

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications

Allard Faculty Publications

2001

Rethinking the Sentencing Regime for Murder

Isabel Grant

Allard School of Law at the University of British Columbia, grant@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs

Citation Details

Isabel Grant, "Rethinking the Sentencing Regime for Murder" (2001) 39 Osgoode Hall LJ 655.

This Article is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons.

RETHINKING THE SENTENCING REGIME FOR MURDER[©]

BY ISABEL GRANT*

This article reviews the current sentencing regime for the crime of murder in Canada with a view to identifying its shortcomings and suggesting possibilities for improvement. The article argues that the existing classification of murder into first- and second-degree, and the harsh periods of parole ineligibility attached to a murder conviction should both be abolished. The author argues for a compromise position, which would maintain the important distinction between manslaughter and murder and yet allow sufficient flexibility for trial judges to ensure that sentences for murder, as with other crimes, can be tailored to fit the crime.

L'auteure considère le régime actuel de l'imposition des peines dans les cas de meurtre au Canada dans le but d'identifier des défauts et de suggérer des améliorations. L'auteure soutient que l'on doit abolir à la fois la classification actuelle des meurtres de premier et deuxième degré et les périodes sans possibilité de bénéficier de la libération conditionnelle qui accompagnent ces infractions. L'auteure avance un compromis qui saurait maintenir la distinction importante entre le meurtre et l'homicide involontaire coupable, mais qui permettrait toutefois aux juges d'imposer des peines appropriées au crimes, aussi bien dans les cas de meurtre que pour les autres infractions.

I.	INTRODUCTION	656
II.	THE DEFINITION OF MURDER	657
III.	EXISTING SENTENCES FOR MURDER	660
	A. <i>First-Degree Murder</i>	661
	B. <i>Second-Degree Murder</i>	663
	C. <i>Sentencing Offenders Under Eighteen Who are Tried as Adults</i>	663
	D. <i>The "Faint Hope" Clause</i>	664
IV.	CHARTER CHALLENGES TO THE EXISTING SENTENCING REGIME	664
	A. <i>First-Degree Murder</i>	664
	B. <i>Second-Degree Murder</i>	668
	C. <i>The Charter Challenge in Latimer: Highlighting the Need for Reform</i>	668
V.	THE SOCIAL REALITY OF MURDER IN CANADA	673
VI.	PROBLEMS WITH THE EXISTING SENTENCING REGIME FOR MURDER	674

© 2001, I. Grant.

* Professor, Faculty of Law, University of British Columbia. The author would like to thank Janine Benedet for reading two drafts of this paper and providing invaluable feedback. Thanks also to Martina Foit and Michelle Mullen for their tireless research assistance.

VII.	A COMPARATIVE REVIEW	679
	A. <i>The United States</i>	679
	1. Non-Death penalty states	680
	2. Death penalty states	682
	3. Discussion	683
	B. <i>England</i>	684
	C. <i>Australia</i>	687
VIII.	REFORMING SENTENCING FOR MURDER IN CANADA	690
	A. <i>Degrees of Murder</i>	690
	B. <i>Parole Ineligibility</i>	692
	C. <i>Life Sentences: Mandatory or Discretionary</i>	693
	1. Retain mandatory life sentences	694
	2. Discretionary life sentences	694
	3. A compromise	697
IX.	CONCLUSION	700
I.	INTRODUCTION	

When one thinks of murder, one is likely to think of our worst crimes—Paul Bernardo and his confinement and killing of three young women, or Clifford Olson and his brutal killing of eleven children. In some respects, these cases present few sentencing challenges because there is a general consensus that such offenders should never re-enter society.

However, not all murders lead to such consensus. For example, Robert Latimer has twice been convicted of murder for killing his disabled daughter, Tracy.¹ Despite differing opinions on the outcome of that case, few would compare Latimer to Bernardo or Olson. Similarly, the Department of Justice report by Madame Justice Lynn Ratushny² revealed that many women are in Canadian prisons for killing abusive spouses. Most would agree that these crimes are on the lower end of the scale, in terms of blameworthiness for murder. In other words, murder encompasses a wide range of offenders and offences, and thus a wide range of culpability. Despite this wide range, there is very little flexibility in our current sentencing regime for murder. While we do distinguish between first- and second-degree murder, this distinction is only relevant for setting the period of parole ineligibility.

¹ *R. v. Latimer* (1994), 124 Sask. R. 180 (Sask. Ct. Q.B.), aff'd (1995), 99 C.C.C. (3d) 481 (Sask. C.A.), [1997] 1 S.C.R. 217, (1997), 121 C.C.C. (3d) 326, rev'd (1998), 131 C.C.C. (3d) 191 (Sask. C.A.), aff'd [2001] 1 S.C.R. 3, (2001), 150 C.C.C. (3d) 129 [hereinafter *Latimer*].

² Canada, *Self Defence Review: Women in Custody* (Ottawa: Department of Justice, 1997) (Final Report by Justice Lynn Ratushny) [hereinafter *Ratushny Report*].

This article will review the law of murder in Canada, with a view to determining whether the current sentencing provisions meet society's needs for dealing with our most serious crime. There are two components to the current sentencing regime. First, every murder is punishable by life imprisonment. Second, depending on whether the murder is classified as first- or second-degree, there are periods of parole ineligibility attached to that life sentence. It will be argued that this mandatory life sentence is too rigid and may result in the imposition of unfair sentences in some cases. It will be further argued that the classification of murders into first- and second-degree has lost its usefulness since the abolition of the death penalty, and that it fails to adequately distinguish the most blameworthy killings from the relatively less blameworthy ones.

This article begins with a brief description of the scope of the crime of murder in Canada. This includes an analysis of the Supreme Court of Canada's constitutional jurisprudence that limited the definition of murder to intentional and reckless killings. The article then sets out the existing sentencing regime for murder. After arguing that the mandatory sentences are too rigid, and after rejecting degrees of murder as a classification system, the article examines alternative sentencing regimes enacted in other jurisdictions. These include the United States, England, and Australia. Finally, the article presents recommendations for reform of the sentencing regime for murder in Canada.

II. THE DEFINITION OF MURDER

Prior to the proclamation of the *Canadian Charter of Rights and Freedoms*,³ Canada had a gradation of murder offences. These ranged from intentional killings and reckless killings in what is now section 229(a),⁴ unlawful object murders⁵ in what is now section 229(c),⁶ and constructive murders in the since repealed section 230.⁷ In constructive murder, death must take place during the commission of various other enumerated offences, such as robbery and sexual assault.

³ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s. 229(a) [hereinafter *Code*].

⁵ Unlawful object murder imposed an objective test, such that if an accused ought to have known he or she was likely to cause death, a conviction would follow.

⁶ *Supra* note 4, s. 229(c).

⁷ *Ibid.*, s. 230.

In a series of cases, the Supreme Court of Canada initially limited the definition of murder to killings where death was objectively foreseeable (to a reasonable person). This definition was then further limited to killings where the death itself was actually foreseen, or at least where bodily harm likely to cause death was actually foreseen. Because these cases have been discussed at length elsewhere, they will only be briefly reviewed here.⁸

In *R. v. Vaillancourt*,⁹ the Court faced a challenge to then section 213(d) of the *Code*, the most criticized form of constructive murder. That section provided that if an accused used a weapon, or had it during the commission of certain specified crimes, or during the escape from those crimes, and a death resulted, that death constituted murder. The section did not require actual foresight of death, nor that death be foreseeable to the reasonable person. In *Vaillancourt*, the majority held that for crimes with a "special stigma," such as murder, there had to be at least objective foresight of the element of the offence that made the crime blameworthy. The majority (per Mr. Justice Lamer, as he then was) posited that some crimes have such a serious social stigma attached to them that the principles of fundamental justice in section 7 of the *Charter* require some level of *mens rea* with respect to the causing of the harm. In the context of murder, this harm is death. *Vaillancourt* was the first case to raise this concept of "stigma," and it was neither clearly defined nor were its origins discussed. Soon after *Vaillancourt*, in *R. v. Martineau*,¹⁰ the majority of the Court extended this reasoning, holding that the principles of fundamental justice require actual foresight of death before an accused can be convicted of murder.

The requirement of subjective foresight was not strictly necessary to decide *Martineau*, which dealt with then section 213(a) of the *Code*, because the principle of objective foresight could have invalidated the section. However, the majority indicated that it wanted to state a principle that would prevent the case from returning to the Court with a challenge to the objective test in then section 212(c) [now section 229(c)]—unlawful object murder. Although this section was not before the Court in

⁸ See, for example, I. Grant, "The Impact of *Vaillancourt v. The Queen* on Canadian Criminal Law" (1990) 28 *Alta. L. Rev.* 443; I. Grant, D. Chunn & C. Boyle, *The Law of Homicide*, looseleaf (Toronto: Carswell, 1994) c. 4. [hereinafter *Homicide*]; D. Stuart, *Canadian Criminal Law: A Treatise*, 3rd ed. (Toronto: Carswell, 1995) c. 3.

⁹ [1987] 2 S.C.R. 636 [hereinafter *Vaillancourt*].

¹⁰ [1990] 2 S.C.R. 633 [hereinafter *Martineau*].

Martineau, the majority cast considerable doubt on the constitutionality of the objective component of section 229(c) [then section 212(c)].

In *Martineau*, the majority developed the concept of stigma, but also noted that the punishment for a crime must be proportionate to the blameworthiness of the offender. The majority held that section 213(a) violated that principle. Murder has the most serious punishment known to our criminal justice system, yet the fault requirement—the intent to cause bodily harm and the intent to commit the underlying offence—was not proportionate to the blameworthiness of murder.¹¹ While the focus in *Vaillancourt* had been on the stigma attached to murder, *Martineau* resulted in a welcome shift towards proportionality.

Soon after *Martineau*, however, the Court shifted its focus from proportionality back to stigma. In *R. v. Logan*,¹² the Court held that the offence of attempted murder was a special stigma crime. Thus, an accused who was a party to that offence could only be convicted if he or she intended to cause or was reckless with respect to causing death. Because attempted murder has no mandatory penalty, the proportionality analysis would have been more difficult to apply. The majority once again focused on the stigma attached to attempted murder, and on its close relationship to the crime of murder. An accused convicted of attempted murder was simply a “lucky murderer”¹³ whose victim did not die. The majority explicitly put the emphasis on stigma rather than on the seriousness of the punishment.¹⁴ In *Logan*, Mr. Justice Lamer stated that in determining the constitutionally required level of fault, “...the social stigma associated with a conviction is the most important consideration, not the sentence.”¹⁵

The definition of murder in 2002 is much more limited than it was before the *Charter*. Section 229 now reads:

Culpable homicide is murder

¹¹ The majority did not address the approach of Madame Justice L’Heureux-Dube. She held that anyone who intends to cause bodily harm during the commission of a robbery, sexual assault, or other such crimes, ought to have foreseen death. In other words, she held that then section 213(a) did require objective foresight of death, which, according to the ratio in *Vaillancourt*, was all that was required.

¹² [1990] 2 S.C.R. 731 [hereinafter *Logan*].

¹³ *Ibid.* at 743.

¹⁴ Note that attempted murder currently does have a mandatory minimum sentence where a firearm is used, but this was not in effect at the time of these cases.

¹⁵ *Supra* note 12 at 743.

- (a) where the person who causes the death of a human being
 - (i) means to cause his death, or
 - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
- (b) where a person, meaning to cause death to a human being, or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
- (c) where a person, for an unlawful object, does anything that he knows *or ought to have known* is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.¹⁶

While section 229(c) still stands, the Supreme Court of Canada indicated in *Martineau* that the objective test in that section probably violates the *Charter*. However, because it has not been subjected to a section 1 *Charter* analysis, it is unclear whether the section would be upheld. It is still utilized by the Crown, but not frequently.¹⁷

Having examined how the Supreme Court has limited the definition of murder, it is necessary to examine both the existing sentencing regime for murder and judicial challenges to that regime.

III. EXISTING SENTENCES FOR MURDER

As described above, there are two parts to the sentence for murder—a mandatory life sentence and a period of parole ineligibility attached to that sentence.¹⁸ The length of the parole ineligibility period depends upon the offender's age and on the distinction between first- and second-degree murder.¹⁹

This distinction evolved from the earlier distinction between capital and non-capital murder. When the death penalty was abolished in 1976 for

¹⁶ *Supra* note 4, s. 229 [emphasis added].

