THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 99 2021 No. 3

CONFRONTING THE EXPERIENCE OF IMPRISONMENT IN SENTENCING: LESSONS FROM THE COVID-19 JURISPRUDENCE

Chris Rudnicki*

The prison largely remains a "black box" in the law of sentencing in Canada. Judges are concerned chiefly with the duration, rather than the quality, of a custodial sentence. That changed with the emergence of the global COVID-19 pandemic. This paper contends that the pandemic jurisprudence presents an opportunity to rethink the role that qualitative conditions of imprisonment play in the sentencing analysis. Using debates that have emerged between leading cases in this jurisprudence as a foil, I argue that the emergent doctrine of individualized proportionality authorizes sentencing judges to open the black box in punishment theory and consider the likely experience of a proposed custodial sanction in crafting a fit sentence. I conclude the paper by highlighting one case that demonstrates the promise of this approach.

La prison demeure en grande partie une « boîte opaque » pour le droit en matière de détermination de la peine au Canada. Les juges se préoccupent principalement de la durée, et non de la qualité, des peines de détention. Mais

* Partner and lead appellate counsel at Rusonik, O'Connor, Robbins, Ross & Angelini, LLP and LLM Candidate at Osgoode Hall Law School in Toronto. My thanks to Justices Kimberley Crosbie and Melvyn Green for their guidance in writing this paper for their sentencing course in the fall of 2020. I am indebted to professor Lisa Kerr for her characteristically thoughtful comments on an early draft and to the peer reviewers for their helpful feedback on my initial submission for publication. Any errors are, of course, my own.

les choses changent depuis l'émergence de la pandémie de COVID-19. Dans le présent article, l'auteur soutient que la jurisprudence établie durant la pandémie présente l'occasion de repenser la place des conditions qualitatives d'emprisonnement dans l'analyse de la peine. Par la mise en relief des débats soulevés autour des principaux jugements faisant jurisprudence, il avance que la doctrine émergente de l'individualisation de la proportionnalité autorise le juge qui prononce la peine à ouvrir ladite boîte opaque, dans la théorie de la peine, et à prendre en considération la façon dont sera vécue la détention envisagée. L'auteur conclut l'article en mettant en lumière un cas qui démontre bien le potentiel prometteur de cette approche.

Contents

1. Introduction

In 1987, Justice Lamer observed that prison sentences cannot be defined by duration alone.[1] The quality of a term of imprisonment—the conditions under which the defendant will actually experience life in jail—can be just as relevant as its length in considering the effect of the sentence. Justice Lamer made this observation more than thirty years ago, in an early case striking down a mandatory minimum penalty as cruel and unusual punishment. Yet despite this straightforward *dictum*—three months' imprisonment for a minor property offence can be just as disproportionate as three years, if served entirely in solitary confinement—the qualitative

[1] *R v Smith*, [1987] 1 SCR 1045 at 1073, 40 DLR (4th) 435 per Justice Lamer (as he then was).

conditions of imprisonment following the imposition of sentence are largely ignored in our law of sentencing.

The emergence of the COVID-19 pandemic disrupted this status quo. In most jurisdictions, the experience of imprisonment after March 2020 was simply harsher than before. Some judges treated these harsh conditions as a factor that could reduce an otherwise fit sentence.[2] Others rejected this approach, insisting that the qualitative conditions of imprisonment are properly left to parole boards.[3] This split in the jurisprudence presents an opportunity to grapple with the role that the qualitative conditions of imprisonment should play in the sentencing calculus. The pandemic will, hopefully, one day end. But I contend that sentencing judges should not relegate the qualitative conditions of imprisonment, so new to the daylight of Canadian sentencing doctrine, back to the shadows.

In the first part of this paper, I outline the status quo approach to sentencing before the onset of the pandemic: a virtually exclusive preoccupation with length that Lisa Kerr calls the "duration focus."[4] I then show how the dangerous and inhumane conditions of confinement brought on by the pandemic compelled some judges to make space for the quality of the custodial sanction in their sentencing analysis. This line of authority, exemplified in the *Hearns* case, treats the inevitably harsher experience of serving a custodial sentence during a pandemic as a relevant factor that can justify a reduced sanction.[5] But this was not the only judicial response to the pandemic. A second line of authority also emerged, most thoroughly explained in *Baptiste*. These cases reject any consideration of the qualitative experience of imprisonment in sentencing, insisting instead that such questions should be left to correctional authorities.[6]

In Part 2, I argue that the *Baptiste* line of authority is inconsistent with the Supreme Court's collateral consequences jurisprudence and with the more robust conception of "individualized proportionality" that has emerged in recent years.[7] *Hearns* and its progeny represent a more coherent application of the fundamental principles of sentencing to the challenge of carceral sanctions during a deadly pandemic. I argue that this line of authority contains the promise of a different way of thinking

---

2 *R v Hearns*, 2020 ONSC 2365 [*Hearns*].

3 *R v Baptiste*, 2020 QCCQ 1813 [*Baptiste*].

4 Lisa Kerr, "How the Prison is a Black Box in Punishment theory" (2019) 69:1 UTLJ 85 at 102 [Kerr, "Black Box"].

5 *Hearns*, *supra* note 2.

6 *Baptiste*, *supra* note 3.

7 Benjamin Berger, "Proportionality and the Experience of Punishment" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 368 at 370 [Berger, "Proportionality"].

about the qualitative conditions of imprisonment once the pandemic has ended—one that is attentive to the actual experience of the sanction imposed.

