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Reform of the Purposes and Principles of Sentencing: A Think Piece

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This short paper reflects on the following question posed to me by the Department of Justice: "In the context of a criminal justice system review, if sections 718 to 718.21 of the Criminal Code (Purpose and Principles of Sentencing) were to be reformed, how would you reform them, what would you include/exclude, and why?" I have been asked to write this piece based on my experience and perspective as a legal academic who writes and teaches in the area of criminal justice, including criminal law, sentencing, criminal procedure, and constitutional issues. I understand that the Department of Justice is not, at this point, asking for a detailed academic research paper, though I will provide references where appropriate and would be pleased to follow up with further information and citations should that prove helpful.

I begin with a few preliminary matters relating to the scope and reach of this reflection piece **(A)**. In part **(B)** I discuss three larger social and legal issues facing sentencing in Canada that serve as orienting points or touchstones for the reforms that I suggest. I argue that any appealing reforms to the purposes and principles of sentencing would have to be directed at reducing the use of incarceration in Canada, remedying the over-incarceration of Indigenous peoples, and addressing the treatment of the mentally ill in the criminal justice system.

Anchored by those orienting justice issues I turn in part **(C)** to the heart of the piece: a discussion of specific suggested reforms and amendments. I argue that reforms to the purposes and objectives of sentencing should jettison the listing of multiple objectives in favour of a single overarching objective: "to contribute, along with crime prevention initiatives, to the maintenance of a just, peaceful and safe society by imposing just sanctions." In terms of an underlying vision of what will best nourish this objective, I suggest that a priority on restoration, rehabilitation, and reintegration is most conducive to addressing the foundational justice issues discussed in part **(B)** and advancing the safety and justice of our society. By contrast, I discuss the problematic status of deterrence and denunciation as sentencing objectives and suggest that reform to the sentencing provisions should seek to de-emphasize these objectives in our practices of sentencing.

A central theme in this paper is that the focus of a reformed scheme should be the *principles of sentencing* that are best suited to giving effect to an underlying policy vision of what sentencing is intended to achieve and what is most likely to meaningfully contribute to a truly just, peaceful, and safe society. To that end, and guided by the goals and issues discussed in **(B)**, I argue that the principles of restraint and individualization should join proportionality in a revised statement of the fundamental principles of sentencing. I offer comments on the other sentencing considerations listed in the *Criminal Code* and suggest certain new considerations that should be taken into account in sentencing, considerations that flow from the fundamental

principles of individualization and restraint, as well as a commitment to the role of substantive equality in crafting sentences that contribute to a just society. Finally, I suggest two "special regard" provisions: one that emphasizes the special regard that a sentencing judge must give to the status of Indigenous peoples in our criminal justice system, and one that draws a sentencing judge's attention to issues of mental illness.

A. Scope of this Paper

The question that has been posed to me implicates a range of issues affecting our criminal justice system and aspects of the *Criminal Code* well beyond the sections that I have been asked to consider. In particular, I note that there are a set of *Criminal Code* provisions and judicial practices that have practical and highly consequential effects on sentencing in Canada. I have in mind, for example, the conduct of sentencing hearings, mandatory minima, and appellate review of sentences (including sentencing guidelines and starting points). Each of these topics has generated significant jurisprudence and academic debate and they, too, require examination and possible reform. That is especially so if Parliament wishes to adopt a new approach to the purpose and principles of sentencing — the success of such a reform will depend heavily on the judicial practices and other *Code* provisions that shape sentencing in Canada. I have views on these matters but given that they fall outside of the question posed to me, I will only be discussing them tangentially and by necessary implication. Given space constraints, please also note that I will not be considering s. 718.21, the provision governing the sentencing of organizations.

Finally, some of what I will discuss below presumes that part of the review of the criminal sentencing regime in Canada will consider the Federal Government's financial investment in restorative and rehabilitative programs. As you will see, an orienting assumption of this paper is that Canadians will be safer, and our sentencing practices will be more rational and just, if rehabilitation, restoration, and reintegration are foregrounded as guiding ideals. No reforms that pursue that vision can be effective without meaningful investment in programs — within and outside of prisons — focused on rehabilitation and reintegration. Reforms to the sentencing purposes and principles of the *Code* will rightly be critiqued if unaccompanied by this kind of institutional and financial investment.

