

**THE GROUND BENEATH OUR SPEECH:  
MORAL ORDERING IN PLEA-BASED CRIMINAL JUSTICE**

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## ABSTRACT

Moral ordering is fundamental to Canada's criminal law and justice systems, and is most explicitly encountered in post-conviction sentencing proceedings. Beginning with the premise that the law's order is founded upon both 'universal' wrongs and 'individualized' responses, this thesis considers some of the problems and opportunities that guilty plea-based resolution processes pose for the moral ordering that criminal courts are convened to undertake.

Chapter One conceptualizes sentencing hearings as formal occasions for the expressive discernment and application of moral values. 'Proportionality', or the gravity of an offence and the degree of responsibility borne by an offender, is the guiding principle by which courts undertake this gauging. This chapter also considers how an offender's normative orientation towards their criminal conduct (commonly expressed as remorse) informs sentencing hearings' function as forums of moral enquiry and ordering.

Chapter Two confronts some of the practical difficulties in plea and sentencing proceedings that inhibit and distort the moral ordering that the law aspires towards. The formation and use of guilty pleas, as the dominant means by which criminal charges are formally resolved, are examined for their capacity to open or constrict avenues of moral communication. Other mechanisms, such as the statutory-based tools of offender allocution and victim impact statements, are also assessed as means by which sentencing courts are able to act as forums of informed, dialogic moral ordering. Chapter Two also considers the influence that professional legal actors have in shaping and mediating the experience of lay participants in these forums.

Chapters Three and Four present empirical research into how the law's concern for moral ordering operates in sentencing courts, with particular regard to the engagement of offenders. Eleven justice system professionals, mostly lawyers, were asked for their perspectives and experiences, and observations of four provincial courts in British Columbia were conducted to analyze a court's "moral speech". It was observed that while a language of moral ordering could be heard in a majority of sentencing hearings, its expression flourished in contexts that afforded focus on an offender's full circumstances, thus drawing upon both individual voices and shared values.

## **PREFACE**

The empirical research contained in this thesis (the “Interview Study”) was approved by the University of British Columbia’s Behavioural Research Ethics Board (“BREB”), Certificate of Approval H09-02540. The Principal Investigator in the Interview Study, Professor Emma Cunliffe, is Simon Owen’s thesis supervisor. Professor Cunliffe collaborated in this research by overseeing Mr. Owen’s collection and analysis of the data collected under the auspices of the BREB-approved Interview Study. Mr. Owen was solely responsible for corresponding with interview participants and conducting interviews.

## TABLE OF CONTENTS

ABSTRACT .....	ii
PREFACE .....	iii
TABLE OF CONTENTS .....	iv
ACKNOWLEDGMENTS .....	vii
DEDICATION .....	viii
INTRODUCTION .....	1
CHAPTER ONE: The Moral Roots and Reach of Canadian Criminal Justice .....	8
1.1    Introduction.....	8
1.2    The Anatomies of Authority .....	9
1.3    The Morality in Liability .....	11
1.3.1    A Crime is a Wrong .....	12
1.3.2    A Crime is Unlawful .....	17
1.3.3    A Crime is Voluntary .....	18
1.3.4    The Commissioner of a Crime is a Responsible Actor .....	21
1.3.5    A Crime is Censured by the State .....	23
1.4    The Moral Proportionality of Punishment .....	31
1.4.1    A Statutory Smorgasbord .....	31
1.4.2    The <i>Criminal Code</i> 's Purposive Tensions: Retributivism and Utilitarianism.....	33
1.4.3    Proportionality through the Eyes of the Beholder .....	35
1.5    The Moral Acoustics of Sentencing Courts.....	37
1.6    Conclusion .....	44
CHAPTER TWO: The Moral Compromises of Guilty Plea Justice .....	46
2.1    Introduction.....	46
2.2    Diagnoses of Rushed Justice.....	48
2.2.1    A Snapshot of British Columbia's Criminal Courts: Volume Overload? .....	50
2.2.2    Feeley's Model of Pre-Sentence Procedural Sanctions.....	52

2.2.3	The Contorting Cultures of Courts .....	54
2.2.4	From General Critiques to Specific Enquiries: Focusing on Guilty Pleas.....	56
2.3	The Nature and Import of Guilty Pleas in Canadian Law .....	58
2.3.1	The Plea's Essential Elements .....	58
2.3.2	The Plea's Uncertain Meaning .....	59
2.3.3	The Plea's Cross-Purposes.....	63
2.4	The Resilience of Plea Bargaining in Canadian Justice .....	64
2.4.1	Professional Perspectives .....	66
2.4.2	Offender Engagement in Plea Negotiations.....	72
2.5	The Audible Promises of Sentencing Hearings.....	75
2.5.1	Pre-Sentence Reports.....	77
2.5.2	Victim Impact Statements .....	79
2.5.3	Offender Allocution .....	81
2.6	The Ordering Influence of Professionals .....	84
2.6.1	Defence Lawyers .....	85
2.6.2	Judges .....	90
2.7	Conclusion .....	92
CHAPTER THREE: Moral Ordering in Plea and Sentencing Proceedings – listening to the perspectives of legal professionals.....		96
3.1	Introduction.....	96
3.1.1	Methodology .....	97
3.1.2	Thematic Overview.....	100
3.2	Interview Findings .....	101
3.2.1	Morality's Place in Criminal Court: An Essential but Contentious Relationship .....	101
3.2.3	Approaches to Law's Moral dimension(s) in Professional Practice .....	103
3.2.4	The Moral Content and Character of Guilty Pleas.....	111
3.2.5	Sentencing Hearings as Forums for Moral Discernment, Dialogue, and Expression .....	116
3.2.6	Overall Critiques of Sentencing Courts as Forums for Moral Expression.....	123
3.3	Conclusion .....	134
CHAPTER FOUR: The Audibility of Moral Ordering in Four Criminal Courts .....		136
4.1	Introduction to the Observation Study .....	136
4.1.1	Study Courts .....	137

4.1.2	Parameters and Methods.....	138
4.1.3	Defining “Moral Speech” .....	140
4.1.4	Weaknesses and Limitations .....	145
4.2	Four Courts; Four Staging Grounds for Moral Ordering.....	146
4.2.1	Court 102 at 222 Main Street, Vancouver.....	146
4.2.2	Vancouver’s Downtown Community Court.....	161
4.2.3	First Nations Court.....	176
4.2.4	Hazelton Circuit Court .....	193
4.3	Moral Speech across the Study Courts: Influences and Import.....	205
4.3.1	Findings .....	206
4.3.2	Conclusion .....	218
CONCLUSION .....		223
BIBLIOGRAPHY.....		228
APPENDICES .....		238
Appendix A:	Letter of Introduction to Observation Study.....	238
Appendix B:	Interview Script (Crown Counsel).....	239
Appendix C:	Interview Script (Defence Counsel) .....	240
Appendix D:	Interview Script (Courtworkers) .....	242
Appendix E:	Tables of Numerical Data .....	243

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This thesis was written on kitchen tables, campground benches, library carrels, and ferry decks from Victoria to Newfoundland; in all of these environments I encountered guidance and understanding. The greatest source of these qualities, however, came from a few special individuals. Professor Emma Cunliffe, my supervisor and constant support by way of various mediums, nurtured this work with her gentle yet incisive wisdom and shepherded me through attacks of insecurity and incoherence. If I didn't emerge completely unscathed, it was not for her lack of effort. I am also very grateful to Professor Michael Jackson for his astute review of multiple drafts. Finally, while some things make more sense on paper than in practice (and some not even so) nothing makes sense without love. My wife Anne Nguyen shared every word of this thesis' progression, as our daughter Lucy grew with it. Their joy, warmth, and inspiration lightened my load, and will always light up my life – I cannot thank them enough in any language.

*To Ronald Allan Spade*



## INTRODUCTION

There is no such thing as an ordinary crime. There is no such person as an ordinary criminal. And, stripped of their legal, procedural, and symbolic sameness, there are no ordinary courts designed to impose an ‘ordinary’ response to such a diverse coincidence of actors and actions. Criminal law, nevertheless, seeks to read these stories in the light of an overarching narrative, an encompassing idea of order. Questions and contentions, of course, are unavoidable in these readings; courts are everyday battlegrounds – and meeting places – of interpretation and meaning. This thesis sets out to listen to some of these encounters.

Two of Canadian criminal law’s most essential elements inform my inquiry. First, notwithstanding the normative diversities inherent in a multicultural, multinational society, the law in this area is characterized by its ‘universality’. The federal *Criminal Code*<sup>1</sup> prescribes precisely which conduct *is* criminal, and the route that *must* be followed by the prosecuting state in establishing a given act’s culpable commission. The law’s universality, constitutionally enabled by s. 91 (27) of the *Constitution Act*,<sup>2</sup> creates an overarching, undifferentiated fabric that blankets the country. What is unlawful in Corner Brook is also unlawful in Montréal and Igloolik, whether this is simple possession of marijuana or first degree murder.<sup>3</sup>

A second fundamental characteristic of Canada’s criminal law counterbalances the first. This is the broad judicial discretion embodied in the sentencing of criminal wrongs. The same statute that reduces an inexhaustible array of circumstances into each of its codified prohibitions also mandates that each case be individually, contextually considered in the determination of its most appropriate response. It is a commitment most succinctly articulated in s. 718.1 of the

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<sup>1</sup> *Criminal Code of Canada*, R.S.C. 1985 c. C-42 [*Criminal Code or Code*].

<sup>2</sup> *Constitution Act, 1867*, 30 & 31 Vict., c. 3 [also R.S.C. 1985, App. II, No. 5] [*Constitution Act*].

<sup>3</sup> Within this ‘universal’ legal structure, it must be noted, significant administrative variations do exist: by virtue of s. 92 (14) of the *Constitution Act*, Canada’s founding constitutional document, each province is authorized to articulate its own regime for how the operation of criminal justice are best organized, and there are also important variances contained in provincial and local policing and prosecutorial policies regarding the realization of the overarching law’s demands and aspirations. As we shall see, the latitude that this arrangement allows can be extremely important for the criminal justice system’s intended coherence; but it is this intentionality that I magnify and scrutinize as one of the system’s foundational basics.

*Criminal Code*, as the “Fundamental Principle” of sentencing: “a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender”.<sup>4</sup>

In order to most usefully explain, explore, and critique this dyad of the criminal law’s constituent features, an interpretive lens or lenses is required. How is the intended coherence of these elements best appreciated? By what means are their conflicts best critiqued? Among the many hermeneutic devices that may be used to approach these questions, this thesis advances the criminal law’s concern for *moral ordering* as its interpretive paradigm. This concern, I suggest, threads through the entire length of the justice system, from the codification of wrongs, to the procedures for how such wrongs should be resolved, to the resolutions themselves.

I highlight the *moral* nature of this concern deliberately, but not without trepidation. At best, morality is an indeterminate concept, and direct experience confirms the awkwardness of its application in a legal context. My professional role in the criminal justice system is as a defence counsel, most recently in a northern region where First Nations communities co-exist with settler cultures, and where courts travel vast distances to import ‘justice’ to a diversity of local contexts. This thesis’ theme of moral ordering thus begs some crucial, pre-ordinate questions.

First, whose morality do I privilege? The lack of absolute consensus as to morality’s content and demands is observable at an interpersonal level as much as it is between different communities of meaning. I experience these frictions regularly in my professional practice; while this scholarship concerns morality, therefore, it is offered neither as espousal nor repudiation of any of the normative orders that abide within the Canadian polity. Most notable among these, perhaps, are Aboriginal legal traditions. There is no shortage of commentary regarding the injustices that Indigenous nations have suffered at the hands of an ignorant or

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<sup>4</sup> Again, this invocation of principle bears qualification. At the post-conviction stage, the criminal justice landscape can be seen as –roughly – inverse from that described above in relation to the ‘basic’ universality of criminal prohibitions and procedures. While the fundamental ethic of sentencing law is discretionary, with individual judges determining the fitness of sanctions in individual cases, this discretion is significantly channelled; both broadly, in terms of the purposive principles that the *Code* sets down to guide judicial decision-making, and specifically, by way of prescribed maximum and, in a smaller but increasing number of offences, minimum punitive terms that must be given. As of 2010, however, the ‘individualized’ character of sentencing can still be discerned as its defining aspect, and it is the playing out of this discretion-based process that I assert as the second of Canadian criminal justice’s basic insignia.

outright malevolent state, no shortage of evidence that Euro-Canadian concepts of law and order have contributed to the imprisonment and impoverishment of an inexcusable proportion of Indigenous people.<sup>5</sup> These failures are ongoing; a generation of inquiries, reports, commissions, and recommendations has yet, in my experience, to substantively ameliorate the justice system's complicity as a source of such inequity. This thesis does not address arguments for Indigenous sovereignty over criminal justice, or for its reclamation according to Indigenous traditions and normative orders. What it does is critique the 'official', currently abiding law on its own terms, and test its accountability for the normative promises it makes. As will be explored within the work's broader focus, some of the justice system's most acute challenges in this regard arise in points of contact with Indigenous persons and communities. By observing some of these encounters, I hope readers may gain insight into how Canadian criminal law's moral fundamentals inform both its flexibilities and rigidities in regards to making space for diverse ideas and practices of 'righting' wrongs.

A second major confrontation faced by scholarship taking a moral focus to criminal law is the justice system's evident and enduring instrumentality, or, more simply, the desire to get things done. This concern is shared amongst its participants, lay and professional. My clients, predominantly, are hauled into the legal process with no end of other burdens and preoccupations, and they just want to resolve their cases as painlessly and speedily as possible. The crimes with which they stand accused are more often symptoms of shaky or shattered circumstances than the product of classical misfeasance. Boredom and bad examples bolster thefts. Alcohol, drugs, and inexpressible distress fuel violence. No one profits from such transgressions, and many are harmed. My profession enters onto this bruised ground, sworn to uphold accused persons' legal and constitutional rights, to hold the state to its onus of proof by adversarial methods, and to act always in clients' best interests from first consultation to final outcome. Our service, however, is often squeezed into the quick steps between bail hearings, plea negotiations, and summary submissions on sentence. Criminal courts, for their part, while

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<sup>5</sup> See e.g. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996). See also Patricia Monture-Angus, "Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice" in David Alan Long and Patricia Dickason, eds., *Visions of the heart: Canadian aboriginal issues* (Toronto: Harcourt Canada, 2000) at 361.

obligated to deliver and oversee the equitability of the legal process and further the search for truth in every case, are pressed to balance these qualities against a desire for administrative efficiency. At this level of day-to-day operation, a focus on the system's moral concerns seems palpably out of place; my colleagues tend to arch their brows when I speak of the law as thusly ordered or ordering.

The criminal justice system can be understood – or withstood – on a number of bases. I am regularly confronted with the dissonance of a client who feels forced to use the language of guilt in relation to an accusation they don't accept or understand, and my voice is too often heard in place of their own in making these admissions. These situations, unsatisfactory as they are, can seem unavoidable to lay and professional participants beguiled by countervailing demands. The system itself can seem little more than a mechanism for the administration of an authority that sustains the status quo and has little resonance for the disempowered people who are its constituents. The whole of it can seem at once coercive and impotent, pompous and hollow. While not discounting this solid shelf of observable meaning, my work attempts to understand and critique the law's most ordinary activities by way of its underlying moral drives. There is something down there, and this thesis wants it told.<sup>6</sup>

Clearly, not all or even most of the justice system's 'ordinary activities' can be scrutinized by a single piece of scholarship. I have chosen, therefore, to restrict my analysis to one pervasive facet of Canada's criminal justice landscape: its predominantly plea-based means of resolving cases. Guilty pleas, by nature, dispense with the adversarial trial, arguably criminal law's most procedurally and rhetorically well-developed feature. The contemporary manifestation and meaning of the fundamental legal principles of universality and individualization, I suggest, cannot be adequately understood without analyzing the most common procedural means by which prohibitions flow into punishments.<sup>7</sup>

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<sup>6</sup> This line is adapted, with apologies, from Gwendolyn MacEwan's "Dark Pines Under Water", published in *The Shadow-Maker* (Toronto: MacMillan, 1972). Full poem available in *Canadian Poetry Online* (Toronto: University of Toronto Libraries, 2000), online: Canadian Poetry Online <<http://www.library.utoronto.ca/canpoetry/macewen/poem7.htm>>.

<sup>7</sup> While pleas and sentencing hearings are procedurally distinct steps in the criminal justice continuum, in the provincial level courts that handle the majority of criminal cases, they are often considered in immediate

My focus on the plea-based character of criminal justice also allows for a somewhat refined application of morality. The moral concerns that this thesis unpacks are solely those which speak directly to the wrongness of a criminal act and the degree of responsibility of an offender. This is the ordering, I suggest, which is embedded at the core of Canada's criminal law, and which is most explicitly manifest in plea and sentencing proceedings. Each chapter builds upon this premise.

In Chapter One, I lay out the moral concerns that are embedded in the criminal law's prohibitions, and expressed in its processes and punishments. I show how assignments and calibrations of crime's 'wrongness' arise throughout the system, from substance to operation to outcome. Chapter One, by way of a broad survey of leading theories, jurisprudence, and constitutional texts, demonstrates that moral ordering is essential to understanding the law's framework of universal prohibitions and individualized sentencing.

Chapter Two takes up plea-based resolutions as an opportunity to more closely reflect upon and critique the viability of the moral ordering identified in Chapter One. In particular, I describe the guilty plea's hybrid status – it is a mechanism that functions simultaneously as substantive admission and procedural convenience. This dual function presents challenges for a plea's givers, recipients, and the courts within which these exchanges take place. I explore what consequences the plea's hybridity has for these players as they seek to discern, inform, or otherwise engage with the moral dimension(s) of a given offence. Given that in lower-level courts, pleas often lead immediately to dispositions, I proceed to scrutinize the sentencing hearing itself as the forum within which moral values and demands are meant to be discerned and expressed. Chapter Two mainly draws from published accounts of previous empirical studies of criminal pleas and sentencing courts. I also consider lawyers' and judges' perspectives in textbooks and trade journals, which provide insight into the critiques and strategic viewpoints emanating from within the system. My own experience as a criminal defence lawyer, although not directly relied upon to establish any particular claims, provides an interpretive lens through which I attempt to draw some general conclusions about discernable

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succession. While I am thus mindful of their distinctiveness, and seek to elucidate their interplay, my analysis inevitably shades one function into the other.

gaps between theory and practice in Canadian criminal justice, as they manifest in plea-based sentencing proceedings.

Chapters Three and Four explore moral ordering in plea-based criminal justice by way of two parallel empirical studies, which contend with the question of how sentencing courts function as forums for the open consideration of the moral questions posed by every offence and every offender. These studies approach this question from two distinct but related directions.

Chapter Three presents an interview-based study with eleven justice system professionals, mainly lawyers. Participants have direct experience working in certain criminal courts in British Columbia whose main or exclusive business is in the plea-and-sentencing (i.e. not trial) functions of criminal justice, and are thus able to offer important perspectives upon the moral ordering that these courts practice. Chapter Four undertakes an observation-based analysis of four such courts, each of which features a notably different context or approach to the sentencing of criminal offences. This chapter assesses each forum as a site for communicative moral ordering, by listening for how, and how often, some of the major themes of such ordering are articulated therein. Using the textual and jurisprudential organization of sentencing law as my guide for what courts ought to be expressing at this stage, I listen in particular for discussions regarding the gravity of an offence and the responsibility of an offender. I also attend to how an offender's normative orientation towards his or her criminal conduct, such as remorse, is expressed and responded to at sentencing hearings.

My thesis is focused upon the normative premises and aims of the criminal justice system's operation, in particular their most 'ordinary' consummation in plea and sentencing proceedings. In essence, I explore this aspect of Canada's justice system as it *is* in the light of what I suggest it *intends* to be. The thesis does not critique specific jurisprudence or set itself against alternate justificatory legal theories. My experience as a practitioner leads me to promote moral ordering as an important, albeit unorthodox, way of conceiving and critiquing the ambitions of an individualized sentencing regime. This same exposure to the practice of criminal law, however, also leads me to question its ultimate usefulness. Is an approach which prioritizes one normative understanding of criminality and its response adequately reflective of the needs and realities of the diverse individuals, communities, and circumstances that are

forced through courtroom doors? Does it neglect or distort the structural inequities that remain so evident in this coercive legal realm? My empirical findings illuminate how, and by whom, some themes of moral ordering are audibly conveyed in plea and sentencing proceedings in the four courts directly studied. In light of the purposive questions asked above, this research is also examined for what it may say about the universality of these themes, and the importance of their expression, within a guilty plea-based system of resolving criminal wrongs.

## CHAPTER ONE: The Moral Roots and Reach of Canadian Criminal Justice

### 1.1 Introduction

Moral ordering, although not the only interpretive rationale for the existence or purpose of criminal law, is nonetheless this body's beating heart. In making this claim, I have adopted a particular definition of morality. Criminal law is *moral*, I propose, not because it is noble or divinely inspired, but because it is a manifest and comprehensively articulated means of identifying and addressing conduct that society explicitly deems to be unacceptable. Such official unacceptability, of course, does not on its own suggest or require moral wrongness; especially in a complex society, legal prohibitions are premised on a variety of purely instrumental bases, and accepted or resisted by their subjects in correspondingly instrumental ways. In this chapter, I support and explain the proposition that *criminal* law is indelibly moral by way of three more specific claims.<sup>1</sup>

First, I argue that the central concern of ascribing criminal liability is moral blameworthiness. Second, I show that, out of many possible goals of criminal punishment, Canada's cohering punitive principle is moral proportionality. Third, I forward in-court plea and sentencing proceedings as the means by which the concern for moral ordering is most openly engaged.

In supporting the above claims, I do not advocate for any particular normative approach to the law's moral concerns, although in practice, the application of moral concepts does engender such judgments (indeed, I will argue that the calibration and expression of moral values is precisely the business and challenge of sentencing courts). Nor do I contend that criminal laws, procedures, and determinative outcomes can be validated or invalidated by recourse to any overarching moral framework, as a classical Natural

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<sup>1</sup> These claims are, however, being applied to the "general part" of criminal law. The literature in this area creates a rough distinction between doctrines, questions, principles etc. that are applicable to criminal law *generally*, and those that deal with *specific* types or classes of offences. See A.P. Simester and Stephen Shute, "On the General Part in Criminal Law" in Stephen Shute and A.P. Simester, eds., *Criminal Law Theory: Doctrines of the General Part*, (Oxford: Oxford University Press, 2002) at 1-12.



Law argument might hold.<sup>2</sup> I suggest, more simply, that the concerns of blame and punishment infuse criminal law with moral consequence and responsibility. Individuals and societies may analyse any number of factors through this dimension, according to a spectrum of orientations. The moral dimension of a given society's criminal law may, therefore, result in a similarly wide range of judgments or resolutions. Though by no means the sole measure by which criminal laws and legal decisions are made, I argue that this dimension remains vital to understanding their potency; not as mechanistic accounting (although rules may bend it so) nor as arbitrary imposition (although it is susceptible to disequilibria of power) but as ways to articulate what justice means and requires. As I will show, Canada has established a generally coherent liberal character – and consequent responsibilities – in this regard. I begin this chapter, therefore, with a very brief outline of the justificatory underpinnings upon which Canada's criminal law is built.

## 1.2 The Anatomies of Authority

Philosophers of justice have long tried to articulate the bases upon which punishment ought to be imposed. Aristotle, perhaps the first proponent of moral censure, grounded his thinking about punishment in the requirement of personal responsibility. In his view, which has since become a foundational principle in all criminal justice systems sharing a 'Western' philosophical heritage, no one can be justly punished without both having committed *and* being properly to blame for proscribed conduct.<sup>3</sup> This normative framework, however, can be applied in various ways.

Although all states make criminal laws, and prohibit many of the same acts, each jurisdiction imputes distinct standards and expectations upon its constituents. This is not simply due to diverse social or cultural mores. While I go on to examine the *moral* judgments that are embedded in and expressed by Canadian criminal justice, any discussion about crime can only be conducted within a particular *political* context. As

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<sup>2</sup> See Howard P. Kainz, *Natural Law: An Introduction and Re-examination* (Peru, IL: Carus Publishing Co., 2004) at 76-79.

<sup>3</sup> George P Fletcher, *The Grammar of Criminal Law*, vol. 1 (New York: Oxford University Press, 2007) at 9.

George Fletcher argues, the two concepts are distinct: “[t]he political addresses the power and prerogatives of state officials...the moral focuses primarily on the lives of individuals, both in their personal flourishing and in their relationships with other individuals”.<sup>4</sup> He goes on to suggest that a given state’s political theory precedes and encompasses any particular moral rationale it employs for prohibiting and punishing an act as criminal:

It is only when a political theory makes reference to a moral question that the latter can become relevant in criminal law... [because] the criminal law addresses the state’s authority to intervene in people’s lives. That authority must first be justified as a matter of political theory before one turns to the criteria, including perceptions of morality, that might enter into the use of the state’s power.<sup>5</sup>

These broad political theories, from least to most interventionist, range from Libertarianism to Liberalism, Communitarianism to Perfectionism. Each justifies a different range of approaches and responses to what is captured as criminal wrongdoing, and each harnesses a different kind of moral order. As Fletcher summarizes:

Libertarians treat the subject as an autonomous person abstracted from society. Liberals are likely to see the potential defendant as a citizen in a broad sense, as someone participating in a political community. Communitarians see him or her as a citizen in a narrower sense, as a brother or sister, as friend, and potentially, as the enemy. The perfectionist sees the same subject of the law as a novice undergoing an educational process.<sup>6</sup>

The application of each theory to a state’s criminal law would, as it were, ‘naturally’ result in variation of prohibitions and punishments. At the far end of the intrusiveness (or cohesiveness) spectrum, a society intent on homogeneity would have no qualms about ‘correcting’ even slight deviations from the established norm through a criminal process. At the other extreme, societies that emphasize liberty would require more significant disruptions in the social fabric (to the extent this fabric is seen to exist at all) before employing legal force. Further, they would likely proceed on a more purely utilitarian basis, without any intentions of morally (re)educating or condemning their

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<sup>4</sup> *Supra* note 3 at 152.

<sup>5</sup> *Ibid.* at 154.

<sup>6</sup> *Ibid.* at 180.

subjects. Although these are fluid categories that, in practice, blend into each other, the political theory that animates and explains western criminal justice systems, including Canada's, can be said to be essentially liberal.<sup>7</sup> This classification will be reappraised at various points throughout the thesis. As we shall see, a state's informing political theory has immediate implications for how conduct is both defined and responded to as criminal.

Having, briefly, noted the political framework upon which Canada's criminal law is built, I turn now to this chapter's central investigation, concerning the fundamentally *moral* demands and promises that are made in this legal realm. Canada's incarnation of Aristotle's ideas of what is just in criminal law, I suggest, can be discerned via three of its core characteristics: the blameworthiness of liability, the proportionality of punishment, and the sentencing court as embodied, expressive linchpin of the universality and individualization combined in these concepts. I expand upon each of these criteria in turn, as interrelated aspects of the moral order set forth in Canadian criminal law.

### **1.3 The Morality in Liability**

One way to enquire into the scope of what is authoritatively considered "criminal" in Canada, as well as the justifications for such designation, is by way of section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").<sup>8</sup> This section states that "[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". These guarantees, and the *Charter* generally, have been interpreted by the Supreme Court of Canada to apply to the substance of criminal law, not merely its operation.<sup>9</sup> That is, subject to certain constitutional limits, no Canadian Parliament can criminalize behaviour or circumstances the law thereby infringes an individual's constitutional right

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<sup>7</sup> See, for general support of this designation, as well as an expansive envisioning of its demands, Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford: Oxford University Press, 2009).

<sup>8</sup> Part I of the *Constitution Act, 1982*, enacted by Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*].

