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Individualized Proportionality and the Experience of Punishment: An Emergent Paradigm for Canadian Sentencing?

Benjamin L. Berger[*]

"Who are courts sentencing if not the offender standing in front of them?"[1]

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I. Individualized Proportionality, Introduced

Drawn from a case in which the Supreme Court of Canada grappled with the signal societal trauma wrought by the operation of the criminal justice system — the travesty of Indigenous over-representation in Canadian prisons — the epigraph to this chapter points to the ethical heart of a distinctive and important development in Canadian sentencing law. It involves an approach that has already disrupted certain elements of contemporary sentencing practice, and it is one that, depending on how sentencing judges embrace it, may open up new futures in Canadian sentencing. This development is the emergence of individualized proportionality as the fundamental principle of sentencing in Canada.

The claim for the emergence of this new fundamental principle may seem incongruous for several reasons. First, there is nothing much new about the idea that some such version of proportionality ought to govern the legal practice of sentencing. Proportionality's core requirement, that the severity of a sanction should reflect the seriousness of the criminal conduct, anchors sentencing practices in jurisdictions around the world and has long occupied a

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[1] *R v Ipeelee*, 2012 SCC 13 at para 86 [*Ipeelee*].

central place in the philosophical literature on punishment,[2] though that core requirement has been underpinned by various justifications.[3] The commitment to calibrating punishment to the degree of blameworthiness of conduct is the heart of contemporary retributive theories of sentencing,[4] much discussed and explored in the literature, even as others have critiqued appeal to the principle as "chimerical as a basis for limiting punishment."[5]

In Canada, a version of this retributively-derived principle of proportionality has been absorbed into the *Criminal Code*. Section 718.1 articulates a "fundamental principle" of sentencing, namely that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[6] And even prior to the 1996 amendments to the *Criminal Code* that introduced this provision, proportionality had "long been a central tenet of the sentencing process".[7] Moreover, there is, to be sure, already a species of "individualization" at work in this brand of proportionality: the punishment is calibrated to the "degree of responsibility of the offender." This is a form of individualization in comfortable harmony with both the guilt phase of the criminal process and retributive theories of punishment, each of which is centrally focussed on the assessment of individual blameworthiness.

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[2] As Lacey and Pickard note, "proportionality stands as they key concept in a much longer history of efforts to modernize and temper punishment, occupying as it does a central place in the work of Enlightenment thinkers of reformers across many nations: Beccaria, Bentham, Jefferson and Montesquieu" (Nicola Lacey & Hanna Pickard, "The Chimera of Proportionality: Institutionalizing Limits on Punishment in Contemporary Social and Political Systems" (2015) 78:2 Modern Law Review 216 at 218.).
[3] See, e.g., Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005). for a review of certain of those various justifications.
[4] Von Hirsch and Ashworth explain that "[w]hat is distinctive about contemporary desert theory is that it moves the notion of proportionality from its peripheral role to a central one in determining sanctions" (*Ibid* at 131.). Consider, for example, Von Hirsch's "censure" theory, which Von Hirsch and Ashworth restate and summarize in *Ibid*, ch 9. See also Andrew von Hirsch, *Censure and Sanctions* (Oxford: Clarendon Press, 1993).
[5] Lacey & Pickard, above note 2 at 227.
[6] *Criminal Code*, RSC 1985, c C-46, s 718.1.
[7] *Ipeelee*, above note 1 at para 36.

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But the innovation in Canadian sentencing law that I am exploring in this chapter lies in a fundamentally different understanding of individualization, of its centrality in just sentencing decisions, and of what its pursuit demands of the sentencing judge. This form of individualization involves drawing close to the offender, through and past questions of responsibility and blame, to reckon with the offender's experience of suffering as a consequence of their wrongdoing. In the Supreme Court of Canada's emergent approach, proportionality remains central to the task of sentencing, as do considerations of responsibility and blame, but the focus on the offender's experience of suffering and of the consequences of wrongdoing draws increased attention to the other side of the proportionality equation: a sensitive, contextualized assessment of what counts as part of "a sentence" or punishment, and of its true severity. The individualization at work here is this individualized gauging of the circumstances of the offender and their experience of suffering, in service of a more refined sense of the true fitness and justness of the sanction imposed. The priority given to this form of individualization reshapes and recolours the principle and practices of proportionality.

This approach to individualized proportionality has two provocative and interrelated features that this chapter will lay bare, one conceptual and one methodological.

First, this turn toward serious regard for the offender's experience of punishment attacks a paradox at the heart of traditional sentencing practices. The customary approach has focussed judges' attention on the quantum and form of punishment in the pursuit of proportionality: the severity of a carceral "sentence" — that which must be made proportionate to the gravity of the offence and the degree of responsibility of the offender — lies in the duration of the sanction imposed by the Court. On this view, proportionality is an essentially quantitative assessment.