B. Fundamental Issues to be Addressed in any Reform

Any reform to the *Criminal Code* must be animated by an evil that we seek to remedy or a good that we aspire to achieve. The suggestions, reflections, and reforms that I offer in this piece are shaped by a concern with addressing a set of pressing policy issues that are fundamental to the justness and integrity of our criminal justice system, and by extension, to the safety and fairness of Canadian society as a whole. I suggest that there are three such fundamental issues to which a substantively appealing reform to our sentencing principles and practices must address. If one accepts the centrality and exigency of these criminal justice issues as premises, one is, in my view, impelled to the kinds of reforms and approaches that I explore below.

The first orienting point is the objective of reducing the use of incarceration in Canada. Bill C-

41[1] was, in part, motivated by this concern, as reflected in the principles of parsimony and restraint found (albeit somewhat structurally buried, as I will discuss below) in ss. 718.2(d) and (e). However, as the Correctional Investigator for Canada reported in 2013, despite sharply declining crime rates, the number of federally incarcerated inmates in Canada had increased by 16.5%.[2] The objective of reducing reliance on incarceration – of reducing over-incarceration – is as philosophically and practically compelling, and even more pressing, as it was in the 1990s. Practically, heavy use of incarceration does not contribute, in lasting ways, to the safety of our communities, as the experience in the United States seems emphatically to teach. Prisons are poor environments for effecting the kinds of change and rehabilitation that conduce to the long-term safety of society when the offender re-enters the community, and incarceration does little to repair or restore the communities that have suffered the effects of crime. Philosophically, commitment to parsimony in the use of state force and restraint in the deprivation of individual liberty are principles that ought to guide a vision of the just response to wrongdoing in a liberal democratic system. And so I take the reduction in the use of incarceration generally — in favour of approaches to sentencing that respond to the individual's circumstances and to the causes of crime — to be a fundamental orienting premise for any reform of these provisions.

Second, and related, any revisions to the purposes and principles of sentencing would have to be centrally inspired by and directed at the foundational justice issue of remedying the over-incarceration of Indigenous peoples. This objective is highlighted in the Minister of Justice and Attorney General's mandate letter, which speaks of "increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians" as amongst the outcomes expected from this criminal justice system review. Of course that goal was also reflected in Bill C-41 and the 1996 sentencing provisions. The Supreme Court of Canada emphasized and sought to address this issue in *R v Gladue*,[3] interpreting s.718.2(e) of the *Code*; but by *R v Ipeelee*[4] the Court conceded that, despite the amendments and the jurisprudence the "crisis" of Indigenous over representation in prisons had only deepened. And in 2016, the Correctional Investigator reported that for the first time in Canadian history, and despite being approximately 3% of the population, over 25% of federal inmates are Indigenous people.[5] Today, any change to the sentencing provisions of the *Criminal Code* must embed and integrate principles and purposes suited to the pursuit of this objective into the structural heart of sentencing practices in Canada. That is, the choice and design of the *overall purposes and principles of sentencing* should be fundamentally informed by the problem of Indigenous over-incarceration. The default frame must shift. Simply naming this issue as an ancillary or discrete sentencing consideration has failed over the last 20 years and does not match the magnitude of the injustice that our sentencing practices have created.

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[1] *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, SC 1995, c 22.

[2] Sean Fine, "Federal prisons more crowded, violent under Tories, ombudsman says", *Globe and Mail* (25 November 2013), online: <http://www.theglobeandmail.com/news/politics/federal-prisons-more-crowded-violent-under-tories-ombudsman-says/article15581828/>.

[3] [1999] 1 SCR 688.

[4] 2012 SCC 13.

[5] "Prison watchdog shocked at number of aboriginal inmates", *CBC News*, online: <http://www.cbc.ca/news/aboriginal/aboriginal-inmates-1.3403647>.

