A New Justification for Section 12 Hypotheticals and Two Rules for Constructing Them

Lisa Kerr and Michael Perlin*

I. INTRODUCTION

The legitimacy of the "reasonable hypothetical" device in the section 12 context is the subject of chronic debate and doubt, despite this device being an accepted part of the analysis in every case in which the Supreme Court has struck down a mandatory minimum. Critics argue that judges should stay focused on the live dispute before the court in a way that better aligns with traditional limits on the judicial role. They say that while courts have constitutional duties, those duties are not a freestanding role but rather a role that is tied to the adjudication of live disputes. They warn that when a court strikes a law based on a foreseeable prospect of unconstitutional application, the court has intervened prematurely.

Defenders of the approach point to the courts' responsibility to adjudicate the constitutional status of laws in the era of the *Canadian Charter of Rights and Freedoms*.[1] They say there is nothing exceptional or untoward about a court exploring the foreseeable effects of an impugned law in the context of a constitutional case, where what is at issue is the "nature of the law" and not the status of a single claimant.[2] Indeed, several public-law cases outside the section 12 context have examined laws based on their prospective unconstitutional effects. In *R. v. Heywood*, for example, the court held that the vagrancy offence in section 179(1)(b) was overbroad in violation of section 7 because its prohibition on loitering for certain sexual offenders could apply in a way that did not serve the purpose of protecting children.[3] The court sketched out a hypothetical scenario in which a

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* Lisa Kerr is Associate Professor at Queen's University, Faculty of Law. Michael Perlin is Crown Counsel with the Ontario Ministry of the Attorney General. In that capacity, he acted on a few of the cases discussed in this paper. The views he has contributed to this paper are shared in his personal capacity and do not necessarily reflect the views of his employer. Thanks to Benjamin Berger for very helpful conversations on the substance of the argument as well as important editorial assistance. Thanks to Assistant Crown Attorney Levi Vandersteen for sharing useful reactions to the ideas in this paper. Thanks to Ash Kamali-Fard for research assistance.

[1] *Canadian Charter of Rights and Freedoms*¸ Part I of the *Constitution Act*, *1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter the "*Charter*"].

[2] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 314 (S.C.C.), per Dickson C.J.C.

[3] *R v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.).

person could commit a single offence at age 18 and still be prohibited from attending a public park anywhere in Canada at age 65.[4] There are other examples of the Court testing the constitutionality of laws by exploring their foreseeable effects on people and entities not before the court, including cases where the law is upheld.[5] The point is that judges have consistently conducted this sort of inquiry in the process of *Charter* review.[6] This approach accords with their remedial responsibility under section 52(1), which is to declare laws that violate *Charter* rights — either in purpose or in effect — invalid.[7]

Today, the Supreme Court cites a long line of precedents to justify the practice of using reasonable hypotheticals to test the possible effects of mandatory penalties.[8] These precedents rest on the idea that the best justification for this approach is the courts' constitutional responsibility to explore the foreseeable effects of a law.[9] In this paper, we say there are additional convincing and practical reasons for the use of hypotheticals in the particular context of section 12, which the Supreme Court could do more to explain. These reasons are tied to the realities of the criminal

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[4] *R v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 799 (S.C.C.).

[5] See *e.g.*, *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59 (S.C.C.), in which the Court struck a provision in the *Immigration and Refugee Protection Act* that made it an offence to "organize, induce, aid or abet" people coming into Canada in contravention of the Act. The migrants before the Court were part of a for profit smuggling operation, but they challenged the constitutionality of the law based on its possible application to "humanitarian workers or family members assisting asylum-seekers for altruistic reasons" (at para. 10). See *e.g.*, *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.), which examined and upheld legislation addressing when accused persons should have access to private records of complainants and witnesses in sexual assault trials, based partly on reasonable hypothetical circumstances (at para. 41). See *e.g.*, *R. v. Ndhlovu*, [2022] S.C.J. No. 38, 2022 SCC 38 (S.C.C.), where the Court found lifetime sex-offender registration to be overbroad, in part through reference to a reported case in which a woman who had committed an offence against a child under her care no longer had access to the child or any other children, such that registration would serve no purpose (at paras. 88-90).

[6] Division-of-powers challenges also routinely involve an individual asserting not that their own rights have been infringed, but rather that a law is unconstitutional based on one level of government's entrenchment into the constitutional jurisdiction of the other level of government.

[7] See *R. v. Ferguson*, [2001] S.C.J. No. 7, 2001 SCC 6 (S.C.C.); see also Benjamin L. Berger, "A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law and R. v. Ferguson" (2009) 47 S.C.L.R. (2d) 101.

[8] See *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2, at para. 68 (S.C.C.) [hereinafter "*Hills*"].

[9] See *R. v. Nur*, [2015] S.C.J. No. 15, 2015 SCC 15, at para. 49 (S.C.C.) [hereinafter "*Nur*"]: "excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would "artificially constrain the inquiry into the law's constitutionality".

justice system and how mandatory penalties can shape penal outcomes in covert ways, apart from, and in addition to, delivering cruel and unusual punishment to individuals.[10] Courts are justified in checking the validity of penal laws by probing foreseeable applications, based on the theory that unconstitutional laws should not be permitted to shape legal outcomes.

Along with offering an additional justification for reasonable hypotheticals, we also try to address the perennial legitimacy struggles that this area of law attracts. We identify organizing principles guiding their construction that are equally grounded in the realities of our criminal law. In every case on this issue, the Supreme Court has repeated that hypothetical circumstances should be reasonable as opposed to "far-fetched or marginally imaginable".[11] The Court has been rightly concerned that, without appropriate restraint, "lawyerly ingenuity" will be the only limit to findings of unconstitutionality.[12] Unfortunately, these stated concerns only amount to vague warnings rather than concrete rules for lawyers who construct hypotheticals and judges who review them. We see that, in some respects, the practice of constructing hypotheticals has become untethered from its underlying task of exploring the foreseeable effects of a statutory provision. The point of the reasonable hypothetical device is to distinguish laws that will produce unconstitutional effects from those for which that outcome is only a speculative possibility. Litigants and judges need better tools to be able to effectively and consistently make that determination.

We argue that two rules would help. Rule #1: personal mitigating characteristics should be considered in the hypothetical. The law is now clear on this embattled point, and debate on this topic should accordingly cease. This is not, as some suggest, an opportunity for judges to construct the "perfect claimant".[13] It is more like an opportunity to take judicial notice of the fundamental reality of Canadian sentencing law: there are many common mitigating circumstances of offenders who appear before Canada's criminal courts.[14] Canadian courts consider how personal characteristics affect the sentencing calculus every day. Further, as we explain, the

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[10] We are focused here on arguments that are tied to the practical realities of how the criminal law operates. But for an excellent higher-level political theory argument about the legitimacy of mandatory minimums in terms of democratic values, see Jeffrey Kennedy, "Justice as Justifiability: Mandatory Minimum Sentences, Section 12, and Deliberative Democracy" (2020) 53:2 U.B.C. Law Review 351.

[11] *Hills*, at para. 78 (S.C.C.).

[12] *Nur*, at para. 75 (S.C.C.).

[13] Lauren Witten, "Proportionality as a Moral Process: Reconceiving Judicial Discretion and Mandatory Minimum Penalties" (2017) 48:1 Ottawa L. Rev. 81, at 88.

[14] Sentencing in the Canadian system is highly individualized, allowing judges to consider these personal circumstances in the analysis of a fit sentence. For the robust mode of "individualized proportionality" that he takes to define Canadian sentencing today, see Benjamin L. Berger, "Proportionality and the Experience of Punishment" in David Cole &

Supreme Court now understands the reasonable hypothetical approach as involving a full sentencing analysis of the hypothetical facts aimed toward identifying "the lowest fit sentence that is reasonably foreseeable"[15] for the offence. Since a full sentencing analysis requires consideration of the mitigating circumstances of the offender, it is evident that those circumstances have become a critical part of the section 12 analysis.