And yet, this way of understanding proportionality is fundamentally at odds with the reality that the severity of a sentence lies not in the cool metrics of quantum alone, but in the experience of suffering — something driven by the real consequences and conditions of punishment, and their effects on a given person's life. Otherwise put, proportionality must be a qualitative inquiry. We know full well, for example, that whether an offender will serve his sentence in a maximum or minimum security facility is determinative of the real severity of a sentence; and yet the system proceeds on the fiction that a judge can be coherently agnostic as to classification when imposing a sentence.[8] The conceptual turn that I am tracing in the jurisprudence involves a kind of phenomenological sensitivity — a commitment to the idea that the lived experience of society's response to wrongdoing is what should interest us in sentencing. In this, it troubles the sustainability of the mis-fit between our prevailing sentencing practices and what is necessary to evaluate the true severity, and hence fitness, of a punishment.

Second, this conceptual shift entails an important methodological or doctrinal implication for sentencing: a significant expansion of regard for what factors are salient in crafting a proportionate sentence. As I will show, factors that have no bearing on one side of the proportionality equation described in section 718.1 — "the gravity of the offence and the degree of responsibility of the offender" — and that reach well beyond quantum of punishment are now considered important in arriving at a fit sentence. The endpoint is that a sensitive reading of contemporary Canadian sentencing jurisprudence shows a style of proportionality at work that is not well captured by the text of section 718.1 alone. A very different brand of proportionality is emerging as the fundamental guide to Canadian sentencing, one in which the sentence is

[8] I return to this example at the end of this chapter.

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calibrated to the individualized experience of punishment, rather than resting on individualized assessments of responsibility and desert alone.

This development involves great intimacy and tremendous reach. "Intimacy" and "reach" may seem strange descriptive bedfellows. But in the context of sentencing they are facets of one another. This is attributable to the distinct nature of the sentencing project, which, when the doctrinal and managerial trappings — important though they are — are stripped away, is about the strategy of a political system, administered through a judiciary, to inflict suffering on an individual as a response to crime. In that unique kind of project, to be intimate, up close, and attentive to the experience of suffering is, indeed, an ambitious political move.

II. The Emergent Principle Described

In this section I trace the ascendancy of this approach to individualization, its effect on the jurisprudential understanding of proportionality, and its qualitative texture through a close consideration of three developments within the Supreme Court of Canada's sentencing jurisprudence of the last fifteen years. Each issue I discuss involves a discrete and sometimes technical point. However, once assembled and put in conversation with one another, the collected pieces paint a vivid picture of the Court's turn away from a more traditional and narrow responsibility-focussed understanding of proportionality and toward an individualized approach that treats the offender's experience of suffering as an essential yardstick for a fit sentence.

(a) Suffering at the Hands of Police

What is the relevance of pain and suffering, inflicted at the hands of the police during arrest, in arriving at a fit sentence? The question is an interesting one because, by the light of the fundamental principle of sentencing set out in the *Criminal Code*, the answer would appear

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to be "none." Police misconduct in the course of arrest bears on neither metric for proportionality stated in s 718.1. No matter how egregious, the treatment of the offender by the police does not affect the gravity of the underlying offence, nor does it alter the offender's responsibility for that offence. Proportionality, as it is described in the *Code*, seems to make such considerations irrelevant to the sentencing function.

This was the problem faced by the sentencing judge in *Nasogaluak*.[9] The police had violently subdued Mr Nasogaluak at the conclusion of a high-speed car chase, initiated because the police suspected that he was driving while impaired. In the course of arresting him for impaired driving and fleeing the police, the officers inflicted multiple punches to Mr Nasogaluak's head and two punches into his back while he was pinned face down on the pavement. These latter punches broke two of Mr Nasogaluak's ribs, resulting in a collapsed lung that required emergency surgery. Mr Nasogaluak, who pled guilty to both charges, argued that his sentence should be reduced as a consequence of this police misconduct, which breached his *Charter* rights. The sentencing judge agreed but, hemmed in by the conventional understanding of the ordinary sentencing principles, he believed he had to reach for an extraordinary solution and so used section 24(1) of the *Charter* to reduce the sentence as a constitutional remedy.

At the Supreme Court of Canada, Justice LeBel agreed that a reduction in sentence was appropriate. But of central interest to this chapter was his finding that resort to section 24(1) was unnecessary: in the absence of a mandatory minimum sentence, the normal logic of sentencing could not only accommodate but might actually impel this result. How could this be?

[9] 2010 SCC 6 [*Nasogaluak*].