A third and final touchstone issue that would need to be addressed in any reform to the sentencing provisions of the *Criminal Code* is the incarceration of the mentally ill. This issue is also highlighted in the Minister's Mandate Letter, wherein she was asked to address the treatment of those with mental illness in the criminal justice system. Published data from the last 10 years paints a harrowing picture, with up to 28% of those in Canadian carceral settings suffering from a significant form of Fetal Alcohol Spectrum Disorder (FASD) (compared with approximately 1% in the general population), a significantly higher incidence of Asperger's syndrome amongst those involved in the criminal justice system as compared to the general population, and up to 35% of the prison population afflicted by a severe form of antisocial personality disorder.[6] Sentencing practices must respond in a more humane, individualized, and effective way to issues of mental illness in the criminal justice system and adopting sentencing purposes and practices that encourage actors in the process to prioritize appropriate responses to mental illness amongst offenders is both practically pressing and an ethical imperative. Avoiding the use of incarceration as a response to complex social problems of poverty, homelessness, and mental health is, it seems to me, an important measure of the justness of our criminal justice system.

Though it is but one element in the ecosystem of criminal justice in Canada (and one that arises well after the harms of crime have already occurred) there is a tendency in media, public and political debates to freight sentencing with more symbolic and political weight — and more various objectives — than it can reasonably bear. The result has been a confused set of sentencing purposes, tensions within the punishment provisions of the *Criminal Code* (e.g. an apparent emphasis on restraint but the proliferation of mandatory minimum sentences), and the development of Canadian sentencing practices and outcomes in troubling directions. My suggestion is that the substantive appeal of any amendments to the purposes and principles of sentencing should be measured by their sensitivity and responsiveness to these three fundamental issues facing our criminal justice system.

C. Reforms

1. Fundamental Purposes and Objectives

One of the notable features of the sentencing reforms brought about in 1996 was the articulation, for the first time, of the purposes and objectives of sentencing. The motivation was to anchor the necessarily discretionary practice of sentencing in a set of common goals, hopefully producing more consistency and reducing disparity. Rather than making decisions about the objectives of sentencing in Canada, however, section 718 of the *Criminal Code* set out a fundamental purpose of sentencing followed by a list from which sentencing judges could select "one or more" objectives in imposing a just sanction. No ranking or priority of these

[6] I review some of these studies, and the general treatment of mental disorder in the criminal justice system, 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 Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford; Portland, OR: Hart Publishing, 2012) 117.

objectives, which would reflect a political judgment about the fundamental orientation and goals of sentencing in Canada, is provided. The result is that the objectives serve as a kind of philosophical buffet for sentencing judges. Whether a judge, based on the argument of counsel, selects (for example) rehabilitation or deterrence as the objective of sentencing in a given case produces a fundamentally different frame and set of assumptions about what a just sanction will involve. A system driven by the objective of denunciation has a fundamentally different shape and very different individual and systemic outcomes than one focused on reparation and restoration. In the end, no decision about the philosophy and political vision that should inform sentencing in Canada was made; that crucial decision was left to individual judges, impeding the coherence, consistency, and systemic focus that a "fundamental purpose" provision should seek to achieve. This buffet approach has allowed debate about the appropriate objectives for a given crime or in a given case to overwhelm discussion of the principles that govern the imposition of a just and appropriate sentence. And if, as often happens, deterrence and denunciation are urged by the Crown and selected by the judge as the guiding objectives in a given case, the principles of restraint and parsimony set out as amongst the principles that should govern sentencing are effectively read out of the analysis. This precise effect was, indeed, one of the features of Canadian sentencing practice that the Court in *Ipeelee* identified as having frustrated the *Gladue* principle. Otherwise put, the current provisions strangely imagine that the principles of sentencing can be coherently articulated independently of a clear decision about the objectives of sentencing. In my view, it is the *principles of sentencing* that do the crucial work in ensuring that the overarching goals of a sentencing regime (including addressing the issues outlined in the previous section) are achieved. The logic should proceed from a clear legislative decision about the purposes of sentencing, through to the principles that will give effect to that objective.

