a just and appropriate sentence in some of the most difficult cases confronting the courts. The development of parity for multiple murders is seen in *Koopmans* and *Bains*, two of the later cases under the *Act*. The sentencing judge, Maisonville J. in both, found *Husbands* to have precedential value as it involved a case of two second degree murders, a factor that distinguished these cases from those where there was also a count of first degree murder.

In the context of the parity principle, hope is a condition of the sentence. A sentence with hope is qualitatively similar to another sentence that allows for hope, even if the two sentences have other differences such as quantitative length. The future directions of the parity principle

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419 *Bourque*, *supra* note 1 at para 43.
420 *Koopmans*, *supra* note 200 at para 73, *Bains*, *supra* note 195 at para 86. As *Koopmans* was argued September 10th and 30th, 2015, and decided September 30th, 2015 while *Bains* was argued September 24th, 25th and October 6th, 2015, and decided October 6th, 2015, it is likely counsel in either case would not have had access to the other decision when making arguments.
can accomplish this form of similarity by incorporate hope of release as a condition of a sentence in at least two ways, distinguishing offenders based on murder typology and age.

**ii. Hope and Parity - Future Directions**

In *Baumgartner*, Rooke J. posited that “there may be cases where the maximum of ineligibility without reduction, even for the totality principle, might apply. Cases such as Olson and Picton come to mind, but the case before me is not one of those.”\(^{421}\) While not naming a criminological typology, Rooke J. identified two of Canadians most notorious serial killers, Clifford Olson and Robert Picton. If, as Rooke J. posited, some offenders should be denied prospective hope, this classification should be made as narrow as possible. It may be that one can differentiate serial murderers from other multiple murderers based on motive, remorse, and likelihood of rehabilitation. Furthermore, academic studies on serial murder raise questions whether these offenders can be rehabilitated.\(^{422}\)

Aside from concerns relating to rehabilitative potential, there are legal distinctions between serial murderers and mass or spree murderers. The transaction concept, a concept used to govern whether sentences should be concurrent or consecutive, is one such distinction. As explained by Manson:

> In exercising discretion over whether to order terms to be served concurrently or consecutively, the sentencing judge should ordinarily be governed by the principle that sentences which are part of the same event or transaction ought

\(^{421}\) *Baumgartner*, *supra* note 165 at para 43.

to be served concurrently but offences which are discrete in time or nature can be the subject of consecutive terms.\textsuperscript{423}

While mass and spree murderers kill their victims as part of one transaction, serial killers operate in a different manner, killing victims in separate transactions over a time span separated by months or even years. Another legal distinction that may be more prevalent in serial killers is selection victims based on factors such as race, national or ethnic origin, colour, sex, age or sexual orientation - aggravating factors codified in s. 718.2(a)(i) of the \textit{Criminal Code}.

A serial murderer being sentenced under the \textit{Multiple Murders Act} and would test the ability to leave hope of release. It is difficult to argue with the notion expressed by Rooke J. that a serial killer such as Clifford Olson, who murdered eleven children and expressed no remorse, should not be given hope. While a case involving a serial murderer would turn on its own distinct factors such as the offender's age, number of victims, whether they targeted a minority population and above all their potential to rehabilitate, it would seem that the most justifiable grounds to sentence an offender to lifelong incarceration would come in the case of a serial killer. If this was ever done, judges in future multiple murder cases must look past factors such as number of victims when applying parity but also consider the typology of the offender and what is known about the offender’s prospects for rehabilitation.

Recidivist murderers pose another set of problems for sentencing under the \textit{Act}. By definition, these offenders are already in the thralls of the criminal justice system, either charged, sentenced, or on parole for a previous murder before committing a second murder. A second murder at any of these phases would be part of a separate transaction and call into question the offender’s ability to reform. There may also be practical limitations in leaving a recidivist

\textsuperscript{423} Allan Manson, \textit{The Law of Sentencing} (Toronto: Irwin Law, 2001) at 101.
murderer with hope. If an offender committed a second murder near the end of their original parole ineligibility period or while released on parole age would become a major factor whether the second sentence could preserve hope of prospective release.

It should be noted that in *Vinter*, a case discussed in chapter five, the European Court of Human Rights dealt with three offenders with three different offending typologies - a recidivist, a mass and a serial murderer. The European Court of Human Rights did not distinguish between these types of murderers but found that a sentence without hope of eventual release was an outright violation of the prohibition against torture or inhuman or degrading punishment. This approach favours leaving hope for all offenders and trusting the parole system to function properly and continue to detain those who remain a risk to society.

The parity principle may also distinguish offenders on the basis of age. Even if the offenders committed similar offences in similar circumstances, it could be argued that an older offender should receive a sentence that is shorter than a younger offender. A life sentence with 35 years of parole ineligibility given to a 20 year old offender is much different than the same sentence given to a 65 year old offender - the former is left with hope while the latter is not.

Hope being recognized as a component of the parity principle may lead to an apparent sentence reduction for older offenders. In this circumstance, the lengths of parole ineligibility may be different; however, remain similar through one common feature, the preservation of hope of eventual release. This approach would prioritize the qualitative element of protecting hope over the quantitative aspect of having periods of parole ineligibility of a similar length.

Preservation of hope becomes more difficult the older the offender is. For an offender who is at least 60, even the minimum punishment for a single count of first degree murder could
foreclose hope of release. Statistics show such cases are rare. Of the 376 Canadian males accused of homicide in 2014, 34 (9%) were between 50 and 59 and 22 (5.8%) were over 60. Of the 55 females were accused of homicide that year, 5 (9%) aged 50-59 and 1 (1.8%) over 60. These individuals are accused and some may have their charges stayed or withdrawn, found not guilty, or be found guilty of manslaughter which does not carry a mandatory minimum punishment. Relatively few elderly offenders will be subject to minimum terms of imprisonment that foreclose hope of release. It is important to note that with the abolition of the faint hope clause, those who do face a 25 year mandatory minimum would have to serve that entire term. An elderly offender facing the mandatory 25 year sentence for first degree murder is one possible basis for this mandatory minimum to be challenged.

b. Hope and Rehabilitation
Section 718(d) of the Criminal Code states the one of the objectives in sentencing is “to assist in rehabilitating offenders.” Rehabilitation is directly tied to the idea that the offender will be returned to society. As rehabilitation has largely been relied on in crafting “lenient” sentences that limit or eliminate the period of incarceration the principle has received little attention in cases of serious criminality such as murder. Clayton Ruby notes that “there has been a gradual recognition that imprisonment does not further goals of rehabilitation” citing the Supreme Court of Canada decision of R. v. Proulx where Lamer C.J.C. wrote: “Parliament has mandated that expanded use be made of restorative principles in sentences as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society.” Rehabilitation is a

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425 Criminal Code, supra note 4 at s. 718.2(d).
stated principle in many cases where the sentencing judge seeks to avoid or minimize imprisonment by imposing a discharge, a conditional sentence or intermittent sentence or by crafting a provincial prison sentence rather than a federal penitentiary sentence.

Several international instruments call for rehabilitation to be a component in an incarceral sentence. The United Nations *Standard Minimum Rules for the Treatment of Prisoners*, a non-binding declaration states:

> The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.  

The International Covenant on Civil and Political Rights, a treaty ratified by Canada, states “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”429 The *Standard Minimum Rules for the Treatment of Prisoners* explicitly mentions release from custody and that rehabilitation should serve to help the inmate leave a law-abiding, self-serving life after release.430

While rehabilitation may take the form of helping the offender serve his or her sentence without committing disciplinary infractions or criminal offences, guiding international interpretations show rehabilitation must mean more than this. Rehabilitation must offer the possibility of release. In *Vinter*, the European Court of Human Rights offered the following analysis of the role of rehabilitation in the German *Life Imprisonment Case*:

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The court also stressed that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. *An offender had to be given the chance, after atoning for his crime, to re-enter society.* The State was obligated – within the realm of the possible – to take all measures necessary for the achievement of that goal. Prisons had a duty to strive towards the re-socialisation of prisoners, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompanied imprisonment.\(^{431}\) [emphasis added]

The Court found that a sentence that did not offer an offender hope of prospective release “struck at the very heart of human dignity if it stripped the prisoner of all hope of ever earning his freedom.”\(^{432}\) For life imprisonment to be permissible, a prisoner needs hope of regaining his or her freedom. Under the *Multiple Murders Act*, rehabilitation serves in a similar manner, with judges already recognizing this principle as one of the reasons to avoid sentencing the offender to the maximum available punishment.

### i. Rehabilitation under the *Multiple Murders Act*

In *R. v. Baumgartner*, Rooke J. addresses the way in which rehabilitation and specific deterrence “go hand in hand” in cases of multiple murders. As noted in chapter four, considering specific deterrence, Rooke J. stated “[s]ome prospect for freedom in the future will help to ensure that he does not commit crimes against prison guards or other inmates”\(^{433}\) further noting that the sentence should rehabilitate Mr. Bourque to the point that should he return to society he lives a peaceful life.\(^{434}\) This reasoning sees social utility in rehabilitation. In *Bourque*, Smith C.J. took a different approach, stating rehabilitation: “will be a function inside prison and, as the Crown states, deserves limited consideration.”\(^{435}\)

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\(^{431}\) *Vinter, supra* note 26 at para 69.
\(^{432}\) *Ibid* at para 69.
\(^{433}\) *Baumgartner, supra* note 165 at para 84.
\(^{434}\) *Ibid* at para 87.
\(^{435}\) *Bourque, supra* note 1 at para 35.
A unique consideration of rehabilitation was offered in *R. v. Husbands*. Mr. Husbands had an extensive criminal history and committed two highly culpable second degree murders. Ewaschuk J. considered Mr. Husbands “a person of generally bad character”\(^{436}\) and “highly manipulative,”\(^{437}\) but found, “[n]onetheless the accused has a realistic prospect of future rehabilitation *should he avail himself of the opportunity to do so,*”\(^{438}\) recognizing the fundamental worth of the human person and the role of the offender’s agency in determining whether or not they are rehabilitated and released.