I conclude the paper by highlighting *R v Marfo*, a case that takes up this promise and carefully considers the likely experience of the defendant's incarceration in crafting a fit sentence.[8] In finding that the "disturbing" inequality experienced by Black inmates in the penitentiary system was "highly relevant" to Mr. Marfo's sentence, I suggest that the sentencing judge stood on firm doctrinal ground. *Marfo* points us toward a future where qualitative conditions of imprisonment are considered before a sentence is imposed, even after the pandemic is over.

In the end, I hope to impress upon the reader that the qualitative conditions of imprisonment are not 'just jail', a non-specific and opaque category of punishment that resists critical scrutiny. Judges should be just as concerned with the quality of a custodial sanction as they are with its duration. It is time to open the "black box" in the law of sentencing.[9] Our law already gives us all the tools we need; the pandemic jurisprudence shows us how we might put those tools to work.

2. Part I: The Pandemic Disrupts the Sentencing Status Quo

A) The pre-pandemic norm: a "duration focus" in custodial sentencing

When a custodial sentence is required, the law of sentencing in Canada is largely concerned with duration. Whether framed as starting points or sentencing ranges, the task of the sentencing judge in most serious cases is to identify an approximate number of months or years given the nature of the offence, and then to fix the length of sentence after considering the aggravating and mitigating factors particular to the case before them.[10] Once the appropriate duration is identified, time spent in pre-trial custody is deducted from this total.[11] In some cases, a sentencing judge

---

8 *R v Marfo*, 2020 ONSC 5663 [*Marfo*].

9 Kerr, "Black Box", *supra* note 4.

10 *R v Lacasse*, 2015 SCC 64 at para 57 [*Lacasse*]. See also Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 73–75. See "Proportionality in Sentence Appeals: Towards a Guiding Principle of Appellate Review" (2018) 23 Can Crim L Rev 77 at 85 (James Foy has called this individual and comparative proportionality—proportionality as between the circumstances of the accused and the circumstances of the offence, and proportionality between the accused and other offenders who have committed the same offence).

11 *R v Summers*, 2014 SCC 26.

may consider harsh conditions of pre-trial confinement as a mitigating factor and deduct additional time from the overall sentence.[12]

Seldom, however, do judges consider the qualitative conditions of incarceration *following* the imposition of sentence.[13] Having decided a fit length of time in custody that accounts for seriousness of the offence and the degree of responsibility of the defendant, what happens during that time, if it is considered at all, is presumed to be a matter of administration for prison officials.[14] The sentencing judge generally hears nothing about, and therefore does not consider, any of the variables that will determine what the experience of imprisonment is actually like for the offender: where the sentence is to be served, how they may be classified by prison authorities, what programming or employment will be available to them, whether they can expect to fear violence from staff or other inmates, or how often they will have access to visits with community services or loved ones.[15] More often than not, judges and lawyers treat questions of prison quality and administration as "technological or administrative issues," rather than issues relevant to determining a fit sentence.[16] Lisa Kerr calls this preoccupation with quantity over quality in sentencing theory the "duration focus": the "view that imprisonment can be measured and fairly distributed by scaling particular amounts of time … in response to wrongdoing".[17]

This approach to sentencing is not without its critics. Kerr argues that punishment and sentencing theorists of all stripes have obscured and neglected the qualitative experience of imprisonment in justifying state punishment for criminal offences. With only rare exceptions, punishment theorists treat the prison as a given, whether the justifications they offer are utilitarian, retributive, or some combination of the two.[18] Yet this

---

12 See e.g. *R v Brown*, 2020 ONCA 196 at paras 6–12.

13 There are some exceptions. Kerr identifies two: vulnerable defendant cases, in which a sentencing court responds to concerns about the impact of imprisonment on those with disabilities or particular health needs, and place of imprisonment cases, in which sentencing courts allow conditions of confinement to affect judicial choice between a federal or provincial institution, provided a proper evidentiary basis is put forward: see Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 CJLS 187 at 191 [Kerr, "Sentencing Ashley Smith"]. Neither of these types of cases consider qualitative conditions of incarceration in the absence of some individual vulnerability, however.

14 Kerr, "Black Box", *supra* note 4 at 87–88.

15 Berger, "Proportionality", *supra* note 7 at 370. But see Kerr's discussion of vulnerable defendant cases and place of imprisonment cases, exceptions to this rule, in note 13 *above*.

16 Kerr, "Black Box", *supra* note 4 at 88.

17 *Ibid* at 102.

18 *Ibid* at 90–93

assumption fails to account for the fact that "the substance of prison life can be as significant as the question of sentence length."[19] While all prisoners experience a form of social banishment, the extent of their exclusion, the services they will have available, the safety of their environment, and a host of other factors will vary significantly between cases.[20] Though these factors can render the actual experience of imprisonment significantly more punitive, they have nothing to do with the moral culpability of the offender or the gravity of the offence. To the extent that punishment and sentencing theorists are committed to proportionality, Kerr argues, "the disconnect between formal culpability and the important terms of imprisonment raise a serious challenge for the endeavour to justify state punishment."[21] This elision translates to a similar gap in the law, as lawyers and judges draw from and are informed by "the vocabulary and methods of punishment and sentencing theory."[22]

Though not explicitly responding to Kerr's work, Benjamin Berger has called for this gap in the law to be filled with what he identifies as the emerging doctrine of individualized proportionality.[23] Berger has long been concerned with the defendant's experience of suffering as relevant factor in the sentencing analysis.[24] As he points out, the Supreme Court has directed sentencing judges to account for this suffering—whether experienced at the hands of police,[25] by operation of the inadmissibility provisions in immigration legislation,[26] or as a result of vigilante violence[27]—in coming to a proportionate sentence.[28] In particular, Justice Moldaver's holding in *R v Suter* that the collateral consequences doctrine authorizes sentencing judges to consider "any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender" signals a broad and expansive approach to the subjective experience of punishment in sentencing.[29] Berger contends that this individualized approach to

---

19 *Ibid* at 95–96.