For these reasons, I would amend s. 718 to state simply that "[t]he fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to the maintenance of a just, peaceful and safe society by imposing just sanctions." Whether a given sanction is just is ultimately determined by a set of carefully crafted principles of sentencing informed by an underlying policy vision of the goals that sentencing is intended to achieve and what is most likely to meaningfully contribute to a truly safe, peaceful, and just society. I would lay the legislative focus on the principles and considerations that should guide sentencing, sidestepping problematic debates about the specific objective that ought to prevail in a given case. That is why I favour the statement of a single, clear overarching objective. Of course, an informing policy vision about what systemic orientation will nourish this objective must be settled upon, whether that vision is explicitly stated in the *Code* or not. In light of my discussion in section (B), I would favour a priority on restoration, rehabilitation, and reintegration as the means best suited to addressing the exigent issues that face our criminal justice system and most conducive to the long-term safety and justice of our society. This would also be faithful to my call for embedding approaches suited to the pursuit of reduced reliance on incarceration, particularly for Indigenous offenders, in the default structure of Canadian sentencing.

In staking out this priority, I must now turn to address the objectives of deterrence and denunciation, which, by virtue of jurisprudential development and legislative intervention, have played a prominent and problematic role in sentencing over the last 20 years.

2. The Status of Deterrence and Denunciation

The practical effect of an emphasis on the objectives of deterrence and denunciation — whether in legislation or in arguments made within a courtroom in a specific case — is to increase the use of incarceration and the length of terms of incarceration. Permitting the adoption of deterrence and denunciation as the primary sentencing objectives in a given case (or a class of cases) is at odds with a commitment to reducing reliance on incarceration.[7] And yet, governed by the current provisions, there is rarely an appellate review of sentence in which, irrespective of the crime charged, the Crown does not advance deterrence and denunciation as the primary objectives driving sentencing. Deterrence and denunciation abstract sentencing from a focus on the individual standing before the court and have the capacity to interfere with crafting an individualized and proportionate sentence. As Chief Justice McLachlin explained on behalf of a majority of the Court in *Nur*, the prioritization of deterrence and denunciation (as well as retribution) is what has driven the proliferation of mandatory minimum sentences "at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime."[8] There is little that one could imagine that would more effectively stake out a new policy path and reorient sentencing practices in Canada from their direction over the past 10 years than to forcefully deemphasize the role and salience of deterrence and denunciation. And there is good cause to do so.

To be sure, denunciation is a necessary and ineradicable feature of criminal punishment. As Justice LeBel explained in *Ipeelee*, the fundamental principle of proportionality intrinsically involves a concern for measured denunciation. He explained that, in addition to serving a "limiting or restraining function," crafting a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender also involves "judicial and social censure".[9] A due measure of denunciation is, thus, already involved in crafting a proportionate sentence. Singling out denunciation as a particular objective in a given case or class of crimes can thus only serve to drive sentencing beyond what would be appropriate to a proportionate sentence. This involves the state in a use of the liberty and the body of the individual for purely communicative purposes. Consistent with viewing sentencing as just one component of the ecosystem of criminal justice, it must also be borne in mind that criminalization (choosing what is a criminal offence), prosecution, and conviction are

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[7] Of course, an emphasis on deterrence and denunciation does not invariably result in a sentence of incarceration – the effect in a given case might be to aggravate a non-custodial sentence. However, as explained in part (B), this paper is shaped by the underlying policy goal of decreasing systemic reliance on incarceration. The weight of juridical experience is that allowing an emphasis on deterrence and denunciation tends, systemically, to increase the use and duration of custodial sentences. That effect is the focus of my discussion here.

[8] *R v Nur*, 2015 SCC 15 at para 44.

[9] *R v Ipeelee*, *supra* note 4 at para 37.

significant means of denouncing conduct. In short, it is difficult to justify denunciation as a priority in settling on the just quantum and form of sentence.