With our second rule, we suggest greater restraint. Rule #2: the hypothetical commission of the offence should generally involve scenarios that have close analogues in the jurisprudence, and, when departing from the jurisprudence, should not involve the coincidence of multiple discrete events. Novel hypotheticals should be straightforward scenarios (the accused shot at a building with a BB gun) not a collection of discrete events that only amount to a crime once spun together. Courts should understand this as largely a task of statutory interpretation, and should focus on the basic elements of the offence disclosed by the provision itself and related caselaw. Justice Lamer in the Supreme Court's first section 12 case, *Smith*,[16] struck the provision at issue because it was certain and inevitable that the hypothetical scenario would arise. While the Court in *Nur* and *Hills* has since rejected a more lenient standard than *Smith* — that the projected application of the law must be common or likely to arise[17] — there should still be meaningful limits on how hypothetical offence-scenarios are constructed. Advocates should rein in the specificity and creativity on display in cases like *Hilbach*, where the Court had to reject hypotheticals that would serve to delegitimize an already contested area of constitutional methodology.

In her reasons in *Nur*, McLachlin C.J.C. refers to "the exaggerated debate" that has surrounded the language of "reasonable hypotheticals" in the section 12 context. She refers to the fear that this approach means that any law can be struck down based on a particular judge's imagination. In describing this fear as "misplaced", McLachlin C.J.C. reminds us that what judges are doing is simply a task of statutory interpretation, central to the judicial role:

> Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.[18]

With this paragraph, notice how McLachlin C.J.C. invokes both a justification for

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Julian Roberts, eds., *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) at 368.

[15] *Hills*, at para. 95 (S.C.C.).

[16] *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.) [hereinafter "*Smith*"].

[17] *Hills*, at para. 79 (S.C.C.); *Nur* at para. 68 (S.C.C.).

[18] *Nur*, at para. 61 (S.C.C.).

reasonable hypotheticals — judicial responsibility to analyze a law's effects — while simultaneously counselling restraint in the construction of such hypotheticals. This paper similarly ties together the question of justification with that of construction. We argue that Rule #2 would fit well with this approach, as it tells counsel and courts to identify realistic scenarios that leave a court striking down a law confident that it is not acting on a speculative, unsteady foundation. In most past cases, this approach has been evident in the simple, realistic scenarios the Supreme Court has relied upon to disclose something meaningful about the scope of the impugned law. In *Smith*, the court looked at how the importing-narcotics minimum applied no matter the amount of the drug imported. In *Nur*, the focus was on how the possession offence could capture a lawful gun owner who makes a mistake as to where it can be stored. In *Lloyd*, the concern was that trafficking could be committed by merely sharing drugs with a friend.[19] It was not necessary in these cases to sketch out the opening scene of a novel, with multiple vividly rendered characters and surprising plot twists to come. Rule #2 tells us to focus on statutory interpretation, not creative writing.

The plan for the paper is as follows. Part II begins with a brief overview of the section 12 standard and methodology for adjudicating mandatory minimum penalties. We then outline the key points of scholarly and judicial debate on the topics introduced above, culminating in three Supreme Court decisions from 2023: *R. v. Hills*, *R. v. Hilbach* and *R. v. Bertrand Marchand*.[20] While these cases purport to settle debate, they do not explore the new justification we offer here: the ways in which mandatory minimums may improperly influence outcomes while evading judicial scrutiny. These decisions justify using personal characteristics in the construction of the hypothetical, and they articulate some limits on the creativity that will be tolerated. They lay the groundwork for a stable methodology for constructing hypotheticals, but they fall short of providing concrete guidance, particularly on the dividing line between appropriate and inappropriate fact scenarios. Part III of the paper is the heart of our contribution, where we lay out our promised argument on a new *justification* for the use of reasonable hypotheticals in the penal context, and two rules for their *construction*.

II. The *SMITH* ORIGINS: AN AIR OF UNREALITY?

When courts review the constitutionality of mandatory minimum penalties, they consider "reasonably foreseeable hypothetical" scenarios which could produce the application of the penalty. The idea is to test the constitutionality of a provision in foreseeable scenarios that are not currently before the court. The practice appeared in *R. v. Smith*, the first Supreme Court case interpreting section 12 in 1987, where the Court examined the validity of a mandatory penalty for drug importing.

The seven-year mandatory sentence at issue was not unfit for the offender before

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[19] *R. v. Lloyd*, [2016] S.C.J. No. 13, [2016] 1 S.C.R. 130 (S.C.C.) [hereinafter "*Lloyd*"].

[20] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26 (S.C.C.).

the court.[21] But Lamer J. observed that the offence provision at issue could conceivably catch a young person bringing a single joint across the border, for whom the mandatory minimum sentence of seven years would be grossly disproportionate. The Court did not say the words "reasonably foreseeable hypothetical" in *Smith*. Nor did it spend significant time trying to justify the approach.[22] Justice Lamer simply said that, given the reach of the provision, it was "inevitable" that a scenario would manifest in which the minimum sentence would be unconstitutional.[23]

Justice McIntyre dissented in *Smith*, noting an "air of unreality" because all parties accepted that an eight-year sentence was fit for the offender before the court. In his view, individuals should be confined to arguing that "*their* punishment is cruel and unusual and not to be heard to argue that the punishment is cruel and unusual for some hypothetical third party".[24]

In a sense, the original debate between Justices Lamer and McIntyre is still with us today.

The reasonable hypothetical device has been highly consequential. The ability to sketch out a version of offence and offender at the low end of moral blameworthiness is a powerful tool for *Charter* claimants. Indeed, in all cases in which the Supreme Court has declared a mandatory minimum invalid, that conclusion has been reached through hypothetical facts rather than the offender before the court. This should come as little surprise, given that prosecutorial discretion likely operates appropriately in most cases to avoid triggering a conviction for an individual that would see a grossly disproportionate penalty.

1. The Cases Over Time: Unceasing Controversy, Vague Guidance

The reasonable hypothetical device has always been the most controversial part of section 12 jurisprudence. Critics say this approach allows courts to stray beyond their legitimate role of adjudicating live disputes based on evidence placed on the record before the court.[25] But the debate was dormant for years after *Smith*, no doubt because section 12 did not result in any further mandatory minimums being struck down by the Supreme Court until 2015. In *R. v. Goltz*, the Court upheld a seven-day

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[21] *Smith* (S.C.C.), per Lamer J.

[22] *Smith*, at 1056 (S.C.C.).

[23] *Smith*, at 1056 (S.C.C.).

[24] Justice McIntyre, dissenting in *Smith*, at 1083-1084 (S.C.C.) (emphasis in original).

[25] For a collection of these critiques and a suggestion that concerns about the use of reasonable hypotheticals may be heightened outside of the s. 12 context that we are focused on here, see Debra Haak, "The Case of the Reasonable Hypothetical Sex Worker" (2022) 60:1 Alberta Law Review 205. For an example of the critique of the reasonable hypothetical device in media discourse, see Editorial Board, "A reality check on the Supreme Court's legal hypotheticals", *The Globe and Mail* (January 4, 2025).

jail sentence and a $300 fine for driving while prohibited.[26] Justice Gonthier for the majority observed that the scheme at issue ensured that only genuinely bad drivers would be prohibited in pursuit of deterrence and public safety. The penalty was not grossly disproportionate for the offender before the Court, whose case, Gonthier J. held, was highly representative of any foreseeable hypothetical. Justice Gonthier cautioned against constructing "far-fetched or marginally imaginable cases".[27]

In *R. v. Morrisey*, the Court upheld a four-year mandatory minimum for criminal negligence causing death using a firearm.[28] The offender conceded that the minimum was not grossly disproportionate for him personally. The Court then considered a hypothetical offender who was playing around carelessly with guns. The penalty was justified because it properly sent a message to take care when handling a potentially lethal weapon.

Scholars began to lament that the Supreme Court had upheld every other mandatory minimum penalty in the years following *Smith*.[29] By the time *Nur* was argued in 2014, the Crown apparently saw a chance to invite the Court to resile from *Smith*. It argued that the reasonable hypothetical methodology was an "attempt at compromise that proves unworkable in practice, produces unpredictable and inconsistent results, and provides little guidance for future cases".[30] It argued further that *Smith* was incompatible with the cases that followed it.

But the majority in *Nur* firmly declined the Crown's invitation to abandon reasonable hypotheticals. The majority struck down mandatory minimum sentences of three and five years, respectively, for the first and subsequent offence(s) of unlawfully possessing prohibited or restricted firearms that are either loaded or with readily accessible ammunition. The Court considered hypothetical scenarios in which the offence would look more regulatory than criminal, for which the minimum jail sentences would be clearly inappropriate.

