

2015

## Sentencing and the Salience of Pain and Hope

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### Source Publication:

Supreme Court Law Review

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### Recommended Citation

Berger, Benjamin. "Sentencing and the Salience of Pain and Hope." *Supreme Court Law Review*, vol. 70, 2015, pp. 337-363.

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# Sentencing and the Salience of Pain and Hope

Benjamin L. Berger<sup>\*</sup>

## I. INTRODUCTION

Sentencing judges rarely speak about punishment. There is much discussion of sentencing objectives, with courts debating, for example, the relative situational importance of deterrence and denunciation, as compared with rehabilitation. Appellate courts emphasize the fundamental purpose of sentencing, which, in Canada, “is 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”.<sup>1</sup> One can find careful reflection on the principles of sentencing, with appellate courts giving guidance on principles of parity and parsimony, mitigation and aggravation. With this, a rich sentencing jurisprudence has developed to help judges to arrive at an appropriate form of sanction, imposed in a fit quantum. But all of this is really just the technocratic rendering of the thing itself. “Sentencing” — and the language of principles and objectives that fuel it — is the bureaucratized expression of how one arrives at what truly is at stake after a finding of criminal liability: the infliction and experience of suffering at the hands of the state. The law of sentencing, as we have it now, is overwhelmingly a kind of meta-narrative: a principled and careful reflection, to be sure, but a principled and careful reflection about how to engage in a process already one step removed from punishment itself.

What would a jurisprudence of sentencing that was induced from the experience of punishment rather than deduced from the technocracy of criminal justice look like? Otherwise put, what would we expect to find

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<sup>1</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.

in sentencing jurisprudence if one began with a phenomenology of punishment? One answer is that we would expect to find more careful attention paid to the empirical bases for our hopes surrounding punishment. One might expect to see more interest in and significance attached to how, when, and why offenders are actually deterred, rehabilitated, or made more responsible. At a time when facts are out of political favour in matters of criminal justice policy, such a jurisprudential reinvestment in the empirical would be refreshing, treating sentencing objectives with the seriousness and realism that one would think they demand.

And yet there is another answer to the question of what we would expect to see in a sentencing jurisprudence calibrated to the experience of punishment. In such a jurisprudence, another set of terms would be salient for the sentencing judge, producing a different and enlarged sense of what is relevant to just and proportional punishment. Those terms would be drawn from what an individual experiences as he or she lives through the state's response to his or her crime. In this jurisprudence "from up close", we would be interested in the pain, loss, estrangement, alienation and other features of the life that the criminal justice system imposes on the offender in response to his or her wrongdoing. Rather than the abstractness of quantum, the focus would be the experience of suffering at the hands of the state. It is, after all, the character of that experience that acts upon the offender and, in so doing, dictates the realization of our sentencing objectives; it is, moreover, the character of that experience that imposes the enormous moral burden that sentencing judges must bear. In short, in such a jurisprudence, sentencing judges would actually speak about punishment.

In this article I suggest that certain decisions of the Supreme Court of Canada nudge the law of sentencing in this direction, offering provocative openings for thinking about sentencing and punishment in richer and more sensitive ways. These openings arise around two elemental components of the phenomenology of punishment — pain and hope — and the ways in which both are salient to sentencing. I will argue that in the two cases at the heart of this article, *R. v. Nasogaluak*<sup>2</sup> and *R. v. Zinck*,<sup>3</sup> attentiveness to the experience of pain and hope impels a broadening of judicial sightlines about punishment and suggests a turn in how judges should reason about just and appropriate sentences. This turn might offer escape from the narrowness and abstractness involved in the

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<sup>2</sup> [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206 (S.C.C.) [hereinafter "*Nasogaluak*"].

<sup>3</sup> [2003] S.C.J. No. 5, [2003] 1 S.C.R. 41 (S.C.C.) [hereinafter "*Zinck*"].

prevailing idea that the quality of punishment can be juridicially measured by reference to form and quantum of sentence alone. This current in the case law offers a new framing of the essential remit of the judge in the task of sentencing: to account for the offender's aggregate experience of the state's response to his wrongdoing.<sup>4</sup>

Justice Louis LeBel authored both *Nasogaluak* and *Zinck*. Over his years on the Supreme Court of Canada, Justice LeBel's criminal justice jurisprudence has been marked by attentiveness to the lived realities and structures of power with which the criminal law is engaged. His decisions on police powers have reflected an abiding concern with the way that state power ramifies in the lives of individuals.<sup>5</sup> His substantive criminal law jurisprudence has paid careful attention to how the criminal law must carefully attend to the circumstances in which individuals find themselves.<sup>6</sup> In all of this work, Justice LeBel has evidenced sensitivity to the force and effects of the criminal law and modesty in the face of the resulting burdens of judgment. There is perhaps no moment in the work of a judge that is more harrowing and morally demanding than the act of sentencing — the moment at which he or she decrees the suffering of

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<sup>4</sup> This claim, and the language of “experience of punishment”, used throughout this article, brings this article into contact with the subjectivist-retributivist debate in punishment theory, discussing whether punishment should be indexed to the subjective experience of offender, including his or her particular abilities, sensitivities, baseline conditions, and the burdens he or she experiences from non-state sources. As will emerge apparent, although I share the subjectivists’ approach to punishment as “suffering” and concern with the “experience of punishment”, my focus in this piece is narrower than theirs, specifically concerned as it is with punishment as the suffering caused by the actions of the state through the criminal process. As an account of a turn in the Supreme Court of Canada’s jurisprudence on sentencing, this article is not focused on the philosophical debate, though I will touch further on these issues, and the place of my argument within them, in Part V of this article. For key pieces in this debate see Adam J. Kolber, “The Subjective Experience of Punishment” (2009) 109 Colum. L. Rev. 182; Shawn J. Bayern, “The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment” (2009) 12 New Crim. L. Rev. 1; John Bronsteen, Christopher Buccafuso & Jonathan Masur, “Happiness and Punishment” (2009) 76 U. Chicago L. Rev. 1037; Dan Markel & Chad Flanders, “Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice” (2010) 98 Cal. L. Rev. 907; David Gray, “Punishment as Suffering” (2010) 63 Vand. L. Rev. 1619; John Bronsteen, Christopher Buccafuso & Jonathan Masur, “Retribution and the Experience of Punishment” (2010) 98 Cal. L. Rev. 1463; Dan Markel, Chad Flanders & David Gray, “Beyond Experience: Getting Retributive Justice Right” (2011) 99 Cal. L. Rev. 605.

<sup>5</sup> See, e.g., *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310 (S.C.C.), in which Justice LeBel, writing with Fish J. in dissent, grounded a more expansive reading of the right to counsel in the subjective perceptions and vulnerabilities of many accused who are brought into contact with the criminal justice system.

<sup>6</sup> See, e.g., *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.), in which Justice LeBel installed the concept of “moral involuntariness” as a principle of fundamental justice to which all defences must be indexed.

another person. Here, too, Justice LeBel has charted out a course that reflects his concern with the tangible effects of criminal law on the lives of individuals and communities. *R. v. Ipeelee*,<sup>7</sup> his powerful call to place practices of sentencing in direct contact with Indigenous peoples' experience of the state and criminal justice, stands out in this respect. In this article, I show that his other sentencing jurisprudence similarly focuses us on the political character of punishment. *Nasogaluak* and *Zinck* join *Ipeelee* in offering an approach to sentencing that pushes judges into a clear-eyed encounter with the human character of that experience, with the modesty and sense of responsibility that this invites. In so doing, Justice LeBel's sentencing jurisprudence is a fitting reflection of his contributions to criminal justice in Canada.

