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This article examines the theoretical foundations and developments of the concept of proportionality in common law sentencing. It traces its evolution within its two main underlying frameworks, desert-based and consequentialist theories of punishment. It specifically examines the Canadian context and illustrates the ways that this concept was mainly rooted in a desert-based framework but has increasingly been infused with consequentialist rationales. This multiplication of underpinnings has led to a conceptual muddling of proportionality, risking voiding the concept of its meaning and usefulness to decision-makers at sentencing. In light of this, this article proposes a nuanced framework, similar to the one in England and Wales, rooted in a dynamic understanding of just deserts that allows for the incorporation of relevant consequentialist aims in a principled fashion.

Keywords

Proportionality; Sentencing; Just Deserts; Retribution; Consequentialist; Punishment

Cover Page Footnote

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This article examines the theoretical foundations and developments of the concept of proportionality in common law sentencing. It traces its evolution within its two main underlying frameworks: desert-based and consequentialist theories of punishment. It specifically examines the Canadian context and demonstrates that this concept was primarily rooted in a desert-based framework but has increasingly been infused with consequentialist rationales. It is argued that this multiplication of underpinnings has led to a conceptual muddling of proportionality, risking voiding the concept of its meaning and usefulness to decision-makers at sentencing. The article therefore proposes a nuanced framework, similar to the one in England and Wales, rooted in a dynamic understanding of just deserts that allows for the incorporation of relevant consequentialist aims in a principled fashion.

Proportionality is a central concept in the laws of sentencing, particularly in jurisdictions that recognize the State's power over the liberty interests of citizens.[1] In several jurisdictions, the principle can be found in statute drafted with varying degrees of specificity.[2]

This article argues that proportionality is a dynamic concept that has evolved across theoretical conceptions of punishment, time, and jurisdiction. It traces the evolution of proportionality within retributive, desert-based, and consequentialist theories of punishment. Anchoring itself in the Canadian context, this article argues that Canada's statutory regime predominantly relies on a desert-based conception of proportionality, which has evolved with its underlying theory of punishment. Indeed, this article highlights that a desert-based conception of proportionality has increasingly integrated advances in scientific and experiential knowledge that challenge some of its pre-existing assumptions. Further, this article posits that jurisprudential evolution of proportionality in Canada has brought it closer to a consequentialist framework. This development has contributed to the multiplication of meanings of proportionality, rooted in different and conflicting rationales. Finally, this article offers some conceptual nuances that could achieve greater clarity, structure, and legitimacy in Canadian sentencing.

This article's contributions are two-fold. First, through its engagement with various conceptions of proportionality, it contributes to the literature on punishment and sentencing theory

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[1] Richard Frase et al, "Proportionality of Punishment in Common Law jurisdictions and in Germany" in Kai Ambos et al, eds, *Core Issues in Criminal Law and Criminal Justice* (Cambridge University Press, 2020) 213 at 213; Julian V Roberts & Lyndon Harris, "Sentencing Guidelines Outside the United States" in Cassia Spohn & Pauline K Brennan, eds, *Handbook on Sentencing Policies and Practices in the 21st Century* (Routledge, 2019) 68 at 68-86.

[2] In Canada, the principle is explicit under s 718.1 of the *Criminal Code*. In England and Wales, although the statute is less explicit, proportionality can be inferred from key provisions that relate to the use of sanction and the definition of crime seriousness. See *Criminal Code*, RSC 1985, c C-46, s 718(1); *Criminal Justice Act 2003* (UK), c 44, s 143(1). See also Andrew Ashworth, "Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing" in Julian V Roberts, ed, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 21 [Ashworth, "Aggravation and Mitigation"].

by providing additional tools for sentencing theorists to examine, reconsider, fine-tune, or reaffirm underlying rationales and their respective relevant factors. Second, by providing decision-makers with distinctions that expose the underlying rationales and assumptions of proportionality, this article contributes to more principled sentencing decisions. This can allow for the creation of a conceptual and methodological framework that classifies sentencing factors consistent with these rationales.

Part I of the article situates proportionality and its evolution within the main theories of punishment, namely retributivist and consequentialist theories. Part II turns to the analysis of the principle of proportionality in Canada, relying predominantly on Supreme Court of Canada decisions since it provides final conceptual guidance on sentencing principles across the country. This analysis suggests that the concept of proportionality in Canada was primarily rooted within an evolving retributive just deserts framework, but in recent years has been shifted primarily to consequentialist grounds. This article argues that the multiplication of understandings impedes the development of a principled conception of proportionality. Part III proposes a dynamic and principled framework of proportionality grounded within a desert-based rationale. This framework proposes conceptual nuances that can account for various aims and offer greater clarity in sentencing, while minimizing the use of criminal law for achieving certain objectives.

I. Underlying Theories of Punishment and Conceptions of Proportionality

The concept of proportionality can be traced back to the Magna Carta[3] and is rooted in liberal modern theories of punishment. As Andrew Ashworth notes, considerations proper to proportionality should "flow from the same source as the rationale(s) of sentencing."[4] Marie-Eve Sylvestre also highlights that proportionality necessarily operates within an underlying theory of punishment.[5]

Modern theories of punishment within the common law are classified as either retributive or consequentialist. Within traditional retributive theories, the justification of punishment flows directly from the person's desert.[6] There is an obligation to punish sufficiently to speak out against the offence and the offender has a "right" to be punished, as punishment honours them as a rational being with intrinsic value.[7] According to this theory, a finding of guilt should be a necessary condition to justify punishment,[8] and punishment should not be administered to promote other goals that are not tied to censuring the offender's wrongdoing[9] since that would instrumentalize the offender and increase the risk of rendering sentences arbitrary and indeterminate. Most critics have highlighted that establishing a precise guide for desert is hard to achieve. As will be seen,

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[3] In 1215, the Magna Carta conceived a form of proportionality: "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of this livelihood." See John R Vile, *Founding Documents of America: Documents Decoded* (ABC-CLIO, 2015) at 5.

[4] *Sentencing and Criminal Justice*, 2nd ed (Butterworths, 1995) at 147.

[5] Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR 461.

[6] Allan Manson, *The Law of Sentencing* (Irwin Law, 2001) at 32.

[7] Mike C Materni, "Criminal Punishment and the Pursuit of Justice" (2013) 2 Br J Am Leg Studies 263 at 274.

[8] Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 Oxford J Leg Stud 57 at 63.

[9] Immanuel Kant, *The Philosophy of Law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, translated by W Hastie (T&T Clark, 1887); Manson, *supra* note 6 at 32-40.

Andrew von Hirsch and Ashworth have attempted to do this with a just deserts understanding of proportionality.

Consequentialist (utilitarian) theories of punishment consider punishment harmful or dissatisfying to those punished, and thus punishment can be justified only to the extent that the benefits and satisfaction it produces, in aggregate, outweigh the harm.[10] It needs to adhere to the principle of utility, which can include objectives of deterrence, rehabilitation, and incapacitation.[11] These theories have been described as prospective because the aim of punishment is forward-looking rather than focused on the past offence.[12] The main critics of these theories have doubted the extent to which any of the traditional crime control purposes such as deterrence, incapacitation, and rehabilitation can be achieved through punishment, and therefore consideration and integration of these factors within sentencing remain imprecise.[13] Moreover, consequentialist factors have also heavily relied on predictions, including of risk and dangerousness, which have in great part contributed to the over-incarceration of marginalized and minority groups in the criminal justice process.[14]

The first liberal account of proportionate sanctions was utilitarian and focused on objectives of crime prevention, especially general deterrence. Cesare di Beccaria's eighteenth-century approach to punishment suggested that "punishments…should be chosen in due proportion to the crime so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal."[15] Early retributive theorists referred to proportionality by highlighting that, to be morally justifiable, punishment had to be proportionate to desert—suggesting that the seriousness of the punishment must precisely match the extent of the offender's desert.[16]

Despite its early iterations, academic literature only renewed its interest in proportionality in the 1970s and 1980s, particularly within just deserts theory, which, "gives the principle a dominant role"[17] and offers a framework for measuring sentencing severity by focusing on the seriousness of the offence. Desert theorists recognized that proportionality can be found in

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[10] Jeremy Bentham, *An Introduction to the Principles of Moral and Legislation*, ed by JH Burns & HLA Hart (Clarendon Press, 1996) at 11-13; John Stuart Mill, *On Liberty* (Penguin Books, 1985).

[11] Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 Crime & Justice 55 at 57-58; Manson, *supra* note 6 at 32, 43-46.

[12] Fish, *supra* note 8 at 63, 64.

[13] For instance, achieving rehabilitation and deterrence through punishment is problematic as punishment does not change behaviour, especially when the actions are rooted in marginalization, discrimination and poverty. See Maria Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43 Dal LJ 103.

[14] Bernard E Harcourt, "Risk as a Proxy for Race: The Dangers of Risk Assessment" (2015) 27 Fed Sentencing Rep 237. Further, research into *Gladue* reports that outline Indigenous background has shown that when tied to consequentialist grounds, including the reduction of crime rates by imposing sentences that effectively deter criminality and rehabilitate offenders, these aims have not been met; these reports have often been used by the court to assess the risk of the offender reoffending, which has undermined efforts to reduce over incarceration. This has had unintended discriminatory consequences by drawing decision-makers' attention to race and risk factors. See Kelly Hannah-Moffat & Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12 Punishment & Society 262; Debra Parkes & David Milward, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2012) 35 Man LJ 84. It is worth highlighting that additional factors have contributed to this reality, notably a colonial culture and systemic racism that have permeated the application of criminal justice in Canada, giving rise to the over-incarceration of Indigenous and racialized people.

[15] *Of Crimes and Punishments*, translated by Jane Grigson (Marsilio, 1996) at 49.

[16] Kant, *supra* note 9.

[17] von Hirsch, *supra* note 11 at 56.

utilitarian theories but highlight that these "[o]ther viewpoints permit proportionality to be trumped, to a greater or a lesser degree, by ulterior concerns such as those of crime control."[18] The following discussion examines the evolution and understanding of proportionality within retributive and consequentialist underlying rationales.

A. Just Deserts and Proportionality

Retributivists have developed a substantive framework to advance the central role of proportionality in sentencing. They retain retribution as a justification for punishment, but also recognize that the imposition of sanctions should result in a tangible social benefit.[19] Desert theorists, such as von Hirsch and Ashworth, recognize the communicative and censuring functions of punishment. Thus, proportionality enables the *fair* expression and communicative function of punishment, conveying censure to the offender, the victim, and society.[20] Extraneous considerations as part of proportionality would disregard the censuring implications of punishment and the principle would be much less useful in guiding sentencers. It also risks prioritizing certain rationales including objectives such as deterrence and rehabilitation that instrumentalize the offender and, as highlighted above, can be ineffective in attaining those aims within the criminal justice system. While desert theorists recognize that sentences can include secondary purposes, these considerations are understood as secondary and extraneous to proportionality.