Regarding the construction of reasonable hypotheticals, the *Nur* majority considered and rejected the Crown argument that the offender must be "generalized to the point where all personal characteristics are excluded".[31] The majority held that "personal characteristics cannot be entirely excluded" and said the appropriateness

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[26] *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.).

[27] *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485, at 506 (S.C.C.).

[28] *R. v. Morrisey*, [2000] S.C.J. No. 39, 2000 SCC 39, at paras. 53-54 (S.C.C.).

[29] Kent Roach, "Searching for Smith: The Constitutionality of Mandatory Minimum Sentences" (2001) 39 Osgoode Hall L. J. 367; Debra Parkes, "From Smith to Smickle: The Charter's Minimal Impact on Mandatory Minimum Sentences" (2012) 57 S.C.L.R. (2d) 149.

[30] *Nur*, Factum of the Appellant, Her Majesty the Queen (August 20, 2014), at para. 26 (S.C.C.).

[31] *Nur*, at para. 73 (S.C.C.).

of hypotheticals must be determined through "judicial experience and common sense".[32]

The Court in *Nur* embraced personal characteristics in a curiously tentative way, cautioning that the approach "excludes using personal features to construct the most innocent and sympathetic case imaginable"[33] and should not entail "remote or far-fetched examples".[34] Add to this that the majority, in discussing the types of personal characteristics that would be useful, gave examples that were really more like features of the hypothetical firearms offences at issue: the fact that someone "might come into innocent possession" of a firearm or may be mistaken as to the law on firearm possession.[35] In applying the reasonable hypothetical approach in *Nur*, the majority put forward bare bones scenarios (*e.g.*, "A person inherits a firearm and before she can apprise herself of the licence requirements commits an offence"). Additionally, the majority expressed a worry articulated by Doherty J.A. in the court below: that with a liberal approach to personal characteristics, "almost any mandatory minimum could be argued to violate s. 12".[36] Perhaps due to the equivocal aspects of *Nur*, subsequent cases attracted ongoing debate about what the Court really thought regarding the justification and construction of reasonable hypotheticals.[37]

One year later in *Lloyd*, a majority of the Supreme Court struck down the one year minimum for repeat drug trafficking. Like in *Smith* and *Nur*, in *Lloyd*, the penalty was not grossly disproportionate for the offender before the Court. But it was struck based on hypothetical offenders. The majority relied on a hypothetical drug-dependent person who shares a Schedule I drug with friends (rather than selling drugs for profit) and would face the minimum because of a prior conviction for sharing marijuana years earlier.[38] The majority also considered an addict with two trafficking convictions, both offences committed only to support his own addiction. Before sentencing, he has undergone treatment and has recovered,[39] but the mandatory minimum would require the judge to incarcerate him for one year.

Personal characteristics play a stronger role in *Lloyd* than in *Nur*: the individual trait of drug dependency features prominently in the hypothetical. The hypothetical offender in *Nur* was far less individualized in terms of mitigating personal

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[32] *Nur*, at para. 74 (S.C.C.).

[33] *Nur*, at para. 74 (S.C.C.).

[34] *Nur*, at para. 75 (S.C.C.).

[35] *Nur*, at para. 73 (S.C.C.).

[36] *Nur*, at para. 73 (S.C.C.).

[37] *Hills*, Factum of the Intervener, Attorney General of Ontario (August 5, 2022), at paras. 40-46 (S.C.C.).

[38] *Lloyd* (S.C.C.).

[39] *Lloyd*, at para. 33 (S.C.C.).

circumstances: an abstract person who committed a version of the offence that was on the regulatory end of the spectrum. Indeed, on one view, the hypotheticals in *Nur* were used only to explore the scope of conduct captured by the offence provision at issue, while the hypotheticals in *Lloyd* were a tentative step toward exploring more: personal characteristics relevant to the fit sentence — *i.e.* the motivations of the offender (a profit-seeking drug dealer vs. a social user or addicted user) and the relevance of certain sentencing objectives like specific deterrence (*e.g.*, the hypothetical offender's rehabilitation making further offending was less likely).[40]

2. Controversy Culminates: The Justice Wakeling Critiques in *Hills* and *Hilbach*

The next batch of mandatory minimum cases to reach the Supreme Court arrived in 2022 and 2023. *R. v. Hills* came from the Alberta Court of Appeal, where Wakeling J. launched a blistering critique of the reasonable hypothetical approach in his concurring opinion. To be clear, his views on section 12 and sentencing are highly idiosyncratic in several places and at odds with much of the jurisprudence.[41] His willingness to apply his own "personal method" rather than the law drew a strong rebuke from the Supreme Court majority.[42] We would add that his opinion is highly critical of prior section 12 decisions and decision makers in several places, going so far as to allege bad faith.[43] Often, his critique of the reasonable hypothetical device blurs together with his view that the standard for a section 12 breach should simply be far more difficult to meet.[44]

Beneath these features of his writing, Wakeling J. raises an important concern about reasonable hypotheticals:

> I suspect that most informed and reasonable Canadians would be aghast to discover

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[40] See the debate on the inferences to be drawn from the second hypothetical in *Lloyd* in the factums filed in *R. v. Hilbach*, [2023] S.C.J. No. 3, 2023 SCC 3, Factum of the Respondent, Mr. Zwozdesky, at para. 27 c.f. & Factum of the Intervener, Attorney General of Ontario, at para. 20 (S.C.C.) [hereinafter "*Hilbach*"].

[41] Including, to take just one example, his view that no custodial sentence can violate s. 12, because imprisonment is not an unusual method of punishment: *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263, at paras. 234-250 (Alta. C.A.).

[42] Justice Martin says the desire of both O'Ferrall and Wakeling JJ. to "excise" the use of reasonably foreseeable scenarios from s. 12 framework is "completely contrary to both precedent and principle" and "lacks merit" (*Hills*, at paras. 67 & 75 (S.C.C.)).

[43] To take just a few examples, Wakeling J. implies either bad faith or misrepresentation when he suggests that Lamer J. "knew" that the reasonable hypothetical in *Smith* would "never happen" (at para. 280); Justice Wakeling then says that the Court in *Smith* "completely ignored" that a responsible prosecutor would never charge the hypothetical offender with the offence provision at issue, before citing a paragraph in which the Court dealt with exactly that issue, albeit disagreeing with Wakeling J.'s analysis of it (at para. 255).

[44] See *e.g.*, the move from paras. 287-288 of his judgment, but this issue occurs throughout.

> that the Supreme Court has constructed a protocol that requires adjudicators to populate make-believe scenarios that must be monitored to ensure that they are not too far-fetched. Abstruse debates are not what one would expect to be a central part of an important constitutional decision-making apparatus. The debates surrounding the legitimacy of hypotheticals must jeopardize the public's confidence in the judicial branch of government.[45]

In our view, there is something to this point. We agree with Wakeling J. that judges ought not to engage in "make-believe" as they carry out this task. But we disagree with his suggestion that this is what the Supreme Court has allowed. Properly understood, analysis of a law's foreseeable effects is not a game of "make-believe". It is, rather, an exercise in statutory interpretation, at times aided by judicial notice, expert evidence, and the common law method.[46] This is ordinary judicial activity, as we describe more fully in our depiction of Rules 1 and 2 below.

3. The 2023 Cases: Hypotheticals Endorsed, Clarity on Personal Characteristics, Ongoing Ambiguity on Construing the Offence

In *Hills*, the Supreme Court majority struck down a four-year mandatory minimum for intentionally discharging a firearm into or at a place, knowing that, or being reckless as to whether, another person is present in the place.[47] Justice Martin's majority decision turned on the following hypotheticals, where a fit sentence would be a suspended sentence with one-year probation: (a) a young person intentionally discharges an air-powered pistol or rifle that is incapable of perforating the residence's walls toward a residence; and (b) a young person fires a BB gun or a paintball gun at a house as part of a game, to pass time, or for a bit of mischief. The constitutional problem evident in *Hills* was that the offence captures conduct that would not call for incarceration, let alone four years' imprisonment.

In *Hilbach*, the Supreme Court majority upheld minimums for a first offence of robbery using a firearm: four years for using an ordinary firearm, and five years for using a restricted or prohibited firearm.[48] The challenge to the four-year minimum was based on a series of hypotheticals, for which the majority identified fit sentences as low as 18 months. But the majority nonetheless upheld the mandatory minimums, largely because the offence(s) covered a narrow band of deliberate, harmful conduct.