## II. PAIN

On May 12, 2014, the early morning calm in Leduc, Alberta was disturbed by a high-speed police pursuit. The RCMP, following up on a tip about an impaired driver, were now trying to apprehend Mr. Lyle Nasogaluak, a man of Inuit and Dene descent; for his part, Nasogaluak was doing his level best to evade capture. At the conclusion of the chase, Mr. Nasogaluak "dangerously revers[ed] his car"<sup>8</sup> towards the pursuing RCMP vehicle, before coming to an abrupt stop. By this point, three officers — Constables Dlin, Olthof and Chornomydz — were on the scene.

When Mr. Nasogaluak opened his car door and began exiting the vehicle, Cst. Dlin pointed his revolver and flashlight at him and ordered him to get out of the car with his hands in the air. Instead, Nasogaluak brought his feet back into the vehicle. Constable Chornomydz intervened. He grabbed Mr. Nasogaluak, who was now holding on to the doorframe and steering wheel, and punched him in the head. Constable Chornomydz testified that he did so to prevent Nasogaluak from driving away and hitting one of the other officers with his vehicle. Mr. Nasogaluak reached towards Cst. Chornomydz, who again punched Mr. Nasogaluak in the head and then dragged him out of the car and onto the ground. Constable Chornomydz, on the evidence a "powerful man who would pack a mean punch",<sup>9</sup> yelled at Mr. Nasogaluak to stop resisting, punching him a

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<sup>7</sup> [2012] S.C.J. No. 13, [2012] 1 S.C.R. 433 (S.C.C.) [hereinafter "*Ipeelee*"].

<sup>8</sup> *Nasogaluak*, *supra*, note 2, at para. 10.

<sup>9</sup> *Id.*, at para. 37.

third time in the head while Cst. Chornomydz sat astride his back and Cst. Olthof knelt on his thigh. Constable Dlin, seeing that Mr. Nasogaluak did not offer his hands to be handcuffed, joined the action at this point, landing two punches into Mr. Nasogaluak's back while he was pinned face down on the pavement, breaking two of Nasogaluak's ribs.

Back at the police station, Mr. Nasogaluak blew over the blood alcohol limit. Although he showed no obvious signs of injury and did not request medical attention — indeed, at one point he indicated to the police that he was not injured — he twice told Cst. Olthof that he was hurt and Cst. Dlin testified that he saw Mr. Nasogaluak crying and saying “I can't breathe”. The supervisor on duty also testified that he observed Mr. Nasogaluak “leaning over and moaning as if in pain”.<sup>10</sup> Upon his release the next morning, Mr. Nasogaluak went to the hospital where the doctors found that he had broken ribs that had led to a collapsed lung, requiring emergency surgery.

No records were made of the use of force during arrest, of the injuries suffered by Mr. Nasogaluak, nor of the fact that Cst. Dlin drew his weapon. There were no videos or recordings and “the trial judge seem[ed] to have had serious suspicious [*sic*] and concerns about the absence of videotapes and may have drawn from it some negative inferences about the nature of the police conduct in this case”.<sup>11</sup>

Mr. Nasogaluak pled guilty to charges of impaired driving and fleeing the police. At the sentencing hearing, he argued that the misconduct of the police constituted a breach of his Charter<sup>12</sup> rights that justified a stay of proceedings or, in the alternative, a reduced sentence. The sentencing judge, Sirrs J., agreed that the officers' use of force breached Mr. Nasogaluak's section 7 right to security of the person (the judge also “somewhat surprisingly”<sup>13</sup> found that his section 11(d) right to the presumption of innocence had been offended). Justice Sirrs concluded that although the first and second punches were lawful, the subsequent blows were unwarranted and excessive. Given these Charter breaches, Sirrs J. concluded that section 24(1) of the Charter authorized him to reduce Mr. Nasogaluak's sentence as a constitutional remedy. Whereas the normal range for conviction on these charges would be between

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<sup>10</sup> *Id.*, at para. 12.

<sup>11</sup> *Id.*

<sup>12</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>13</sup> *Nasogaluak*, *supra*, note 2, at para. 15.

six and 18 months incarceration, Sirrs J. imposed a 12-month conditional discharge on each count, to be served concurrently, and a one year driving prohibition. Justice Sirrs reasoned that this “life-altering experience”<sup>14</sup> satisfied the goals of deterrence and denunciation and, given the egregious police misconduct, incarceration was not appropriate.

Although it disputed some of the findings of fact made by the sentencing judge, a majority of the Court of Appeal of Alberta affirmed Sirrs J.’s conclusion on the section 7 breach and his use of section 24(1) to reduce the sentence. However, given the minimum fine of \$600 for a first offence of impaired driving, the Court of Appeal set aside the conditional discharge on that count, substituted a conviction, and ordered that Mr. Nasogaluak pay the minimum fine. A majority of the Court affirmed the conditional discharge for evading a police officer.<sup>15</sup> The Crown appealed to the Supreme Court of Canada.

The appeal put two central questions before the Supreme Court: (1) whether the sentencing judge properly concluded that the police had used excessive force amounting to a section 7 violation; and (2) whether a reduction in sentence was an appropriate remedy pursuant to section 24(1). The Court had little difficulty affirming the Court of Appeal’s conclusion that the trial judge had acted reasonably in finding that the constables’ use of force in this case was excessive. Justice LeBel, writing for a unanimous Court, emphasized the force of these blows and the serious health consequences for Mr. Nasogaluak. The Court also found that the breach of section 7 “is easily made out on the facts of this case”.<sup>16</sup>

The focus of Justice LeBel’s reasons is the question of how this kind of police action and its effects on the offender should be factored into sentencing decisions. On this point, Justice LeBel’s key message — the conclusion of greatest interest to this article — is that the reduction in sentence was appropriate but that such reductions did not require the extraordinary resort to a constitutional remedy pursuant to section 24(1) of the Charter. In circumstances such as this one, in which the police have acted egregiously with serious effects for the offender, conventional

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<sup>14</sup> *Id.*, at para. 17.

<sup>15</sup> Justice Jean Côté, in dissent, would not have reduced the sentence outside of the judge-made sentencing guidelines, which he treated as “akin to a minimum penalty” (*id.*, at para. 25). In the words of the Supreme Court of Canada, Côté J.A. “had difficulty accepting that the *Charter* breaches were so egregious that they warranted the remedy of a conditional discharge” (*id.*). The Supreme Court of Canada’s unanimous decision in this case roundly rejected both of these conclusions.

<sup>16</sup> *Id.*, at para. 38.

sentencing principles could not only accommodate but might actually impel a reduction in sentence. Justice LeBel explains that in extraordinary cases Charter breaches suffered by an offender might authorize the reduction of a sentence below a statutory minimum, a remedy that would require the authority of section 24(1). However, the only statutory minimum at play in *Nasogaluak* was the \$600 fine and therefore, in the absence of a mandatory minimum standing in the way of a just and appropriate sentence, the “life-altering experience” that Mr. Nasogaluak suffered at the hands of the RCMP could be addressed using the ordinary objectives and principles of sentencing.