According to just deserts, proportionality enables fairness by scaling punishments in relation to the offence.[21] This scaling supposes that societies judge punishments on their severity by choosing "anchoring points" based on convention (cardinal proportionality). From there, sentencing judges are guided by ordinal proportionality: A sentence must reflect the gravity of the offence relative to other offences and the various degrees of seriousness in the range of conduct

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[18] *Ibid*. See *e.g.* Adrian Hoel, "The Sentencing Provisions of the International Criminal Court: Common Law, Civil Law, or Both?" (2007) 33 Monash UL Rev 264 at 288 ("Given that the sentencing provisions of the ICC have endorsed proportionality, it would seem to be uncontentious that retribution will be endorsed as the primary sentencing purpose"); Michael Tonry, "Selective Incapacitation: The Debate Over its Ethics" in Andrew von Hirsch & Andrew Ashworth, eds, *Principled Sentencing* (Northeastern University Press, 1992) 166 (implying that the concept of proportionality is entirely retributive and stating that proportionality is relatively unimportant to utilitarians).

[19] Just deserts theorists, such as von Hirsch, refer to "defining" retributivism, meaning that principles of just deserts should define the degree of punishment severity as precisely as possible, no more and no less. They recognize that departures from proportionality can at times be justifiable but stand in need of defence. Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1976); von Hirsch, *supra* note 11 at 56. This is different from Norval Morris's notion of "limiting retributivism," which suggests that desert remains partly relevant to proportionality but functions only as an upper and lower limit on just punishment. This theory allows all traditional punishment purposes to play a role but places retributive outer limits both on who may be punished (only those who are blameworthy), and how hard they may be punished (within a range of penalties that would widely be viewed as neither unfairly severe nor unduly lenient). See Norval Morris, "Punishment, Desert and Rehabilitation" in Hyman Gross & Andrew von Hirsch, eds, *Sentencing* (Oxford University Press, 1981) 257. More recently, Richard Frase suggests that proportionality should largely be a matter of retributive considerations, with utilitarian concerns applicable only within a narrow range of deserved sentences. See Richard S Frase, "Limiting Retributivism" in Michael Tonry, ed, *The Future of Imprisonment* (Oxford University Press, 2003) 83 [Frase, "Limiting Retributivism"]. For desert theorists, however, limiting retributivism is mainly imposed on the basis of consequences, with a very loose outer limit—highlighting that desert and retributive dimensions are not the underlying aspects of this theory. See Malcolm Thorburn & Allan Manson, "The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning" (2007) 10 New Crim L Rev 278 at 279, 286-87.

[20] Ashworth, "Aggravation and Mitigation," *supra* note 2 at 28; Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005).

[21] von Hirsch, *supra* note 11 at 55-56.

covered by the offence. Within this framework, proportionality is primarily concerned with measuring sentence severity to facilitate fairness, consistency, parity, and predictability in sentencing.[22] It is understood that each offender should receive an equally severe sentence as those who committed offences of equal seriousness. Critics have highlighted that this logic must give way whenever it is at odds with considerations that they deem more important, such as the effective pursuit of instrumental goals—deterrence, rehabilitation, and the like.[23]

Finally, just deserts proportionality provides a framework for individualized desert-based calibration because sentences are intended to reflect adequate censure by highlighting the level of blame for the offence. The framework focuses on two constitutive components: the gravity of the offence (harm component) and the level of blameworthiness (culpability) of the offender. In this sense, the sentence needs to be calibrated so it is neither too severe nor too lenient in light of these components. Critics of this approach have argued that the focus on crime seriousness and sentence severity can be too formalistic. By focusing almost exclusively on fitting punishments to particular crimes, von Hirsch and Ashworth have given the impression over the years of being uninterested in other aspects of the offender's situation.[24] However, as will be discussed, desert theory has evolved, allowing for more flexibility to consider additional factors that are relevant to the offender's situation in relation to blame and harm.

As will be seen, concepts such as censure, punishment, culpability, and harm have evolved within desert theory, yet remain grounded in determining the level of blame in relation to the gravity of the offence. Current desert-based proportionality grounds its approach in greater individualization and attention to social and experiential contexts by expanding the relevant factors that can be taken into account to ascribe the level of guilt and to understand harm.

1. The Dynamic Evolution of Censure and Punishment

As highlighted above, desert-based proportionality serves to ensure the *fair* expression and communicative function of punishment, which conveys censure to the offender, the victim, and society.[25] The normative message relating to censure treats the offender as an agent capable of moral deliberation and response without being instrumentalized. This resonates with Joel Feinberg's understanding of punishment, described as "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation."[26]

According to desert theorists, censure "serves only to give the actor the *opportunity* to make a response"[27] and "as an *appeal* to people's sense of the conduct's wrongfulness."[28] Traditional desert theory, contrary to penance theory,[29] suggests that censure is not *aimed* at

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[22] *Ibid.*

[23] Norval Morris, *Madness and the Criminal Law* (University of Chicago Press, 1982).

[24] See Thorburn & Manson, *supra* note 19.

[25] Ashworth, "Aggravation and Mitigation," *supra* note 2 at 254; von Hirsch & Ashworth, *supra* note 20. Censure rooted within a just deserts framework with an individualized and experiential conception of blame, discussed below, would be much more conducive to limiting the over-incarceration of marginalized groups than consequentialist accounts which have in great part contributed to the production of inequalities in sentencing as a product of risk-based analyses.

[26] "The Expressive Function of Punishment" in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) 95 at 98.

[27] von Hirsch & Ashworth, *supra* note 20 at 17-18 [emphasis in original].

[28] *Ibid* [emphasis in original].

[29] RA Duff, *Trials and Punishments* (Cambridge University Press, 1986) [Duff, *Trials and Punishments*]; Antony Duff, *Punishment, Communication and Community* (Oxford University Press, 2001) [Duff, *Punishment, Communication, and Community*].

provoking a discursive response, and therefore there is no need to tailor the censuring response to the actor's supposed degree of receptivity.

In recent years, certain retributivists have re-conceptualized censure and punishment as a more dynamic form of communication. While they recognize that the communicative dimension of punishment is not *aimed* at provoking a response, they nevertheless suggest that if the offender takes the opportunity to respond, this can be considered at sentencing and during the administration of the sentence.[30] This responsive view of penal censure suggests that the sentence may evolve in response to certain acts of the offender.[31] Accordingly, a responsive censure-based approach argues that the censuring authority, whether it be the sentencer or the administrator of the sentence, should be attentive to the fruits of the offender's moral deliberation, as they may affect the degree of censure that is (or remains) appropriate. The actions that serve to mitigate the degree of censure necessary are of a specific nature: They must be related to the offence for which censure was originally expressed. They can include, for instance, conduct post-conviction, such as an offender who undertakes reparative steps to address the harm caused, expression of remorse, and guilty pleas. It is argued that these responses to censure can result in a diminished punishment. Contrary to traditional desert theory, the offender is recognized as a *responsive agent* who partakes in a dialogue and cannot be ignored.[32] Accordingly, this approach enables authorities to review the original censuring decision over the years, in order to account for the prisoner's response to the sentence's message in relation to the offence.[33]

The notion of punishment has also evolved within desert-based rationales. For instance, authors have recognized the possibility for restorative justice, fines, and conditional sentences to communicate censure, and therefore to become recognized as providing different alternatives to imprisonment, which has been regarded as the sentence of reference over the last century.[34] These recent understandings of punishment have also relied on desert-based communicative theory to suggest that, since messages need to be understood by offenders and society, it is important to account for the offender's experience of punishment[35] instead of understanding punishment severity by merely relying on abstract accounts of typical individuals. This theoretical position challenges quantitative understandings of punishment, by pointing to empirical studies that suggest that punishments twice as severe in experiential terms are not necessarily twice as long.[36] This

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[30] Julian V Roberts & Netanel Dagan, "The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure" in Antje du Bois-Pedain & Anthony E Bottoms, eds, *Penal Censure: Engagements Within and Beyond Desert Theory* (Hart, 2019) 141 at 143.

[31] *Ibid.*

[32] Hannah Maslen, *Remorse, Penal Theory and Sentencing* (Hart, 2015).

[33] Roberts & Dagan, *supra* note 30 at 155. Examples of responsive offence-related factors include the way the person addresses the harm inflicted by compensating the victim's loss: showing sincere empathy and remorse; apologizing; taking responsibility for the harm. Responsive factors unrelated to harm and culpability should be excluded from this account, since they may rely on utilitarian aims such as diminishing reoffending.

[34] Kathleen Daly, "Restorative Justice: The Real Story" (2002) 4 Punishment & Society 55 at 60; Duff, *Punishment, Communication, and Community*, *supra* note 29.

[35] Adam J Kolber, "The Subjective Experience of Punishment" (2009) 109 Colum L Rev 182.

[36] Pierre Tremblay, "On Penal Metrics" (1988) 4 J Quantitative Criminology 225 at 235; Robert E Harlow, John M Darely & Paul H Robinson, "The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions" (1995) 11 J Quantitative Criminology, 71; Mara F Schiff, "Gauging the Intensity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale (CPSS)" (1997) 22 Crim Justice Rev 175.

conception of punishment also highlights that the scaling of severity based on the types of sanctions can vary to account for experience.[37]

2. Culpability (Blame) and Its Evolving Relationship to the Offence

Offender culpability (blame) and its impact have always been a consideration in the ascription of guilt, but the relevant factors through which culpability has been assessed have expanded. Under traditional desert theory, developed by von Hirsch and Ashworth, factors considered relevant to culpability include "factors of intent, motive and circumstances that determine the extent to which the offender should be held accountable for the act."[38] Hence, desert theorists heavily relied on criminal law doctrines of culpability, such as intention, recklessness, negligence, and excuses. They also acknowledged that culpability extended beyond mere cognition to a wide range of volitional and situational factors.[39] For instance, diminished volitional capacity is a conceivable basis for claiming reduced culpability.[40] Such factors remain retrospective as they focus on the offender's culpability during the commission of the offence.[41] Within this traditional theory, "what's done cannot be undone, as it were,"[42] and the offender's culpability remains intact, regardless of regrets or efforts to undo the act.

Factors such as redressing systemic wrongs, the pursuit of equality policies, collateral effects of conviction and sentence on the offender, reparation, remorse, and other post-offence matters[43] are considered unrelated to harm and culpability,[44] and are thus referred to as "extraneous" and without bearing on the determination of a proportionate sentence. Despite desert theorists' commitment to the dominant role of proportionality in the determination of principled punishments, they also acknowledge that there are situations where departures from proportionality are justifiable, if explained.[45]

In recent years, desert theory has developed a more flexible understanding of culpability grounded in social context. Indeed, it increasingly relies on the advancement of interdisciplinary knowledge and empirical data to inform the assessment of culpability and provides greater space to consider individualized personal characteristics and the circumstances of the offender in their understanding of culpability.

For instance, desert theorists traditionally resisted seeing a nexus between social deprivation and diminished culpability. While they recognized that there can be a strong association between social deprivation and offending behaviour, they maintained that this does not

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[37] For instance, banishment, imprisonment, fines, restoration, and other types of sanctions may be experienced differently.