Notably, the challenge in *Hilbach* to the five-year minimum involving a restricted

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[45] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263, at para. 263 (Alta. C.A.).

[46] It's important to notice, for example, that cases involving reasonable hypotheticals may rely on expert evidence placed before the trial judge. In *Hills*, for example, a firearms expert, called by the defence, tested eight different types of air-powered pistols or rifles and concluded that while they met the *Criminal Code* definition of a firearm, many of them were incapable of penetrating the wall of a house: see *Hills*, at para. 22 (S.C.C.).

[47] Sections 244.2(1)(a) and (b).

[48] Section 344(1)(a.1) with an ordinary firearm; s. 344(1)(a)(i) with a restricted or prohibited firearm.

or prohibited firearm was not argued based on reasonable hypotheticals. It focused on the young Indigenous man before the Court. Once again writing for a majority, Martin J. concluded that a fit sentence for the offence at issue was three years, but that five years was not grossly disproportionate to that. There were significant mitigating factors, including in terms of reduced moral blameworthiness due to *Gladue* factors and the negative impact of imprisonment on Indigenous people.[49] The trial judge who had struck down the penalty sought to keep this young Indigenous man out of the federal penitentiary, worried about the risk that he would be criminalized for life.

Two aspects of *Hilbach* help to understand Martin J.'s willingness to tolerate the gap between the fit sentences (18 months and three years) and the mandatory sentences (four and five years). First, Martin J. makes clear in *Hilbach* that the most constitutionally vulnerable mandatories will be those that displace a non-custodial sentence for jail. She distinguishes *Nur*, *Smith* and *Lloyd* on the basis that the provisions considered in those cases required custody where a far lighter penalty, including probation, could be appropriate.[50] In other words, the most vulnerable mandatories attach to offence provisions that are drafted broadly enough to capture situations that call for a sentence falling short of imprisonment. This is because of the profound qualitative difference between a community-based penalty and imprisonment. Second, and relatedly, both the fit sentence for Mr. Hilbach and the mandatory sentence entail lengthy periods of custody. The temporal gap between the fit penalties and the mandatory minimums is far greater in *Hilbach* than, say, in *Lloyd*. But the qualitative gap is, at least in one respect, less. *Lloyd* was a contrast between a year in jail and something far less than that, presumably non-custodial. Justice Martin observed that *Hilbach* involved no such qualitative contrast.[51]

In *Bertrand Marchand*, the Court struck down two mandatory minimums. The first required one year imprisonment for child luring prosecuted by indictment.[52] The majority considered a detailed hypothetical involving a young female teacher who texts a student and arranges to meet for sexual touching.[53] Justice Martin, again writing for a majority, held that a 30-day intermittent sentence would be fit, in light of diminished moral blameworthiness due to mental disorder and the primacy of rehabilitation and treatment for offenders whose mental illnesses contribute to their offending.

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[49] Justice Martin was clear that these factors properly carry "significant weight". (*Hilbach*, at paras. 62-63 (S.C.C.)).

[50] *Hilbach*, at para. 75 (S.C.C.).

[51] Of course, many would reply to Martin J. that there is in fact a significant qualitative contrast between the fit sentence of three years and the mandatory of five years: the mandatory entails release into the community at a far later date, whether on parole, statutory release or warrant expiry.

[52] See s. 172.1(2)(a) & s. 172.1(1)(b).

[53] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at para. 116 (S.C.C.).

The second mandatory in *Bertrand Marchand* required six months' imprisonment for child luring prosecuted summarily.[54] The majority considered a hypothetical 18-year-old who requests an explicit photo from his 17-year-old girlfriend and then shares the photo with someone else.[55] Here, Martin J. found a conditional discharge with six months' probation would be fit, in light of youth and the fact that the hypothetical was a first-time offender. Further, Martin J. emphasized that "*both* parties are young, close in age, and in a consensual relationship that shows no signs of the long-term exploitation or grooming that is involved in many child luring cases".[56] Justice Martin concluded that both mandatory minimums were grossly disproportionate to the fit sentences.

Again, with respect to the second hypothetical offender, note that the offence and offender called out for a six-month punishment, of the same duration as the six-month mandatory minimum under section 172.1(2)(b). Gross disproportionality was found in the qualitative change that the impugned law required: from probation to imprisonment.

III. NEW JUSTIFICATION

We will now draw from these 2023 cases to advance our new justification for reasonable hypotheticals along with two new rules for their construction. In *Hills*, Martin J. observes that hypotheticals are an accepted and appropriate tool, and she expresses a desire to lay some of the debate about them to rest. She says hypothetical scenarios are legitimate for three reasons: (1) they enable courts to discharge their constitutional responsibilities,[57] (2) they are more efficient than litigating individual case after case,[58] and (3) their use is settled law.[59]

We worry that these reasons, which are not new, will not succeed in putting controversy to rest. We worry that these reasons do not fully answer the question of why courts cannot just wait until a mandatory sentence actually produces an unconstitutional result: until a person actually stands to be *subjected* to cruel and unusual punishment. We offer an additional justification, tied to the ways a potentially unconstitutional mandatory penalty will inevitably shape penal outcomes in cases where the penalty will not produce a grossly disproportionate sentence for the offender before the court.

Justice Martin is of course right that the use of hypotheticals is settled law. The cases have consistently held that invalid laws must be declared of no force or effect

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[54] See s. 172.1(2)(b) & s. 172.1(1)(a).

[55] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at para. 119 (S.C.C.). (emphasis in original).

[56] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at para. 132 (S.C.C.).

[57] *Hills*, at para. 72 (S.C.C.).

[58] *Hills*, at para. 73 (S.C.C.).

[59] *Hills*, at para. 69 (S.C.C.).

because of their potentially unconstitutional effects on the basis that "it is bad for all of society for unconstitutional legislation to remain on the books".[60] The basic principle is that unconstitutional laws should not be enforced or allowed to dictate and shape criminal law outcomes. We agree with this concern but much more could be said about how it is engaged by unconstitutional mandatory minimum sentences. We explain how unconstitutional mandatory minimum sentences can dictate and shape penal outcomes in a variety of profound ways that can evade attention and scrutiny. If courts were limited to reviewing the constitutionality of mandatory minimums by only examining how they apply to individual offenders appearing before them, these effects would go unchecked. Using reasonable hypotheticals allows courts to ensure that only valid laws produce penal outcomes.

There are three dimensions to this new justification, all of which are grounded in the specific institutional realities of our criminal law. First is the way in which a mandatory minimum sentence can affect resolution discussions and plea bargains by shaping outcomes in ways that are not only insulated from judicial review but entirely invisible to the court. As we explore, a guilty plea may be entered precisely to avoid triggering a mandatory penalty. The sentence to be imposed will appear to raise no constitutional issue, despite being influenced by an unconstitutional law. The offender will be in no position to challenge the unconstitutional provision, which isn't even being applied to him and will not be canvassed when he enters his plea.

The Court could say more about those institutional dynamics, building on the crucial point from Palma Paciocco that mandatory minimums can have the effect of transferring discretionary power from judges to prosecutors.[61] One version of this kind of argument was briefly put to the court in *Hilbach* by the B.C. Civil Liberties Association ("BCCLA"), which argued that "removing reasonable hypotheticals from the analysis would allow unconstitutional mandatory minimums to be used as a cudgel to encourage accused persons to plead guilty to lesser offences".[62]

Indeed, the majority in *Nur* acknowledged how a mandatory minimum "creates an almost irresistible incentive for the accused to plead to a lesser sentence", which

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[60] *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38, at para. 96 (S.C.C.); *R. v. Albashir*, [2021] S.C.J. No. 48, 2021 SCC 48, at paras. 40-42 (S.C.C.); *Lloyd*, at para. 16 (S.C.C.). As Colton Fehr has put it: "allowing accused to employ reasonable hypothetical scenarios is more likely to further the purpose of the Charter: protecting citizens from abuse of state power". Colton Fehr, "Tying Down the Tracks: Severity, Method, and the Text of Section 12 of the Charter" (2021) 25 Can. Crim. L.R. 235, at 236.

[61] Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 81:3 Can. Crim. L. Rev. 241, at 242-243.