20 *Ibid* citing Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974) at 2.

21 *Ibid* at 97.

22 *Ibid* at 88.

23 Berger, "Proportionality", *supra* note 7 at 370.

24 See e.g. Benjamin Berger "Sentencing and the Salience of Pain and Hope" (2015) 11:4 Osgoode Leg Studies Research Paper Series 97.

25 *R v Nasogaluak*, 2010 SCC 6 [*Nasogaluak*].

26 *R v Pham*, 2013 SCC 15.

27 *R v Suter*, 2018 SCC 34 [*Suter*].

28 Berger, "Proportionality", *supra* note 7 at 372–78.

29 *Suter*, *supra* note 27 at para 47.

proportionality necessarily requires engagement with the qualitative experience of imprisonment following the imposition of sentence.[30]

Notwithstanding these theoretical and doctrinal critiques of the duration focus, sentencing judges have chiefly remained concerned with identifying the right quantity of a custodial sentence, without regard to its quality. That changed with the onset of the global coronavirus pandemic.

B) The experience of imprisonment during a pandemic: a new approach emerges

As with virtually every other sphere of society, the global pandemic had an immediate and significant impact on the justice system when it arrived in Canada in March of 2020. Courts at all levels suspended in-person operations, with narrow exceptions for urgent hearings.[31] Federal penitentiaries significantly altered their operations in hopes of limiting opportunities for the deadly virus to enter their facilities. On March 31, 2020, Correctional Services of Canada issued a national directive that included the suspension of all visits, the discontinuation of prisoner transfers, the closure of prison gyms, libraries, and communal spaces, and the suspension of rehabilitative programs.[32] Hundreds of federal prisoners were tested for the disease, and hundreds were placed in some kind of medical isolation as a preventative measure.[33] Provincial facilities began issuing temporary absences to offenders serving intermittent sentences to reduce possible exposure.[34] Notwithstanding these efforts, several provincial and federal institutions experienced outbreaks, in one

---

30 Berger, "Proportionality", *supra* note 7 at 383–84.

31 Lisa Matthews, "Bail in the Time of COVID-19" (6 April 2020), online: *CanLII Authors Program* <https://perma.cc/3Z3Y-RJTL> (These restrictions were gradually lifted at different times in different regions, depending on the policies of the local government and the number of cases).

32 Office of the Correctional Investigator, "COVID-19 Status Update-First OCI COVID Update" (23 April 2020), online (pdf): <https://perma.cc/G388-ZNLH> at 3 [First OCI COVID Update]. Regular reports from the Office of the Correctional Investigator throughout the pandemic, while sympathetic with the need to reduce the risk of transmission, warned that the suspensions of programming, visitation, and recreational activities undertaken to this end breached "domestic and international human rights standards": Office of the Correctional Investigator, "COVID-19 Status Update-Third COVID-19 Status Update" (23 February, 2021), online (pdf): <https://perma.cc/XYN7-ERH7> at 13 [Third OCI COVID Update]. See also Office of the Correctional Investigator, "COVID-19 Update for Federal Corrections" (19 June 2020), online (pdf): <https://perma.cc/AK5Z-8UAE> at 7.

33 First OCI COVID Update, *supra* note 32 at 2.

34 Kayla Goodfield, "Ontario expands temporary absences for intermittent inmates to avoid COVID-19 outbreaks at jails" (20 March 2020), online: *CTV News* <https://perma.cc/K5KF-RUUS>.

case forcing the closure of a provincial jail and the transfer of its inmates to medical isolation in facilities nearby.[35] During the second wave in the fall and early winter of 2020-2021, outbreaks occurred in several institutions.[36] Thousands of prisoners fell ill—over 10% of the federal prison population, compared to a 2% infection rate amongst Canadians generally.[37] Some died.[38]

When courts resumed sentencing hearings, the pandemic could not be ignored. Most sentencing judges were prepared to take judicial notice of COVID-19 and the basic preventative measures being recommended by virtually every public health authority in the country, often referring to the drastic changes that had been made to the court's own procedures.[39] An influential affidavit prepared by epidemiologist Dr. Aaron Orkin and made widely available to defence counsel served as an evidentiary foundation in many cases for the proposition that confinement in a congregate living facility, such as a jail, posed an elevated risk of contracting COVID-19.[40]

Some judges began considering the experience of incarceration during this unprecedented global pandemic as a relevant circumstance in crafting a fit sentence. *R v Hearns* was an influential trial level decision released early in the pandemic by Justice Renee Pomerance in Windsor, Ontario.[41] The defendant pled guilty to a serious aggravated assault. While high on crystal methamphetamine, he struck the victim with a bat, fracturing her skull and lacerating her scalp. She required surgery and remained unconscious for several weeks. Justice Pomerance characterized the offence as a "brutal

---

35 Alyshah Hasham & Jim Rankin, "Eight Staff, 60 inmates test positive for COVID-19 at Brampton Jail. Inmates transferred to Toronto South Detention Centre" (20 April 2020), online: *Toronto Star* <https://perma.cc/3E8N-3BRA>.