[38] Andrew von Hirsch & Nils Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11 Oxford J Leg Stud 1 at 2-3.

[39] Andrew Ashworth, *Sentencing and Criminal Justice*, 6th ed (Cambridge University Press, 2015) at 158 [Ashworth, *Sentencing and Criminal Justice*].

[40] For instance, mental disability is recognized as a factor that can diminish culpability on the basis that a person's capacity to comply with the law is impaired. See von Hirsch & Ashworth, *supra* note 20 at 63.

[41] As von Hirsch and Harnrahan highlight "judgments about seriousness are judgments about past events…By waiting longer one learns nothing new." See Andrew von Hirsch & Kathleen J Hanrahan, *The Question of Parole: Retention, Reform, or Abolition?* (Ballinger, 1979) at 29.

[42] Julian V Roberts & Hannah Maslen, "After the Crime: Retributivism, Post-Offence Conduct and Penal Censure" in AP Simester, Antje du Bois-Pedain & Ulfrid Neumann, eds, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart, 2014) 88 at 89.

[43] Ashworth, "Aggravation and Mitigation," *supra* note 2.

[44] *Ibid* at 27.

[45] von Hirsch, *supra* note 11 at 56.

deny the capacity to behave otherwise.[46] Desert theory nuanced itself throughout the years by recognizing additional studies that suggested that individuals within socially deprived circumstances may find themselves under pressure to commit crime. It also acknowledged that some people are trapped in a criminal lifestyle, with scarcely more capacity for free choice than the person subjected to direct threats and that, therefore, they should not be held to the same normative expectations as others. Hudson warned that some assumptions around the notion of free will and culpability need to be reconsidered:

> [T]he notion of free will…is assumed in ideas of culpability....Legal reasoning seems unable to appreciate that the existential view of the world as an arena for acting out free choices is a perspective of the privileged, and that potential for self-actualization is far from apparent to those whose lives are constricted by material or ideological handicaps.[47]

There is an increasing understanding that human choice is a complex, interactive process that involves both a distinctively human capacity for moral reasoning, and strong instincts and inclinations.[48]

Based on these reflections, desert theorists acknowledge that social deprivation can constrain an offender's choice to an extent significant enough to reduce their culpability.[49] They highlight that the evidence on how socio-economic differences interact with the communities and institutions in which they live remains uncertain and varying in degree. In recent years, evidence of this can be grounded in lived experiences from marginalized communities that can be conveyed through various reports, including Gladue reports and Race and Culture Assessments.[50]

Moreover, recent accounts of retributive proportionality expand culpability beyond substantive criminal law doctrines and have recently found the offender's prospective conduct following the offence to be relevant. While the offender's conduct before the offence has always been a relevant consideration in the ascription of guilt within retributive theories, prospective conduct was traditionally excluded and has only recently been considered to provide "a context in which to judge not the seriousness of the crime…but the extent to which the offender should be considered blameworthy."[51] Specifically, some scholars recognize the relationship between post-offence conduct, such as remorse and reduced culpability,[52] and previous convictions and greater culpability.[53] This literature recognizes mitigating and aggravating factors that were traditionally

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[46] von Hirsch & Ashworth, *Proportionate Sentencing*, *supra* note 20 at 63; Ashworth, *Sentencing and Criminal Justice*, *supra* note 39 at 159; Michael S Moore, "The Moral Worth of Retribution" in Ferdinand Schoeman, ed, *Responsibility, Character, and the Emotions* (Cambridge University Press, 1988) 179; Sanford H Kadish, *Blame and Punishment: Essays in the Criminal Law* (Macmillan, 1987).

[47] Barbara A Hudson, "Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice" in Antony Duff et al, eds, *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press, 1994) at 302. This analysis was referred to by just deserts theorists von Hirsch and Ashworth in *Proportionate Sentencing* (*supra* note 20 at 72).

[48] Anthony Bottoms, "Five Puzzles in von Hirsch's Theory" in Andrew Ashworth & Martin Wasik, eds, *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Clarendon Press, 1998) 53 at 81–82.

[49] Ashworth, *Sentencing and Criminal Justice*, *supra* note 39 at 159.

[50] Dugas, *supra* note 13; *R v Anderson*, 2021 NSCA 62; *R v Morris*, 2021 ONCA 680.

[51] Julian V Roberts, "The Recidivist Premium: For and Against" in Andrew von Hirsch, Andrew Ashworth & Julian Roberts, ed, *Principled Sentencing: Readings on Theory and Policy*, 3rd ed (Hart, 2009) at 155.

[52] *Ibid*. Within this perspective, offenders' remorse speaks to their relation to the act for which they are being punished. Remorseful offenders are concerned with achieving some rectification for their wrongdoing—taking a step away from their offending and therefore reducing the extent to which they are considered blameworthy.

[53] See Julian V Roberts, "Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium" (2008) 48 Brit J Crim 468 (arguing that within just-desert, reoffending is a mark of increased

considered irrelevant since culpability strictly referred to blameworthiness during the commission of the offence.[54] This new development has been referred to as "retributarianism,"[55] which suggests greater individualization and an extension of the relevant timeframe for assessing culpability.

3. The Evolution of the Gravity of the Offence (Harm)

The second component of proportionality refers to the gravity of the offence and encompasses the harm related to the offence – understood as "injury done or risked by the act."[56] This component has always been a component of desert-based proportionality, but its conceptualization evolved from an abstract understanding to the recognition of individualized/experiential accounts.

Indeed, traditional desert theorists initially assessed this dimension of proportionality within a more abstract analysis that refers to the typical victim. They developed a framework they term the living standard approach, which gauges levels of harm by placing them on a scale[57] to assess the effect of the typical case of particular crimes on the living standard of victims. The framework first examines what interests are violated or threatened by the standard case of the crime.[58] Second, there is a quantification of the effect of violating those interests on the living standards of the typical victim.[59] At this stage, these quantifications of effect on living standards need to be transferred to a scale of harm. Within this framework, harm refers to what is conceived as typical relating to given offences and is therefore not individualized. An additional step includes possible reduction in the level of seriousness to reflect the remoteness of the actual harm.

Recent conceptions of this component have evolved to recognize individualized and experiential conceptions of harm as part of the analysis. This evolution has been particularly prominent with the rise of the victim in the criminal process. Indeed, some literature on victim impact statements (VIS) argues that these statements advance proportionality by providing

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blameworthiness for reasons similar to premeditation, namely the presence of a more culpable state of mind). Having already been convicted and sentenced, an offender should take steps to address the causes of non-compliance. Also, having already been convicted gives, or should give, the actor increased awareness of the wrongfulness of his behaviour when he contemplates doing this again. See also Darcy L MacPherson, "The Relevance of Prior Record in the Criminal Law: A Response to the Theory of Professor von Hirsch" (2002) 28 Queen's LJ 177; Youngjae Lee, "Recidivism as Omission: A Relational Account" (2009) 87 Texas L Rev 571; Julian V Roberts, *Punishing Persistent Offenders: Exploring Community and Offender Perspectives* (Oxford University Press, 2008).

[54] Retributivists are divided on this topic. For some, prior convictions should never be relevant elements at sentencing since they do not relate to the specific offence under consideration. See *e.g.* George P Fletcher, *Rethinking Criminal Law* (Little, Brown & Company, 1978); Mirko Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish, 2001). Traditional desert-theory has assigned a very limited role to previous convictions under the progressive loss of mitigation doctrine, which argues that first offenders should receive a discounted sentence, as well as those who have had up to a certain number of previous convictions. According to this perspective, it is only after several repetitions that offenders should be dealt with by the imposition of the full measure of penalty at the level of the ceiling for the offence. See *e.g.* Martin Wasik & Andrew von Hirsch, "Section 29 Revised: Previous Convictions in Sentencing" (1994) 24 Crim L Rev 409; von Hirsch & Ashworth, *supra* note 20.

[55] Hadar Dancig-Rosenberg & Netanel Dagan, "Retributarianism: A New Individualization of Punishment" (2019) 13 Crim L & Philosophy 129.

[56] von Hirsch & Jareborg, *supra* note 38 at 2.

[57] *Ibid*. See also Ashworth, *Sentencing and Criminal Justice*, supra note 39.

[58] These interests are divided into four generic categories: physical integrity; material support and amenity; freedom from humiliation or degrading treatment; and privacy and autonomy.

[59] Effects are categorized into four levels: subsistence; minimal well-being; adequate well-being; and significant enhancement.

accounts of harm more accurately than those relating to the traditional objective standard.[60] It has been argued that without a clear understanding of the impact of the crime, a court is sentencing on the basis of the generic level of harm associated with a legal category, resulting in a loss of proportionality and hence justice.[61] Indeed, studies suggest that judges have found VIS useful to craft proportionate sentences as the statements provide them with more information about the actual harm suffered.[62]

B. Utilitarian Conceptions of Proportionality

Conceptions of proportionality underpinned by utilitarianism are less developed within the academic literature.[63] Under a utilitarian perspective, sentences may be disproportionately severe in two situations.[64] The first, "ends benefits" proportionality, occurs when burdens outweigh the benefits produced by the penalty or when burdens, compared to a lesser penalty, outweigh the benefits. Alternatively, it can be disproportionately lenient when it is less effective than a more severe, but still cost-effective, penalty. The second, "alternative-means" proportionality, suggests that a sentence is disproportionately severe when there exist less costly or burdensome means of achieving the same goals.

Some more recent utilitarian theories of punishment consider proportionality a moderating principle—a ceiling requiring that a sentence not exceed what is just and appropriate to achieve their retained utilitarian aim.[65] In this sense, proportionality is described as a brake rather than a yardstick and operates to limit the negative effects of punishment.

"Limiting retributivism" is a form of hybrid theory that is rooted within a consequentialist rationale. Norval Morris, its leading proponent, and other subsequent endorsers developed theories of punishment that aim to provide solutions to systemic criminal justice problems, including the growing size of the prison population and the overrepresentation of racial minorities and people with mental health issues, rather than to formulate principled and legitimizing frameworks of punishment.[66] This theory suggests that proportionality should set loose upper and lower limits to ensure punishment is not contrary to community standards and, within these limits, judges can

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[60] Anthony Bottoms, "The 'Duty to Understand': What Consequences for Victim Participation?" in Anthony Bottoms & Julian V Roberts, eds, *Hearing the Victim: Adversarial Justice, Crime Victims, and the State* (Willan Publishing, 2010) 17; Edna Erez, "Who's Afraid of the Big Bad Victim?: Victim Impact Statements as Victim Empowerment and Enhancement of Justice" (1999) Crim L Rev 545; Paul G Cassell, "In Defense of Victim Impact Statements" (2009) 6 Ohio St J Crim L 611; Marie Manikis & Julian V Roberts, "Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm" (2010) 15 Can Crim L Rev 1; Marie Manikis, "Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims" (2015) 65 UTLJ 85. This contribution and conception of proportionality is also supported by Paul G Cassell & Edna Erez, "Victim Impact Statements and Ancillary Harm: The American Perspective" (2011) 15 Can Crim Law Rev 149.