<sup>9</sup> See *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia) Section 94(2)*, [1985] 2 S.C.R. 486 (S.C.C.) for Lamer J.'s comments on this point.

to be free of prohibitions that are not ‘fundamentally just’. Below, I employ this basic requirement to describe the moral ordering premised in – and promised by – Canadian criminal law. Five elements, I suggest, provide the necessary layers of this foundation: as I proceed to explain, all crimes, to be established as such, must be *wrong, unlawful, voluntarily* committed by a *responsible* actor, and *censured* by the state.<sup>10</sup>

### 1.3.1 A Crime is a Wrong

To be a crime, any given conduct must be cast as wrong. This is morality’s most basic and profound entrée into the question of what is properly ‘criminal’. It must be clearly defended and explained, because it raises implications that are potentially dangerous to Canada’s politically liberal identity. While this thesis posits an essential connection between wrongful conduct and criminal liability, the former concept is clearly much broader and more nebulous than the latter. Not every moral wrong, however widely or deeply held as such, is prohibited by law. The validity of this separation (if not its appropriate scope) seems firmly entrenched as a tenet of Canada’s liberal identity.<sup>11</sup> But what guarantees the reverse proposition – that each and every crime must be established, or at least coherently argued, as morally wrong?

One school of legal theory suggests that this need not be a requirement at all. Legal Positivism is, at base, a refutation of the classic Natural Law precept that laws cannot be valid or ‘true’ laws if they do not possess some basis in extrinsic moral standards.<sup>12</sup> All that is necessary for any conduct to be properly criminalized, so the argument seems to lead, is a sufficiently clear proclamation from the appropriate source. In regards to criminal law, however, positivism’s claims are somewhat muted. H.L.A. Hart,

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<sup>10</sup> See, for representative sources, the Law Commission of Canada’s 2003 discussion paper *What is a Crime? Challenges and Alternatives* (Ottawa: Her Majesty the Queen in Right of Canada, 2003), online: Law Commission of Canada < [http://epe.lac-bac.gc.ca/100/206/301/law\\_commission\\_of\\_canada-ef/2006-12-06/www.lcc.gc.ca/about/2003\\_dis\\_paper\\_toc-en.asp](http://epe.lac-bac.gc.ca/100/206/301/law_commission_of_canada-ef/2006-12-06/www.lcc.gc.ca/about/2003_dis_paper_toc-en.asp)>, and Jeremy Horder’s article “Criminal Culpability: The Possibility of a General Theory” (1993) 12 *Law & Phil.* 193. I include other sources in the discussion below.

<sup>11</sup> While Canada’s mainstream political parties, whether called Liberal, Conservative, or any other name, do have different ideas as to where the criminal law and matters of purely moral opinion ought to diverge, there does not seem to be serious disagreement as to the importance that some distinction between these spheres ought to be maintained.

<sup>12</sup> See John Gardner, “Legal Positivism: 5 1/2 Myths” (2001) 46 *Am. J. Juris.* 199.

positivism's leading 20<sup>th</sup> Century proponent, devoted considerable thought to crime and punishment, and while disavowing that criminal law *requires* a moral justification, he recognized, both as a matter of fact and of good public policy, that it draws substantial authority from, and indeed is important in shaping and reflecting, moral norms.<sup>13</sup> In principle, positivism is concerned to show that the classic Natural Law precept of law's basis in morality is neither universal nor necessary, but most positivists acknowledge their practical correlation. From a theoretical perspective, therefore, criminal law's basis in moral standards is a mark not so much of its *validity* as of its *virtue*. This thesis takes no contention with this general proposition. But there is reason to believe that, in Canada at least, the requirement that criminal laws be justified as morally wrongful (by more than authoritative fiat) is indeed essential to the state's use of this power.

The first place we must turn to in finding evidence for this proposition is in Canada's constitutional division of legislative authority, and the federal power over criminal law that falls under s. 91 (27) of the *Constitution Act*. Unlike in states with a unitary system, the federal government has had to justify the bases upon which it seeks to make criminal prohibitions. The link between what can be appropriately designated 'criminal' and a threshold of moral 'wrongness' began to take shape early in the Supreme Court of Canada's jurisprudence regarding s. 91(27). In *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada)*,<sup>14</sup> the Court restricted the purpose of criminal legislation, as a requirement of its validity, to combating "some evil or injurious or undesirable effect upon the public...".<sup>15</sup> These effects were broadly construed, however, to attach to a wide range of "social, economic, or political interests", and so long as the state could point to the protection of such an interest as underpinning a given piece of criminal legislation, it was not required to articulate any further, explicitly 'moral' justification for its classification as such. The 'wrongness' of a criminal act could thus, in law, have remained an unquestioned, even irrelevant matter; perhaps self-evident in most cases,

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<sup>13</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals", (1958) 71:4 Harvard L.R.1 at 6-7.

<sup>14</sup> [1949] S.C.R. 1 (S.C.C.) [*Margarine Reference*].

<sup>15</sup> *Ibid.* at 49.

but beyond the realm of contestation in the crucial few where it might have made a difference.

With the advent of the *Charter*, however, the Supreme Court was given a significantly more expansive opportunity elaborate upon criminal laws' requisite procedural and purposive content, as applied to the individual rights and freedoms that these laws necessarily curtail. According to the principles of "fundamental justice" that the Court has thus far outlined, criminal laws cannot be "arbitrary or irrational".<sup>16</sup> They cannot impose punishment without a minimum of proven fault.<sup>17</sup> They cannot be unduly vague.<sup>18</sup> And they cannot, as I argue in this chapter, prohibit conduct that a state has not established as being, according to a "significant societal consensus", morally wrong.<sup>19</sup> But of course these requirements demand refinement. The 'common' moral ground from which criminal laws may potentially grow can be, in some cases, quite meagre. This reality, which is perhaps most pronounced in divided, turbulent, or simply normatively diverse societies, continues to be of concern in contemporary Canada. In a society with entrenched constitutional guarantees of liberal freedoms, what are the markers and boundaries of the moral justifications of criminal law's authority? Disputes about the law's appropriate margins offer clues into what sustains its core. And there are, perhaps, few criminal laws more disputed than that which prohibits the possession of personal quantities of marijuana. The Supreme Court of Canada, in *R. v. Malmo-Levine; R v. Caine*,<sup>20</sup> adjudged the constitutionality of this very law, and in doing so directly tackled the issue of whether the state can criminally prohibit 'harmless' conduct.

In this case, a 6-3 majority held that, while the criminal prohibition of marijuana may be a dubious or disproportionate means of addressing the harm this substance causes, as a matter of "law, not policy",<sup>21</sup> it was confirmed as constitutionally valid. In arriving at

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<sup>16</sup> *R. v. Malmo-Levine; Rv. Caine*, [2003] S.C.R. 571 [Malmo-Levine] at para. 135.

<sup>17</sup> *Reference re s. 94(2) of the Motor Vehicle Act(British Columbia)*, *supra* note 11 at 518-519, 521-522.

<sup>18</sup> See eg. *Canada v. Pharmaceutical Society (Nova Scotia)* [1992] 2 S.C.R. 606 (S.C.C.) at 643.

<sup>19</sup> *R. v. Malmo-Levine*, *supra* note 16 at para. 113.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra* note 16 at para. 90.

this conclusion, the majority refused to accept the appellant's assertion of the classic libertarian 'Harm Principle' as a principle of fundamental justice under s. 7 of the *Charter*.<sup>22</sup> Justices Gonthier and Binnie, writing for the majority of the Court, ruled that this theory's articulation of what justifies state intervention – namely, and solely, conduct that causes “clear and tangible harm to the rights and interests of others”,<sup>23</sup> provided an insufficiently comprehensive basis upon which other justifiable aims of the criminal law could be directed. Their decision quoted Hart when defending criminal legislation as properly pertaining to a more “complex” spectrum of interests:

Mill's formulation of the liberal point of view may well be too simple. The grounds for interfering with human liberty are more various than the single criterion of 'harm to others' suggests: cruelty to animals or organizing prostitution for gain do not, as Mill himself saw, fall easily under the description of harm to others. Conversely, even where there is harm to others in the most literal sense, there may well be other principles limiting the extent to which harmful activities should be repressed by law. So there are multiple criteria, not a single criterion, determining when human liberty may be restricted.<sup>24</sup>

But while the prevailing judgment in this case explicitly disavowed the paramountcy of the Harm Principle *per se*, it did cast the criminal law as necessarily targeting, if not solely harm to others, then harm to “some fundamental conception of morality”,<sup>25</sup> so long as such standards were proven to be “integral to our ideas of civilized society”.<sup>26</sup> The requirement of *some* harm to *some valid* state interest, therefore, was implicitly upheld. The majority in *Malmo-Levine* did find that the state had sufficiently established that unregulated marijuana use did constitute harm to a valid state interest (here, the protection of vulnerable groups of actual or potential users) that was more than trivial or insignificant, thus justifying its continued prohibition.

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<sup>22</sup> See John Stuart Mill, *On Liberty*, Currin V. Shields, ed. (New York: Liberal Arts Press, 1956).

<sup>23</sup> *Supra* note 16 at para. 107.

<sup>24</sup> H. L. A. Hart, "Immorality and Treason" (1971) *Morality and the Law* 49 at 51, as quoted in *Ibid.* at para. 109 (emphasis added in *ibid.*).

<sup>25</sup> *Supra* note 16 at para. 116, quoting *Sopinka J. R. v. Butler*, [1992] 1 S.C.R. 452 at 498 (emphasis added in *ibid.*).

<sup>26</sup> *Ibid.* at para. 118.

The reasoning in *Malmo-Levine*, while finding its justificatory basis for the prohibition of marijuana in the language of harm, *also* acknowledges the justifiability of criminalizing conduct that is even less apparently harmful, such as bestiality or incest.<sup>27</sup> It is in regards to offences such as these that other moral justificatory principles can be seen to exert continued force. According to George Fletcher, there are two other moral concepts besides that of harm capable of justifying criminal prohibitions: Duty and Norm.<sup>28</sup> The former, very much rooted in ancient and theistic relations between subject and sovereign, has very limited resonance in liberal polities, implicating as it does the surveillance of “desires, thoughts, [and] intentions” without proof of resulting harm.<sup>29</sup> In contrast to harms, which are palpable, duties “exist only in the minds of those who say they exist”.<sup>30</sup> The latter justification, that regarding breaches of norms, can be understood as a refinement or expansion of the harm principle, but also as a separate moral foundation for certain legal prohibitions. As Fletcher argues, our moral ideas of acceptable or unacceptable conduct do retain palpable influence; for example, in regards to the availability of defences (such as duress or necessity) or excuses (such as self-defence or, in some cases, consent) for crimes that actually *have* caused palpable harm to a protected interest. It is useful here, Fletcher suggests, to focus in on precisely what conduct is prohibited: not harm-risking or -causing conduct *per se*, but a particular norm against doing so with or without certain factual requisites.<sup>31</sup>

When it comes to substantive justifications for what are apparently norm-based criminal offences, however, it seems that in the *Charter* era, neither courts nor legislators are comfortable with explicitly endorsing this moral principle. As can be seen from the Supreme Court’s reasoning in *Malmo-Levine*, norm-based justifications are usually characterized as other ways to understand harm, or, when they have to be directly confronted, found inadequate as a distinct basis for criminalizing ‘harmless’ conduct. In

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<sup>27</sup> See *Ibid.* paras. 117-118 for the majority opinion’s discussion of these and other ‘harmless’ crimes.

<sup>28</sup> *Supra* note 3 at 37-43.

<sup>29</sup> *Ibid.* at 38.

<sup>30</sup> *Ibid.* at 39.

<sup>31</sup> *Ibid.* at 42.



*R. v. Labaye*,<sup>32</sup> for example, the Supreme Court redefined indecency (in the context of the *Criminal Code*'s s. 210(1) prohibition on keeping a "bawdy house") to impart a harm-based rationale. Chief Justice McLachlin rejected an older definition based on community standards of tolerance, suggesting that the "requirement of a risk of harm incompatible with the proper functioning of society" is the only legitimate basis for criminal offences.<sup>33</sup> A society's moral norms, therefore, are perhaps best understood as *explicitly* obsolete as justification bases for criminal prohibitions, but *implicitly* present along the margins and at the depths of what we continue to call crimes.

Certainly, the *Criminal Code* is far from being a completely cohesive or coherent piece of legislation. It contains provisions based on antiquated or discredited moral principles, and offences whose criminalization arguably causes more harm than it prevents. But it is by the cases on the penumbra, I suggest, which are most likely to fall into disuse or eventually be abolished altogether, that the general proposition is proven: the vast majority of criminal offences in Canada are predicated on a theory of harm, a core of normative moral opprobrium that is (intended to be) common to the diverse constituencies that the law binds. Not all harms are crimes, but (almost) all crimes are also, in an apprehended or actual sense, in a strict or expansive understanding of the term, 'harmful', and, by the establishment of this connection, thereby wrong.

### **1.3.2 A Crime is Unlawful**

The second element I propose is more straightforward than the first, although it also merits far more discussion than I will allow for here. A wrong, however heinous and harmful, cannot be responded to through criminal legal means if it is not made to fit within a pre-existing, promulgated statute.<sup>34</sup> It must be defined and proscribed by law.

Different legal theories have different ideas of what is legislatively required to constitute 'law', but they can be fairly synthesized in the Canadian criminal law context. H.L.A.

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<sup>32</sup> [2005] 3 S.C.R. 728 (S.C.C.).

<sup>33</sup> *Ibid.* at para. 24.

<sup>34</sup> With very limited exceptions, 'common law offences' (crimes not based in statute) do not exist in Canada, by virtue of s. 9 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. In this sense all *mala in se* are also *mala prohibita*.

Hart thought that it was enough that statutes provide persons with “fair opportunity” to know and obey the law, in order to justify the application of penalties upon those who do not.<sup>35</sup> Lon Fuller presupposed an “inner morality” that mandated certain core aspects of fairness, universality, prospectivity, etc.<sup>36</sup> As we have seen above in the Supreme Court of Canada’s jurisprudence on the requisite principles of fundamental justice, and as Canada’s abiding adherence to Rule of Law principles of procedural justice suggest, this country’s criminal laws are expected to exhibit a high degree of specificity and intelligibility. Indeed, the *Charter* itself explicitly enshrines the principle of prospectivity, at s. 11(g).

The consequence of these relatively stable and widely accepted justificatory legal requirements should, in theory, tightly circumscribe what harmful conduct the law is able to pursue. Morally speaking, Canada’s justice system is designed to ensure that it penalizes only those who have been reasonably (if not personally) warned about the unlawfulness of their behaviour before committing it. In most cases, this is presumed by virtue of the ‘common’ morality upon which criminal prohibitions are founded. But since awareness of the law cannot be guaranteed or proven, s. 19 of the *Criminal Code* provides that “[i]gnorance of the law by a person who commits an offence is not an excuse for committing that offence”, provided that a manner of ‘fair warning’, assessed in terms of the above principles, has first been given.

### **1.3.3 A Crime is Voluntary**

The requirement that criminal conduct be voluntary is further indication of the criminal law’s concern with moral blameworthiness. As with the concept of ‘wrongness’, this term also requires considerable refinement and explanation; unlike the moral concept discussed above, however, voluntariness is more a term of legal art than of common consensus. But beginning at this level of common sense, it is already evident that physically or mentally involuntary actions do not easily lead to findings of fault, the lifeblood of criminal culpability. When issues of voluntariness are raised in criminal

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<sup>35</sup> H.L.A. Hart, *The Morality of the Criminal Law* (Jerusalem: Magnes Press, 1964) at 27.

<sup>36</sup> Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

court, however, the law has fashioned its own somewhat esoteric definition of this concept's meaning and applicability. This is, perhaps, due to the fact that voluntariness does not become legally relevant until after a person has committed an otherwise criminal act. Legal authorities are concerned not to allow the concept expansive scope, and as is discussed below, certain serious harms have occasioned attempts to dilute or do away with the defence of having 'involuntarily' committed a crime. At minimum, however, a nub of avoidable conduct (or a failure to act when action was clearly needed) without which the wrong would not have taken place, must still be found before the actor can be lawfully sanctioned. In Canada, Parliament and the Supreme Court have engaged in considerable 'dialogue' around the issue of whether extreme intoxication renders criminal acts involuntary<sup>37</sup>, for example, or when mistaken belief in consent in cases of alleged sexual assault can operate as a defence.<sup>38</sup> Where the defence of involuntariness is refused, either by statute or common law, the rationale seems to be that the actor opened himself up to moral censure by his causal recklessness or wilful blindness to the harm he subsequently caused.

The parameters of fault have also been drawn to exclude situations where an actor's otherwise voluntary criminal conduct was the result of duress or necessity. This 'moral involuntariness' was most expansively articulated by the Supreme Court in the case of *R. v. Ruzic*.<sup>39</sup> In this case, the Supreme Court confirmed that s. 7 of the *Charter* incorporated a necessary aspect of "moral blameworthiness",<sup>40</sup> and extended the statutory defence of "compulsion by threats"<sup>41</sup> to include situations (such as that Ms. Ruzic found herself in as a coerced importer of narcotics into Canada) where the duress, although not immediately proximate in space or time, was nonetheless sufficiently inexorable as to remove any 'realistic choice' *not* to engage in the criminal act. This

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<sup>37</sup> See *R. v. Daviault*, [1994] 3 S.C.R. 63 (S.C.C.) and Parliament's 'response' in s. 33.1 of the *Criminal Code*.

<sup>38</sup> See for ex. *R. v. Pappajohn*, [1980] 2 S.C.R. 120, *R. v. Sansregret*, [1985] 1 S.C.R. 570, and s. 273.2(b) of the *Criminal Code*.

<sup>39</sup> [2001] 1 S.C.R. 687.

<sup>40</sup> The defence of moral blamelessness, in relation to the defence of necessity, was first upheld in *R. v. Perka* [1984] 2 S.C.R. 232 at p. 269-270.

<sup>41</sup> *Criminal Code*, *supra* note 34 at s. 17.

exemption, however, is statutorily excluded from crimes of serious violence.<sup>42</sup> The differences of opinion between courts and Parliament on the scope and meaning of voluntariness-based defences illustrate conflicting moral perspectives. The law-making authority, in this realm, commonly focuses on the objective wrongfulness of the act, while courts are more willing to consider the subjective state of mind of the actor.

While subjective intention is the most unequivocal measure of the *mens rea*, or “guilty mind”, requirement of criminal liability, less purposeful states of mind can also ground culpability. The applicable standard, sometimes codified or embedded within statutory language but always subject to contextual interpretation, is dependent upon the seriousness of the offence and/or the degree from which the conduct at issue departed from that expected of a reasonable person. In cases that aren’t likely to incur heavy penalties or social censure, and particularly where the accused’s subjective mental state would be very onerous to prove, objective negligence has been found sufficient.<sup>43</sup> In more serious offences, s. 7 of the *Charter* has been applied to require either subjective intention or “gross” negligence.<sup>44</sup> A line of jurisprudence has also described the difference between crimes of ‘specific’ and ‘general’ intent, with the former requiring a higher degree of *mens rea* to establish culpability. Whatever the formula employed, an attempted balancing can be perceived in this ongoing dialectic, between the repugnance that society attaches to certain *acts*, and the level of mental awareness and foresight deemed necessary to open individual *actors* up to censure. Moreover, these connected qualitative assessments - of repugnance and censure – are themselves mobile along a spectrum of moral blameworthiness that is calibrated not only to the harm (such as causing another person’s death) but also to assessments of why it happened (was it an accident? Was the accident someone’s fault? Was the fault excusable, or egregious?). This often awkward and uneasy interface between conceptions of moral ‘good’ (that law must respond to harm) and moral ‘right’ (that law

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<sup>42</sup> *Ibid.* and see *R. v. Sandham* [2009] O.J. No. 4471 (Ont. S.C.J.).

<sup>43</sup> See *R. v. Hundal*, [1993] 1 S.C.R. 867 (S.C.C.) at para. 15.

<sup>44</sup> See *R. v. Creighton*, [1993] 3 S.C.R. 3 (S.C.C.) affirming that gross negligence could ground a conviction of manslaughter, and *R. v. Martineau*, [1990] 2 S.C.R. 633 (S.C.C.) requiring proof of subjective foresight for a murder conviction.

can only respond to culpable actors) is moderated, in Canada, by “the principle of fundamental justice that the moral fault of the accused must be commensurate with the gravity of the offence and its penalty”.<sup>45</sup>

The law’s interpretation and application of ‘fault’ cannot be reduced to simple principles, and much nuance has been lost in the foregoing discussion. In general, however, our criminal law tends not to hold persons accountable for conduct they could not avoid – and does so out of a concern both for individual and institutional moral integrity.

#### **1.3.4 The Commissioner of a Crime is a Responsible Actor**

A fourth plank in the foundations of criminal law – that an act, however wrong, *prima facie* illegal, and voluntarily committed, cannot be a crime unless committed by a responsible actor, places further moral constraints on what is properly ‘criminal’. The most clear-cut of these is age – Canadian law maintains that persons under the age of twelve are not sufficiently advanced in their moral development to be held accountable for their conduct. For similar reasons, pursuant to the *Youth Criminal Justice Act*,<sup>46</sup> youth between the ages of twelve and seventeen are approached in a manner that recognises their immaturity, although youth does not wholly excuse criminal conduct.<sup>47</sup>

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<sup>45</sup> *R. v. Creighton*, *ibid.* at paras. 46-47 (per McLaughlin J.).

<sup>46</sup> S.C. 2002, c. 1 [YCJA].

<sup>47</sup> See *R. v. D.B.*, [2008] 2 S.C.R. 3 at paras. 40-42 (per McLaughlin C.J.). Separate juvenile justice frameworks, such as Canada has long had, arguably place more explicit emphasis and importance on moral ordering – or at least its pedagogical communication – than do their adult comparators: see Kathleen Daly and Brigitte Bouhours, “Judicial Censure and Moral Communication to Youth Sex Offenders” (2008) 25 Just. Q. 496. This pedagogical focus is commonly seen as being more likely to make an impression on young people and influence their subsequent choices and lifestyles. This focus is often paired with more resources and efforts to support young offenders’ rehabilitation, along with more substantive opportunities for non-adversarial dialogue, in a sense, to ‘save’ these young people – and their communities – from them turning into the dangerous, irredeemable recidivists that society fears and abhors. See, for a discussion of the effectiveness of one such approach, Hennessey Hayes and Kathleen Daly, “Youth Justice Conferencing and Reoffending” (2003) 20 Just. Q. 725. See also, in relation to Restorative Justice Principles, the discussion in this chapter, below at §1.3.5. My thesis, however, despite and perhaps because of the more encouraging reflections that youth justice systems have for a theory of communicative moral ordering, is explicitly *not* including youth-focused models in its argument. Although there are fascinating comparative investigations to be made between how moral concepts are harnessed in youth versus adult court, I have not chosen to pursue such a line of enquiry. By limiting my focus to the adult criminal justice system I hope to best explore how the criminal law’s concern for moral ordering manifests (or does not) in more general or fundamental ways.

While the choice of these age ranges may be arbitrary or debatable, with some youth who exhibit significant independence falling under a more lenient, or entirely non-criminal legal regime than some adults of pronounced immaturity, there is nevertheless a moral hermeneutic at work distinguishing between those held criminally responsible and those who are not.

A more contextualised manifestation of the requirement of responsibility is seen in the area of law determining mental fitness to stand trial or be held criminally responsible for unlawful conduct. Similar to defences based on involuntary conduct, this statutory provision operates to exempt from conviction persons who have been medically assessed as falling below a legal threshold: that of understanding the nature and consequences of their conduct, knowing right from wrong, and being capable of a basic comprehension of courtroom procedures. If such a status is established, in regards to when the act was committed, and/or when the case is to be tried, the criminal law will defer to provincial mental health regimes, which are designed to ensure persons receive treatment while balancing the risk of their release against the safety of themselves and others.

Again, while this in practice leaves people of demonstrable mental fragility to be dealt with by the criminal justice system,<sup>48</sup> it is further evidence that the law's definition of what is criminal seeks to ground its operation on moral responsibility, or, in Aristotelian terms, the apportionment of blame only upon those who justly deserve it. As reflected in the language of s. 16(1) of the *Criminal Code*, which establishes the defence of mental disorder, to be criminally responsible persons must be capable of "appreciating the nature and quality of the act... [and] of knowing that it was wrong". To be clear, the defence has been interpreted so as to not apply to one (such as a psychopath) who "has the necessary understanding of the nature, character, and consequences of the act, but merely lacks appropriate feelings for the victim or lacks feelings of remorse or guilt for

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<sup>48</sup> See *R. v. Whittle*, [1994] 2 S.C.R. 914 (S.C.C.) which found that an accused is fit to stand trial provided he has the cognitive capacity to understand proceedings and communicate with counsel.

what he has done...”,<sup>49</sup> or who simply subjectively feels their conduct is morally acceptable. “Wrong”, in s. 16(1) “is not to be judged by the personal standards of the offender but by his awareness that society regards the act as wrong”.<sup>50</sup> The morality here, as I took pains to argue in §1.3.1, is not any one person’s, but rather a standard around which there is a shared societal consensus. But the underlying premise articulated in the law on mental disorder, and of responsibility more generally, arguably maintains a basic connection between individual and institutional moral intelligibility. It is upon this basis that courts assess and express concepts of blameworthiness, vis-à-vis both the offender and the surrounding community.

### **1.3.5 A Crime is Censured by the State**

The fifth and final element of criminal law’s moral framework, like the first, encompasses a deep well of normative discretion. Both the original question of what is wrong, and the ultimate question of what merits censure, are inquiries that presuppose an authoritative entity to provide the answer. As reflected in the above outline of law’s political prerequisites in § 1.2, each state presumes itself as the ultimate voice through which these questions are answered. For a wrong to be formally assessed as a crime, therefore, state-based (court) confirmation is necessary. Even more so than in the legislating of certain wrongs as unlawful, however, the process by which some acts result in criminal convictions, while others do not, is channelled by an intricate interplay of decisions and circumstances. Some of these criteria are deliberatively normative, others instrumental, and still more arbitrary or haphazard. To draw a generalised conclusion from this thick skein of context, luck, and choice, I suggest that while not every (and perhaps not even most) presumptively unlawful wrongs are confirmed as criminal and result in state censure, all those that do arrive at this point have been considered as morally ‘fit’ for such a disposition by a variety of state-authorized actors.

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<sup>49</sup> *Kjeldsen v. R.*, [1981] 2 S.C.R. 617 (S.C.C.) at 626, quoting Martin J.A. in *R. v. Simpson*, (1977) 35 C.C.C. (2d) 337 (Ont. C.A.) at 355.

<sup>50</sup> *R. v. Schwartz*, [1977] 1 S.C.R. 673 (S.C.C.) per Dickson J. at 678, as approved in *R. v. Chaulk*, [1990] 3 S.C.R. 1303.

This claim must be explicated. There is an array of reasons, emphatically *not* dependent on any moral assessment of the conduct, for why some acts do not result in formal state censure. Most obviously, many otherwise criminal acts are never reported to or identified by the police.<sup>51</sup> Resources for enforcing the law may be unequally distributed (in both the literal and critical sense of that term) some communities or individuals may not feel able or willing to initiate or facilitate prosecutions that may be seen as ineffective or counterproductive, and pressure or outright oppression from the offender or other non-legal forces may impede people from disclosing unlawful conduct. Some bodily or property rights are not, in practice, accorded the protection that the law officially affords them. These are important problems for society to grapple with, and most definitely erode the moral authority of courts as ‘equal opportunity’ judges of proscribed conduct. Without minimizing the issue, I can only argue here that, although the gap between “what happens” and “what the law sees” may be legitimately critiqued as a source of injustice, this (apparently perennial) state of affairs does not, by itself, impoverish a court’s ability to pass moral judgment on the wrongful, unlawful conduct that *is* brought within its purview.<sup>52</sup>

The Canadian Constitution itself enshrines another reason why some presumptively unlawful acts do not result in state censure. In a system that seeks to balance the state’s interest in securing convictions against the protection of individual liberties, some prosecutions will have to be forestalled or ultimately founder if those latter rights have been infringed. *Charter* challenges are litigated daily in Canada’s criminal courts, mainly concerning the right not to speak to investigative authorities (s. 7) the rights against unreasonable search and seizure (s. 8) arbitrary detention or arrest (s. 9) or the right to retain and instruct counsel (s. 10(b)). The formal balancing of these interests is conducted under a s. 24(2) analysis which considers whether evidence obtained in an

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<sup>51</sup> Lucia Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004) at 6.