Justice LeBel anchors his conclusions in the centrality of the principle of proportionality to the sentencing process. He notes that, although it is now specifically articulated as the fundamental principle of sentencing in section 718.1 of the *Criminal Code*, the importance of proportionality as the guiding principle for just and appropriate sentencing has both a long history and a constitutional dimension reflected in section 12 of the Charter. The principle of proportionality, he explains, has two functions. First, it has a “limiting or restraining function”,<sup>17</sup> whereby solicitude about the principle ensures that the offender is punished no more than is necessary. Second, it has a balancing dimension that is concerned with “judicial and social censure”.<sup>18</sup> Attentiveness to proportionality means that judges will craft sentences that adequately reflect and condemn offenders’ “role in the offence and the harm they caused”.<sup>19</sup>

And yet despite the pride of place given to proportionality in the judgment, for the purposes of this article, the conceptually pivotal move made by Justice LeBel is to draw these general principles of proportionality down into the life and circumstances of the individual offender. He underscores that sentencing is, at its heart, an individualized process. The question is always what is fit and appropriate — what is a proportionate sentence — *given the particular circumstances of the offence and the offender*. Those individualized circumstances are what guide a judge in selecting sentencing objectives. Those circumstances are the target of the mitigating and aggravating considerations listed in the *Criminal Code* and used by sentencing judges. The fitness of the sentence — the ultimate

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<sup>17</sup> *Id.*, at para. 42.

<sup>18</sup> *Id.* Justice LeBel again describes these two functions of the proportionality principle in *Ipeelee*, *supra*, note 7, at para. 37.

<sup>19</sup> *Nasogaluak*, *supra*, note 2, at para. 42.



standard for all punishments — is a function of responsiveness to these circumstances. Circumstantial fitness, according to Justice LeBel, is the orienting idea of Canadian sentencing.

This priority for the circumstantial fitness of a sentence is why general sentencing ranges developed by appellate courts are merely guidelines and must be departed from where the circumstances so require. Although ranges help to produce parity in sentencing, “[a] judge can order a sentence outside that range”, Justice LeBel clearly explains, “as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit.”<sup>20</sup> This priority on calibrating sentence to the circumstances of the offence and the offender also explains why minimum sentences are so deeply problematic: they place a predictive limit on what might constitute circumstantial “fitness”, heedless of the unpredictable range of circumstances that life might produce. Despite the restraint in his language, Justice LeBel’s reflection on minimum sentences in *Nasogaluak* nevertheless conveys just this concern: “[a] relatively new phenomenon in Canadian law, the minimum sentence is a forceful expression of governmental policy in the area of criminal law.”<sup>21</sup>

Yet how does the priority that Justice LeBel gives to circumstantial fitness as the means to achieving proportionality allow him to give space for police misconduct within the normal practices of sentencing? The conventional wisdom is that the “circumstances” relevant to calibrating a sentence are the details of the offence and the harms caused, as well as the degree of responsibility of the offender. Section 718 states as much and this is precisely why the sentencing judge and the Court of Appeal in *Nasogaluak* saw the need to recruit section 24(1) in order to factor the Charter breaches into the sentence. Yet police misconduct in the course of making an arrest does not bear on the gravity of the offence for which Mr. Nasogaluak was convicted. 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. Nevertheless, Justice LeBel is saying that, without recourse to a Charter remedy, the normal logic of sentencing should take account of what happened to Mr. Nasogaluak. This is where Justice LeBel’s decision in *Nasogaluak* represents such a provocative and important imaginative expansion of what is salient in sentencing.

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<sup>20</sup> *Id.*, at para. 44.

<sup>21</sup> *Id.*, at para. 45.

In justifying his conclusion, Justice LeBel explains that “[a] sentence cannot be ‘fit’ if it does not represent the fundamental values enshrined in the *Charter*.”<sup>22</sup> Sentencing is about communicating “society’s legitimate shared values and concerns”.<sup>23</sup> A Charter breach indicates that the state has offended these values and concerns and a sentence can and should communicate society’s resulting condemnation if the breach has a sufficient link to the circumstances of the offence or the offender. Justice LeBel defends this view by reference to section 718 of the *Criminal Code* and its statement that the fundamental purpose of sentencing is to contribute to “respect for the law and the maintenance of a just, peaceful and safe society”. “This function”, he explains, “must be understood as providing scope for sentencing judges to consider not only the actions of the offender, but also those of state actors.”<sup>24</sup> This is both a more expansive and a more political conception of sentencing than is normally conceded in the jurisprudence. Justice LeBel summarizes this point as follows:

...Provided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society’s collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society.<sup>25</sup>

Based on these arguments about using sentencing to communicate society’s disapproval about Charter-offensive state conduct, one might conclude that what is happening in this “expansion of relevance” is the accommodation of a concern about society’s “standing to blame”. Antony Duff has written most extensively on this idea as it relates to criminal responsibility.<sup>26</sup> If one understands blame as a relational or reciprocal process between society and an individual, it may be that systemic injustice or state misconduct can erode the authority that society has to blame an offender. By visiting serious disadvantage or inflicting social wrongs upon an individual, the state may share responsibility for

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<sup>22</sup> *Id.*, at para. 48.

<sup>23</sup> *Id.*, at para. 49.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> R.A. Duff, “Blame, Moral Standing and the Legitimacy of the Criminal Trial” (2010) 23 Ratio 123; R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2009).

the crime, making it unjust to blame the individual.<sup>27</sup> In a sentencing context, in which a decision has already been made to blame the offender, it may be that the reduction in society's authority flowing from the misconduct of state actors reduces our sense of how much punishment the state, through the imposition of a sentence, can justly impose. Justice LeBel's references to communicating disapproval about state misconduct and concern about the harm to societal values supports this interpretation of why the kind of Charter breach in *Nasogaluak* might be relevant in the normal sentencing calculus. Justice LeBel's supportive reliance on *R. v. Kirtzner*,<sup>28</sup> a case in which the Court of Appeal for Ontario reduced a sentence in light of the police role in creating the opportunity to commit the offences (albeit short of entrapment), also suggests that this derogation in "standing to punish" is part of what is going on in *Nasogaluak*. That is itself a significant jurisprudential development.

And yet this does not seem to provide an entirely adequate account of why the experience suffered by Mr. Nasogaluak is relevant to the normal sentencing process. The qualifier that begins Justice LeBel's summary statement reproduced above is significant: "*Provided that the impugned conduct relates to the circumstances of the individual offender and the circumstances of his or her offence*,"<sup>29</sup> sentences should take account of this kind of misconduct. Justice LeBel repeatedly notes that such incidents must be connected to or "align with"<sup>30</sup> the circumstances of the offender or of the offence. Appalling though it was, it is difficult to identify a clear link between the conduct of the RCMP officers and the charged offence in *Nasogaluak*. This is not, in fact, a case like *Kirtzner* in which the misconduct and the offence are tightly linked. All of the impugned conduct in this case followed the completion of the *actus reus* of the two convicted offences. Accordingly, in *Nasogaluak*, the nexus on which Justice LeBel insists would have to be found in the link between the police misconduct and Mr. Nasogaluak's circumstances. Where do we find this link?