### ii. Rehabilitation and Hope - Future Directions

Rehabilitation exists in a symbiotic relationship with hope – the end goal of rehabilitation, reintegration into society, is only possible in sentences where the offender has hope, while hope provides the offender with a sense of agency and serves as a source of motivation to rehabilitate. Hope theory illustrates this relationship. As explained in chapter six, mechanisms of release such as parole, clemency and re-sentencing serve as hope producing pathways. Rehabilitation is both a pre-condition to these pathways and a pathway in and of itself as an offender must demonstrate rehabilitation to those who will determine if release will be granted. Future cases should factor in this relationship when making a determination of parole ineligibility period.

Hope gives the offender agency. Agency is present where a sentence allows hope of release and the offender believes his or her own actions will determine whether release will be granted making the offender more likely to engage in the rehabilitative pathway towards release. If the offender is given a sentence so lengthy that the offender is likely to die before being eligible for parole, agency and therefore hope are taken away. Similarly, if the offender believes

\(^{436}\) *Husbands, supra* note 187 at para 19.  
\(^{437}\) *Ibid* at para 19.  
\(^{438}\) *Ibid* at para 19.
his or her crime would make their release impossible, regardless of whether this is true, agency is taken away and hope falls aside.

c. **Hope and Proportionality and Totality**
The fundamental principle of sentencing law is the proportionality principle codified in s. 718.1 of the *Criminal Code*. In instances of consecutive sentences, the proportionality principle expresses itself through the more particular totality principle.\(^{439}\) Codified in s. 718.2(c) of the *Criminal Code*, the totality principle dictates that “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.” In *R. v. M(CA)* the Supreme Court of Canada stated:

The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing, supra*, at pp. 44-45:

The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if *its effect is to impose on the offender "a crushing sentence” not in keeping with his record and prospects.*\(^{440}\) [emphasis added]

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The Court went on to recognize that an offender’s age is relevant in considering the totality principle, noting that when a sentence starts to surpass the estimated length of the offenders remaining life “the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves,” as such “a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender’s expected remaining lifespan that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value.”

In subsequent cases, several courts have attempted to bring a formulaic approach to the application of the totality principle. Seeking to provide a consistent approach to totality, Manson distinguishes high-end offences and non-high end offences. For the high-end category, which includes murder, Manson states “there is little need to be methodologically fastidious. It is the total that matters.” This sentiment was followed in Baumgartner where Rooke J. stated “[t]he process you take is not what is important. It is the result that is important.” Manson posits four basic principles about what is excessive or unduly harsh:

1. The total sentence should not be crushing to rehabilitative/re-integrative prospects.

\[441\] *Ibid* at para 74.
\[442\] *Ibid* at para 74.
\[443\] The Manitoba Court of Appeal stated the procedure for sentencing multiple counts: “[I]s for the sentencing judge to first determine whether the offences in question are to be served consecutively or not. Second, if they are to be served consecutively, then an appropriate sentence for each offence should be determined. Third, the totality principle should be applied to the total sentence thereby arrived at to ensure that the total sentence is not excessive for this offender as an individual. In effect, the sentence must be given a ‘last look.’ Fourth, if the judge decides that it is excessive, then the sentence must be adjusted appropriately. In some cases that might require a significant adjustment.” See *R v Draper*, 2010 MBCA 35 at para 30.
\[444\] Allan Manson, “Some Thoughts on Multiple Sentences and the Totality Principle: Can We Get It Right?” (2013) Canadian Journal of Criminology and Criminal Justice 481 at 491 [*Manson (2013)*].
\[445\] *Baumgartner*, *supra* note 165 at para 69.
2. The total sentence should not exceed life expectancy.

3. The harm of punishment should not be significantly greater than the harm culpability inflicted on victims.

4. The totality calculation may vary with the category of offences in question.\textsuperscript{446}

These four points reflect an approach to totality that includes both quantitative aspects in assessing the length of the sentence alongside qualitative elements such as what would be crushing to the rehabilitative prospects.

i. **Totality under the Multiple Murders Act**

The totality principle has been a key consideration in the early cases under the *Multiple Murders Act*. In *R. v. Vuozzo*, Campbell J. stated: “[o]ne of the most significant principles applicable to this case is the so-called ‘totality’ principle.”\textsuperscript{447} Contrasting the first two cases considered under the *Act*, *R. v. Baumgartner* and *R. v. Bourque*, it is clear to see the disparate sentences rendered can be explained in large part by differing views on how the totality principle should be applied.

In *Baumgartner*, Rooke J. found “[t]he issue of a crushing sentence in the context of this Offender, at age 21, is not an irrelevant consideration.”\textsuperscript{448} Addressing the complex web of factors considered under totality, Rooke J. stated that totality is:

> [I]mpacted by the "character", the "nature", and the "circumstances", and takes into account other principles of sentence such as the importance of denunciation and deterrence over rehabilitation, but at the same time the relevance of rehabilitation to support specific deterrence both while he is in prison and if he were, at some advanced age, to be released on parole all while remaining under life sentence.\textsuperscript{449}

\textsuperscript{446} *Manson 2013, supra* note 444 at 491.  
\textsuperscript{447} *Vuozzo, supra* note 164 at para 3.  
\textsuperscript{448} *Baumgartner, supra* note 165 at para 66.  
\textsuperscript{449} *Ibid* at para 110.
Justice Rooke found Mr. Baumgartner’s age to be a positive factor and considered the fact that Mr. Baumgartner was not “psychotic” like other mass murderers such as Clifford Olson and Robert Picton. Finding that a prospect for parole would be important for the safety of inmates and prison staff, Rooke J. then considered a number of sentencing options, finding the sentencing ultimately “is a question of at what age should he be eligible to apply for parole, with no guarantee that he will be paroled.”

Justice Rooke engaged in a quantitative exercise, looking at specific sentence lengths and assessing their appropriateness. Rooke J. considered the maximum available sentence, life imprisonment with no eligibility of parole for 75 years, when Mr. Baumgartner would be 91, stating such a sentence “would be much too long and too harsh.” Next, he considered a 55 year period of parole ineligibility, making the earliest parole eligibility date at age 75, finding this sentence “likely unduly harsh.” Ultimately Rooke J. considered two possible sentences, life imprisonment with parole ineligibility set at 50 years and life imprisonment with parole ineligibility set at 40 years. As the sentencing took place as part of a joint submission, the question was not which of these two sentences should be imposed, but whether the 40 year period of parole ineligibility that was submitted jointly by experienced counsel “is contrary to the public interest and would bring the administration of justice into disrepute.” Rooke J. ultimately found this was not against the public interested and imposed the 40 year period of parole ineligibility.

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450 Ibid at para 110.
451 Ibid at para 110.
452 Ibid at para 110.
453 Ibid at para 110.
454 Ibid at para 110.
455 Ibid at para 110.
In *R. v. Bourque*, a sentencing decision now under appeal, Smith C.J. took a different approach to totality. Under his consideration of the totality principle, Smith C.J. wrote, “[t]his must be considered with Section 718.1[proportionality] which is the fundamental principle on sentencing, that is, that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”\(^{456}\) As discussed in section two of this chapter, under proportionality, Smith C.J. simply declared the crime “one of the worst in Canadian history.”\(^{457}\)

As discussed, this sentence was criticized by Campbell J. In *Vuozzo*, Campbell J. stated that Smith C.J. “failed to address whether such a sentence would be "unduly long or harsh” when considering the totality principle. Regarding Smith C.J.’s treatment of the proportionality principle and the totality prince Campbell J. stated:

> [L]umping the two together and simply declaring the crime to be the "worst" does not constitute consideration under s. 718.2 (c). As a result of that failure, in my view, *Bourque* does not constitute an appropriate precedent when it comes to applying the totality principle to the overall sentence to be imposed.\(^{458}\)

In *R. v. Husbands* Ewaschuk J. echoed these criticisms, finding Mr. Bourque’s sentence “flawed by error in principle”\(^{459}\) and as such, this could not be a reasonable hypothetical case under the mandatory minimum sentencing framework.

### ii. Hope and Totality - Future Directions

Whereas hope can be integrated into the principles of parity and rehabilitation, hope operates as an external guide with totality by which sentences top-end can be measured. Reading hope as an element of the totality principle ensures judges do not give an offender a sentence that is a “crushing blow.” When an offender is denied freedom and personal autonomy through

\(^{456}\) *Bourque, supra* note 1 at para 44.

\(^{457}\) *Ibid* at para 38.

\(^{458}\) *Vuozzo, supra* note 16 at para 69.

\(^{459}\) *R v Husbands*, [2015] OJ No 2673 at para 20 [*Husbands (Charter)*].
incarceration and not given any hope that he or she will ever be able to regain their freedom, a crushing sentence is realized. As the Supreme Court of Canada has stated, sentences of this length deplete the functional value of traditional sentencing goals including general deterrence and denunciation.

Under the *Multiple Murders Act*, the quantitative and qualitative dimensions of sentencing and incarceration blend together. Through quantitative sentencing, the determination of how many years the offender must serve before being eligible for parole, the qualitative aspect of hope is determined. Longer periods of parole ineligibility manipulate hope to make the sentence harsher but when this ineligibility period reaches or exceeds the natural life span of the offender a crushing blow is dealt.

A natural life sentence that sets parole eligibility beyond the expected lifetime of the offender denies hope of release; such a sentence is the type of “crushing blow” the totality principle prohibits. Attention must be paid to the lived experience of incarceration. Offenders without hope of prospective release know they will never regain freedom and their sentence will only end when they grow old or ill and die. While parole eligible offenders may end up spending as much or even more time in prison if they do not achieve parole, by having the opportunity for parole, they have hope. Their sentence is a much different lived experience than an offender without hope.

The concept of hope within the totality principle should not be read in a manner that results in calculating the highest possible sentence that falls just short of the speculated lifespan of the offender. As hope is read in totality it should be done in a manner that recognizes the distinct worth of each human life, even those who have killed. Hope can mean more than
wishing to spend a few years outside prison before one dies; hope can mean the opportunity to atone for ones actions and rejoin society with meaningful years to live.