[62] *Hilbach*, Factum of the Intervener, British Columbia Civil Liberties (September 1, 2021), at para. 47 (S.C.C.).

can be misused by prosecutors.[63] The majority cited this concern to explain why they rejected Moldaver J.'s argument that prosecutors could be trusted to elect to proceed summarily if a grossly disproportionate mandatory minimum would apply if the offence was prosecuted by indictment. The risk that mandatory minimums will encourage guilty pleas in a way that avoids judicial scrutiny is a reason to test mandatory minimums with reasonable hypotheticals, rather than leaving them on the books.

To be clear, although the *Nur* majority was concerned about prosecutors abusing their authority, we are not suggesting that Crown prosecutors are in the habit of threatening an offender with a charge attracting a mandatory minimum in order to extract a guilty plea. But the scenario we worry about, in which resolution discussions are affected by a mandatory minimum penalty, can manifest more subtly. Consider the offence of robbery. Section 344(1)(a) provides that if a restricted or prohibited firearm is used in the commission of the offence, a minimum punishment of five years applies. If no such firearm is used, there is no minimum penalty. The Crown's ability to prove beyond a reasonable doubt that a firearm was used may well be a live issue during plea negotiations. During these discussions, the defence may present a plea to robbery without an admission that a firearm was used.

A sensible prosecutor will reflect on whether it will be able to prove the use of the firearm or that the firearm was prohibited or restricted. Perhaps the firearm was never recovered, or the case involves a secondary party whose knowledge that a firearm would be used may be difficult to show. In any event, there is no doubt that the resolution process would be lubricated by a Crown's willingness to drop that issue. Legitimate concerns about the ability to prove an essential element relating to the firearm might weigh in favour of the Crown accepting a guilty plea to a reduced charge (assuming that option is available under Crown policy),[64] and have the effect of taking the mandatory minimum off the table. The defence may be keen to accept, aware of the greater jeopardy that could follow on a trial that includes the firearm issue.

Another example could arise in a murder prosecution. A conviction for murder attracts a life sentence with a minimum period of parole ineligibility. In many instances, a conviction for manslaughter attracts no minimum sentence. The interest in avoiding the minimum sentence for murder might encourage some accused persons to plead guilty to manslaughter rather than trying to rely on a potentially legitimate complete defence to the alleged crime — like a claim of self-defence. The case of Helen Naslund is a rich illustration.[65] Ms. Naslund killed her abusive

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[63] *Nur*, at paras. 92, 95-96 (*per* McLachlin C.J.C.) and para.169 (*per* Moldaver J., dissenting).

[64] See, *e.g.*, Ontario, Crown Prosecution Manual, s. D. 14: Firearms, online: <https://www.ontario.ca/document/crown-prosecution-manual/d-14-firearms>.

[65] *R. v. Naslund*, [2022] A.J. No. 32, 2022 ABCA 6 (Alta. C.A.).

husband and faced a charge of first-degree murder with a mandatory life sentence. She pleaded guilty to manslaughter in exchange for the Crown agreeing to a sentence of 18 years' imprisonment. On review, Greckol J. concluded that the sentence was unduly harsh because it failed to account for the fact that Ms. Naslund was a "battered woman" who, having endured a physically abusive 27-year marriage, committed the killing with at least a degree of self-defence. It seems clear from her sentence appeal that Ms. Naslund could have advanced self-defence at a trial of these charges, but chose not to do so, to avoid the risk of the mandatory life penalty. Mandatories shape outcomes even when they are not imposed, because the presence of a mandatory penalty influences the resolution process.

Of course, the mandatory minimums for robbery-with a firearm and murder discussed above are among the few that have been upheld.[66] But this scenario can play itself out with other offences that have minimum sentences. It is essential to ensure that a mandatory minimum, which is undoubtedly shaping outcomes even in cases where it does not officially apply, itself is constitutional. Reasonable hypotheticals can be used to answer that constitutional question.

An unconstitutional penal law allowed to operate can shape outcomes in another way. In many cases, an offender is not able to show that a mandatory minimum produces a grossly disproportionate sentence for him, though it may well be that the sentence it produces for him is unfit.[67] *Hilbach* makes it clear just how much a mandatory minimum (in that case, of four years) can inflate a fit sentence (18 months) without reaching the high standard of gross disproportionality.[68] The BCCLA noted this concern in its factum in *Hilbach*: "without reasonable hypotheticals, an offender whose sentence was 'merely excessive' . . . would be sentenced to a lengthier carceral term than was 'fit', due solely to the mandatory minimum punishment".[69]

An unfit (but not grossly disproportionate) sentence does not offend section 12. That said, it is constitutionally objectionable for an unconstitutional law to be applied by the courts, even in cases where its effects are not unconstitutional. This legal outcome, an unfit sentence, should not be dictated by an unlawful enactment. The goal of preventing this outcome justifies considering reasonably foreseeable scenarios. The reasonable hypothetical approach allows offenders to test whether a law should be permitted to have such a profound effect on their liberty. In *Hilbach*, of course, the law withstood the test.

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[66] See *Hilbach* (S.C.C.) and *R. v. Luxton*, [1990] S.C.J. No. 87,[1990] 2 S.C.R. 711 (S.C.C.).

[67] This possibility rests on the fact that the standard of gross disproportionality under s. 12 is considerably higher than the standard of fitness which guides trial judges as well as the standard of demonstrably unfit which guides appellate intervention.

[68] *Hilbach*, at paras. 92-93 & 108 (S.C.C.).

[69] *Hilbach*, Factum of the Intervener, British Columbia Civil Liberties Association (September 1, 2021), at para. 44 (S.C.C.).

A final aspect of this justification for reasonable hypotheticals is attentive to the social realities of criminal law, and specifically the barriers that many offenders face in bringing a *Charter* challenge to *Criminal Code* provisions. As the Criminal Lawyers' Association put it in their factum in *Hills*: "many offenders do not have the wherewithal, the means or the stomach for a protracted, costly, and stressful challenge to a mandatory minimum sentence".[70] Challenging a provision will add considerable delay, cost, and complexity to a proceeding. Bringing a section 12 challenge to even a patently dubious sentencing law will be a mountain that is very often too difficult to climb. This is another practical reason to allow litigants to test the reach of laws through arguments about prospective effects.

To summarize, our argument here is that the problem with an unconstitutional mandatory minimum is not just that it will *one day* apply to an offender for whom it will be grossly disproportionate, in violation of section 12. We recognize that the response from critics to that narrow worry is as follows: why not just challenge the outcome in that particular case and at that particular time, especially if you are so certain it will manifest? We say that the problem is a more significant one, with broader effects, which can be seen when one turns to the institutional and social realities of the criminal justice system. The problem is that a questionable provision can continue to have real effects along the way while being insulated from review. Unconstitutional laws should not be permitted to influence conduct or outcomes.

Notice that our arguments may fit with the textual account of section 12 offered by Wakeling J. in *Hills*. He emphasized that the language of the provision requires exposure to the law at issue: "everyone has the right not to be *subjected* to any cruel and unusual punishment".[71] Of course, Wakeling J. wants to put an end to the reasonable hypothetical device with this emphasis. But notice how we are similarly focused on the way in which a law may be delivering real effects, which we show by way of attention to how the criminal justice system operates. We agree that everyone has the right not to be exposed to or *subjected* to a law that allows cruel and unusual punishment.

The Supreme Court observed in *Smith* that mandatory minimums make it more likely "that an accused will plead guilty to a lesser or included offence".[72] Our view is that this and the related concerns we have discussed should feature prominently in any discussion of the merits of using hypothetical scenarios in section 12 analysis. The Supreme Court could take up these points as a way to do more to try to convince skeptics: those who see the use of hypothetical scenarios as a needlessly radical and premature way of analyzing the validity of laws in the adversarial legal system. The skeptic must be told about the trouble that mandatories can cause in cases where

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[70] *Hills*, Factum of the Intervener, Criminal Lawyers' Association of Ontario (August 30, 2021), at para. 22 (S.C.C.).

[71] *Hills*, at para. 136 (S.C.C.) (emphasis added).

[72] *Smith*, at 1080-1081 (S.C.C.).

they don't even appear on the face of the disposition of a case and how this is unacceptable if the mandatories themselves are not even valid.

1. New Rules for Construction

(a) Rule #1

We argue for two related principles that must guide how we construct hypothetical scenarios to consider a mandatory minimum's foreseeable effects. Rule #1: personal mitigating characteristics can be considered. The law is now clear on this historically contested point.