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<sup>27</sup> For an argument in this vein surrounding poverty, see Victor Tadros, "Poverty and Criminal Responsibility" (2009) 43 J. Value Inquiry 391. I discuss this concept in the context of the law of mental disorder in Benjamin L. Berger, "Mental Disorder and the Instability of Blame in the Criminal Law" in Francois Tanguay-Renaud & James Stribopoulos, eds., *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Portland, OR: Hart Publishing, 2012), at 117.

<sup>28</sup> [1976] O.J. No. 2364, 14 O.R. (2d) 665 (Ont. C.A.) [hereinafter "*Kirtzner*"].

<sup>29</sup> *Nasogaluak*, *supra*, note 2, at para. 49 (emphasis added).

<sup>30</sup> *Id.*, at para. 48.

The provocative answer offered by this case is that we find this nexus, simply, in the pain that he suffered. His sentence is justifiably reduced because he has already suffered harm at the hands of the state in response to his misconduct. When a judge decides how much and what form of punishment to inflict on the accused, the ways in which he has already suffered is salient. The sentencing judge in *Nasogaluak* was right to imagine that the accused's lived experience — in this case his “life-altering experience” — of the entirety of the state's actions taken in response to his criminal acts is the engine that drives the sentencing machine. In this way, I read *Nasogaluak* as authority for the idea that punishment is found in the aggregate experience of the state's response to an offender's wrongdoing. For Mr. Nasogaluak, the character of that experience was one of pain. That pain, suffered outside the colouring lines of duration and form of incarceration, is relevant to reasoning about a just and appropriate sentence. As a jurisprudential contribution, *Nasogaluak* directs sentencing judges to think about the punishment — and, therefore, the salient factors affecting a “fit” sentence — in a more expansive way than we are accustomed to seeing.

Other statements made by Justice LeBel in *Nasogaluak* support this interpretation. He describes the concept at the heart of the case as being about “recognizing harm or prejudice caused to the offender as a mitigating circumstance”.<sup>31</sup> He underscores that incidents that fall short of a Charter breach — short of violating the fundamental values enshrined in the Charter — can nevertheless affect the fitness of a sentence. And he points to cases not only of police violence, but prosecutorial and police delay, as well as unlawful searches of private premises. A sentence must be indexed to the roots-to-branch experience of the state's response to an offender's crime.

Nor does *Nasogaluak* sit alone as a recent Supreme Court of Canada case that points to this more expansive sense of what “counts” as punishment in the context of sentencing, suggesting a turn in our sentencing law to take greater account of this aggregate experience of punishment. In 2013, Wagner J. decided *R. v. Pham*<sup>32</sup> on behalf of a unanimous Court. At issue was whether an otherwise fit sentence can and should be reduced in light of collateral consequences of sentencing that would arise by operation of the *Immigration and Refugee Protection Act*<sup>33</sup> (“IRPA”). The accused was sentenced to two years imprisonment

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<sup>31</sup> *Id.*, at para. 54.

<sup>32</sup> [2013] S.C.J. No. 100, [2013] 1 S.C.R. 739 (S.C.C.) [hereinafter “*Pham*”].

<sup>33</sup> S.C. 2001, c. 27.

for certain drug offences. By operation of the IRPA, that sentence would mean that Mr. Pham would lose his right to appeal a removal order against him. He therefore applied to have his sentence reduced by one day. The Crown, previously unaware of this consequence, consented; however, the Court of Appeal of Alberta refused to vary the sentence explaining that to do so would frustrate the objectives of the IRPA. Like Justice LeBel in *Nasogaluak*, Wagner J. reasoned from the fundamental principle of proportionality and, in particular, the principles of individualization and parity, to conclude that collateral consequences of a sentence are relevant in arriving at a just and fit sentence. In this case, the Court found that the effects of the IRPA should be considered and it reduced Mr. Pham's sentence by one day. But consider the breadth of Wagner J.'s general statement of principle:

[T]he collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender.... Their relevance flows from the application of the principles of individualization and parity.<sup>34</sup>

Justice Wagner made clear that sentences should not be artificially manipulated to create unfit sentences that frustrate the effects of legislation. However, the overall consequences — “any consequences for the impact of the sentence on the particular offender” — are ingredients in arriving at a fit sentence in the normal sentencing process.<sup>35</sup> As in *Nasogaluak*, the focus is on the suffering inflicted on the offender through the State's response to his wrongdoing.

And so *Nasogaluak* may have signalled a turn to a more expansive way of thinking about sentencing. One can read *Nasogaluak* through the lens of Charter breaches and their relevance to sentencing; I am suggesting that it is both more illuminating and more provocative to read it as a case about pain and the importance of grounding the act of

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<sup>34</sup> *Pham, supra*, note 32, at para. 11.

<sup>35</sup> There are elements in existing sentencing practice that go some way to considering a broader range of the consequences of imprisonment. Consider, for example, the case law indicating that sentencing judges should account for the separation of a mother from her family when arriving at a fit sentence (see, e.g., *R. v. Collins*, [2011] O.J. No. 978, 104 O.R. (3d) 241 (Ont. C.A.)) or, more generally, the impact of incarceration on families (see, e.g., *R. v. Gerald*, [1965] J.Q. no 22, 46 C.R. 365 (Que. C.A.)).

sentencing in an offender's experience of state punishment. To develop that theme, I turn now to a case that exposes another dimension of that experience.

### III. HOPE

*R. v. Zinck* was a relatively low-profile decision that attracted little media attention and has gathered no significant academic interest. A unanimous and succinct decision penned by Justice LeBel, the case concerns the interpretation of and proper analytic approach to section 743.6 of the *Criminal Code*, the provision that allows sentencing judges to delay parole eligibility for a wide range of offences. The decision is clear and legally uncomplicated; the analytic path that the case lays down for deciding on an extended period of parole ineligibility is arguably somewhat awkward, but that is largely a function of the legislation itself. And yet if we turn it in our hands just a little, this otherwise unassuming case offers some provocative reflections on changes in the role of sentencing judges and the dimensions of punishment to which judges must attend. Like *Nasogaluak*, the case gestures to the rising importance of a judge's attention to the experience of punishment, rather than simply the quantum of sentence, as the measure of a just and appropriate sentence. In his reasons, Justice LeBel points to a significant shift in the role of sentencing courts, a shift occasioned by legislative change but one that, I suggest, calls on judges to adopt a richer understanding of punishment and suffering. As is so frequently true, the case arose out of sad facts.

Thomas Zinck was in his mid-50s and had a long criminal record, including convictions for robbery, theft, other property crimes and alcohol and firearms offences, as well as parole and probation violations. A heavy drinker, "[h]e was also fond of firearms and kept a number of them in his house."<sup>36</sup> Zinck lived next door to Stéphane Caissie and, according to the evidence, they had an amicable relationship. Caissie's house had recently been the subject of three break-ins, and "[i]t appears that Zinck took it on himself to watch for burglars."<sup>37</sup> On the night that led to his conviction for manslaughter, a night on which he had been drinking heavily, Zinck thought that he saw burglars at his

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<sup>36</sup> *Zinck*, *supra*, note 3, at para. 3.