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In his reasons, Justice LeBel affirms the central role of proportionality and s. 718.1 as the fundamental sentencing principle in Canadian law, emphasizing that attentiveness to proportionality means that judges will craft sentences that adequately reflect and condemn offenders' "role in the offence and the harm that they caused."[10] But this alone cannot explain the salience of Mr Nasogaluak's suffering to a fit sentence, given that the police misconduct bore on neither. Justice LeBel reaches past the four corners of section 718.1, providing a more expansive and political conception of sentencing than is normally found in the jurisprudence. He explains that "[p]rovided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society."[11] He draws support for this proposition from s. 718's articulation of the fundamental purpose of sentencing, which includes contributing to "respect for the law and the maintenance of a just, peaceful and safe society." So perhaps this expansion of relevance is justified by something like a concern about society's "standing to blame."[12] By visiting serious disadvantage or inflicting social wrongs on an individual, the state may erode its authority to punish or even share responsibility for the crime *per se*, diminishing that of the offender.[13]

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[10] *Ibid* at para 17.
[11] *Ibid* at para 49.
[12] RA Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial" (2010) 23 Ratio 123; RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2009).
[13] For arguments in this vein surrounding poverty, see Victor Tadros, "Poverty and Criminal Responsibility" (2009) 43 Journal of Value Inquiry 391; Marie-Eve Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) 55:4 McGil LJ 771. I discuss this concept in the law of mental disorder in Benjamin L Berger, "Mental Disorder and the Instability of Blame in the Criminal Law" in Francois Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford; Portland, OR: Hart Publishing, 2012) 117.

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And yet this does not seem to provide an adequate account of why Mr Nasogaluak's "life-altering experience" is relevant to his sentence. Recall Justice LeBel's proviso: state misconduct may be factored into the sentence "*provided that the impugned conduct relates to the circumstances of the individual offender and the circumstances of his or her offence"*. Appalling though it was, there is no link between the misconduct of the police and the circumstances of the offence. And so the relevant link must be to Mr Nasogaluak's "circumstances." What is the nature of this link?

The provocative answer offered by this case is that we find this nexus in the pain that he experienced. His sentence is justifiably reduced because he has already suffered harm at the hands of the state in response to his misconduct. In arriving at a fit and proportionate sentence, the ways in which the offender has already suffered as a consequence of his misconduct are salient. That pain, experienced outside the usual colouring lines of duration and form of incarceration (and not digestible as part of the gravity of the offence or the degree of responsibility of the offender), is nevertheless relevant to reasoning about a just and appropriate sentence.

Justice LeBel describes the broad discretion created by ss. 718-718.2 of the *Code* as anchored by a foundational idea: that "the determination of a 'fit' sentence is…an individualized process".[14] The facts and reasons in *Nasogaluak* suggest something about the character of this individualization. It draws the judge out of the narrow understanding of punishment suggested by the *Code* and into contact with an offender's experience of suffering in response to wrongdoing.

[14] *Nasogaluak*, above note 9 at para 43.

(b) Collateral Consequences of Sentencing

The more commodious sense of punishment drawn from *Nasogaluak* points the way to a second development in Canadian sentencing law relevant to the emergent principle of individualized proportionality: expansive regard for the "collateral consequences of a sentence." While sentencing judges have long considered certain factors that might be considered "collateral" to sentence, they have done so in circumstances in which the consequences at issue were tightly linked to the nature of the sentence itself, such as the impact of a custodial sentence on parenting or families.[15] Since 2013, however, the Supreme Court has embraced a capacious definition of collateral consequences and has justified this approach on grounds that highlight both the doctrinal priority and distinctive character of individualization in Canadian sentencing.

The first step in this development came with the Supreme Court of Canada's acceptance in *R v Pham*[16] that an otherwise fit sentence could and should be reduced in light of immigration consequences flowing from a criminal sentence. The *Immigration and Refugee Protection Act* stipulated that a non-resident sentenced to a term of imprisonment of two years or more lost their right to appeal a removal order.[17] Mr Pham applied to have his sentence of certain drug offences reduced by one day to avoid this significant consequence of his two year sentence. The Court of Appeal refused to vary the sentence but the Supreme Court found that these "collateral consequences" imposed by *IRPA* should be considered and reduced his sentence accordingly.

[15] Consider, for example, the case law indicating that sentencing judges should account for the separation of a mother from her family (see, e.g., *R. v. Collins*, [2011] O.J. No. 978, 104 O.R. (3d) 241 (Ont. C.A.)) or, more generally, the impact of incarceration on families (see, e.g., *R. v. Geraldes*, [1965] J.Q. no 22, 46 C.R. 365 (Que. C.A.).

[16] 2013 SCC 15 [*Pham*].

[17] SC 2001, c 17 [*IRPA*]. That threshold was since reduced to 6 months by the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16, s 24.

Of central interest is how the Court justified this outcome. Justice Wagner (as he then was), writing for the Court, defined collateral consequences broadly: "the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender." Such consequences "may be taken into account in sentencing as personal circumstances of the offender."[18] "However," Wagner J pauses to explain, "they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender."[19] He thus positions the role of collateral consequences firmly outside the frame of s 718.1, but explains that "[t]heir relevance flows from the application of principles of individualization and parity."[20] Inasmuch as it informs the individualized "impact of the sentence," consideration of collateral consequences aids in ensuring that the sentence is truly "fit having regard to the particular crime and the particular offender"[21] and actually equivalent in severity to sentences imposed for similar crimes committed in similar circumstances. The two conventional s 718.1 metrics are still critical to arriving at a fit sentence but the relevance of collateral consequences is a function of close attention to a third focal point: the offender's personal circumstances and how these inflect the severity of the sentence imposed.