The faint hope clause served as a counter-balance between the sentencing principles calling for harshness such as denunciation, deterrence and the principles calling for leniency such as restraint and rehabilitation. After serving at least 15 years in prison, the offender received an opportunity to make his or her case to society, represented by a jury of their peers, and had an opportunity to regain their freedom. Had the faint hope clause not been abolished, the *Multiple Murders Act* would not have created a sentence without hope of prospective release as offenders would be given hope through the faint hope clause. With the clause abolished, the preservation of hope must now be made at the time of sentencing. In chapter nine I outline a legislative salutation calling for the government to introduce a new form of the faint hope clause.

The totality principle calls for hope to be preserved in a sentence. A sentence without hope violates the principle of totality as it serves as a “crushing blow” to the offender telling them that no matter how they spend the decades they will serve behind bars there is no chance of atonement, reconciliation with society or freedom. The more attention sentencing judges pay to the concept of hope in totality and ask the question of what can be hoped for, the more likely that in appropriate cases restraint will be shown. With delaying parole eligibility adding to the harshness of the sentence, having a lower period of parole eligibility increases hope in the offender and offers the potential for useful years outside of prison. Lifelong incarceration has no place in a system of law that respects the rule of totality. While the quantitative length of such a sentence is troubling, more troubling is the crushing blow that comes from the qualitative aspect of denying an offender all hope. The totality principle should guide judges into preserving hope
and trusting that a decade or more down the line the parole system will make proper assessments of offenders and continue to deny freedom to those who pose a risk to society.

4. Conclusion
Hope is not a principle of sentencing law but rather a fundamental component of the human experience, it comes as no surprise that multiple principles of sentencing law reflect on hope. Under the parity principle, hope is a condition of the sentence - sentences that leave an offender with hope are “similar” even if they are numerically different. Rehabilitation and hope go hand-in-hand, serving as motivating factors for one another and fulfilling the pathway and agency component of the goal of release. Totality uses hope as a guidepost, setting the top-end of criminal sentences. Hope runs through these principles, a reflection on how hope “inflects the nature of a sentence” and impacts the lived experience of incarceration.

The Multiple Murders Act puts Canada at a cross-road in criminal sentencing. The decisions made by legislatures and the courts will serve as a statement, in Canada and internationally, as to how Canada responds to crime. While lifelong incarceration may seem a proportionate response for murder, particularly when there are multiple victims, Canadian law requires other principles, including totality, to be considered as well. Providing hope of prospective release of course does not guarantee eventual release. The offender must still obtain parole, something which is difficult for offenders serving life sentences. While it does not guarantee eventual freedom, interpreting the sentencing principles in a manner that provides hope of prospective release respects the human dignity and promises that, as a just and civil society following the rule of law, Canada will not irrevocably condemn any individual to lifelong incarceration.

Berger, supra note 352 at 355.
Chapter Eight – Hope as a Constitutional Principle*

1. Introduction

While Canadian courts have interpreted the codified sentencing principles in a manner that establishes hope of release as a consideration at sentencing there has been greater resistance to protecting hope of release under Charter of Rights and Freedoms. Two recent decisions have addressed this issue. In the first, United States v. Muhammad ‘Isa, the Alberta Court of Appeal rejected an argument that extradition to face possible life without parole violated s. 7 of the Charter. The second case, R. v. Husbands, rejected a constitutional challenge to s. 745.51 of the Criminal Code, the section added by the Multiple Murders Act giving sentencing judge’s discretion to make parole ineligibility periods consecutive for multiple murders. Against the backdrop of these cases, this chapter discusses the rationale for protecting hope of release under the Charter.

The discussion of the constitutionalization of hope is not merely an academic exercise. This chapter begins highlighting the increased role of the Charter in sentencing law. Next, the chapter discusses how the consideration of hope under the Charter would aid in statutory interpretation, impact extradition decisions and call for greater use of international law in the decision-making process. The chapter then briefly outlines the cases of Muhammad ‘Isa and Husbands and discusses how the arguments made in these cases could be re-framed in order to establish hope of release as a constitutional right. The reframing addresses arguments against lifelong incarceration that can be made under s. 7 of the Charter, first in the context of extradition and secondly under the Multiple Murders Act. That is followed by a discussion of s. 12 of the Charter, outlining its two branches of s.12 protection, protections against maximum

* A preliminary version of this chapter was presented at the Cultural, Social and Political Thought Colloquium at the University of Victoria on February 26th, 2016. I am thankful for the organizers and attendees of this event and the valuable feedback received.
punishments and minimum punishments, and suggests of how each applies in the context of the
*Multiple Murders Act.*

2. **The Charter and Sentencing Law**

Enacted in 1982, the *Charter of Rights and Freedoms* has influenced many areas of Canadian law. Don Stuart states that the *Charter* “has had a considerable impact on the courts in Canada”\(^{461}\) and while “reform of the criminal law was not uppermost in the minds of politicians, our criminal justice system has been its main beneficiary.”\(^{462}\) However, sentencing law may be one of the last areas to have been substantially impacted by the *Charter.* In an essay published in 2009, Justice Rosenberg of the Ontario Court of Appeal stated the “protection against cruel and unusual punishment has operated at the very edges of the criminal justice system…. Otherwise, the Charter has had very little influence on our system of punishment.”\(^{463}\) Justice Rosenberg contemplated “[m]aybe this is how it should be. Maybe this is one area that is best left to the good sense of lawmakers.”\(^{464}\)

In only eight years since Rosenberg J. penned those words there has been an increased use of the *Charter* resolving issues in sentencing law. In 2014 the Supreme Court of Canada considered the meaning of “punished again” within s. 11(h) of the *Charter* in the case of *Canada (A.G.) v. Whaling*\(^{465}\) and in *R. v. Anderson,* the Court addressed whether s. 7 of the *Charter* required the Crown to consider an accused’s Aboriginal status in making decisions that limited


\(^{462}\) *Ibid* at v.

\(^{463}\) Honourable Marc Rosenberg, “Twenty-Five Years Late: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law” (2009) 45 Supreme Court Law Review (2d) 233 at 256.

\(^{464}\) *Ibid* at 256.

judges sentencing discretion. In 2015 the Supreme Court of Canada struck down two mandatory minimum sentences related to firearms offences in the case *R v Nur*. In 2016 the Court struck down a mandatory minimum in the *Controlled Drugs and Substances Act* in *R. v. Lloyd* and struck down a portion of the *Truth in Sentencing Act* in *R. v. Safarzadeh-Markhali*. There have been numerous other challenges to mandatory minimum sentences at lower courts. The recent increase in the use of the *Charter* is directly tied to legislation enacted during the Tough on Crime era. It is almost certain that more offenders will raise challenges to provisions enacted during this era, including the *Multiple Murders Act*.

3. The Value of Considering Hope of Prospective Release under the *Charter*

While hope of prospective release has been achieved in the majority of cases under the *Multiple Murders Act* through interpretation of the codified sentencing principles, a constitutional ruling would aid in statutory interpretation, impact extradition decisions and call for greater consideration of international experiences.

a. Aiding in Statutory Interpretation of the *Multiple Murders Act*

While the judiciary is generally chary when it comes to striking down sentencing legislation under the *Charter*, the values embodied within the *Charter* can be used as an interpretive tool when clarifying legislative ambiguity. In *R. v. Rodgers*, the Supreme Court of Canada discussed the role of the *Charter* in clarifying statutory ambiguity, with Charron J. stating:

> [I]n the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter*

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466 R v Anderson, 2014 SCC 41.
principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. [italics in the original]470

The Court has noted that statutory ambiguity exists when a statute lends itself to “two or more plausible readings, each equally in accordance with the intentions of the statute”471 but has cautioned against using *Charter* values “to create ambiguity when none exists.”472 As discussed in part six of this chapter, the Multiple Murders Act gives trial judge’s discretion to make parole ineligibility periods consecutive but is silent on the issue of whether or not there is a presumed upper-limit on the periods of parole ineligibility that can be imposed. It is argued that reading the statute in context of its intentions as well in harmony with the full context of the *Criminal Code*, two plausible readings are present. Judges sentencing offenders under the *Act* have used both readings, leading to inconsistent sentencing practices. While the majority of judges imposing a sentence under the *Act* have followed the approach set out in *Baumgartner* which favours leaving hope of prospective release, this view is not unanimous. *Charter* values can assist in clarifying this legislative ambiguity, demonstrating that hope of prospective release ought to be preserved at sentencing.

b. Impact on Extradition Cases
A constitutional ruling on the existence of a right to hope for prospective release would have a significant impact on some extradition rulings. Extradition decisions hold an important place in international law and serve as a measure of how well a country’s practices are accepted in the eyes of their worldwide peers. After abolishing capital punishment in 1976, Canada fell out of step with the rest of the world and in 2001 was the only country without capital punishment to

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still extradite individuals who may face capital punishment. A similar pattern may be repeating itself with lifelong incarceration. A ruling protecting the right to hope, whether coming from an extradition or domestic decision, would send a strong message that Canada’s criminal justice system recognizes the fundamental worth of each human person, even those who have taken a life.

c. Drawing on International Experiences
Aside from the impact on domestic law and international policy, Canadian constitutional rulings should continue to give serious consideration to international jurisprudence and treaties in reaching conclusions on what punishments are constitutional. As Benjamin Oliphant writes:

[T]he courts have come to embrace international law and human rights norms, notably in the course of defining the guarantees found in the Canadian Charter of Rights and Freedoms (the "Charter"). Indeed, more than simply being considered among various aids to interpretation, it is often said that the Charter must be presumed to provide at least as much protection as international human rights law and norms, particularly those binding treaties that served as its inspiration.473

While the principles of applying international law in Charter jurisprudence can be easily stated, the application is not always straightforward. As Oliphant notes “[t]he Court's framework for the use of international law has been called ‘imperfect at best, and improvised at worst,’ ‘inconsistent and even unintelligible,’ ‘troublesome and confused,’ and ‘unpredictable’”474 stating the courts have “been anxious to rely on non-binding international human rights law”475

475 Oliphant, supra note 473 at 108.
in certain cases but “content to downplay them” in others. This leads Oliphant to prefer a nuanced approach to the use of international law in Charter cases as articulated by McLaughlin J. (as she then was) in *R. v. Keegstra* where she stated:

> Canada's international obligations, and the accords negotiated between international governments may well be helpful in placing Charter interpretation in a larger context. Principles agreed upon by free and democratic societies may inform the reading given to certain of its guarantees. It would be wrong, however, to consider these obligations as determinative of or limiting the scope of those guarantees. The provisions of the Charter, though drawing on a political and social philosophy shared with other democratic societies, are uniquely Canadian. As a result, considerations may point, as they do in this case, to a conclusion regarding a rights violation which is not necessarily in accord with those international covenants.