<sup>37</sup> *Id.*

neighbour's house. He went over to Caissie's home with a loaded gun and banged on the door, stirring Caissie out of bed. When Caissie answered the door Zinck's gun went off, killing Caissie instantly. The sentencing judge was not able to conclude what precisely happened; what was clear, however, was that Zinck was heavily intoxicated and stated, "shortly after the shooting, that he had 'got one' (a burglar)."<sup>38</sup>

Mr. Zinck pleaded guilty to manslaughter. In view of the criminal record of the accused and the circumstances of the offence, the Crown asked for a 15-year term of incarceration and further requested that the sentencing judge consider delaying Mr. Zinck's parole ineligibility period pursuant to section 743.6 of the *Criminal Code*. Defence counsel made no specific submission on the applicability of this provision. The section provides that, rather than allowing the standard operation of the *Corrections and Conditional Release Act*,<sup>39</sup> when an offender receives a sentence of incarceration for two years or more, a court may order that the period of parole ineligibility be raised to one half of the total sentence (rather than the usual one third) or 10 years, whichever is less. The section specifies that the court may do so "if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires". Subsection (2) states "[f]or greater certainty" that "the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles."

The sentencing judge described the crime as one of "totally gratuitous violence, committed in the home of the victim" and noted the "poor prospects for rehabilitation".<sup>40</sup> He concluded that the protection of the public was the chief consideration and imposed a sentence of 12 years of incarceration. He went on to conclude that this was, indeed, a proper case for the application of section 743.6, explaining laconically that, in light of the circumstances and character of the offender and the need for denunciation, the parole ineligibility period would be six years.

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<sup>38</sup> *Id.*, at para. 4.

<sup>39</sup> S.C. 1992, c. 20.

<sup>40</sup> *Zinck*, *supra*, note 3, at para. 7.

On appeal, Mr. Zinck argued that there had been certain failures of procedural fairness (no written notice of the section 743.6 application and insufficient reasons) and that the sentencing judge had erred by applying section 743.6 without “special or exceptional” circumstances. The Court of Appeal of New Brunswick split on this issue, with the majority saying that no such special circumstances were required and the dissent insisting on a more demanding standard for the delay of parole ineligibility. At the Supreme Court of Canada, Justice LeBel dispensed with the procedural objections with relative ease.<sup>41</sup> The central jurisprudential point would be whether special or exceptional circumstances were needed for a judge to delay parole ineligibility and, relatedly, how a judge ought to go about analyzing this question.

Ultimately, Justice LeBel found that the delayed ineligibility period was justified in Mr. Zinck’s case. To arrive at this conclusion, however, he had to resolve the interpretive disagreement that both split the Court of Appeal in this case and could be found in the appellate jurisprudence in various provinces. Justice LeBel describes one “thread” in the jurisprudence that views this step — delaying parole ineligibility — as exceptional and therefore requiring the clear identification of some special or exceptional circumstances to justify the use of section 743.6. He notes that many judgments have adopted this kind of approach, with the Courts of Appeal for Ontario and Quebec interpreting the provision in this “narrow” way. On the other hand, according to certain courts, “a sentencing judge does not have to look for unusual circumstances before ordering delayed parole.”<sup>42</sup> Here he points to the Court of Appeal of Alberta decision in *R. v. Hanley*,<sup>43</sup> in which a panel comprised of Fraser C.J.A. and Rawlins and Binder JJ. rejected the view that section 743.6 could only be used if the facts of the case were “extraordinary”, “unusual”, or even “particularly aggravating”.<sup>44</sup> The Court of Appeal of Alberta stated, that “[t]here is nothing in s. 743.6 which indicates that it is a condition precedent to its exercise that either the circumstances of the offence or the offender be in this ‘unusual’ category, let alone so unusual, in order for a trial judge to impose an order under this

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<sup>41</sup> Written notice, he concluded, is not required, and although the sentencing judge could well have — and probably ought to have — offered more extensive reasons, those given did not breach the minimum standard for adequacy of reasons. *Id.*, at paras. 35, 38-39.

<sup>42</sup> *Id.*, at para. 28.

<sup>43</sup> *R. v. Hanley*, [1998] A.J. No. 1490, 228 A.R. 291 (Alta. C.A.).

<sup>44</sup> *Id.*, at para. 18, cited in *Zinck*, *supra*, note 3, at para. 28.



section.”<sup>45</sup> As is apparent, this “broad” interpretation of section 743.6 would make delayed parole ineligibility a more “normal” part of the sentencing process.

In a charitable reading of this jurisprudential landscape, Justice LeBel concludes that this conflict of interpretations is more apparent than real. He states that the extent of the inconsistency “has been overplayed” and that if one looks at the actual use of the provision, appellate courts seem to be on the same page.<sup>46</sup> I say that this reading is generous because the two strands of interpretation assume very different postures towards the act of delaying parole ineligibility. There is a clear gap between the ethic or attitude that each, respectively, invites a sentencing judge to adopt. And, on this point of the proper posture that a judge should assume, Justice LeBel seems to side with the “narrow” or restrained use of section 743.6. He explains that a sentencing judge should adopt a “two-step intellectual process when deciding whether to delay parole”.<sup>47</sup> The first step is to apply the normal sentencing principles in arriving at an appropriate sentence for the crime. Then the judge turns to the issue of delayed parole and reconsiders all of the circumstances in light of the sentencing principles and objectives, but with priority given to the specified factors of denunciation, and specific and general deterrence. And what is the test for deciding whether a delay in parole eligibility is warranted? It is in answer to this question that one detects the tenor of restraint in Justice LeBel’s decision.

He explains that, at this second step, the burden is on the prosecution to demonstrate that an order of delayed parole eligibility “is needed to reflect the objectives of sentencing, with awareness of the special weight ascribed by Parliament to the social imperatives of denunciation and deterrence”.<sup>48</sup> The test is one of necessity. Having already balanced all of the objectives and arrived at a “fit sentence” (one begins here to feel the awkwardness of this two-stage balancing), the prosecution must convince the judge that “additional punishment is required”.<sup>49</sup> In tension with the Alberta Court of Appeal’s statements that nothing about section 743.6 requires “unusual” or “particularly aggravating” circumstances, Justice LeBel emphasizes that section 743.6 must not be used “in a

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<sup>45</sup> *Id.*, cited in *Zinck*, *id.*

<sup>46</sup> *Zinck*, *id.*, at para. 29.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*, at para. 31.

<sup>49</sup> *Id.*

routine manner”,<sup>50</sup> and “should not be ordered without necessity”.<sup>51</sup> “The decision to delay parole remains”, Justice LeBel explains, “out of the ordinary” and, though available as an option, should only be employed where it “appears to be required” in order to arrive at an appropriate punishment in the circumstances of the case.<sup>52</sup> In a crucial statement, Justice LeBel describes the orienting idea that should inform the judge at the end of this two-stage intellectual process: “the sentencing decision must remain alive to the nature and position of delayed parole in criminal law as a *special, additional form of punishment*.”<sup>53</sup>

This statement is crucial not only because it reveals the posture of restraint that should inform the judge, but also because it offers the key to unlocking a deeper significance of the *Zinck* decision. In what does the *specialness* of delayed parole inhere? In brief, it is the way that it involves the sentencing judge in the manipulation of hope.<sup>54</sup> In this way, it is another dimension of the shift in the role of the sentencing judge suggested in *Nasogaluak* and *Pham*, one that is more sensitive and responsive to the experience of punishment.