<sup>52</sup> These concerns do, of course, form part of the morally-informing context within which courts make such judgments. Courts, and the legal orders they represent, which do not in some way acknowledge the capriciousness and even outright unfairness that contributes to some persons being subject to legal judgment while others are not, arguably spend a significant part of their moral capital upfront. See Alan Brudner, *supra* note 7 at 324.



unlawful manner should be excluded from a trial. Relevant factors include the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and society's interest in the adjudication of the case on its merits.<sup>53</sup> The overriding determination concerns the maintenance of the justice system's overall social authority – in the language of s. 24(2) evidence tainted by a *Charter* breach “shall be excluded if it is established that... the admission of it in the proceedings would bring the administration of justice into disrepute”.

Other reasons for quashing charges or ordering acquittals in criminal cases may include abuse of prosecutorial process, undue delays in bringing cases to court (as per s. 11(d) of the *Charter*) and other serious jurisdictional or procedural irregularities. The theme running through all of these examples is that, although the conduct at issue may meet all of the other requirements of being a crime, countervailing factors *for which the state itself is responsible* interpose to prohibit a conviction. There may be moral claims propelling the law's privileging of interests in this case-by-case assessment – coerced confessions are not usually countenanced, for example, while courts are more likely to excuse minor constitutional indiscretions that lead to material evidence of a serious crime – but the blameworthiness of the putatively criminal act is not, in theory, of primary relevance at this stage. While the prosecutions that actually fail as a result of constitutional or procedural arguments may be comparatively few, these failures (are meant to) condition the subsequent behaviour of law enforcement authorities, and remind society that the state's interest in prosecuting crime must not be furthered at the expense of individual rights.

Finally, there is (at least officially) a “golden thread” of presumed innocence that underpins all criminal prosecutions in Canada,<sup>54</sup> one that is not ultimately severed except on evidence that proves guilt beyond a reasonable doubt. This high standard, coupled with the legal, constitutional, and circumstantial requirements constraining the

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<sup>53</sup> *R. v. Grant*, [2009] S.C.C. 32 at para. 71.

<sup>54</sup> This term was first articulated in the United Kingdom's jurisprudence by Viscount Sankey in *Woolmington v. D.P.P.*, [1935] A.C. 462 (H.L.) at pp. 481-82, and has been explicitly adopted in Canadian jurisprudence: see, for ex., *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 30.

prosecution's case, inevitably results in verdicts of acquittal even when there is general 'gut' certainty that person X committed crime Y. 'Getting off on a technicality' or because of a key witness's recalcitrance may not absolve anyone in the court of public opinion, but is necessary to preserve what a liberal state may claim as its most noble morality: that it is better to let slip the nine guilty than punish the one without blame. There are no half measures here, no probability-based judgments. As Lucia Zedner observes, one of the central fictions of criminal law is the stark distinction it erects between guilt and its absence.<sup>55</sup> At least in terms of an act's status as criminal, and the explicitly punitive consequences that a state may thereby visit upon its perpetrator(s), unless exactly proven according to all of the above standards, a wrong does not exist, and never did.<sup>56</sup>

While such legal 'fictions' may bear little relation to messy realities beyond the courtroom doors, they can be seen as attempts to further position the adjudicative institution as committed to moral certainty in its judgments. In order to prepare the ground upon which guilt may be planted, all facts and arguments considered extraneous to the narrow question of whether *this individual committed this unlawful wrong, with a "guilty mind"* and *without* recourse to one of the few enumerated excuses, must be stripped away. Such factors may become relevant again at sentencing, of course, and as I discuss at greater length below, how they are considered at this stage can significantly undergird, or undermine, the moral authority that the criminal law takes great pains to showcase through the process of attributing blame.

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<sup>55</sup> Zedner, *supra* note 51 at 12. Note that she is using the term 'crime' to include wrongs that the state may have not officially proscribed, or at least has not confirmed as such in relation to a specific actor and conduct in a court of law. In keeping with my working definition of the term, I refrain from labelling any conduct as 'criminal' unless and until it is finally confirmed as such by a court of law in a specific case.

<sup>56</sup> An equally powerful dichotomy also operates to polarize offender and victim. Except in cases where criminal charges are laid on both sides of a conflict (and, even here, each proceeding will take place separately) criminal law accepts nothing "comparable to the question of comparative [or contributory] negligence" between offender and victim. In the constructed silos of individual prosecutions, at least at the stage of determining guilt, nothing so nuanced as shared responsibility is permitted entry. See Fletcher, *supra* note 3 at 129.

Having briefly considered the reasons *not* dependent on an act's moral attributes for why it may or may not be confirmed as criminal, I return to those assessments that *are* concerned with the moral 'fitness' of an act's formal, forced inclusion within the law's censuring gaze. As with the above analysis of some of the non morally-founded reasons for this attribution, I locate those that follow as generally normative in nature. It is important to note, however, that these two sets of criteria operate simultaneously, in the same intricate context of instrumental, circumstantial, political and personality-driven variables. This is not a uniform or static environment, and even within the same legal territory, each of these factors may manifest quite differently across space and time. Nevertheless, choices based on moral assessments of what conduct ought to be classified as criminal can be discerned throughout the passage of a given case.

Those who are directly affected by presumptively wrongful conduct make the initial choices in this regard. Often the choice to alert law enforcement authorities is obvious, but, in addition to the pragmatic or structural concerns noted above, there are normative reasons why this may not be a straightforward decision. Conduct that is judged by a given in-group to be acceptable, regardless of what the law has decided, often escapes or actively eludes the state's attention. The relative triviality of some illegality, as assessed by the community immediately responsive to a given act/actor, may also result in conduct being summarily excused or censured without resort to a state-based apparatus.

The situations in which the law is and is not called upon say much about a community's ability and willingness to self-govern. As Zedner reminds us, "at no time has the state had exclusive jurisdiction over crime control... [and] only as informal sources of social control grew weaker did the institutions of criminal justice develop to become the dominant means of imposing order"<sup>57</sup>. This process, neither uniform nor explicit but tending, particularly in large and loosely bonded societies such as Canada, towards greater reliance on state involvement in conduct that might otherwise be 'hidden',

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<sup>57</sup> Zedner, *supra* note 51 at 3-4.

points to several possible causal and contributory factors.<sup>58</sup> These may include an increased comfort with or habituation to the criminal justice system's normative mechanisms, the atrophy of internal means of defining and responding to wrongdoing, and, particularly in societies where one normative order eclipses others, an apparent capitulation to the official regime, even while local levers of control persist in exercising parallel, formally unsanctioned authority. These factors may operate in tandem for some communities, and also variably depending on the types of conduct at issue: while some acts may be able to be kept entirely 'in the family', others may leave such profound signs or effects as to inexorably invite the state's attention.

Once the state does become engaged at the investigative level, another layer of morally-based decision-making asserts itself. This is most perceptible in the least serious crimes, where the police and prosecution are statutorily empowered to stream cases out of the court system.<sup>59</sup> This can involve anything from perfunctory verbal warning to referral into an established diversion program. Considerations at this stage include the amount of harm or loss caused, the age, background, and adjudged character of the offender, his or her acceptance of responsibility and apparent willingness to make amends, previous history with the police or before the courts, and, sometimes, the views of the victim(s).

Diversion programs are commonly grouped and self-identify under the banner of restorative justice. Restorative justice is both a philosophy and a practice of responding to wrongdoing.<sup>60</sup> The principles and processes restorative justice espouses are not, in theory, confined to minor misfeasance. With values that encompass empowering those closest to a given crime (victims, offenders, families and other supporters) to work towards shared resolutions that repair or restructure damaged relationships, denouncing harmful behaviour through the voices most likely to penetrate an offender's

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<sup>58</sup> I can only point to some of these factors here; further inquiry is beyond this thesis's purposive scope.

<sup>59</sup> See the 'alternative measures' provisions of the *Criminal Code*, *Supra* note 39 at s. 717. See also the 'extrajudicial measures' component of the *Youth Criminal Justice Act*, *supra* note 46, Part I.

<sup>60</sup> Erik Luna, "In Support of Restorative Justice", in *Criminal Law Conversations*, Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan eds., (New York: Oxford University Press, 2009) 585-595.

protective defences without denigrating his or her abiding human dignity, and responding to the fullest context of wrongdoing, in its causes as well as consequences, Restorative Justice presents as an integrated, albeit ambitious, alternative to state-based justice.<sup>61</sup> What such an approach requires, however, are perhaps the rarest and least reliable of phenomena: offenders who are genuinely responsible, remorseful, and motivated to make amends, victims who are resilient, compassionate, and interested in openly reliving the circumstances of their victimization, support networks who will contribute without taking over or entrenching conflicts, and facilitators who can skilfully navigate the emotional shoals of the subject matter. Whether such capacities can be located or cultivated in the hearts of those burdened by harmful conduct is a matter of indeterminate debate, but at least in most Canadian jurisdictions, the question is not being deeply considered by legislators, who have the greatest means and authority to test its answer. Restorative justice across the country, with the possible exception of Nova Scotia,<sup>62</sup> is stalled on the margins of criminal justice. With comparatively miniscule budgets and staffs often composed largely of volunteers, restorative justice programs have produced generally encouraging outcomes<sup>63</sup> in the realm of non-violent, youth and first-offender minor offences most commonly assigned to them. They are most significantly limited, however, by an ideological resistance that, sometimes explicitly but more often evident in the simple persistence of the status quo, refutes the thesis that most offences/offenders are responsive to or deserving of 'restoration', or that community-based processes can effectively denounce wrongdoers and protect society.<sup>64</sup> At base, perhaps, is the reluctance of an established apparatus, founded upon

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<sup>61</sup> *Ibid.*

<sup>62</sup> See, generally, Nova Scotia, *Nova Scotia Restorative Justice Program* (Halifax: Government of Nova Scotia, 2009), online: Nova Scotia Justice <[http://www.gov.ns.ca/just/Restorative Justice/](http://www.gov.ns.ca/just/Restorative%20Justice/)>. This province's initiatives, however, are currently only available to youth.

<sup>63</sup> See, for the most comprehensive recent review of Restorative Justice program effectiveness, Jeff Latimer, Craig Dowden, and Danielle Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (2005) 85 *The Prison Journal* 127.

<sup>64</sup> See, generally, the critique of the 'dominant' system articulated by Hermann Bianchi in *Justice as Sanctuary* (Bloomington IN: Indiana University Press, 1994). Bianchi states, at 41: "reversion, conversion, repentance, forgiveness, atonement, reconciliation, penitence: all these concepts are entirely ignored in the punitive model or criminal law... [i]t is not lack of good will that causes administrators of punitive

and animated by authoritative power, to give way to decentralized approaches, however promising they may be.<sup>65</sup>

Whether cynical or sincerely held, arbitrary or evidence-based, the rationales that keep diversion programs from responding to all but the most minor unlawful conduct illuminate still more morally normative choices as to what ought to be confirmed in law as “criminal”. These choices, most often made by prosecutors after charges have been formally laid, reflect the widespread public and political belief that most wrongs, committed by most perpetrators, merit the ‘official’ censure that only public justice processes are able to deliver. In return, courts, in applying a single set of laws and procedures for establishing guilt irrespective of a given crime’s cultural, socio-economic, or territorial characteristics (so long as it is located within their established jurisdiction) offer a powerful presentation of universality, accountability, and impartiality, all of which are important indices of justice in a liberal state. I explore in greater detail in the next section how the composition and orientation of courts can increase or erode their authority, not only as arbiters, but also as interpreters and clarifiers of the (presumptively morally significant) wrongs that are brought to their attention.

As we have seen, the first four elements of criminal law’s moral foundations – that conduct must be wrongful, unlawful, and committed with at least a minimum amount of voluntariness by a legally responsible actor – are all in some respect articulations of the blameworthiness that must be established before given conduct will be finally confirmed as criminal by a court. This final threshold, as I have discussed, encompasses a complexity of normative, instrumental, and even happenstance factors, none of which can be conclusively delimited or defined. The moral coherence aspired to by Canada’s law and justice systems, therefore, is neither perfect nor complete. I suggest, however, that the five elements discussed in this section still channel the essential nature of moral

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justice to be unacquainted with such concepts. It is simply the reality that the punitive system does not allow for them”.

<sup>65</sup> It must also be noted here that some substantive critiques have been made of restorative justice’s ability to further its objectives while protecting the interests of vulnerable persons. See, generally, Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: University of British Columbia Press, 2004).

blameworthiness that establishes the core meaning of criminality. Although by far not all morally blameworthy conduct is formally assigned this label, that which does has necessarily been considered to meet all five of the above requirements, by the prosecuting authority as well as the confirming court. Through this *substantially* morally-based filtering process, the criminal justice system seeks to ensure that the acts that it captures, by its own terms at least, are amenable to, and justify, its similarly morally-fuelled dispositions. As set out at the beginning of this chapter, I reiterate that moral censure, rooted in righteous blame, is at the stem of just punishment. It is to punishment, therefore, which encompasses the second of my three claims regarding criminal law's fundamental concern with moral ordering, that I now turn.

#### **1.4 The Moral Proportionality of Punishment**

While I do not concentrate on punishment *per se* in this thesis – every one of the major philosophies has bookshelves of support and criticism devoted to it – no discussion of the morality of criminal justice can ignore the ‘end results’ of the sentencing process. There are as many theories of punishment as of crime, setting forth a similarly wide range of explanations, from Foucauldian discipline to Neo-Marxist economic determinism to Weberian bureaucratism.<sup>66</sup> The discussion that follows focuses solely on contemporary Canadian law, and argues that of the many available bases upon which punishments *can* be fashioned, the most coherent choice of punishment in *most* cases – both according to the *Criminal Code* and its underlying justificatory premises that were sketched out above in § 1.3 – is that of “moral proportionality”. The composition of this proportionality in a given case, as will be seen, results from the application of ‘universal’ norms to individual, contextually calibrated blame.

##### **1.4.1 A Statutory Smorgasbord**

A mélange of rationales is discernable in Canada's sentencing schema. In no particular order of importance, the *Criminal Code* endorses:

- Denunciation of wrongful conduct (at s. 718(a));

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<sup>66</sup> Lucia Zedner surveys these diverse theories in *supra* note 51 at 76-82.

- Deterrence, both ‘specific’ (vis-à-vis the offender) and ‘general’ (vis-à-vis others in society) (s. 718(b));
- Incapacitation of offenders, “where necessary” (s. 718(c));
- Rehabilitation (s. 718(d));
- Reparations to victims or the community (s. 718(e));
- Promotion of “a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community” (s. 718(f));
- Parity, vis-à-vis “similar” offences, offenders, and circumstances (s. 718.2(b));
- Constrained totality (so that consecutive offences are not “unduly long or harsh” (s. 718.2(c)); and
- Restraint in the use of imprisonment, if less restrictive sanctions are appropriate (s. 718.2(d)) and “with particular attention to the circumstances of aboriginal offenders” (s. 718.2(e)).

The *Code* also generally allows for punishments to “be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender”, and enumerates a non-exhaustive list of aggravating (but not mitigating) factors (at s. 718.2(a)).

One principle, however, is advanced as an overarching guide to balancing these diverse and potentially conflicting impetuses. Section 718.1, the “Fundamental Principle” of sentencing, states that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”. A court that seeks to impose a fair sentence according to this framework must therefore determine not only the ‘badness’ of the crime, but also the ‘blameworthiness’ of the offender. While a range of maximum and (increasingly) minimum sentences, as well as previous decisions in similar cases, offer presumptive boundaries and benchmarks in this regard, punishments are meant to fit the unique characteristics of the criminal as well as the crime. Canada’s sentencing courts, while authorized to bring much discretion to the imposition of punishment, are thus guided by a conceptual framework that privileges the morally formulated concern of “proportionality”. Below, I consider how this textual organization impacts the prioritization of diverse sentencing objectives.



#### 1.4.2 The *Criminal Code*'s Purposive Tensions: Retributivism and Utilitarianism

Not all of the sentencing principles surveyed above are primarily concerned with proportionality, and some have the potential to weaken or undermine what coherence may be drawn from it as a synthesizing principle. Restitution, for example, if strictly construed as the obligation to undo the harm or pay back the loss an offence has caused, is a civil concept unrelated to punishment *per se*. As such, it is rarely the dominant aspect of a sentence, and may only form part of a disposition if readily measurable in monetary terms.<sup>67</sup>

Often it is simply impossible for criminal harms to be literally recompensed; the debt owed by an offender must be repaid, if at all, through more symbolic means. Two distinct moral theories, both reflected in the *Criminal Code*, claim normative space in this area: Utilitarianism and Retributivism.<sup>68</sup> Broadly, Utilitarianism suggests that society ought to seek to improve its overall welfare, while Retributivism posits that this end (even supposing it can be agreed upon and realized) ought not to be achieved by 'unjust' means. Most appositely to this discussion, Retributivism counsels us to respect a pre-existing, overriding concept of human dignity, and thus disavow any criminal law, process, or punishment that undermines this moral absolute. Looked at another way, while utilitarian rationales for punishment are primarily reductive, or aimed at minimising future criminal harms, retributive rationales are concerned with what offenders deserve (no less, and even more certainly, no more). Although it is shaded and moderated by our evolving social mores, liberal constitutional principles, and other sentencing objectives, I argue in this section that Canada's express privileging of proportional punishment takes its moral energy from the Retributive principle of just deserts. As discussed below, however, this does not mean that sentencing judges are not influenced by a host of other normative decision-making bases, including, most powerfully, the utilitarian goal of social protection.

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<sup>67</sup> *Criminal Code*, *supra* note 34 at s. 738.

<sup>68</sup> Fletcher, *supra* note 3 at 190.

The protection of society from the risk of future criminal harms, as reflected in the aims of rehabilitation, deterrence and incapacitation, is clearly motivated by utilitarian considerations. There is an irreconcilable tension, it seems, between the goals of retributive justice (which require, *inter alia*, that no one be punished more than they deserve) and those of social protection, which legitimize sentences that are far in excess of what an offender may be said to deserve. On the other hand, at the retributive end of this spectrum, there may be no utilitarian basis at all for a particular punishment, though a retributive conception of ‘justice’ may demand it. As the criminologist Nigel Walker has observed, it is common for judges to appeal to different justifications in different circumstances, with the importance of finding a retributive ‘fit’ growing according to the seriousness of the offence.<sup>69</sup> Incapacitation is also recognised as an important aim of punishment, whose statutory subservience seems belied by its common (and politically endorsed) application. Retributive justifications (depending on who is making them) can found long prison sentences, but incarcerating offenders as a means of preventing future crime requires a utilitarian rationale. In Canada, indeterminate prison or supervisory terms are rarely imposed, and only according to statutory provisions that require the establishment of both an offender’s violent past and elevated risk of future dangerousness.<sup>70</sup> Punishments for particular crimes cannot, in law, be *primarily* incapacitating. Mandatory life sentences for murder convictions (and mandatory punishments generally) however, can be seen as an exception to Canada’s general application of contextually calibrated Kantianism. In this most serious class of crime,<sup>71</sup> the driving force behind the most serious punishment that is mandatorily applied thereto is neither Utilitarianism, nor specific retribution, but rather,

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<sup>69</sup> Nigel Walker, *Punishment, Danger, and Stigma: The Morality of Criminal Justice* (Oxford: Basil Blackwell, 1980) at 30-31.

<sup>70</sup> *Criminal Code*, *supra* note 34 at Part XXIV (“Dangerous Offenders and Long-Term Offenders”).

<sup>71</sup> Which itself contains gradations according to the circumstances of the offence’s commission and the protected nature of certain classes of victim. See *ibid.* s. 231 (2) (“murder is first degree murder when it is planned and deliberate”) s. 231 (4) (“murder of peace officer, etc.”) and s. 231 (7) (“all murder that is not first degree murder is second degree murder”).

arguably, an expression of abhorrence for the wilful taking of another's life, irrespective of the circumstances.<sup>72</sup>

Finally, from a Retributive perspective, punishing people as an 'example' to others is morally repugnant in that it treats individuals as means rather than ends.<sup>73</sup> The *Criminal Code*'s inclusion of general deterrence as a principle of sentencing explicitly endorses this approach. To utilitarian-minded judges, this rationale can certainly take the form of an overriding justification for particular punishments, but again, the *Code*'s textual framework restrains the applicability of the deterrence principle. Specific deterrence (also explicitly endorsed in the *Code*) is somewhat more palatable to a Retributive perspective, in that it seeks to speak directly to the offender, but as a dominant justification, it allows a virtually limitless range of punishments moored less to the offence than the court's assessment of the offender. These sanctions can range from nothing at all (for those already reformed, repentant and/or incapable of further offending) to 'whatever works' punishments that can employ horrendous techniques to deliver their message. In Canada, however, s. 12 of the *Charter* operates to disallow the most grossly disproportionate of such dispositions.<sup>74</sup> According to the *Criminal Code* and leading jurisprudence,<sup>75</sup> sentences must be appropriately and contextually balanced by way of the fundamental (Retributive) principle of proportionality. But what, in practice, does this require sentencing courts to consider? How is proportionality meant to be discerned? The following section considers these important questions.

#### **1.4.3 Proportionality through the Eyes of the Beholder**

The proportionality that is meant to guide the imposition of punishments can be interpreted in two quite different ways. The narrower application of this principle, based on a kind of formal equality, would result in rigid sentencing gradations according

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<sup>72</sup> It must be noted that while the penalty is the same in both first and second degree murder (life imprisonment) the parole eligibility requirements are significantly different (25 versus ten year minimums). This reflects the attenuated blameworthiness ascribed to persons convicted of second degree murder.

<sup>73</sup> Walker, *supra* note 69 at 198-205.

<sup>74</sup> See the Supreme Court of Canada's discussion of s. 12's requirement in *R v. Marmo-Levine*, *supra* note 16 at paras. 159-162.

<sup>75</sup> See *R v. Proulx*, [2000] 1 S.C.R. 61 at para. 82.

to the adjudged gravity of the offence. This brand of strict retributivism is evident in jurisdictions that employ a point or tariff scale to determine the appropriate amount of punishment,<sup>76</sup> whereby the worse the crime itself, or the more aggravating the circumstances of its commission, the harsher the penalty. But while certain aspects of the *Criminal Code*'s sentencing provisions lend support to this approach, others, including the latter clause of the proportionality principle, endorse a broader interpretation. Through this lens, the establishment of liability for a given crime is merely a base prerequisite for more nuanced considerations of an offender's responsibility for the offence, at which stage virtually anything in one's personal or social situation has potential importance. Proponents of more socially just responses to criminal wrongdoing are attracted by such a 'substantive equality' reading of proportionality: Michael Tonry suggests that justice cannot be extended to minorities or the poor without this "compassionate" interpretation of culpability,<sup>77</sup> and Barbara Hudson argues that, especially in regards to offences borne from socio-economic poverty, a person's 'choice' to commit crime ought not to be understood in black-and-white terms. H.L.A. Hart's notion of crime as requiring a 'fair opportunity to resist', she suggests, should be expanded to encompass culpability reductions "in circumstances such that conformity with the law [is] more difficult than for most people".<sup>78</sup>

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<sup>76</sup> This approach is reflected, although only to an advisory extent, in the sentencing guidelines contained in the US Penal Code: see the provisions establishing the United States Sentencing Commission, 28 U.S.C. 58.

<sup>77</sup> Michael Tonry, "Individualising Punishments" in *Principled Sentencing: Readings on Theory and Practice*, Andrew Von Hirsch, Andrew Ashworth, and Julian Roberts, eds., (Oxford: Hart Publishing, 2009) 354.

<sup>78</sup> Barbara Hudson, "Justice and Difference" in *ibid.* 366 at 369. The reality that most crime is committed by those on society's margins, however, must be coupled with the equally inescapable fact that the majority of those harmed by crime are also mired in socio-economic inequality. Those who seek to have sentences reflect justice for offenders, therefore, must contend with the possibility that furthering this cause may infringe the concept of justice interpreted by victims. Indeed, as Hudson acknowledges, this is an abiding difficulty, and sometimes it is simply not possible to 'do justice' to both offenders and victims in the same part of the criminal justice system, much less maintain consistent standards across the spectrum of situations and personalities that play into the determination of punishments. It would seem to come down to a matter of judicial preferences, which all theorists may be able to agree allows for considerable compassion or harsh treatment, depending on whose interests – victim, offender, community, or a combination of all – are privileged by a sentencing court.

In the interminable debate of parity versus particularity, however, both of which are reflected in the *Code*'s objectives, the "fundamental principle" of proportionality seems to most favour the latter concern, and the specific deserts of specific offenders. The balance aimed at by this individualised assessment, while weighing in the harm to victims and the needs and values of society, is most dependent upon individually ascribed moral blame. Every court, in (almost) every case, must attune itself to what, in its estimation, each offender 'justly deserves', and, subject to subservient adjustments, let such gauging drive its judgment. But turning back again from outcomes, it is necessary to enquire into the means through which this balancing is accomplished. The next section, accordingly, takes up the last of my three claims regarding criminal law's fundamental moral concerns. In §1.3, I advocated moral blameworthiness as the cohering principle of criminal liability. This section has advanced moral proportionality as Canada's cohering principle of punishment. Below, I consider the formal process by which these requisites of the law's moral order are applied and expressed.

### **1.5 The Moral Acoustics of Sentencing Courts**

Many of the terms that I have been using in this chapter – words like blame, guilt, and offence – are inescapably morally evaluative concepts. Although they may have also have strict legal meanings, even (perhaps especially) when they are employed in a determinative way by courts of law, they evoke powerful and deeply-rooted judgment, "an attitude of contempt, an emotional disposition to demote the accused in the eyes of others".<sup>79</sup> This is a good reason why the law is, in theory, very careful not to use them without careful consideration and guarantees of assurance. The mechanism of assigning criminal responsibility is *designed* to both call down and control the moral opprobrium that flows, from a diversity of social sources, onto offenders upon their conviction. While they are ultimately unable to completely be so, criminal courts try, at least, to provide the authoritative voice through which society expresses its disapproval of criminal conduct, both to offenders and to itself.

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<sup>79</sup> Fletcher, *supra* note 3 at 132.

There is evidence for this ambition in the sentencing provisions of the *Criminal Code*. The first enumerated purpose of sentencing, at s. 718(a) is to “denounce unlawful conduct”, and the last, at s. 718(f) is to “promote a sense of responsibility in offenders, and [acknowledge]... the harm done to victims and the community”. While, in theory, these aims may be substantially accomplished by the punishment itself, certain core procedures, long upheld by courts as essential to their legitimacy and function, indicate that something more directly communicative is endorsed. Defendants must personally appear before the court to receive their sentences, which are orally delivered from the judge’s bench. Members of the community are allowed to witness this (like every) public proceeding, and, as I shall address in greater detail below, submissions are invited from the prosecutor, defence counsel, the offender him or herself, and any victim of the offence. In most major respects, the process by which a person’s sentence is communicated would appear to be secondary in importance, at least in terms of the legislated purposes and principles at play, only to the punishment itself.

A number of theorists support this orientation, ascribing and prescribing it normative force. R.A. Duff has articulated a comprehensive communicative theory of punishment, which he argues is most appropriate for a liberal polity that defines offenders as responsible moral agents (as, I have argued above, does Canada’s). Such a society’s criminal law, he asserts, cannot merely attempt to coerce conformity and obedience through punishment. Presuming as it does a shared community of values, which locates and addresses offenders as wayward members thereof,<sup>80</sup> the law must instead

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<sup>80</sup> R.A. Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001). At 68, he states that:

A community can exist only if *most* of its members recognize themselves as members of it and share in those values and aspirations. The law speaks to such members in what they can hear as their own voice – in terms to values to which they are already committed and of what they owe to others who they already recognize as their fellow citizens.

Although there will always those who dissent from or reject this normative community, Duff insists that “we try to find ways of bring them to recognize a certain kind of fellowship and to accept the moral demands that it makes” (at 70). Failures are of course inevitable, but the attempt is essential given that it is the community’s moral norms that are being applied to the offender, and justify his or her punishment. In Chapter Two, I discuss some of the complexities of this perspective as it relates to the Canadian context.

aim... to persuade them to refrain from criminal wrongdoing because they realize it is wrong. *That* aim can of its nature be achieved only by a communicative process that seeks to bring citizens to recognize and accept not just that certain kinds of conduct are 'prohibited' by the law but that and why such conduct is wrong.<sup>81</sup>

Regardless of the sensibility that particular offenders may bring into, or indeed, as responsible moral agents, take from a criminal court's sentencing process (whether shame, openness, indifference, or defiance) the process itself must yet advance the same invitation. Albeit usually embedded in the "hard treatment" of punishment,<sup>82</sup> Duff characterizes this invitation as fundamentally offering the opportunity of repentance and eventual reintegration in the normative community. Furthermore, in order to best ensure that offenders are able to hear (if not ultimately accept) the moral message that a sentencing court seeks to send, this forum must attend just as carefully to *how* this message is communicated:

[i]f the defendant is to be answerable, she must be called to answer in a language that she can understand... what someone hears, or can be reasonably expected to hear, when he is addressed depends not just on the content of what is said, but on the context in which it is said, and the accent in which it is spoken.<sup>83</sup>

What this would require in practical terms, of course, differs between communities, but the idea is relatively straightforward: criminal courts have important normative responsibilities, which ought to be communicated in the most comprehensive and comprehensible way possible. Further, this should be a dialectical process, which "aims not merely to communicate with the offender, but also to provide a means by which she can communicate apologetically with her victim and the community".<sup>84</sup>

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<sup>81</sup> *Ibid.* at 81.