[61] Julian V Roberts & Marie Manikis, *Victim Personal Statements: A Review of Empirical Research* (Office of the Commissioner for Victims of Crime and Witnesses of England and Wales, 2011) at 9.

[62] See *e.g.* Julian V Roberts & Allen Edgar, *Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions* (Department of Justice Canada, 2006) at 15 (in which judges noted that statements were particularly useful for crimes of violence, property offences where the extent of loss was unclear, or cases in which the harm to the victim was unusual, exceptional or "not clearly manifest to an objective observer"); Erez, *supra* note 60.

[63] Richard S Frase, "Theories of Proportionality and Desert" in Joan Petersilia and Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012) 131.

[64] Richard S Frase, "Limiting Excessive Prison Sentences Under Federal and State Constitutions" (2008) 11 J Constitutional L 39 at 43.

[65] von Hirsch & Ashworth, *supra* note 20 at 5.

[66] Manson & Thorburn, *supra* note 19.

pursue any consequence-oriented objectives.[67] Richard S. Frase recently criticized this loosely-defined limit and suggested that proportionality should largely be a matter of retributive considerations, with utilitarian concerns only relevant within a narrow range of deserved sentences.[68]

Factors relevant to the determination of a sentence within utilitarian conceptions depend on the chosen objective of sentencing, such as deterrence, rehabilitation, reparation, or public protection. Factors are relevant only insofar as they relate to limiting the harm of punishment or ensuring that the sentence meets its objective. For instance, similar to retributive sentencing, punishment in proportion to past harm is relevant within utilitarian theory, but only when this will prevent future similar crimes by the offender through deterrence, incapacitation, and/or rehabilitation, or prevent crimes by others through deterrence and norm reinforcement. Further, contrary to desert-based proportionality, culpability for utilitarians is relevant only to the extent that it relates to future benefits of the punishment—for instance, the dangerousness, rehabilitative, and deterring possibilities for this offender and others.

As recognized by its founder, Morris, the theoretical foundations of consequentialist proportionality, including limiting retributivism, have been weaker than desert-based accounts. Specifically, unlike a desert-based conception that developed frameworks for achieving ordinal proportionality,[69] consequentialist conceptions of proportionality are primarily grounded in a logic of efficiency towards achieving various objectives, discussed above, but without a clear framework of how and in what ways this can efficiently be achieved with punishment. Further, they have been concerned primarily with criminal justice policy-making and, unlike just deserts theory, less with principled accounts that provide justifications for state coercion through sentencing.[70] Desert-based theorists have, in this sense, also developed frameworks to determine and justify which factors are considered relevant to censure being commensurate to the degree of blameworthiness that a conduct would warrant.

As a response to some of these critics, Morris' theory was refined by drawing on just deserts to set the outer limits of proportionate punishment. However, theorists have continued to suggest that the framework needs to provide more guidance on judicial discretion to pursue instrumental ends. As Frase highlighted, a more precise formulation of the limited retributivist model needs to be set out and "must, itself, be kept within some limits or it ceases to have any real meaning or utility."[71] For the time being, a more precise formulation of a predominantly consequentialist model to achieve utilitarian goals, such as deterrence and rehabilitation, has yet to be achieved and, for many consequentialists, keeping within the limits drawn by a desert-based perspective risks undermining the achievement of these utilitarian goals. This can be seen in the numerous judgments wherein consequentialists are tempted to ignore these limits in order to achieve such objectives, yet still refer to proportionality. In this sense, proportionality rooted within a consequentialist model provides much less guidance for sentencers and is less firmly rooted in an underlying rationale. Finally, its emphasis on a series of objectives undermines the

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[67] Norval Morris, *The Future of Imprisonment* (Chicago University Press, 1974); Manson & Thorburn, *supra* note 19.
[68] "Limiting Retributivism," *supra* note 19.
[69] von Hirch & Ashworth, *supra* note 20 at 140. The three sub-requirements proposed by desert theorists include parity, rank-ordering, and spacing of penalties. For a desert-based understanding of proportionality, the requirements of ordinal proportionality are not mere limits, and they are infringed (considered disproportionate) when persons that are similarly blameworthy for a similar conduct receive unequal sanctions on ulterior (*e.g.*, crime prevention) grounds.
[70] Manson & Thorburn, *supra* note 19 at 279.
[71] *Ibid* at 295.

censuring dimension of punishment, which risks greater arbitrariness and the dangers highlighted with consequentialism.

II. The Evolving Conception(s) of Proportionality in Canadian Sentencing

The following section examines the evolution of proportionality in Canada. It argues that proportionality within legislation is rooted in desert. Moreover, it suggests that the Supreme Court of Canada rooted proportionality within desert theory and in recent years evolved, just like desert theory, to expand the components of desert-based proportionality, namely culpability and harm. Most recently, however, the Court has re-defined the concept of proportionality to incorporate both desert and utilitarian approaches,[72] muddling the underpinnings of this concept. Finally, this section argues in favour of a dynamic approach to proportionality that is rooted within a desert-based logic of punishment, where other sentencing considerations can be integrated separately from proportionality.

A. Desert-based Proportionality in Canada

The principle of proportionality has a long historical presence in Canada. Even prior to its entrenchment as a fundamental principle of sentencing in the *Criminal Code*, courts highlighted the necessity of a proportionate relation between punishment and blameworthiness.[73]

In 1996, the principle of proportionality was officially recognized as the fundamental principle of Canadian sentencing. Section 718.1 of the *Criminal Code* specifies that all sentences must be proportional to the gravity of the offence and the degree of responsibility of the offender.[74] This incorporation was in great part due to the influence of the Canadian Sentencing Commission, which produced the Report on Sentencing Reform in 1987.[75]

At the time this report was drafted, judges chose among different principles and combined them as they saw fit, in the absence of paramount guiding principles and objectives.[76] As a response to this "amalgam approach,"[77] the Sentencing Commission relied on the work of von Hirsch, who developed just deserts theory. Accordingly, it integrated von Hirsch's dual desert-based components to the principle of proportionality, which stated that "[t]he paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence."[78]

Although Parliament maintained the amalgam approach by avoiding hierarchizing the objectives of sentencing, it nevertheless recognized von Hirsch's desert-based conception of proportionality as the fundamental principle of sentencing in Canada.[79] This provision, among the most explicit incorporation of desert-based proportionality in common law, explicitly mentions

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[72] Sylvestre, *supra* note 5.
[73] *R v Martineau*, [1990] 2 SCR 633 at 645 (proportionality between punishment and blameworthiness was recognized as a principle of fundamental justice). Earlier, the Court of Appeal of Ontario also alluded to the importance of "just proportion" between the crime and the sentence by highlighting that the nature and gravity of the crime need to be taken into account when determining a sentence. See *R v Wilmott*, [1966] 2 OR 654 (CA).
[74] See *supra* note 2, s 718.1.
[75] *Sentencing Reform: A Canadian Approach* (Ottawa: CSC, February 1987).
[76] *Ibid* at 58.
[77] Manson, *supra* note 6 at 62.
[78] Canadian Sentencing Commission, *supra* note 75 at 154.
[79] Manson, *supra* note 6 at 62, 76.

von Hirsch's dual components of proportionality, the gravity of the offence and the blameworthiness of the offender.

The Sentencing Commission also referred to theories linking punishment to prevention and penal censure,[80] as well as the rule of law. For instance, it stated that punishment does not serve to "deter those tempted to break the rules but rather to maintain the rules as a set of standards that compel allegiance in spite of violations."[81] Punishment is legitimized because it is an appropriate way of *addressing* the perpetrator and society, seen as agents capable of deliberation. This reasoning aligns with a desert-based communicative theory discussed above, which suggests that despite some preventive dimension, "[a]ny positive-general-preventive effect that such messages have would be secondary to such normative reasons."[82] Based on these understandings, the Commission recommended that "[i]n furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions."[83] This dimension is included in section 718 of the Criminal Code, which highlights that the fundamental purpose of sentencing in Canada "is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions."[84] This roots the rationales of sentencing in desert and links them to the foundational dimensions of criminal law and the rule of law.

Further evidence that the principle of proportionality is predominantly rooted in desert theory can be found in the Supreme Court of Canada's interpretation of this legislative principle. As will be seen, it has been linked to the retributive aims of punishment, desert, and censure, while also recognizing a restraining dimension and linking the principle to the importance of parity.

1. Retributive-based Proportionality and Censure

In *R. v. M.(C.A.)*, the Court cited the Canadian Sentencing Commission's 1987 Report on Sentencing Reform to state that a theory of retribution centred on "just deserts" or "just sanctions" provides a helpful organizing principle for imposing criminal sanctions.[85]

Placing the principle of proportionality at the centre of the discussion, Chief Justice Lamer argued that retribution provides a relevant "conceptual link" between criminal liability and the eventual sanction, and that proportionality determines its measure. He justified retribution by distinguishing it from vengeance in the following terms:

> Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint;

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[80] Von Hirsch's work is cited by the Canadian Sentencing Commission, highlighting that "[h]ad punishment no preventive value, the suffering it inflicts would be unwarranted" (*supra* note 75 at 131). This vision, however, sees censure as predominantly a tool to communicate with moral agents.

[81] Canadian Sentencing Commission, *supra* note 75 at 151, citing Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) at 400-01.

[82] von Hirsch & Ashworth, *supra* note 20 at 20.

[83] Canadian Sentencing Commission, *supra* note 75 at 153.

[84] *Supra* note 2, s 718.

[85] [1996] 1 SCR 500 at para 78.

> retribution requires the imposition of a just and appropriate punishment, and nothing more.[86]

In addition to linking proportionality to retribution, the Court highlighted the importance of ensuring that the sentence imposed bears some relationship to the offence[87] when examining desert—thus adopting the logic of offence centrality at the heart of desert-based proportionality. Prior to the legislative amendments, this idea was expressed by Justice Wilson's concurring judgment in *Re B.C. Motor Vehicle Act*:

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.[88]

This idea of a "fit" sentence is synonymous with a desert-based conception of proportionality.

The relationship between proportionality and retribution is also found in the Court's justification of proportionality as a principle. In a Kantian logic, Justice Rosenberg highlighted that "[c]areful adherence to the proportionality principle ensures that th[e] offender is not unjustly dealt with for the sake of the common good"[89]—a statement supported by the Supreme Court of Canada.[90] Proportionality is therefore rooted in retributive desert considerations rather than on consequentialist underlying theories of punishment.

The Court echoed desert theory throughout the years by holding that punishments must be sufficiently afflictive to enable censure, but no more than necessary to speak out against the offence and the offender's level of blameworthiness.[91] It links just deserts to sentencing as a form of judicial and social censure, referring to works by desert theorists to highlight this as their rationale[92] and its restraining function.[93]

This dual dimension of desert is also featured in *R. v. Ipeelee*,[94] in which Justice Lebel describes proportionality as linked to the objective of denunciation—related to desert theory's notion of censure—and the restraining component, tied to the offender's moral blameworthiness.