¹⁷ See *R. v. Menard*, [1998] 2 S.C.R. 109 [hereinafter *Menard*]; *R. v. Meiler* (1999), 136 C.C.C. (3d) 11 (Ont. C.A.) [hereinafter *Meiler*]; *R. v. D.A.H.* (1997), 120 C.C.C. (3d) 533 (B.C. C.A.) [hereinafter *D.A.H.*]; *R. v. Nette* (1999), 141 C.C.C. (3d) 130 (B.C. C.A.); *R. v. Nienhuis* (1991), 12 W.C.B. (2d) 106 (Alta. C.A.). The proper approach to section 229(c) is to read out the objective test as was done in *Meiler*. Failure to do so may sometimes result in a new trial (*D.A.H.*), but not always (*Menard*).

¹⁸ *Code*, *supra* note 4, s. 745.

¹⁹ *Ibid.*, s. 745.1(a).

all non-military crimes, it was replaced with the current regime of first- and second-degree murder, with the mandatory life sentence, and lengthy parole ineligibility periods. The criteria for rendering a murder first-degree, however, have been expanded beyond the requirements for capital murder. When the death penalty was abolished, capital murder applied only to the murder of a police officer or a prison guard.²⁰

The Supreme Court of Canada has held that the distinction between first- and second-degree murder is one that exists only for sentencing purposes.²¹ The trier of fact first determines whether the accused is guilty of murder under the definitions in section 229 of the *Code*. If a determination of guilt is made, the trier of fact must then consider how to classify that murder for the purpose of sentencing.

A. *First-Degree Murder*

A trial judge has no discretion in sentencing an offender convicted of first-degree murder. Adults convicted of first-degree murder are subject to a mandatory sentence of life imprisonment with twenty-five years of parole ineligibility.²² There is no allowance for gradations in culpability for those convicted of first-degree murder. However, as will be discussed below, anyone who is serving a sentence with a parole ineligibility period of fifteen years or more may apply to have that period of parole ineligibility reduced after serving fifteen years.²³

Section 231²⁴ of the *Code* identifies certain kinds of murders as being first-degree. Premeditated murders, murders for hire, murders of police and prison officials, and murders during the commission of certain offences are all characterized as first-degree. This section provides that:

- (1) Murder is first degree or second degree murder.
- (2) Murder is first degree murder when it is planned and deliberate.
- (3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing

²⁰ *Criminal Code*, S.C. 1953-54, c. C-51, s. 202A(2); *Homicide*, *supra* note 8 at 7-6.

²¹ *R. v. Farrant*, [1983] 1 S.C.R. 124

²² *Code*, *supra* note 4, s. 745(a).

²³ *Ibid.*, s. 745.6(1).

²⁴ *Ibid.*, s. 231.

- or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.
- (4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is
- (a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;
 - (b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or
 - (c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein
- (5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections;
- (a) ... (hijacking an aircraft);
 - (b) ... (sexual assault);
 - (c) ... (sexual assault with a weapon, threats to a third party or causing bodily harm);
 - (d) ... (aggravated sexual assault);
 - (e) ... (kidnapping and forcible confinement); or
 - (f) ... (hostage taking).
- (6) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 264 [criminal harassment] and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered.
- (6.01) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder where the death is caused while committing or attempting to commit an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity.²⁵
- (6.1) Irrespective of whether a murder is planned and deliberate on the part of a person murder is first degree murder when the death is caused while committing

²⁵ *An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, S.C. 2001, c. C-41, s. 9.

or attempting to commit an offence under section 81 [using explosives] for the benefit of, at the direction of or association with a criminal organization.²⁶

B. *Second-Degree Murder*

There is no definition of second-degree murder in the *Code*. Rather, it is a residual category for all murders that are not first-degree. Second-degree murders are subject to a period of parole ineligibility of between ten and twenty-five years.²⁷ That period is determined by the trial judge, who asks the jury to recommend a period of parole ineligibility within that range. The trial judge should consider the recommendation, but is not bound by it. Section 745.4 provides that the judge should consider the nature of the offence, the circumstances of its commission, and the circumstances of the offender.²⁸ Because the maximum sentence for second-degree murder is the same as that for first-degree murder, one might assume that the worst second-degree murders are on par with first-degree murder. Thus, the distinction between the two categories merges at this point. The range in the period of parole ineligibility of ten to twenty-five years recognizes that some second-degree murders are more blameworthy than others. In fact, the majority of second-degree murders result in periods of parole ineligibility closer to ten years than to twenty-five.

C. *Sentencing Offenders Under Eighteen Who are Tried as Adults*

Offenders who were under eighteen at the time the murder was committed, but who are tried as adults, are subject to lower periods of parole ineligibility. If the offender was sixteen or seventeen when the murder was committed, the parole ineligibility period will be ten years for first-degree murder and seven years for second-degree murder.²⁹ If the offender was younger than sixteen when the crime was committed, the parole ineligibility will be between five and seven years. These rules only apply to young offenders who are transferred to adult court. Offenders

²⁶ If an accused convicted of murder has previously been convicted of any form of murder, he or she is to be sentenced to life imprisonment with no parole eligibility for twenty-five years, even if the murder is still technically of the second-degree. See *Code*, *supra* note 4, s. 745(b).

²⁷ *Ibid.*, s. 745(c).

²⁸ *Ibid.*, s. 745.4.

²⁹ *Ibid.*, ss. 745.1(b), (c).

dealt with under the *Young Offenders Act*³⁰ will be sentenced according to it.

D. *The "Faint Hope" Clause*

Section 745.6 of the *Code* allows those who have been sentenced to more than fifteen years of parole ineligibility to apply for a reduction after serving fifteen years in prison.³¹ This provision has been referred to as the "faint hope" clause. Those who have committed more than one murder are not entitled to apply.³² Before a full hearing can be held, the applicant must satisfy the Chief Justice of the province in which the conviction took place that there is a reasonable prospect that the application will succeed. If that burden is met, then a jury will be empaneled to decide whether or not to lower the period of parole ineligibility. The criteria include, but are not limited to, the character of the applicant, his or her conduct while imprisoned, the nature of the crime, and any information provided by the victim's relatives.³³ It is important to note that reductions in parole ineligibility by juries do not necessarily lead to the offender's release. The Parole Board determines whether to release the offender on parole. The jury's decision simply determines the earliest time at which the offender will be eligible to apply for parole.

IV. CHARTER CHALLENGES TO THE EXISTING SENTENCING REGIME

A. *First-Degree Murder*

There have been several *Charter* challenges to the sentencing provisions for first-degree murder, most of which have focused on the mandatory nature of the parole ineligibility period. Unlike its activism in dealing with the definition of murder, the Supreme Court has shown more deference to Parliament in assessing the mandatory penalties.

³⁰ R.S.C. 1985, c. Y-1, s. 20(1)(k.1)

³¹ *Code*, *supra* note 4, s. 745.6.

³² *Ibid.*, s. 745.6(2).

³³ *Ibid.*, ss. 745.6(1), 745.6(3).

The two leading cases are *R. v. Arkell*³⁴ and *R. v. Luxton*.³⁵ In *Arkell*, the challenge focused on section 231(5).³⁶ In *Luxton*, the accused challenged both section 231(5) and the mandatory minimum twenty-five year parole ineligibility period for first-degree murder. In both cases, the Court relied heavily on findings from its decision in *Martineau*, which was handed down the same day. The Court held in *Martineau* that murder requires either intention or recklessness with respect to causing death. Thus, it was no longer possible for accidental or negligent killings to be elevated to first-degree murder under section 231(5). This finding was particularly significant because prior to *Vaillancourt* and *Martineau*, accidental killings during the commission of certain crimes could be elevated to first-degree murder, through the combination of section 230 and section 231(5).

In disposing of the section 7 argument in *Arkell*, Chief Justice Lamer revisited the underlying rationale of section 231(5), as set out by the Court in *R. v. Paré*.³⁷ The rationale is that all murders within section 231(5) take place when the accused is unlawfully dominating the victim, and it is this unlawful domination which justifies the additional fifteen years of parole ineligibility. There is no principle of fundamental justice, the Court held, that precludes Parliament from classifying murders committed during the commission of certain underlying offences as being more serious than others. Accordingly, Parliament may attach a more serious penalty:

Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between the sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender.³⁸

In *Luxton*, the Court held that Parliament had clearly adhered to the principle that there must be proportionality between moral blameworthiness and punishment of the offender. The majority also emphasized that proportionality between the sentencing scheme and the seriousness of the offence is only one factor in assessing the

³⁴ [1990] 2 S.C.R. 695 [hereinafter *Arkell*].

³⁵ [1990] 2 S.C.R. 711 [hereinafter *Luxton*].

³⁶ *Supra* note 4, s. 231(5).

³⁷ [1987] 2 S.C.R. 618 [hereinafter *Paré*].

³⁸ *Arkell*, *supra* note 34 at 214–15.

constitutionality of a sentencing scheme. A just sentencing scheme must also take into account the societal interest in punishing wrongdoers in terms of protection, deterrence, rehabilitation, and retribution.³⁹

On reading the sentencing cases, one senses that the Court was retreating from its own activism in the *mens rea* cases. Some of the defence arguments against the mandatory sentence were given little attention. First, the Court failed to address the impact on an offender of a twenty-five year period of parole ineligibility.⁴⁰ Even though most offenders can apply after fifteen years to have that period reduced, as the name "faint hope" clause suggests, a reduction is not guaranteed. Moreover, release is still not guaranteed after serving the twenty-five year period. Literature suggests that prison violence, both self-inflicted and against others, is higher among those sentenced to these long, indeterminate periods of imprisonment.⁴¹

Second, the Court failed to consider whether there could be a range of blameworthiness that might come within a particular category of first-degree murder. This is perhaps most easily illustrated in the context of planned and deliberate killings. The category ranges from the planned killing of an ailing, terminally ill spouse, to the planned, deliberate, and brutal murder of a child.

Third, the Court's suggestion that Parliament has been sensitive to the particular circumstances of each offender through various provisions (for the royal prerogative of mercy, and for escorted absences from custody for humanitarian and rehabilitative purposes) ignored the fact that these options are entirely discretionary. As we have seen recently in cases involving wrongful convictions for murder, seeking relief through the royal prerogative of mercy may be cumbersome and take years to pursue.⁴²

Finally, the Court did not address the possible misuse of the first-degree murder provisions to induce inappropriate plea agreements. As discussed below, an accused facing the risk of a mandatory twenty-five years of parole ineligibility might plead guilty to a lesser offence, even where a

³⁹ *R. v. Lyons*, [1987] 2 S.C.R. 309. The Court also rejected the section 9 and section 12 arguments under the *Charter*. The Court held that Parliament was free to impose a very severe penalty on our most serious crime.

⁴⁰ Allan Manson, "The Easy Acceptance of Long Term Confinement in Canada" (1990) 79 C.R. (3d) 265.

⁴¹ R. Lorean Scanlon & Frank J. Porporino, *Homicide Offenders Imprisoned in Canada: A Descriptive Study of Offender, Offence and Victim Characteristics* (Ottawa, 1987) at 23-24; *Homicide*, *supra* note 8 at 7-33.

⁴² *R. v. Milgaard*, [1971] 2 W.W.R. 266 (Sask. C.A.); leave to appeal to S.C.C. refused (1971), 4 C.C.C. (2d) 566 (S.C.C.); *Reference Re Milgaard*, [1992] 1 S.C.R. 866.

potential defence exists to all charges. The stakes involved in first-degree murder are so high that the possibility of the Crown overcharging to pressure an accused into a plea agreement is serious.

Provincial appellate courts have rejected challenges to other forms of first-degree murder. *R. v. Bowen*⁴³ is the most recent of three appellate decisions to discuss whether section 231(4),⁴⁴ which automatically elevates the murder of police officers, prison guards, and other vulnerable members of the criminal justice system to first-degree murder, violates section 12 of the *Charter*.⁴⁵ The Alberta Court of Appeal dismissed the accused's attack on the constitutionality of the combined effect of sections 231(4) and 745:

As noted, the additional element required for first-degree murder is that the victim is a police officer executing his or her duty. That always implies an extra degree of blameworthiness because it means that the accused has also stopped the officer from doing his or her duty. When one recalls the serious duties of a peace officer that is obviously and always a serious aggravating factor.⁴⁶

Mister Justice Côté held that in order to have succeeded on the section 12 claim, the accused would have needed to present some hypothetical scenario in which an individual who killed a police officer should be sentenced to less than fifteen years of parole ineligibility.⁴⁷ Since no such scenario could be envisioned, the section 12 claim was unsuccessful.