<sup>82</sup> R.A. Duff, "Punishment, Retribution, and Communication" in *Principled Sentencing*, *supra* note 77, 126 at 129.

<sup>83</sup> *Supra* note 80 at 189, 192.

<sup>84</sup> *Ibid.* at 159.

Duff's orientation is supported, in part, by Christopher Bennett.<sup>85</sup> Bennett perceives a "crisis of meaning" in the criminal justice system, in which "it is not clear what the system is actually meant to be doing, what that overall purpose of criminal justice is – or whether the officially given purposes are really compelling ones".<sup>86</sup> For Bennett, the state has to (continually) justify its coercive involvement in people's lives, which can only be grounded in the repair of political community, once ruptured:

[t]he concern of the criminal law is with the maintenance of a certain relationship between citizens. Unless what citizens do offends the standards internal to this political relationship the criminal law has no business with the morality of its citizens' actions.<sup>87</sup>

Once such an offence has been established, the presiding institution is called upon to channel and express a collective duty: "symbolically adequate" condemnation, which "impose[s] upon the offender a duty to make amends of the sort that he would be spontaneously motivated to make were he genuinely sorry for what he has done".<sup>88</sup>

Where Duff and Bennett part ways, however, is in regard to the state's responsibility for encouraging repentance. While for Duff this is an essential part of the 'communicative' aspect of sentencing, Bennett holds that the 'expressiveness' of a state's censure ought merely to symbolize, through punishment, the qualities and quantities of remorse and apology a given offence engenders. Whether the offender actually travels that emotional road is not, for him, the state's business.<sup>89</sup>

The engagement and participation of offenders (and arguably victims as well) in the actual process of discerning and delivering sentences is thus less important for Bennett than for Duff. Both theorists, however, place emphasis on a judge's authority to look, as deeply as is felt necessary, into the context and characteristics of the wrong and wrongdoer. This standpoint, indeed, is true of all who imbue courts with the

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<sup>85</sup> Christopher Bennett, *The Apology Ritual* (Cambridge, Cambridge University Press, 2008). Although written from a British context, I take Bennett's theoretical critique and prescriptions to apply to Canada's situation as well.

<sup>86</sup> *Ibid.* at 13.

<sup>87</sup> *Ibid.* at 166.

<sup>88</sup> *Ibid.* at 171.

<sup>89</sup> *Ibid.* at 193-194.



responsibility of assessing and addressing the moral gaps a given offence opens between members of a community and/or between individuals and the state. It is also a perspective that has apparently been accepted in Canadian law, as reflected in the various inherent and statutory mechanisms designed to afford courts the scope to make such deep contextual enquires. I spend more time on the practical intricacies of this function in the next chapter. What I have tried to express in this section is that the theories that open this judicial ambit and discretion *fundamentally* concern the state's capacity and entitlement to make moral judgments, not just about the wrong itself, but about who committed it and what is required in response. Before concluding my development of these theories, however, I must outline some of their most important critiques.

The most profound caution that is usually raised against a justice system that seeks to address the full offender, rather than just the offence, is that it will shift the proper locus of guilt from act to actor. While the concept of 'guilt', as I have noted above, is itself inherently interlaced with emotional, even theological content, George Fletcher warns that

we do not need to – and indeed should not – refer to our own deeper feelings or those of the offender. Any attempt to address the real guilt of the perpetrator introduces a personalized approach to punishment... the criminal law requires only that the offender commit an unlawful act inexcusably.<sup>90</sup>

This wariness stems from the evident problems, both moral and practical, of punishing character: Fletcher invokes the Nazis' punishment of inner mental states,<sup>91</sup> while Ekow Yankah castigates a "good guys and bad guys" understanding of (U.S.) criminal justice, in which offenders are stigmatized as "immoral other[s]", fuelling a "desire to punish villains... satisfied only by continually punishing that class of immoral characters, creating a permanent criminal caste".<sup>92</sup>

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<sup>90</sup> *Supra* note 3 at 299-300.

<sup>91</sup> *Ibid.* at 35.

<sup>92</sup> Ekow N. Yankah, "Good Guys and Bad Guys: Punishing Character, Equality, and the Irrelevance of Moral Character to Criminal Punishment" (2003-2004) 25 Cardozo L. Rev 1019 at 1025, 1027.

Perhaps understandably, theory-driven endorsements or critiques of courts' ambition and ability to discern the full moral context within which particular wrongdoers commit particular wrongs are apt to accentuate extremes. While Duff's communicative sentencing invitations presuppose, and depend upon, a careful and caring normative community, the strictly reigned-in approach advocated by Fletcher and Yankah apprehends an authority that easily abuses its power. In Canada at least, the prevailing reality likely ranges between these poles, according to the particular dynamics of offence, offender, court, and community. What the above criticisms of discretionary sentencing seem not to acknowledge is the possibility – manifestly real in the Canadian context – that imposing 'one size fits all' punishments leads to far more injustices than it prevents.

The above discussion has remained exclusively within an Anglo-American analytical context. Before concluding this section, however, another important thrust of critical opinion must be touched upon. This is the argument – founded upon considerable evidence – that the ideas, conventions, processes, and very language embodied in Canadian sentencing law offers scant resonance for the traditions and experiences of the country's Indigenous communities.<sup>93</sup> In its seminal decision in *R. v. Gladue*,<sup>94</sup> the Supreme Court of Canada confirmed that the "unique" circumstances of Aboriginal offenders require a sentencing court's particular attention.<sup>95</sup> This, the Court ruled, includes adopting a "remedial" approach to the manifest over-incarceration of Aboriginal persons, by way of an enriched consideration of an Aboriginal offender's cultural context, background circumstances and systemic disadvantage.<sup>96</sup> Criminal

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<sup>93</sup> See e.g., *The Report of the Aboriginal Justice Inquiry: The Justice System and Aboriginal People*, vol. 1, by A.C. Hamilton and C.M. Sinclair (Winnipeg: Government of Manitoba, 1991). Many publications have been issued on Aboriginal-state conflicts in the area of criminal justice, but few so extensive as this seminal report.

<sup>94</sup> [1999] 1 S.C.R. 688 [Gladue].

<sup>95</sup> *Ibid.* at para. 37. The decision in *Gladue* interprets s. 718.2 (e) of the *Criminal Code*, which mandates a sentencing court to consider all sanctions other than imprisonment that are reasonable in the circumstances, "with particular attention to the circumstances of aboriginal offenders". Section 718.2 (e) came into effect in 1996 as part of a broad legislative amendment to the sentencing provisions found in Part XXIII of the *Code*.

<sup>96</sup> *Ibid.* at paras. 44, 82-85.

courts, after *Gladue*, were not to apply the law to “prefer certain categories of offenders over others”, but rather to reinvigorate Canada’s overall framework of proportionate, individualized sentencing to better reflect Indigenous understandings of justice, in process as well as product.<sup>97</sup>

There are suggestions that the clarion call issued by the *Gladue* decision has not been meaningfully heeded, at least not to the extent required for sentencing courts to substantively ameliorate Aboriginal experiences in the criminal justice system.<sup>98</sup> As stated in this thesis’ Introduction, while I cannot speak to these dissatisfactions directly, neither can I ignore the important question of whether Aboriginal traditions, realities, and aspirations can be incorporated into Canada’s existing model of criminal justice, or whether distinct ideas and methods are required to realize truly appropriate processes and outcomes for these normative communities. The *Gladue* decision (like this thesis) imagines that the flexibility inherent in Canadian law, despite the system’s historic complicity in injustices perpetuated against Indigenous communities, is able to adjust to positively include Indigenous concepts and practices of resolving wrongs. I test this expectation within the empirical research that is presented in Chapters Three and Four. This research, as part of its intention to explore the moral acoustics of sentencing courts across a variety of contexts, encounters some practical applications and challenges of the *Gladue* decision’s demands in regards to how the voices of Aboriginal offenders are being heard in plea and sentencing proceedings.

From the above review of jurisprudence, it is clear that Canadian law endorses tailored approaches to the sentencing of offences and offenders. All that is mandated, in most instances, is that dispositions reflect one or more of the sentencing principles set out in the *Criminal Code*, and, most of all, that they abide by the overarching ethic of proportionality. A number of countervailing factors, however, exert continual pressure

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<sup>97</sup> *Ibid.* at para. 37.

<sup>98</sup> See Kent Roach, “One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal” (2009) 54 *Crim. L.Q.* 470. See also Andrew Welsh and James R.P. Ogloff, “Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions” (2008) 50 *Can. J. Crim. & C.J.* 491.

on this practice. Some of these forces, as they influence the ability of guilty pleas and ‘plea based’ courts to reflect the law’s expectation for contextually resonant, communicative decision-making, are explored in the following chapter.

## **1.6 Conclusion**

This chapter suggested that Canadian law pertaining to criminal liability, sentencing, and punishment is predicated on a theory of moral blameworthiness, moral responsibility, and moral proportionality. In the process of determining guilt, moral standards and defences operate to convict only those adjudged to shoulder personal, inexcusable accountability. Once this is established, the law authorizes, indeed expects, courts to consider a wide range of ‘relevant’ characteristics and circumstances in order to gauge and express the most appropriate moral orientation to the offence. Finally, sentences themselves are primarily constructed on an assessment of the gravity of *this* offence, and the responsibility of *this* offender. This, I have posited, is criminal law’s core anatomy. As we have seen, however, none of the three claims upon which this argument rests are absolute, crystalline, or without contention. At a minimum, then, this thesis proceeds on the basis that Canada’s criminal law and justice system, in its textual and theoretical essence, tries or purports to reflect, articulate and enforce a moral language of ‘just’ blame and its most ‘just’ response.

The above guiding concepts, while they may be grounded in legislators’ and courts’ conceptions of what is basic, shared, or common across society, and while they manifest concern for victims’ grievances or loss, are primarily directed at the offender him- or herself. It is *their* wrong that a court confirms, *their* blame that it ascribes, and *their* punishment that it imposes. I proceed to develop this focus more fully in Chapter Two, which examines the third of my claims – for the sentencing process’s importance as site for the fulfilment and expression of all the law’s moral content and intention – in light of the host of practical challenges and intricacies that impinge upon this function. This next section of the thesis, and indeed the empirical studies that follow in Chapters Three and Four, place the *communicative* dimension of the sentencing process under particularly close scrutiny. And, as I will argue, there is no legal mechanism more

consequential – and fraught with difficulties – at this final stage of the criminal law process than the communication of plea, especially that which acknowledges guilt.

## CHAPTER TWO: The Moral Compromises of Guilty Plea Justice

### 2.1 Introduction

In Chapter One, I argued that the content of criminal culpability is primarily based on calibrations of moral blameworthiness, and that finding this fit, in terms of the gravity of an offence and the degree of responsibility of an offender, demands the active discernment of a sentencing court. I demonstrated how a court's engagement with offenders themselves, as agents imbued with moral standing and possessed of relevant information and perspective, is important to the process of gauging the moral proportionality essential to the concept of punishment that Canadian law seems to privilege. This demand, I suggested, is best met by a sentence that conveys, with as much communicative clarity as possible, both why and how much an offender's conduct is proscribed by society. Justice, seen in this light, is the considered fit of a punishment to *this* offender for *this* offence, and ought, ideally, to be etched out in as clear and comprehensive a manner as possible. I further posited that the law intends this to be done through a forum that gathers together the 'appropriate' actors for a process of engaged deliberation. I concluded that sentencing hearings – more than any other stage in the justice process – foreground the moral dimension of the law's foundations and aspirations.

It is one thing to advance these claims at the theoretical level. It is quite another, however, to defend such ideas, and advocate for their importance, in the 'real world' of criminal justice. The criminal law's concern for communicative moral ordering can be seen to derail at many of the justice system's junctures. This chapter, however, focuses principally on guilty pleas and their resultant resolutions of criminal charges. In doing so, I ask how Canadian sentencing courts may attempt to reinvigorate some of the moral authority and relevance that certain critics describe as generally – and systemically – hijacked or lost. Using these pessimistic interpretations as touchstones for my own enquiry, I explore how guilty pleas are manufactured in the pre-trial

process, moderated by professional representatives, and employed and understood as expressive mechanisms in sentencing.

The plea is a significant – perhaps *the* significant – representation of the voice that courts give to and expect from defendants. We shall see that it communicates a very particular kind and content of information, which centrally affects the legal status of the speaker (defendant) and the structure and direction of the legal proceedings. In this respect, a defendant's voice, as expressed in the plea, has quite clear and well-defined meaning. But such institutionally bestowed speech does not fully describe defendants' 'voice', as it speaks or is silenced, heard, presumed, and interpreted in criminal proceedings. When the criminal defendant speaks, in a substantive moral sense, such speech is filtered through (and often walled up within) the institutional mechanism and institutional meaning of the plea. As this chapter seeks to demonstrate, this seemingly ubiquitous difficulty (of overlapping and mutually obscuring meanings) directly affects how sentencing courts are able to promote the moral ordering that Chapter One advanced as their most fundamental and appropriate function. Confining my exploration to the major constituents of plea-based criminal justice (being resolution discussions, guilty pleas, and sentencing hearings) I attend to the audibility, ideal and actual, of lay and professional participants' normative orientations towards 'wrong' and 'wrongdoer'. Meaningful moral communication between these actors in plea and sentencing proceedings is possible, I posit, to the extent that they are able and willing to share their normative 'stories' in a common tongue. But there is much, within and surrounding the articulation of the plea itself, that impedes the development and use of such a shared language.

The moral ordering that is meant to vitalize criminal law can be dissipated by a host of countervailing pressures and concerns. I begin, in §2.2, by describing the general contours of this landscape, locating my more specific inquiries in a broader critical context. Section 2.3 then develops guilty pleas as the most significant – and most problematic – of the communicative mechanisms available to accused persons in Canada's system of criminal justice. I outline the plea's formal legal character and

requirements, and proceed towards a more nuanced understanding of the guilty plea's meaning(s) and consequences.

In §2.4, I shift away slightly from the plea itself, to consider its formation. I ask, specifically, how plea bargaining affects the capacity of guilty pleas to inform or advance engagement with the moral inquiries that s. 718.1 of the *Criminal Code* necessitates; namely, the gravity of *this* offence and the responsibility of *this* offender. The influence of Crown and defence lawyers in shaping the content and character of acknowledgments of guilt is particularly scrutinized in this section. Section 2.5, in turn, explores the impact that negotiated pleas have on post-conviction court processes. Here, with my focus specifically on the offender, I enquire into the use of statutory mechanisms that are formally available to enrich the content and communication of sentencing goals.

Finally, §2.6 enquires into how defence counsel and judges channel how offenders themselves speak, and are spoken to, as moral actors in the sentencing process. I suggest that the direct and indirect influence of these professionals, when combined with the procedural and cultural pressures already confronting lay participants, profoundly impacts upon the viability of guilty plea-based sentencing hearings as meaningful conduits of moral content.

## **2.2 Diagnoses of Rushed Justice**

Criminal justice processes have long been explained by recourse to one of two interpretative models. Known as the “Crime Control” and “Due Process” models, both were first articulated over fifty years ago by the criminologist Herbert Packer.<sup>1</sup> The Due Process model formally presupposes the legal innocence of defendants and accords each a spectrum of rights and protections that adhere throughout the system's operation, from arrest to correction. Generally speaking, this is the model that most closely represents the contemporary Canadian approach to the adjudication of criminal

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<sup>1</sup> Herbert L. Packer, *The Limits of The Criminal Sanction* (Stanford: Stanford University Press, 1968) at 149ff.



offenders, as evidenced by the *Charter*'s enshrining of legal rights and the explicit importance accorded to adversarial methods and standards of proof. The Crime Control model, however, is perhaps more reflective of observable reality. Through this lens of understanding how justice systems operate, certainty and efficiency are privileged; presumptively strong cases are ushered towards convictions, while those flagged as problematic are whittled down or summarily withdrawn. This is the model, as Packer recognized, that is more apt to encourage, or coerce, negotiated guilty pleas.<sup>2</sup>

While features of both the Due Process and Crime Control models are observable in plea and sentencing practices in Canadian courts, neither was developed to account for a justice system's promises or problems in the realm of moral ordering. Chapter One developed a framework of Canadian criminal justice's promises in this regard, and this chapter encounters some of the moral problems faced by Canada's prevailing guilty plea-based means of 'ordering' criminal justice. Before narrowing my inquiry to pleas and sentencing hearings themselves, this section introduces three more general critiques of Western criminal justice structures. Each supplements Packer's bivalent thesis, and each assists in understanding the difficulties that sentencing courts encounter in upholding the communicative, intelligible kind of moral ordering that the law arguably expects them to practice. First, via an overview of British Columbia's criminal court system, I locate one rationale for why sentencing courts tend not to act as forums of communicative moral engagement: they simply don't have time. I then introduce two other empirically-based explanations of rushed, non-resonant justice processes: Malcolm Feeley's critique of 'procedural' sanctions, and the scholarship that focuses on how cultural dynamics inhibit lay persons' substantive involvement in a court's operations.

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<sup>2</sup> *Ibid.* at 221ff.

### 2.2.1 A Snapshot of British Columbia's Criminal Courts: Volume Overload?

All criminal prosecutions in B.C. begin in Provincial Court, and a vast majority – over 90% by the Court's own estimation<sup>3</sup> – are ultimately disposed of at this level of court as well. On average, almost 70% of prosecutions in the province result in findings of guilt,<sup>4</sup> while the largest percentage of others – nearly another 25% - are ended by a stay of proceedings.<sup>5</sup> While it is clear from these statistics that only about 5% of prosecutions result in not guilty verdicts or other dispositions (such as outright withdrawals or peace bonds) it is less easy to quantify the proportion of guilty verdicts that are obtained by way of plea as opposed to a contested trial. Considerable anecdotal and experiential evidence, however, supports the conclusion that the overwhelming majority of these cases are resolved via guilty plea.<sup>6</sup> The judgments and sanctions that provincial courts mete out, therefore, can fairly be said to be substantially predicated upon an offender's eventual admission of criminal culpability.

These admissions, further, are made in abundance. In 2006-2007 fiscal year, 44,289 "total cases" were heard in adult criminal court in B.C.<sup>7</sup> Other figures cite that an average of 85,000 Reports to Crown Counsel are forwarded from police to prosecutors

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<sup>3</sup>Provincial Court of British Columbia, "About the Court" (Victoria: Office of the Chief Judge of the Provincial Court of British Columbia, 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.B.C..ca/aboutthecourt/index.html>>.

<sup>4</sup>The B.C. Prosecution Service reported that 69.8% of prosecutions in 2008/09 were disposed of by way of conviction: B.C. Prosecution Service, *Annual Report, 2008/09* (Victoria: Ministry of Attorney General, 2009), online: Ministry of Attorney General <[http://www.ag.gov.B.C..ca/prosecution-service/pdf/CJB\\_AnnualReport-2008\\_09.pdf](http://www.ag.gov.B.C..ca/prosecution-service/pdf/CJB_AnnualReport-2008_09.pdf)> at 10.

<sup>5</sup>A 'stay' is (almost always) a Crown-initiated request to the court for the prosecution to be discontinued. There are many possible reasons for such requests, principally including the Crown's recognition of insufficient evidence or other weaknesses that reduce the likelihood of conviction below an acceptable level. The cited figure for 2008/09 was that 23.4% of all prosecutions resulted in a stay of proceedings: *Ibid.* at 10. It is unclear, however whether this figure includes the many cases in which a defendant pleads guilty to only some of the charges in a multi-count prosecution, with the others being stayed.

<sup>6</sup>Joseph Di Luca, "Expedient McJustice or Principled ADR? A Review of Plea Bargaining in Canada" (2005) 50 *Crim L.Q.* 14 at 15, quotes a figure of 80% in the Ontario context, while Justice Gilles Renaud, in the introduction to his text *Speaking to Sentence: A Practical Guide* (Toronto: Thompson Carswell, 2004) estimates that "over 95% of cases result in a guilty plea of some kind".

<sup>7</sup>Statistics Canada, table 252-0045 "Cases in adult criminal court, by province and territory (British Columbia 2006/2007)" (Ottawa: Statistics Canada, 2009), online: Statistics Canada <<http://www40.statcan.gc.ca/l01/cst01/legal19k-eng.htm>>. "Total cases" comprises both *Criminal Code* offences (approximately 87% of this total) as well as other federal statute-based prosecutions, such as those conducted under the auspices of the *Controlled Drugs and Substances Act*, S.C. 1996 c. 19.

in the province every year, which encompass approximately 92,000 accused persons and 165,000 criminal charges.<sup>8</sup> The Provincial Court of B.C. reports hearing an average of 100,000 adult criminal cases each year.<sup>9</sup> More specifically, a 2006 survey of provincial court judges in B.C. reported that judges individually conduct an average of 55 sentencing hearings each month.<sup>10</sup> These findings reflect commensurate burdens on Crown and defence counsel to ‘get through’ lengthy court lists.<sup>11</sup>

It would seem reasonable to conclude, from these statistics, that B.C.’s courtrooms can be very busy, time-pressured places, which afford little room for the comprehensive, communicative engagement of non-professional perspectives.<sup>12</sup> These pressures, of course, cannot be discounted as a principle reason why criminal courts are not more solicitous of the values and voices of lay participants.<sup>13</sup> In Chapter Four of this thesis, I empirically assess case volumes as a variable of the moral ordering that plea courts can be heard to practice. Some observers, however, have argued that other factors are equally if not more responsible for the justice system’s shortcomings in this regard. Two such critiques are outlined below.

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<sup>8</sup> B.C. Ministry of Attorney General, “Ensuring an Effective Criminal Justice Response to Violence Against Women” by Brian Rendell (Victoria: Ministry of Attorney General, 2009), online: International Centre for Criminal Law Reform and Criminal Justice Policy <<http://www.icclr.law.uB.C.ca/files/VAW/04%20Brian%20Rendell%20VAW%20presentation.pdf>>. These figures likely comprise youth as well as adult files.

<sup>9</sup> Provincial Court of British Columbia, *2008/2009 Annual Report* (Victoria: Office of the Chief Judge of the Provincial Court of British Columbia, 2009), online: Provincial Court of British Columbia <<http://www.provincialcourt.B.C.ca/downloads/pdf/annualreport2008-2009.pdf>> at 11.

<sup>10</sup> Justice Canada, *Victim Impact Statements at Sentencing: Judicial Experiences and Perspectives* by J.V. Roberts and Allen Edgar (Ottawa: Department of Justice Canada, 2006) at 1.

<sup>11</sup> It is important to acknowledge that there is much variation in the volume of caseloads, in terms of quantity, type, and context. Considering only absolute numbers, this variation can range from very high volume urban centres to circuit courts that visit small communities only a few times per year. See, for an illustration of this point, my empirical findings from four provincial courts in B.C., presented below in Chapter Four.

<sup>12</sup> See, for example, Provincial Court of British Columbia, *Report on Backlog in Vancouver Adult Criminal Court*, by the Main Street Criminal Procedure Committee (Victoria: Office of the Chief Judge of the Provincial Court of British Columbia, 2005), online: Provincial Court of British Columbia <<http://www.provincialcourt.B.C.ca/downloads/pdf/MainStreetCriminalProcedureCommitteeReportonBacklog.pdf>>.

<sup>13</sup> See Brian A. Grossman, “Conflict and Compromise in the Criminal Courts” (1968-1969) 11 *Crim. L.Q.* 292, at 298. See also Milton Heumann, “Back to the Future: The Centrality of Plea Bargaining in the Criminal Justice System” (2003) 18 *Can. J.L. & Soc.* 133, at 136, referencing George Fisher’s text *Plea Bargaining’s Triumph* (Stanford: Stanford University Press, 2003).

### 2.2.2 Feeley's Model of Pre-Sentence Procedural Sanctions

Malcolm Feeley's study of American plea courts, while conducted over thirty years ago, provides considerable insight into a problem that endures across jurisdictions.<sup>14</sup> He disputes the common contentions that heavy caseloads,<sup>15</sup> bureaucracy,<sup>16</sup> a lack of skilled personnel,<sup>17</sup> and/or pervasive plea bargaining<sup>18</sup> "add up to a complete account of what shapes the decision process".<sup>19</sup> As an alternative to the dichotomous 'Due Process'<sup>20</sup> and 'Plea Bargain'<sup>21</sup> models for explaining the brand of 'justice' that courts privilege, both of which focus on outcomes, Feeley posits that an analysis of the process itself, from arrest through to disposition, tell us more about how the criminal justice system punishes defendants. This is a model that accords greater determinative weight to the implicit, systemic burdens and coercions placed upon accused persons than the explicit judgments and sentences that officially describe the justice that courts mete out. Feeley does not suggest that normative assessments are not being made in criminal law processes, only that they cannot be easily discerned either through official rationales or in the "noisy exchanges and rushed judgments" that characterize most plea and sentencing proceedings.<sup>22</sup> He recognizes that

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<sup>14</sup> Malcolm Feeley, *The Process is the Punishment* (New York: Sage Foundation, 1979).

<sup>15</sup> *Ibid.* at 12. He suggests that courts actually "organize their work so that they must operate at a frantic pace".

<sup>16</sup> *Ibid.* at 12-13. Criminal courts, Feeley states, do not exhibit the central features of bureaucratic systems, being characterized by discretion, lacking strict hierarchies, and more "market-place [than]... assembly line".

<sup>17</sup> *Ibid.* at 14. He finds no evidence that more or 'better' professionals leads to improvements in regards to the considered engagement of lay participants.

<sup>18</sup> *Ibid.* at 12-14. The adversary system, Feeley suggests, has never been fully operative, and people plead guilty for many reasons, including as a result of 'losing' legal gambits in the pre-trial process.

<sup>19</sup> *Ibid.* at 12.

<sup>20</sup> *Ibid.* at 26-7. This model privileges procedural protections, and assumes a 'win/loss' mentality focused primarily on formal end results. But Feeley suggests that in practice, strict results are not the overriding concern of either the prosecution or accused.

<sup>21</sup> *Ibid.* at 28. This is a narrower variant of Packer's Crime Control model. Feeley acknowledges that plea bargaining benefits both parties with certainty, efficiency, and cost-reductions, but, as mentioned above, questions whether it provides the best account of a court system's normative ordering.

<sup>22</sup> *Ibid.* at 8.

law is, above all, a normative ordering. It gives expression to deeply felt sentiments within a society. Courts are staffed with representatives of this society, and what they do is in part a function of their own sense of justice.<sup>23</sup>

He suggests, however, that

[t]o the extent that ...'by-product' costs of the pretrial process loom large in the minds of the accused, courts are not and cannot be what they claim they are, for these costs shift the locus of sanctioning away from the formal stages of adjudication and sentencing onto the process itself.<sup>24</sup>

Prison sentences are dwarfed by pre-trial detention, fines by the costs of mounting a defence or lost wages, and substantive crimes by an accumulation of charges for breaching bail conditions or missing court.<sup>25</sup> In this unfocused, uncertain environment, decisions about what a particular defendant deserves are made in the colloquial barter between prosecutors and defence lawyers. These interlocutors assess a spectrum of factors (some so complex and subtle as to be invisible even to the ones employing them<sup>26</sup>) to arrive at a case's 'worth'. This bartering, Feeley suggests, encompasses multiple conceptions of substantive justice: the adjudication of the act itself, the settlement of disputes, and a consideration of the actor, which tempers abstract principles with an eye to how they impact on real persons and situations.<sup>27</sup> Further, since the "theoretical exposure" (i.e. maximum sentence) of most crimes is much harsher than what a defendant is realistically facing, defendants are easily convinced that their pleas represent 'good deals'. This affords defendants a sense of partial victory, and their representatives a chance to show their usefulness.<sup>28</sup>

All of the factors weighed in such informal bartering processes are, of course, amenable to being aired in the formal, public forum of sentencing courts. The normative force and even relevance of this official apparatus, however, is exhausted by the explicit and

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<sup>23</sup> *Ibid.* at 15.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.* at 30.