However rare the use of section 743.6 may be, placing the issue of parole eligibility within the remit of the sentencing judge — integrating it into the global assessment of a fit sentence — marks a significant imaginative reconfiguration of the sentencing judge’s relationship to punishment. In an important section of the *Zinck* decision, Justice LeBel explains that there had traditionally been a hard separation between those who determined the proper sentence and those responsible for running jails and overseeing the conditions and implementation of punishment. Courts discharged the first responsibility at the moment of sentencing and other agencies — parole boards, correctional offices, *etc.* — tended to the details of punishment. In this division of labour, issues of parole

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<sup>50</sup> *Id.*, at para. 30.

<sup>51</sup> *Id.*, at para. 31.

<sup>52</sup> *Id.*, at para. 33.

<sup>53</sup> *Id.*, at para. 31 (emphasis added).

<sup>54</sup> Very little legal scholarship has considered the relationship between law and hope. Although their focus is not punishment and sentencing, Kathryn Abrams and Hila Keren discuss law’s role in encouraging hope in “Law in the Cultivation of Hope” (2007) 95 Cal. L. Rev. 319. They adopt “a vision of hope based on the assertion of human agency as opposed to one which places its faith in the supernatural or extrahuman” (at 325). See also Alice Ristroph, “Hope, Imprisonment, and the Constitution” (2010) 23 Fed. Sentencing Rep. 75 [hereinafter “Ristroph”]; Philip Pettit, “Hope and Its Place in Mind” (2004) 592 Annals Am. Acad. Pol. & Soc. Sci. 152.

eligibility were simply not part of the work of the judge.<sup>55</sup> Parole assessments focus on “the ongoing observation and assessment of the personality and behaviour of the offender during his or her incarceration,”<sup>56</sup> a set of assessments that looks to the dangerousness and the offender’s individualized prospects of reintegrating into the community. Parole determinations are, in essence, responsive to the lives lived by offenders while serving their sentences. Parole is itself a manipulation of the character of that experience; it is about the “conditions under which the sentence is being served.”<sup>57</sup> In provocative contradistinction to the conventional way of viewing the sentencing task, these decisions are, as Justice LeBel puts it, “highly attentive to context and based, at least in part, on *what actually happened* during the incarceration of the offender.”<sup>58</sup>

Making delayed parole eligibility a sentencing variable in a wide range of offences restructures this allocation of concern. In this way, “[t]he adoption of s. 743.6 altered ... significantly the nature and scope of sentencing decisions in Canadian criminal law.”<sup>59</sup> Justice LeBel notes that, with its new role in the judge’s sentencing assessment, “[d]eferred access to parole has now become a part of the punishment.”<sup>60</sup> This change necessarily draws the sentencing judge away from more abstract considerations of quantum and form in sentencing to the *character* of the time served. Delaying parole is a means of adding “harshness” to the sentence, as Justice LeBel recognizes.<sup>61</sup> That harshness is created through the manipulation of the affective life of the offender. It is to be a sentence served for a longer period bereft of hope of relief or release.

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<sup>55</sup> The one notable exception was sentencing for second degree murder, which carries a minimum punishment of life imprisonment and a variable parole ineligibility period of between 10 and 25 years.

<sup>56</sup> *Zinck, supra*, note 3, at para. 19.

<sup>57</sup> *Id.*, at para. 20. See, e.g., *Cunningham v. Canada*, [1993] S.C.J. No. 47, 2 S.C.R. 143, at 150-51 (S.C.C.); *R. v. C.A.M.*, [1996] S.C.J. No. 28, 1 S.C.R. 500, at para. 62 (S.C.C.).

<sup>58</sup> *Zinck, supra*, note 3, at para. 19 (emphasis added). As La Forest J. wrote for the majority of the Court in *R. v. Lyons*, [1987] S.C.J. No. 62, [1987] 2 S.C.R. 309, at 341 (S.C.C.), a case concerning the constitutionality of indeterminate sentences imposed through the dangerous offenders scheme, “it is clear that an enlightened inquiry under s. 12 *must concern itself, first and foremost, with the way in which the effects of punishment are likely to be experienced*. Seen in this light, therefore, the parole process assumes the utmost significance for it is that process alone that is capable of truly accommodating and tailoring the sentence to fit the circumstances of the individual offender” (emphasis added).

<sup>59</sup> *Zinck, supra*, note 3, at para. 22.

<sup>60</sup> *Id.*, at para. 23.

<sup>61</sup> *Id.*, at para. 24.

In this, delaying parole becomes a “significant component of a sentence”.<sup>62</sup> “It may almost entirely extinguish any hope of early freedom from the confines of a penal institution with its attendant rights or advantages.”<sup>63</sup> Sentencing judges are now asked to think about and act upon the interior lives of the offender as lived during the sentence.<sup>64</sup> Drawing on the division with which I began this article, it involves judges not just in decisions about sentencing, but directly in the experience of punishment through an act of hope management.

Hope is one of the conditions that inflects the nature of a sentence. It gives flavour, character and existential texture to the experience of punishment. To be sure, it is not alone in this. Fear, shame, loneliness and a host of other affective states shape the true harshness or leniency of punishment. Although sentencing cannot take full account of these emotional dimensions of an offender’s experience, neither can it be wholly insensitive to them and remain a meaningful measure of punishment. And yet to the extent that they tend to imagine that the fitness of a carceral sentence can be discerned through duration alone, practices of sentencing have been detached from this truth. In this respect, the traditional division of labour that Justice LeBel describes — between judges who sentence and other actors who are concerned with the conditions and implementation of that sentence — is uncommonly naïve in its narrow sense of how one measures punishment. The Court’s decision in *Zinck* and the integration of parole considerations into the structure of sentencing disrupts this division.

To be clear, the valence of section 743.6 is all wrong: it is motivated by a desire to limit hope and, thereby, to increase harshness by inflicting greater emotional suffering from the predictive distance of the sentencing hearing, without the ability to gauge how the offender *in fact* changes and reacts to punishment. In this, it turns its back on the potential of hope — the motivating, productive and (to indulge in raw pragmatism) even behaviour-controlling influences of hope. But this legislative change also does something structurally interesting. In a small but significant way, it invites sentencing judges into imaginative engagement

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> In her treatment of the U.S. Supreme Court decision in *Graham v. Florida*, 560 U.S. 48 (2010), in which the Court held that a sentence of life without the possibility of parole was cruel and unusual punishment when applied to juvenile offenders who did not commit homicide, Alice Ristroph concludes that the decision “suggests that to assess the severity of a prison sentence, one must give some consideration to the prisoner’s subjective experience”: Ristroph, *supra*, note 54.

with the offender's experience of punishment. On a full, attentive view of the sentencing system, a judge can no longer say what was once available as a claim: that the conditions of a sentence are not a court's concern. The seal has been broken.

I read *Zinck*'s message of caution and restraint about delaying parole ineligibility as, in part, sensitivity to this need for a sentencing judge to be alive to the way that a sentence is lived and, specifically, to the harshness involved in the extinguishment of hope. This is what is "special" about delayed parole as a part of punishment; and, this is what calls for prudence in its use. If this is correct, then along with the juridical recognition of the salience of pain in punishment, *Zinck* stands as another marker suggestive of a turn towards a more expansive way of thinking about criminal punishment, a way of thinking more firmly rooted in the offender's real experience of the state's response to his or her wrongdoing. I turn now to what the salience of pain and hope — and the perspective that this implies — might mean for the concept of proportionality in sentencing.