Similarly, the British Columbia Court of Appeal upheld section 231(2),⁴⁸ which elevates planned and deliberate murders to first-degree murder. In *R. v. Cairns*,⁴⁹ the accused appealed the life sentence imposed for his first-degree murder conviction. He argued that the sentence

⁴³ (1990), 2 C.R. (4th) 225 (Alta. C.A.).

⁴⁴ *Code*, *supra* note 4, s. 231(4).

⁴⁵ See also *R. v. Collins* (1989), 69 C.R. (3d) 235 (Ont. C.A.) [hereinafter *Collins*] and *R. v. Lefebvre* (1989), 71 C.R. (3d) 213. In *Collins*, the Ontario Court of Appeal held that this section only survived the constitutional challenge because knowledge (or recklessness) of the identity of the victim was read in. This decision countered the Court's previous *obiter* in *R. v. Munro* (1983), 36 C.R. (3d) 193 (Ont. C.A.).

⁴⁶ *Bowen*, *supra* note 43 at 232.

⁴⁷ Note here that the Court is incorporating the faint hope clause of s. 745.6(1) into its analysis of s. 231(4), which allows an accused convicted of first-degree murder to apply for a reduction in the twenty-five year period of parole ineligibility after fifteen years.

⁴⁸ *Supra* note 4, s. 231(2).

⁴⁹ (1989), 51 C.C.C. (3d) 90 (B.C. C.A.).

constituted cruel and unusual punishment, contrary to section 12 of the *Charter*. In rejecting this argument, Madame Justice Southin remarked:

I cannot see that 25 years in prison for the planned and deliberate taking of another human life is "cruel or unusual treatment or punishment". It is a great deal less "cruel" than the treatment Cairns inflicted on Mr. Parks.⁵⁰

B. *Second-Degree Murder*

Fewer challenges have been launched against sentences for second-degree murder; perhaps because of the discretion allowed trial judges in setting the parole ineligibility period. In *R. v. Mitchell*,⁵¹ the Nova Scotia Court of Appeal was unsympathetic to the accused's constitutional challenge to the life sentence and mandatory minimum ten-year period of parole ineligibility for second-degree murder. The Court not only dismissed the accused's cross-appeal, but ultimately allowed the Crown's appeal, raising the accused's period of parole ineligibility from fifteen to twenty-one years. The circumstances in *Mitchell* made the case particularly unsympathetic, as it involved the death of a child following a long period of abuse.

C. *The Charter Challenge in Latimer: Highlighting the Need for Reform*

All of the challenges to the sentencing regime for murder discussed above, arose in circumstances that were less than sympathetic. In addition, they all involved challenges to the legislation itself. The constitutional challenge in *Latimer* was different. *Latimer* did not argue that the existing sentences for murder were unconstitutional. Rather, he argued that the application of the statutory penalties to him, given the facts of his case, would result in cruel and unusual punishment. Thus, he was asking for a constitutional exemption to the existing penalties for murder.

Latimer was twice convicted of second-degree murder by juries in Saskatchewan for the murder of his daughter Tracy. Tracy was born with cerebral palsy and had multiple physical and developmental disabilities. Tracy was a quadriplegic and bedridden for much of her life. She had several seizures each day and was in constant pain.⁵² She had undergone

⁵⁰ *Ibid.* at 104.

⁵¹ (1987), 39 C.C.C. (3d) 141 (N.S. C.A.) [hereinafter *Mitchell*].

⁵² These facts are taken from the first Court of Appeal judgment in *Latimer*, *supra* note 1, (1995), 99 C.C.C. (3d) 481 (Sask. C.A.).

surgery in the past and was facing another surgery for a dislocated hip. On the day of her murder, while the rest of his family was out, Latimer put Tracy in his truck, set up a hose device from the exhaust, and shut all the windows, so that Tracy would be asphyxiated. After her death, he brought her back to bed, and attempted to persuade police that she had died of natural causes. He later confessed.

After his first conviction for second-degree murder, Latimer appealed to the Saskatchewan Court of Appeal. That Court was divided as to whether the mandatory sentence was constitutional. The division in the Court reflected the vast differences in public opinion surrounding this case.

The majority judgment by Justice Tallis (Justice Sherstobitoff concurring) had two central themes. The first focused on the seriousness of the crime in question, and on the appropriateness of the existing sentence for that crime. The second theme was that of deference to Parliament in setting the sentences for murder.

The majority focused on the fact that Tracy was disabled and that the killing resulted from that fact. According to the majority, Latimer murdered Tracy because she had a disability, not because she was in pain. The majority posed what it considered a pivotal question:

If the child were not permanently disabled, but in extreme pain, would there be any question about making heroic efforts to sustain and maintain life? If the answer is no, then the decision would appear to be clearly predicated upon the diminished value assigned to the life of a handicapped child. One would not be so inspired by love and compassion to take the life of the non-handicapped child.⁵³

The Court held that it was important for society to express its outrage at such a crime, particularly given the vulnerability of the victim. Society cannot condone anyone making life and death decisions for another person.

The majority indicated that its proper role was to interpret Parliament's laws, not to write them. It noted that Parliament had prescribed the sentences it felt appropriate for first- and second-degree murder. If Parliament wanted to provide an exception for "mercy" killings, it was open for it to do so. It also relied on the passage from Chief Justice Lamer in *Luxton*, noting that Parliament had been sensitive to the circumstances of each offender by allowing the royal prerogative of mercy, escorted absences from custody for humanitarian reasons, and early parole.

⁵³ *Ibid.* at 519.

The dissent by Chief Justice Bayda focused on Tracy's pain. He held that Latimer acted out of compassion stemming from her pain, not because she had a disability. The dissent considered the public reaction to Latimer's sentencing and the letters that had been sent in his support to justify the conclusion that the mandatory minimum sentence would be cruel and unusual if applied to Latimer.

The Supreme Court of Canada ordered a new trial for Latimer on grounds unrelated to this constitutional challenge.⁵⁴ At his second trial, Latimer was again convicted of second-degree murder. After conviction, Mr. Justice Noble considered Latimer's section 12 argument, that the mandatory life sentence with ten years parole ineligibility would be cruel and unusual. He held that there were differences in the second trial that justified departing from the Court of Appeal's first decision. Perhaps most importantly, the jury had asked during its deliberations, if it could have input into sentencing. When asked for a recommendation on parole ineligibility, the jury recommended a period of one year, not a period between ten to twenty-five years as provided by law.

In deciding whether the sentence was grossly disproportionate, Justice Noble found Latimer to be "a devoted family man with a loving and caring nature."⁵⁵ He had no criminal record and was not a threat to society. In concluding that Latimer acted out of love and compassion, seeking to end his daughter's pain, Justice Noble held that Latimer's culpability was at the lowest end of the scale. He suggested that the jury must have felt the same way. Thus, he allowed the constitutional exemption and sentenced Latimer to one year in prison and one year probation.

The Saskatchewan Court of Appeal overturned the judgment of Justice Noble, and held that Latimer must be sentenced to the mandatory minimum sentence. It held that there was no basis, evidentiary or legal, for the trial judge to distinguish the first appellate decision. Thus, the Court imposed the mandatory minimum penalty on Latimer.

On further appeal to the Supreme Court, the Court unanimously dismissed Latimer's appeal, and denied that the circumstances of the killing merited a "constitutional exemption" under section 12 of the *Charter*. While the Court appeared to leave open the possibility that an exemption would be available under certain circumstances, it held that for Latimer, the mandatory minimum punishment for second-degree murder was not cruel and unusual. This conclusion was based on the view that the murder

⁵⁴ *Latimer*, *supra* note 1, [1997] 1 S.C.R. 217.

⁵⁵ *Latimer*, *supra* note 1, (1997), 121 C.C.C. (3d) 326 at 340.

of Tracy, while an “error in judgment” by a distraught and otherwise loving parent, was a highly culpable act.

The Court considered the character of Latimer’s actions, and the consequences of those actions as they related to the gravity of the offence. The Court declined to consider Latimer’s motive in killing Tracy; the character of the offence was to be determined by reference to the accused’s *mens rea* and his knowledge of the law. The Court noted that second-degree murder was an act of extreme blameworthiness, in that it required proof of subjective foresight of death.

The Court went on to consider the characteristics of the offender and the particular circumstances of the offence. The Court concluded that the aggravating circumstances of initial attempts at concealment; lack of remorse; planning and premeditation; and his position of trust over Tracy, outweighed the mitigating factors of Latimer’s character, reputation, and concern and perseverance as a parent.

The Court acknowledged that imposing the mandatory penalty on Latimer did not further the sentencing goals of specific deterrence or rehabilitation. However, the Court was of the view that the denunciatory aspect of the sentence could serve the function of general deterrence. This principle, the Court noted, was “...particularly [applicable] where the victim is a vulnerable person with respect to age, disability, or other similar factors.”⁵⁶

The Court did acknowledge the considerable public controversy that existed over Latimer’s conviction, noting the existence of the royal prerogative of mercy in section 749 of the *Code*.⁵⁷ The Court explicitly declined to comment on whether this provision should be applied. It did suggest that the considerations under that section were not identical to the section 12 analysis, and could include the effect of the seven-year legal process on Latimer and his family. The Court did not deal at length with any of the more general arguments against mandatory minimum sentences. While noting the considerable difference of opinion on the wisdom of such sentences, the Court deferred to Parliament on this issue.

Latimer demonstrates that when a case becomes polarized in the media, basic legal principles may be forgotten. For example, some argued that if Latimer were not given the full weight of the law, it would devalue the lives of his daughter and other persons with disabilities. It was also argued that this could encourage other caregivers to kill their children with

⁵⁶ *Latimer*, *supra* note 1, [2001] 1 S.C.R. 3 at 41.

⁵⁷ *Supra* note 4, s. 749.

impunity. At the other extreme, *Latimer* was used as a vehicle for arguing in favour of mercy killing. In the opinions of some people, Latimer should not have been punished because what he did was not blameworthy.

In my view, both of these extreme positions miss the mark. Lenience for Latimer does not necessarily devalue the life of his daughter or other persons with disabilities. It does not necessarily lead to impunity for others who kill children with disabilities. It has long been accepted that sentencing should involve a consideration of the circumstances of both offence and offender. If there is a reason to show compassion to a particular offender, that does not necessarily devalue the life of their victim. Robert Latimer found himself in extremely difficult circumstances. He was faced with a child in pain about which he could do very little. His response—killing his daughter—was wrong and warranted punishment. However, it was not on par with many other second-degree murders.

On the other hand, *Latimer* was not about mercy killing. Mercy killing involves the ending of a life for someone who is terminally ill. This generally occurs with the consent of that person or, where the person is not competent to give consent, with the consent of a substitute decision maker. Mercy killing is about hastening an already impending death in order to minimize the suffering of the individual. Any attempt to legalize mercy killing must incorporate careful safeguards so that the potential for abuse is minimized. The killing of Tracy Latimer was not a mercy killing. Robert Latimer alone made the decision to kill his daughter. She was not consulted, nor was her physician. Latimer was the decision maker as well as the one carrying out the final act. Advocates of mercy killing would do well to find a better case to use as support for its decriminalization.

The killing in *Latimer* was different not because Tracy was disabled, but because the accused was motivated by compassion. While all lives are equally valuable, not all killers are equally deserving of the same degree of punishment. Our legal system recognizes that other forms of extreme emotion may mitigate the seriousness of a killing. Provocation, for example, reduces murder to manslaughter in order to enable the judge to exercise flexibility in sentencing. A person who kills under duress may have a complete defence if the common law defence is open to him or her.⁵⁸ However, there is no defence of extreme emotional distress for a caregiver who, for whatever reason, cannot carry on. For most crimes, these facts would be considered at sentencing. For murder, however, there is little room to consider mitigating factors at sentencing.

⁵⁸ *Homicide*, *supra* note 8 at 6–70.

Latimer has brought the issue of sentencing for murder into the public spotlight again. In contrast to the usual call for harsher sentences for murder, many believe the mandatory life sentence with ten-year parole ineligibility was too harsh for *Latimer*.