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system....Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the

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[86] *Ibid* at para 80.
[87] *Ibid* at para 40.
[88] [1985] 2 SCR 486 at 533 [*BC Motor Vehicle Act*].
[89] *R v Priest* (1996), 10 CCC (3d) 289 at 297-98 (Ont CA).
[90] *R v Lacasse*, 2015 SCC 64 at para 128 [*Lacasse*]. This case relates to an offence of impaired driving causing death and discusses whether it was open to the trial judge to consider the frequency of impaired driving in a region where the offence was committed as a relevant factor. As part of this analysis, it examines proportionality (*ibid* at para 13).
[91] *R v Nasogaluak*, 2010 SCC 6 at para 42 [*Nasogaluak*]; *Lacasse*, *supra* note 90 at paras 12, 123, 154, Gascon J, dissenting. See also *R v Friesen*, 2020 SCC 9 at para 75 [*Friesen*], citing *Nasogaluak*, *supra* note 91 at para 42 (confirming that proportionality serves its function of "ensur[ing] that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused").
[92] *Nasogaluak*, *supra* note 91 at para 42, citing Julian V Roberts & David P Cole, "Introduction to Sentencing and Parole" in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (University of Toronto Press, 1999) 3 at 10.
[93] *Nasogaluak*, *supra* note 91 at para 42.
[94] 2012 SCC 13 [*Ipeelee*]. In this case, two Indigenous offenders with long-term supervision orders (LTSO) for committing offences while intoxicated were sentenced to imprisonment for breaching conditions in the LTSO. They had addictions to drugs and alcohol and a history of committing sexual assaults when intoxicated. The Court had to decide how to determine a fit sentence for a breach of an LTSO in the case of an Indigenous offender.

> principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.[95]

Curiously, the Court divides proportionality into a dual function: The principle either promotes justice for victims and ensures public confidence or ensures justice for the offender. This division supposes that victims and the public share interests, which are inherently different from those held by the offender. This logic is questionable since victimization, offenders, and the public confidence are interrelated. More often than not, these actors share similar interests in just sanctions.[96] Further, the Court also seems to suggest that the restraining dimension of proportionality only relates to the moral blameworthiness of the offender but not the gravity of the offence, departing from just deserts theory.

Further, the Court has drawn important links between proportionality and parity—a crucial component of desert-based sentencing. It has long held that similar offenders who commit similar offences in similar circumstances should receive similar sentences, and that parity and proportionality are not in tension.[97] In *Friesen*,[98] the Court recently recognized that "parity is an expression of proportionality" and "[a] consistent application of proportionality will lead to parity."[99] This highlights that proportionality can be individualized to attend to individual dimensions of the offender, an argument that is increasingly permeating desert-based theory. As highlighted by the Court in *Lacasse*, "[i]ndividualization and parity of sentences must be reconciled for a sentence to be proportionate."[100]

Finally, as will be seen below, the Supreme Court of Canada has also rooted proportionality within desert theory by considering factors that relate to its dual components: the gravity of the offence and degrees of culpability.

2. A Commitment to the Dual Components of Just Deserts and the Exclusion of Extraneous Factors from the Concept of Proportionality

The Supreme Court of Canada relied on desert-based proportionality by underscoring its equal commitment to both the gravity of the offence and blameworthiness of the offender. For instance, in *R. v. Proulx*, the Court highlighted that the presumptive exclusion of certain offences from the conditional sentencing regime on the basis of proportionality misconstrues the nature of this principle, because this inordinately focuses on the gravity of the offence and insufficiently on moral blameworthiness.[101] More recently, in *Ipeelee* and *Lacasse*, the Court reiterated this dual and equal commitment to both components of proportionality.[102]

In earlier decisions, in addition to reaffirming the importance of both components, the Court held that factors unrelated to these dual components, such as time spent in pre-sentence custody and the collateral effects of a sentence, are irrelevant to proportionality, but can be taken into account in the overall punishment.

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[95] *Ipeelee*, *supra* note 94 at para 37.
[96] Marie Manikis, "A New Model of the Criminal Justice Process: Victims' Rights as Advancing Penal Parsimony and Moderation" (2019) 30 Crim LF 201.
[97] *R v Pham*, 2013 SCC 15 at para 9 [*Pham*]; *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 68; *Lacasse*, *supra* note 90 at para 53.
[98] *Friesen*, *supra* note 91.
[99] *Ibid* at para 32.
[100] *Lacasse*, *supra* note 90 para 53.
[101] *R v Proulx*, 2000 SCC 5 at para 83 [*Proulx*].
[102] *Ipeelee*, *supra* note 94 at para 36; *Lacasse*, *supra* note 90 at para 53.

This approach to proportionality is seen in early cases that followed the codification of proportionality, including *Proulx*[103] and *R. v. Fice*.[104] For instance, when discussing conditional sentences and whether time spent in pre-sentence custody are relevant to the overall sentence, the Court applied its reasoning from *Wust*[105] to conclude that although time spent in pre-sentence custody needs to be considered within the total punishment, it is not a mitigating factor that can affect the range of sentence and the availability of a conditional sentence. According to the Court, "[t]his makes sense because the appropriate range of sentence is related to the gravity of the offence or the moral blameworthiness of the offender, and these concepts do not change with the time spent in pre-sentence custody."[106] This approach maps onto Ashworth's view of "extraneous" factors,[107] according to which only factors related to harm and blameworthiness are relevant to proportionality.

More recently, the Court took a similar view of desert-based proportionality in *Pham*.[108] In this case, an accused without citizenship was convicted of drug-related offences and would face the loss of his right to appeal a removal order against him under the *Immigration and Refugee Protection Act* (IRPA) if sentenced to a term of imprisonment of at least two years. The Court had to determine whether a sentence can be varied on the basis that the offender would face collateral consequences under the IRPA. It made clear that aggravating and mitigating factors should pertain to the dual components of desert-based proportionality. Indeed, in the words of the Court, some personal circumstances of the offender, such as the collateral consequences of a sentence "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 (s. 718.2(a) of the *Criminal Code*)."[109]

The Court maintained that collateral consequences of a sentence can remain relevant to the overall sentence, but only when they are justified by reference to *other* principles, such as individualization and parity, or objectives of rehabilitation.[110] This resonates with desert theory's concept of extraneous factors.

Within this framework, a distinction between the proportionate aspect of sentences and other aspects is therefore needed to determine which factors can be taken into account as part of a proportionate sentence, and which additional factors can be relevant in the overall sentence but are separate from proportionality (because they rest on different underlying rationales). Indeed, a distinction can be made between mitigating factors and factors that can reduce the sentence on different underlying theories. Mitigating factors, according to desert-based proportionality, refer only to factors that are relevant to the gravity of the offence and blameworthiness yet external to proportionality, such as collateral effects and time spent in pre-trial detention, which may be relevant to craft "fit" sentences. Therefore, as will be discussed in Part III(A), below, fitness should not be used interchangeably with proportionality. Terminology is important to root concepts within principled rationales, which in turn affect the relevance of factors in sentencing.

While the Court initially adopted a desert-based understanding of proportionality, it evolved to offer a new conception of proportionality that is difficult to reconcile with its previous

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[103] *Supra* note 101.
[104] 2005 SCC 32 [*Fice*].
[105] *Fice*, *supra* note 104 at para 21, citing *R v Wust*, 2000 SCC 18 at para 41.
[106] *Fice*, *supra* note 104 at para 22.
[107] Ashworth, "Aggravation and Mitigation," *supra* note 2 at 25.
[108] See *supra* note 97.
[109] *Ibid* at para 11.
[110] *Ibid*. See also *R v Suter*, 2018 SCC 34 at para 48 [*Suter*].

iterations about the gravity of the offence and blameworthiness as the relevant elements of proportionality. Part II(C) will explore the ways that the Court has increasingly rooted proportionality within consequentialist rationales.

B. The Evolution of Retributive-based Proportionality: The Expansion of Culpability, Harm, and Punishment

In recent years, the Supreme Court of Canada interpreted the dual components of proportionality by relying on evolving understandings of culpability, harm, and punishment. Consideration of the evolving knowledge on culpability (blame) and harm suggests that desert-based proportionality has the potential to evolve in a principled manner. As discussed below, the Court's evolving understanding of culpability and harm parallels some of the evolution in desert-based theory.

1. The Evolving Conception of Culpability/Blameworthiness

In *Ipeelee*, the Court recognized the importance of assessing culpability within a desert-based framework of proportionality. It provided interpretative remarks on factors relevant to understanding culpability within the context of sentencing Indigenous offenders under section 718.2(e) of the *Criminal Code*.

Despite its emphasis on the various objectives and conceptions of proportionality in *Ipeelee*, the Court rooted in part the *R. v. Gladue*[111] methodology under 718.2(e) within a desert-based understanding of proportionality. The *Gladue* methodology instructs judges to take into account: (1) the unique systemic and background factors which may have played a part in bringing the Indigenous offender before the courts; and (2) the types of sentencing procedures and sanctions potentially appropriate in the circumstances for the offender in light of their particular Indigenous heritage.[112]

In *Ipeelee*, the Court specified that systemic and background factors can be relevant mitigating factors, because they may explain in part the Indigenous offender's conduct.[113] Indeed, it argued that "systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness."[114] The Court echoes traditional desert theory by referring to voluntariness, an aspect of criminal liability. It suggests that while socio-economic deprivation faced by many Indigenous offenders rarely—if ever—attains a level whereby their actions could be considered involuntary and therefore undeserving of criminal sanctions, it can nonetheless be said that their circumstances may diminish their moral culpability. The language of desert used by the Court suggests a desert-based understanding of culpability.

Although traditional desert theory has resisted linking volition, socio-economic deprivation, and culpability, the Court followed desert theory's increasing openness to external

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[111] [1999] 1 SCR 688 [*Gladue*]. In *Gladue*, an Indigenous woman pled guilty to manslaughter for killing her partner who was having an extramarital affair with her sister. This was a seminal decision that interpreted section 718.2(e) of the Canadian Criminal Code, which requires sentencers to pay particular attention to the circumstances of Indigenous offenders and to consider all available sanctions other than imprisonment, including restorative and Indigenous approaches to sentencing. *Ipeelee* is a complementary decision that provides further guidance.

[112] *Ipeelee*, *supra* note 94 at para 72.

[113] *Ibid* at para 73; *R v Wells*, 2000 SCC 10 at para 38 [*Wells*]. The Court refers to desert-based proportionality such that the sentence must be proportionate to the gravity of the offence as well as the degree of responsibility of the offender.