With its decision in *R v Suter*,[22] the Court committed itself even more deeply to this logic, with greater conceptual implications for sentencing. The accused accidentally drove his vehicle into a restaurant patio, killing a two-year-old boy. Although he was not impaired at the time of

[18] *Ibid* at para 11.
[19] *Ibid* at para 11.
[20] *Ibid* at para 11.
[21] *Ibid* at para 14.
[22] 2018 SCC 34 [*Suter*].

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the accident, he was given improper legal advice that led him to refuse to provide a breath sample. He was charged with, and pled guilty to, refusing to provide a sample knowing that a death was caused. The poor advice was clearly relevant to the sentencing judge's decision to set the sentence well below the normal range, but the macabre twist was this: prior to sentencing, Mr Suter was abducted by three hooded men who drove him to a secluded area, beat him, and cut off one of his thumbs with pruning shears. Was the sentencing judge entitled to factor this vigilante action into his decision?

Justice Moldaver, for the majority, held that he was. Note the significance of this holding: both the police conduct in *Nasogaluak* and the immigration consequences at issue in *Pham* involved state action. Those cases thus suggest that the aggregate treatment of an accused at the hands of the state is relevant to sentencing. Factoring the vigilante action in *Suter* into the sentence significantly expands this already provocative proposition: the suffering need not be traceable to the state. Justice Moldaver offers a broadened definition of collateral consequences as including "any consequence arising from the commission of an offence, the convictions for an offence, or the sentence imposed for an offence that impacts the offender,"[23] whether or not they are foreseeable or natural.[24] All such consequences, irrespective of their nexus with the state, are relevant to a fit sentence. This is an expansive holding, the boundaries of which have yet to be worked out.

The Court is again clear that the relevance of such collateral consequences is not a function of the seriousness of the offence or the responsibility of the offender. Rather, the

[23] *Ibid* at para 47.
[24] *Ibid* at para 49.

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question is "whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances."[25] They must be considered "[t]o ensure that the principles of individualization and parity are respected".[26] The brand of individualization impelling this approach goes beyond questions of responsibility. It exceeds simply tailoring the sentence to the individual's objective characteristics. This touchstone principle of individualization, which colours and directs the search for proportionality, is about broad sensitivity to the factors that will shape an offender's experience of the consequences of their wrongdoing.

(c) The Relevance of Hope

To complete the picture of this emerging sensitivity to the experience of punishment, I turn to the relevance of hope. This brings us closest yet to the offender's subjective and affective experience of punishment — a sensible place for us to be when assessing the fitness of a sentence, but somewhere that systems of punishment are loathe to go.

Unlike the others, this development was precipitated by legislative change. Section 743.6 introduced the ability of a sentencing judge to increase the period of parole ineligibility where the court is satisfied that "the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires". Traditionally, there had been a tight seal between the judicial determination of the fit sentence and those responsible for overseeing the conditions and implementation of punishment. In this division of labour, decisions about parole were simply not part of the work of a judge: "[c]onsiderations relating to parole eligibility normally remained

[25] *Ibid* at para 48.
[26] *Ibid* at para 51.

irrelevant to the determination of the fitness of a sentence".[27] Judges sentence; other actors are concerned with the conditions and implementation of this sentence.[28] However, as Justice LeBel explained in *Zinck*, "[t]he adoption of s. 743.6 altered… significantly the nature and scope of sentencing decisions in Canadian criminal law."[29]

Section 734.6 was drafted in a way that "left many substantive and procedural questions unanswered."[30] The key substantive issue that emerged was the appropriate test for deciding whether the use of section 743.6 is warranted. In particular, a split had opened up in appellate courts as to whether extended parole ineligibility ought to be reserved for special or exceptional circumstances. In *Zinck*, the Supreme Court held that it should be. Justice LeBel, writing for the majority, held that "[t]he decision to delay parole remains out of the ordinary,"[31] and that "it should not be ordered without necessity, in a routine way."[32] This posture of relative restraint, he explains, is a product of an orienting duty: that "the sentencing decision must be alive to the nature and position of delayed parole in criminal law as a *special, additional form of punishment*."[33]

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[27] *R v Zinck*, 2003 SCC 6 at para 18 [*Zinck*]. The one notable exception was sentencing for second degree murder, with a mandatory life sentence and a variable parole ineligibility period of between 10 and 25 years. Justice LeBel notes that "[w]hile some courts may have increased the length of a jail term to manipulate the term of parole ineligibility, such a practice is quite improper."

[28] For a recent articulation of this standard division of labour, see *R v Passera*, 2019 ONCA 527 at para 24 [*Passera*]: "Sentencing judges are charged with imposing a fit sentence for the offence and the offender, having regard to concerns which include rehabilitation, deterrence and denunciation. Correctional authorities take the sentence as imposed and are responsible for administering that sentence."