Before addressing concerns with the existing sentencing regime for murder, it is helpful to review briefly the statistics on murder, to determine what they tell us about our most serious crime.

V. THE SOCIAL REALITY OF MURDER IN CANADA

With the obvious exception of *Latimer*, almost all the cases to reach the Supreme Court of Canada regarding the *mens rea* for murder, or sentencing for murder, have involved cases where the victim was unknown to the accused.⁵⁹ This is probably consistent with how most Canadians think about murder: the violent stranger. However, the reality of homicide in Canada differs from the public perception. While surveys suggest that the average Canadian is most afraid of murder or violent crime perpetrated by a stranger, 40 per cent of all homicide victims are killed by family members, and 45 per cent are killed by acquaintances.⁶⁰ In 1998, over half of all female homicide victims were killed by a person with whom they had an intimate relationship at some time in the past. According to the Canadian Centre for Justice Statistics, the time of greatest risk for being a homicide victim is during the first year of life.⁶¹ These figures belie the notion that murder is committed by the violent stranger. In fact, we are most in danger from those around us, and often, those with whom we have had our most intimate relationships.⁶²

The ratio of males to females accused of homicide has remained stable over the recent past, with males constituting approximately 88 per cent of all those charged with homicide, and also 66 per cent of all victims. The homicide rate generally is declining, and has been since the mid-1970's.

⁵⁹ One case not discussed in this article is *R. v. Sit*, [1991] 3 S.C.R. 124, rev'g. (1989), 47 C.C.C. (3d) 45 (Ont. C.A.). Mr. Sit devised a plot to kidnap his cousin and demand a ransom. Sit's accomplices murdered the cousin and Sit was charged as a party to the murder. The Supreme Court found that the sections under which Sit was charged—sections 213(c) and 21(2)—contravened sections 7 and 11(d) of the *Charter*, and were not justified under section 1 of the *Charter*. The accused in *Martineau* did not know his victims.

⁶⁰ O. Fedorowycz, "Homicide in Canada 1998" (1999) 19 *Juristat* No. 10.

⁶¹ *Ibid.* at 10.

⁶² For more discussion about our misperceptions regarding the nature of violent crime, see I. Grant, "Legislating Public Safety: The Business of Risk" (1998) 3 *Can. Crim. L.R.* 177.

This was when Canada abolished the death penalty, suggesting that abolition of the death penalty did not cause an increase in homicides. The rate is declining in the United States as well, although the United States still has three to four times the rate of homicide as Canada when controlled for population differences.⁶³ The United States notwithstanding, Canada has a high rate of homicide relative to its population; a rate that is higher than that in England, for example.⁶⁴

Despite the overall decline in the rate of homicide in Canada, the rate of first-degree murder charges has increased since 1976. Because this reflects charges laid and not convictions, it is possible that this statistic reflects the willingness of the Crown to overcharge in an attempt to facilitate plea-bargaining, rather than an increase in the most serious murders *per se*.

This very brief review portrays murder more often as a crime of intimate relationships gone terribly wrong than as a crime of psychopaths or serial killers. While our sentencing regime obviously has to deal with these latter offenders, they should not be the primary focus when developing a sentencing regime for murder.

VI. PROBLEMS WITH THE EXISTING SENTENCING REGIME FOR MURDER

The first and most significant problem with our existing sentencing regime for murder is its lack of flexibility. The mandatory minimum life sentence and the harsh periods of parole ineligibility do not allow for genuine mitigating and aggravating factors to be taken fully into account. The rigid categories of first- and second-degree murder compound this problem. In cases such as *Latimer*, this inflexibility may result in unduly harsh penalties being imposed. In 1984, the Law Reform Commission of Canada, quoting the 1953 Report of the Royal Commission on Capital Punishment in England, noted that, "there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder."⁶⁵ While the definition of murder has been

⁶³ Fedorowycz, *supra* note 60 at 3.

⁶⁴ *Ibid.*

⁶⁵ U.K., Royal Commission on Capital Punishment, *Report of the Royal Commission on Capital Punishment*, (London: Her Majesty's Stationary Office, 1953), quoted in Canada, *Law Reform Commission of Canada Working Paper 33: Homicide*, (Ottawa, 1984) at 68-69.

narrowed by the Supreme Court of Canada under the *Charter*, there is still a wide range of offences included within the category of murder.

Latimer demonstrates the problems with the inflexibility of murder sentencing. Unlike sentencing for other crimes, with murder individual circumstances often cannot be considered at sentencing because of the inflexible *Code* provisions. Taking such circumstances into account does not devalue the victim. Punishment in criminal law is generally tailored to fit the crime and the criminal, not to reflect the value of the life of the victim. Our system assumes all victims are equally valuable, whatever their circumstances.

Other examples of cases where the inflexibility of murder sentencing is unjust can be found in the *Ratushny Report*, which reviewed the cases of women who had been convicted of murder for killing their abusive spouses.⁶⁶ Prior to *R. v. Lavallee*,⁶⁷ such a woman would most likely be convicted of murder, and sometimes even first-degree murder if she planned the killing in advance. Harsh mandatory minimums were applied to women who killed to protect their own lives or those of their children.

The second problem with the sentencing regime for murder is a direct result of the inflexibility of the sentencing structure; defences have developed that operate solely to reduce murder to manslaughter to avoid the mandatory penalties. This makes the law more complicated and difficult for juries to apply. The defence of provocation, for example, only exists to reduce murder to manslaughter; for all other crimes provocation may be relevant for sentencing but not for liability.⁶⁸ The defence of provocation has been soundly criticized elsewhere for privileging the emotion of rage over other emotions (such as despair or compassion).⁶⁹ Intoxication has also developed largely as a defence that reduces murder

⁶⁶ *Ratushny Report*, *supra* note 2

⁶⁷ [1990] 1 S.C.R. 852.

⁶⁸ *Code*, *supra* note 4, s. 232.

⁶⁹ See M. Spatz, "A Lesser Crime: A Comparative Study of Legal Defences for Men Who Kill Their Wives" (1991) 24 Col. J. of Law & Soc. Probs. 597; J. Greene, "A Provocation Defence for Battered Women Who Kill" (1989) 12 Adelaide L. Rev. 145; A. Cote, "La rage au cœur" (Regroupement des femmes de la Cote Nord, 1991); J. Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 192; T. Pickard *et al.*, eds., *Dimensions of Criminal Law*, 2nd ed. (Toronto: Emond Montgomery, 1996) at 804; L. Taylor, "Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence" (1986) 33 U.C.L.A. L. Rev. 1679; E. Sheehy, *Special Defences for Women: Outline* (Ottawa: National Association of Women and the Law, 1987); J. Abell & E. Sheehy, *Criminal Law and Procedure: Proof, Defences & Beyond*, 2nd ed. (North York: Captus Press, 1998); A. Ripstein & M. Thornton, "Introduction: Criminal Law" (1988) 11 Can. J. L. & Jur. 3.

to manslaughter. If the Supreme Court had its way, this defence could lead to an acquittal on all charges.⁷⁰ While there is no specific defence of diminished responsibility in Canada, courts have allowed evidence of mental illness, short of a mental disorder defence, to negate the intent for murder, thus reducing the crime to manslaughter.⁷¹ Intoxication and mental illness have also resulted in reductions of first-degree murder to second-degree murder by negating the ability to plan and deliberate.⁷² All these defences developed originally to avoid the death penalty and are now used to avoid the rigours of sentencing for murder. If there were some flexibility in the sentencing regime, the law could be simplified for juries, and these other factors could be left to judges at the sentencing stage.

Similarly, the offence of infanticide (which applies to a woman who has killed her newborn child) is subject to a maximum of only five years imprisonment. This offence would not be necessary if murder had flexible sentences. The fact that a woman was suffering from a postpartum disorder could be taken into account at sentencing. One of the reasons for developing the crime of infanticide was that juries were not willing to sentence such women to death when charged with murder, and thus brought in acquittals or convictions for lesser offences.

Our existing regime does not necessarily designate all of the most heinous killings first-degree murder, despite what the Supreme Court has held in the sentencing cases. For example, a random drive-by shooting of a child that was not planned in advance is second-degree murder. Even if more than one child is killed, it is second-degree murder if no planning and deliberation existed.

It is not always true that planned killings are more heinous than impulsive, random killings. Someone who kills impulsively, for no

⁷⁰ The Court in *R. v. Daviault*, [1994] 3 S.C.R. 63, held that extreme intoxication akin to insanity could negate the general intent required for crimes such as manslaughter, or negate the *actus reus*. Parliament quickly intervened and enacted section 33.1 of the *Code*, which precludes the defence of intoxication for general intent crimes involving violence to the person. The question that remains is whether section 33.1 will be upheld as constitutional. The constitutionality of section 33.1 has been challenged in a number of recent cases. See e.g.: *R. v. Brenton* (2001), 199 D.L.R. (4th) 119; *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. Gen. Div.) [hereinafter *Dunn*]; *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C. S.C.); and *R. v. Decaire* (11 September 1998), Justice Festeryga (Ont. Gen. Div.) aff'd without reasons (Ont. C.A.). Only in *Dunn* was the provision found to violate the *Charter*. The Supreme Court of Canada has yet to rule on the constitutionality of this provision.

⁷¹ *Homicide*, *supra* note 8 at 6-123-6-133.

⁷² *R. v. Wallen*, [1990] 1 S.C.R. 827 [hereinafter *Wallen*] (intoxication) and *R. v. More*, [1963] S.C.R. 522 [hereinafter *More*] (mental illness).

comprehensible reason, "may be even more cruel, dangerous, and depraved than the premeditated killer who plans the crime in advance."⁷³

Furthermore, there are no sharp lines dividing the categories of murder. For example, questions about how far in advance planning must occur,⁷⁴ and whether an intoxicated or mentally ill accused can plan and deliberate⁷⁵ have arisen. In fact, the early case law on planning and deliberation, which is still relied upon today, was developed when the death penalty was still an option. The Supreme Court of Canada gave a narrow definition to planning and deliberation, and was willing to find ways out through intoxication and mental illness.⁷⁶

The current sentencing regime causes anomalies for parties to murder as well. Consider the liability of a party to a planned and deliberate killing. Party liability on the basis of planning and deliberation does not adequately reflect the culpability of a party to murder. If the party thought the principal was committing an unplanned killing, then the party is guilty of only second-degree murder. If the party knew the principal was planning in advance to commit the killing, then the party is guilty of first-degree murder.⁷⁷ But is the party any more culpable in the second situation than in the first? In both cases the party foresaw a killing or bodily harm likely to cause death. Foreseeing the mental state of the principal should have nothing to do with the party's culpability.

The way we assess which murders are planned and deliberate may also, in some contexts, be problematic. The murders that are most likely to be planned and deliberate may be those where the accused has a relationship with the victim. Given the large percentage of murders that take place in the context of intimate relationships, one would expect that a large number of domestic murders would be labeled first-degree. To the contrary, domestic murders appear more likely to be seen as crimes "in the heat of the moment," rather than as the result of a calculated course of abuse ending in murder. In *R. v. Randhawa*,⁷⁸ for example, the accused killed his wife with repeated blows of an axe. The Court of Appeal

⁷³ D. Givelber, "The New Law of Murder" (1994) 69 *Indiana L.J.* 375 at 383.

⁷⁴ *R. v. Ruptash* (1982), 68 C.C.C. (2d) 182 (Alta. C.A.).

⁷⁵ *Wallen*, *supra* note 72 (intoxication) and *R. v. Jacquard*, [1997] 1 S.C.R. 314 (mental illness).

⁷⁶ *More*, *supra* note 72.

⁷⁷ See *R. v. McGill* (1986), 15 O.A.C. 266 and *R. v. Wong* (1992), 71 C.C.C. (3d) 490 (B.C. C.A.) leave to appeal to the S.C.C. refused (1992), 74 C.C.C. (3d) vi (note).

⁷⁸ (1990), 104 A.R. 304 (C.A.), leave to appeal to S.C.C. refused (1990), 111 A.R. 320.

described the murder as “the grotesque culmination of at least fifteen years of hostility”⁷⁹ from the accused to his wife. After verbal insults were exchanged, the accused told his wife she would be killed. Their daughter intervened, at which time the accused dragged both mother and daughter to the basement and searched for a weapon. The daughter broke free and called for help, but the wife was hacked to death.