[114] *Ipeelee*, *supra* note 94 at para 73.

knowledge about the relationship between volition and culpability. Indeed, there is recognition among desert theorists that moral volition varies in degree, which can be integrated in our understanding of culpability. Remaining in desert-based understandings, by explicitly referring to criminal liability's premise which follows from voluntary conduct that is deserving of criminal sanctions, as well as recognizing degrees of diminished moral blame, the Court nevertheless employs a more flexible evidential standard to link social deprivation and volition in the context of Indigenous offenders. Departing from traditional desert theory, the Court makes clear that a causal link between background factors and the offence is not required.[115] The Court also makes clear that systemic and background factors do not operate as an excuse or justification for the offence but provide context that can bear on the offender's culpability. The Court's position reflects an increasing recognition that socio-economic factors affect volition, even if this remains difficult to prove with causal certainty.

2. The Evolving Conception of Harm/Gravity of the Offence

The Supreme Court of Canada also addressed the harm/gravity dimension of proportionality. While it limited its importance in the context of Indigenous offenders in *Ipeelee*, it made this aspect prominent in *Friesen*[116] for sexual violence against children, accounting for society's contemporary understanding of the gravity of this form of violence. The recent rise of VIS also contributed to a re-conceptualization of harm that is more subjective and experiential, similar to the evolution in desert-based theory.

In the context of sentencing Indigenous offenders, *Gladue* highlights the importance of desert-based proportionality by specifying that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."[117] Therefore, from a desert-based perspective, the seriousness of the offence would be weighed along with the culpability of the offender, including background and systemic factors.[118] This might give rise to a situation where sentences for more serious offences will be closer to the ones for offenders who do not have the mitigating elements that relate to the background factors discussed in *Gladue* and *Ipeelee.* If mitigating elements exist, such as those that relate to the socio-economic context that can affect blame, this would be relevant in the assessment of proportionality.[119] Arguably, the Court had this in mind in *Gladue*, which does not mean that the consideration of background under section 718.2(e) is not to be taken into account.

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[115] *Ibid* at para 81.

[116] This case involves sexual assault against a young person and whether an error of law or a demonstrably unfit sentence was rendered when relying on the starting point for sexual offences towards youth. *Friesen, supra* note 91 at paras 2-3.

[117] *Supra* note 111 at para 79; *Wells, supra* note 113 at paras 42-44.

[118] As highlighted by Justice Iacobucci, the sentencing judge must also look to the circumstances of the Indigenous offender, which include factors that relate to moral blameworthiness. See *Wells, supra* note 113 at para 38.

[119] In recent years, *Gladue* reports have been helpful in offering additional context that allow for a greater understanding of blameworthiness. However, when tied to consequentialist aims, such as reducing crime rates by imposing sentences that effectively deter criminality and rehabilitate offenders, these aims have not been met. Instead, they have been used as risk assessment tools that illustrate the risk of reoffending and have undermined efforts to reduce the over-incarceration of Indigenous people, contributing to discriminatory practices and decisions. See Constance MacIntosh & Gillian Angrove, "Developments in Aboriginal Law: The 2011-2012 Term – Charter Rights, Constitutional Rights, Taxation and Sentencing" (2012) 59 SCLR 1.

Surprisingly, in *Ipeelee*, the Court treated the notion of offence seriousness invoked in *Gladue* as a foreign concept in Canadian sentencing. The Court referred to an article that suggests that in the absence of either a legal test to determine what is considered "serious" and a distinction between serious and non-serious crimes in the Code, it can be said that statutorily speaking, there is no such thing as a "serious" offence.[120] This affirmation is curious for a Court that has relied on desert-based proportionality and levels of offence gravity, examining the relative seriousness of offences as part of its analysis. Further, the *Criminal Code* refers to gravity in its definition of proportionality under section 718.1, and several provisions note that offence seriousness is an important dimension of sentencing.[121] Moreover, the Supreme Court of Canada referred to this notion in various criminal justice contexts, including in decisions that engage with proportionality.[122] Instead of suggesting that ordinal ranking does not exist and avoiding this concept in *Gladue*, sentencing law would have benefited from additional clarification on offence seriousness.

The evolving notion of offence gravity as an important dimension of proportionality is discussed in *Friesen*.[123] This case involved sexual assault against a young person and whether an error of law or a demonstrably unfit sentence was rendered when relying on the starting point for sexual offences towards youth. Accordingly, the Court had to assess offence gravity and posited that the concept of harm may evolve with society's understanding or with new knowledge that exposes biases and myths surrounding specific harms. The Court emphasized that the concept of gravity in proportionality must not only consider physical but also emotional and psychological harm.[124]

Moreover, like the evolution of desert theory, the Court clarified that the inherent harm to the offence is insufficient when examining harm. Sentences need to reflect the gravity of the offence, as well as the consequential harm to children and their families, caregivers, and communities, and the experiential harm suffered by victims. This resonates with the literature on VIS from a desert-based perspective, which recognizes the importance of ancillary harm and lived experiences in the calibration of the harm dimension of proportionality.

C. An Evolution Towards Consequentialist Conceptions of Proportionality and the Inclusion of Extraneous Factors

While the retributive and desert-based foundations of proportionality remain strong in Canada, the Supreme Court of Canada has recently begun to infuse its judgments with consequentialist views of proportionality that conflict with its desert-based conception. This increasing multiplication of meanings of proportionality has given rise to a situation where factors previously considered extraneous to proportionality are now being considered within its definition. This can be seen in several recent judgments, including *Ipeelee*, *Lacasse*, *Nasogaluak*, *Pham*, and *Suter*.

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[120] *Ipeelee*, *supra* note 94 at para 86.

[121] For instance, the *Criminal Code* as well as the *Youth Criminal Justice Act* define serious offences in relation to the sentence. See *Criminal Code*, *supra* note 2, ss 2, 467.1(1); *Youth Criminal Justice Act*, SC 2002 c 1, s 2. This is also the case between summary and indictable offences.

[122] See *e.g. BC Motor Vehicle Act*, *supra* note 88 at 533; *Friesen*, *supra* note 91 at para 79; *R v Grant*, 2009 SCC 32 at para 62; *Suter*, *supra* note 110 at para 81.

[123] *Friesen*, *supra* note 91 at para 79.

[124] *Ibid* at paras 76-86.

1. *Ipeelee, Lacasse*, and the Multiple Underpinnings of Proportionality

As seen above, the Court in *Ipeelee* and *Lacasse* interprets proportionality within the dual elements of just deserts. Despite its commitment to this conception, the Court refers to ideas antithetical to this rationale in the same judgement. For instance, it stated that "[w]hatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality."[125] If the fundamental principle of proportionality is understood as the gravity of the offence and the level of blameworthiness of the offender, it is difficult to conceptualize how it could both be rooted in other objectives and remain proportionate. In this sense, as will be developed below, a sentence that takes into account extraneous factors that relate to objectives that are not rooted in desert, can be considered fit, if justified and proven efficient, but disproportionate.

Similarly, in its discussion of the breach of long-term supervision order in *Ipeelee*, the Court stated that

> [a]s with any sentencing decision, the relative weight to be accorded to each sentencing principle or objective will vary depending on the circumstances of the particular offence. In all instances, the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender.[126]

This confuses the analysis: On the one hand, the Court defines proportionality by alluding to its dual desert-based components, yet, on the other, it invites judges to include unrelated objectives.

It thus appears that desert-based components can be set aside to prioritize various consequentialist objectives, but as will be seen below, this would limit the individual censuring dimension of proportionality and its expression of individual blame. This version of proportionality departs from even the most flexible conceptions of retributive (or deserts) accounts as it offers a primary role to consequentialist underpinnings.

2. *Nasogaluak*: Proportionality Rooted in Consequentialist Conceptions of Expression and Censure

Nasogaluak considered unwarranted and excessive use of police force during an arrest. In this case, a defendant pled guilty to charges of impaired driving and fleeing the police. The Court held that the excessive use of police force was a constitutional violation of the defendants' rights under section 7 of the *Canadian Charter of Rights and Freedoms* and that a reduction in sentence was an appropriate remedy for a rights violation under section 24(1). The Court further suggested that in circumstances where the state acted egregiously with serious effects for the offender, conventional sentencing principles impel a sentence reduction, even if not considered a Charter violation.[127]

The Court anchored its reasoning about the reduction of sentence in proportionality. Similarly to *Ipeelee*, the Court first anchored proportionality within just deserts by positing that proportionality requires that sentences not exceed what is appropriate given the moral blameworthiness of the offender and the gravity of the offence.[128] Linking proportionality to desert, the Court referred to works by desert theorists in its explanation of sentencing as a form of judicial and social censure.[129]

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[125] *Ipeelee*, *supra* note 94 at para 37; *Lacasse*, *supra* note 90 at para 154.
[126] *Ipeelee*, *supra* note 94 at para 51.
[127] *Nasogaluak*, *supra* note 91 at paras 6-7, 14.
[128] *Ibid* at para 42.
[129] *Nasogaluak*, *supra* note 91 at para 40-42, citing Roberts & Cole, *supra* note 92 at 10.

Despite this, the Court suggested that state misconduct needs to be accounted for in sentencing because of the expressive component of proportionality. The Court's reasoning mixes three separate ideas: the expressive censuring function of desert; the purpose of sentencing as contributing to respect for the rule of law under section 718; and an expression of censure about the action of state actors. Yet, desert-based proportionality and section 718 of the Code are rooted in a shared premise that sentences must be tailored to censure the blameworthiness of the *offender* and not that of state actors.

A sentencing theory that incorporates state responsibility within its censuring dimension of the sentence is premised on different rationales than the provisions to which the Court refers. This conception of censure could be linked to R.A. Duff's moral standing theory,[130] which recognizes that the state's moral authority to condemn and punish is weakened by its own faults. However, for Duff this expressive theory provides grounds for questioning the state's authority to punish, rather than a sentence reduction on that basis. Victor Tadros's theory provides ground for preserving the state's legitimacy to punish while also recognizing the communicative value of ascribing responsibility to the state.[131]

It is worth reiterating that the legislator defined proportionality within desert theory to include two components, the gravity of the offence and the level of blameworthiness of the offender, and that this was often reiterated by the Court. For example, even in *Nasogaluak*, the Court highlights that "[f]actors unrelated to the offence and to the offender will remain irrelevant to the sentencing process and will have to be addressed elsewhere."[132] Thus, it appears incoherent with this conception, underpinned by a censure-based framework, to include state misconduct as a factor of proportionality, because it is unrelated to the two relevant components.[133] The Court's widening of the expressive function of sentencing to include censuring state liability suggests that proportionality is underpinned by a utilitarian aim of censuring the state, which cannot also adequately reflect a desert-based conception.