36 Third OCI COVID Update, *supra* note 32 at 2. See also Jeremiah Rodriguez, "Inmates fear 'leaving in a body bag' as COVID-19 outbreaks in prisons worsen" (4 January 2021), online: *CTV News* <https://perma.cc/ZNX3-9MLW>.

37 Third OCI COVID Update, *supra* note 32 at 2.

38 As of July 10, 2021, according to Correctional Services of Canada's own data, 1,580 federal prisoners had tested positive for COVID-19, and six had died from the illness: Correctional Services Canada, "Testing of inmates in federal correctional institutions for COVID-19" (20 January 2021), online: *Correctional Services Canada* <https://perma.cc/W8FH-X3AE> (Note that these figures reflect only prisoners in federal custody, excluding the significantly larger population of prisoners awaiting trial or serving sentences in provincial remand facilities).

39 Lisa Kerr & Kristy-Ann Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19" (2020), 64 CR (7th) 311 at 317, 318, 321, 329 [Kerr & Dubé]; Terry Skolnik, "Criminal Law During (and After) COVID-19" (2020) 43:4 Man LJ 145 at 173–174. See e.g. *R v Morgan*, 2020 ONCA 279 at para 8 [*Morgan*].

40 Kerr & Dubé, *supra* note 39 at 325–26; *R v Jaser*, 2020 ONCA 606 at paras 99–102.

41 *Hearns*, *supra* note 2.

and unprovoked attack on a vulnerable and defenceless victim."[42] The defendant had a substantial criminal record including multiple entries for crimes of violence and was bound by four separate probation orders at the time of the offence.[43] The Crown and defence jointly recommended a sentence of "time served," the equivalent of 33 months and 11 days, plus a period of probation.[44]

In acceding to this submission, which appears to be well below the established range,[45] Justice Pomerance recognized that the risk of infection from COVID-19 is necessarily increased in custodial facilities, where essential features such as "cramped quarters, shared sleeping and dining facilities [and] lack of hygiene products" render physical distancing "difficult, if not impossible."[46] Stressing the individualized character of a sentencing proceeding, she held that the pandemic forms part of the "specific circumstances of each case" that must be considered in addition to the gravity of the offence and the offender's degree of responsibility.[47] She concluded that "a sentence may be reduced where it is necessary to denounce state misconduct, *or* where it is necessary to account for other punitive consequences, *or* where the sentence would have a more significant impact on an offender."[48] While she was not prepared to locate this principle strictly within the four corners of the collateral consequences doctrine, noting that conditions of imprisonment "are as direct a consequence as one can imagine," she relied on the emergent principle that where a sentence has a more significant impact on the offender because of their individual circumstances, that forms an important part of the sentencing equation.[49]

Crucially, Justice Pomerance did not hold that the pandemic was only relevant where the defendant proffers evidence of individual vulnerability. The pandemic renders a sentence of imprisonment harsher both because of the risk of infection *and* "because of restrictive lock down conditions aimed at preventing infection."[50] While allowing that evidence of heightened

---

42 *Ibid* at para 4.

43 *Ibid* at paras 5–6.

44 *Ibid* at paras 8–9.

45 See *R v Tourville*, 2011 ONSC 1245 at para 30 (Justice Michael Code's authoritative decision on the appropriate range of sentence for different categories of aggravated assault. This kind of offence would be classified under the third category and attract a sentence in the range of four to six years in the penitentiary).

46 *Hearns*, *supra* note 2 at para 11.

47 *Ibid* citing *Lacasse*, *supra* note 10 at para 58.

48 *Ibid* at paras 19–20 [emphasis in original], citing *Nasogaluak*, *supra* note 26 and *Suter*, *supra* note 27.

49 *Hearns*, *supra* note 2 at para 20.

50 *Ibid* at para 16.

vulnerability would still be relevant, Justice Pomerance's analysis looked beyond medical risk and to the actual experience of imprisonment itself.[51] By making space for this experience in the balance of sentencing, *Hearns* moved beyond the duration focus of pre-pandemic case law and attended to the quality, rather than merely the quantity, of the custodial sanction.

The appellate jurisprudence in Ontario has endorsed this approach, if not explicitly naming *Hearns* in reported decisions. In *R v Morgan*, heard 10 days after *Hearns* was decided, the Court of Appeal for Ontario agreed that judicial notice could be taken of "the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid transmission."[52] The panel agreed that the harsh conditions of the appellant's confinement could potentially be considered as a relevant collateral consequence, though held that on the facts of the case before them to reduce the custodial term any further would result in a disproportionate sentence.[53] *Morgan* has been cited approvingly in several subsequent decisions at the Court of Appeal for Ontario. In *R v Reddick*, the panel readily accepted that "hardship arising from lockdowns can qualify as a collateral consequence that warrants consideration during sentencing."[54] In *R v Fairbarn*, in deciding to substitute a conditional sentence for a sentence of imprisonment imposed at trial before the pandemic began, the Court held that "[t]he pandemic certainly renders incarceration more difficult and potentially more dangerous than it was before March 2020."[55]

---

51 *Ibid* at para 20.

52 *Morgan*, *supra* note 39 at para 8.

53 *Ibid* at para 8.

54 *R v Reddick*, 2020 ONCA 786 at para 11.