This approach balances the views of the international community with the societal values of Canada. *Burns* demonstrates how the approach articulated by McLaughlin J. has been utilized. In *Burns* the Court acknowledged there was not “an international law norm against the death penalty, or against extradition to face the death penalty” but the initiatives of the international community in the decade since *Kindler* and *Ng* were decided, allowing extradition to face capital punishment, helped shift the balance by the time *Burns* was decided with the Court finding the Charter required assurances that capital punishment will not be imposed be sought. The international standard was not determinative but the emerging international consensus was an influential basis to outline the scope of rights protected via the Charter.

The debate over lifelong incarceration could follow a similar path. There is no international law norm against lifelong incarceration, but as chapter five outlines, there is an emerging consensus against such a punishment being imposed domestically and extraditing someone who

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476 *Ibid* at 115.
478 *Burns, supra* note 123 at para 89.
may face lifelong incarceration. Canadian courts confronting a situation of lifelong incarceration must pay attention to the ever growing international consensus on this issue. While the determination of what is cruel and unusual punishment or what constitutes a violation of a principle of fundamental justice will be determined on the basis of Charter provisions that are uniquely Canadian, international law can and should assist the legislature and judiciary in making these determinations.

4. Constitutional Challenges to Lifelong Incarceration
Two recent decisions have explored the issue of lifelong incarceration under the Charter. In a 2014 decision, United States v. Muhammad ‘Isa, the Alberta Court of Appeal allowed the extradition of the accused without assurances that he would not face life without parole. The accused, Faruq Khalil Muhammad ‘Isa, is a naturalized Canadian citizen whom the United States alleges was a member of a terrorist facilitation network. The United States sought extradition to New York to face charges of conspiracy to murder Americans abroad, provision of material support to terrorist conduct and aiding and abetting the murder of US nationals abroad.479 Mr. Muhammad ‘Isa was committed for extradition and the Minister ordered Mr. Muhammad ‘Isa be surrendered to the United States. Mr. Muhammad ‘Isa challenged both the committal order and Minister’s decision on appeal.

Among other grounds of appeal, Mr. Muhammad ‘Isa argued the Minister’s decision to surrender him violated the Charter because he faced the possibility of life without parole. In dismissing this argument, the Court noted the high degree of deference owed to the Minister, coupled with the presumption that Canada will have differentiation in sentencing with treaty

479 Muhammad ‘Isa, supra note 9 at para 2.
partners. The Court stated “[l]ife sentences are known to Canadian law” while noting that under Canadian law parole eligibility is stipulated after a period of time. Citing *Burns*, the Court stated: “[t]he Supreme Court gave examples of stoning adulterers or amputating the hands of thieves, where “the punishment is so extreme that it becomes the controlling issue in the extradition and overwhelms the rest of the analysis.” The Court also noted that in *Burns* the accused would face life without parole, an issue the Supreme Court took no issue with.

Ultimately, the Court found life imprisonment without parole falls short of meeting a punishment so extreme it becomes the controlling issue and found this ground of judicial review “without merit.” Mr. Muhammad ‘Isa’s application for leave to appeal to the Supreme Court of Canada was rejected and he was ultimately extradited, his case remains before the Federal Court in New York.

A domestic application the *Charter* addressing lifelong incarceration arose in *R. v. Husbands*. As discussed in chapter four, a jury found Christopher Husbands guilty of two counts of second-degree murder, a conviction which is under appeal. Prior to sentencing, Mr. Husbands raised a constitutional challenge, arguing that s. 745.51 of the *Criminal Code*, the provision giving sentencing judges the discretion to order that sentences for multiple murders be served consecutively, violated ss. 7 and 12 of the *Charter*. The s. 7 argument centered on the right to timely review by a parole board and the s. 12 argument stated consecutive sentences were cruel and unusual based on the circumstances of the particular offender and a reasonable hypothetical offender. All arguments were dismissed and Mr. Husbands was sentenced to life imprisonment without parole.

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480 *Ibid* at paras 69, 70.
482 *Ibid* at para 72 citing *Burns, supra* note 123 at para 69.
483 *Ibid* at para 74.
484 *Ibid*. A similar result was reached by the Ontario Court of Appeal, see *United States v Qumsyeh*, 2015 ONCA 551, leave to appeal to SCC refused, 36593 (December 3, 2015).
with no parole eligibility for 30 years. The Court’s rejection of these Charter challenges is critiqued in the next sections of this chapter.

While the arguments in Muhammad ’Isa and Husbands were rejected, similar arguments may ultimately be accepted by a Canadian court. The following sections will explore how hope of release can be considered as an element of ss. 7 and 12 of the Charter and rational for supporting hope of release as a constitutional right. Within these sections the arguments made in Muhammad ’Isa and Husbands will be explored in greater detail.

5. Lifelong Incarceration and Section 7
Both Mr. Muhammad ‘Isa and Mr. Husbands raised issues that the incarceration they could be facing violated s. 7 of the Charter. Section 7 guarantees “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” All forms of incarceration, including probation, engage the liberty interest of s. 7 and therefore must be in accordance with the principles of fundamental justice.

The arguments raised under s. 7 in Muhammad ’Isa and Husbands varied due to the different nature of the cases. In domestic sentencing cases, the state action being challenged typically is legislation that imposes a grossly disproportionate sentence to be imposed, in which case the legislation can be declared of no force and effect; Charter values can also aid in the interpretation of legislation to ensure sentences imposed do not violate Charter principles. In extradition cases, where the issue under dispute is whether the punishment which may be imposed by the requesting state may violate the Charter, the state action is the surrender order made by the Minister. As the Supreme Court of Canada explained in Lake v. Canada (Minister

485 Charter, supra note 10 at s. 7.
486 MVR, supra note 11 at para 74.
of Justice) “[t]he test that has been applied is whether ordering extradition would ‘shock the conscience’, or whether the fugitive faces ‘a situation that is simply unacceptable’” 487

Whether life without parole meets the standard of shocking the conscience or being a situation that is simply unacceptable was dismissed in Muhammad ‘Isa as being “without merit.” 488 There are three main problems with the Court’s analysis. First, conflationing a life sentence with life without parole fails to recognize a fundamental difference in these punishments. Secondly, the Court was mistaken in reading Burns as a binding authority allowing extradition to face life without parole. Lastly, even if Burns can be said to support this proposition, reliance on this 2001 decision fails to reflect the evolutionary nature of standards of decency and what punishments are seen as “shocking the conscience” or being “simply unacceptable.”

a. The Contentions in Muhammad ‘Isa

i. The difference between life sentences and lifelong incarceration
As discussed in chapter five, Zyl Smit notes that the ambiguity of what life imprisonment actually entails is a primary reason it fails to be highly controversial. Life imprisonment with parole eligibility and life without parole are fundamentally different punishments. This denial of hope materially changes the experience of punishment. The Alberta Court of Appeal’s failure to make this distinction is a major flaw in the decision and fails to account for a historical protection of hope found in Canadian sentencing law.

Since Confederation there has been a conscious choice in Canada to ensure all offenders, even those serving life sentences, retain hope of prospective release. Prior to 2011, with the

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487 Lake v Canada (Minister of Justice), 2008 SCC 23 at para 31 (internal citations omitted).
488 Muhammad ‘Isa, supra note 9 at para 74.
implementation of the *Multiple Murders Act* coupled with the removal of the faint hope clause for future offenders, no Canadian was sentenced to such a fate.\textsuperscript{489} The Canadian sentencing system has always recognized hope as a fundamentally important principle. Even when the death penalty was mandatory for murder, offenders were given two forms of hope. The first came through the Royal Prerogative of Mercy that left offenders with hope of having their death penalties commuted. For those who had their death sentences commuted to life imprisonment, the second form of hope of release from incarceration through the *Ticket of Leave Act* and later the *Parole Act* became present. Offenders whose sentences were not commuted were not made to suffer decade after decade of ongoing incarceration, with no prospect of eventual release. While some may argue the fate they suffered, death, was far crueler, chapter six demonstrates some offenders prefer death to a meaningless life in prison.\textsuperscript{490}

An early, explicit statement demonstrating the historical understanding of the importance of hope comes from the 1956 *Fauteux Report* that stated any prisoner should always have “the expectation that, in the foreseeable future, confinement will end. There must always be hope.”\textsuperscript{491} The 1976 amendments to Canada’s homicide sentencing laws also demonstrate a pre-Charter recognition of the importance of hope. In setting a 25 year minimum sentence as a substitute for capital punishment, Parliament recognized there may be cases where even 25 years is too harsh, either based on the circumstances of the offence or the exemplary conduct of the offender while serving the sentence. This concern and the recognition of the international norms relating to

\textsuperscript{489} There remains, in theory, the possibility an elderly offender received a sentence that extended past their reasonable lifespan, however, the *Multiple Murders Act* creates the theoretical possibility of an offender receiving a sentence without hope of eventual release at a young age. This theoretical possibility was made realistic with the sentencing of Justin Bourque.

\textsuperscript{490} *Johnson & McGunigall-Smith, supra* note 366.