[29] *Ibid* at para 22. In *Zinck*, the accused, who had an extensive criminal record including a number of firearm and alcohol offences, was charged with second degree murder in the drunk shooting of his neighbor. He pleaded guilty to manslaughter and was sentenced to a 12 year term of imprisonment with parole eligibility delayed for 6 years.

[30] *Ibid* at para 24.

[31] *Ibid* at para 33.

[32] *Ibid* at para 31.

[33] *Ibid* at para 31. [emphasis added]

This last phrase offers the key to unlocking the deeper significance of *Zinck* for this chapter. What makes delayed parole eligibility a "special" as a form of punishment? The Court's core answer: in the manipulation of hope. Delaying parole brings a particular "harshness" to sentencing.[34] This harshness is not solely a matter of a longer period of time in custody; depending on the decisions of a parole board, an offender with an earlier parole eligibility date may well nevertheless remain detained. Rather, the "harshness" arises by depriving the offender, from the outset, of the prospect of earlier release, thereby altering the affective life of the offender. Justice LeBel observes that delaying parole "may almost entirely extinguish any hope of early freedom from the confines of a penal institution with its attendant rights or advantages."[35] A sentence served without such hope is a tougher sentence. This distinctive harshness is what is "special" about delayed parole as an aspect of punishment and calls for parsimony in its use. With deferred access to parole now "part of the punishment,"[36] sentencing judges are drawn out of abstract reflection on quantum into sympathetic engagement with the circumstances and conditions that will shape how an accused will experience their punishment. *Zinck* does not mean that parole eligibility is now a standard consideration in the sentencing process.[37] This remains a statutory exception. But on a full, attentive view of the sentencing

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[34] *Ibid* at para 24.
[35] *Ibid* at para 24.
[36] *Ibid* at para 23. See also *Passera*, above note 28 at para 23, Doherty JA: "when a sentence involves a term of imprisonment, the sentencing process can be viewed as encompassing both the term imposed by the sentencing judge and the statutory provisions under which the sentence will be administered by correctional authorities after it is imposed. *Together they describe and define the punishment imposed*." (emphasis added)
[37] See *Passera*, above note 28 at para 26, at which Justice Doherty explains that "[s]ubject to specific statutory exceptions (e.g. ss. 743.6 and 745.5)…. [q]uestions relating to if, when, or how and offender might be released on some form of conditional release prior to the completion of the sentence are not for the sentencing judge to determine".

system, one can no longer easily say what was once available as a claim: that the conditions of a sentence are never a court's concern. The seal has been broken.

Hope inflects the qualitative nature of a sentence. It gives flavour, character, and existential texture to the experience of punishment. To be sure, it is not alone in this. Fear, shame, loneliness, despair and a host of other internal states help determine the true harshness or leniency of punishment. Although sentencing cannot take full account of these emotional dimensions of an offender's experience, *Zinck* suggests that neither can it be wholly insensitive to them and remain a meaningful measure of punishment. And, indeed, we have seen Canadian courts pick up and develop this incipient concern about hope and the interior lives of offenders as they wrestle with another emerging issue in sentencing: how to approach the "stacking" of parole ineligibility periods — and the prospect of "whole life sentences" — made possible by a legislative change made in 2011.[38] Reflecting a significantly more qualitative understanding of punishment, this attention to the affective dimensions of the experience of punishment is another facet of the emergent principle of individualization at work in Canadian sentencing law.

(d) The Principle Summarized

The three developments that I have drawn from the Court's contemporary sentencing jurisprudence each insist, in their own way, that the character, severity, and hence fitness of a sentence is ultimately derived from the offender's experience of suffering. *Nasogaluak* tells us that pain inflicted by police is part of the punishment; the cases on collateral consequences note that an offender's sentence is to be found in the aggregate ways in which the state and, indeed,

[38] Section 745.51 of the *Criminal Code*, introduced in 2011, Bill C-5. See, e.g., *R v Klaus*, 2018 ABQB 97; *R v Vuozzo*, 2015 PESC 14.

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society respond to an offender's wrongdoing; in its concern with hope, *Zinck* directs sentencing courts down and inward, into the affective dimensions of punishment. Assembled, these developments suggest a phenomenological turn in thinking about sentencing in Canada, one that is more attuned to the lived experience of criminal punishment.

The juridical expression of this turn is a unique marriage of proportionality and individualization. This chapter began with an epigraph from *Ipeelee*, one that I described as expressing the ethical heart of this development. And, indeed, in *Ipeelee* the terms of this marriage are made clear. Justice LeBel describes proportionality as "the *sine qua non* of a just sanction"[39] but emphasizes that, "[d]espite the constraints imposed by the principle of proportionality,"[40] sentencing is "a highly individualized process."[41] When sentencing an Indigenous offender against the background crisis of the radical overrepresentation of Indigenous persons in Canadian prisons, this involves considering the unique circumstances of the offender, including not only their background experiences but the worldviews and values that they and their communities hold.[42] Despite the unique context of *Ipeelee*, Justice LeBel is insistent that this close attention to the personal circumstances of Aboriginal offenders is none other than the expression of "the fundamental duty of a sentencing judge"[43] in all cases: to "engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them."[44]

[39] *Ipeelee*, above note 1 at para 37.
[40] *Ibid* at para 38.
[41] *Ibid* at para 38.
[42] *Ibid* at paras 72, 74.
[43] *Ibid* at para 75.
[44] *Ibid* at para 75. For a piece contrasting the Canadian and Australian approaches to individualized justice in the context of the sentencing of Indigenous offenders, see Thalia Anthony, Lorana Bartels & Anthony Hopkins, "Lessons Lost in Sentencing: Welding Individualized Justice to Indigenous Justice" 39:1 Melbourne University LR 47.