55 *R v Fairbarn*, 2020 ONCA 784 at paras 57–58. Nova Scotia has also adopted this approach: see *R v Dawson*, 2021 NSCA 29 at para 105. It bears noting that another early decision of the Court of Appeal for Ontario appears to run in a different direction: *R v Lariviere*, 2020 ONCA 324 (In a short decision dismissing a self-represented sentence appeal, the Court cited *Morgan* but held that "[t]he COVID-19 pandemic does not impel us to intervene and disturb a sentence that is fit", as "there is nothing about the particular circumstance of the appellant's incarceration, nor any indication of a unique or personal vulnerability, that would justify shortening the fit sentence that was imposed": see paras 16–17. It appears this decision was driven by the lack of an evidentiary foundation for the proposition that Mr. Lariviere's experience of incarceration was or would be harsher than under normal circumstances. Given the short nature of this decision, the lack of evidence led on the conditions of imprisonment, and the other appellate decisions that endorse the *Hearns* approach to COVID-19 in sentencing, it appears that *Lariviere* is an outlier in Ontario).

C) Competing authority: *R v Baptiste* and the resistance to change

Notwithstanding its adoption in Ontario, *Hearns* was by no means the only judicial response to the pandemic in sentencing. Judges in jurisdictions across the country continued to insist that it is not the proper role of a sentencing court to inquire into the conditions of incarceration following the imposition of sentence. *R v Baptiste*, decided by Justice Dennis Galiatsatos in Montreal, represents the most thorough account of this view, considering and explicitly rejecting Ontario jurisprudence that "accounted for COVID-19 by imposing a more lenient sentence."[56] Mr. Baptiste was found guilty of several firearm offences after a short trial. As in *Hearns*, counsel approached the sentencing hearing with a joint submission. In refusing the submission and imposing a penitentiary sentence, Justice Galiatsatos rejected the proposition that there should be any reduction in sentence as a result of the pandemic in the absence of evidence of individual vulnerability.[57] First, he noted that the progression of the pandemic is uncertain and that it would be inappropriate to assume conditions in custody would remain particularly harsh, and if so, for how long.[58] Second, he held that it would be "more appropriate" to leave considerations of the pandemic to the parole board, noting that correctional authorities have a statutory duty to provide essential healthcare and that Mr. Baptiste's health must be considered in parole decisions.[59] In his view, the *Criminal Code* sentencing provisions "are simply not the appropriate mechanisms to deal with *potential* or *future* difficulties to be encountered while serving a sentence," as "parole authorities, public health officials and political decision makers are better suited to address these undeniably important issues."[60] Third, he viewed himself bound by appellate authority that generally prohibits sentencing judges from considering parole eligibility in determining a fit sentence.[61] Fourth and finally, to grant reductions in sentence for persons sentenced after March 2020 as a result of harsher prison conditions would be arbitrary, as "[p]ersons already serving sentences would not be able to benefit even though they are facing the exact same level of risk."[62]

---

56 *Baptiste*, *supra* note 3 at paras 240–250 (Justice Galiatsatos's decision was reversed on other grounds in June 2021: 2021 QCCA 1064).

57 *Ibid* at para 242 (Justice Galiatsatos's refusal to accede to the joint submission was the basis for the Quebec Court of Appeal's intervention).

58 *Ibid* at paras 242–244.

59 *Ibid* at para 244.

60 *Ibid* at para 246 [emphasis in original].

61 *Ibid* at para 247.

62 *Ibid* at para 249.

These arguments have been endorsed to varying degrees by trial courts across the country.[63] They represent a lingering discomfort among some members of the judiciary with any suggestion that they should move away from the duration focus in sentencing. The existence of *Baptiste* and cases like it demonstrate that there remain potential doctrinal obstacles that must be overcome before judges will be prepared to consider the qualitative experience of imprisonment in the sentencing analysis. In the next part of this paper, I attempt to clear those obstacles and argue that, even after the pandemic, we should grapple with the conditions of incarceration following the imposition of sentence in the proportionality assessment.

3. Part II: Answering Baptiste's Objections: A New Horizon for Proportionality in Sentencing

A) Resolving the evidentiary and jurisdictional objections to prospective credit for the pain of pandemic imprisonment

Though Justice Galiatsatos raised four discrete objections to granting credit for a qualitatively harsher experience of imprisonment as a result of the pandemic, his concerns are better understood in two categories. The first is evidentiary: he was uncertain exactly how long the harsher conditions of confinement would last and concerned that any credit for future conditions risked overcompensating the accused, in essence granting them a disproportionate windfall. The second—and in my view more fundamental—objection is jurisdictional: not only did Justice Galiatsatos feel it "more appropriate" to leave the conditions of confinement to correctional authorities, he saw that conclusion as being compelled by precedent. In this section, I address each of these objections in turn.

The difficulty with the evidentiary objection is that there is nothing unusual about evidence-based predictions in Canadian law. As Kerr has pointed out, "the calculation of damages for personal injuries is often concerned with future categories of loss."[64] Judges in criminal cases are permitted to impose longer sentences in some circumstances based on predictions about dangerousness or likelihood of reoffence.[65] Just because

---

63 See e.g. *R v Greer*, 2020 BCSC 1131 at paras 48–54; *R v Zhao*, 2020 BCSC 1552 at paras 134–136; *R v Milne*, 2020 BCSC 2101 at paras 128–134; *R v Noonan*, 2020 PESC 28 at para 83–84; *R v ED*, [2020] NJ No 124 (QL) at para 39, 2020 CanLII 42688 (NL (PC)); *R v Bielny*, 2021 ABQB 293 at paras 27–29.