\textsuperscript{491} *Fauteux, supra* note 167 at 48-49.
incarceration lengths for murders led to the creation of the faint hope clause giving offenders hope that reform may lead to release as early as the fifteenth year of their sentence.

Sentences that preclude hope of eventual release have also been avoided in non-homicide cases. As the Supreme Court of Canada noted in *R. v. M. (C.A.)*, Canadian courts rarely imposed single and consecutive fixed-term sentences beyond 20 years and sentences should not exceed the expected lifespan of an offender.492 Furthermore, individuals given fixed-term sentences or life sentences for offences other than high treason or murder can apply for parole at the lesser of one-third of the sentence or seven years imprisonment, or the lesser of one-half of the sentence or ten years if extended parole ineligibility is sought by the Crown and imposed by the judge at sentencing.

The protection of hope of prospective release has been a historically protected right in Canada. This longstanding protection may lead to hope of prospective release being recognized as a principle of fundamental justice. Nader Hasan writes that principles of fundamental justice may emerge from a historical origin “[i]f there is an unbroken chain of rights protection reaching back to our Nations pre-Charter history.”493 Hasan states “[t]he historical approach posits that the principles of fundamental justice fulfil an overarching purpose of the Charter by ensuring that rights and principles do not lose their protected status merely because they were not specifically enumerated in the text of the Charter.”494 Hope of prospective release has always been protected in Canada and as such may formulate its own principle of fundamental justice.

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492 *M (CA)*, *supra* note 430 at para 74.
493 Nadar Hasan, “Three Theories of ‘Principles of Fundamental Justice’” 63 Supreme Court Law Review (2d) 339 at 344 [*Hasan*].
494 *Ibid* at 343.
A life sentence where release remains possible and lifelong incarceration are materially different sentences. By conflating the two, the Court in Muhammad ‘Isa failed to draw a critical distinction between these punishments. The Court also failed to recognize that hope of prospective release has been historically protected in Canada since Confederation.

ii. The Holding in United States v. Burns
The Court in Muhammad ‘Isa found that Burns “serves as an instance of extradition of Canadian fugitives, albeit on the assurance that they would not face death by execution in a US prison, to answer charges that might nevertheless lead to their death by natural causes in a US prison after serving a sentence of life imprisonment without possibility of parole.” While the accused did face such a sentence, and both ended up receiving life sentences with no parole eligibility for 99 years, the raison d’etre of Burns was whether extradition to face capital punishment violated the Charter. To find Burns stands for the proposition that extradition to face life without parole passes constitutional muster fails to read Burns decision in the of the circumstances of that case.

iii. Evolving Standards of Decency
Even if Burns can be said to stand for the proposition that extradition to face life without parole is not a constitutional violation forgoes allowing standards of decency to grow and evolve over time. Principles of law, particularly those based on societal values of decency are not static. As noted in chapter five, United States Supreme Court Justice Stevens wrote in Graham that “[p]unishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time.”

Evolving standards of decency may also give rise to a new principle of fundamental justice. Hasan writes principles of fundamental justice can be formed under an evolutionary

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495 Muhammad ‘Isa, supra note 9 at para 73.
496 Graham, supra note 260, concurrence of Stevens J. at 1-2.
theory if they are founded on “the dignity and worth of the human person’ and ‘on the rule of law.”

As stated by Hasan, the evolutionary theory is:

[T]he most expansive and thus potentially the most indeterminate. Principles of fundamental justice rooted in this theory are recognized where a section 7 right to life, liberty or security of the person outweighs a competing government interest. These principles of fundamental justice protect an evolving set of national values.

Standards of decency can evolve quickly. Capital punishment was mandatory for all murder offences in Canada in 1961 and was fully abolished 15 years later. The United States took eight years to evolve from allowing juveniles to receive capital punishment to barring all juveniles from receiving life without parole. The Alberta Court’s unquestioning reliance on Burns ignores the evolutionary societal knowledge gained in over a decade since that decision was rendered including a growing body of international jurisprudence that has rejected lifelong incarceration.

Where an accused faces extradition to a jurisdiction where he or she may be sentenced to lifelong incarceration, judges, lawyers and intervenors must be cognisant of both Canada’s historical protection of hope in sentencing law as well the evolving standards of decency as they pertain to the issue of lifelong incarceration. In doing so, a strong argument can be made that extradition to face lifelong incarceration violates the Charter of Rights and Freedoms and should not be allowed. Since 2001 a growing body of international jurisprudence and social science evidence has led to ever-growing criticisms of lifelong incarceration. Canada’s own experience sentencing under the Multiple Murders Act further demonstrates this point, with the majority of judges recognizing that standards of decency require hope of release to be present.

498 Hasan, supra note 493 at 361.
b. R. v. Husbands – Lifelong Incarceration and Section 7

In Husbands it was argued that s. 7 guaranteed a right to a timely review by a parole board to determine whether the imprisonment is still justified. Mr. Husbands argued that R. v. Lyons supported this proposition. In rejecting this argument, Ewaschuk J. properly noted Lyons was decided in the context of a dangerous offender application where the law imposed an indeterminate sentence for persons declared dangerous offenders. Justice Ewaschuk found that the differences between indeterminate and fixed term sentences were numerous, rendering the analogy inappropriate. Despite this there are still good reasons for s. 7 to be considered in cases of multiple murder. Although courts have a stated preference to deal with issues of punishment under the more specific right, s. 12, the unique features of multiple murders cases should permit challenges under s. 7.

The Multiple Murders Act may offend three principles of fundamental justice - arbitrariness, overbreadth and gross disproportionality. As gross disproportionality under s. 7 shares the same test as under s. 12 this section will only consider how sentences under the Multiple Murders Act may offend arbitrariness and overbreadth. These principles have similar features, as Hamish Stewart states they “involve failures of instrumental rationality” and “[w]henever a law fails to satisfy one of these norms, there is a mismatch between the legislature’s objective and the means chosen to achieve it: the law is inadequately connected to

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500 Husbands (Charter), supra note 459 at para 24.
501 The Supreme Court of Canada stated that finding a punishment disproportionate under s. 7 but not under s. 12 would render the interconnected web of rights of ss.7-14 incoherent, see R v Malmo-Levine, R v Caine, 2003 SCC 74 at para 160 [Malmo-Levine].
its objective or in some sense goes too far in seeking to attain it.”

The principles of instrumental rationality share a similar analytical framework. As McLaughlin C.J.C. explains in *R. v. Bedford*:

All three principles -- arbitrariness, overbreadth, and gross disproportionality -- compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Therefore, if only a handful, or even a single, individual’s s. 7 rights are denied in a manner that is not in accordance with the principles of fundamental justice, a Charter breach is established. Lifelong incarceration, therefore, cannot be examined looking at how it would impact the worst, most unrepentant offender, but how it would impact an offender who used his or her

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503 *Ibid* at 151. Prior to the Supreme Court’s decision in *R v Bedford*, Stewart questioned the utility of keeping all three norms, finding at least three ways to understand the relationship between overbreadth, arbitrariness and gross disproportionality. In the first way, all overbroad laws offend s. 7, making the latter norms superfluous; the second way is to find a law overly broad only if it is arbitrary or grossly disproportionate, making the norm against over-breadth unnecessary. The third solution is to keep the norms separate from one another, a finding that a law may infringe one of these norms but not the other two. In *Bedford*, McLaughlin C.J.C. endorsed the third approach, stating “it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is no connection between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective” and later that “[g]ross disproportionality asks a different question from arbitrariness and overbreadth.” See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 117, 120 [italics in the original] [*Bedford*]. In a case comment on *Bedford* Stewart writes “the Bedford Court confirmed that each of these norms is different from the others and has a distinct role to play in constitutional law.” See Hamish Stewart, “Bedford and the Structure of Section 7” (2015) 60:3 McGill Law Journal 575 at 577.

504 *Bedford, supra* note 502 at para 123 [italics in the original].
incarceration as a means of real change and deserves a second chance to live in society. A sentence that precludes hope of release infringes s. 7’s protection in a manner that is not in accordance with the principles of fundamental justice.

i. Arbitrariness
While discretionary in nature, the *Multiple Murders Act* could allow for a sentence that infringes s. 7 by violating the liberty interest in an arbitrary manner. Arbitrariness “targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person.” The use of consecutive sentences could create an arbitrary term of imprisonment; *Charter* values must be used in interpreting the Act to avoid such a result.

One way the *Multiple Murders Act* could create an arbitrary sentence is if it leads to the continued imprisonment of an individual who poses little to no risk to society. Prior to the Act, multiple murderers had an opportunity to apply for parole after 25 years and demonstrate their potential for re-integration into society at this point. Now sentences can be extended to delay the first parole eligibility date, potentially past the offender’s natural lifespan. If an offender, having served decades of imprisonment, continues to be incarcerated despite no longer presenting a risk to society, a sentence that began with the valid goal of offering protection to society may become disconnected with this purpose as time goes on and become an arbitrary sentence. The *Charter* value of arbitrariness must be used to guide sentences under the Act and provide offenders with some opportunity to apply for release.

If the Act was used to construct a natural life sentence, such a sentence would be arbitrary as its length is not measured by the gravity of the crime, need for retribution and deterrence or risk to society, but rather the offenders age and health. As Lord Justice Laws stated in *R Carter v Canada*, 2015 SCC 5 at para 83.
(Wellington) v. Secretary of State for the Home Department, a whole-life tariff “is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live.” 506 Two similar offenders may commit similar crimes and receive identical sentences yet may spend drastically different amounts of time behind bars due to physical health. The length of actual incarceration is therefore determined by arbitrary measures such as physical health that are connected to state goals of protection of society. Interpreting s. 745.51 of the Criminal Code in light of the Charter right of not to be subject to arbitrary laws demonstrates that s. 7 calls for an upper-limit on these sentences. This is bolstered by the way the Act may also violate the norm against overbreadth.

ii. Overbreadth
Overbreadth examines whether a law is broader than necessary to accomplish its purpose. Laws that remove hope by placing overly restrictive controls on measures of release such as parole or re-sentencing risk being overly broad. As explained by the Supreme Court of Canada:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

The Court has further explained that overbreadth analysis must be very attuned to the case at bar, stating “[o]verbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the

506 Wellington, supra note 226 at para 39.
focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose.”

Lifelong incarceration is an overly broad measure going further than necessary to accomplish the state’s objective at the expense of offender’s liberty rights. Here the state removes hope by unduly foreclosing less restrictive pathways towards release such as parole. These alternative pathways may provide society with the necessary protection while avoiding overreaching and incarcerating individuals who pose little or no risk to society.