<sup>26</sup> *Ibid.* at 124-5.

<sup>27</sup> *Ibid.* at 22-4. This 'equitable' assessment is reflected in the high number of stayed or withdrawn charges, especially in cases where it's accepted that the appropriate penalty has already been paid. See *ibid.* at 274.

<sup>28</sup> *Ibid.* at 190-192.

implicit sanctions and trade-offs already made in the pre-trial process.<sup>29</sup> Feeley contends that this happens as a function both of the instrumental pressures borne by defendants, and the influence of professionals who render proceedings both technical and routine. It also occurs irrespective of caseload pressures. As he found in a comparative assessment of high-volume and low-volume courts, the basic tasks of both courts “are handled in the same rapid and perfunctory manner”.<sup>30</sup> It is not volume, therefore, that erodes the criminal law’s moral authority and expressive aspirations, but the ‘law-less’ informal sanctions and unsupervised discretion that Feeley observed in both contexts. Although, he asserts, appropriate results may well be reached in individual cases, the justice system itself is indelibly weakened by the potency of pre-trial coercions.<sup>31</sup>

Feeley’s empirical critique seriously challenges Chapter One’s argument that morally engaged discernment and communication is a core aspect of courts’ and participants’ responsibilities at the plea and sentencing stage of criminal proceedings. As he demonstrates, factors such as pre-trial detention and procedural delays allow informal means of ordering to trump a justice system’s avowed mechanisms, expectations, and even authority.

In addition to these ‘unintentional’ distortions, more pointed critiques have been advanced to explain the criminal justice system’s failure to adequately function as a site for the communicative moral ordering of wrongs and wrongdoers. These include analyses that hold the very culture of the law and legal professionals responsible for impeding and devaluing the (moral) perspectives of lay participants. The following section summarizes this general argument.

### **2.2.3 The Contorting Cultures of Courts**

The influence of lawyers in producing efficient, disciplined guilty pleas has been a subject of critique and discussion for decades. Abraham Blumberg famously assailed

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<sup>29</sup> *Ibid.* at 275.

<sup>30</sup> *Ibid.* at 260.

<sup>31</sup> *Ibid.* at 289.

defence counsel for contributing to the “confidence game” he observed playing out in an American jurisdiction in the 1960s. Guilty pleas, he contended, were engineered by lawyers who sacrificed “ideological and professional commitments” to clients in favour of maintaining self-interested relationships with other actors in the institutional structure.<sup>32</sup> This, perhaps the most far-reaching condemnation of defence counsel as “double agent[s]” in an environment of coerced resolutions and hollow due process protections,<sup>33</sup> was reassessed by Debra Emmelman in her study of public defenders in California.<sup>34</sup> The lawyers she observed, unlike those under Blumberg’s gaze, were sincerely motivated to advocate on behalf of their indigent clients. Instead, they were constrained, in the process of advising and representing those pleading guilty, by a cultural environment that frowned, not merely on crime, but on clients’ assumptions, impressions, worldviews, and interpretations.<sup>35</sup> This, Emmelman concluded, was the main reason why the lawyers in her study tended to prefer plea bargained outcomes and strict ‘information control’ during sentencing hearings, rather than allow their clients to freely speak. This approach was simply the best way to shepherd defendants through a hostile normative order that pejoratively assessed, not only their alleged criminal conduct, but their very character and worldview.<sup>36</sup> The clear implication, from both Blumberg and Emmelman’s studies, is that there is little meaningful chance for defendants to effectively address the system’s interpretations of who they were and what they had done. Defendants in these settings are thus unable either to acknowledge, resist, or offer an alternative understanding of the moral valuations that implicitly and explicitly occurred in course of their cases.

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<sup>32</sup> Abraham S. Blumberg, “The Practice of Law as a Confidence Game” (1967) 1:2 Law & Soc. Rev. 15 at 19.

<sup>33</sup> *Ibid.* at 31. See also Andrew E. Taslitz, “The guilty plea state” (2008) 23:3 Criminal Justice 4, for a less incendiary updating of this argument.

<sup>34</sup> Debra S. Emmelman, *Justice for the Poor: A study of criminal defense work* (Burlington VT: Ashgate Publishing, 2003).

<sup>35</sup> *Ibid.* at 37.

<sup>36</sup> *Ibid.* at 103.

These concerns can perhaps be more deeply understood as supporting sociological interpretations on the fraught nature of “subaltern” speech.<sup>37</sup> That is, plea and sentencing hearings may provide the opportunity – even expectation – for lay participants to ‘speak’, but, beyond and within the instrumental obstructions already noted, the voices that these (constructed) actors are accorded may not (and perhaps cannot) be their own. Emmelman observed this operating in relation to indigent defendants in California,<sup>38</sup> and other studies have considered how the mainstream criminal justice system’s cultural framework compounds the “disordering” of Aboriginal individuals and communities.<sup>39</sup> Such studies, which focus on the distorting effects that unequal power arrangements have upon the agency and identities of disempowered subjects, help to explain the silence that many lay participants exhibit in the plea and sentencing process. These critiques also question the dominant law’s assumption, set out in the context of Canadian sentencing law in Chapter One, that its processes and structures are able to equitably offer opportunities for meaningful participation to all who are bound by the law’s authority. As mentioned, Chapters Three and Four will examine some of the practical applications of this assumption, especially in regards to the audibility of Aboriginal perspectives in sentencing hearings.

#### **2.2.4 From General Critiques to Specific Enquiries: Focusing on Guilty Pleas**

Explicitly or implicitly, the perspectives outlined above recognize that guilty plea-based justice is the norm in the contexts they consider. As §2.2.1 briefly showed, this reality remains the norm in contemporary British Columbia, as a representative Canadian

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<sup>37</sup> See Gyatri Chakravorty Spivak, “Can the Subaltern Speak?” in *Marxism and the Interpretation of Culture*, Cary Nelson and Lawrence Grossberg, eds. (Urbana, IL: University of Illinois Press, 1988) at 271. By using the term “subaltern”, I do not mean to suggest that this concept, which Spivak and other scholars have defined in very specific sociological contexts, encompasses all lay participants in criminal justice proceedings. I refer to it here because, in my experience and estimation, it captures something important about many of those whose histories, circumstances, and very bodies have been cast into the law’s gaze. Presumed, by this structure, to know certain things about its operation and purpose, and defined by it in a variety of ways, disempowered constituents are arguably unable to dispute or even respond to these characterizations, at least within the formal avenues the law affords.

<sup>38</sup> Emmelman, *supra* note 34.

<sup>39</sup> See e.g., Hadley Friedland, “Different Stories: Aboriginal People, Order, and the Failure of the Criminal Justice System” (2009) 72 Sask L. Rev. 105.



jurisdiction. As the empirical studies in the following two chapters will illustrate, there is a diversity of ways to organize and practice 'guilty plea justice', which manifest commensurately diverse patterns of participant engagement with the moral concerns at the heart of criminal law. The formal nature and import of the plea itself, however, is more or less the same across all of these contexts, and it forms the linchpin of this chapter's enquiries. While practically ubiquitous, the guilty plea has not itself attracted a great deal of scholarly focus. Oonagh Fitzgerald's 1990 analysis of the plea's status and use in Canada stands as the leading academic text upon the subject.<sup>40</sup> Her work continues to present a challenging critique of how Canada's law and justice systems have misused a most important mechanism. Fitzgerald argues that, despite what the law may officially expect, overt and covert coercions embedded in the court process undermine the reliability of the guilty plea as a 'free' admission of guilt. Indeed, she states, "few guilty pleas could be described as entirely voluntary, given that nearly every guilty plea must be influenced to some extent by the hope of gaining a sentencing advantage".<sup>41</sup> This situation, for Fitzgerald, is to some extent unavoidable in a system that holds out the expectation of mitigated punishment in exchange for acceptances of responsibility.<sup>42</sup> For her, however, the plea's professional mediators – most pointedly defence counsel and judges – bear both the ability and onus to minimize the dangers this situation creates. Her arguments are considered at various points in several of the following sections, and, together with the more general criticisms introduced above, are reassessed in this chapter's conclusion. In the rest of this chapter, I locate the guilty plea as a key focal point for understanding how the criminal law's concern for moral ordering is, in practice, compromised or attenuated.

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<sup>40</sup> Oonagh E. Fitzgerald, *The Guilty Plea and Summary Justice* (Toronto: Carswell, 1990).

<sup>41</sup> *Ibid.* at 138.

<sup>42</sup> I discuss the status and rationales for this 'plea discount' below, in §2.3.

## 2.3 The Nature and Import of Guilty Pleas in Canadian Law

In this section, I examine the guilty plea as legal mechanism, including how a plea's legal use and meaning influences its ability to inform a court's work in terms of moral ordering.

### 2.3.1 The Plea's Essential Elements

In Canada, a guilty plea does significant work in procedurally restructuring the entire justice process from that point forward. It formally establishes an acknowledgment of the "essential legal ingredients" of a given offence.<sup>43</sup> It relieves the Crown of the responsibility of proving guilt beyond a reasonable doubt, terminates the presumption of innocence, transforms the conveyor's legal identity from accused to offender, "abandons [their] non-compellability as a witness and... right to remain silent and surrenders [the] right to offer full answer and defence to a charge".<sup>44</sup> In performing these functions, a guilty plea establishes the legal and factual basis for the next, and last, stage in court-based criminal proceedings, the sentencing hearing. Its instrumental status and effect, therefore, is reasonably clear. This prescribed aspect of its character operates as the non-negotiable, unambiguous baseline of what the guilty plea is and does.

In this respect, a plea of guilt might be taken to lead to a substantial amount of clarity in sentencing proceedings. While it arguably does so in terms of factual and legal essentials, however, there is far less certainty around the question of whether a guilty plea in Canada conveys an acceptance of personal responsibility for a crime, an acknowledgment that it was wrong, or an expression of remorse.<sup>45</sup> To the degree that a court, victim, offender, or community considers it important to pronounce upon or scrutinize these qualities, they must look beyond the confines of this single utterance. Although the law constructs guilt to encompass a core of moral culpability, it is

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<sup>43</sup> *R. v. Gardiner*, [1982] 368 S.C.R. 2 at 414.

<sup>44</sup> *Adgey v. R.* (1973) SCC, 177 at 183, per Laskin J.

<sup>45</sup> See Richard Weisman, "Being and Doing: the judicial use of remorse to construct character and community" (2009) 18 Soc. & Legal Studies 47. I discuss Weisman's work in greater detail below, at §2.6.2.

dangerous to give its official admission much weight, either positive or negative, without attending carefully to the practical context in which a plea is given. Yet even when analyzed in this light, a plea conceals as much as it clarifies.

### **2.3.2 The Plea's Uncertain Meaning**

The word “guilty” itself carries weight that a purely formal or legalistic framework cannot uphold.<sup>46</sup> Judges, victims, and indeed all within the community of interest that a given crime creates, may reasonably seek to perceive, within or through the plea, the redeeming seeds of remorse, accountability, and willingness to change. There exists a gap, however, between a legal order that defines and determines its expectations and impacts through a formalistic, procedural lens, and one that seeks to impart normative coherence upon its subject matter via more contextually rich interpretations. This section explores the depth and implications of this gap.

Although the act of pleading guilty to an offence often encompasses – and disguises – a complex skein of instrumental and normative impulses, in Canada it is the only alternative to proceeding to trial. Unlike in many parts of the United States,<sup>47</sup> Canadian law permits no middle ground for accused persons between their acceptance of all or none of the ‘essential’ elements of a crime. Depending on one’s perspective, this rule either prevents two-faced, selective admissions of responsibility, or unduly restricts an accused person’s ability to resolve charges with maximum efficiency and minimum capitulation.

A greater variety of available pleas might be expected to contribute to more communicative precision and intelligibility, thereby giving ground to more informed and

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<sup>46</sup> See George Fletcher, *The Grammar of Criminal Law*, vol. 1 (New York: Oxford University Press, 2007) at 299-300.

<sup>47</sup> See Stephano Bibas, “Harmonizing Substantive Criminal Law Values and Criminal Procedure: the case of Alford and Nolo Contendere pleas” (2003) 88 Cornell L.R. 1361. In many states, albeit with prosecutorial and/or judicial consent, accused persons can enter pleas that surrender legal innocence but do not acknowledge factual, moral, or extrinsic legal responsibility. Alford pleas function to allow a court to convict a defendant, in instances where there is evidence of legal guilt but the defendant is not willing to admit responsibility. It is similar to (really a subset of) a no contest plea, but used in more serious cases where this plea is not available. I focus on the more generic and widely employed no contest plea in this section.

focused sentencing hearings. There is no empirical evidence, however, that they have supported this type of normative calibration. Indeed, the use of so-called “Alford” and “no contest” pleas in the US has drawn criticism for draining the justice process of moral substance. Stephanos Bibas, for example, contends that these pleas “allow guilty defendants to avoid accepting responsibility for their wrongs”, thus undermining the law’s core moral messages and impeding the healing of both offenders and victims.<sup>48</sup> Bibas suggests that no-contest pleas are often made in the name of procedural efficiency and to secure strategic advantages such as reduced punishments and the maintenance of defences for subsequent civil trials. He also argues that they “risk convicting innocent defendants and [creating] the perception that innocent defendants are being convicted”.<sup>49</sup>

Bibas privileges and defends the justice system’s functions of persuasion (i.e. encouraging accused persons to voluntarily accept their guilt) and prosecution (i.e. seeing cases through a contested trial, when guilt is denied). These twin functions must be vigorously maintained, he argues, if the ever-tenuous balance between ‘justice’ and ‘system’ is not to list dangerously from the former to the latter. Courts must not shy away from trials, he says; they “serve not only to acquit innocent defendants, but also as morality plays to teach guilty defendants and vindicate their victims and the community’s moral norms”.<sup>50</sup> A robust endorsement of trials as a means of resolving guilt would also bolster the moral integrity of the system, Bibas argues, and thus lead to more meaningful, cathartic acknowledgments of responsibility. He reasons that “confessions in open court, even if induced by some external pressure, can begin to breach the dam of denial” that he sees as obstructing the therapeutic (if difficult) process that begins with the acceptance of having done wrong.<sup>51</sup>

Supporters of the no contest plea, by contrast (whom Bibas refers to as “proceduralists”) uphold its “liberal emphasis on freedom of contract, autonomy, and

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<sup>48</sup> *Ibid.* at 1363.

<sup>49</sup> *Ibid.* at 1366.

<sup>50</sup> *Ibid.* at 1361.

<sup>51</sup> *Ibid.* at 1397.

informed choice”.<sup>52</sup> As this argument goes, the law shouldn’t force people into the cognitive dissonance caused by having to plead guilty (for reasons of strategy or efficiency) while maintaining innocence. No contest pleas are thus a reasonable compromise, given that the justice system has limited appetite and capacity either to prosecute a substantial number of charges, or to persuade defendants who are reluctant to accept the more personal aspects of responsibility (whether because they are innocent, defiant, or in denial). In this way, supporters of no contest pleas contend, the system reaps the benefits of streamlined outcomes in the vast majority of cases in which a trial is unnecessary, and defendants resolve their cases without incurring the unnecessary discomfort of admitting full (moral) guilt.<sup>53</sup>

The arguments that are put forward in defence of no contest pleas can be interpreted as explicitly or implicitly favouring a model of criminal justice that is much less concerned with moral ordering than with efficient legal resolutions. This is a subject of enduring, deep-seated debate in both Canada and the US. But as mentioned above, Canadian law has, thus far, not afforded accused persons the option of pleading no contest.

Moreover, Canadian law brooks no equivocation regarding the admission required by a plea of guilt. With an exactitude that Bibas would likely applaud, Canadian courts expect defendants to either accept ‘essential’ responsibility for their crimes,<sup>54</sup> or proceed to trial. Does this enforced choice of starkly opposed options, then, facilitate the moral integrity and engagement of the kind Bibas articulates?

In a sense, the above question is immune to numerical analysis, but both Canada and the US have high rates of ‘guilty plea’ resolution.<sup>55</sup> At first blush, this weakens the

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<sup>52</sup> *Ibid.* at 1373. Bibas cites Frank Easterbrook, “Criminal Procedure as a Market System” (1983) 12 J. Legal Stud. 289, as one of the leading proponents of this perspective.

<sup>53</sup> See, for an articulation of the market efficiency argument, Easterbrook, *ibid* at 320. For an expansion of the perspective that focuses on the avoidance of defendants’ shame and embarrassment, see Jonathan Kaden, “Comment: Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination”, (1998) 89 J. Crim. L. & Criminology 347.

<sup>54</sup> As discussed above, in §2.3.1, this comprises admission of the *actus reus* (“guilty act”) and *mens rea* (“guilty mind”) that together are necessary to establish criminal culpability.

<sup>55</sup> See, for the latest US figures, United States Courts Statistics Division, *Caseload Statistics 2009*, especially table D-4 “US District Courts – Criminal Defendants Disposed of, by Type of Disposition and Major Offense

suggestion that American defendants are employing their added options in a widespread way to hedge responsibility,<sup>56</sup> or that recalcitrant defendants proceed to trial in greater numbers when those pleas are unavailable. There is, of course, a diversity of factors and motivations impinging on the decision to plead. Some are intrinsic to the individual; senses of remorse, duty, or honesty, for example, are not dependent on the nature or choices of the system that calls them to account, although structural factors may influence whether and how these feelings manifest. Others are related to the offence – serious or subjectively indefinite charges (those that hinge on the interpretation of legal terms such as criminal negligence, for example) are less likely to result in guilty pleas, perhaps because people are unsure if they are guilty or have little to lose by fighting it out in court.<sup>57</sup> Similarly, gaps or inadequacies at the investigative stage will likely prompt fewer guilty pleas (and more dropped charges) than ironclad cases. Other factors, however, are particular to the institutional context. It seems that the availability and impact of ‘mid-way’ pleas has been analyzed, and either supported or assailed on both sides of the Canada-US border,<sup>58</sup> primarily on the basis of ideological assignments of criminal law’s purpose and capabilities. The argument over no contest pleas thus reveals fundamental disagreements as to the criminal law’s appropriate and possible normative orientation. Based on Bibas’s logic, Canada should be somewhat further ahead of the US in terms of how the plea may be used to buttresses or inform substantive moral values. As I explore further below, however, this is far from clearly so. While an in-depth comparative analysis is beyond the scope of this thesis, I proceed to suggest that, even though Canadian law may, by its superficial construction, *appear* to privilege moral ordering over procedural efficiency,

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(excluding Transfers)”, online: Administrative Office of the US Courts  
<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/D04Mar09.pdf>.

<sup>56</sup> Nor, however, are these pleas made in a negligible proportion of cases. No statistics are apparently kept as to the incidence of no contest and Alford pleas in the US, but Bibas’ informal survey located approximately 18,500 reported no contest and 2500 Alford pleas, the majority of which are made regarding sexual and violent offences. Bibas, *supra* note 47 at 1376.

<sup>57</sup> See Avishalom Tor, Oren Gazal-Ayal, and Stephen M. Garcia, “Fairness and the Willingness to Accept Plea Bargain Offers” (2010) 7 J. Empirical Legal Stud. 97.

<sup>58</sup> See Frederick Forsyth, “A plea for Nolo Contendere in the Canadian Criminal Justice System” (1997-1998) 40 Crim. L.Q. 243.

guilty pleas have come to be used in a way that obstructs the former purpose in favour of the latter.

### **2.3.3 The Plea's Cross-Purposes**

In keeping with Canada's express commitment to certainty in convictions, a plea of guilt is not legally valid until accepted by the court. It will be set aside if a judge determines it was not made voluntarily or is not an unequivocal acceptance of the essential elements of the charge. A plea of guilty is also liable to be refused or vacated if it is established that the accused does not adequately understand its nature and consequences, including that any sentencing agreement between Crown and defence is not binding on the court.<sup>59</sup> Yet despite this exacting standard, guilty pleas are the predominant means of resolving cases. I do not accept, in this thesis, that this widespread and enduring situation is substantially due to the intrinsic willingness of accused persons to submit themselves to judgment. All other factors being equal, even when defendants do feel remorse and responsibility, the countervailing impulses of fear and embarrassment would arguably repress many voluntary admissions of guilt. But although not grounded in (or, indeed, countenanced by) Canada's textual legal framework of statutes and jurisprudence, the law, as Fitzgerald has argued, has evolved an implicit structure of pressures and enticements that exerts powerful influence on accused persons to plead guilty.

While for some the decision to plead guilty may be substantially driven by remorse, and for others the same decision may be motivated by entirely instrumental reasons, a veil is cast over this spectrum of normative rationales by the plea's function as a means of achieving systemic efficiency. Without concerted effort on the part of parties and/or process, the presence and range of moral orientations that are enveloped in guilty pleas tends to remain muddled and uncertain. It can be argued, of course, that this uncertainty has its own instrumental purpose; the justice system simultaneously benefits from the procedural efficiencies that guilty pleas produce, while also mining

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<sup>59</sup> *Criminal Code of Canada*, at s. 606(1.1). See also Don Stuart, Ron Delisle, and Tim Quigley, eds., *Learning Canadian Criminal Procedure*, 9<sup>th</sup> ed. (Toronto: Thompson Carswell, 2008) at 715.

normative legitimacy from pleas' ostensible status as admissions of moral responsibility. As I develop below, while this perspective does have considerable persuasive force, there is also evidence for maintaining less cynical expectations of the guilty plea's role in our overall system of justice. This role, and any attempts to reconcile its cross-purposes outlined above, cannot be adequately understood apart from a consideration of the guilty plea's most common means of formation. Accordingly, the next section explores the negotiation or bargaining stage of criminal proceedings.

## **2.4 The Resilience of Plea Bargaining in Canadian Justice**

In a system of justice that is founded on the presumption of innocence and proof beyond a reasonable doubt, but which must afford these principles to legally represented defendants,<sup>60</sup> who appear before judges willing to hold the prosecuting state accountable for its promises,<sup>61</sup> trials must *necessarily* be rare. Guilty pleas, without coincidence, are the most common procedural means by which criminal prosecutions are disposed. There is also anecdotal evidence that a negotiation practice (known in official parlance as 'resolution discussions', and more colloquially as 'plea bargaining') is responsible for assuring both the quantum and the substantive content of "guilty plea justice" that has become so widespread in Canada and many other jurisdictions.<sup>62</sup>

Plea bargaining in Canada is a somewhat ambiguous, poorly-bordered concept, which encompasses everything from informal hallway conversations between counsel to pre-arranged meetings mediated by a judge. Indeed, the term itself has proven

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<sup>60</sup> Due to cutbacks in legal aid programs in many Canadian jurisdictions, legal representation is less comprehensively available than it has been in recent decades. Many indigent defendants charged with minor crimes must represent themselves if they wish to proceed to trial. In my experience as a practitioner, however, this has not resulted in substantially more contested trials, perhaps due to the fact that attractive resolution options are still being offered by prosecutors, defendants are intimidated by the prospect of self-representation, and/or duty counsel are made available to assist people in pleading guilty.

<sup>61</sup> See John Langebein, *The Origins of the Adversary Criminal Trial* (New York: Oxford University Press, 2003) at 26, who found that judges in pre-modern England "sat at the King's pleasure" and thus heavily favoured the prosecution. By contrast, contemporary Canadian judges are independent and sworn to uphold the fairness of the adversarial system.

<sup>62</sup> Di Luca, *supra* note 6 at 15.



controversial, with both proponents and detractors focusing on insinuations of commodified, bartered justice to either condemn the practice or seek to rebrand it under the more innocuous (but no less ambiguous) banner of 'resolution discussions'.<sup>63</sup> Irrespective of the appellation (I use them interchangeably here) or their respective insinuations, it is clear that some manner of pre-plea negotiation between justice professionals is an entrenched feature of Canadian criminal justice, as it arguably long has been.<sup>64</sup> There is a suggestion, moreover, that despite official administrative attempts to recuperate and recast the practice as a "mandatory and desirable component of our modern justice system",

plea bargaining remains at its most basic a process whereby an accused person "bargains" with the prosecution in the hope of receiving the most favourable treatment possible. Concessions by accused, most notably concessions of guilt, are the currency with which the favourable treatment is purchased.<sup>65</sup>

It is tempting to deduce from this view, which is not seriously refuted in the literature, that plea bargained cases – namely those in which the charges, facts and/or sentencing recommendations have been agreed upon beforehand by counsel – drain the formal sentencing hearing of moral relevance, resonance, and authority. Indeed, this is among the conclusions arrived at by Feeley in his study of American plea court justice. Even presuming, as I do, that allegations of criminal conduct provoke normative responses (be they shared, contested, or entirely divergent) among those whom they touch, such an instrumentalist interpretation of plea bargaining suggests that the practice substantially prevents in-court proceedings from meaningfully engaging with these perspectives. This is true, I argue in this section, to the extent that Crown Counsel are motivated to 'resolve' cases solely according to the instrumental objectives of efficiency and certainty, defendants accept or reject offers on the basis of a similarly instrumental, cost/benefit analysis of expected outcomes, and victims wish or are given little or no say

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<sup>63</sup> *Ibid.* at 16.

<sup>64</sup> See Milton Heumann, *supra* note 13 at 135, discussing George Fisher's historical findings.

<sup>65</sup> *Ibid.* at 18.

in negotiations. As Fitzgerald baldly states, “[lawyers’] motives for agreeing on the guilty plea may be quite inimical to concerns of justice”.<sup>66</sup>

An instrumentalist reading of the practice also implies that plea bargaining processes can forestall or control judicial discretion over the sentences that are ultimately imposed. Each plank of this interpretation is deeply problematic to an understanding of criminal justice that privileges the discernment and expression of calibrated moral values. But despite the persuasive arguments and considerable anecdotal evidence that plea bargaining practices have such an overwhelming effect on the manufacture, meaning, and discharge of guilty pleas, other voices suggest that the normative purpose of criminal law is not entirely displaced by the pressures, temptations –and enduring prevalence – of negotiated settlements. Below, I explore two general sets of perspectives, which speak to both sides of this debate.

#### **2.4.1 Professional Perspectives**

One pillar of support for plea bargaining comes from the prosecution. Crown Counsel’s discretion to set the terms and tone of resolution discussions, although significantly moderated by extrinsic factors,<sup>67</sup> channels a stream of normative content. Resolution discussions themselves, of course, defy direct observation or analysis due to their private and individual nature, but there are signals from the prosecutorial perspective that plea bargaining is *intended*, at least, to focus a court’s concern for moral ordering, not confound it.

The B.C. Prosecution Service has issued extensive guidelines for resolution discussions,<sup>68</sup> which are based on the principle that their acknowledged efficacy in streamlining cases ought only to bolster the proper functioning of the justice system. The guidelines state:

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<sup>66</sup> *Supra* note 40 at 215.

<sup>67</sup> Considerations impinging on the Crown’s discretion at this stage include a particular office’s caseload and the quality of investigations, as well as the informing backdrop of legislation, policy, and (real or apprehended) public opinion.

<sup>68</sup> B.C. Ministry of Attorney General, *Crown Counsel Policy Manual*, “RES-1: Resolution Discussions and Stays of Proceedings”, October 2, 2009, online: B.C. Prosecution Service <[http://www.ag.gov.B.C.ca/prosecution-service/policy-man/pdf/RES1-ResolutionDiscns\\_SOPs-2Oct2009.pdf](http://www.ag.gov.B.C.ca/prosecution-service/policy-man/pdf/RES1-ResolutionDiscns_SOPs-2Oct2009.pdf)>.