64 Kerr, "Sentencing Ashley Smith", *supra* note 13 at 206.

65 See e.g. the dangerous offender regime contained in section 753 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] or the Supreme Court's holding in *R v Friesen*,

there is an element of uncertainty in the effect of a sanction on a defendant does not mean that a judge is precluded from considering what is most likely to occur in deciding a fit sentence.

Justice Galiatsatos is right that judges should not base sentencing decisions on speculation. But evidence about the likely experience of a sentence may come from a variety of sources. Section 723 of the *Criminal Code* gives a sentencing court wide latitude to admit relevant evidence in a sentencing proceeding, including hearsay.[66] Evidence concerning conditions of incarceration could come from the defendant themselves, if they expect to serve their sentence in the same facility where they spent pre-trial custody,[67] from reports by correctional watchdogs like the federal Office of the Correctional Investigator,[68] or from correctional officials with knowledge of local conditions.[69] While sentencing courts should doubtless insist on an evidentiary foundation for a submission that a particular offender is likely to experience harsher conditions of imprisonment, that is an obstacle that can be overcome.

Still, even with an evidentiary foundation for the claim that a given experience of imprisonment will be harsher for a particular defendant, there will always remain the possibility that those likely conditions will not in fact materialize, rendering the sentence disproportionate. But the converse is also true: if judges decline to compensate a defendant for what is likely to be a harsher experience of imprisonment, then as Berger points out, the proportionality exercise will still have failed, but "in the direction of over-punishment."[70] Our law of sentencing requires that judges impose the least restrictive sanction appropriate in the circumstances.[71] To the extent that a sentencing judge faces a choice between risking under-compensating or over-compensating a defendant for a likely harsher experience of confinement following the imposition of sentence, the law in Canada clearly, I suggest, prefers the latter.

I do not see Justice Galiatsatos's evidentiary objection as categorical. Evidentiary gaps can be filled, and our law permits judges to draw conclusions based on what will probably happen. But his second, jurisdictional, objection is more absolute. Justice Galiatsatos held that it is not appropriate for a sentencing court to concern itself with future

---

2020 SCC 9 at paras 122–24 that likelihood of reoffence may serve to increase an otherwise fit sentence in the name of public protection.

66 *Criminal Code*, *supra* note 65, s 723.

67 *R v Adamo*, 2013 MBQB 225 [*Adamo*].

68 As Justice Ducharme did in *Marfo*, *supra* note 8, discussed in some detail *below*.

69 See e.g. *R v Persad*, 2020 ONSC 188 at paras 14–18.

70 Berger, "Proportionality", *supra* note 7 at 384.

71 *Criminal Code*, *supra* note 65, ss 718.2(d), (e).

conditions a defendant may encounter in custody, finding that he was bound by precedent to ignore any question that touched on sentence administration. As authority for this proposition, he relied on the jurisprudence generally prohibiting sentence calibration with a view to an offender's "actual" release from custody based on a belief about when they would become eligible for parole. For example, in *R v Bernier*, the Court of Appeal for British Columbia held in reducing a sentence on appeal that it was inappropriate for the trial judge to have considered the offender's eligibility for early release in coming to a fit sentence.[72] It is for judges to decide the length of a fit custodial term, and for the parole board, in executing its statutory powers conferred by Parliament, to decide whether an offender may be released from custody before that term expires and if so, on what conditions.[73]

This is an important objection, because if Justice Galiatsatos is right about this precedent, *stare decisis* would bar sentencing judges from considering reasonably anticipated conditions of imprisonment altogether. But there is good reason to think that Canadian precedent does not go quite so far as that. First, as Berger argues, the Supreme Court in *R v Zinck* explicitly held that in deciding whether to increase a parole eligibility period, a sentencing court would have to consider whether, in the circumstances of the offence and the offender, the "special, additional punishment" of delayed parole was warranted.[74] In characterizing delayed parole eligibility as punishment, *Zinck* explicitly "breaks the seal" between sentence allocation and administration and calls on sentencing judges, at least in the context of s. 743.6 applications, to attend to the offender's experience of imprisonment in deciding a proportionate sanction.

Justice Galiatsatos's conclusion about this precedent is also problematic in that it cannot account for "vulnerable defendant" cases, where concerns about the effect of imprisonment on offenders with particular needs are taken into account in deciding the duration of a custodial sanction.[75] If sentencing judges are categorically prohibited from considering the qualitative conditions of imprisonment, then there would be no basis for considering the harsh effects of custody on those with individual vulnerabilities; these would simply be questions left to prison administrators to manage in accordance with their statutory mandate. Only an individualized approach that looks to the sentenced individual's

---

72 *R v Bernier*, 2003 BCCA 134 at para 44.

73 *Ibid* at para 45.

74 *R v Zinck*, 2003 SCC 6 at para 25.

75 Kerr, "Sentencing Ashley Smith", *supra* note 13, citing *Adamo*, *supra* note 67, *R v Newby*, 1991 ABCA 307 & *R v Wallace*, 1973 CanLII 1434, 1973 CarswellOnt 1079 (WL Can) (Ont CA). See also *R v Collins*, 2011 ONCA 182.

experience of the conditions of incarceration can coherently account for the relevance of "vulnerable defendant" cases.