Rule #1 reflects and emerges from a shift in the focus of the reasonable hypothetical tool. At an earlier stage of the jurisprudence, hypotheticals were primarily used to elucidate the scope of conduct captured by the provision, a task for which personal characteristics offer little assistance. But in *Hills*, Martin J. subtly shifted the analysis in a way that now clearly justifies their use.

The change is evident by comparing the Court's approaches *Nur* and *Hills*. In *Nur*, the majority referred to hypotheticals as a device designed to show "the sort of situations", "minimum conduct", "kind of conduct" and "situations" caught by the law. The language suggested hypotheticals were focused on the breadth of the law — exploring whether a law is so broad that it includes conduct not properly subject to the minimum sentence. The majority considered a hypothetical scenario, and, without identifying a particular fit sentence to the scenario,[73] held that the mandatory minimum three-year sentence would be "grossly disproportionate to the sentence the conduct would otherwise merit". While the majority in *Nur* accepted that personal characteristics "cannot be entirely excluded", the characteristics employed in the hypothetical were bare bones. The Court gave as examples of permissible characteristics "the fact that an offender . . . might come into innocent possession of the prohibited or restricted firearm, or be mistaken as to the scope of the prohibition".[74] These factors speak to the blameworthiness of the conduct, not mitigating personal characteristics like age or the absence of a criminal record that would mitigate in all cases.

With *Hills,* the Court embraced a different purpose and approach to reasonable hypotheticals. Their purpose was no longer about exploring the scope of conduct captured by the law, but became "to test the limits of the scope of application of a mandatory minimum" by identifying "the lowest fit sentence that is reasonably foreseeable".[75] In this approach, the analysis does not culminate in a comparison between conduct and the minimum sentence. An additional step is inserted: we take the conduct, analyze it to determine the fit sentence for that conduct, and compare

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[73] The majorities in *Smith* and *Lloyd* also did not identify fit sentences for the hypotheticals they considered.

[74] *Nur*, at para. 74 (S.C.C.).

[75] *Hills*, at para. 179 (S.C.C.).

the fit sentence and the mandatory sentence. To do this, Martin J. writes, courts must determine a fit sentence for the hypothetical as precisely as possible.[76]

Once this subtle shift is made to require a complete sentencing of the hypothetical, the full range of mitigating personal characteristics that might reasonably coincide in a given case becomes essential to the analysis. Sentencing cannot be completed without looking at both the circumstances of the offence, and the degree of responsibility of the offender, both of which can be affected by mitigating personal characteristics (sections 718.1 and 718.2(a)). Canadian sentencing law is highly discretionary and attuned to individual circumstances. Not a day passes in Canadian sentencing courts without judges considering the ways in which youth, racial disadvantage, Indigeneity, poverty, and mental illness can affect the question of a just sentence; offenders with "some or all of these characteristics appear with staggering regularity in our provincial courts".[77] Any trial judge who deals with criminal law matters could recite these traits at a moment's notice. Police, lawyers and judges all know that these personal characteristics are part of the structural disadvantage that gives rise to heightened risk of involvement in the criminal justice system,[78] and the law is clear that these factors serve as mitigating in the proportionality analysis. Since we now understand the purpose of the hypothetical is to uncover the lowest fit sentence an offence provision will be expected to generate, courts should consider highly common scenarios in our justice system as concrete guidance on the extent to which personal characteristics should be included in the analysis.

The move in *Hills* to an approach involving a full sentencing analysis builds on past cases. As noted above, one hypothetical in *Lloyd* included personal characteristics, related to addiction and recovery, that may be seen to speak to mitigation without reference to the scope of the conduct captured by the provision. Yet the *Lloyd* majority did not conduct a full sentencing analysis or arrive at a particular sentence for the hypothetical. Later, in *Boudreault*, the Court used personal mitigating characteristics to show how a facially neutral law requiring a minimum financial penalty for every criminal finding of guilt was adversely affecting many. Consistent with the approach Martin J. later adopted in *Hills*, in *Boudreault*, she expressly considered what the fit sentence would be for the hypothetical at issue.[79] In the 2023 decisions, Martin J. tied these threads together to explicitly adopt an approach involving a complete sentencing. Since you cannot properly sentence

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[76] *Hills*, at para. 94 (S.C.C.).

[77] *R. v. Boudreault,* [2018] S.C.J. No. 58, 2018 SCC 58, at para. 55 (S.C.C.).

[78] In *Lloyd*, the intervener African Canadian Legal Clinic put the point this way: "every criminal lawyer in a major urban centre is aware that courts consistently deal with cases involving African Canadian offenders that face systemic barriers and personal disadvantage that have contributed to their arrest, drug dependency, and involvement in low end drug deals. . ." (Intervener Factum December 18, 2015), at para. 14).

[79] *R. v. Boudreault*, [2018] S.C.J. No. 58, 2018 SCC 58, at paras. 56-58 (S.C.C.).

someone without considering mitigating factors, personal mitigating characteristics have became an essential part of the analysis.

The strongest point on this front — which, we suggest, should routinely be included when developing hypothetical scenarios — is likely the factor of Indigeneity. The majority in *Hilbach* repeats the holding in *Nur* that courts may consider hypothetical scenarios involving Indigenous offenders, which "aligns with the imperative statutory guidance provided by Parliament in s. 718.2(e)".[80] As the court recognized in *Boudreault*, Indigenous people dealing with poverty, precarious housing, disabilities, and addictions appear regularly in provincial courts.[81] Given the systemic conditions that produce social instability and offending, along with the reality of systemic discrimination, it is all too reasonably foreseeable that sentencing courts will continue to encounter a disproportionate share of Indigenous people at sentencing.

Rule #1 is now clearly the law, and debate about this issue should accordingly cease. What's more, the holding in *Hilbach* that the robbery-firearm minimums were constitutional lays to rest a major critique of the use of personal characteristics: the suggestion that all mandatories will be struck down if sympathetic mitigating characteristics are included. Justice Doherty's prediction in *Nur* that the inclusion of mitigating personal characteristics would spell the end of all mandatory minimums has not been borne out.

(b) Rule #2

For Rule #2, we argue that the hypothetical commission of the offence should generally involve scenarios that have close analogues in the jurisprudence, and when departing from the jurisprudence should not depend on the coincidence of multiple discrete events. The hypothetical facts of the offence should be limited to the conduct and mental elements that are apparent in a straightforward reading of the provision or governing caselaw.[82] Highly unusual fact patterns regarding the commission of the offence are not reasonably foreseeable and do not appear regularly — or ever — in courts. They should not be put forward or used to test the validity of a mandatory minimum.

This issue has received differing treatment over the years in terms of the standard that must be met. *Smith* reasoned that it was legitimate to consider prospective applications of mandatory minimums only where it was certain or inevitable that

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[80] See *Hilbach*, at paras. 40 & 43 (S.C.C.); *Hills*, at para. 86 (S.C.C.).

[81] *R. v. Boudreault*, [2018] S.C.J. No. 58, 2018 SCC 58, at para. 55 (S.C.C.).

[82] We acknowledge that in Canadian criminal law, the "basic elements of the offence" are often not readily apparent from the face of a *Criminal Code* provision and that a great deal flows from how offences are constructed by courts. But the fact that offence interpretations are contested and change over time, or that new offences are added to the *Code,* does not affect our claim here: that courts analyzing a mandatory penalty should look primarily to the provision and related caselaw in order to discern its elements according to the prevailing law.

they would arise and generate a grossly disproportionate outcome.[83] In *Morrisey*, the majority held that hypotheticals must involve "common examples of the crime".[84] The *Nur* majority expanded the range of conduct that could be considered, rejecting an argument that hypotheticals should be limited to "situations that are likely to arise in the general day-to-day application of the law"; *Nur* held that the situation need not be "common or likely".[85] At the same time, the majority used language that sought to limit the scope of what could be considered: "[l]aws should not be set aside on the basis of mere speculation"; and "far-fetched or remotely imaginable examples" must be excluded.[86] In *Hills*, Martin J. held that, while the scope of the offence can be explored, "straining each and every constituent element by fanciful facts is not helpful".[87]

We argue that these comments, while expressed in different terms, speak to the same fundamental point: a hypothetical is reasonable (and a legitimate tool to test a law's constitutionality) if the court has some confidence in the situation arising.