Under s. 7 of the Charter, s. 745.51 of the Criminal Code is not unconstitutional per se, however, its unrestrained application could lead to sentences - deprivations of liberty which engage s. 7 - that offend the principles of arbitrariness and overbreadth. The use of Charter values in interpreting this section demonstrates that at the very least hope of release must remain present.

6. Lifelong Incarceration and Section 12
Mr. Husbands also argued that s. 745.51 of the Criminal Code violated s. 12 of the Charter.

Section 12 provides that “[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.” The section applies to two branches of punishment: maximum punishments and minimum punishments, with each branch having its own analytical framework. The arguments raised in Husbands raised dealt with the maximum punishment but utilized the minimum punishment framework. While failing to make this distinction did not

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508 Bedford, supra note 502 at para 113.
509 A slightly different categorization of s. 12’s two branches of protection is provided by Dwight Newman. Newman writes “[t]he first branch prohibits a punishment that is barbaric, such as the lash, lobotomization, or castration. The second branch prohibits a punishment that is grossly disproportionate. A sentence that fits this second branch is so disproportionate that Canadians would regard it as equivalently intolerable or abhorrent or, in other words, as a sentence that shocks the conscience. Dwight Newman, “Cruel and Unusual Treatment or Punishment” (2014) Halsbury’s Laws of Canada (QuickLaw) citing R v Smith, [1987] 1 SCR 1045, [1987] SCJ No 36 at 1074.
affect the result of the case it led to a missed opportunity to provide guidance as to how the
Multiple Murders Act interacts with the Charter.

The protection against maximum punishments has received limited examination under
the Charter as the Charter was enacted after these punishments such as lashes and capital
punishment were abolished in Canada. This framework has largely been developed in obiter
through extradition decisions, asking whether a punishment is so inherently repugnant that it
could never be an appropriate punishment however egregious the offence. The framework for
analysis of protection against minimum punishments has received considerable use in recent
years due to the proliferation of mandatory minimum sentences. Under the framework
developed by the courts, a mandatory minimum sentence can be struck down if it is grossly
disproportionate for the actual offender before the court or would be grossly disproportionate to a
reasonable hypothetical offender. A violation of s. 12 will only be found where a court is
mandated by the legislature to impose a sentence that is grossly disproportionate.

The discretionary availability of a harsh sentence that is not actually imposed does not
engage the minimum punishment branch of s. 12 protection. For example, in R. v. Malmo-
Lavine the Supreme Court considered the availability of imprisonment for simple possession of
marijuana. The Court noted that as possession of marihuana carried no mandatory minimum
sentence, nothing impeded a sentencing judge from imposing a fit sentence which the Court
noted was most often a discharge or conditional sentence.\(^{510}\) As the Court stated, in the context
of imprisonment “the operative concept here is the use of incarceration, not the availability of
incarceration.”\(^{511}\)

\(^{510}\) Malmo-Levine, supra note 500 at para 154.
\(^{511}\) Ibid at para 150 [underling in the original].
The protection against maximum punishments works in a different manner. This branch of s. 12 protects against the possibility of sentences being imposed. Suppose the offence of possession of marijuana carried the maximum sentence of six months in jail, a fine of one thousand dollars, or 10 lashes. A constitutional challenge to these punishments would find that, as discretionary sentences, the imprisonment and fine do not violate s. 12 (although any sentence actually imposed nearing these upper limits would likely be an error in principle). However, the 10 lashes, while not mandated and left to the discretion of the judge, would be a violation of the constitutional protection against cruel and unusual punishments. Even if lashes were never imposed for this crime, the mere possibility of such a sentence would sufficiently shock the conscience to merit constitutional intervention. In a case of extradition, the Minister would likely be constitutionally obligated to ensure that lashes would not be imposed before signing the extradition warrant.

a. Lifelong Incarceration and Maximum Sentencing Protection
The s. 12 argument raised by Mr. Husbands was that a sentence where parole eligibility was made consecutive through s. 745.51 would be cruel and unusual punishment. This argument was raised on the basis of himself as the particular offender and on the basis of a reasonable hypothetical offender.

Justice Ewaschuk noted the minimum period of incarceration facing Mr. Husbands was 10 years with no parole eligibility,\(^{512}\) that Mr. Husbands could receive a parole ineligibility period as high as 50 years did not factor into the analysis of the minimum sentencing framework. Under the circumstances of the particular offender, Ewaschuk J. found the Crown’s proposed sentence, life with forty years of parole ineligibility, would not be cruel and usual for an offender.

\(^{512}\) *Husbands (Charter), supra* note 459 at para 3.
who had a criminal record and “was a long-time drug dealer and a facilitator of illegal handguns” who killed two victims, wounded four others and ensured a riot in a crowded shopping mall. 513

Mr. Husbands raised the case of R. v. Bourque as a reasonable hypothetical offender. Justice Ewaschuk endorsed the reasoning of Campbell J. in Vuozzo, stating “R. v. Bourque does not constitute an appropriate precedent because the sentencing judge failed to apply the fundamental principle of totality” 514 and stated that “a reasonable hypothetical may not be based on an order or sentence flawed by error in principle.” 515

Any period of parole ineligibility above 10 years and the decision whether the parole ineligibility periods for the two second degree murder convictions would be consecutive, was discretionary, not mandated. The arguments that the availability of such a provision violated s. 12 under the minimum sentencing framework were therefore properly dismissed. An argument about the top-end of a sentence that can be reached via discretion should utilize the maximum sentencing framework.

The maximum sentencing framework asks whether a sentence is “so inherently repugnant that it could never be an appropriate punishment, however egregious the offence” 516 such as corporal punishment and torture. Lifelong incarceration meets this criteria. International jurisprudence serves as a starting point for demonstrating how sentences that preclude hope of release are cruel and unusual punishment. As chapter five illustrates, there is a growing international norm against imposing sentences that do not allow for hope of prospective release.

While the existence of a growing international norm against such sentences is instructive to Canada, it is perhaps even more compelling to examine why the international courts have

513 Ibid at para 22.
514 Ibid at para 19.
515 Ibid at para 20.
516 Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at para 51.
made such rulings. Many of the courts examined the role of hope in the offender’s eventual reconciliation with society. As stated in chapter five, the majority in *Graham v. Florida* wrote, “[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.” A similar notion was expressed by Justice Power-Forde in a concurrence in *Vinter* where she stated to deny inmates “the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.”

These judgments reflect on how lifelong incarceration forecloses any possibly for atonement and reconciliation with society. While the general use of incarceration is a means to an end, punishment to denounce and deter criminal conduct and rehabilitate the offender, lifelong incarceration is simply an end. The prisoner is denied hope of one day regaining his or her autonomy and making basic choices that give human life meaning and dignity.

**b. Lifelong Incarceration and Minimum Sentencing**

The power to make parole ineligibility periods consecutive, as vested by the *Multiple Murders Act*, may also raise concerns with the minimum sentencing protections offered by s. 12 of the *Charter*. This argument failed in *Husbands* because the convictions were both for second degree murder. In sentencing for multiple second degree murders, the offender is insulated from the prospect of a cruel and unusual punishment twice over - first the sentencing judge has discretion whether to make the parole ineligibility periods consecutive; secondly the sentencing judge has discretion whether to make the parole ineligibility for one or more of the murders in excess of the 10 year minimum. The judge has discretion to set parole ineligibility anywhere between 10

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517 *Graham, supra* note 260 at 28.
518 *Vinter, supra* note 26 concurring judgement of Judge Power-Forde at 54.
and 50 years. The multiple steps of judicial discretion, coupled with the potential for appellate review, sufficiently reduce the risk of an unconstitutional sentence being rendered. Similarly, where an offender commits one or more first degree murders and one or more second degree murders, sentencing judges still have a sufficient degree of maneuverability in sentencing. In such a case the parole ineligibility period could be set at 25 years, 35 years, or any number of years between 36 and 50.

A case involving only first degree murders operates differently. As Canadian law does not allow for constitutional exemptions to alleviate against unfit mandatory minimum sentences a judge must either impose the minimum sentence or strike the punishment down under the Charter. However, even when there is a mandatory minimum, judges cannot forgo consideration of all sentencing principles and surrounding legislation. In R. v. Wust the Supreme Court of Canada stated “it is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system.” This leads to there being two ways to interpret how ss. 745(a), the section setting parole ineligibility for first degree murder at 25 years, and s. 745.51 that grants judge’s discretion to make parole ineligibility periods consecutive operate together in conjunction with rules relating to mandatory minimum sentences in a case of multiple first degree murders.

519 Sentences with parole ineligibility set between 11 and 19 years can be achieved by making the sentence for each count 11-19 years and making the sentences concurrent. Parole ineligibility between 20 and 25 years can be reached one of two ways, setting the parole ineligibility for each count at 20-24 years and making the time concurrent, or setting parole ineligibility for each offence between 10 and 12 years and making the sentences consecutive. A 25-50 year period of parole ineligibility can be reached by consecutive sentences where each sentence has parole ineligibility set at least 10 and no more than 25 years.