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This "fundamental duty" joins and modifies — and even controls — the "fundamental principle" found in s. 718.1 of the *Code*. This is individualized proportionality. It is not the result of raw judicial innovation; rather, it is a principled judicial articulation of what is necessary in order to ensure that a sentence is truly fit and proportionate, as the *Code* requires. And what it demands is an imaginative engagement with how society's response to wrongdoing will be experienced by this person standing before the Court. As a legal matter, in view of these developments, I suggest that it would now be an error for a judge to invoke proportionality without emphasizing its essentially individualized nature, and then wrestling with the real effects of the criminal process and proposed sentence on the life lived by the offender.

III. The Promise and Challenges of Individualized Proportionality

It is no coincidence, I suggest, that the development of this brand of individualization has been co-emergent with the Supreme Court's reckoning with Indigenous over-incarceration. The experience of this crisis has induced a sense of concern and wariness about the use of criminal punishment in ways that are undisciplined by the actual lives that such punishment produces. The *Report of the Royal Commission on Aboriginal Peoples*[45] and the *Report of the Truth and Reconciliation Commission of Canada*[46] lent urgency to this shift in attitude, while the introduction of s. 718.2(e) and the Court's decisions in *Gladue* and *Ipeelee* gave it shape. The emergent principle of individualized proportionality participates in that same ethos. Its normative upshot is also a posture of caution and restraint, achieved by demanding a searching

[45] Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol 1-5 (Ottawa: Supply and Services, 1996).
[46] *Final Report of the Truth and Reconciliation Commission of Canada*, vol 1-6 (Montreal: McGill-Queen's University Press, 2015).

engagement with the range of circumstances that will affect how punishment will actually be experienced by the person standing before a sentencing judge.

Though it marks a departure from more familiar retributivist constructions of proportionality,[47] this development in Canadian sentencing law and practice is appealing for a number of reasons. It responds better to the humanity of the moment of sentencing and what is morally and politically urgent about it: the extraordinary act — carried out by a judge — of the state effecting political ends by inflicting violence and suffering on an individual. It seems ethically crucial that the judge draw close to the individual in that moment in order to ensure that the character of this suffering is appreciated; only then can we speak intelligibly about the fitness of a punishment.

The developments that I have explored thus also contribute to a more satisfying sense of what constitutes a "sentence" or "punishment" and, with this, a more realistic approach to proportionality. Moving beyond questions of quantum and form, the inquiry takes on a thick qualitative dimension, with the measure of a sentence taken from the actual experiences of punishment and aggregate consequences that result from one's wrongdoing. This institutional sensitivity to the individualized realities of punishment may help "make the metaphor of

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[47] Indeed, many retributivist theorists would likely balk at the form of individualization that I have identified in the Supreme Court's jurisprudence as an intolerable departure from the conceptual justifications that underpin proportional sentencing. On von Hirsch's censure model, for example, the "central justifying feature of punishment" is the "visitation of censure," and treating as relevant to sentencing factors that do not bear directly on "the degree of reprehensibleness" of the offender's conduct diminishes the legitimacy of state punishment (von Hirsch & Ashworth, above note 3 at 134.). The focus of this chapter has been on tracing and exploring this jurisprudential development; assessing whether this development can be reconciled with retributive theories of punishment is the task for a different piece. It bears noting, however, that retributivist theorists insist that proportionality depends on the accurate assessment of the severity of the sanction, though less attention is given to this point in the literature. (See, e.g., *Ibid* at 147–148; von Hirsch, above note 4 at 33–35.) As I have described it, the heart of this development in the Court's jurisprudence is a more expansive and phenomenological approach to how one understands the character and, hence, severity of the punishment itself. I note and discuss the subjectivist-retributivist debate on how to assess severity of punishment below.

proportionality meaningful, and punishment accordingly limited in real terms."[48] By contrast, failing to account for these lived realities, the exercise of seeking proportionality is consigned to fail ("in real terms"), and to do so in the direction of over-punishment. In this, this emergent approach is better equipped to offer up some resistance to the well-worn pattern of criminal punishment reproducing and exacerbating pre-existing disadvantage and marginalization.