Crown Counsel must act in the public interest at all times to ensure that the integrity of the criminal justice system is protected and nothing is done to bring the administration of justice into disrepute.<sup>69</sup>

Much about these concepts, of course, is open to interpretation. The clear implication, however, is that plea negotiations are not merely about achieving certainty and efficiency. Mary Dickie, a Crown Attorney in Ontario who has written about the Crown's role in this regard,<sup>70</sup> highlights the flexibility that resolution discussions can promote, in terms of time but also "flexibility in approach, such as allowing victims to be present for parts of the meeting... where there is a need for an apology that is appropriate for the case as part of the resolution".<sup>71</sup> As is reflected in B.C.'s guidelines, Dickie also stresses that proposed resolutions cannot infringe the fundamental sentencing principle of proportionality as to the gravity of the offence and degree of responsibility of the offender.<sup>72</sup>

Both the Ontario and B.C. guidelines stipulate that resolution discussions must only be conducted in a context where a defendant accepts "legal and factual guilt" to a charge.<sup>73</sup> Dickie acknowledges that there may be occasions where an accused maintains innocence but still wishes to negotiate a plea. This is precisely the situation accommodated in US courts that accept Alford pleas, but Canadian courts – and prosecutors – are less sanguine about the dissonance this seems to involve. Dickie advises that, in these cases, "Crown Counsel... should be reluctant to enter into further plea discussions beyond initial screening... [which] should be the most reasonable position the Crown has to offer at this stage".<sup>74</sup> She concludes, in regards to the practice in general, that

[p]roperly conducted resolution discussions are not "plea bargaining" at all, but

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<sup>69</sup> *Ibid.* at 2.

<sup>70</sup> Mary Dickie, "Through the Looking Glass – Ethical Responsibilities of the Crown in Resolution Discussions in Ontario" (2005) 50 *Crim. L.Q.* 128. The relevant policy framework is substantially the same in Ontario and British Columbia.

<sup>71</sup> *Ibid.* at 136.

<sup>72</sup> *Ibid.* at 139.

<sup>73</sup> *Supra* note 68 at 1. The Ontario directives state that the Crown must not accept a guilty plea "knowing that the accused is innocent". Dickie, *ibid.* at 142.

<sup>74</sup> Dickie, *supra* note 70 at 142.

merely an extension of the screening process in an effort to find the correct result for a matter before the court. They allow Crown Counsel, in co-operation with defence counsel and the court, to develop innovative approaches to trial proceedings, dispositions and sentences that can satisfy the needs of the accused, victims and society.<sup>75</sup>

Dickie's view mirrors the official prosecutorial rationale for pre-plea discussions as facilitative of 'just' resolutions. Through this lens, the practice can provide a valuable layer of substantive, as well as procedural, flexibility to criminal proceedings, without supplanting or obstructing the court's ultimate authority over these planes.

Even this optimistic account of how negotiated pleas can streamline and focus courts' operation recognizes the substantial implications that the practice has in regards to which justice agent holds effective normative control over criminal proceedings. Crown Counsel can decide who to prosecute, to add or drop charges, to proceed by indictment or summary conviction, to support or oppose bail applications, and to arrange for hearings before a particular judge, as well as make the usual submissions on sentence. They have the power, in sum, to deeply shape the kind of case that a sentencing judge ultimately considers. This is why the principled use and interpretation of prosecutorial policies is so crucial to how the criminal law's concern for moral ordering is channelled through institutional structures.

While the 'appropriate' use of plea bargaining is thus primarily dependent on the engagement and oversight of Crown Counsel, the maintenance of this purpose requires the support of other justice system participants. Commentators from the defence perspective have tended to take a somewhat more cynical, instrumentalist view of why negotiated pleas remain so important to the criminal justice system's functioning. Ontario lawyer Joseph Di Luca agrees that efficiency and certainty are certainly basic motivators for defendants' entering into resolution discussions, but suggests that this does not often happen in a free and flexible environment.<sup>76</sup> In Di Luca's view, a context of widespread pre-trial detention, overcharging, and the gap (whether actual or

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<sup>75</sup> *Ibid.* at 147.

<sup>76</sup> Joseph Di Luca, "Expedient McJustice or Principled ADR? A Review of Plea Bargaining in Canada", *supra* note 6.

perceived) between the punishments that defendants expect to receive after a trial versus a guilty plea, create coercive conditions that bury criminal law's substantive values and procedural promises. In extreme cases, he suggests, these forces can even push those who are innocent to plead guilty simply to end their ordeals.<sup>77</sup> Although these types of wrongful convictions are perhaps least illuminated of the justice system's miscarriages, due to the fact that guilty plea-based outcomes are rarely appealed, the findings of the recent Inquiry into Pediatric Forensic Pathology in Ontario (the "Goudge Inquiry")<sup>78</sup>, as well as the Ontario Court of Appeal decision in *R v. Hanemaayer*<sup>79</sup> illustrate that such miscarriages do occur. In minor or 'routine' cases, this problem may be even more acute, given that, as Feeley observed, the costs of proceeding through the system can outstrip the official sanction of a negotiated or plea-based outcome.

In a companion article to Di Luca's, Greg Lafontaine and Vincenzo Rondinelli, like him defence lawyers in Toronto, perceive plea bargaining through an even more instrumentalist lens.<sup>80</sup> To these authors, the justice system functions as no more than a marketplace based on principles of supply and demand, with guilty pleas being its main commodity. This trend, they argue, has solidified in the age of the *Charter*:

[a]s a collateral effect of the liberalization or constitutionalization of Canadian criminal law and criminal procedure, there is now a very large number of criminal defendants who have been vested with the ability to trade the opportunity to litigate a constitutional infringement or a procedural misstep for the certainty of lenient treatment on a guilty plea.<sup>81</sup>

Even apart from cases where legitimate trial issues are 'traded' for attractive plea resolutions, Lafontaine and Rondinelli note that trials are financially out of reach for many defendants (a problem compounded by cuts to legal aid programs) and guilty

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<sup>77</sup> *Ibid.* at 37-38.

<sup>78</sup> Inquiry into Pediatric Forensic Pathology in Ontario, the Honourable Stephen T. Goudge, Commissioner (Toronto: Ontario Ministry of Attorney General, 2008), online: Attorney General for Ontario <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html>>. In nine of the fourteen cases reviewed by the Inquiry in which incorrect pathologist conclusions resulted in wrongful convictions, the accused had pleaded guilty.

<sup>79</sup> 2008 ONCA 580 (Ont. C.A.).

<sup>80</sup> Greg Lafontaine and Vincenzo Rondinelli, "Plea Bargaining and the Modern Criminal Defence Lawyer: Negotiating Guilt and the Economics of 21<sup>st</sup> Century Criminal Justice" (2005) 50 *Crim L.Q.* 108.

<sup>81</sup> *Ibid.* at 111-2.

pleas are the path of least resistance through a slow and circuitous system that is not, ultimately, about substantive ‘truth’ or moral reckoning at all.<sup>82</sup> They criticize the rhetoric of accountability, particularly for the majority of charges dealt with by provincial courts:

[t]he acknowledgment of criminal guilt is an unnecessary impediment to the effective resolution of a significant number of lower end criminal charges... a mechanism for resolution that did not require an acknowledgment of criminal guilt could result in the diversion of a meaningful number of cases out of the trial courts.<sup>83</sup>

They suggest that the adoption of no contest pleas in Canada may accomplish this goal, as well as creative solutions arrived at by counsel “willing to attempt to fashion novel resolutions [such as peace bonds, voluntary donations, community service, and/or letters of apology] that leave all concerned in a particular case with the sense that justice has been served”.<sup>84</sup> In this respect, Lafontaine and Rondinelli support Dickie’s flexibility-based rationale for plea bargaining, although only to the extent that cumbersome and costly court processes can be circumvented to secure “excellent result[s]” for defendants.<sup>85</sup>

There remains a legitimate question as to whether the maintenance of the proportionality standard for sentencing can be reconciled with the implicit, but widely acknowledged ‘discount’ that plea bargaining depends upon. Observers and practitioners speaking from a range of perspectives, and citing a variety of rationales, seem in agreement that guilty pleas do generally result in mitigated punishment.<sup>86</sup> Both Di Luca and Lafontaine and Rondinelli deal directly with how judges persist in citing remorse as the presumed reason behind a defendant’s guilty plea, and thus as a court’s rationale for imposing a less punitive sentence than the offence would otherwise have

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<sup>82</sup> *Ibid.* at 112.

<sup>83</sup> *Ibid.* at 122.

<sup>84</sup> *Ibid.* at 123.

<sup>85</sup> *Ibid.* at 120.

<sup>86</sup> The mitigation that a guilty plea accrues has been widely acknowledged in Canadian jurisprudence, including by the Supreme Court of Canada in *R. v. Gardiner*, *supra* note 43. As I discuss below, a number of reasons have been put forward for the maintenance of this discount, including the insignia of remorse that a guilty plea may arguably provide, the time and expense that a guilty plea saves the justice system, and the trouble or distress avoided for potential witnesses who do not have to testify.

merited. This, they allege, is no more than a hollow attempt to maintain the illusion that guilty pleas are necessarily acknowledgments of moral culpability. While some defendants may indeed experience and seek to express this quality, these defence lawyers argue that the entrenchment of plea bargaining, especially in a mercantile and/or coercive context, renders the connection between guilt and remorse suspect and unnecessary. The plea discount must be maintained, Lafontaine and Rondinelli exhort, but solely for the ‘realistic’, instrumental reason of

a desire to conserve resources...[r]etaining the remorse mantra as a routine component of every sentencing submission after a guilty plea can only breed cynicism in those within the system and in the public.<sup>87</sup>

While for Lafontaine and Rondinelli, “[r]emorse no longer has, as a matter of substance, any real value at all”,<sup>88</sup> Di Luca acknowledges that it remains an important mitigating factor, but one that cannot be discerned by way of the plea itself. To do so, he suggests, is distorting and unfair:

[t]he person who pleads guilty may have no remorse whatsoever and yet may reap the benefit of the implicit show of remorse garnered by the guilty plea simpliciter. While a guilty plea may be used as an indicia of remorse, it is not necessarily proof of remorse in and of itself.<sup>89</sup>

Other observers, as will be discussed below, also underscore the impropriety of a ‘necessary and sufficient’ connection between the communication of a guilty plea and the presence or expression of remorse. To the extent that this (or, indeed, any) normative orientation on the part of a defendant matters at all to the sentencing process and sanction, it seems clear that it must be discerned by further or other means. Below, I look more closely at whether (as Dickie implies) the bargaining process is amenable as a vehicle for or facilitator of the articulation of lay participants’ moral perspectives. While this question has considerable relevance for victims as well as defendants, my focus, in the section below and in this thesis generally, is limited to accused persons’ engagement with moral ordering in plea court processes.

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<sup>87</sup> *Supra* note 80 at 126, 125.

<sup>88</sup> *Ibid.* at 126.

<sup>89</sup> Di Luca, *supra* note 6 at 62.

#### 2.4.2 Offender Engagement in Plea Negotiations

Practitioners' contentions as to plea bargaining's impact and propriety, while important to consider, have the potential to treat lay participants – here, accused persons – as voiceless or one-dimensional caricatures. While this is patently incorrect,<sup>90</sup> it may be replicated in negotiated settlements to the extent that the full and nuanced views of these central participants are not heard, or are only superficially represented by the professionals who are the core and controlling interlocutors in the vast majority of resolution discussions.<sup>91</sup> This section accordingly asks how offender perspectives are brought into the 'black box' of plea bargaining.

The majority of defendants whose pleas are negotiated are directly represented at resolution discussions<sup>92</sup> by a legal professional who is mandated to act in their best interests. As is evident in the defence counsel perspectives articulated above, this orientation is commonly applied in a mercantile fashion, with defendants presumed to adopt a rational bargaining position according to the attractiveness of plea offers and the anticipated risk of proceeding to trial. This presumption, while a seemingly reasonable heuristic for defence counsel to adopt in relation to most of their clients, must be adapted to the practical as well as normative considerations active in each particular context.

Some of the practical factors have already been mentioned. Much work has been done, for example, on the effect that pre-trial detention has on a person's likelihood of pleading guilty.<sup>93</sup> Studies have noted that while the prison population itself has

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<sup>90</sup> See, for example, the discussion of offender perceptions of 'fairness', below in this section.

<sup>91</sup> This empirical statement is drawn from my experience as a practitioner. Contrary to Dickie's claim about resolution discussions being used as opportunities for flexible, inclusive negotiation, over three years of practice I have never been involved in a resolution meeting at which either my client or a victim was present.

<sup>92</sup> Unrepresented accused persons may, of course, enter into resolution discussions with prosecutors on their own behalf, but such meetings are actively discouraged by most Crown Counsel. The B.C. Crown Counsel Policy Manual, for its part, urges prosecutors to "exercise caution" in this area, and encourage defendants to seek legal assistance. *Supra* note 68 at 3.

<sup>93</sup> See, for example, G. Kellough and S. Wortley, "Remand for Plea: Bail decisions and plea bargaining as commensurate decisions" (2002) 42 *Brit. J. Criminology* 186.



remained relatively stable,<sup>94</sup> the detention of persons before trial has risen over the past decade to include roughly half of all those in provincial institutions.<sup>95</sup> In light of the federal government's recent move to curtail enhanced sentencing credit for time spent in prison awaiting one's day in court,<sup>96</sup> Lafontaine and Rondinelli's observation that "[b]ail is... the most valuable commodity that a defendant can have...,"<sup>97</sup> is likely to apply with even greater force. Simply put, persons whose freedom the law has forfeit before finding them guilty are much less inclined to exercise the due process rights that are ostensibly theirs. The pressure to settle, often in exchange for release, thus threatens to indelibly colour plea negotiations. Defendants who are (understandably) motivated to secure their release may agree to plead guilty irrespective of their normative orientation towards the actual offence or negotiated outcome, and professional representatives may, also understandably, end up advising and encouraging cost-benefit decision-making in spite of policies and principles that justify plea bargaining as facilitating substantively 'just' outcomes. The instrumentalism of this process also

imprints upon [accused persons] a conception of criminal prosecution as a system which is subject to manipulation by those experienced at the game to the exclusion of those who are not.<sup>98</sup>

Finally, there is the potentially detrimental influence of defendants' representatives themselves. As Oonagh Fitzgerald alleges in her critique of plea-based criminal justice, "[g]iven the fiduciary relationship between defence counsel and client, the pressures exerted by counsel may be the greatest threat to an accused's freedom of choice in pleading and the most important influence in prompting negotiated pleas of guilty".<sup>99</sup>

Although in chronic danger of being overcome by the mercantile and pressurized context that seems to characterize the practice of plea bargaining in Western criminal

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<sup>94</sup> See Statistics Canada, table 251-0005 "Adult correctional services, average counts of offenders in provincial, territorial, and federal programs (British Columbia)" (Ottawa: Statistics Canada, 2009), online: Statistics Canada <<http://www40.statcan.gc.ca/l01/cst01/legal31-eng.htm>>.

<sup>95</sup> See Cheryl Webster, Anthony Doob, and Nicole Myers, "The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada" (2009) 21 Current Issues Crim. Just. 83 at 84.

<sup>96</sup> See the recently enacted *Truth in Sentencing Act*, S.C. 2009 c.29.

<sup>97</sup> *Supra* note 80 at 113.

<sup>98</sup> Brian A. Grossman, "Conflict and Compromise in the Criminal Courts" *supra* note 13 at 301.

<sup>99</sup> Fitzgerald, *supra* note 40 at 146.

justice systems, there is evidence that participants' normative expectations (of, for example, justice and fairness) are not entirely extinguished at this stage of criminal proceedings. Defendants' expression of these expectations, however, may perversely result in less 'just' outcomes in some instances. As a recent US-Israeli article suggests, criminal defendants make assessments of the substantive and comparative fairness of prosecutors' sentencing positions, and sometimes reject offers that offend these values even if they are 'rationally' attractive.<sup>100</sup> Tor, Gazal-Ayal, and Garcia's argument is predicated on an analysis of cases in which a defendant's plea decision could be seen to be founded on normative rather than instrumentalist grounds.<sup>101</sup> It also includes an empirical study, which was conducted with the use of a role-playing script.<sup>102</sup> This study analyzed 'fairness' assessments through the lens of participant-defendants' self-adjudged awareness of guilt and probability of an acquittal at trial. In the case of 'truly innocent' participant-defendants, the authors noted a marked preference to proceed to trial even if the likelihood of acquittal is objectively low,<sup>103</sup> while those who were uncertain of their guilt tended to exhibit an "egocentric bias" that inflated their self-assessed prospects of acquittal and lead to a similar, but less pronounced, aversion to 'unfair' plea bargains.<sup>104</sup> Although not conducted in a 'real world' environment, this study suggests that even defendant who know they are guilty exhibit some agency in rejecting plea bargains that they view as unfair.<sup>105</sup> But the authors conclude, rather glumly, that

innocent defendants... will reject discounted offers... [and] will bear higher average penalties than guilty defendants facing comparable conviction

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<sup>100</sup> Avishalom Tor, Oren Gazal-Ayal, and Stephen M. Garcia, "Fairness and the Willingness to Accept Plea Bargain Offers", *supra* note 57.

<sup>101</sup> *Ibid.* at 99. The authors mention, for example, an American case where the defendant rejected an 'unfair' plea bargain offer of five years in jail, even though the almost certain alternative was imprisonment for life.

<sup>102</sup> *Ibid.* at 103. The participants in this study, however, were drawn from a pool of college and university students, and thus do not represent the 'average' real life criminal defendant in terms of income, education, and social marginalization.

<sup>103</sup> *Ibid.* at 102. The authors note that only 6% of a database of 316 wrongful conviction cases resulted from a guilty plea, although, as noted above in the text and accompanying footnote 83, such miscarriages are perhaps least likely to be addressed.

<sup>104</sup> *Ibid.* at 108-109.

<sup>105</sup> *Ibid.* at 113.

probabilities, who accept the discounted plea offers at significantly higher rates.<sup>106</sup> This is, of course, the result of a combined plea discount and trial ‘penalty’, although the latter factor does not formally have any place in Canadian sentencing law.<sup>107</sup>

Whether they are innocent, guilty, or uncertain, defendants’ abiding sense of fairness in criminal proceedings does not seem to significantly counter the predominantly instrumental pressures and incentives embedded in the pre-plea environment. Indeed, while according to the presumably well-intentioned principles embodied in Crown policy manuals, resolution discussions are meant to be used to support and enhance the substantive as well as procedural functioning of the justice system, there is considerably more empirical and anecdotal evidence that the practice distorts or misrepresents the substantive basis upon which pleas are made and convictions founded. Negotiated outcomes would thus tend to undermine opportunities for meaningful moral discernment and decision-making at the formal sentencing stage, not bolster it.

This thesis maintains that the law’s concern for moral ordering, although demonstrably weakened by plea bargaining’s privileging of instrumental rationality and behind-the-scenes normative evaluation, does remain important, in practice as well as theory. Not every guilty plea is comprehensively bargained, and courts remain, officially at least, the ultimate arbiters and dispensers of sentences. Mindful of the effect that plea bargaining has on the manufacture of guilty pleas, the following section will accordingly turn to the sentencing hearing itself, to examine how courts use the tools and influence their authority grants them to (re)open possibilities at this stage for engaging offenders with the moral dimension(s) of a given case.

## **2.5 The Audible Promises of Sentencing Hearings**

However problematic or impenetrable the stage of pre-plea negotiations may be, every criminal case is formally resolved in open court. It is here where all participants gather

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<sup>106</sup> *Ibid.* at 122.

<sup>107</sup> Lafontaine and Rondinelli contend, however, that an “entertainment tax” of proceeding to trial is imposed in cases where a court sees a defendant has having wasted its time by not pleading guilty. *Supra* note 80 at 116.

to hear and be heard, to make submissions and present evidence, to argue for or against a particular outcome or to try to convince a judge why a negotiated settlement should be approved. In contrast to most resolution discussions, accused persons are present and expected to be directly involved, victims are, formally at least, invited to articulate their loss, and interested observers are encouraged to attend to bolster the process' legitimacy and social oversight. If there is any occasion for substantive, contextual moral engagement in criminal law, sentencing hearings are uniquely well suited for the job. They are also able to incorporate a significant amount of innovation and flexibility to accommodate the diversity of contexts and circumstances that call upon the criminal justice system for a response. This encompasses circle sentencing and other tailored proceedings sometimes employed in Aboriginal communities,<sup>108</sup> delayed dispositions to allow defendants to attend treatment programs before being sentenced,<sup>109</sup> and provisions that enable courts to effectively extend their oversight over the course of an offender's community-based sentence, to monitor compliance and make adjustments as deemed necessary.<sup>110</sup> Sentencing hearings can even assume features of a contested

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<sup>108</sup> These 'alternative' approaches, many of which attempt to draw upon traditional First Nations' peacemaking practices, draw statutory support from s. 718.2(e) and the seminal Supreme Court of Canada case of *R. v. Gladue*, [1991] 1 S.C.R. 688, which counsel courts to pay "particular attention" to the circumstances of Aboriginal offenders during sentencing. There is a significant body of scholarship on circle sentencing practices in Canada, much of it supportive of this approach's attempt to reconcile offender, victim, and community needs with the justice system's overarching structure and principles: see generally Ross Gordon Green, *Justice in Aboriginal Communities. Sentencing Alternatives* (Saskatoon: Purich Publishing, 1998) which also considers other initiatives such as elder panels and community advisory committees. Critical analyses of circle sentencing have also been made. For a feminist perspective that questions the practice's ability to adequately safeguard victims of 'intimate' violence, see Emma Cunliffe and Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19 Can. J. Women & L. 1. For a Sto:lo scholar's critique of how such innovations cannot effectively address the colonialism and systemic injustices embedded in Western conceptions of justice, see Wenona Victor, *Indigenous Justice: Clearing Space and Place for Indigenous Epistemologies* (West Vancouver: National Centre for First Nations Governance, 2007) at 16. See generally also James (Sakej) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous L.J. 1.

<sup>109</sup> As authorized by the *Criminal Code*, *supra* note 59 at s. 720 (2).

<sup>110</sup> *Ibid.* s. 732.1 (2)(b) which requires offenders serving probation orders to "appear before the court when required to do so by the court".

trial, for example when the Crown seeks to prove aggravating factor(s) that are contested by the defence.<sup>111</sup>

Besides the communication of the plea itself, the *Criminal Code* provides for a number of tools that courts may use to amplify lay persons' normative perspectives regarding a given case. These tools are, arguably, intended to enrich the sentencing process and assist judges in determining an appropriate sentence. Focussing solely on the normative engagement of offenders, I consider three of these mechanisms below.

### **2.5.1 Pre-Sentence Reports**

Section 721 of the *Code* provides for the preparation of 'pre-sentence reports' ("PSRs") which are commonly used to bring the offender's background, circumstances, and prospects before the court, as well as allow a probation officer to make general recommendations as to the viability of available sentencing options. Significantly, s.721(3) mandates that PSRs should address an offender's "age, maturity, character, behaviour, attitude and willingness to make amends", all of which may play in to a court's assessment of moral culpability. The ability of probation officers to effectively gauge and articulate the more subjective criteria enumerated in the legislation, however, is uncertain and dependant on a host of factors including an offender's willingness to speak about this sensitive subject matter, a probation officer's skill and interest in drawing it out, and the trust that may exist or be developed between these interlocutors. As with so much of the criminal adjudication process, the purpose and scope given to these mechanisms is, in practice, far from uniform or straightforward, with some professional actors exhibiting much more tact and interest in employing PSRs as a vehicle for moral engagement than others. Their use in Canada has not been extensively studied, but the available scholarship suggests that they are employed both as "social histories" and as more technical "risk/needs assessments", with a trend, in

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<sup>111</sup>The *Criminal Code*, *supra* note 59 at s. 724 (3) provides for the establishment of facts considered relevant to the determination of sentence. The standard of proof varies between a balance of probabilities for mitigating or neutral evidence, to proof beyond a reasonable doubt for aggravating factors. This difference, now codified, results from the Supreme Court of Canada's ruling in *R. v. Gardiner*, *supra* note 43.

many provinces, to emphasize the latter.<sup>112</sup> This trend is supported by 1996 amendments to the *Criminal Code* that permit judges to order specifically focused PSRs, targeted to those issues deemed by the court to be of particular relevance.<sup>113</sup> This includes the identification of offenders' "criminogenic needs" and the availability of programmatic interventions, which would arguably allow judges to impose more appropriate sentences, both custodial and probationary.<sup>114</sup> There is much less evidence, however, of PSRs being used specifically to open up room for offenders to make representations concerning their perspectives on the offence in question. In general, it seems, PSRs are employed in a more instrumental manner, as vehicles for a probation officer's rendering and interpretation of relevant 'facts' for a sentencing court's (normative) consideration.

Following the Supreme Court of Canada's decision in *R. v. Gladue*,<sup>115</sup> some Canadian jurisdictions have provided for an enhanced version of PSRs to be produced to aid courts in the sentencing of Aboriginal offenders. Such "Gladue Reports" are designed to offer judges an enriched understanding of the background and systemic factors that have contributed to a particular Aboriginal person appearing before them, and to assist in developing alternatives to incarceration. They are, therefore, perhaps less inclined than other PSRs to function as "actuarial risk" assessments, and more well-suited to "culturally situate offenders".<sup>116</sup> In theory, at least, a comprehensive Gladue report affords a court's lay and professional participants a greater ability to identify and address gaps in their normative understandings of the wrong committed and its appropriate response. As some critics have claimed, however, the justice system's overall tendency towards employing PSRs as actuarial risk/needs assessments has similarly (dis)coloured the ability of Gladue reports to fulfil their cultural and normative

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<sup>112</sup> David P. Cole and Glen Angus, "Using Pre-Sentence Reports to Evaluate and Respond to Risk" (2002-2003) 47 *Crim. L.Q.* 302 at 308.

<sup>113</sup> s. 721(4).

<sup>114</sup> *Supra* note 112 at 308-309.

<sup>115</sup> *Supra* note 108.

<sup>116</sup> Kelly Hannah-Moffat and Paula Maurutto, "Recontextualizing pre-sentence reports: Risk and race" (2010) 12 *Punishment & Society* 262 at 265-6.

gap-narrowing functions.<sup>117</sup> In this thesis' empirical enquiries, I pay some attention to how the *Gladue* decision is being employed to cultivate the perspectives and participation of Aboriginal offenders.

### 2.5.2 Victim Impact Statements

Section 722 of the *Criminal Code* provides for the preparation and presentation of 'victim impact statements' ("VISs") which are designed to give victims the chance to directly convey how a given offence has affected them. There is an explicit expectation that these statements will be used "[f]or the purpose of determining the sentence to be imposed on an offender..."<sup>118</sup> but the degree to which this actually happens is, like PSRs, uncertain. Anglo-Canadian legal scholar J.V. Roberts, author or co-author of the most pertinent examinations of Canada's experience with VISs, has advocated perhaps the strongest argument in favour of this mechanism's potential as a force for moral ordering, as well as some the most discouraging reports of its practice as such. Echoing the theorists R.A. Duff and Anthony von Hirsch in privileging their retributive, communicative focus, Roberts argues that VISs are meant to play an important role in allowing victims to articulate the impact of the crime not only to the court, but directly to offenders as well:

Confronting the offender with the consequences of his or her actions and accompanying the message by the censure of the court (the sentence) is essential if the sentencing process is to achieve its codified goals. ...Hearing from the victim involves a completely different communicative dynamic from hearing about the impact of the crime through the sentencing submissions of the prosecutor... it is a message of *sensitization*; an appeal from one individual to another...<sup>119</sup>

Against this inspiring ideal, however, Roberts posits that "the criminal justice bureaucracy has assimilated the VIS in a way that has changed its role, undermined its utility to judges and contributed to the disillusionment of victims".<sup>120</sup> He has found that

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<sup>117</sup> *Ibid.* at 280.

<sup>118</sup> *Criminal Code*, *supra* note 59 at s. 722(1).

<sup>119</sup> J.V. Roberts, "Victim Impact Statements and Sentencing" (2002-2003) 47 *Crim. L.Q.* 365 at 377.

Emphasis in original.