520 R v Wust, 2000 SCC 18 at para 22 [Wust].
The first reading, based on a strict reading of the sections, means parole ineligibility periods must be in 25 year increments. The second reading would allow for the parole ineligibility period to be between 25 and 50 years. It is argued that the second reading is correct as this best allows a sentencing judge to respect the principle of parity without disregarding totality and rehabilitation, avoid an absurd result, find internal coherence and consistency in the *Multiple Murders Act* that is in accordance with *Charter* values.

i. **First reading**
Reading ss. 745(a) and 745.51 of the *Criminal Code* in conjunction with one another suggests that in cases of multiple first degree murders parole ineligibility periods must be set in 25 year increments. Section 745(a) mandates that persons convicted of first degree murder must receive a life sentence “without eligibility for parole until the person has served twenty-five years of the sentence.” If a sentencing judge uses his or her discretion under s. 745.51 to make the periods of parole ineligibility consecutive these sections could be read to suggest that the next possible parole eligibility period would be at 50 years of a sentence. This interpretation appears to have been used in *Bourque*, with both defence and Crown counsel suggesting parole ineligibility periods in 25 year increments, 50 years and 75 years respectively.

Such a reading presents obvious problems. A 50 year period of parole ineligibility is five times longer than that given to any offender other than those convicted of murder or high treason. For an offender past their mid-30’s, 50 years of parole ineligibility would deny hope of prospective release. Sentencing judges would be chary to impose 50 years of parole ineligibility on any offender. As noted in chapter four, Campbell J. considered such a sentence in *Vuozzo*, which would have the effect of making the offender ineligible for parole until age 96. Justice Campbell found such a sentence would be unduly long and harsh, stating, “[a]part from the
unlikelyhood the offender will live to that age, in my opinion, the prohibition on even applying for parole until then virtually eliminates any hope. Such a sentence would go beyond retribution and become vengeful, and that would not be just. If parole ineligibility can only be set in 25 year increments for cases of multiple first degree murder it is likely that parole ineligibility will be set at 25 years in all but the most egregious cases. Perhaps this is how the law should operate.

As noted in chapter five, the European Court of Human Rights suggests 25 years as the maximum period of incarceration before an offender should be eligible to apply for parole. From 1976-2011 Canada’s parole ineligibility for first degree murder was set at 25 years. There is no indication that this failed to deter crime or that offenders undeserving of parole were released just because they were eligible for parole.

However, a 25 year period of parole ineligibility for a multiple first degree murderer could create anomalous results. As chapter four indicates, in cases where there is one first degree murder and one second degree murder, judges have consistently set parole ineligibility periods past 25 years by making the sentences consecutive. It would seem contradictory to see an offender receive a lesser period of parole ineligibility for committing multiple first degree murders as opposed to a first and second degree murder. The second reading of these sections provide solutions to avoid such a result.

ii. Second Reading
Even if sentencing judges are required to impose the full mandatory minimum sentence or strike the penalty down, mandatory minimums do not completely disregard other principles of sentencing law. In Wust the Supreme Court ruled that judges may account for pre-trial detention, even if the result is a sentence below the mandatory minimum. In making this ruling the Court

521 Vuozzo, supra note 16 at para 114.
522 Vinter, supra note 26 at para 120.
noted legislation dealing with mandatory minimum must be consistent with general purposes of sentencing law. The Court also provided guidance for interpretation of penal statutes in general, giving four points of guidance:

1) that provisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused;
2) the need to interpret legislation so as to avoid conflict between its internal provision;
3) to avoid absurd results by searching for internal coherence and consistency in the statute; and
4) finally, where a provision is capable of more than one interpretation, to choose the interpretation which is consistent with the Charter.  

Allowing sentencing judges to impose a global sentence where parole ineligibility is greater than 25 years but less than 50 years. This interpretation best meets the principles of statutory interpretation allowing for internal consistency in the statute, avoiding absurd results and relying on Charter values.

If s. 745(a) and 745.51 operated to make a sentencing judge choose either a 25 or 50 year period of parole ineligibility in a case of a double first degree murder, the principles of parity and totality conflict with one another, with parity suggesting a sentence of over 25 years is needed and totality suggesting less than 50. A global sentence in between these marks allows internal consistency in the statute.

Such a sentence also avoids the absurd result of an individual convicted of two first degree murders receiving less parole ineligibility than a similar offender convicted of one first and one second degree murder. In Vuozzo, it appears clear that due in large part to the offender’s age, Campbell J. would not have given a 50 year period of parole ineligibility even if the second

\footnote{Wust, supra note 519 at para 34.}
murder had been in the first degree. If the statute operates to only allow parole ineligibility for multiple first degree murders to be set in 25 year increments, an offender convicted of two first degree murders may incongruously receive a lesser period of parole ineligibility then an offender convicted of one first degree and one second degree murder.

Allowing global parole ineligibility periods to be shaped by the totality principle and Charter values also promotes the purpose of the Multiple Murders Act. The Act has the laudable objective of ensuring each victim of a murder is accounted for at sentencing. However, if s. 745.51 of the Criminal Code is interpreted requiring the minimum sentence be imposed for each victim this goal will not be met as these sentences would violate both sentencing principles and the Charter. Interpreting the Act to allow for global sentences where parole ineligibility exceeds 25 years but is less than 50 years would allow for this goal to be met without passing unconstitutional sentences.

7. Conclusion

The Multiple Murders Act is a significant punitive turn in Canadian sentencing law which, on its strictest interpretation, could lead to sentences focused exclusively on retribution and denunciation. While such sentences have largely been avoided through interpretation of sentencing principles, the Charter offers further guidance on how to sentence utilizing this new tool. In extradition decisions, where Canadian sentencing principles are not considered, the Charter is the only tool an accused has in order to protest against lifelong incarceration. Judges and litigants in cases involving multiple murder or extradition where lifelong incarceration is possible must be attuned to the Charter issues the potential sentences raise, whether these issues call for a legal interpretation based on Charter values or a direct constitutional ruling.
The concerns of lifelong incarceration are profound. In accordance with our own Charter values, Canada should join a growing list of jurisdictions that do not extradite individuals who face possible lifelong incarceration. Such a stance would accord with our own historical protection of hope of release which has been recognized since Confederation and also keep Canada in line with evolving standards of decency.

The application of the Charter to the Multiple Murders Act requires a more nuanced approach because, as noted by Ewaschuk J. in Husbands, the Act does not require anything more than the mandatory minimum sentence for a single count of murder, either 10 or 25 years depending on the degree. However, Charter values aid in the interpretation of this statute, specifically showing that there ought to be a presumed upper-limit on these sentences. If multiple periods of parole ineligibility are made consecutive so as to exceed the expected lifespan of the offender a form of lifelong incarceration, a natural life sentence, is given. Such a sentence may offend the principles against arbitrariness and overbreadth and therefore must not be imposed. Furthermore, under the maximum sentencing framework of s. 12, such a sentence is grossly disproportionate. The relationship between the Act and the minimum sentencing branch of s. 12 is more complex, again, the Act only requires the mandatory minimum sentence for the highest degree of murder to be imposed once. However, a purposive reading of the Act in conjunction with judicial guidance to interpret mandatory minimums within the full context of the sentencing scheme supports allowing for global sentences which set parole ineligibility greater than the minimum for one count of murder but less than the minimum for two counts of murder made consecutive.
Chapter Nine - Moving Forward with Hope

1. Proposed Legislative Reforms
The judiciary is not the only branch of government that should pay attention to hope for murderers. The judiciary’s role is to interpret legislation and only step in when Parliament has overstepped its constitutional powers; it is primarily the responsibility of Parliament to pass laws that reflect the needs and values of society. The *Multiple Murder Act*, properly interpreted, does not raise constitutional issues. However, it gives to sentencing judges power to pass sentences that may be unfit in a given case. To the credit of the justice system - including the judiciary, Crown prosecutors and defence counsel, the new sentencing tools have been used with a degree of restraint. However, there are still legislative reforms that could be taken to assist in balancing the punitive goals of sentencing with humanitarian concerns.

The simplest legislative reform would be the full repeal of the changes enacted through the *Multiple Murders Act* and *An Act to Amend the Criminal Code and Another Act*. Homicide rates show that after the abolishment of the death penalty murder in Canada declined. There is no evidence to suggest the sentences for murder were inefficient at deterring crime. The faint hope clause was used by few offenders, and those who made applications were frequently successful. Overall, the fourth era of murder sentencing was an unnecessary turn done for political reasons rather than necessity.

Measures short of a full repeal of the new laws - a move that would be done at great political expense - could help ensure sentences passed given recognition to victims, send a strong message of denunciation and deterrence while balancing the rights of offenders. First, I suggested a modified form of the faint hope clause be enacted to ensure all offenders retain hope of prospective release. Next, I suggest that the *Criminal Code* could be modified to codify the
right to hope that has emerged under the *Multiple Murders Act*. Lastly, I suggest that in order to protect the accused’s right to a fair trial and better meet societal expectations of the justice system the mandatory minimum period of parole ineligibility period for second and subsequent murders should be removed.

**a. Renewal of the Faint Hope Clause**

The reintroduction of the faint hope clause is one of the most promising paths to ensure that hope remains present in sentencing and imprisonment. As outlined in chapter three, the faint hope clause was introduced in 1976, in concert with the abolishment of capital punishment and the introduction of the 25 year mandatory minimum period of parole ineligibility. The faint hope clause provided added incentive to inmates to reform and allowed an opportunity to call to attention changes of the offender’s situation. The faint hope clause also allowed for parole ineligibility to be reduced to a sentence closer to international standards of murder sentencing.

Most offenders who applied for faint hope hearings were good applicants. Offenders who abused the faint hope process such as Clifford Olson were a rare exception to the rule. Furthermore, after the 1997 amendments to the faint hope clause, applicants were subject to a judicial screening prior to a jury hearing thus avoiding giving undeserving offenders an opportunity to grandstand and further victimize the families and communities they harmed.

Amendments to the *Criminal Code* that would re-open faint hope applications to all offenders, including multiple murderers, would help balance between competing aims of punishment and ensuring all offenders be given hope of prospective release. As addressed in the conclusion of chapter six, the faint hope clause was a pathway by which offenders have a realistic but not certain chance of achieving the goal of release which emphasized the offender’s agency in whether they would achieve this goal.
The largest proposed change to the faint hope clause is the removal of s. 745.6(1)(a.1) of the *Criminal Code*, the section that precludes offenders who committed their offence on or after December 2nd, 2011 from ever applying.