Finally, the authorities relied on by Justice Galiatsatos for the proposition that qualitative conditions of imprisonment are always irrelevant in sentencing simply do not make that claim. The Court of Appeal for Ontario recently and thoroughly reviewed this jurisprudence in *R v Passera*. Writing for the court, Justice Doherty affirmed the rule that parole eligibility is typically not part of sentence determination.[76] Sentencing judges are not entitled to increase a fit custodial sentence because, in their view, the offender should spend more time in jail before being eligible for conditional release. Nor are they entitled to reduce a fit custodial sentence because they believe the offender's rehabilitation would better be served by an earlier release date. Parole eligibility decisions, subject to discrete statutory exceptions, have been assigned by Parliament to correctional authorities, and involve different considerations than those that influence the determination of an appropriate sentence.[77]

Nothing in this logic precludes a sentencing judge from considering the impact of the actual conditions of incarceration on the offender before them. *Hearns* does not ask sentencing judges to fix the length of sentence so as to achieve a particular parole eligibility result; it asks sentencing judges to consider the harsher experience of imprisonment in the *overall sentence itself*. As Justice Doherty notes in *Passera*, sentencing judges are still obliged to impose a proportionate sentence that takes into account the individual circumstances of the offender.[78] In deciding whether a custodial sentence is proportionate, and if so, how long a sentence is necessary to satisfy the purpose and principles of sentencing, a judge will necessarily have to consider the impact of that sentence on the offender before them. Recognizing that harsher conditions of imprisonment can render a custodial term more punitive, and reducing the overall sentence in the name of parity and proportionality as a result, does not tread on the parole board's statutory responsibility for parole eligibility decisions.

But the most fundamental answer to the objections raised in *Baptiste* is that they fail to account for Justice Moldaver's injunction in *Suter* that individualized proportionality requires attention to "*any* consequence arising from the commission of an offence, the conviction for an offence, *or the sentence imposed by an offence*, that impacts the offender."[79] Sentencing in Canada no longer merely involves, if it ever did, the rote

---

76 *R v Passera*, 2019 ONCA 527 at paras 22–24.

77 *Ibid* at paras 24–27

78 *Ibid* at para 24 citing *Suter*, *supra* note 27.

79 *Suter*, *supra* note 27 at para 47 [emphasis added].

application of proportionality as between the gravity of the offence and the degree of responsibility of the offender. The individual circumstances of the defendant are a crucial component of assessing the punitive effect of a proposed sentence. The conditions of incarceration, including the harsher experience of imprisonment during a pandemic, "may mean that an offender is no longer 'like' others, rendering a given sentence unfit."[80] In the interest of parity, proportionality, and individualization, it is only natural that sentencing judges consider the actual impact of a proposed custodial sanction. While Justice Galiatsatos is right to be concerned about prisoners serving sentences during the pandemic who did not have the "benefit" of a sentencing hearing conducted after March 2020, his judgment neglects Justice Lebel's fundamental question regarding parity and proportionality in *R v Ipeelee*: "Who are the courts sentencing if not the offender standing in front of them?"[81]

B) The path ahead: individualized proportionality and the qualitative conditions of imprisonment

I have argued in the foregoing that *Hearns* is more faithful than *Baptiste* to the Supreme Court's direction that judges attend to the individual circumstances of the accused in crafting a fit sentence. Justice Pomerance was right to find that the particular pains of imprisonment in a pandemic are worthy of consideration in the balance of sentencing. But the pandemic is not the only circumstance, that can render a sentence of imprisonment more qualitatively harsh for a particular defendant. As Berger argues, the form of individualization that has emerged in the Supreme Court's sentencing jurisprudence "involves drawing close to the offender, through and past questions of responsibility and blame, to reckon with the offender's experience of suffering as a consequence of their wrongdoing."[82] He calls this principle "individualized proportionality": a shift away from a rote application of proportionality as between the gravity of the offence and the degree of responsibility of the offender to a broader attentiveness to the offender's individual circumstances—which necessarily include their experience of the penalty imposed.[83]

If *Suter* represented an incremental expansion of the proportionality assessment to include evidence of any relevant consequence suffered by the defendant as a result of the offence,[84] then the pandemic jurisprudence expands this concept further still to include evidence about the qualitative

---

80 *Ibid* at para 48.

81 *R v Ipeelee*, 2012 SCC 13 at para 86.

82 Berger, "Proportionality", *supra* note 7 at 370.

83 *Ibid*.

84 *Suter*, *supra* note 27 at para 47.

conditions of a proposed terms of imprisonment. I agree with Berger that "it would now be an error for a judge to invoke proportionality without emphasizing its essentially individualized nature and then wrestling with the real effects of the criminal process and proposed sentence on the life lived by the offender."[85] He imagines what this might look like in practice:

> Seized with the inescapable salience of the conditions and consequences of punishment to their duty to craft a fit sentence, perhaps sentencing judges will begin to insist on more information about the real conditions and foreseeable experiences that an offender will face: the carceral institution at which the sentence will be served, but also the living conditions, practices of confinement, available programming, and extant levels of violence in that institution, to name but a few crucial factors.[86]

This paper is concerned with clearing the doctrinal barriers to considering the qualitative conditions of imprisonment as part of the proportionality assessment in sentencing. In my view, resolving the *Baptiste* objections to the *Hearns* line of authority achieves this goal by necessary implication. The task remains to consider how judges might put these doctrinal tools to work in individual cases. In the paper's conclusion, I discuss how judges might approach this task, highlighting one case that provides a model for how qualitative conditions of incarceration might be considered in the sentencing analysis, once the pandemic has ended.