3. *Pham* and *Suter*: Expanding the Meaning and Factors of Proportionality to Reach Specific Objectives

In *Pham*, the Court had to determine whether it would reduce the offender's two-year imprisonment sentence to account for the collateral consequences of this sentence on his immigration status. Under the *Immigration and Refugee Protection Act*, a non-citizen sentenced to a term of at least two years loses the right to appeal a removal order against them.[134]

While the Court adopted a desert-based reasoning to highlight those collateral consequences of the sentence are not mitigating or aggravating factors, it proceeded by using utilitarian rationales to consider the collateral factors as a relevant part of the sentence. Indeed, in numerous passages, it highlighted that the sentence could vary under proportionality in order to

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[130] Duff, *Punishment, Communication, and Community*, *supra* note 29 at 184.
[131] Victor Tadros, "Poverty and Criminal Responsibility" (2009) 43 J Value Inquiry 391.
[132] *Nasogaluak*, *supra* note 91 at para 63.
[133] Benjamin L Berger, "Sentencing and the Salience of Pain and Hope" in Dwight Newman & Malcolm Thorburn, eds, *The Dignity of Law: The Legacy of Justice Louis LeBel* (LexisNexis, 2015) 337 at 344. This highlights that "police misconduct in the course of making an arrest does not bear on the gravity of the offence (…) nor does it alter his degree of responsibility for the impaired driving or flight from the police, both of which occurred before the police misconduct" (*ibid*).
[134] *Pham*, *supra* note 97 at paras 1-2.

"avoid the impact of collateral immigration consequences on the offender."[135] This suggests that a proportionate sentence can be tailored to reach particular objectives.

Further, the Court specifies:

> The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.[136]

This suggests that its understanding of proportionality is rooted in multiple conceptions. First it employs the default position that roots proportionality in desert by suggesting that a sentence is proportionate to the gravity of the offence and blameworthiness, but then it proceeds to suggest that sentences may account for the collateral immigration consequences and *remain* proportionate. The latter dimension of proportionality is rooted in consequentialism, as the sentence is adjusted to serve a specific objective.

Similar conceptions of proportionality are featured in additional statements such as:

> [W]here a sentence is varied to avoid collateral consequences, the further the varied sentence is from the range of otherwise appropriate sentences, the less likely it is that it will remain proportionate to the gravity of the offence and the responsibility of the offender. Conversely, the closer the varied sentence is to the range of otherwise appropriate sentences, the more probable it is that the reduced sentence will remain proportionate, and thus reasonable and appropriate.[137]

The Court also adds that a judge may conclude that even a minimal reduction of sentence would render it inappropriate in light of the gravity of the offence and the offender's blameworthiness.

This statement again reflects the two conceptions of proportionality discussed above, which are difficult to reconcile with one another while meeting their underlying purposes and remaining a helpful guiding principle. The first conception is the default position that relies on the gravity of the offence and the level of blameworthiness to determine proportionality, seemingly understood as a sentencing range.[138] The second suggests that outside the range of desert-based proportionality, a sentence can nevertheless *remain* proportionate, including in situations where it is relevant to consider collateral consequences as part of the sentence. This highlights that the main conception of proportionality is desert-based, but the sentence can nevertheless be tailored to meet a specific objective.

According to the Court, a sentence may cease to be proportionate if the consideration of this factor departs too much from desert-based proportionality. However, no indications are provided on how to measure the closeness to proportionality and when a sentence ceases to be proportionate. Questions also remain about which collateral consequences can be deemed relevant to this sentencing calibration.

In *Suter*,[139] an offender was severely beaten by a vigilante prior to his arrest and requested a sentencing reduction partly on this basis. Like in *Pham*, the Court referred to a default desert conception of proportionality, holding that "the fundamental principle of proportionality must

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[135] *Ibid* at paras 20, 18.
[136] *Ibid* at para 14.
[137] *Ibid* at para 18, 20. See also *ibid* para 14 (highlighting a similar contradiction, namely that "a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender").
[138] Although the Court seems to equate sentencing ranges in Canada to desert-based proportionality, this issue is not directly explored in this article and will be left for another day.
[139] *Suter*, *supra* note 110.

prevail in every case—collateral consequences cannot be used to reduce a sentence to a point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender."[140] Nevertheless, the Court also used a consequentialist conception when it stated that "[e]xamining collateral consequences enables a sentencing judge to craft a proportionate sentence in a given case by taking into account *all* the relevant circumstances related to the offence and the offender."[141] This conceptualization of proportionality hinges on consequentialist grounds as it aims to minimize the hardship on the offender.

III. Towards a Clearer Grounding of Proportionality: The Need for a Coherent Underlying Rationale

An amalgam approach to sentencing recognizes that there is not one objective that is more important than the other. Their weight will depend on the particular circumstances of the offence and the offender. In Canada, although sentencing may serve several objectives, Parliament conceived the principle of proportionality as the fundamental principle of sentencing under section 718.1, and as desert-based by focusing on the dual components of desert, namely the gravity of the offence and the degree of responsibility of the offender. This conception is rooted in desert-based theory that considers individual censure to be the driving element of proportionality, and its purpose to be communicating the offender's blame for the offence. As explained by von Hirsch and Ashworth, "treat[ing] desert as providing only limits in the manner Morris proposes, would disregard the censuring implications of punishment"[142] and therefore the communicative dimension of proportionality would be trumped by a series of other considerations, mainly determined by risk. This central dimension of proportionality would be undermined and the principle itself would cease to be a useful guide in the absence of a clear theoretical underpinning.

With a coherent underlying rationale, the signal communicated is coherent, and any additional underpinnings reflected in a sentence can be considered separately as part of a different analysis, outside of proportionality, that allows additional considerations only if they are carefully justified and proven to meet their purported objectives (with guidance from a framework conceived outside of proportionality). This approach would suggest that certain consequentialist objectives of sentencing might need to be reconsidered[143] because they are not adequately justified or efficient within the process, while those that remain can be further developed with clear guidance (the specific substance of which is beyond the scope of this article).

In contrast, the suggestion that proportionality needs to include objectives and factors unrelated to the dual components raises principled and methodological questions, especially when this logic is present in the same judgment, which risks conflicting with the communicative and censuring logic behind desert. Rooting proportionality within several underlying foundations creates various conceptions of proportionality—rendering the principle effectively meaningless and unhelpful, while weakening the just censuring role of proportionality. Moreover, rooting proportionality within multiple consequentialist considerations would suggest that the principle could mean different things depending on its purported aim and be used to attain multiple and inconsistent end results.

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[140] *Ibid* at para 56.
[141] *Ibid* at para 46 [emphasis in original].
[142] *Supra* note 20 at 139.
[143] This can be the case for the objective of deterrence, which many studies have shown does not meet its purported objectives. See *e.g.* Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 10 Crime & Just 143.

A desert-based approach to proportionality should be dynamic, while remaining grounded in a consistent rationale. Indeed, as highlighted in Part II(A)(2), desert theory has evolved to include experiential understandings, scientific developments, and community values. This evolving framework is concerned with the state's justification of the use of coercive power over an individual, remaining consistent within an internal underlying theory that values individual censure.[144]

A. Proportionality and Fitness as Distinct Concepts

Just deserts theorists, such as Ashworth (discussed above), recognize contexts in which the calibration of a sentence requires a departure from proportionality, and where the consideration of "extraneous factors" that are rooted within consequential objectives can be justified.[145]

Building on this idea, this part proposes conceptual nuances that understand proportionality as dynamic and separate from "extraneous" considerations, while dividing "extraneous" considerations into two separate concepts: "fitness" and "external."

One way to achieve the nuances that would complement desert theory would be to introduce the concept of "fitness"—represented in Figure 1, below—as distinct from proportionality (A). Fit sentences would refer to situations where it would be justified and proven to be effective to consider factors outside of desert-based proportionality as part of the overall sentence (B). These include contexts where a punitive approach remains relevant and when the state has legitimacy to punish. Factors that are extraneous to proportionality, such as time spent in pre-trial detention or collateral consequences of punishment, may be relevant for a fit sentence but would feature separately from proportionality. This framework would allow for a separate analysis of proportionality rooted within clearer and more flexible desert-based grounds. Most importantly, it would enable the individual censuring/communicative dimension of the sentence to remain clear and intact as part of the initial step. The proportionate sentence could be provisional and clearly articulated with reasons within judgments. In the event that there are additional objectives and factors proven to achieve their purported aims, which can be justified, then a fit sentence that takes into account those additional elements can be determined.

Finally, "external" (C) would refer to considerations and factors that are unrelated to any objectives of sentencing or best addressed in systems outside of the criminal process, either due to the irrelevance and inefficiency of a punitive response, or because the state has lost its legitimacy to punish. These two dimensions will be examined in Part III(C), below.

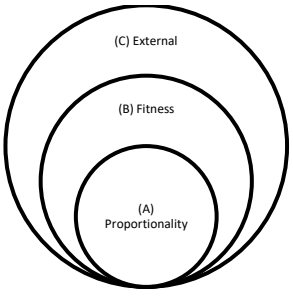

Figure 1: Concepts for Sentencing Calibration

[144] Manson & Thorburn, *supra* note 19; Ashworth, *Sentencing and Criminal Justice*, *supra* note 39.
[145] Ashworth, "Aggravation and Mitigation," *supra* note 2 at 25.

To date, the Supreme Court of Canada has employed the terms "fitness," "appropriateness," and "proportionate" interchangeably, albeit seemingly rooting them in different rationales. In *Re B.C. Motor Vehicle Act*,[146] a "fit" sentence was considered proportionate to the seriousness of the offence rooted in desert theory. Similarly, in *Lacasse*, the Court highlighted that "proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on the offender."[147] However, since the Court started rooting proportionality in both desert-based and consequentialist rationales, the meaning of fitness has become less consistent.

For instance, in *Pham*, the term "fitness" seemingly refers to a desert-based sentencing range and to a wider consequentialist conception, as discussed above. Similarly, in *Nasogaluak*, the Court highlights that a sentence falling outside the regular range of appropriate sentences is not necessarily unfit, stating that "a sentencing judge may take into account police violence or other state misconduct while crafting a fit and proportionate sentence."[148] This equates fitness to both desert-based and consequentialist conceptions, suggesting that sentences within a desert-based range are fit, but sentences outside the range may also be fit.

This equivalency between fitness and proportionality rooted in both desert and consequentialism is also seen in *Ipeelee*, where the Court refers to *Re B.C. Motor Vehicle Act* to suggest that fitness equates with desert-based proportionality.[149] It also uses the terms "appropriate," "proper," "proportionate," and "fitness" interchangeably and links them to the importance of considering *Gladue* to craft a fit and consistent sentence with fundamental principles of proportionality.[150] The consideration of *Gladue* includes an evolving conception of desert-based proportionality, but also consequentialist views of proportionality. In this sense, "fitness" is linked to various conceptions of proportionality, which runs the risk of making it analytically confusing and meaningless.

The proposed concepts introduced in Figure 1, above, can be useful on an analytical level to distinguish between the rationales and purposes of sentencing. In the Canadian context, these nuances can provide greater analytical clarity to sentencers, who have used the terminology of proportionality and fitness interchangeably, without a clear underpinning. On a more methodological level, these conceptual nuances can be integrated within the structure of sentencing guidelines, as discussed below, to provide sentencers with separate analytical tools that distinguish between: (1) considerations and factors that are relevant to proportionality understood as individual censure; (2) considerations and factors that can render the sentence fit if justified under different legitimate grounds that efficiently attain their aims; and (3) considerations and factors that would render the sentence disproportionate and unfit, which must therefore be discarded from sentencing.