The second proposed change is the removal of s. 746.2 of the *Criminal Code*. This section came into force in 1997 and precluded multiple murderers from making a faint hope application. Little objection could be made to this section at the time of its passing given that these offenders were still eligible for parole at the 25 year mark of their sentence. It is only in conjunction with the *Multiple Murders Act* that this section raises serious concerns. It is suggested that single count murderers should be able to receive a faint hope hearing after 15 years while multiple murderers should have to wait at least 25 years before making a faint hope application. This would ensure multiple murderers still receive a sentence that recognizes the increased gravity of their crime.

The faint hope clause could also be amended to provide greater clarity as to the factors to be considered in determining whether parole ineligibility ought to be reduced. This would serve to better assist the judiciary and juries deciding faint hope applications as well as to provide offenders with clearer pathways to achieve the goal of release. I propose that s. 746.3(1) of the *Criminal Code* should be amended to add in the factors of the offenders’ age and health, the length of time served in custody, and new information gained since the sentencing including rehabilitative efforts taken by the applicant and current risk assessments. The factors should also include the caveat that the nature of the offence for which the applicant was convicted shall not override the analysis of the other factors and that primary consideration shall be placed on offender’s reformation and current risk to society. This follows the German approach clarified in
the *War Criminal Case* that found subsequent reviews must place greater weight on the prisoner’s personality, age and prison record.

The last significant modification proposed is the removal of the ability for the judicial screening judge or empaneled jury to decide the applicant cannot make another faint hope application. This section was not troublesome when offender’s whose applications were denied were still eligible for parole at the 25 year mark of their sentence. However, if the *Multiple Murders Act* is used to extend parole ineligibility beyond an offender’s natural lifespan, the faint hope clause could be the only hope producing pathway available to an offender. Because of this unsuccessful applicants should be given another opportunity so as to ensure hope is never extinguished.

The faint hope clause struck a balance between the retributive and deterrence objectives of punishment and an offender’s prospects of redemption. While offenders received life sentences with lengthy periods of parole ineligibility they were not deemed irredeemable, a pathway towards release was provided. This pathway involved having members of society determine whether or not the offender should be given the chance to return to the community before they served their original sentence in full. The evidence shows the faint hope clause was properly used and offenders effectively self-screened their applications, leading to few applying and high success among those who did apply. The renewal of the faint hope clause would ensure all offenders are given hope of prospective release. Paradoxically if this legislative reform was undertaken the lengthy sentences given under the *Multiple Murders Act* would be less troublesome. While it is not suggested that this should be done, if the faint hope clause was renewed as suggested courts could impose any length of parole ineligibility without removing hope from the offender.
b. Codification of the Right to Hope
The codification of the right to hope would give formal recognition to sentencing principles that emerged in interpretation of the Multiple Murders Act. The decision of Baumgartner, the first case under the Act, explicitly mentioned the importance of hope connecting this unwritten principle to totality and rehabilitation with most subsequent cases following this line of reasoning.

The codification of the right to hope could come by adding onto s. 745.51(1) of the Criminal Code. I suggest that this section, which grants sentencing judges the discretion to make parole ineligibility periods consecutive for multiple murders, should be expanded to add: “For greater certainty concurrent sentences shall not exceed the anticipated natural life span of the offender.” If the faint hope clause was renewed for offenders including multiple murders, thus providing a pathway for release for all offenders, this section could be further nuanced to add in exceptional circumstances where a court may consider imposing a natural life sentence. These exceptional circumstances should be tightly controlled to only apply to offenders such as serial killers who pose a high risk to society and limited reformative potential.

c. Alteration of Mandatory Minimum for Second and Subsequent Murders
As outlined in chapter eight, in a case of two first degree murders, statutory interpretation may allow for a period of parole ineligibility of greater than 25 but less than 50 years. Such a sentence sends a strong denunciatory message and promotes the purposes of the Multiple Murders Act while still abiding by the principles of parity and totality. Parliament could clarify the availability of such a sentence with language reducing or eliminating the mandatory period of parole ineligibility for second and subsequent murders. Doing this would allow the Multiple Murders Act to better achieve its goal or recognizing each murder victim, as well ensure public
confidence in the administration of justice, better protect the right to a fair trial and help to ensure all offenders are left with hope of prospective release.

The structure of the *Multiple Murders Act* makes cases of multiple first degree murders exceeding difficult at sentencing. As discussed in chapter four and eight, when an offender is convicted of multiple first degree murders there is limited maneuverability at sentencing, a judge may have to decide on either a 25 year or 50 year period of parole ineligibility - the former less than case law suggests appropriate but the latter serving as a crushing blow removing hope.

However, where there is at least one second degree murder conviction the sentencing judge has more ability to tailor the sentence to the circumstances of the offence and offender. The ability to tailor sentences has led to several cases being resolved by a plea where the offender accepts guilt for one first degree murder in exchange for the other murder being reduced to second degree - this was done in *Baumgartner, Vuozzo, W.G.C.*, and a similar process occurred in *O’Hagan and Another*. While prosecutorial discretion is a fundamental and necessary element of the criminal justice system, the *in camera* decision making that is not subject to judicial review absent an abuse of process has the potential to interfere with the accused’s right to a fair trial and erode public confidence in the justice system. Such a process poses risks to the criminal justice system including increasing the risk of a wrongful conviction, minimizing incentive to plead guilty, moving the judicial responsibility of sentencing into a prosecutorial function and undermining the message of the *Multiple Murders Act* of giving each victim recognition.

Several benefits would flow from removing the mandatory minimum attached to second and subsequent murders. First, the inflexible sentencing dispositions available in cases where all
murders are first degree can be avoided. This will allow for sentencing judges to craft a sentence that is tailored to the circumstances of the offence and the offender. Offenders will also be more likely to be convicted under the offence that truly matches their culpability.

Such a measure would not lead to an automatic sentence reduction for offenders, in many cases the eliminated minimum would allow for a longer period of parole ineligibility to be imposed. If a 45-year old offender was convicted of two counts of first degree murder, he or she may likely get a 25 year sentence as the other option - a 50 year sentence - would make them ineligible for parole until the age of 95 and therefore likely offender sentencing and Charter principles. However, if they sentencing judge was not obligated to impose the full 25 years for the second murder, the sentence may well exceed the 25 year minimum in order to take into account the offender's culpability, bring the sentence into parity with similar offenders and recognize each victim.

There are at least three ways to eliminate or reduce the mandatory minimum for second and subsequent murders. The first is to add language to the Criminal Code noting that the minimum period of parole ineligibility does not apply for second and subsequent offences. The second way would be to make the minimum for second and subsequent murders one year. This would allow sentencing judges the opportunity to pass a sentence where a portion of the parole ineligibility period was spent specifically due to the murder of one victim. The third and most attractive is to detach the mandatory minimum from the first murder as well. Under this formulation an offender must serve at least 25 years. Under the current law, a 50 year old offender who committed two first degree murders would likely receive two concurrent 25 year periods of parole ineligibility. With no mandatory minimum per offence, the offender could
receive a sentence with 30 years of parole ineligibility, or two 15 year terms running concurrently.

2. Concluding Thoughts
When I began writing this thesis, Baumgartner and Bourque were the only two individuals sentenced under the Multiple Murders Act. As explored in chapter four and further in chapter seven, these sentences set forth a troubling dichotomy. Is, as Baumgartner suggests, hope protected under Canadian law, or, as Bourque holds, should hope of prospective release be removed from similar offenders?

The seven cases following Bourque overwhelming supported the former proposition, giving hope to murderers who were youthful, elderly, who murdered strangers or family members motivated by greed or revenge. Regardless of the circumstances of the case, the sentencing judges recognized, as a principle of sentencing law, the right to hope. One recent case, which is not discussed elsewhere in this thesis, has taken a divergent position. On June 27th, 2016 John Paul Ostamas, 40, of Winnipeg, Manitoba was sentenced to life imprisonment with no parole eligibility for 75 years for the second degree murder of three homeless men.524

A promising development for the right to hope in Canada came with Mr. Bourque’s filing of an appeal to his sentence. The appeal will illuminate the Canadian position on the importance of hope in sentencing. Given Canada’s historical recognition of hope of prospective release, protected in the era of capital punishment through the Royal Prerogative of mercy coupled with the availability of release for offenders who death sentences were commuted and further protected when capital punishment was abolished, it would come as no surprise if Mr. Bourque’s

parole ineligibility period was reduced. Arguments in favour of a reduction are bolstered by the emergence of the right to hope in international law.

Should the Court of Appeal reduce Mr. Bourque’s parole ineligibility, there are still questions as to how and by how much. The most straightforward mechanics for a reduction to apply the principles of parity and totality, recognizing stripping Mr. Bourque of hope makes his sentence dissimilar to similar offenders and amounts to a crushing blow. Constitutional issues may also come into play. While a 75 year period of parole ineligibility may seem patently unfit, a 50 year period on a 24 year old offender still comes close to eliminating hope, however, a 25 year period may not account for the full gravity of his crimes. As chapter eight discusses, the Court may be able to set a period of parole ineligibility somewhere between 25 and 50 years, interpreting the 25 year period of mandatory parole ineligibility and the power to make these periods consecutive in accordance with the principles of sentencing law and Charter values.

Any reduction of Mr. Bourque’s sentence may not change his eventual fate. The right to hope for prospective release is distinct from a right to be released. Mr. Bourque and the other offenders convicted under the Act have committed grave crimes, taking the lives of more than one innocent victim. These crimes deserve severe punishment. Many may prove irredeemable, posing to great of a risk to society to ever be released, and therefore remain incarcerated until their draw their final breath. Yet they will have suffered this fate due to their own actions, not because the justice system turned its back on them. The question raised in this thesis is how severe of a punishment should be given a just and civil society grounded in the rule of law. If the true measure of a society’s civility can be measured by how it treats its prisoners, leaving all offenders with hope ensures our Canadian society recognizing the fundamental worth of the human person. By providing hope for murderers, we are able to find hope in ourselves.
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