#### IV. SUFFERING, PROPORTIONALITY AND PUNISHMENT

Proportionality has become the modern measure of justice.<sup>65</sup> The movement to broad proportionality standards in constitutional law is a feature not just of Canadian jurisprudence, but of constitutional systems around the world. Proportionality has appeared as the underlying logic of rules of evidence and has even found its way into the law governing civil procedure.<sup>66</sup> And, of course, proportionality reasoning has a long and impressive provenance in the field of sentencing and has assumed constitutional status in Canada.<sup>67</sup> The prevailing juridical wisdom is that the path to just judgment is paved with proportionality reasoning. It has offered itself as a kind of conceptual multi-tool, fit for tightening all of the furniture of justice.

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<sup>65</sup> I discuss and critique this rise of proportionality in Benjamin L. Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61 U.T.L.J. 579. On the centrality of proportionality to modern notions of justice, see, e.g., Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012); David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004); Grant Huscroft, Bradley W. Miller & Gregoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014).

<sup>66</sup> *Hryniak v. Maudlin*, [2014] S.C.J. No. 7, [2014] 1 S.C.R. 87, at para. 28 (S.C.C.).

<sup>67</sup> *Ipeelee*, *supra*, note 7, at para. 36.

And yet there is an abiding indeterminacy at the heart of proportionality tests, an uncertainty that renders them oddly (or perhaps seductively) agnostic. The normative valence of a proportionality test is entirely indeterminate until and unless one knows what is being made proportionate to what — until, that is, one knows the points for the comparison that proportionality analysis invites. In some areas of law, courts have taken care to specify the content of these tests. With respect to our section 1 *Oakes* test,<sup>68</sup> for example, work is continually being done to fine tune the relevant comparators and the measures of proportionality. Yet even in that setting, it is often the case that everything turns on what a judge places on the scales of overall balancing. In some settings this indeterminacy commends itself as flexibility; in others — in sentencing — this agnosticism can be dangerous when held up against the ethical stakes of the endeavour.

To some, the claim that a troubling indeterminacy afflicts the principle of proportionality that governs sentencing in Canada will seem mislaid. After all, we have a legislated list of the objectives and purposes of sentencing, as well as a series of principles, augmenting and filling out our fundamental principle of proportionality in sentencing. Although this is true, there remains a troubling imprecision in that principle of proportionality: although one point of comparison is expanded upon and made precise — proportionality has regard, on one side, to “the gravity of the offence and the degree of responsibility of the offender” — the other side is ambiguous. What must be made proportionate to the gravity of the offence and the degree of responsibility of the offender? “A sentence.” But what is the gravamen of the sentence? The customary approach, one that reflects an old-fashioned retributive approach to sentencing, has focused judges’ attention on the quantum and form of punishment. On this view, proportionality is an essentially quantitative assessment. And yet, this way of understanding proportionality effectively reads the experience of punishment out of the act of sentencing.

I have been urging a broader, more political conception of punishment and, with it, sentencing. Punishment inheres in the experience of the suffering inflicted on an offender by the state in response to his or her wrongdoing. That suffering arises from the conditions and actual treatment of the offender, the consequences of conviction, and even the affective dimensions of the sentence. In contemporary theoretical debates

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<sup>68</sup> See *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

about punishment, a critique of so-called subjectivist theories is that focusing on the subjective experience of punishment would involve us in the unattractive exercise of calibrating punishment to expensive tastes and insensitive offenders.<sup>69</sup> Would we have to account for the offender who would suffer more in prison because he is used to silk sheets or because of the shame of a conviction given his social circles? Might we have to punish more severely the offender who is inured to deprivations, having lived a particularly harsh life? Such outcomes should trouble us and surely call for judgments about when and why we are willing to accommodate the subjective experiences of offenders. Yet anxiety about the difficulty of those cases should not distract from recognition that the experience of suffering is the phenomenological essence of punishment. And if this is so, some regard to the sources and character of that suffering is essential to a just sentencing process. Thus, although I have considerable sympathy for aspects of the subjectivist view of punishment given its focus on the experience of punishment as suffering, this article is not intended as an embrace of a fully subjectivist approach to sentencing nor an answer to the criticisms levied against it. Rather, I argue for an expansion of regard in what should be factored into an assessment of a fit response to criminal acts. In particular, without having to answer the question of accounting for suffering engendered by expensive tastes, particular sensitivities, or burdens experienced from non-state sources, we can nevertheless give greater and more realistic regard to suffering inflicted by the state as such through the criminal process. My claim is about a reformation and enlargement of how we think about the nature of the punishment that must fit the crime. It is state-imposed suffering — not just the sentence, narrowly conceived as quantum and form — that must be proportional to the gravity of the offence and the degree of responsibility of the offender in order to arrive at a just and appropriate sentence.

Yet this article is not chiefly an argument that this is how sentencing ought to be calibrated, staking out a position in the theory of criminal punishment. The core claim is descriptive, showing that recent decisions of the Supreme Court have directed us to the conclusion that this is in fact how sentencing should be approached. *Nasogaluak*, *Pham*,

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<sup>69</sup> See, e.g., David Gray, “Punishment as Suffering” (2010) 63 Vand. L. Rev. 1619.

and *Zinck* each insist in their own ways that the measure of “a sentence” is to be induced from the details of the experience of the offender. *Nasogaluak* tells us that the pain suffered by the offender is part of the sentence; *Pham* reminds us that the sentence includes the consequences of conviction; and *Zinck* draws us down and inward, into the affective life of the offender, showing that hope — and its absence — colours and shapes sentence. All of this suggests a turn in thinking about sentencing in Canada, one that is more attuned to the lived experience of criminal punishment.

The jurisprudential marker for this shift is the marriage of proportionality and individualization over which Justice LeBel has presided in these and other cases. Proportionality, he insists and *Pham* confirms, is an *individualized* concept, and individualization demands attentiveness to the ways in which a sentence will visit itself on and be received within the life of an offender. In Justice LeBel’s most celebrated contribution to Canadian sentencing law, *R. v. Ipeelee*,<sup>70</sup> his affirmation and clarification of the *Gladue*<sup>71</sup> principles governing the sentencing of Aboriginal offenders includes a strong message about the centrality and nature of this requirement for individualization in sentencing more generally. Reviewing the principles of sentencing in Canada, Justice LeBel describes proportionality as “the *sine qua non* of a just sanction”<sup>72</sup> and characterizes it as a principle of fundamental justice,<sup>73</sup> but emphasizes that the measurement of a just sanction is “a highly individualized process”.<sup>74</sup> In the context of the sentencing of Aboriginal peoples, that individualization involves regard to the unique circumstances of the offender, which include both the circumstances and background that brought the offender before the court and the types of sanctions that may be appropriate. A sentencing judge must consider the range of appropriate sanctions not because this bears on the culpability of the offender, but because the fitness of a sentence can only be assessed in terms of how it will be received and experienced by the individual, including the “world views” and “values” of offenders.<sup>75</sup> Moreover, Justice LeBel insists on reading the

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<sup>70</sup> *Ipeelee*, *supra*, note 7.

<sup>71</sup> See *R. v. Gladue*, [1999] S.C.J. No. 19, 1 S.C.R. 688 (S.C.C.).