<sup>120</sup> *Ibid.* at 393.

while judges tend to agree that the information contained in VISs is otherwise unavailable,<sup>121</sup> they have been reluctant to let it influence their sentencing practices. In the infrequent instances where VISs do affect outcomes, a certain asymmetry is evident. While judges will rarely increase a sentence just because a victim desires it (although aggravating factors that it discloses may indeed have this effect) they are more likely to reduce a sentence if the otherwise appropriate punishment would result in undue hardship for a victim (such may happen when the victim is a member of the offender's family).<sup>122</sup> This is not surprising or disturbing in itself, Roberts notes – sentences that further harm victims in the interests of strict retributivism may not promote the fundamental principle of public respect for the law, and there is no commensurate “theoretical justification” to increase punishments to satisfy victims who demand disproportionately harsh dispositions.<sup>123</sup> What is of significantly more concern to the justice system's aspiration to discern and deliver punishments that proportionately account for the gravity of the offence (which arguably requires an appreciation of the impact on individual victims) is the evidence that VISs are rarely used, and even then not for their intended purpose of communicating a victim's narrative of loss. In the first years of VISs incorporation in Canadian law, it was found that few were being submitted to court. This, as Roberts relates, was not so much due to victims' refusal to participate as a failure of the Crown to contact them.<sup>124</sup> This problem has, certain policy documents suggest, been ameliorated somewhat in light of a greater legislative and political emphasis on victims' rights,<sup>125</sup> but VISs are still completed in a small number of

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<sup>121</sup> *Ibid.* at 390. See also the 2006 survey conducted by Roberts and Edgar, *supra* note 10 at vii, where judges tended to agree that VISs did provide information that was not found in other sources, although not in a majority of cases.

<sup>122</sup> *Ibid.* at 385.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.* at 379. Victim Impact Statements became formally incorporated into the *Criminal Code* in 1988.

<sup>125</sup> The B.C. Prosecution Service Policy Manual, for example, in the directive “Victims of Crime” stipulates that “Crown Counsel must provide victims with a reasonable opportunity to have the impact of the offence brought to the attention of the court”. *Crown Counsel Policy Manual*, “VIC-1: Victims of Crime” (Victoria: Queen's Printer, 2003), online: Ministry of Attorney General <<http://www.ag.gov.B.C.ca/prosecution-service/policy-man/pdf/VIC1-VictimsOfCrime-20May2003.pdf>> at 1.



potentially applicable cases.<sup>126</sup> Roberts states that “only a minority of crime victims elect to submit a statement of impact, and far fewer are actually present in court at the sentencing hearing”.<sup>127</sup> He further notes that in practice some victims have been frustrated in their desire to orally deliver their statement at the sentencing hearing itself.<sup>128</sup>

Roberts has concluded that the prevailing scholarly and judicial focus on VISs as mechanisms that are designed to affect sentencing *outcomes* (which as mentioned above has proven to be rather negligible) overshadows their ‘true’ purpose as vehicles for the communication of victims’ narratives.<sup>129</sup> The indication is that despite legislative and rhetorical acceptance of the value and importance of this purpose, VISs are not, in practice, being used to fulfill this function. If, then, it is desirable for offenders (and, indeed, judges) to be brought towards an understanding of the gravity of an offence vis-à-vis its impact on actual persons, it seems that victim impact statements are not a common means by which this understanding is fostered.

### 2.5.3 Offender Allocution

Section 726 of the *Criminal Code* provides yet another statutory mechanism for increasing the ability for courts and lay participants to directly communicate. This is the provision requiring judges to ask, before pronouncing sentence, whether offenders wish to address the court themselves. This is commonly known as the defendant’s right of allocution, and has been a feature of Western criminal justice systems since before the involvement of defence counsel, or indeed the right to silence as currently

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<sup>126</sup> Roberts and Edgar, *supra* note 10 at 1. This 2006 survey of judges in three jurisdictions found that VISs were completed in just 8% of cases in B.C., 11% in Manitoba, and 13% in Alberta, although judges also reported that their use was increasing. It is not clear whether these percentages represent all cases or just those with an identifiable victim.

<sup>127</sup> *Supra* note 119 at 379. This is compounded by the disturbing finding that 70% of judges in B.C. reported proceeding to sentencing without knowing if a VIS had been requested or submitted: *Supra* note 10, at 5-6.

<sup>128</sup> *Ibid.* at 369. This is in apparent contradiction to s. 722 (2.1) of the *Criminal Code*, which permits victims to read their statements in court. Roberts and Edgar’s 2006 survey, however, *supra* note 10 at 7-9, found that victims rarely request to deliver their statements orally, and when they do judges report granting these requests.

<sup>129</sup> J.V. Roberts and Edna Erez, “Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements” (2004) 10 Int. Rev. Victimology 223.

understood.<sup>130</sup> In guilty plea dispositions, allocution is the only opportunity that defendants have to make representations to the court. These representations, of course, are not completely unrestricted. As a consequence of pleading guilty to a given offence, defendants are forestalled (at least in Canada) from using this opportunity to proclaim or even insinuate their legal or factual innocence. Allocution statements are, therefore, principally amenable to expressions of remorse, accountability, and other normative statements concerning the offence or the offender's perspective on the justice of the proceedings or impending outcome.

Despite its longstanding place as a feature of all criminal sentencing hearings, there is a paucity of scholarship on Canada's experience with defence allocutions. There is a more substantive body of literature in the United States that has considered this feature of criminal proceedings in terms of both theory and practice.<sup>131</sup> The most interesting analysis, in light of this thesis' focus on normative communication, interprets allocution as an opportunity for defendants not only to speak in aid of mitigated punishments (its traditional and most accepted function) but also impart to the sentencing process the "humanization" that only lay participants are able to provide.<sup>132</sup> According to Kimberly Thomas, defendants (especially minorities and the poor) with their unique stories, perspectives, and interpretations, are effectively silenced by court processes focused on legal intricacies and instrumental efficiency. In this stilted context, "[a]llocution matters because it is one place in the criminal process where every convicted defendant has the chance to speak".<sup>133</sup> Further, while claims in aid of mitigation can be effectively conveyed by competent counsel, Thomas suggests that "the real experiences of defendants, who sometimes want to convey alternative stories of mercy, innocence, and defiance",<sup>134</sup> are not amenable to third party representation. She warns that if the acceptance of allocution as an opportunity for humanization is not fostered by the

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<sup>130</sup> See John Langebein, *The Origins of the Adversary Criminal Trial*, *supra* note 61 at 62-3.

<sup>131</sup> This is, in part, because defendant allocutions have been more closely defined and scrutinized in American jurisprudence, particularly capital cases.

<sup>132</sup> Kimberly A. Thomas, "Beyond Mitigation: Towards a Theory of Allocution" (2006) 75 Ford. L.R. 2641.

<sup>133</sup> *Ibid.* at 2643.

<sup>134</sup> *Ibid.* at 2645.

criminal justice system, the practice risks losing meaningful relevance,<sup>135</sup> further entrenching ‘silent’ proceedings with consequent losses to defendants,<sup>136</sup> courts,<sup>137</sup> victims,<sup>138</sup> and the public.<sup>139</sup> Thomas acknowledges that a broad, humanization-based understanding of allocution could lead to some disruptions in the system’s efficiency and the reinforcement of some stereotypes about poor defendants, as well as its potential manipulation by others with the means and ability to do so. She concludes, however, that these dangers (which engaged courts ought to be equipped to curtail) are outstripped by the benefits of an approach that would “give life to an historic practice”.<sup>140</sup>

Thomas presents a persuasive case for the revitalization of allocution in sentencing courts. The capacity of the practice to accomplish the potential she outlines, however, depends upon facilitation through supportive court processes and professionals. Despite codified opportunities, contemporary Western justice systems have not, in practice, provided an effective place for lay participants to engage with ‘their’ cases.<sup>141</sup> In Canada, the situation is perhaps even direr than in the US, given the lack of substantive debate on the ‘audibility’ of offenders at sentencing. Perhaps the voices

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<sup>135</sup> *Ibid.* at 2658-9. This is particularly so in an environment of increasing mandatory and mandatory minimum sentences, where allocution’s traditional mitigation rationale has less purchase.

<sup>136</sup> *Ibid.* at 2674-5. Thomas sees four advantages accruing to defendants who are empowered to use an allocution practice based in humanization: they are more likely to be active participants in their own cases, to be seen as participants in public life, to “create and express” themselves, and to more explicitly choose when to remain silent instead of seeing it as the default option.

<sup>137</sup> *Ibid.* at 2676-9. For Thomas, without a meaningful opportunity for humanizing allocution, courts are less likely to hear about significant differences between defendants that may not be relevant to other parts of the proceedings, less likely to reflect just and effective moral proportionality in their sentences, and eroding the legitimacy of the process and outcome, especially in an environment of trial-less, ‘guilty plea’ justice.

<sup>138</sup> *Ibid.* at 2671-3. Thomas asserts that arguments for greater victim participation in sentencing hearings are consistent with, and indeed employ similar rationales as, those that support defence allocution. The basic aim underpinning both is providing meaningful and effective opportunities for communication.

<sup>139</sup> *Ibid.* at 2679-80. She suggests allocution can enrich the public’s appreciation for the nuances of individual offences and offenders, and allows it to hear any normative representation that defendants might wish to make, from apology to defiance. This is important, Thomas suggests, to the ongoing discourse on the functioning and fallibilities of the justice system.

<sup>140</sup> *Ibid.* at 2685.

<sup>141</sup> Indeed, there is evidence that the very opposite is happening. See, in the US context, Alexandra Natapoff, “Speechless: The Silencing of Criminal Defendants” (2005) 80 N.Y.U. L.R. 1449, which argues that the systematic silencing of defendants through ‘protective’ legal and procedural mechanisms constitutes a “massive democratic and human failure”.

that are most responsible for this silence, however, are legal representatives themselves. The final section in this chapter looks directly at how these actors, in particular defence counsel and judges, are implicated in the apparent gap between how sentencing processes are *designed* to foster normative communication, and the degree to which they actually do so. It should be recognized here that the “considerable and important differences” between official rhetoric and “operational realities” make it difficult to know and interpret a process that is often not what it purports to be.<sup>142</sup>

## 2.6 The Ordering Influence of Professionals

*There was one thing though that vaguely bothered me. In spite of all my worries, I'd occasionally feel tempted to intervene and my lawyer would always tell me, 'keep quiet, it's better for you.' In a way, they seemed to be conducting the case independently of me.*<sup>143</sup>

In addition to mandating opportunities for lay participant involvement, the *Criminal Code* also includes specific provision for submissions to be made by the prosecution and defence.<sup>144</sup> Indeed, as is apparent to any observer of an orthodox sentencing hearing, the most audible, and often only, voices heard are those of professional representatives. So-called ‘submissions on sentence’ are, in almost every case, crucial to how a given offence will be comprehended by the judge who receives them. It is here where the prosecutor lays out the relevant factual basis for a conviction, including representations on any aggravating or mitigating circumstance that these facts disclose. This is also where the Crown, as society’s representative, may bring in a victim’s or community’s perspectives, and forward the state’s recommendations as to the appropriate sentence. Defence submissions mirror those of the prosecution. This is where defence lawyers can contextualize, or, in some cases, contest the Crown’s summary of facts, offer claims of mitigation or expound upon those already in evidence, and advance their own recommendations as to the justice of a given outcome. As has been intimated

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<sup>142</sup> Grossman, *supra* note 13 at 301. I hope to go some ways towards remedying this handicap through my own empirical investigations, which are presented in Chapters Three and Four.

<sup>143</sup> Albert Camus, *The Outsider* (London: Penguin Classics, 2000) at 95.

<sup>144</sup> *Criminal Code*, *supra* note 59 at s. 723.

throughout this chapter, the choices that professional actors make indelibly affect the substantive and procedural character of how guilty pleas are produced, performed, and, eventually, interpreted in court.

I have already mentioned the Crown's role in resolution discussions, above at §2.4.1. The longstanding articulation of prosecutors as disinterested "ministers of justice"<sup>145</sup> can be taken to apply, in theory at least, to their role throughout the sentencing process. The normative influence embedded in Crown Counsel's discretion, as I have mentioned, is considerable. I am more interested in this section, however, in how defence counsel's less regulated, more intimate position vis-à-vis their clients affects how the criminal law concern for moral ordering operates *upon* and *through* defendants in plea and sentencing proceedings. The prosecution can make normative claims about the wrongness of the crime or the badness of the wrongdoer, and can facilitate victim involvement. The judge, as is further explored below, comes to normative conclusions about the offence and offender, whether they are subsumed in simple affirmations of the resolution that has already been arrived at by the parties, or asserted in the questions, lectures, and ultimate dispositions that she is authorised to pronounce. Defendants, as we have seen, are also, theoretically and in law, capable of using the sentencing hearing as an opportunity to make their own normative statements about their conduct, character, and the punishment that impends upon them. All of these moral valuations are focused on the individual who has accepted personal legal responsibility, via their plea, for criminal conduct. Defence lawyers, as is explored below, stand as crucial intermediaries of these messages, and are significantly responsible for their audibility and reception in open court.

### **2.6.1 Defence Lawyers**

There is an ongoing debate about how defence counsel ought to respond to the moral implications of their work. The parameters of this debate are as wide as the legal profession itself, touching on lawyers' ethical and moral responsibilities towards clients,

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<sup>145</sup> See Rand J.'s comments in *Boucher v. The Queen*, [1955] S.C.R. 16 at pp 23-24.

courts, society, and themselves. The core contention concerns whether lawyers ought to sustain a 'zealous', adversarial position as far as the scope of their representation and the law allow,<sup>146</sup> or if this position needs to be tempered to account for the broader interests and ambitions of 'justice'.<sup>147</sup> Although I can only deal with a small part of this debate here, it has important implications for law's normative aspirations. In particular, I ask how legal professionals' self-conceptions of their responsibilities for and relationship to clients at the plea and sentencing stage can make a difference between hearings that are relevant and resonant to defendants as moral actors, and those that are deaf or inattentive to their standing as such.

Two contrasting perspectives can be generalized here. The 'standard' conception endorses defence counsel maintain managerial control over their clients to the conclusion of proceedings according to a strictly instrumental understanding of these clients' best interests. This type of advocacy has already been observed as explaining the decisions that lawyers tend make in both the 'plea bargain' and 'due process' models of criminal proceedings, as well as Feeley's alternative 'pre-trial process' critique.<sup>148</sup> As we have seen, this viewpoint has recourse to substantial arguments to sustain its dominance, including the manifest power imbalance between the prosecuting state and individual defendants, and the basic interest in harm avoidance that most persons privilege when accused of wrongdoing. It is therefore eminently reasonable and appropriate, according to its supporters, for defence counsel to act as a shield, protecting their clients' instrumental interests against a state that is intent on doing them harm. This position does, however, tend to elide the interesting question of cause and effect – whether the way lawyers manage their clients is a response to the risks an overbearing institution presents, or whether this advocacy approach itself

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<sup>146</sup> See Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Burlington: Ashgate Publishing, 2009).

<sup>147</sup> See William H. Simon, *The Practice of Justice: A theory of lawyers' ethics* (Cambridge: Harvard University Press, 1998).

<sup>148</sup> The two models can perhaps best be understood as threading throughout a 'typical' legal process, one or the other asserting itself according to the circumstances and intentions of particular courts and participants.

complicates a court's ability to 'justly' interpret the offences and offenders they must judge.

The contrasting viewpoint holds that perhaps lawyers can, and should, take a substantially different approach to advocacy, by seeking to reconcile their clients' best interests with the law's normative aspirations. This requires, of course, a re-conceptualization of both – a re-visioning of values and intentions from staunchly opposed to mutually supportive. Proponents have found an intelligible language to advance these ideas in the discourse of Therapeutic Jurisprudence, which is an emerging body of literature that enquires into the "law's impact on emotional life and psychological well-being... as a social force that produces behaviours and consequences".<sup>149</sup> As a guide for practitioners, judges, and institutions, Therapeutic Jurisprudence is largely interested in enhancing rehabilitative outcomes. Its claims, however, also encompass normative engagement, privileging practices that are most likely to foster the "cognitive restructuring" that defendants arguably need to learn from their experience in the justice system and rebuild law-abiding lives.<sup>150</sup> Although couched in a context of respect for clients' freedom to choose adversarial or disengaged orientations to their cases, Therapeutic Jurisprudence suggests that many of those who are subject to the law's judgment do want, and would substantially benefit from, meaningful opportunities to speak and be heard as moral agents in the criminal process, particularly when it comes to accepting responsibility for their conduct.<sup>151</sup> Lawyers can assist in this regard by acting, not (merely) as legal managers, but as normative "change agents",<sup>152</sup> encouraging clients to discuss the reasons underlying their offending and how to prevent it in future, cultivating their participation in formulating appropriate sentencing recommendations, facilitating in-court apologies,<sup>153</sup> and in general

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<sup>149</sup> David Wexler, ed., *Rehabilitating Lawyers: Principles of therapeutic jurisprudence for criminal law practice* (Raleigh: Carolina Academic Press, 2008) at 3.

<sup>150</sup> *Ibid.* at 8.

<sup>151</sup> See, for example, Philip Gould and Patricia Murrell, "Therapeutic Jurisprudence and Cognitive Complexity: An Overview" (2002) 29 *Fordham Urb. L.J.* 2117, as well as, generally, the other TJ-based works referred to in this section.

<sup>152</sup> *Supra* note 149 at 24.

<sup>153</sup> Beth Bromberg, "A Defence Lawyer's Perspective on the Use of Apology", in *supra* note 149 at 225.

supporting people's ability to "tell their stor[ies] to an attentive court..."<sup>154</sup> While this approach cannot guarantee the instrumentally 'best' outcome for every individual, at least in terms of the length or nature of their punishment, it does promise to re-invigorate the justice process' normative aspirations. It seeks to do so in terms of both the unofficial ordering that is conducted in lawyers' chambers and courthouse hallways, and the explicit mechanisms embodied in plea and sentencing hearings. There are indications that some of Therapeutic Jurisprudence's prescriptions have been put into practice, with positive results, by individual courts and professionals.<sup>155</sup>

As a theory, Therapeutic Jurisprudence represents an exciting invitation for the criminal justice system to evolve beyond the standard 'due process' and 'plea bargain' models of practice, which are both characterized by the managerial control of lawyers and the minimal participation of lay participants. But it has, predictably, incurred criticism for promoting an overly paternal, interventionist ethic among lawyers, and eroding the protections that vulnerable clients require from an abidingly harsh legal and political superstructure far more interested in exploiting the occasion to punish than fostering the opportunity for therapeutic engagement.<sup>156</sup> This fundamental wariness of the law's ability, and right, to mix its coercive authority with inducements to 'free' moral dialogue is likely to always separate those who uphold an orthodox understanding of their professional responsibilities towards clients' best interests, and those who advance a more ambitious 'therapeutic' agenda.

Ultimately, there is little argument that defence counsel must fearlessly advocate on behalf of their clients' legal interests throughout their representation. This is most clearly evident in a contested trial, and as we have seen, also applies, though in a much murkier context, in plea negotiations that attempt to secure viable 'deals'. To the extent that a comprehensive agreement is reached with the prosecutor, a defence

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<sup>154</sup> Michael King, "TJ, Criminal Law, and the Guilty Plea", in *ibid.* at 231.

<sup>155</sup> See, for example, the articles authored by practitioners in Wexler, *ibid.*

<sup>156</sup> See Mae Quinn, "An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged" (2007) 48 Boston College L.R. 539.



lawyer's duties at the sentencing hearing are usually confined to a straightforward 'sales pitch', in which a client's involvement will not likely be required or encouraged beyond rote acknowledgments. As Feeley's account of the implicit normative ordering that occurs throughout the legal process acknowledges, in cases such as these there is little left for either lay participants or judges to do, and the sentencing hearing itself becomes no more than a hollow *pro forma* ritual with a foreordained conclusion.

Not infrequently, however, and even within those cases that have apparently been decided beforehand, it becomes a matter of a client's 'best interests' that they be viewed by the presiding judge in the most sympathetic possible light. Advocates attempt to influence this normative assessment in several ways. Criteria of mitigation include a defendant's age (very old or very young is best) lack of, dated, or unrelated prior criminal record, physical or psychological health concerns, immaturity or diminished insight, background, upbringing, or Aboriginal or minority heritage, prior victimization, evidence of good character, community support, efforts to reform, and, most subjectively, remorse.<sup>157</sup> As any good counsel understands, "in the final analysis, it is the presence or absence of moral blameworthiness that drives the sentencing process..."<sup>158</sup> But, paradoxically, it can be this very concern that contributes to the profound silencing of defendants in the hearings designed to gauge and give voice to this assessment. Lawyers' solicitousness of their clients' instrumental interests may tend, purposively or not, to impoverish normative exchanges. The expression of remorse, for example, while generally viewed as a 'good' quality, requires defence lawyers to either give up a certain degree of control over what their clients may say, carefully stage-manage its delivery, or take over its articulation entirely. As will be more intimately explored in Chapter Three, a lawyer's self-conception of his or her role will influence how they resolve this question. As is taken up below, counsel's predictive interpretations of potential judicial responses to their clients' stories is also an important factor in opening or restricting flows of normative expression.

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<sup>157</sup> See s. 718.2(e) of the *Criminal Code*, and Gilles Renaud, *Speaking to Sentence: A Practical Guide*, *supra* note 6 at 43-49.

<sup>158</sup> *Ibid.* at 47.

### 2.6.2 Judges

According to Feeley's analysis, a judge's role in the discernment and communication of a deserved sentence, although officially authoritative and imbued with discretion, can in practice be minimal, a mere imprimatur on a pre-determined outcome. Yet, as the final determiners of what ought to be done in each particular case, judges cannot be dismissed as careless or ignorant to the frailties and inadequacies of imparting remorse into the spare admission of legal guilt. Nor, as former lawyers,<sup>159</sup> are most inattentive to the distortions wrought by pre-plea pressures and negotiations. For any (including judges themselves) who privilege the law's concern for substantive, justly informed decision-making at sentencing, the characterization of judges as mere figureheads must therefore be gravely considered, and stridently resisted. Fitzgerald, for example, strongly counsels against judges who passively accept the *bona fides* of a guilty plea without inquiring into its formation:

Because the guilty plea process is so susceptible to pressures that detract from the acceptability of the guilty plea, the conscientious performance of the trial judge's supervisory role is crucial. Unless the trial judge makes inquiry into the circumstances of the plea and any plea bargain, there is no reason to assume that the guilty plea is voluntary, intelligent, and accurate and therefore no basis upon which to accept it as a legitimate means of resolving a criminal matter.<sup>160</sup>

Notwithstanding the passivity that Fitzgerald rightly critiques, however, there are indications that judges are indeed interested and motivated in taking a much more active role in ascertaining and shaping the normative features of the justice process. As we have observed, these normative forces withstand and co-exist with the instrumental pressures and function of plea and sentencing processes.

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<sup>159</sup> Although not necessarily criminal lawyers.

<sup>160</sup> Fitzgerald, *supra* note 40 at 168-169. The kind of inquiry that Fitzgerald endorses is also now mandated by s. 606(1.1) of the *Criminal Code*, which states that

[a] court may accept a plea of guilty only if it is satisfied that the accused

- (a) is making the plea voluntarily; and
- (b) understands

- (i) that the plea is an admission of the essential elements of the offence,
- (ii) the nature and consequences of the plea, and
- (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

The failure of a court to make such inquiries, however, does not, per. 606(1.2) affect the plea's validity.

Gauging an offender's moral orientation towards their offence is a key aspect of this role. A judge's perception of remorse, as Richard Weisman has argued, including its presence or absence but also its authenticity and depth, plays strongly into the "moral dichotomization of those who have been found culpable."<sup>161</sup> This, in turn, makes a difference to their treatment:

[w]rongdoers who are regarded as remorseful are viewed as more worthy of mercy, safer for re-inclusion into the community, and more similar to their law-abiding neighbours than those who have not shown or whose expressions of remorse are judged as not credible.<sup>162</sup>

Weisman recognizes the distorting effects that the legal process can have on this discernment. Convincing moral performances matter, of course, but they are made "in a context of suspicion... affected by their proximity to law's own coerciveness".<sup>163</sup> More than an apology, therefore, and much more than the simple act of pleading guilty, is required from a defendant to 'prove' to judges that their manifest remorse is 'worth' a reduced punishment. A guilty plea's instrumental efficiency, here, though privileged in some of the literature above as a valid, distinct rationale for mitigating punishment, is the remorseful offender's enemy, for it taints the authenticity of their feelings. As Weisman shows, judges are concerned with reading into a defendant's non-verbal "body glosses" and "indicia... of personal transformation" in determining whether their more formal expressions of accountability – most often a plea and apology – are genuine and credible.<sup>164</sup> While defence counsel may engineer, represent and manage some of these signs, their involvement can also weaken or counteract the 'true feeling' that a sentencing judge is trying to discern, and a client is trying (or trying not) to convey. Weisman locates considerable nuance and paradox in offenders' 'messaging' of remorse in criminal court. It is here that defendants are expected to fully acknowledge and offer no excuses for their wrong, so that they may be seen as having transcended

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<sup>161</sup> *Supra* note 45 at 48.

<sup>162</sup> *Ibid.* at 49.

<sup>163</sup> *Ibid.* at 50-51.

<sup>164</sup> *Ibid.* at 51-52.

their transgression, and consequently be appropriate recipients of mercy/mitigation.<sup>165</sup> But while the question of remorse offers arguably the most important and meaningful opportunity for courts and offenders to communicate with each other (defendants, for example, need to know the precise bases upon which they are being judged, in order to respond to the normative assessments to which they are subject) the stories that judges and defendants tell each other are circumscribed by the pressures and compromises leading up to this denouement. Although judges – who may not be involved in or responsible for the legal and factual bargaining that often becomes the version of ‘what happened’ that is brought into court – do, according to Weisman, sincerely try to discern an offender’s ‘true feeling’ about their wrong, their ability to effectively assess such qualities are stunted and strained by the narrative enclosures within which sentencing hearings commonly operate. Further, as Weisman notes, in this context it is not so much whether remorse is actually felt by an offender, it is whether (and how) it is recognized according to the “‘feeling rules’ of the community”,<sup>166</sup> which a judge is implicitly tasked with applying. These rules, in his view, require an appropriate measure of felt suffering (for having done wrong) and surrender to the moral authority of the court, untainted by any suggestion of strategic posturing. There must be neither excessive nor insufficient emotion here, and no stray strand of feeling can be allowed to detract from the performance. The courtroom display of remorse, it seems, is executable only by virtuosos or the utterly guileless. It is small wonder that, in practice, lawyers tend to counsel the less risky option of silence or short utterances of regret, lest their clients’ feelings – express and/or judicially interpreted – run afoul of the rules that, according to Weisman’s argument, exert informal but forceful influence over how cases are ultimately discerned and decided.

## **2.7 Conclusion**

This chapter has covered a wide and varied terrain locating and analyzing the guilty plea in its informing legal and practical context. First, I looked at the statistical picture in

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<sup>165</sup> *Ibid.* at 52-54.

<sup>166</sup> *Ibid.* at 58.

British Columbia, which provides basic insight into the courtrooms wherein defendants enter guilty pleas and ultimately have their cases resolved. This snapshot illustrated that B.C.'s plea courts can be busy, imposed-upon places, which does provide some support for the contention that sentencing hearings *cannot* comprehensively realize the moral ordering that the law arguably asks of them, simply because they are overburdened by sheer volume. I then turned to consider some of the empirical studies that refute or problematize these quantitative claims. Malcolm Feeley's findings regarding one local court system's unofficial, process-embedded sanctions, and Debra Emmelman's analysis of another court's cultural environment provide two US-based arguments forwarding other important reasons for why the practice of moral ordering fails to match its theoretical and textually-supported aspirations. These arguments have been tested, and to a considerable extent validated, by the more specific inquiries that this chapter has surveyed, such as Joseph Di Luca's critique of plea bargaining, JV Roberts' work regarding victim impact statements, and Richard Weisman's study of judicial constructions of remorse.

My investigations in this chapter have been largely predicated on Oonagh Fitzgerald's critique of 'summary justice' in the Canadian justice system, but tailored to my particular focus on how guilty pleas may facilitate or frustrate the criminal law's concern with communicative moral ordering. In this vein, §2.3 outlined the guilty plea's official function and requirements, comparing the dichromatic Canadian situation with some critiques and defences of 'no contest' pleas in the US, and also exploring how the diversity of motives and rationales that defendants conceivably pour into guilty pleas can be significantly influenced and obscured by the coercive mechanisms that the system has evolved to promote efficiency. These coercive forces, as §2.4 discussed, are most identifiably channelled through the practice of plea bargaining. After surveying a variety of perspectives on the use and virtue of this 'indispensible' means of resolving cases, I concluded that, while there is evidence that plea bargaining obstructs or sublimates the law's concern for moral ordering, it ought not to completely frustrate formal sentencing hearings from undertaking this function. Section 2.5 focused directly

upon sentencing hearings as the most formally important stage for moral ordering, including in its gaze what I found to be its most promising features for cultivating the necessary information and engagement for this deliberation to take meaningful effect. Finally, §2.6 considered the influence that professionals, primarily defence counsel and judges, have in setting the course of sentencing hearings as expressive forums in this regard.