We have already seen facets of the promise of individualized proportionality realized in elements of Canadian sentencing practice. This is most vivid in the notable story of judicial resistance to mandatory minimum sentences. The essential character of mandatory minimum sentences is that they place predictive floors on the exercise of individualization; as Chief Justice McLachlin emphasized in the case that signalled the Court's stand against mandatory minimum sentences, these minimums thus "affect the outcome of the sentence by changing the normal judicial process of sentencing."[49] The Court's method for assessing whether a mandatory minimum sentence is cruel and unusual, contrary to section 12 of the *Charter*, is essentially one of deep individualization: generating a reasonable hypothetical *crime* but also, crucially, *offender* who would be subject to the minimum. Effectively signalling the constitutional demise of broadly framed mandatory minimum sentences, the Court has explained that "such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."[50] Mandatory minimum sentences have, indeed, not fared well before the courts.[51] And it is notable that in the Supreme Court's most recent invalidation of a

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[48] Lacey & Pickard, above note 2 at 228.
[49] *R v Nur*, 2015 SCC 15 at para 44.
[50] *R v Lloyd*, 2016 SCC 13 at para 35.
[51] For an excellent resource tracking the fate of mandatory minimum sentences in Canada, see https://mms.watch.

mandatory sentence — the victims fine surcharge — the analysis went well beyond the formal sentence. In *R v Boudreault*, the Court delved deeply into the impecunious offender's experience of the criminal process and — crucially and provocatively — the relationship between criminal punishment, poverty, and structural economic injustice.[52]

Below the constitutional register, the promise of individualization can be found in the softening of the Court's approach to judicially-created sentencing ranges.[53] It is similarly found in a recent instance of a judge using the expansive approach to "collateral consequences" as authority for factoring an offender's disability into the fitness of a sentence not because it was "relevant to the seriousness of the offence or the blameworthiness of the offender,"[54] but because the medical condition would inflect the experience of the sentence imposed on him or her. And, with *Boudrealt* in hand, perhaps it will be a tool by which sentencing practices can become more sensitive to questions of mental health and poverty.

And yet there are challenges involved in the embrace of individualized proportionality, ones that may affect or limit the role of this emergent principle in the future of Canadian sentencing.

The first is conceptual in nature. With a turn to the individual experiences of the offender as an important barometer for the fitness of a sentence, we come up against a significant problem related to the scope, and normative risks, of this approach. In contemporary theoretical debates about punishment, critiques of subjectivist theories that focus in this way on the experience of punishment point to the risk that this will involve us in the unattractive exercise of

[52] *R v Boudreault*, 2018 SCC 58 [*Boudreault*].
[53] See *R v Lacasse*, 2015 SCC 64 at para 25; *Suter*, above note 22 at para 25.
[54] *R v Polanco*, 2019 ONSC 3073 at para 37.

adjusting sentences to account for expensive tastes and insensitive offenders.[55] And so, concerned with the individualized experiences of the person before the court, would we have to account, for example, for the offender who would suffer more in prison because he is used to silk sheets or because of the shame of conviction given his social standing? Or, seeking a due measure of subjective suffering, might we have to punish more severely the offender who is inured to deprivations, having lived a particularly harsh life? This is a point of significant conceptual vulnerability in the approach that I have described. As Von Hirsh and Ashworth note in their critique of subjectivist approaches to gauging the severity of punishment, "[s]ome convicted persons are tough, others are tender, so that greater deprivations might be visited on the tough ones (irrespective of the seriousness of their offences) because they would feel them less keenly."[56] Such outcomes are surely troubling and pose a problem naturally generated by the acknowledgment of suffering as the phenomenological essence of punishment.

My sense is that the proper response is not to resile from this truth and the challenge it presents by retreating into the comfort of a quantitative retributivism that blinds itself to the expanded range of factors and considerations that affect the contextualized experience — and,

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[55] See, e.g., David Gray, "Punishment as Suffering" (2010) 63 Vand L Rev 1619. For a defence of the relevance of the subjective sensitivity of offenders to assessments of punishment severity, see Adam J Kolber, "The Subjective Experience of Punishment" (2009) 109 Colum L Rev 182. Although I share his view that "any successful justification of punishment must take subjective experience into account" (235), my response to the problem of the sensitive offender differs from his.

[56] von Hirsch & Ashworth, above note 3 at 147. For key pieces in the subjectivist-retributivist debate in punishment theory, discussing whether the severity of punishment should be indexed to the subjective experience of offender, including his or her particular abilities, sensitivities, baseline conditions, and the burdens he or she experiences from non-state sources, see, e.g., Shawn J Bayern, "The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment" (2009) 12 New Crim L Rev 1; John Bronsteen, Christopher Buccafuso & Jonathan Masur, "Happiness and Punishment" (2009) 76:3 U Chicago L Rev 1037; Dan Markel & Chad Flanders, "Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice" (2010) 98:3 Cal L Rev 907; John Bronsteen, Christopher Buccafuso & Jonathan Masur, "Retribution and the Experience of Punishment" (2010) 98:5 Cal L Rev 1463; Dan Markel, Chad Flanders & David Gray, "Beyond Experience: Getting Retributive Justice Right" (2011) 99:2 Cal L Rev 605.