4. Conclusion: Individualized Proportionality in Practice

R v Marfo is a case that stands out for many reasons.[87] Mr. Marfo was found guilty of possession of a loaded semi-automatic handgun, two loaded overcapacity magazines, and 7 grams of crack cocaine. Mr. Marfo is Black and there was significant evidence led at his sentencing hearing concerning the role systemic discrimination played in bringing him before the court.[88] Justice Ducharme, recognizing the Black Lives Matter protests and subsequent increased public concern and debate over systemic discrimination that took place in the spring and summer of 2020, and reflecting on recent Supreme Court jurisprudence, held that sentencing judges have a special role to play in combating systemic discrimination:

> as judges, it is our duty to consider the impact such discrimination has had on someone we are sentencing. We must also ensure that neither the process nor the result of sentencing results in further systemic discrimination. [89]

---

85 *Berger*, "Proportionality", *supra* note 7 at 382.

86 *Ibid* at 388.

87 *Marfo*, *supra* note 8.

88 *Ibid* at paras 6–20.

89 *Ibid* at para 29.

In weighing the significance of systemic discrimination in Mr. Marfo's sentencing, Justice Ducharme considered, among other information, an Office of the Correctional Investigator report on the inequalities faced by Black inmates.[90] He found that Black prisoners are more likely to face disciplinary charges, more likely to be placed in maximum security, less likely to have their security classification lowered, more likely to be placed in segregation, more likely to experience violence, more likely to be associated with gangs, and more likely to be denied access to jobs and vocational training than non-Black prisoners.[91] He found this information "very disturbing [and] *highly relevant* to the determination of the appropriate custodial sentence for Mr. Marfo."[92] In the end, Mr. Marfo received a two-year sentence—substantially below the range of sentence for loaded firearms found in combination with Schedule I narcotics.[93]

Justice Ducharme's judgment is a model of individualized proportionality in practice. While never losing sight that a sentence must always remain proportionate as between the gravity of the offence and the degree of responsibility of the offender—in the end, he declined to impose the conditional sentence requested by the defence—Justice Ducharme's judgment involves drawing close to the offender standing before him to assess how he would actually experience the sanction imposed. Rather than rejecting responsibility for what was likely to happen to Mr. Marfo once he came under the jurisdiction of correctional authorities, Justice Ducharme carefully examined the evidence about the experience of Black men in federal penitentiaries. In holding that the quality of Mr. Marfo's custodial term, not simply its duration, was relevant to the punishment he would experience, I contend that Justice Ducharme stood on firm doctrinal ground.

To be sure, there will be practical challenges in seeing this approach adopted more widely. While judges imposing reformatory sentences will no doubt be familiar with or have ready access to information about local

---

90 *Ibid* at para 52, citing Canada, Office of the Correctional Investigator, *Annual Report of the Correctional Investigator 2012–13* (Ottawa: Office of the Correctional Investigator, 27 June 2014) (Howard Sapers), online: <https://perma.cc/LZ89-4BF4>.

91 *Marfo*, *supra* note 8 at para 52.

92 *Ibid* [emphasis added].

93 While the Supreme Court struck down the three-year mandatory minimum penalty for possession of a firearm in *R v Nur*, 2015 SCC 15, then Chief Justice McLachlin held that in "the vast majority of cases" where the firearm is possessed for a criminal purpose that "a three-year sentence may be appropriate": see para 82. In an oft-cited decision on firearm sentencing following *Nur*, Justice Michael Code held that three years to five years is the appropriate range for a first s 95 offence where the use and possession of the gun is associated with criminal activity, such as drug trafficking": see *R v Graham*, 2018 ONSC 6817 para 38.

conditions, a penitentiary sentence could result in a defendant being sent anywhere in the country. Counsel in these cases will need to familiarize themselves with the byzantine world of correctional administration in order to supply an appropriate evidentiary foundation for their sentencing judge. As the practice of considering qualitative conditions of imprisonment becomes more common, probation officers preparing pre-sentence reports pursuant to section 721 of the *Criminal Code* might begin including potential security classification, perhaps the most significant indicator of how severe an experience imprisonment will be, as a matter of course. As judges grapple with identifying the experience of imprisonment the defendant before them is likely to face, they should bear in mind that they need not be satisfied to a standard of certainty. Disputed facts in sentencing need only be proven on a balance of probabilities at a sentencing hearing.[94] It should also be remembered, as noted above, that a judge who declines to consider likely conditions of imprisonment risks imposing a sentence that is more punitive than intended.[95]

These barriers to implementation should not deter judges from soliciting evidence or submissions from the parties on the qualitative conditions of imprisonment. Sentencing judges have broad authority to consider a wide range of information in fashioning a fit sentence for the circumstances of the offence and offender. As I have endeavoured to show, there is a compelling doctrinal basis for moving beyond the duration focus and inquiring into the quality, not merely the quantity, of a proposed custodial sentence. When supplied with an evidentiary foundation, sentencing judges have firm authority to consider the qualitative conditions of imprisonment—the distance from loved ones, the availability of rehabilitative programming, the risk of violence, etc—in deciding whether to send someone to jail, and if so, for how long. While it is open to a sentencing judge to decide how much weight should be given to this factor in a given case, no longer can it be said that it should be given no weight at all.

The "black box" of punishment theory is at last open. The task now is to look inside.

---

94 See *Criminal Code*, *supra* note 65, s 723(3)(d).

95 Berger, "Proportionality", *supra* note 7 at 384.