The Court of Appeal concluded that there was insufficient evidence of planning and deliberation. The statement that the wife would die was consistent with intent, but did not indicate planning and deliberation. The Court held that the fact that Randhawa was looking for the axe and did not know where it was, was evidence against planning and deliberation, as was the fact that the accused admitted the killing to the police. Most troublesome was the Court’s statement that the brutality of the killing, in the domestic context, often negates planning and deliberation. Even where a man has beaten and abused his partner for a long period of time, where he has searched for a weapon, and where the victim is told in advance that she will die, the murder may not be first-degree. While the new section 231(6.1)⁸⁰ may elevate a very small number of domestic murders to first-degree murder, specifically those in which the accused has followed and stalked the woman, most will remain second-degree. Where that is the case, section 718.2(a)(ii) provides that the fact that a crime was committed against a spouse or child is an aggravating factor.⁸¹ This fact could be considered in determining parole ineligibility for second-degree murder.⁸²

Section 231(5) also presents difficulties. Certain offences are included as warranting the label of first-degree murder based on the unlawful domination of the victim.⁸³ But it is sometimes very difficult to draw the line between offences. For example, at what point does an armed robbery (not included in section 231(5)) become a forcible confinement (an offence included in section 231(5))? The answer is not clear in the case law, thus giving the judge and trier of fact the opportunity to decide where the case fits. Similarly, under section 231(5), a party is liable for first-degree

⁷⁹ *Ibid.* at 305.

⁸⁰ *Supra* note 4, s. 231 (6.1).

⁸¹ *Supra* note 4, s. 718.2(a)(ii).

⁸² I am not advocating longer periods of imprisonment for murder, but rather that we be careful with respect to which killings we label as the most serious.

⁸³ *Paré*, *supra* note 37.

murder if he or she is a substantial or integral cause of the death.⁸⁴ What if the party is one cause of the death, but not a substantial cause? Can a meaningful line be drawn between a cause and a substantial cause, or is the Court giving jurors flexibility to decide how much responsibility the party should bear?

These examples illustrate some of the problems created by the need to characterize some murders as more blameworthy than others. It is important to remember why degrees of murder were originally developed. The distinction between first- and second-degree murder arose out of the distinction between capital and non-capital murder. After the abolition of the death penalty, the retention of first-degree murder, with its accompanying harsh penalty, was said to serve the function of appeasing those who favoured retention of the death penalty. This purpose has outlived its usefulness. Furthermore, as demonstrated above, first-degree murder is neither a precise nor exhaustive categorization of the most culpable murders. If there were flexibility in sentencing, all of the factors set out in section 231, plus additional factors, could be taken into account.

If one accepts that distinguishing between first and second-degree murder is not a useful mechanism in determining which murders are most blameworthy, it is necessary to consider what alternatives are available. With this in mind, the approaches taken in the United States, England, and Australia will be examined. A brief review of each sentencing regime reveals some of the alternatives available to law-makers.

VII. A COMPARATIVE REVIEW

A. *The United States*

Since criminal law falls within state jurisdiction, each state has a different sentencing regime for murder. Both states with the death penalty and those without will be examined. This analysis presents a survey of some of the sentencing regimes, highlighting similarities and differences with Canada.

This task is complicated by the fact that different states have different definitions of murder. However, since many states use degrees of murder, one can still examine how these states identify and punish their most serious murders. One very significant definitional difference between the countries is that, in Canada, the Supreme Court has abolished "felony

⁸⁴ *R. v. Harbottle*, [1993] 3 S.C.R. 306 at 323.

murder.” Many states still retain this classification. The fact that a murder was committed during the commission of a serious crime can elevate the murder to first-degree in Canada. However, the killing must still be intentional or reckless before it can be called murder. In the United States, by contrast, some states designate killings committed during the course of a felony as murder regardless of the intent of the offender.

1. Non-Death penalty states

Twelve states and the District of Columbia do not have the death penalty.⁸⁵ There is marked similarity between Canada and the non-death penalty states as to what factors warrant a first-degree murder classification. Premeditation,⁸⁶ contract killings,⁸⁷ the killing of criminal justice officials,⁸⁸ and some form of felony murder,⁸⁹ are shared by Canada and many U.S. states. There are several additional criteria found in U.S. states that are not found in Canada. These include multiple murders,⁹⁰ killings by poison,⁹¹ and the killing of a witness in a criminal proceeding.⁹²

⁸⁵ Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. This information is current to July, 2001.

⁸⁶ See e.g. Iowa, Ia. Stat., tit. 16 § 707.2(1) (1996) [hereinafter *Iowa Code*]; Massachusetts, Ma. Stat. Ann., ch. 265 § 2 (1999) [hereinafter *Mass. Ann. Laws*]; Michigan, Mi. Stat. Ann., ch. 750 § 316(1) [hereinafter *Michigan Code*]; West Virginia, W.V. Stat., ch. 61 § 61-2-1 (2000) [hereinafter *W.V. Code*] and Vermont, Vt. Stat. Ann. § 2301 (2000) [hereinafter *V.S.A.*].

⁸⁷ See e.g. Hi. Stat., tit. 37 § 707.701(1)(d) [hereinafter *Hawaii Code*].

⁸⁸ See e.g. *Hawaii Code, ibid.* at § 707.701(b); *Iowa Code, supra* note 86, § 707.2(4); *Michigan Code, supra* note 86, § 316(2)(c); Minnesota Criminal Code, ch. 609 § 105(4)(1999) [hereinafter *Minnesota Code*]; and General Laws of Rhode Island, tit. 11 § 11-23-1 (2000) [hereinafter *R.I. Gen. Laws*]. Note that the Canadian provision covers only police officers, peace officers, prison guards, and other such persons, whereas in the United States it is common to see reference to the killing of judges, prospective witnesses, and others in the criminal justice system.

⁸⁹ See e.g. *Iowa Code, supra* note 86, § 707.2(2); *Mass. Ann. Laws, supra* note 86, ch. 265 § 1; *Michigan Code, supra* note 86, § 316(1)(b); *Minnesota Code, ibid.*, § 609.185(3); North Dakota Century Code, tit. 12 § 12.1-16-01.1.c (2000) [hereinafter *N.D. Code*]; *R.I. Gen. Laws, ibid.*; *W.V. Code, supra* note 86, § 61-2-1; *V.S.A., supra* note 86, § 2301. In Canada, there is the two-stage process where there must be proof of an intentional or reckless killing before section 231(5) comes into play. That section makes murders during the commission of other offences first-degree. Sexual assault is the most commonly listed offence found in most U.S. states as well as in section 231(5).

⁹⁰ See e.g. *Hawaii Code, supra* note 87, § 707.701(a).

⁹¹ See e.g. *Michigan Code, supra* note 86, § 316(1) and *V.S.A., supra* note 86, § 2301.

⁹² See e.g. *Hawaii Code, supra* note 87, § 707.701(c).

Of the states with some form of felony murder, there is usually a wider range of offences than those found in section 231(5) of the *Code*. Most U.S. versions of felony murder include robbery and burglary, which are not found in section 231(5).

The killing of a child is occasionally mentioned as a factor leading to a first-degree murder conviction.⁹³ For example, in Alaska, the first-degree category focuses largely on children. Thus, the killing of a child after inflicting serious physical injury by at least two separate acts, and the killing of a child during a sexual assault constitute first-degree murder.⁹⁴ One difference between the two countries is the focus on premeditation as the foundational criteria in Canada. While several states list this as a factor, it is more common to see an emphasis on either interference with the justice system (killing witnesses, police officers, or prison officials), or killing during other serious offences as the core criteria. Thus, in the United States the focus is on the circumstances of the killing rather than on the killer's mental state.

There is less similarity between the countries when one considers the punishments applied in the non-death penalty states. A range of punishments is found in the non-death penalty U.S. states.⁹⁵ Some states provide for a life sentence without parole for first-degree murder,⁹⁶ and in

⁹³ See e.g. Alaska Stat. tit. 11 § 11.41.100(a)(2)(3) (2000) [hereinafter *Alaska Code*]; *Iowa Code*, *supra* note 86, § 707.2(5) and *Minnesota Code*, *supra* note 88, § 609.185(5).

⁹⁴ *Alaska Code*, *ibid.*, § 11.41.100(a)(2)(3).

⁹⁵ Most of the statutes are specific about how many years must be served before parole eligibility. Some, however, require further inquiries into parole and other legislation which is beyond the scope of this article.

⁹⁶ Hawaii has life without parole, however the judge must submit an application to the governor to commute the sentence to life with parole, unless the offender is a repeat offender. (*Hawaii Code*, *supra* note 87, § 706-656). Hawaii also has the possibility of life without parole for second-degree murder, but only if the killing was "heinous, atrocious, or cruel, manifesting exceptional depravity," or if there is a previous conviction for murder (*Ibid.*, § 706-657). The *Iowa Code* provides for a sentence for the accused's natural life, unless it is commuted by the governor (*supra* note 86, § 902.1). North Dakota also has life without parole for a class AA felony, but nonetheless the offender is eligible for parole after thirty years (*N.D. Code*, *supra* note 89, § 12.1-32-01(1)). *R.I. Gen. Laws*, *supra* note 88, § 11-23-2, and *W.V. Code*, *supra* note 86, § 62-3-15, have discretionary life without parole maximums for first-degree murder. The District of Columbia provides for life without parole in a separate hearing if the prosecution proves beyond a reasonable doubt any of the aggravating factors. The wording of the legislation is such that the sentence of life without parole is discretionary, even if the State does so prove. The aggravating factors are similar to those rendering murder as first-degree in other statutes, however there are one or two categories worthy of note: where the murder was based on the victim's race, colour, religion, national origin, or sexual orientation, and where the victim was especially vulnerable due to age or a mental or physical disability.

one state, even for second-degree murder.⁹⁷ Life without parole is almost always a discretionary sentence in these states. However, "life without parole" does not necessarily mean life without parole. North Dakota, for example, allows an accused sentenced to life without parole to apply for parole after thirty years of imprisonment. The period which the accused must serve for first-degree murder or the equivalent ranges from fifteen years⁹⁸ to ninety-nine years.⁹⁹

There is also a wide range of sentences for second-degree murder in these states. There appears to be more discretion for second-degree murder, with the sentences ranging from a minimum of ten years before parole¹⁰⁰ to the potential of life without parole.¹⁰¹ Most of these jurisdictions do have a mandatory minimum sentence for second-degree murder.

2. Death penalty states

The analysis in this section focuses on four states, New York and California, which were chosen for their size, and Texas and Florida, which were selected for their high rates of execution.

In none of these states is the death penalty mandatory, nor does any state make the death penalty available for all murders. In California, first-degree murder is punishable by death, imprisonment for life (without parole), or imprisonment for a period from twenty-five years to life.¹⁰² In New York, first-degree murder is punishable by death, imprisonment for life without parole, or life imprisonment with a period of parole ineligibility

⁹⁷ *Hawaii Code*, *supra* note 87, § 706-656; Alaska has a maximum ninety-nine years for second-degree murder (*Alaska Code*, *supra* note 93, §12.55.125(3)(a), (2)(b)).

⁹⁸ *R.I. Gen.Laws*, *supra* note 88, §11-23-2.2. In West Virginia, a jury recommendation of mercy, or a guilty plea, can prevent life without parole and allow eligibility for parole consideration after a minimum of fifteen years (*W.V. Code*, *supra* note 86, § 62-3-15).

⁹⁹ In Alaska, if the victim is a peace officer, firefighter, or correctional employee, if there is a previous conviction for murder, or if there is physical torture, the accused must be sentenced to ninety-nine years. (*Alaska Code*, *supra* note 88, §12.55.125(a)).

¹⁰⁰ *R.I. Gen. Laws*, *supra* note 88, § 11-23-2, and *Alaska Code*, *supra* note 93, § 12.55.125(3)(b).

¹⁰¹ In Hawaii, where the killing was particularly cruel or atrocious, or where there was a previous conviction for murder. See *supra* note 91.

¹⁰² Cal. Stat. Ann. tit. 8 § 190 (2000) [hereinafter *California Code*].

of twenty to twenty-five years.¹⁰³ In Texas and Florida, first-degree murder is punishable by either death or life imprisonment without parole.¹⁰⁴

While each state differs in the procedures to be applied, the essential similarity is that the jury weighs aggravating and mitigating factors to determine whether death should be imposed. In Texas, California, and New York, the decision as to whether death should be imposed is made by the jury. In Florida, the jury makes a recommendation to the judge, and the final decision lies with the judge.