<sup>72</sup> *Ipeelee*, *supra*, note 7, at para. 37.

<sup>73</sup> *Id.*, at para. 36.

<sup>74</sup> *Id.*, at para. 38.

<sup>75</sup> Justice LeBel explains that, when sentencing Aboriginal offenders, sentencing judges must “abandon the presumption that all offenders and communities share the same values when it comes to sentencing and to recognise that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community” (*id.*, at para. 74).



fitness of the punishment in the context of the “legacy of colonialism”<sup>76</sup> and the many historical traumas and structural deprivations suffered by Indigenous peoples at the hands of the state. Meeting the critique that this amounts to a form of “race-based discount on sentencing”,<sup>77</sup> Justice LeBel responds that paying attention to the “circumstances” of Aboriginal offenders in this rather thick way is not a departure from the normal principles of sentencing but, rather, an expression of “the fundamental duty of a sentencing judge”,<sup>78</sup> which he says is to “engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them.”<sup>79</sup> What Justice LeBel is describing is an imaginative engagement with what the state’s response to wrongdoing will mean in and for the particular life of this offender, a sense of what is relevant to assessing the fitness of a punishment that is expanded well beyond traditional visions of retributivism. In a riposte to the idea that the *Gladue* approach should be abandoned in cases of very serious offences, Justice LeBel uses this controlling concept of individualization to put the concern for parity in its place:

[W]ho are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.<sup>80</sup>

The import and appeal of this principle that proportionality is an intrinsically individualized concept lies in the way that it denies escape to the comfort of cool metrics and abstract guidelines for the judge faced with the harrowing moment of intervening in the shape of an individual’s life through the infliction of suffering. Ethically, that is as it should be, because this demand for sympathetic engagement with the particular person standing before the court invites modesty and caution about the use and effects of state violence as a response to social breakdown. As a legal matter, I suggest that in the wake of these decisions it would now

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<sup>76</sup> *Id.*, at para. 77.

<sup>77</sup> *Id.*, at para. 75.

<sup>78</sup> *Id.*, at para. 75.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*, at para. 86.

be an error for a judge to speak of proportionality without emphasizing the individualized nature of the sentencing process and then wrestling with the real effects of the criminal process and proposed sentence on the life lived by the offender.

## V. CONCLUSION: THE ROLE OF THE SENTENCING JUDGE

In his ethnography of the Conseil d'État, French philosopher and anthropologist Bruno Latour describes the effort to understand life through the language and procedures of law as “like trying to fax a pizza”.<sup>81</sup> Seeking to understand and account for the lives of offenders, and the experience and impacts of state punishment, is a fine example of this structural frustration. Despite the flexibility of the rules of evidence in the sentencing phase, and even with judges being equipped with additional tools (like *Gladue* reports) to better understand the circumstances of the person before them, there is an untraversable gap between the act of sentencing and the experience of suffering through punishment. The setting of the courtroom, the formal disciplines of judicial decision-making, the one-off nature of the judgment, and the institutional constraints of the legal system all limit the capacity of the act of sentencing to reach into and engage with the lives of offenders. The lives and experiences of offenders will always remain foreign to the law that is tasked with punishing them. One who is most interested in the lives that will be lived by those who are sentenced might be tempted, then, to apply Latour's verdict to the rules and process of sentencing: “there would be no point in trying to increase the power of the model, it is simply not the right medium”.<sup>82</sup>

The turn in Canadian sentencing jurisprudence described in this article, a turn in which Justice LeBel has been centrally involved, will not eliminate the gap between the law of sentencing and the lives of those punished. And yet these cases nudge the law in an important direction, calling upon judges to think of punishment and proportionality in view of the aggregate suffering experienced by the offender at the hands of the state, in response to his or her wrongdoing. The wisdom of this expansion of the field of vision for sentencing judges is that it respects the truth that the severity of a sanction — and with this, the

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<sup>81</sup> Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Cambridge, U.K.: Polity Press, 2010), at 268.

<sup>82</sup> *Id.*

suffering experienced by the offender — is a function of the character, not just the quantum, of punishment. Holding that principle, we might begin to imagine new possibilities in our practices of sentencing. Informed by *Pham*'s insistence that the collateral consequences of a sentence are part of evaluating a just and appropriate sentence, might we imagine a sentencing judge requiring the Crown to provide a plan for punishment in which the expected level of security, institutional setting and available programming (to name just a few factors) are set out in order to allow her to exercise her task of crafting a fit and just sentence? With *Nasogaluak*, *Pham* and *Zinck* in mind, might we imagine information about the real conditions and experiences within an institution — the predictability of violence, the practices of segregation, and the experiences of inmates, all points on which we need better research and more knowledge<sup>83</sup> — becoming essential to the process of sentencing? Perhaps administrative and practical difficulties would frustrate either development — perhaps it is “simply not the right medium” — but a judge who sees that the seal between conditions and consequences of punishment, on the one hand, and sentencing, on the other has been broken, would stand on solid ground insisting on such information as the *sine qua non* to crafting a fit sentence.

The most immediate and arguably most significant effect of these cases, however, is the way in which they reimagine the role and remit of a sentencing judge. If something more of the experience of punishment is to ground the assessment of a fit and appropriate sentence, the essential task of the judge is an imaginative engagement with the lives of those that they punish. This is a fitting reflection of the ethical temper of Justice LeBel's jurisprudence. I suspect that the shift or turn that I have described is also a more authentic reflection of the harrowing task undertaken daily by sentencing judges. There is no doubt considerable comfort to be found in fidelity to an “acoustic separation”<sup>84</sup> between the

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<sup>83</sup> For research and studies that help us in this vein, see, *e.g.*, Lisa Coleen Kerr, “The Origins of Unlawful Prison Policies” (2014) 3 Can. J. Hum. Rts. 1; Sharon Dolovich, “Incarceration American-Style” (2009) 3 Harv. L. & Pol'y Rev. 237; Keramet Reiter, “The Supermax Prison: A Blunt Means of Control, or a Subtle Form of Violence?” (2014) 17 Radical Phil. Rev. 457; *A Three Year Review of Federal Inmate Suicides (2011 – 2014)* (Ottawa: Office of the Correctional Investigator, 2014).

<sup>84</sup> Paul Kahn, drawing this concept from Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law” (1984) 97 Harv. L. Rev. 625, uses the idea of “acoustic separation” to analyze the way in which liberal states manage the conflict between the violence of political sovereignty and a commitment to the rule of law: Paul W. Kahn, “Managing Violence: Acoustic Separation, Memorials and Scapegoats” (2008) 77 Rev. Jur. U.I.P.R. 317.

conditions/experience of punishment and the quantum of sentence — a comfort understandably sought by judges and commentators alike. But the price of that comfort seems unacceptably high in ethical terms, for there is something ethically suspect to inflict a sentence without regard to the experience of punishment. By sentencing, one is intervening in a life. In assessing the justice of that intervention, pain matters; hope matters, estrangement, fear, promise and opportunity all matter. It matters that Mr. Pham would be deported. It matters what Mr. Nasogaluak experienced at the hands of the police. And, it matters what the affective life of Mr. Zinck would be. And so in addition to shifting and improving our sense of what proportionality in sentencing might mean, these cases recover a clear-eyed sense of the role of the sentencing judge and the moral burdens of sentencing.