Deterrence sits on even shakier ground. For some years the scholarly literature has shown that deterrence is principally achieved through certainty of apprehension and swiftness of outcome. The dubious status of deterrence and doubt about its role in sentencing were identified in the 1987 report of the Sentencing Commission. And in *Nur*, the Supreme Court has itself recently suggested some caution about the force of deterrence as a sentencing objective. In assessing the government's argument that a mandatory minimum sentence that offended s. 12 of the *Charter* could be justified on the basis of deterrence, denunciation, and retribution, Chief Justice McLachlin cited the Report of the Sentencing Commission and stated that "empirical evidence suggests that mandatory minimum sentences do not, in fact, deter crimes".[10] In the end, in the context of a section 1 analysis, the Court could not conclude that mandatory minimum sentences were rationally connected to the objective of deterrence. Although this reasoning related specifically to one means of aggravating sentence — mandatory minima — Chief Justice McLachlin generally cited longstanding "[d]oubts concerning incarceration as a deterrent"[11] and it is difficult to contain the logic of this ruling to mandatory minimum sentences alone. It is true that a priority on the objectives of deterrence and denunciation have been endorsed by the Court for some offences and certain classes of offenders, as recently as in *R v Lacasee*.[12] But, in the end, permitting the identification of deterrence as a primary objective in sentencing serves to ratchet up sentences, does so on shaky empirical footing, and has the strong potential to run serious interference on an overall policy goal of reducing reliance on incarceration, as the experience of the over-incarceration of Indigenous peoples has emphatically shown.

For all of these reasons, in a reform to the sentencing provisions of the *Criminal Code* I would include a clause that explicitly provides that deterrence and denunciation are *secondary* goals of sentencing and that in no case may they be used to arrive at a more restrictive sentence than would be warranted by application of the fundamental principles of sentencing set out in the *Code* (as explained in the next section).[13] Given the widespread presence of reasoning about deterrence and denunciation in our existing sentencing jurisprudence, an explicit provision of this sort is necessary if one wishes to chart out a new

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[10] *R v Nur*, *supra* note 8 at para 114.

[11] *Ibid* at para 113.

[12] 2015 SCC 64. Justice Wagner, writing for the majority of the Court, explained that "[w]hile it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who will be sensitive to harsh sentences. Impaired driving offences are an obvious example of this type of offence" (para 73).

[13] My critiques of denunciation and deterrence might suggest that they ought to have no place whatsoever in our sentencing practices. As I have explained, a role for measured denunciation is implied by the principle of proportionality, but I have considerable sympathy for this view with respect to deterrence. Nevertheless, given that the jurisprudence and some empirical evidence suggests a certain limited role for deterrence, I have framed this proposed clause in terms of deterrence and denunciation being *secondary* goals of sentencing. The key, in my view, is to ensure that deterrence and denunciation are deemphasized and marginalized as drivers of sentencing. A government might choose to pursue an even more ambitious stance with respect to deterrence.

direction in sentencing in Canada, particularly one that seeks to meaningfully address the fundamental issues set out in part (B) of this paper. The prevailing emphasis on the objectives of deterrence and denunciation must be disrupted if the hope is for different and better outcomes of our sentencing practices. This kind of provision would achieve that disruption or "resetting" of the sentencing jurisprudence.[14] Moreover, and for the same reasons, I would support the removal of sections 718.01-718.03. To make the overall point again, the focus should be on carefully crafted principles of sentencing shaped by (a) an underlying policy vision of the goals that sentencing should achieve and (b) an assessment of what is most likely to meaningfully contribute to a truly safe, peaceful, and just society.

3. The Fundamental Principle(s) of Sentencing

So what are those fundamental principles?
The current provisions identify one such principle, the principle of proportionality. The status of proportionality as a guiding principle for just and appropriate punishment has a long philosophical history and is well established in the contemporary Canadian jurisprudence. In *Ipeelee*, the Court described proportionality as "the *sine qua non* of a just sanction." As framed in our *Code*, proportionality is specifically interested in measuring the sentence against two factors: the gravity of the offence and the degree of responsibility of the offender. Though necessary to the crafting of a just sentence, I would suggest that this single fundamental principle is no longer sufficient as the sole overall principle to guide sentencing. Two further principles should be added.