In each of these states there is a bifurcated system; that is, the decision about guilt for first-degree murder is made first. Once that decision has been made, a hearing will take place and the jury will then be asked to weigh aggravating and mitigating factors to determine what sentence should be imposed. In New York, the aggravating factors are the same as those that elevate murder to first-degree, but there is a statutory list of mitigating factors. In Texas, the jury is first asked whether the accused would be a continuing threat to society and, if convicted as a party to murder, whether the accused caused the death or intended to cause the death. If these questions are answered in the affirmative, then the jury is told to determine whether there are sufficient mitigating circumstances that warrant the imposition of a life sentence instead of the death penalty. The jury is unfettered in deciding what factors to consider. In California and Florida, there is a list of aggravating and mitigating factors. In both of these states, and in New York, the mitigating factors include those personal to the accused such as mental disability, age, duress, and emotional distress. Lists of aggravating factors tend to look more at the details of the crime and the identity of the victim.

3. Discussion

What can we learn from the various sentencing regimes in the United States? With respect to degrees of murder, there are more similarities with Canada than differences. All the criteria that make murder first-degree in Canada are consistently found in the U.S. jurisdictions which rely on degrees of murder. However, the United States does demonstrate that there is potentially a much wider range of factors that make murders particularly heinous. U.S. states consistently consider factors such as multiple murders and murders with particular brutality.

¹⁰³ *N.Y. Penal Law* § 70.00 (McKinney 1998).

¹⁰⁴ *Tex. Penal Code Ann.* § 12.31 (West 1989), and *Fla. Stat. Ann.* § 775.082 (West 1992).

How do penalties for murder in non-death penalty states compare with the penalties in Canada? Obviously, life without parole is more extreme than any punishment found in Canada. One can see legislative attempts in these states to have it both ways, labeling a sentence as life without parole, and yet providing for parole. As for the other U.S. jurisdictions, the parole ineligibility period in Canada for first-degree murder seems to lie somewhere in the middle of U.S. provisions. The U.S. penalty regimes are sufficiently diverse, and exist in the context of a country where most states have the death penalty. Even the non-death penalty states must be influenced by that fact.

The most notable feature of the death penalty states is the important role given to the jury in making the decision as to whether death should be imposed. While in some states the jury's discretion is fettered by specific factors, in Texas, the jury is essentially free to consider all factors relating to the crime. In a related vein, the system is a bifurcated one. The decision is first made about the accused's guilt for murder, either first-degree or capital, and then the decision is made as to whether the death penalty should be imposed. This is done so that at the sentencing stage there can be a full and open hearing, without concerns about prejudice which might exist if such evidence were heard at trial. There is surprising consistency in the criteria justifying the imposition of the harshest penalty known to law. These include murder for hire, multiple murders, murders during the commission of other serious crimes, repeat murders, and murders involving torture or particular brutality to the victim.

B. *England*

One might expect that the English sentencing regime would have more in common with Canada than does the U.S. regime. To the contrary, the English sentencing regime for murder is the most unusual of the jurisdictions examined here.

Prior to 1957, all murders in England were punishable by death, unless the offender was a pregnant woman or a person under eighteen when the offence was committed.¹⁰⁵ In 1957, England adopted a system of capital and non-capital murder. Murders of police officers or prison officials, murders in the course of a theft, murders by shooting or causing an explosion, or murders in the course of resisting arrest, were capital

¹⁰⁵ See J.C. Smith, "The Penalty for Murder" (1988) 19 *Cambrian L. Rev.* 5.

murders.¹⁰⁶ This classification system lasted only eight years. In 1965, the death penalty was abolished altogether, and replaced with a mandatory sentence of life imprisonment, except for those under eighteen at the time of the offence.¹⁰⁷ The prescribed life sentence for murder in England is unique in that the period of imprisonment to be served by a convicted murderer before parole is not determined by a court of law, but by a cabinet minister, the Home Secretary. Murder is the only crime for which courts are afforded no discretion in sentencing.¹⁰⁸

Since 1983, the mandatory life sentence for murder has consisted of three phases. The first, referred to as the "tariff," is a period of incarceration to mark retribution and deterrence. The second is a period of imprisonment which lasts as long as the prisoner is perceived to be a risk to the community. The third is a period of release of the offender on license which is subject to recall for the rest of the offender's life, similar to an offender being on parole for a life sentence in Canada. The power of recall is apparently used frequently and sometimes the offender may be recalled and released more than once.

Upon a conviction for murder, the trial judge is bound by statute to impose a sentence of life imprisonment.¹⁰⁹ Although the trial judge is given no discretion in sentencing, the judge is authorized to give a recommendation on the minimum period which should be served before the Home Secretary orders the release of the offender.¹¹⁰ The trial judge submits a view of the appropriate tariff to the Home Secretary by way of the office of the Lord Chief Justice, who also submits an opinion on the matter. While the judicial advice is influential, it is not binding. The Home Secretary is free to vary the tariff period in making the final decision.

Since the House of Lords ruling in *R. v. Secretary of State for the Home Department ex parte Smart Pegg Doody and Pierson*,¹¹¹ the power of the Home Secretary to set tariffs which are vastly different from those recommended by the trial judge and the Lord Chief Justice has been fettered. The Home Secretary is now required to inform the offender of the

¹⁰⁶ *Homicide Act, 1957* (U.K.), 1957, c. 11, ss. 5-7.

¹⁰⁷ *Murder (Abolition of the Death Penalty) Act 1965* (U.K.), 1965, c. 71, s. 2 [hereinafter *Murder (Abolition of Death Penalty) Act*]. Those who are under the age of eighteen at the time of the offence are sentenced to mandatory detention at Her Majesty's pleasure.

¹⁰⁸ Smith, *supra* note 105.

¹⁰⁹ *Murder (Abolition of Death Penalty) Act*, *supra* note 107, s. 1(1).

¹¹⁰ *Ibid.*, s. 1(2).

¹¹¹ [1993] 3 W.L.R. 154.

tariff period recommended by the judiciary. The offender must be given an opportunity to make representations in writing as to the appropriate tariff. In addition, the Home Secretary is now obliged to give reasons for departing from the judicial recommendation, and the Home Secretary's decision may be open to challenge by way of judicial review. While the Home Secretary may ask the Parole Board for advice, he or she is not bound by that advice.

Once the tariff has been served, the Home Secretary retains the discretion to release the life prisoner on license. Thus, the Home Secretary maintains the ultimate power to determine both the appropriate tariff—the minimum period of incarceration—and the date of release.

Both the mandatory life sentence for murder and the role of the Home Secretary in sentencing convicted murderers have been widely criticized.¹¹² The role of the Home Secretary is criticized for bringing a political component into sentencing for murder that does not exist for any other crime. Reforms for “discretionary lifers,” as they are called, have been called for repeatedly by members of the House of Lords, but blocked by the political process:

The existence of the mandatory life sentence for murder, and the decision-making structures which flow from it, quite clearly have a political rather than a jurisprudential basis. Its rationale has been exposed as confused and contradictory by the courts. The senior judiciary has argued that there is no legitimate philosophical basis for a mandatory sentence for murder, since the offence itself varies so greatly.¹¹³

J.C. Smith has noted how ill-placed the Home Secretary is to set the tariff compared to the trial judge. The trial judge has heard the evidence, seen the witnesses and the accused, and heard arguments relating to mitigating factors.¹¹⁴ Perhaps the most influential criticism has been that of the European Court of Human Rights. In hearing the appeal of two ten-year old boys convicted of the brutal murder of two-year old James Bulger, the Court ruled that the intervention by the then Home Secretary, Michael Howard, was a violation of their human rights. The two boys were sentenced to serve a minimum of fifteen years in prison by the Home Secretary. The trial judge had originally recommended a minimum of eight years, which was raised to ten years by the Lord Chief Justice. While the European Court could not overturn the boys' convictions nor order their

¹¹² See Smith, *supra* note 105.

¹¹³ Justice Society, *Sentenced for Life* (London: Justice, 1996) at 35-36.

¹¹⁴ Smith, *supra* note 105 at 10.

release, the British government is obligated to reform those sentencing practices deemed by the Court to be in breach of the European Convention on Human Rights.

The British government has responded to the European Court ruling, removing the Home Secretary's power to decide the tariff for child murderers. However, the tariff period is still determined by the Home Secretary for adult murderers.

C. *Australia*

Australia is the only jurisdiction under review which has experimented with more lenient sentences for murder. The definitions of murder in the various Australian states are similar to the Canadian definitions before the Supreme Court invalidated the various forms of constructive murder. Comparisons of the sentences between the two jurisdictions must be made in light of this difference. The broader definitions in Australia should support more lenient sentences because more offenders are swept into the category of murder.

Unlike in Canada, most Australian states do not distinguish among degrees of murder. While most of the states examined have similar definitions of murder, there is more variation in punishments. Western Australia, Queensland, and the Northern Territory all impose a mandatory life sentence for murder. However, the period that an offender will actually spend incarcerated differs among jurisdictions.

Tasmania, New South Wales, and Victoria all provide for a maximum sentence of life, but none of these states prescribes a minimum sentence or period of parole ineligibility. Victoria and Tasmania appear to be the most flexible, with both jurisdictions providing for a maximum penalty of life imprisonment. Neither jurisdiction prescribes a corresponding maximum or minimum period of parole ineligibility.

In New South Wales, the mandatory life sentence for murder was abolished in 1983. This change followed the Report of the Task Force on Domestic Violence,¹¹⁵ which expressed the view that life imprisonment was too harsh a punishment for women who killed abusive spouses.¹¹⁶ Life imprisonment remained the starting point for sentencing, but a judge could

¹¹⁵ G.D. Woods, *Report of the Task Force on Domestic Violence*, (Sydney: New South Wales Premier's Department, 1981).

¹¹⁶ See G.D. Woods, "The Sanctity of Murder: Reforming the Homicide Penalty in New South Wales" (1983) 57 *Australian L.J.* 161 at 161.

impose less than a life sentence where it appeared “that the person’s culpability for the crime is significantly diminished by mitigating circumstances.”¹¹⁷ In other words, life was to be the norm unless mitigating circumstances were established. The 1990’s saw increased public demands for honesty in sentencing, particularly for violent criminals. Hence in 1990, the meaning of “life imprisonment” was revised, so that offenders sentenced to “life” for murder would actually spend the rest of their lives in prison.¹¹⁸ Most recently, the *Crimes (Sentencing Procedure) Act, 1999*.¹¹⁹ has changed the starting point by providing that life sentences should only be given where the goals of sentencing require it:

A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.¹²⁰

Section 61 of the *Crimes (Sentencing Procedure) Act* implies that life imprisonment is to be reserved for the most serious murders, where no other sentence will meet the stated goals. Section 21(1) further provides that where life is the maximum sentence, a court may impose a specified period of years, thus indicating that a life sentence is not mandatory. However, where life is given, courts have no statutory authority to set a period after which the accused is eligible for parole.

A brief review of the case law suggests that even for murder, life sentences are not meted out very often. In the 2000 decision in *R. v. Valera*,¹²¹ the Court indicated that since “life means life” was enacted in 1990, only sixteen life sentences had been handed down for murder (plus the one in *Valera* itself). Courts have interpreted the legislation to mean that life imprisonment must be reserved for the worst category of murders only.¹²²

With regard to whether a case falls in the worst category, the Court held that this test did not mean that a lesser penalty had to be given if one

¹¹⁷ *Crimes (Homicide) Amendment Act 1982* (Aust.), 1982, No. 24 (NSW), s. 19.

¹¹⁸ *Crimes Act 1990* (Aust.), 1990 (NSW), s. 19A (which replaced s. 19, *ibid.*).

¹¹⁹ *Crimes (Sentencing Procedures) Act, 1999* (Aust.), 1999, No. 92 (NSW).

¹²⁰ *Ibid.*, s. 61(1).

¹²¹ [2000] N.S.W. S.C. 1220 [hereinafter *Valera*].

¹²² See *R. v. Georgiou*, [2000] N.S.W. S.C. 287.

could imagine a more heinous case. "A life sentence offends this principle only if the case is recognizably outside the category."¹²³

In *Valera*, for example, the two killings were random and revealed horrendous brutality. The first victim was decapitated and his body seriously mutilated after death. The judge noted that the accused was only nineteen years old at the time of the murders and had no criminal record. Nonetheless, the heinous nature of the killings justified the imposition of a life sentence.