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hence, true severity — of a punishment.[57] Instead, the conceptual and doctrinal challenge is to generate a principled basis on which to distinguish the kinds of features and experiences that we think ought to concern us in the task of individualization. I am not able to take up this challenge fully here, but a plausible starting point — one drawn from an underlying commitment to ensuring that sentencing contributes to a more just and equitable society — would be that we ought to exclude from consideration those circumstances whose effect would be to exacerbate systemic inequality.

And yet however significant this conceptual challenge, it vanishes in comparison with the second limit facing the future and impact of individualized proportionality, one that is systemic and institutional in character.

That challenge is as follows: however robust the commitment to individualized proportionality as the measure of fitness in the sentencing process, at the conclusion of the sentencing hearing the offender is deposited into a system that is manifestly not driven by this ethic, but the practices of which can fundamentally alter the true nature of the punishment. Far from being organized around principles of individualized proportionality, practices of prisons and correctional authorities are governed by an approach that approximates what Simon and Feeley famously described in their article, "The New Penology."[58] This approach is not centrally

[57] Acknowledging the essential nature of the task of gauging the severity of punishment to a coherent approach to proportionality, von Hirsh and Ashworth, above note 3 at 147–8, propose a ranking penalties based on "how they typically impinge on persons' *living standard*" — a kind of "interests analysis" rather than an approach focused on the experience of punishment. Not only is this approach at odds with the phenomenological approach to understanding the severity of a sanction defended in this chapter, it is confined, for von Hirsh and Ashworth, to ranking the severity of non-custodial sanctions. With respect to custodial sanctions, they are breezily quantitative, stating only that "prison sanctions can be compared by their duration" (147).

[58] Malcolm M Feeley & Jonathan Simon, "The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications" (1992) 30 Criminology 449 [Feeley & Simon, "The New Penology"]. Feeley and Simon subsequently qualified many of their claims in "The Form and Limits of the New Penology" in Thomas G Blomberg & Stanley Cohen,

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concerned with "responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness."[59] The conditions produced by those decisions and techniques are what most directly affect the experience of punishment and with this, as I have argued, they control the true nature of the sentence imposed. The sharpest example is the operation of classification systems that sort offenders into institutions with diverse conditions of constraint, access to programming, and living conditions. No matter how sensitively arrived at, the ultimate character of a sentence is determined by the decisions and practices of non-judicial actors that the sentencing judge does not control and, indeed, about which she is usually left ignorant. This is the paradox that darkens the promise of individualized proportionality, one that flows from attention to the institutional context of sentencing.

Although judges have made some efforts to engage with the conditions of incarceration for sentencing purposes,[60] this paradox is a product of the administration of sentences, and prisons themselves, being largely treated as a "black box"[61] by not just sentencing theory, but by contemporary sentencing practices. Yet, perhaps we can begin to imagine new possibilities in these practices that can respond to the ethic and duty of individualized proportionality. Seized with the inescapable salience of the conditions and consequences of punishment to their duty to craft a fit sentence, perhaps sentencing judges will begin to insist on more information about the real conditions and foreseeable experiences that an offender will face: the carceral institution at

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eds, *Punishment and Social Control* (New York: de Gruyter, 2003) 75, but their description of the orientation of modern penal practices is still heuristically useful.

[59] Feeley & Simon, "The New Penology", above note 58 at 452.

[60] Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 CJLS 187 at 201.

[61] See Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2018) 69:1 UTLJ 85.

which the sentence will be served, but also the living conditions, practices of confinement, available programing, and extant levels of violence at that institution, to name but a few crucial factors. And met with an inability or resistance to supply that information, perhaps a judge will inaugurate a practice of sentencing an offender on the basis of a "reasonably worst hypothetical" — explicitly assuming, for example, incarceration in a maximum security facility with poor conditions and limited programming — so as to ensure that the sentence she authorizes does not prove unfit. Though innovative, even disruptive, such a step would be faithful to Parliament's command for parsimony in the use of sanctions[62] and would honour the fundamental duty and principles as articulated by the Supreme Court in the cases I have discussed.

It may be that the systemic membrane (made of inertia, bureaucracy, and administrative difficulty) between sentencing courts and those responsible for administering sentences will prove too thick to readily pierce, resisting such innovations. But a judge who made such efforts — one who sees that the seal between the quantum of sentence and the experience of punishment cannot be coherently maintained and has, indeed, already been broken by force of the principle of individualization — would, in my view, stand on firm ground, both ethically and legally. Moreover, the cost of failing to try is simply too high. Once seen, the role of sensitive regard for the actual experience of punishment in properly discharging the burdens of sentencing cannot be readily put out of mind. To then acquiesce to the character of that experience being determined entirely by correctional bureaucracy is to turn one's back on the salutary moral sensibilities that have informed the emergent principle of individualized proportionality, and to foreclose the futures of sentencing that it might inspire.

[62] *Criminal Code*, above note 6, s 718.2(d).

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