The first can be drawn from key jurisprudential developments and is both practically and conceptually crucial to addressing the issues outlined in part (B) of this paper: the principle of individualization.[15] In essence, the principle of individualization calls upon a judge to consider the way in which a particular sanction will visit itself on the offender given the *particular circumstances, background, and experiences* of that offender. In a number of cases the Supreme Court has made clear that proportionality must be understood as a fundamentally individualized concept, demanding "an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them."[16] Indeed, in *Ipeelee*, Justice LeBel described this principle of individualization as "the fundamental duty of a sentencing judge".[17] This principle is fundamental because it expands a sentencing judge's scope of regard beyond the two considerations intrinsic to the current proportionality principle, namely the gravity of the offence and the degree of responsibility of the offender. Doing so is essential to crafting a just and appropriate sentence because it ensures that the sentence is calibrated not only to these two relatively abstract considerations, but to the concrete and lived effects of a

[14] Although the question posed to me was about legislative amendments to the purpose and principles of the sentencing section of the *Criminal Code*, this is one example of the way in which legislative reform is intimately linked to change in judicial sentencing practices.
[15] I have explored the nature of this principle and some of its implications in Benjamin L Berger, "Sentencing and the Salience of Pain and Hope" 70 Supreme Court Law Rev 2d 337.
[16] *R v Ipeelee*, *supra* note 4 at para 75.
[17] *Ibid*.

sentence on the life of the individual before the court; otherwise put, individualization ensures that sentencing judges are truly measuring the severity of the suffering imposed by the state through sentencing. Punishment will always be experienced by the individual, and so a just sanction will always have to be individualized. As Chief Justice McLachlin stated in *Nur*, "imposing a proportionate sentence is a highly individualized exercise".[18]

The principle of individualization thus requires the sentencing judge to move beyond gravity of offence and degree of responsibility to consider issues such as the background and circumstances of the offender, as well as the offender's aggregate experience of his or her treatment at the hands of the state. The principle of individualization has a number of practical consequences for sentencing. It explains why a judge may consider state misconduct in arriving at a just sentence in the circumstances.[19] As Justice Wagner explained in *R v Pham*,[20] it also requires a sentencing judge to consider collateral consequences of sentencing (defined broadly by Wagner J as "any consequences for the impact of the sentence on the particular offender"[21]) in settling on the appropriate severity and form of sanction.[22] It is a principle that would also mandate careful consideration of the mental health history and circumstances of an offender, crucial to addressing this issue outlined in part (B). Overall, the principle of individualization also ensures that the laudable principle of parity is not a numerical or formal concept but, rather, sensibly focusses on the parity of experience and consequence for the offender — a more robustly equality-infused sense of parity in treatment that can mitigate the extent to which sentencing serves to aggravate conditions of economic and social marginalization. This point comes through with considerable force in Justice LeBel's use of individualization as a controlling concept in *Ipeelee*:

> Who 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.[23]

Although Justice LeBel is explaining the force of individualization as a fundamental principle

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[18] *R v Nur*, *supra* note 8 at para 43. See also *Ipeelee*, *supra* note 4, in which Justice LeBel explained that the measurement of a just sanction is, of necessity "a highly individualized process" (para 38).

[19] See *R v Nasogaluak*, 2010 SCC 6, as explained and discussed in Berger, *supra* note 15.

[20] *R v Pham*, 2013 SCC 15.

[21] *Ibid.* at para 11.

[22] As Justice Wagner explained at para 11, such collateral consequences (like consequences of sentencing on immigration status) "are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2 (*a*) of the *Criminal Code*). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718 (*d*) of the *Criminal Code*)." (emphasis added)

[23] *R v Ipeelee*, *supra* note 4 at para 86.

in the sentencing of Indigenous offenders, the case law is clear that the point is a general one. Indeed, this is another way in which the principles essential to the just sentencing of Indigenous persons can and should be installed into the general, default architecture of sentencing in Canada.