In order to fall within the worst category of cases, it is not necessary that the murder be planned and deliberate,¹²⁴ nor is this category limited to accuseds who are likely to remain a continuing danger to society.¹²⁵ Multiple murders may support a life sentence,¹²⁶ but will not in themselves be a sufficient justification for imposing life.¹²⁷

The "worst category" of cases is not a very helpful test for determining who will get a life sentence and who will not. The application of the test turns on an evaluation of which murders are worse than others. This evaluation is clearly normative, and one about which there might be significant disagreement among reasonable people. In New South Wales, the murders that fit into this category seem to be the random ones, stranger killings, particularly those involving mutilation¹²⁸ or pain and degradation for the victim.¹²⁹

Neither Victoria nor Tasmania have mandatory life sentences for murder, nor mandatory periods of parole ineligibility. Furthermore, in these jurisdictions, life imprisonment does not necessarily mean that an offender will spend the rest of his or her life incarcerated. Notwithstanding this difference from New South Wales, life sentences do not appear to be commonly imposed for murder in these jurisdictions either. In both jurisdictions, since 1997, sentences most often range from twelve to twenty-five years, with periods of parole ineligibility from eight to nineteen years. One can see that even where a life sentence is not mandatory, reasonably

¹²³ *Ibid.* at para. 106.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Valera*, *supra* note 121.

¹²⁷ *Georgiou*, *supra* note 122. Where there were three victims killed and another injured in a motorcycle gang dispute, the Court nonetheless found the case did not warrant life imprisonment.

¹²⁸ *R. v. Fernando* (1997), 95 A Crim R 533.

¹²⁹ *R. v. Garforth* (23 May 1994), (N.S.W.C. C.A.) [unreported].

long periods of imprisonment are imposed for murder in these jurisdictions.

The brief review of these jurisdictions demonstrates that there are few innovative sentencing regimes for the crime of murder that might provide guidance or direction for reform in Canada. The Australian jurisdictions which have abolished mandatory life imprisonment, particularly New South Wales, are the most revealing for the purposes of this article. New South Wales demonstrates that where mandatory life sentences have been abolished, life sentences are reserved for the most heinous and brutal cases. However, the sparse use of a life sentence in New South Wales must be viewed in the context of legislative reform, which makes a life sentence mean life imprisonment. This makes it particularly difficult to draw generalizations from that jurisdiction to our own, where a life sentence can mean as little as seven-years imprisonment. Nonetheless, the experience in these jurisdictions with discretionary life sentences suggests that, should Canada adopt such a regime, we might still have difficulties in determining which murders are most deserving of a life sentence.

VIII. REFORMING SENTENCING FOR MURDER IN CANADA

Several issues arise from our existing regime and from the above discussion of alternate regimes. First, do we need degrees of murder to identify which murders are most heinous? Second, should we retain periods of parole ineligibility for murder? Third, should we maintain a mandatory life sentence for all murders?

A. *Degrees of Murder*

The distinction between first-and second-degree murder should be abolished. Degrees of murder are most frequently used in the United States, even in states which currently do not have the death penalty. The distinction may be useful in jurisdictions where the death penalty is applied to some murders and not to others, although there are problems with its use even in that context. Even in death penalty states in the United States that distinguish between first-degree or capital murder and second-degree or non-capital murder, there is a recognition that the distinctions are not in themselves adequate for determining who should die. After a finding of capital murder is made, juries are given the opportunity to consider

mitigating factors.¹³⁰ In Australia and England, where the death penalty has been abolished, degrees of murder have been almost entirely rejected. England experimented with degrees of murder after limiting the death penalty to certain murders in 1957.¹³¹ The degree regime lasted only eight years, and was subject to criticism. Smith provides the following example:

Any attempt to single out particular factors as meriting capital punishment and include them in a statutory definition is, in my opinion, doomed to failure. Consider the factors of poison, deliberation and pre-mediation mentioned in the Pennsylvania statute [the first statute to use degrees of murder]. All these may be present in the case of the so-called mercy-killer, e.g. the mother who, after long and hard thought, gives her incurably ill and suffering child an overdose of sleeping pills. No one, I imagine, would wish to hang her.¹³²

The same can be said about trying to distinguish between murders which deserve twenty-five years of parole ineligibility and those deserving ten years. It is not always possible to decide which killings are more heinous, nor is it necessary to have that distinction carved in stone legislatively.

Degrees of murder can also result in overcharging, or in pressuring accused persons into plea agreements to avoid the harsh penalties for first-degree murder. A charge of first-degree murder could induce a guilty plea to second-degree murder, or even manslaughter, in the interests of avoiding the mandatory penalty. It may be a particular problem in the context of women who kill abusive partners.¹³³ While such women may have a defence of self-defence or even duress, the literature suggests that such defences are often difficult to establish.

Harsh mandatory sentences shift some of the sentencing power from the judge to the police and prosecutors, who decide which charges are laid. While we may not fully trust judges to impose appropriate sentences, at least judges' decisions are subject to public scrutiny. The same is not true of prosecutorial decisions regarding charge selection.

¹³⁰ See e.g. *California Code*, *supra* note 102, §190.1.

¹³¹ *Homicide Act*, *supra* note 106, ss. 5–7.

¹³² Smith, *supra* note 105 at 6.

¹³³ Canada, *The Self-Defence Review: Overview and Next Steps* (Ottawa: Government of Canada, September 1997).

B. *Parole Ineligibility*

The harsh periods of parole ineligibility attached to a murder sentence should also be abolished. According to a brief submitted to the Department of Justice by the Elizabeth Fry Society, Canada is second only to the United States in terms of the average length of time served for first-degree murder (28.4 years).¹³⁴ England and Australia have much lower averages, at 14.4 and 14.75 years respectively.¹³⁵ While I am not suggesting that short sentences are necessarily always better, if we are eventually going to release most offenders, we need to examine the penological purposes of keeping murderers in jail for a quarter of a century.

What would happen if the existing periods of parole ineligibility for murder were abolished? If the life sentence is retained in Canada, this would not mean that a convicted murderer would spend the rest of his or her life in prison. The *Corrections and Conditional Release Act*¹³⁶ provides that an offender sentenced to life is *eligible* for parole after seven years. Of course, this does not mean that the offender will be paroled after seven years, but rather, it simply provides the opportunity to apply for parole. Furthermore, once paroled, a life sentence means that the offender is permanently subject to re-imprisonment for breach of parole conditions.

For most offences, the *Corrections Act* allows for parole eligibility after the offender has served one-third of his or her sentence. Section 743.6 of the *Code*, however, gives the sentencing judge the discretion to increase the period before parole eligibility from the usual one-third to one-half the sentence imposed (or ten years, whichever is less).¹³⁷ This applies to a scheduled list of offences including attempted murder and manslaughter. Currently, murder is not one of the scheduled offences because it has its own stringent periods of parole ineligibility. If those periods were repealed, one option would be to add murder to the schedule of offences covered by section 743.6, thus providing for parole ineligibility for up to ten years, depending on the sentence imposed. While I am not generally in favour of increasing the periods of parole ineligibility for murder, it might appear incongruous if offences less serious than murder were included in section

¹³⁴ Response to the Department of Justice re: *Reforming the Criminal Code Defences: Provocation, Self-Defence and Defence of Property*, online: The Canadian Association of Elizabeth Fry Societies <<http://www.elizabethfry.ca/Response/15.htm>> (date accessed: 13 February 2000) at 15.

¹³⁵ *Ibid.*

¹³⁶ S.C. 1992, c. 20, s.120. [hereinafter *Corrections Act*].

¹³⁷ *Code*, *supra* note 4, s. 743.6.

743.6 and murder was not. The question would then be whether any murder would require a sentence harsher than life with ten years of parole ineligibility.

C. *Life Sentences: Mandatory or Discretionary*

The most difficult issue in sentencing for murder is whether or not the life sentence should be retained. Most observers would agree that the maximum penalty for murder should be life imprisonment. The more difficult question is whether life imprisonment should be mandatory for all murders.

Many jurisdictions have struggled with this question.¹³⁸ Jurisdictions which abolish the death penalty tend to replace it with mandatory life imprisonment. After experience with mandatory life sentences, some Australian states have moved to a discretionary life sentence.¹³⁹ The trend in the United States, however, has been towards more rigid penalties for murder, with life without parole and the death penalty being utilized more frequently.

There are at least three options for dealing with the life sentence. First, we could retain the existing regime, where life imprisonment is mandatory for all murders. Second, we could abolish the mandatory life sentence, leaving life as the maximum sentence. This would make the sentencing regime for murder identical to that for attempted murder and manslaughter. Third, we could develop a regime in which life imprisonment is the norm for most murders, but provision is made for an exemption from the mandatory penalty in cases where a life sentence would result in a miscarriage of justice. The following sections will examine each of these options.

¹³⁸ See e.g. Australia, Law Reform Commissioner of Victoria, *Murder: Mental Element and Punishment* (Working Paper No. 9) (Melbourne: The Commissioner, 1984); Butler Committee on Mental Abnormal Offenders, Cmnd. 6244, 1975; U.K., Report of the Advisory Council on the Penal System, *Sentences of Imprisonment: A Review of Maximum Penalties* (London: Her Majesty's Stationary Office, 1978); and New Zealand, Criminal Law Reform Committee, *Report on Culpable Homicide*, (Wellington: Criminal Law Reform Committee, 1976).

¹³⁹ New South Wales moved first from the death penalty, to a mandatory life sentence, and then to a discretionary life sentence where a judge may impose any term less than life imprisonment.

1. Retain mandatory life sentences

Those in favour of a mandatory life sentence point to the important denunciatory function that the penalty serves. The mandatory life sentence makes a strong statement that all murders, regardless of the circumstances, involve the intentional or reckless taking of a human life, and anything less than a mandatory life sentence does not adequately reflect the gravity of the crime. The taking of a life should consistently be met with our most serious sentence. It also provides for a degree of certainty both in terms of deterrence and for the families of murder victims. This view is based on the idea that murder is a unique crime, deserving of a uniquely harsh sentence. Further, if the life sentence is mandatory, one avoids the difficulties inherent in making distinctions between the taking of one life versus the taking of another.

However, the notion of one sentence for all murders fails to take into account that murders fall along a spectrum of moral culpability. While there are the Bernardos and the Olsons on one end of the continuum, and true mercy killers on the other, the vast majority of murderers lie somewhere between these two extremes. Both these extremes, in other words, are anomalies. A mandatory life sentence fails to acknowledge any range of culpability for different murders. The rigidity of the life sentence, and the corresponding inability to respond to the varying circumstances of murder, lead me to reject this option.

2. Discretionary life sentences

The second option is to retain life as the maximum sentence for murder, but to make it discretionary. Having life as a maximum, but not minimum sentence, assumes that murders differ in culpability. It provides judges with discretion to take into account the mitigating and aggravating circumstances in each case.

Underlying this option is the view that murder is not unique when compared to, for example, attempted murder and manslaughter. Both of these offences have a maximum life sentence with no mandatory minimum. How unique is murder? In terms of moral culpability, murder may be closer in culpability to attempted murder than to manslaughter. In fact, the *mens rea* for some attempted murders is more blameworthy than for murder. Whether an attempted murder becomes a murder may depend on the quality of medical care available, the pre-existing health of the victim, or even the accused's competence with firearms. Of course, this fails to take into account the central difference between murder and attempted murder,

that is, the causing of death. The punishment for murder must take that central fact into account.

Manslaughter shares with murder the causing of death, but it lacks the same degree of moral culpability. Both manslaughter and attempted murder have maximum life sentences, but the trial judge has the discretion to set the appropriate sentence up to and including life. Life imprisonment is reserved for the worst manslaughters and the worst attempted murders. Our sentencing regime for murder abandons this principle, perhaps on the implicit premise that all murders are the worst offence.

One advantage of this option is that if we reject the mandatory penalties for murder, we could also abandon some of the defences which have evolved to get around the harshness of sentencing for murder. Provocation is the most obvious example. Removing mandatory minimum sentences would enable judges to consider relevant factors at sentencing. Similarly, the informal defence of diminished responsibility, where judges use mental illness, short of that required for a mental disorder defence, to reduce murder to manslaughter would no longer be necessary. Arguably also, intoxication could be taken into account at sentencing, and not at the liability stage of a trial. Finally, the offence of infanticide, which some say was developed because juries refused to convict of murder women who killed their newly born children, could be abolished if sentencing for murder were sufficiently flexible.