The Court has been inconsistent, however, on the degree of confidence required. When will a scenario become speculative or far-fetched?

The framing drawn from *Smith* — the scenario must be inevitable — has some appeal: it is the inevitability of a future *Charter* breach that justifies immediate remedial action. We strike the law now on the basis that it would be harmful to allow the law to operate while we wait for a scenario that will someday occur. As our confidence that a scenario will occur declines, the concerns regarding make-believe scenarios become increasingly cogent.

That said, we acknowledge that inevitability that a situation will arise would be a punishing standard for applicants to meet, and is one that has been rejected by the Court. The majority in *Nur* departed significantly from the *Smith* standard in holding that hypothetical scenarios need not even be likely. This aspect of *Nur* has been affirmed in *Hills*.[88] The law is clear that the scenario need only be reasonably foreseeable.

In our view, in identifying scenarios and assessing whether they are reasonably foreseeable, courts should start with the facts of reported cases. Chief Justice McLachlin spoke to how courts should do so in *Nur*: "The judge may wish to start with cases that have actually arisen . . . and make reasonable inferences from those cases to deduce what other cases are reasonably foreseeable".[89] We would go further

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[83] *Smith*, at 1053-1054 & 1078 (S.C.C.).

[84] *R. v. Morrisey*, [2000] S.C.J. No. 39, 2000 SCC 39, at paras. 30-33 & 50-54 (S.C.C.).

[85] *Nur*, at paras. 67-68 & 72 (S.C.C.).

[86] *Nur*, at paras. 57, 62 & 75 (S.C.C.).

[87] *Hills*, at para. 83 (S.C.C.).

[88] *Hills*, at para. 79 (S.C.C.); *Nur*, at para. 68 (S.C.C.).

[89] *Nur*, at para. 22 (S.C.C.).

to add that courts should be skeptical about scenarios that have no close analogues in the jurisprudence, particularly for commonly-committed offences.

Obviously, though, new situations will arise. As such, courts should not be bound strictly to reported cases. However, in assessing whether it can be said that a novel situation is reasonably foreseeable, courts should be wary of accepting complex new scenarios, particularly ones that depend on a confluence of numerous discrete events. Each "plot twist" added to a hypothetical must make it that much more improbable and speculative, and that much less appropriate a basis on which to set aside a law.

There is a great deal in *Hills* that supports our idea of Rule #2.[90] Justice Martin held that the reasonably foreseeable scenario must fall within the scope of the offence and "not stretch or strain its constituent elements".[91] She warns counsel about stretching the imagination too far, reminding us that this warning was also contained in *Nur*.[92]

The way that Martin J. applied the analysis in *Hilbach* also suggests that the Court is interested in reining in the scope of hypotheticals. *Hilbach* was argued and decided with a companion case, *Zwozdesky*, which considered the penalty of four years for robbery using an ordinary firearm.[93] *Amicus* in this case raised five detailed scenarios where the mandatory minimum is allegedly grossly disproportionate. The following three scenarios were rejected by the court:

(1) Eric, a licensed firearm owner, is an 18-year-old student in Grade 12 at a high school in small-town Alberta. His teachers describe him as "a nice kid, but not the brightest bloom in the canola patch". He lives on a farm with his parents. He and a friend are out hunting on his family's land near the Pembina River. He finds two hunters skinning a deer. He knows from town gossip that one of the men has a prior *Wildlife Act* conviction for poaching. He confronts them and tells them they do not have permission to be on the land. Eric tells the trespassers: "Give me your hunting tags and get out of here." No response. Eric lifts his hunting rifle in the air for effect but does not point it at them. The men hand over their tags. Eric destroys the tags. The men leave. Eric takes the deer. The RCMP arrest him at school the next day. Eric admits he was wrong to take the deer and

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[90] *Hills*, at para. 77 (S.C.C.): (1) The hypothetical must be reasonably foreseeable; (2) Reported cases may be considered in the analysis; (3) The hypothetical must be reasonable in view of the range of conduct in the offence in question; (4) Personal characteristics may be considered as long as they are not tailored to create remote or far-fetched examples; and (5) Reasonable hypotheticals are best tested through the adversarial process.

[91] *Hills*, at para. 151 (S.C.C.).

[92] *Hills*, at para. 91 (S.C.C.).

[93] This penalty provision was upheld in *Hilbach* but was repealed between the hearing and judgment in *Hilbach*.

the hunting tags, even if the deer was shot on his family's land.

(2) Danielle, a 19-year-old street youth with a drug addiction, is trafficked in sex work by her boyfriend. Her boyfriend carries a gun, which she knows as he has recently used it to threaten her. They decide to shoplift cheese and razors from a grocery store. When stopped by a security guard, Danielle shouts, "Out of our way — he's got a gun!" The gun is not produced, but police find the weapon in her boyfriend's waistband when the pair are later arrested.

(3) Chahid, a 19-year-old youth and refugee from a war-torn country, has learning difficulties and post-traumatic stress disorder. On a walk, his friend approaches two people at a bus stop, flashes a handgun in his waistband and demands their cellphone, which they turn over. Chahid was unaware his friend had a gun before this moment and unaware that his friend planned a robbery. Nevertheless, he keeps a "nervous lookout". As it happens, the police are nearby and move to intercede. Chahid tells his friend to run, but the two are arrested. At sentencing, Chahid has completed high school, entered a post-secondary trade program, and supports himself with manual labour. A sentence above six months would place him at risk of deportation. He pleads guilty as a party to the offence.[94]

The *Hilbach* majority held that these three hypotheticals serve to demonstrate "more about the imagination of counsel" than the true scope of the provision.[95] It said there is "little use in evaluating the impugned provision based on outlandish scenarios on the theory that the imagined scenarios may happen one day". The Eric scenario was technically within the scope of section 344(1)(a.1), but it was far-fetched and marginal.[96] Regarding Chahid, the situation barely satisfied the criteria of an aider or abettor under section 21(1) of the *Criminal Code*; it likely involved conduct that would likely fall outside the ambit of the provision.[97] The scenarios involving Danielle and Chahid stack multiple mitigating personal characteristics alongside the most marginal iterations of the offence to construct the "most sympathetic offender" imaginable.[98]

These examples also run afoul of the caveat we would require for courts considering novel circumstances not derived from reported cases. Each scenario turns on multiple discrete events that come together to produce the offence. Eric's decisions are influenced by his personal background, by happening to come across

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[94] *Hilbach*, Factum of the Respondent, Mr. Zwozdesky (July 28, 2021), at para. 73 (S.C.C.).

[95] *Hilbach*, at para. 89 (S.C.C.); see also *Hills*, at para. 83 (S.C.C.).

[96] *Hilbach*, at paras. 88-89 (S.C.C.).

[97] *R. v. Briscoe*, [2010] S.C.J. No. 13, 2010 SCC 13, at para. 18 (S.C.C.).

[98] *Hilbach*, at paras. 88-89 (S.C.C.).

men apparently committing an offence, by happening to have knowledge about those men, and by the men happening to respond in a particular way when confronted. The scenario is too specific and too contingent on discrete events to be reasonably expected to arise in the future. If the facts of the Eric situation do arise in the future, it would be a remarkable coincidence.

The *Hilbach* majority agreed that two final hypotheticals, involving "Brian" and "Adam", were reasonably foreseeable.[99] Brian was based on a reported case.[100] Both involved young Indigenous men and relied heavily on mitigating personal characteristics, which we endorsed as legitimate under Rule #1. In terms of the commission of the offence, the important fact was that the offence allows ordinary firearms to be used, which can cover an unloaded BB gun or airsoft pistol. Adam involved the robbery of a drug dealer by a person suffering from mental health and addiction challenges. An air-powered pistol may be a relatively uncommon firearm to use for this offence, but it is used in robberies. This, in our view, is the pertinent part of the commission of the offence in terms of the scope of conduct it may capture and how it may permit a spectrum of moral blameworthiness. A simple reasonable hypothetical can highlight this issue.

Turning to *Bertrand Marchand,* the Court's approach may at first blush be seen as a departure, but it is in fact consistent with Rule #2 as we have described it. The Court considered two hypothetical instances of child luring.