The second principle that I would add to the existing "fundamental" proportionality principle is the principle of restraint. The justification for adding this as one of (what would now be) three fundamental principles of sentencing can be briefly stated. Paragraphs 718.2(d) and (e) currently articulate forms of this restraint principle, requiring judges to use the least restrictive sanction appropriate in the circumstances and clearly stating that imprisonment should be used as a last resort (with "particular attention to the circumstances of Aboriginal offenders"). Though suggesting the centrality of restraint to a just, peaceful, and safe society, these provisions are essentially buried as one of five "other sentencing principles" that "a court that imposes a sentence shall also take into consideration." As I have suggested, the subsidiary status of these "other principles" (subsidiary to the menu of objectives as well) have blunted their force. Restraint is not an ancillary or technical consideration. It is a fundamental element of a vision of the approach to sentencing that is most suitable and just in a free and democratic society. It is also the "*sine qua non*" (to borrow from the Court's characterization of the importance of proportionality) of addressing the foundational justice issues outlined in part (B). It should therefore be pulled out of the list of "other principles" and centralized in our sentencing approach. I am skeptical that reduction of reliance on incarceration, novel and modern approaches to sentencing, and advances on issues of Indigenous over-incarceration are possible without elevating restraint as one of the fundamental principles of sentencing.

Ultimately, then, I suggest that s 718.1 be amended to reflect the "fundamental *principles*" of sentencing. A sentence must be: (a) **proportionate** to the gravity of the offence and the degree of responsibility of the offender; (b) **individualized** so as to take into account the particular circumstances, background, and experiences of the offender; and (c) **restrained** such that it imposes the least restrictive sanction appropriate in the circumstances, with imprisonment used only when no other sanction is appropriate. This triptych of fundamental principles – whereby each is distinctive but all inform each other – gives focused guidance on how to give effect to an underlying vision of what is likely to best contribute to a just, peaceful, and safe society.

4. Other Sentencing Considerations

In focusing this paper, I have chosen not to separately consider each of these principles (or, perhaps more accurately and helpfully labelled, "considerations") currently listed in s 718.2 as "other sentencing principles" that "a court that imposes a sentence shall take into consideration". My emphasis is on an enriched and reoriented set of fundamental principles and, consistent with that emphasis, I would introduce these supplementary and largely technical, though important, considerations — such as totality, parity, etc. — by stating that "In giving effect to the fundamental principles of sentencing, a court that imposes a sentence

shall take into account the following considerations". I have already suggested that the principle of restraint is different in kind and more foundational to orienting sentencing practices than the other considerations listed here; I have, as a result, urged that paragraphs 718.2(d) and (e) be integrated into our fundamental principles of sentencing. I have only a couple of brief observations about the remaining considerations listed in the current provision.

First, although 718.2(a) purports to direct judges to consider aggravating and mitigating circumstances, the subparagraphs that follow all list aggravating factors (many of which, of course, can be highly relevant). The effect is to create a menu of statutory aggravation. I would suggest a more balanced list of aggravating and mitigating factors, such as is found in the excellent recent amendment to the defence of person provisions of the *Criminal Code* (see s34(2)). Second, I pause to note that recent amendments to sentencing provisions elsewhere in the *Code* have created significant tensions with some of the considerations listed here. Bill C-54, for example, which provided for parole ineligibility periods for those convicted of multiple murders to be served consecutively (see s 745.51), is in troubling relationship with the totality principle listed in s 718.2(c). This is reflective of a general problem in the sentencing provisions in our *Code* (the proliferation of mandatory minima and the fundamental principle of proportionality, with its crucial individualization dimension, is another potent example) and will require sustained legislative attention and reform that should, in my view, begin with decisions about the guiding principles and then turn to consequential amendments that give effect to those principles.