While this option has obvious advantages, it also has potential problems. Should the sentence for murder be identical to that for manslaughter and attempted murder? Sentencing for each of these offences should take into account, among other things, whether the intent to take a life was present, and whether or not a life was taken. Only murder satisfies both these criteria. Attempted murder and manslaughter each has only one of these elements. If we have rejected the mandatory parole ineligibility periods, there is little left to differentiate the offences.

Currently, manslaughter and attempted murder need not result in a custodial sentence.¹⁴⁰ If the mandatory life sentence were repealed, it would be necessary to decide whether it should ever be possible to receive a suspended sentence with probation for murder. Would a non-custodial sentence ever be an adequate reflection of society's outrage at the intentional or reckless taking of a human life? If we wanted to avoid non-custodial sentences, it would be necessary to set a minimum penalty of

¹⁴⁰ Attempted murder has a mandatory minimum sentence of four-years imprisonment where a firearm is used in the commission of the offence.

some term of imprisonment. We would once again be faced with the difficulties of setting one minimum penalty for an offence with such a wide range of culpability.

However, even with the relatively low parole ineligibility period attached to life imprisonment, if life sentences were made discretionary, it is still likely that life imprisonment would be reserved for the most serious cases. The impact of this change might then be to push manslaughter and attempted murder sentences down, so as to maintain a distinction in culpability among the three offences. While this result is not necessarily bad, it is something we should do carefully and deliberately. Similarly, plea negotiations may be more difficult where all three offences have the same sentence.

It has been argued that it is necessary to abolish the mandatory life sentence for murder in order to treat fairly women accused of killing their abusive spouses. Women who kill abusive spouses in fear for their own lives should not end up with mandatory life sentences and harsh periods of parole ineligibility. However, in my view, the problem here lies primarily in our formulation of self-defence, in prosecutorial decisions about what charge to lay, and in plea negotiations. A woman who kills in fear for her life, after repeated physical violence, should be acquitted on the basis of a proper understanding of our law of self-defence. Furthermore, Crown prosecutors should be educated about the proper charge selection where a woman has been the victim of persistent abuse. Finally, it is necessary to ensure that such women are given competent legal counsel and are not coerced into plea agreements to avoid the harsh reality of a murder conviction. In my view, abolition of the periods of parole ineligibility will go a long way towards dealing with the plea negotiation problem in these cases. Women may be pleading guilty to manslaughter or even second-degree murder because of their fear of the harsh parole ineligibility periods associated with murder and, especially first-degree murder. Once these have been abolished along with degrees of murder, as recommended above, the pressure to enter into plea agreements when the woman has a legitimate defence, will significantly decrease.

Despite these considerations, it is still true that some female offenders will be advantaged by abolishing mandatory minimum life sentences. But it is equally true that women are more often victims of murder, after years of domestic abuse, than they are the killers of their abusive husbands. I acknowledge that treating their killers harshly may in fact do nothing to protect women in violent relationships. Men rarely contemplate the differences between murder and manslaughter when assaulting their spouses. But it is important, when domestic abuse escalates to murder, that it be considered very serious on the spectrum of murders.

In *The Law of Homicide*,¹⁴¹ I suggested that the life sentence for murder be retained. This view was criticized,¹⁴² and this criticism led me to re-think the issue. I started this article in order to argue for the abolition of the mandatory life sentence, and in favour of full discretion for the trial judge. However, in writing this article, I am still not convinced that this is the best option at the present time in history. On the one hand, retaining the mandatory life sentence has the possibility of imposing life imprisonment in the few cases where it is too harsh. On the other hand, giving trial judges absolute discretion risks trivializing some murders and treating them on par with attempted murder (in which no life is taken) and manslaughter (in which a life is taken unintentionally).

After struggling with this issue, I have concluded that the majority of murders deserve a life sentence, with its seven-year parole ineligibility period assuming that the first/second-degree classification is abandoned and that the harsh periods of parole ineligibility are abolished. However, I now believe it is important for the law to recognize that there will be cases where a life sentence with its seven years of parole ineligibility will be too harsh. The question then is whether the law should start from the position of a life sentence where exceptions from that have to be justified or whether life sentences should be the exception and not the rule. While I have not fully resolved this question in my own mind, the following presents one possible compromise between maintaining the existing regime and abolishing the mandatory life sentence altogether.

3. A compromise

In my view, some sort of compromise is necessary between always imposing a life sentence for murder and giving trial judges complete discretion; a compromise that will recognize the unique seriousness of murder on the one hand, and yet allow for flexibility on the other. One such compromise might be to impose a life sentence (with its corresponding seven-years parole ineligibility) as the starting point for murder, and to provide a mechanism for departing from that norm in cases where a life sentence would constitute a miscarriage of justice. This would be a statutory exemption, and not a constitutional one. It would require sentencing judges, before imposing a sentence for murder, to consider

¹⁴¹ *Homicide*, *supra*, note 8 at 7-82-7-83.

¹⁴² See, for example, P. MacKinnon, "Reflections on Homicide" (1995) 6 *Crim. L. Forum* 315; and H.A. Kaiser, "A Confluence of Authority and Critique" (1996) 19 *Dal. L.J.* 198.

whether or not a life sentence would constitute a miscarriage of justice in the circumstances of a case.

There are different variations on the exemption idea. It could be based on a recommendation from the jury or entirely within the discretion of the trial judge. In my view, this function is more appropriately a judicial one, as is the rest of sentencing. There should be no burden of proof on the accused to establish that a miscarriage of justice would result. This decision should be made at the discretion of the court, on consideration of all the evidence before it, submissions from both parties, a pre-sentencing report, and a victim impact statement.

This option does have the advantage of retaining some difference between the sentence for murder and that for manslaughter, without the rigidity of our existing regime. The starting point would be a life sentence for murder, but a means for departing from that starting point would be available, without resort to a constitutional exemption. The seriousness of murder could be recognized, without the rigidity of the existing regime.

What would a life sentence look like under this option? First, because the mandatory parole ineligibility periods would be abolished, the life sentence would have a parole ineligibility period of seven years. It would be possible to add murder to section 743.6, which would enable the trial judge to impose a period of parole ineligibility of up to ten years.¹⁴³

There are two further questions that would need to be addressed. First, in cases where a life sentence is departed from, should there be any minimum sentence? Second, are there any circumstances where a life sentence with a parole ineligibility period increased to ten years (assuming murder was added to section 743.6) would be inadequate? I argue that there should be no minimum sentence. Cases where life imprisonment is being departed from will likely be exceptional and will likely have unpredictable circumstances. Judges need an unfettered discretion to deal with such unusual circumstances.

The second question asks whether the maximum period of parole ineligibility should ever be raised above ten years. Do we ever need more than life imprisonment with no parole for ten years in order to adequately reflect society's denunciation? It is important here to distinguish between parole ineligibility and release. A period of ten years before being eligible for parole by no means guarantees the offender's release after ten years. Thus, the period of parole ineligibility is not a reflection of the appropriate sentence for the accused. It is simply the time before which the Parole

¹⁴³ See *supra* note 137 and accompanying text.

Board cannot consider the offender's case. In a certain respect, it is the denunciatory part of the sentence, that is, the part of the sentence that reflects society's outrage at the crime. The risk-prevention part of a sentence (*i.e.*, the determination of whether an offender will present a risk to society upon release) cannot be assessed by a judge years in advance. Risk assessment is more appropriately left to the Parole Board when release is under consideration. A judge is better placed to determine the sentence necessary to denounce the crime and seek retribution. For a crime as serious as murder, where the sentence is likely to be a long one, a judge's role should end there.

The question should be whether a life sentence with ten years of parole ineligibility is sufficient for the denunciatory part of the sentence, the expression of society's outrage, and the need for retribution. In my view, the answer will almost always be yes. There are some murderers, however, whose crimes are so terrible that they may deserve periods of parole ineligibility longer than ten years for adequate denunciation. Paul Bernardo and Clifford Olson come to mind as two obvious examples. The multiple murders committed by each of these men and the brutality and utter senselessness of their killings, cry out for periods of parole ineligibility greater than ten years. There are different ways of accomplishing this goal.

First, the dangerous offender legislation could be amended to include murder within its scope. The difficulty with this option under our existing law would be the conflicting periods of parole ineligibility. Currently, a dangerous offender is eligible for parole after seven years of imprisonment. This could be changed to provide an exception for murder, such that where the dangerous offender hearing is predicated on a murder conviction, the parole ineligibility period available for that crime (ten years under section 743.6) would govern in lieu of the seven years for the usual dangerous offender. The dangerous offender designation does not guarantee that such offenders will be incarcerated for more than ten years. It is more of a symbolic statement to the Parole Board, regarding the offender's dangerousness.

A second possibility would be to bypass section 743.6 for murder altogether, and to enact a separate provision for murder such that parole ineligibility could be raised to, for example, fifteen years, on a Crown application. In my view, the dangers of such a mechanism outweigh its benefits. The central danger is that it will be used too often, and that we will continue to see sentences for murder of life imprisonment with high periods of parole ineligibility. Unless we are going to adopt life without parole, at a certain point we are going to have to trust our Parole Board to keep such offenders imprisoned until they no longer present a risk to the public. As long as our system gives the Parole Board this power, it is

unnecessary to design our murder sentencing regime around our very worst, and admittedly unusual, offenders. Thus, I conclude that life without parole for seven years, which could occasionally be increased to ten years under section 743.6, is a harsh enough maximum sentence. This maximum, coupled with the authority resting in the trial judge to depart from the life sentence where its imposition would result in a miscarriage of justice, is a compromise designed to protect accused persons and victims.

IX. CONCLUSION

This article has argued for the abolition of degrees of murder and the harsh parole ineligibility periods under our existing regime. The former leads to arbitrary classifications, which may not reflect the increased culpability that goes with our most serious murders, and the latter results in longer periods of imprisonment than may be necessary to serve legitimate social objectives.

I have struggled with whether the mandatory life sentence should be abolished, and instead, I recommend a compromise. I believe that for most murders, life imprisonment and parole ineligibility for seven years is a reasonable penalty. Having said that, I also recognize that there will be cases where a life sentence is unjust. It is difficult, if not impossible, to set out in advance the conditions in which injustice could result. Rather than resorting to constitutional exemptions, I would support giving sufficient discretion to judges, such that they could decide, in each case, whether the life sentence would result in a miscarriage of justice. This option would retain life imprisonment as the norm for murder without imposing a heavy onus on an accused to depart from that norm.

I realize that some will criticize the retention of the life sentence as the starting point for murder, even with an escape clause. However, given that the Supreme Court of Canada has narrowed the definition of murder, it is important for our society to make a strong denunciatory statement about persons who intentionally or recklessly take the life of another human being. If we are concerned about mercy killings, there is the escape clause to deal with cases where justice demands lenience. Sentencing judges are well-positioned to make assessments about which sentences require a departure from the norm, having heard submissions from both sides. It will thus be up to judges to determine how frequently and under what circumstances this escape clause should be utilized. At the very least, those circumstances should be consistent with the general principles of sentencing

and the values reflected in section 718.2.¹⁴⁴ Thus, for example, murders based on hate for persons of a particular race or sexual orientation, or those committed pursuant to a pattern of spousal or child abuse, would not normally be considered for the exemption.

I also believe that this compromise is the next logical step in the reform of murder sentencing. In 1976, we moved away from the death penalty to our current regime (less some minor modifications). It is now clear that removing the death penalty has not increased the murder rate. To the contrary, that rate is declining. The compromise I propose is a significant step in the reform of sentencing for murder. I believe it is also more likely to be accepted by the public than simply putting murder sentencing on par with that of manslaughter and attempted murder.

Abolishing the mandatory life sentence for murder and allowing an unfettered judicial discretion may ultimately be the sentencing option we choose for murder. However, we may need to approach this result gradually. Experience with the regime proposed in this article could provide us with data with which to assess whether judges can use this more limited discretion appropriately. If so, then the public and legislators could be more confident in allowing judges more complete discretion.

Some will be concerned that any movement towards flexibility for murder sentencing will lead to an increase in the murder rate. We survived abolition of the death penalty with no increase in murder rates, and in fact saw a decrease. I am confident that we could also survive the above proposed regime.

¹⁴⁴ *Code, supra* note 4, s. 718.2.