B. A Methodological Framework that Grounds Proportionality in a Clearer Desert-Based Conception and Analyses Extraneous Dimensions Separately

A methodology that distinguishes between desert-based factors that relate to proportionality and other relevant factors rooted in consequentialism as part of the overall sentence can partially be

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[146] *Supra* note 88 at 533.
[147] *Supra* note 90 at para 12.
[148] *Supra* note 91 at para 55.
[149] *Ipeelee*, *supra* note 94 at para 37, citing *BC Motor Vehicle Act*, *supra* note 88 at 533.
[150] *Ipeelee*, *supra* note 94 at para 87.

found in England and Wales's sentencing guidelines.[151] In this jurisdiction, the Sentencing Council of England and Wales (Council)[152] issues guidelines on sentencing, which the courts must follow unless there are specific justified reasons not to do so. Sentencing guidelines are available for a wide range of offences, and the Council also produces overarching guidelines on general sentencing issues and principles.

The structure of the offence-specific guidelines is unique as it follows specific steps and provides guidance on factors that the court should take into account in sentencing. The first two steps are the most critical as they set out the different levels of sentence based on the harm and the blameworthiness of the offender. These preliminary steps focus on a desert-based proportionate sentence, and generally each offence has been stratified into categories of seriousness with ranges and starting-point sentences for each category. The resulting sentence is referred to as the provisional sentence, which is heavily rooted in individual desert.

Specifically, step one of these guidelines lists factors exclusively relevant to the determination of a proportionate sentence, namely factors pertaining to harm and culpability, which are closer to a traditional desert framework that is focused on the offence.[153] Step two completes this analysis by fine-tuning the provisional sentence, calibrating harm and culpability by referring to a list of non-exhaustive factors related to a more flexible desert-based conception of proportionality, such as remorse, age, and mental disorder. Nevertheless, step two does not entirely conform to the proposed framework as some factors are underpinned by consequentialism.[154]

The remaining factors (steps three, four, et cetera) mainly relate to crafting an overall fit sentence, as distinct from a proportionate one. Specifically, from step three onwards, they acknowledge the possibility of taking into account utilitarian factors, such as remand time, dangerousness, and assistance to the prosecution.

This methodology recognizes the importance of crafting proportionate sentences and roots proportionality in a predominantly desert-based rationale. Through its first two steps, the analysis is focused on individual desert-based censure, which allows for this expressive aim to be met by determining a provisional sentence, which is understood to be proportionate. In the event that there are additional objectives and factors that are proven to achieve their purported aims, which can be justified, then a fit sentence can be determined that takes these additional elements in account. This can be part of steps three, four, and so on. Each of these additional steps can also be accompanied by their own guidelines since they serve different rationales. For instance, in Canada, an additional

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[151] See *e.g.* Sentencing Council, "Robbery: Definitive Guideline" (1 April 2016), online (pdf): <www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-definitive-guideline-Web.pdf> [perma.cc/2G6B-P6KA] [Robbery Guideline].

[152] Sentencing Council, "About Us" (n.d.), online: <www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council> [perma.cc/4YYZ-J88W]. The Council was set up in 2010 to promote greater transparency and consistency in sentencing, while maintaining judicial independence. Guidelines in England and Wales reflect in great part desert-based proportionality by scaling punishments within a community conception of levels of severity and expert approaches to experiential understanding of punishment. This differs from starting points or sentencing ranges that exist in certain countries, including Canada, where conceptions of punishment are articulated by judges.

[153] Robbery Guideline, *supra* note 151 at 4.

[154] *Ibid* at 5. Factors such as serious medical conditions and sole or primary carer for dependant relatives are arguably rooted within consequentialist rationales. Under the proposed framework, these factors would best be placed in a separate subsequent section that relates to factors that are rooted in consequentialist rationales to allow for a provisional desert-rooted censure.

step could be "state blame," which would have its own guidelines and recognize an appropriate reduction of sentence (or other responses) based on the level of state blame.[155]

In Canada, a body like a Sentencing Council,[156] formed by plural groups and voices, could draft guidelines by taking into account evolving knowledge on sentencing. These guidelines could be context-specific to jurisdictions and thus the default sanction and anchoring need not be imprisonment;[157] it could include a myriad of other dynamic censuring responses, infused with individuality and experiential understandings of proportionality and punishment.

C. Recognizing the Limits of Punishment and the State's Loss of Legitimacy

A principled yet dynamic desert-based approach to proportionality would enable greater recognition that some issues may be best addressed in systems that are not punitive. A retributive or desert-based framework would be used only in instances where censure is relevant to address blameworthy moral agents while recognizing that other systems may best address other problems. A predominantly consequentialist framework risks overreaching to include too many objectives in sentencing, such as rehabilitative and restorative ones that are best achieved outside a punitive process. Further, a desert-based approach to proportionality would reject being associated with deterrence, the latter being classified as consequentialist and, in great part, inefficient. As seen above, within a punitive framework, these objectives also risk contributing to the over-representation of marginalized groups by purporting to solve certain problems and by focusing on risk.

Further, a consequentialist model of proportionality may create tensions between retributive and consequentialist rationales of punishment, which may limit the censuring dimension of punishment while also limiting the realization of certain objectives. In *Ipeelee*, for example, a focus on the gravity of the offence and blame undermines rehabilitative and restorative efforts that could be achieved outside the criminal process.[158] Even in cases where individual blame is minimal due to social deprivation, a consequentialist framework, whether it aims to rehabilitate, restore relationships, or reduce the over-incarceration of Indigenous people,[159] operates within a punitive process that can limit the attainment of these objectives. Rather, thought and resources could be invested in the development of appropriate services[160] and guidelines that enable and inform useful delegation outside the criminal process. Legal pluralist approaches rooted in Indigenous self-governance may be one way to enable the implementation of these aims outside the proposed liberal approach.[161]

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[155] This dimension is beyond the scope of this article and is defined in Marie Manikis, "Recognising State Blame in Sentencing: A Communicative and Relational Framework" (2022) Cambridge LJ [forthcoming]. For its underlying rationale, found notably within relational theories of responsibility, see Tadros, *supra* note 131.

[156] Robbery Guideline, *supra* note 151.

[157] This respects desert theory's cardinal understanding of proportionality and would require some changes in Canada since the current system is still in large part tied to incarceration for certain offences.

[158] *Supra* note 94.

[159] Section 718.2(e) is seen as a remedial measure of the over-represented people in prisons. See *Criminal Code*, *supra* note 2, s 718.2(e). The Court highlights that sentencing judges can endeavour to reduce crime rates in Indigenous communities by imposing sentences that deter criminality and rehabilitate offenders. See *Ipeelee*, *supra* note 94 at para 66.

[160] Interventions outside the criminal process can include mechanisms of diversion, prevention, and restorative processes.

[161] Marie-Eve Sylvestre & Marie-Andrée Denis-Boileau, "*Ipeelee* and the Duty to Resist" (2018) 51 UBC Law Rev 548.

In addition, in cases of egregious state abuses like *Nasogaluak*,[162] including consequentialist objectives such as denouncing the state in the sentencing process can inadvertently legitimize the state's jurisdiction to punish despite egregious abuse. Instead, there should be space,[163] as part of decisions to prosecute and sentencing, to recognize instances where the state loses its legitimacy to punish. In such cases, discussed by Duff above, consequentialist objectives are best addressed outside of the criminal process.

Finally, more reflection is needed about the criminalization of certain behaviours and the ways in which discretionary powers by police and prosecutors are employed to determine the use of diversion or the inclusion of cases in the criminal justice process. Sentencing is the end-game of a wider system that upholds a punitive approach. Indeed, this framework would propel guidance from a Sentencing Council to determine whether certain aims in certain contexts, such as rehabilitation or restoration, would benefit from a delegation of jurisdictional competence to more appropriate systems. Many goals are not adequately reached through criminalization and punishment, but rather with socio-economic changes in the wider societal fabric. If individuals are not deserving of punishment, or if other objectives are considered more important, the way forward is to rely on separate systems.

IV. CONCLUSION

Proportionality in sentencing can be rooted in various theoretical underpinnings of punishment. Both retributive and consequentialist frameworks of proportionality have shown dynamism through their recent conceptual evolutions. For instance, a retributive-based conception of proportionality has evolved to allow for more individualization and experiential approaches to blame and harm. The variations under consequentialist versions of proportionality are less focused, often grounded in more hybrid and conflicting rationales. Thus, they have been criticized for rendering their conception of proportionality confusing and less meaningful.

The Canadian context illustrates some of the evolving conceptions of proportionality. The Supreme Court of Canada has predominantly rooted proportionality within desert, as intended by Parliament, and within this framework, has integrated a dynamic conception of desert theory as seen with notions of culpability in *Ipeelee* and harm in *Friesen*. The Court has also expanded its theoretical underpinnings, leading to a multiplication of conceptions of proportionality—at times within the same judgment. This move risks making the principle meaningless as it is sometimes rooted in dynamic desert, and in other circumstances, understood as a broader concept used to attain various ill-defined and conflictual goals.

This article suggests that a clearer grounding of proportionality would root this principle within dynamic desert, which would preserve a principled underlying justification and enable a provisional sentence to meet its intended censure. This would allow us to distinguish factors on the basis of their underlying justification of punishment, enabling principled nuances and treatment in sentencing. In this sense, factors rooted in desert would be considered relevant to proportionality while others, rooted in consequentialist rationales, would be extraneous to this concept, yet may still be taken into account in the overall sentence if justified and efficient under a punitive system.

This framework provides legislatures and judges with guidance rooted in clear and principled underpinnings. It proposes a methodology, similar to the one in England and Wales, but

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[162] *Supra* note 91

[163] This may be found in the external factors (C) within the framework discussed in Figure 1, above. The determination of which forum or stage can be seen as the appropriate space is beyond the scope of this article and best left for another day.

rooted in the Canadian socio-legal context, that limits arbitrariness and advances proportionality while providing space in sentencing for the consideration of factors outside proportionality when justified. A sentencing body can be designed to implement this framework, which would be cognizant of the importance of judicial discretion while requiring judges to justify their decisions. In turn, judges would follow a consistent methodological approach in which they would identify a proportionate sentence (provisional sentence), followed by crafting an overall fit sentence when justified and when this differs from the proportionate one.

This framework would allow for a systemic reflection on the pertinence of incorporating certain objectives within a punitive criminal process. If an initial desert-based approach is not appropriate, judges would have the jurisdiction to defer to more appropriate systems that predominantly serve different aims. As such, this approach recognizes the over-use of punitive approaches and calls for better-suited external systems to address certain issues. Importantly, this acknowledges the limits of punishment for achieving certain objectives and facilitates the recognition that the state can lose its legitimacy to punish in certain contexts.