In a reform to s 718.2, I would however add two new and related specific sentencing considerations that flow naturally and, in my estimation, necessarily from inclusion of *individualization* as a fundamental principle. Indeed, they are already implied by individualization, though I think that their separate articulation is important in helping to give substance to that fundamental principle. First, and supported by the jurisprudence that I have discussed, a sentence should take into account the collateral consequences of the sentence on the particular offender. Such a clause would essentially codify the important principle established in *Pham*. Second, I would include as a consideration that, if a period of incarceration is to be imposed, the sentence must take into account the reasonably foreseeable conditions of incarceration and the availability of rehabilitative programming. This would be a bold new inclusion, asking judges to inquire into the form of incarceration that is likely to be imposed and the conditions in our carceral institutions before settling on a sentence. Our current sole focus on quantum and duration as the determinants of the severity and appropriateness of a sentence of incarceration is inadequate if we are committed to the idea that sanctions are just when they are calibrated in a proportional — let alone individualized and restrained — manner. To put the point simply, a 3-year sentence served in a maximum security facility with little by way of rehabilitative programs is a fundamentally different and more severe punishment than a 3-year sentence served in a medium security prison with robust programing available. To arrive at a proportional, individualized, and restrained sentence (and to give effect to the proposition that society will be safer and more just if an offender is rehabilitated rather than simply incarcerated) a

sentencing judge must know what the conditions and experience of incarceration will be. There is, in my view, support in the jurisprudence for such a clause and it would be a salutary intervention into our sentencing practices.[24]

Finally, mindful that the fundamental purpose of sentencing directs our attention to the role of just sanctions in maintaining a just society, I would provide that a court that imposes a sentence shall take into consideration the extent to which a sanction contributes to the exacerbation or amelioration of social inequality and of the marginalization of historically disadvantaged communities. Although implicit in all that I have suggested in this paper, this sentencing consideration is of sufficient ethical and practical importance to warrant separate and explicit emphasis.

5. Special Regard

The early portion of this piece identified three fundamental justice issues that any reforms to the purposes and principles of sentencing would have to meaningfully address. Anchored and informed by those foundational issues, this paper has thus far sought to provide reflections and reforms that would enhance the justice and effectiveness of our sentencing practices as a whole. I have, for example, proposed principles for the default frame and practices of sentencing that are also suited to reducing Indigenous over-incarceration and to the kind of individualization that would help to address the treatment of the mentally ill in our sentencing system. It nevertheless remains important, in my view, to ensure that reforms to this part of the *Criminal Code* put separate and forceful emphasis on the fundamental issues with which I began this piece.

Accordingly, I would include a separate provision — not one tucked into the other principles of sentencing — that sets out the special regard that a sentencing judge must give to the status of Indigenous persons in our criminal justice system. Such a provision would essentially capture and preserve the principles and practices set out in *Gladue*, as interpreted and clarified in *Ipeelee*, as part of a systemic commitment to responding to the legacy of colonialism and issues of justice for Indigenous peoples.[25] Without reviewing in detail the holdings in those cases, I would favour an independent section providing that: in giving effect to the purpose and fundamental principles of sentencing, special regard should be had to remedying the over-incarceration of Indigenous offenders, and that in all cases involving Indigenous offenders, irrespective of the seriousness of the nature of the offence, a sentencing judge is under a duty to consider (a) the unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or

[24] I expand upon and justify this proposal in Berger, *supra* note 15.

[25] As Justice LeBel so aptly put it in *Ipeelee*, *supra* note 4, "[t]he overwhelming message emanating from the various reports and commissions on Aboriginal people's involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism." (para 77)

connection.[26]

Similarly, although such regard is necessarily implied by the fundamental principles of proportionality and individualization, given the pressing issue of the incarceration of the mentally ill as discussed in part (B), I would include a separate provision stating that, when giving effect to the purpose and fundamental principles of sentencing, judges must give special regard to the effect of mental illness on the responsibility of the offender and the form of sanction best suited to responding to the circumstances and needs of offenders suffering from mental illness. "Mental illness" should be understood broadly to include not only the kinds of mental disorder that qualifies for the defence of NCRMD, but conditions such as FASD, autism spectrum disorder, and personality disorders. If a term other than "mental illness" better captures that broad range of conditions, that term should be used.

D. Conclusion

Thank you for the opportunity to contribute this short "think piece" as part of your review of the Purposes and Principles of Sentencing section of the *Criminal Code*. Should you require further information or elaboration of anything contained in this paper, please do not hesitate to call upon me.

[26] The inclusion of sections governing the procedure and funding for gathering the information necessary for this kind of assessment ("*Gladue* reports") is an important matter that falls outside the scope of what you have asked me to consider in this paper.