The Court analyzed the one year minimum under section 172.1(2)(a) (luring, prosecuted by indictment) by reference to these facts:

> The representative offender is a first-year high school teacher in her late 20s with no criminal record. The offender has been diagnosed with bipolar disorder. One evening, she texts her 15-year-old student to inquire about a school assignment. Feeling manic, she directs the conversation from casual to sexual. The two meet that same evening in a private location where they both participate in sexual touching. The offender does not engage inappropriately with the student on any further occasions. The offender pleads guilty and expresses remorse on sentencing.[101]

This detailed scenario might appear to go too far. It involves a seemingly improbable series of events coinciding to establish the constituent elements of the offence. However, in determining this scenario was "not far fetched and falls squarely with the scope of the offence", Martin J. noted that the scenario was based on a real case of a teacher diagnosed with bipolar disorder who had engaged with several victims. The key modification in the hypothetical was reducing the number of victims to one. The conduct considered in the hypothetical had formed the basis of charges. It was reasonably foreseeable because it had actually happened. We agree that reported cases are fair game.

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[99] *Hills*, at para. 85 (S.C.C.).

[100] *R. v. Smart*, [2014] A.J. No. 835, 2014 ABPC 175 (Alta. Prov. Ct.).

[101] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at para. 116 (S.C.C.).

The Court analyzed the six-month minimum under section 172.1(2)(b) (luring prosecuted summarily) by reference to these facts:

> The representative offender is an 18-year-old who is in a romantic and sexual relationship with a 17-year-old. In one text, the offender asks her to send him an explicit photo. She does, and he then forwards that photo to his friend without his girlfriend's knowledge. This friend, who is also 18, does not transmit this photo to anyone, but retains it on his mobile phone.[102]

This hypothetical is not rendered as vividly as the first one considered in *Bertrand Marchand*. While it is detailed, we agree with Martin J. that the scenario is reasonably foreseeable. As she observed, the practice of teenagers sending one another sexualized photos "is commonplace enough that the term 'sexting' has grained mainstream recognition".[103] This hypothetical is appropriate, in that it depicts a straightforward scenario, like the ones considered in *Nur*, not a collection of discrete events that only amount to a crime once spun together.

In our view, this hypothetical is problematic for another reason: it relied on a statutory pathway not at issue in the appeal. In *R. v. Brown*, the unanimous Supreme Court held that when assessing a mandatory minimum that attaches to an offence that can be committed through different statutory pathways, the constitutional analysis should focus on the pathway at issue. *Brown* considered the mandatory minimum for using a firearm to commit an indictable offence. The accused (whose underlying indictable offence was robbery) sought to rely on a hypothetical involving mischief. The Court rejected the hypothetical as unreasonable and upheld the mandatory minimum "when the underlying offence is robbery", but declined to answer whether it would do so for "other potential underlying indictable offences" that were "not at issue".[104]

The offence of luring considered in *Bertrand Marchand* also includes many statutory pathways. It requires proof of an act of luring for the purpose of committing any one of several listed secondary offences. The facts before the Supreme Court involved two people who had engaged in luring for the purpose of committing hands-on offences, presumably the listed secondary offence of sexual interference (section 151(a)).[105] Yet the second hypothetical the majority considered

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[102] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at para. 119 (S.C.C.).

[103] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at para. 121 (S.C.C.).

[104] *R. v. Brown*, [1994] S.C.J. No. 95, [1994] 3 S.C.R. 749 (S.C.C.). This approach allows courts to focus on the narrow problem actually at issue, and to grant an appropriately tailored remedy. If a particular statutory pathway results in a *Charter* breach, the court might be able to "read down" the minimum sentence so that it no longer applies to that offending pathway. See *Ontario (Attorney General) v. G*, [2020] S.C.J. No. 38, 2020 SCC 38, at paras. 100-103 & 112-113 (S.C.C.); *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 695-696 (S.C.C.).

[105] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26, at paras. 17-19 & 111 (S.C.C.).

involved a different listed secondary offence: distributing child pornography (section 163.1(3)). By analyzing the six-month mandatory minimum as it relates to distributing child pornography, the majority decided a question that was not at issue, while failing to directly analyze whether the six-month minimum is unconstitutional as it applies to luring for the purposes of committing sexual interference. *Brown* suggests that the hypotheticals in *Bertrand Marchand* should have been limited to specific statutory pathway before the Court.

A final issue is the question of the relationship between Rule #1 and #2. While obviously not expressed in our particular language, the Court in *Hilbach* spoke to this, effectively emphasizing that a liberal approach to Rule #1 may call for balance under Rule #2 so as to stay within the realm of the reasonable:

> Common sense and judicial experience counsels that offenders with only mitigating personal characteristics are rare, and it is even more improbable to see such offenders in the most unlikely scenarios falling within the scope of an offence. Stacking mitigating factors and stretching every constituent element of an offence produces a hypothetical scenario that is fanciful and not reasonably foreseeable.[106]

This passage gets at how Rule #2 would help address one of the most common complaints about the reasonable hypothetical approach, discussed above: *i.e.* that courts are basing an important decision whether to override the will of Parliament by playing a game of "make believe". If courts apply the rules suggested in this paper, the reasonable hypothetical analysis should remain grounded in reality.

It makes sense that Crown prosecutors have repeatedly tried to limit the construction of hypotheticals, including by arguing against the use of personal mitigating characteristics in constructing hypothetical offenders. It is also understandable that defence lawyers take every chance to be creative, even artful, in the crafting of scenarios that will expose the reach of a provision. Both sides, not to mention trial judges, should benefit from principled, fixed rules as to how to construct the reasonably foreseeable scenario. We argue that the reasonable hypothetical device should be constrained in specific ways rather than through vague warnings against excesses of imagination. The rules could then be applied consistently by courts. Taken together, our two rules offer one way to channel the energies of both defence lawyers and Crown prosecutors and give more specific guidance to judges, rendering the law in this area more legitimate and stable.

IV. CONCLUSION

The use of reasonable hypotheticals is justified in the section 12 context of penal laws, given the interlocking and intertwined effects of *Criminal Code* provisions on criminal justice outcomes. It is unacceptable to just tell trial judges to wait for the offender who raises a personal claim that the penalty is grossly disproportionate for them. When it comes to sentencing laws, there are special reasons to examine the prospect that a law is unconstitutional, given the real effects it will have along the

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[106] *Hills*, at para. 91 (S.C.C.).

way. Mandatories will produce unfit sentences and will affect resolution agreements. Many individuals will be deterred from bringing onerous and costly *Charter* challenges.

The Supreme Court should say more about how these institutional realities that are unique to criminal law justify the practice of using reasonable hypotheticals. Not least because it would help to combat the ongoing contestation and related politicization of this area of law, by addressing critics and encouraging a better understanding of how the criminal justice system operates.

It would also help if the Court clarified the methodology for constructing reasonable hypotheticals. At this point in the development of section 12, it is clear that personal characteristics are properly considered in the reasonable hypothetical. Debate about this topic should end. The reasonable hypothetical is now meant to determine the lowest sentence that a provision can reasonably be expected to produce, which requires a complete sentencing analysis. Our depiction of Rule #1 flows from the fact that mitigating personal characteristics are a robust part of the highly individualized and discretionary system of Canadian sentencing law.

But when it comes to the commission of the offence, we say counsel and courts should refrain from painting elaborate scenarios. Leading up to 2023, Supreme Court authorities focused on interpreting and exploring the basic elements of the offence using straightforward scenarios. In *Smith*, the emphasis was that the importing provision caught even a small amount of a less harmful drug; in *Lloyd*, the concern was how drug trafficking could be committed by sharing rather than selling; in *Nur*, the concern was that the offence could capture what was effectively a licensing oversight. Even *Hills* was focused on understanding that the firearm requirement could be met by a BB gun. While *Bertrand Marchand* imagines the commission of an offence in a manner that does more than probe the elements of child luring — using a hypothetical painted in vivid colours and detail — the hypothetical was pulled from a case, and modified to simply reduce the number of times the offence was committed from many to one. The hypotheticals rejected in *Hilbach* went too far, stringing together a series of discrete events that will likely never arise in real life. Such hypotheticals form too speculative a basis on which to invalidate laws.

Lawyers may enjoy the chance at creative expression, in the same way that law professors relish their annual opportunity to draft an amusing or intricate fact pattern exam. But the legitimacy of the endeavour — what we say is the ordinary and appropriate responsibility of courts to explore the foreseeable effects of laws as part of *Charter* review — calls for restraint.