As we have seen in this chapter, there are both opportunities and impediments to the 'open' communication of moral norms at the plea and sentencing stage of mainstream criminal justice proceedings. The opportunities, in keeping with a theory of criminal law as fundamentally interested in proportionately apportioning blame for *this* offence to *this* offender, are substantially found in the *Criminal Code's* provisioning for the balanced presentation of perspectives. These provisions include allocution, victim impact statements, and mediated representations from the community and the wrongdoer. Such opportunities are further endorsed and expanded by some of the literature that focuses on the flexibility of pre-plea negotiation processes, and the potential that lawyers and judges may have to therapeutically support the normative engagement of lay participants.

Most of the analyses of how the mainstream justice process operates that have been considered in this chapter, however, speak strongly of the abiding and widespread impediments to this aspiration. These critiques are found throughout systems and across jurisdictions. The moral ordering that is, necessarily, done in the course of a criminal justice process, these analyses suggest, mostly happens in the dim light of bargained outcomes and the poorly regulated 'punishments' incurred in the procedural burdens that defendants bear prior to and irrespective of their adjudged guilt. For these observers, although judges are officially empowered, and often motivated, to inquire into the moral dynamics of a particular case (and employ same in their dispositions) their efforts are hampered and often trumped both by competing instrumental pressures and other, less measureable interferences to the normative audibility of sentencing hearings.

This chapter identified the major obstacles to moral communication in a system that, arguably, purports and aspires to build its assessments and ultimate authority upon such a foundation. I have explored these obstacles by way of guilty pleas, in part due to this mechanism's sheer predominance in a system of plea-based criminal justice, but also to enquire whether guilty pleas provide any nurturance to moral dialogue in sentencing hearings. I found that the preponderance of the literature suggests that guilty pleas, to the extent that they can be validly characterized as strictly instrumental admissions, chiselled by coercive forces and managed by professional representatives, tend to stifle moral engagement more than they sustain it.

It is evident that there are multiple interwoven reasons why guilty pleas do not, by and large, promote normatively communicative sentencing hearings, and why these hearings cannot, thereby, discern or articulate contextually calibrated, morally resonant dispositions. The literature that I have canvassed advances a corresponding braid of explanations and prescriptions, attuned to each observer's focus and location. Theory, existing empirical studies, and statistics all suggest the guilty plea is a pervasive but problematic mechanism for ascribing moral culpability. This evidence, moreover, points towards guilty pleas as acting more as obstacles than invitations when it comes to furthering moral communication and dialogue in sentencing hearings. The final two chapters of this thesis consider these findings against the practices of particular courts, and the interpretations of particular legal professionals. For all their insufficiencies, criminal courts – in particular those accepting pleas and passing sentence – continue to function as official forums of moral ordering in society, and it is important to ask how they are actually doing in this regard. Accordingly, this thesis proceeds to undertake some of the empirical work necessary to most usefully respond to the question of how the criminal law's concern for moral ordering is being grappled with by various courts and legal professionals in British Columbia's 'plea-based' justice system.

## CHAPTER THREE: Moral Ordering in Plea and Sentencing Proceedings – listening to the perspectives of legal professionals

### 3.1 Introduction

As Chapters One and Two have related, the existing scholarship says much about how criminal justice systems fare as forums and facilitators of moral ordering. The empirical studies that form the remainder of this thesis are intended to contribute to this ongoing discussion, in two distinct ways. Chapter Four consists of an observational study that attempts to illuminate how, and through whom, law's concern for moral ordering is expressed in sentencing proceedings in four provincial-level courts in B.C. (the "Study Courts").<sup>1</sup> As will be discussed in greater depth in that chapter, I approach that study as an 'outside' observer, in much the same position as most of the researchers whose contributions to the field were considered in Chapter Two. The perspectives of those who work *within* criminal justice structures, however, are equally necessary to a comprehensive development of this thesis' questions. These perspectives cannot be fully accounted for by external theorizing or observation. This chapter, therefore, presents the views and experiences of a small sampling of justice system professionals who work in B.C. courts, as to how the law's moral concerns are engaged with by legal structures, processes, and actors. Of course, 'comprehensiveness' in this realm can never be realized – there is simply no way to canvass or gauge the full spectrum of opinions across the multitude of circumstances and vantage points that even one court, let alone an entire justice system, encompasses. The small windows that this chapter opens up are, therefore, offered as partial – though nonetheless important – insights into how legal professionals envision and practice criminal law's core 'business' of moral ordering, particularly in guilty plea and sentencing proceedings.

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<sup>1</sup> These courts, as will be more comprehensively introduced and described in Chapter Four, are the plea court (at the time of writing, Court 102) at the Provincial Court at 222 Main Street in Vancouver ("Court 102") the Downtown Community Court, also in Vancouver ("Community Court") a court based in New Westminster known as First Nations Court ("First Nations Court") and a circuit court location in the northern B.C. community of Hazelton ("Hazelton" or "Hazelton Court"). The four courts are collectively known as the "Study Courts".



### **3.1.1 Methodology**

I undertook the interviews that form the basis for this chapter with three research questions in mind. First, and most basically, I wanted to listen to how practitioners articulate their understandings of the law's moral ordering function. Second, I wanted to gauge how legal professionals – primarily defence lawyers and Crown Counsel – conceive of and practice their roles in moderating the communicative exchanges that constitute plea and sentencing proceedings. Third, I reasoned that that these professionals' familiarity with the courts and processes I was studying would provide perspectives and insights unattainable to outside observers.

While the two empirical studies presented in this chapter and the next (respectively, the "Interview Study" and the "Observational Study") both regard the same basic subject matter, they differ in purpose and approach. The Interview Study is intended to be a bridge between the themes and critiques developed, via an analysis of literature, in Chapters One and Two, and the observational analysis contained in Chapter Four. All participants in the Interview Study worked in one or more of the four courts that form the basis for the Observational Study and, as indicated above, their experiences in these forums are important to the insights developed in both chapters. Like most professional legal actors, the Interview Study's participants work in multiple court settings, and the perspectives they articulate are based in experiences that transcend the Study Courts themselves. Thus, while I was interested in cultivating their views regarding these courts in particular, the insights and opinions they expressed extend beyond such contexts.

#### ***3.1.1.1 Recruitment and selection of participants***

Participants were recruited for the Interview Study via a process of self-selection: first, a letter of invitation<sup>2</sup> was distributed by mail or email to potential participants, which I broadly identified as anyone working in one or more of the Study Courts in a professional capacity. Those who were interested in participating were invited to contact me to arrange an interview. I attempted to obtain a roughly equal proportion of participants with experience in each of the

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<sup>2</sup> Attached as Appendix 'A'.

Study Courts, who came from a variety of professional backgrounds. While this would ideally have included judges, Crown, defence, and ‘third party’ professionals in each court, I was unable to secure this level of participation.

Participants consisted of a total of eleven justice professionals, who were interviewed between January and April, 2010. All of the participants worked in one or more of the Study Courts at the time of interview. Nine were lawyers, and two were non-lawyer professionals who worked directly with lay persons in criminal court.<sup>3</sup> Three Crown Counsel, five defence lawyers, and one person who acted in both capacities comprised the nine lawyer participants. These participants exhibited a considerable range in terms of age and number of years in legal practice. The most ‘junior’ participant had been a lawyer for approximately two years, while the most senior had been practicing for well over twenty.

In addition to the nine lawyers, I also interviewed two courtworkers. Both of these individuals worked, although not exclusively, with First Nations Court, one of the four Study Courts selected for the Observational Study. I include their perspectives for two reasons. First, I wanted to hear how non-lawyer professionals perceive and experience law’s concern for moral ordering. Second, I wanted to listen to more than one voice speaking in relation to each of the Study Courts, and First Nations Court itself is distinct in being much less focused on lawyers and adversarial representation in general. Although I also invited (but did not obtain) participation from courtworkers in the other Study Courts, the inclusion of these two participants can be seen to reflect First Nation Court’s distinctiveness. My interviews with these two participants, however, largely resulted in the first rationale being considered under the rubric of the second. The voices of these non-lawyer participants are therefore hardly audible in this chapter’s more general inquiries, especially those which relate directly to the experiences of legal professionals in plea and sentencing proceedings. They are more prominently featured in Chapter Four’s Observational Study, wherein I consider each participant’s reflections on the Study Court(s) with which they are familiar.

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<sup>3</sup> Often generically referred to as ‘courtworkers’, these justice professionals are usually skilled in specific areas and/or equipped with specific resources to assist lay persons involved in criminal court with their particular needs. This can include victim services workers, Native courtworkers, and addiction counsellors.

Each participant reviewed and signed a consent prior to being interviewed, which included the provision that personally identifying information would not be disclosed. Generic identifying information, such as a participant's gender, professional capacity, and court(s) in which they work, is made available, both to differentiate between participants and to provide important context to their perspectives. I also assign each participant a pseudonym. They are thus introduced as follows:

1. Hannah, who has been practicing law for eight years, works as a Crown and defence lawyer in northwestern British Columbia.
2. Gerald, who has been a lawyer for twelve years, has spent the past two years practicing as a defence counsel in northwestern B.C.
3. Mary, who has been a defence lawyer in northwestern B.C. since becoming a lawyer two years ago.
4. Patrick, who has been a defence lawyer in northwestern B.C. for eight years.
5. Rolf, who has been a Crown Counsel in northwestern B.C. for over twenty years.
6. Bruno, who has been a defence lawyer in the Lower Mainland of B.C. for seven years.
7. Nita, who has practiced as a defence lawyer in the Lower Mainland for over twenty years.
8. Trent, who has been a Crown Counsel in the Lower Mainland for five years, and currently works in Court 102 at 222 Main Street in Vancouver.
9. Allison, who has been a Crown Counsel in the Lower Mainland for six years, and currently works at First Nations Court.
10. Jane, who has over twenty years experience as an alcohol and drug counsellor with the Native Courtworker and Counselling Association of B.C., and regularly attends at First Nations Court.
11. Mike, who works as a support and liaison worker at First Nations Court.

All interviews were conducted in a face-to-face environment, and lasted between 30 and 60 minutes. They were conversational in nature, but based upon structured lists of questions, or

interview ‘scripts’.<sup>4</sup> I used similar scripts for each participant, with minor modifications tailored to a person’s professional role as Crown, defence, or courtworker. The interviews were audio-recorded and transcribed into written form.

### **3.1.2 Thematic Overview**

This chapter empirically explores and contextualizes the theoretical propositions introduced in Chapter One as well as the structural and systemic questions raised in Chapter Two, and its progression roughly replicates the themes developed in each. I begin, at §3.2.1, by outlining participants’ general thoughts on the interrelation of morality and criminal law, before probing issues related to their experience as practitioners mediating this relationship. Section 3.2.2 opens with the general question of how participants evaluate the interplay between personal moralities and professional duties, and then considers how Crown and defence counsel understand their responsibilities vis-à-vis the moral dimensions that may be located within formal acknowledgments of guilt and determinations of sentence. In §3.2.3, I ask participants to focus directly on how guilty pleas express or obscure defendants’ moral perspectives on their fault for a given offence. Section 3.2.4 considers the sentencing hearing itself as a locus for communicative moral ordering, including the utility of the statutory mechanisms of pre-sentence reports, victim impact statements, and offender allocution. Finally, §3.2.5 relates participants’ perspectives on the overall appropriateness and effectiveness of sentencing courts as forums for ‘moral speech’; that is, the audible engagement, by all potentially informing voices, with the process or product of moral ordering. These inquiries, of course, are fundamentally interwoven, and there is much thematic overlap, concurrence and contradiction both between and within participant responses. I include a short reflection at the end of each section, both to help synthesize the multitude of perspectives, and to offer my own interpretation of how the voices of these practitioners inform the themes and ideas privileged in this thesis.

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<sup>4</sup> These scripts are attached as Appendices ‘B’ through ‘D’.

## 3.2 Interview Findings

### 3.2.1 Morality's Place in Criminal Court: An Essential but Contentious Relationship

Morality pervades what I do and yet I don't consciously think about it at all...<sup>5</sup>

Each interview opened with a broad question: how do you understand the relationship between law and morality, in the context of your work?

Gerald, a defence lawyer in northwestern B.C., was anxious not to accept 'morality' as an undifferentiated, all-pervasive or unifying quality. He split the concept into three branches:

[The] first is my own morality in the sense of right, wrong, ethics, what's permissible and what's not. And then there is the social morality, which is in some ways embodied in the *Criminal Code* and the statutes in which society is saying here are the minimum standards that we want everybody to meet. And then of course there is the personal morality of the client and whatever mix they bring to that... it's all morality but it's got different heads to it..... There's always overlap...sometimes it's almost complete contiguity but often times it's only a little patch where they all intersect.<sup>6</sup>

Other participants generally supported this idea of multiple moralities asserting claims for relevance in criminal court proceedings. There was agreement that the morality embodied in legislation is often contestable, if not in terms of legal liability then at the level of moral blameworthiness. Patrick, another northern defence lawyer who highlighted the "multi-dimensional" nature of morality, contended that although 'wrongness' appears as "cut and dried" in legal prohibitions, the moral meanings, requirements, and consequences of proscribed conduct must necessarily be contextually calibrated at the sentencing stage.<sup>7</sup> For him, this was among the most important purposes of a sentencing hearing. Rolf, the veteran Crown Counsel who appears regularly in Hazelton court, cautioned that the law 'on the books' does not, of itself, provide moral guidance for answering these questions, but only a "legal framework" for determining legal issues. In this respect, he understood law and morality as "almost two separate worlds", and he pointed to the dangers of an overly close relationship between the

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<sup>5</sup> Author interview with "Hannah", January 17, 2010. All following quotations are taken from this interview.

<sup>6</sup> Author interview with "Gerald", January 19, 2010. All following quotations are taken from this interview.

<sup>7</sup> Author interview with "Patrick", January 17, 2010. All following quotations are taken from this interview.

two, wherein partial or prejudiced notions of moral repugnance could easily result in unjust laws and unfair prosecutions.<sup>8</sup>

Nita, the defence lawyer who practices in Vancouver's Community Court, echoed Rolf's concern. For her, the danger of criminal law overstepping its 'appropriate' role as evoker of shared social notions of what is "just immoral" has already been realized:

...stealing is wrong. Killing people is wrong. Assaulting people is wrong. Breaking their property is wrong. But really, anything beyond that.... crimes of you know, prostitution and gambling and drugs and all that a kind of stuff I just think it's absolutely crazy that the criminal justice system is involved in that sort of stuff.... we've skewed the whole thing in such a crazy way without looking at this sort of overarching umbrella of what really is worthy of denunciation...<sup>9</sup>

Several participants also added their perspectives on the underlying causes of criminal behaviour, which, in their view, can distort or even obliterate the moral sensibilities and responsiveness of the persons whose conduct provokes the law's response. From Bruno's experience as a defence lawyer in Vancouver, the chief contributor of this disintegration is drugs, whether abused for intoxication or profit:

Drug dealers destroy many lives but I've never heard one express remorse over the consequences of his or her actions. ...If you fall low enough, morality can disappear....crime can become a philosophy, a way of life, and people become very self-centered. They only care about the consequences for themselves.<sup>10</sup>

Jane, the counsellor who assists people at First Nations Court, took a different view. She understood crime itself to be the consequence of a perpetrator's afflictions or unmet needs: "[crime]... is an acting out... a cry out... for help. Because if they didn't need the help, they wouldn't be doing the things that they're doing".<sup>11</sup>

This section presents only a small sampling of participants' understandings of the complex interrelationship of law and morality, expositions of which will weave throughout the more specific topics addressed in the following sections. The quotation that opened this section, however, adequately captures how almost all of the Interview Study participants approached

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<sup>8</sup> Author interview with "Rolf", January 20, 2010. All following quotations are taken from this interview.

<sup>9</sup> Author interview with "Nita", March 10, 2010. All following quotations are taken from this interview.

<sup>10</sup> Author interview with "Bruno", March 25, 2010. All following quotations are taken from this interview.

<sup>11</sup> Author interview with "Jane", March 30, 2010. All following quotations are taken from this interview.

this topic: while moral concerns or valuations pervade criminal law and legal practice, their influence is rarely, outside of egregious cases, consciously considered. This base reality made it quite difficult in some instances for participants to engage with my invitations to engage with morality. Their responses, however, converge on some key points. All acknowledged the fundamental interrelationship of morality and criminal law, but each also related how the two concepts are not, and ought not to be, synonymous. Indeed, irrespective of their professional position, participants were careful to differentiate personal mores (whether their own or others') from social standards and judgments of 'right' and 'wrong', and both of these from the business that courts conduct. This business, both Crown and defence participants implied, while not indifferent to other strands of morality, includes responsibilities to the 'law' that make it difficult, if not inappropriate, for courts deeply speak to or from the more organic moralities that arise as personal, interpersonal, or social valuations. As multiple participants noted, these three spheres of meaning are ever-shifting, their conversations inter-informing but fraught with inherent and contextual dangers. These dangers were noted to include the essential contestability and multi-dimensionality of morality itself, the power and coercion embedded in law, and the interfering variables of addiction, intoxication, past abuse and/or mental illness frequently borne by those whom the law seeks to judge for their conduct. As Patrick recognized, however, if these conversations are to be held at all within the judicial process, it is at sentencing where they must take place. I take up this theme in the following section, in which participants reflect upon their roles in the plea and sentencing process.

### **3.2.3 Approaches to Law's Moral dimension(s) in Professional Practice**

Three areas are developed in this section: first, whether lawyers' personal moral values affect the way they perform their professional duties, second, whether counsel (defence in particular) feel responsible for engaging with the moral dimension of people's decisions to plead guilty, and third, how counsel conceive of and discharge any role as moral advocate or spokesperson at sentencing hearings.

### 3.2.3.1 *The interplay of personal values and professional duties*

The lawyers whom I interviewed, both Crown and defence, were unanimous in stating that their personal views or opinions should not – and don't – affect the discharge of their legal responsibilities. This was most strongly evoked by defence counsel regarding their role in advising clients in the pre-conviction stage of proceedings. Hannah, when I asked her about whether she tries to be a moral guide for her clients, responded emphatically:

No. Facts and the law, facts and the law.... If you were just using your role to be someone's moral guide, you'd be pleading out 95%... I am able to go click, I'm not responsible for [a client's] behaviour... there is a point once you've gotten by noticing what your client's charged with... then it's business. Then it's all about looking at the case and going can the Crown prove it? What's at stake for my client?... What are the risks to you to fight this versus pleading out?

Gerald expressed a similar view.<sup>12</sup> Mary underscored that, while a person's decision to plead ought always be up to them, she must be careful to neither give nor 'hear' too much information at this sensitive deliberative juncture, lest it compromise her ability to represent a client:

I go through all the circumstances and I discuss with them what my view of the facts are and we have a discussion over... what they want to do first... I also don't get them to say that they're guilty unless we go for a guilty plea... it's a fine line because sometimes they might tell you something that makes them guilty...<sup>13</sup>

Rolf, the veteran Crown, was adamant that prosecutors ought never to imbue professional decision-making with personal moral values. He stated:

I think the *Criminal Code* is quite clear and I think when you bring your own personal morality into it I think there's a danger of... treating people differently just because of one's moral framework. .... I think guilt or innocence shouldn't be based on morality. I think sentencing at that point it creeps in but I think you have to be careful because, whose morality?

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<sup>12</sup> He stated: with regard to his approach to clients who are reluctant to face inculpatory 'facts and law':

Certainly I'm always constrained by instructions I get from the client. And if they say, now I don't think I did anything wrong, I may go through with them if there's this huge evidence review base against them and say okay, we go to trial... And I try to bring them around to understanding that the court's denunciation of behaviour and setting of limits is a socially responsible function that should be in place. But if they still can't get to it, then really there's not much choice than to set it down for trial, in spite of the fact that there may be a poor outcome.

<sup>13</sup> Interview with "Mary", January 19, 2010. All following quotations are taken from this interview.



#### ***3.2.3.4 Defence involvement in clients' deliberations and decisions on plea***

Rolf's acknowledgement that the law's moral dimension gains prominence after legal guilt is established was shared by participants from the defence bar. The latter's common view was that after the factual and legal particulars of a case have been fully canvassed, and a client has decided to plead guilty, discussion of moral concerns such as remorse and accountability does become appropriate, even essential, to effective representation. As a precursor to this inquiry, however, I asked if it was important for counsel to understand the reasons behind a person's decision to plead guilty, and whether that choice requires or includes an engagement with the moral dimension of a given offence.

Patrick expressed what could be understood as a 'traditional' defence approach to representation, in which Crown and court are strictly held to their procedural and constitutional obligations even in cases where a client's substantive guilt seems obvious.<sup>14</sup> He stressed that, as a defence lawyer, he would not assist someone to plead guilty unless legal guilt is both established (on the law and facts) and accepted (by the client). No participant contradicted Patrick on this point. For him, the consensual taking of responsibility is a necessary prerequisite to, and indeed itself the moral dimension of, all of his cases that resolve by a plea of guilt. I asked him if he would be prepared to help a client plead guilty who indicated that they did not accept such responsibility. Patrick distinguished here between denials of factual responsibility, in which cases he stated that he would absolutely refuse further representation, and denials of a given offence's 'wrongness':

if they've instructed me to present that [information] to the court, I have two options. I can either say, okay I'm going to do this, but you need to know that the court may then refuse to accept your plea. Or the alternative is, I'll let you explain it to the court. Because I cannot in good conscience do it.

The general consensus was that both lawyer and client should be clear and in agreement on the latter's decision to enter a plea.

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<sup>14</sup> For Patrick, this adversarial ethic amounts to a "moral duty" owed to clients.

Once a client has accepted legal guilt, I asked participants whether they go on to discuss any moral dimensions of this decision. Gerald expressed his view of what would be most fundamental to any defence lawyer's duties vis-à-vis advising clients at this stage:

Certainly I assume that most counsel in the back room are having those kinds of discussions with the client in some respect – if nothing else, did you know what you were doing? And did you know it was wrong? ...[C]overing off the basics.

Hannah evoked her own more expansive, 'counselling' approach to engaging with those in the process of accepting legal guilt:

I make it my mission, once I get a client in private, who's instructed me to cut a deal for him or her, to not then ignore them as a human being... interestingly, when you're having that talk with the client, there is no equivocation. They actually are relieved and unburdened that they're pleading guilty...and I encourage them, I try to say look, I can't put words in your mouth, but I'm going to tell you something, don't talk in legalese, don't try to be all formal. Speak from your heart. Are you sorry? Say I'm sorry. Say the words, and, and don't talk about the complainant. Don't blame anyone else for what you did... I mean I have to get their permission to do this, but I'll lay their souls bare [to the court at a sentencing hearing].

Hannah was, however, convinced that most defence lawyers tended not to practice in this fashion. She expressed a belief that some colleagues actually attempted to shut down any discussion about moral perspectives, both in private and in court:

a lot of [clients] come to you having had a different lawyer in the past... and there's a lot of nudge, nudge, wink, wink that goes on with defence lawyers... [these] lawyers might have kind of encouraged them to just you know what, just cut the deal... this is good for you and just you know what just do it... [they] don't talk to them about the morality of what [clients] have done.

Other participants from the defence bar, although they did not perhaps share Hannah's sense of "mission", did not substantially validate her concern about the neglect of clients' moral standing, agency and the moral implications of a decision to plead guilty. The prevailing view among these other participants, however, was that in-depth discussion of such issues was reserved for receptive clients. Mary, for example, viewed a given case's moral dimension as something that a client would have to introduce, which in her experience only happened in a minority of cases. Nita told me that her likelihood of engaging with a client on a moral plane

“would really depend on the person... whether they’re interested in hearing [it]... I don’t believe in casting pearls among swine”.

Nita also stated that she had encountered situations in which a client had rapidly changed their narrative in response to instrumental circumstances. She told me that, while she had seen other lawyers “plead people out” if instructed to do so, even when their clients had openly denied responsibility for an offence, she did not countenance this practice:

I know there are some lawyers who’d say I will take my instructions even if they’re say I’m guilty or not guilty, I’ll still plead them regardless. I’m taking my instructions from my client if that’s what they want to do. I personally will not do that and I just say look, you just told me you didn’t hit this person. You were nowhere near it... so unless you have an epiphany that somehow now it’s falling within [the legal definition of] assault, you can either talk to [another] counsel or you can speak on your own behalf.

Finally, Patrick noted that, especially in the cross-cultural context of legal practice in northern B.C., moral concepts may not be understood in a uniform way, even when legal guilt is admitted or unavoidable:

I have to be cautious of... not imposing my moral beliefs on to them, because they may have a very different moral perspective coming from a different background etcetera. My job is to objectively tell them the law says this is morally culpable for the following reasons. And my job is not to debate with them whether or not it’s morally correct...

The views that participants from the defence bar expressed on this point indicate a general alertness to the fact that a client’s decision to plead guilty does, necessarily, involve a dimension of moral judgment. As Patrick recognized, however, this assignation of normative meaning may not (and in his view need not) be an individual client’s or that of their local cultural context. While Patrick, perhaps, would not be inclined to try to span any gap between a client’s and the law’s interpretation of the wrongness of a given act, a lawyer such as Hannah would likely place more importance on perceiving and fostering connections between individual and institutional moralities, in preparing a client for the ‘effective’ performance of their decision to plead guilty.

### ***3.2.3.5 Acting as a moral advocate or spokesperson at sentencing hearings***

Both Crown and defence lawyer participants agreed that their roles at sentencing hearings do, at least in the abstract, include acting as spokespersons or interpreters of moral values.

Because their roles are so different (even directly opposed) at this juncture, I develop each set of perspectives in turn.

i) Defence perspectives

Hannah was again the most vocal in evoking what in her view constituted “good” practice:

When you then walk in and you’re doing a guilty plea and sentencing... then you absolutely if you’re doing your job, talk about morality... morality comes right back into the picture once you’re doing a good sentencing.

Gerald expanded upon what such talk would likely consider:

the entire circumstances of the offender and their family and the history and the preceding events and whatever triggered it off. The part played by the victim and so on in trying to look at okay, how does everything fit together so that interconnectedness that is part of morality is brought out...<sup>15</sup>

All defence lawyer participants told me that their duty towards their clients’ best interests continues throughout their representation, and that this overarching obligation would channel or modify the information and argument they put before a court at sentencing. Strategies for fulfilling this obligation, however, differed among participants.<sup>16</sup>

Trent, from his vantage point as Crown in a high volume urban plea court,<sup>17</sup> confirmed the variability in approach to this aspect of defence practice, as well as offering his view of what is more and less effective:

I know some defence counsel who yell at their clients themselves about how what they have done is wrong and make them feel much worse than the judge ever would. ...[while] some defence counsel will try to really minimize the severity of what the client has done...but when they go too far, I don't think they're doing their client a service,

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<sup>15</sup> Bruno advocated a similar approach:

you can either show or you can tell, you can state or you can describe, I mean everybody says, my client is 32 years old, he was born here, he has an addiction to... What I try to communicate is the kind of person [he or she is]. I try to give a judge a glimpse into the personality of my client to kind of put some flesh on the bones...

<sup>16</sup> Bruno, for example, stated that

sometimes I tend to be rougher on my client in my submissions than both the judge and the prosecutor on the theory that if I give it good to my client than maybe the judge will feel some sympathy [for him or her].

<sup>17</sup> Court 102 at the Provincial Court at 222 Main Street in Vancouver (one of the four Study Courts).

either from the judge, in terms of persuading the judge, or in terms of sort of shielding them from getting any kind of moral message from the judge.<sup>18</sup>

ii) Crown perspectives

Hannah noted that although the ‘law on the books’ itself provides a basic framework for assessing the gravity of an offence and the degree of responsibility of an offender, it is the responsibility of individual prosecutors to contextualize these principles: “we’re the ones conveying the facts to the court... and it’s not just about reading in, it’s about making sure [to]... highlight anything egregious, abnormal...”. She tempered this statement, however, by stressing the balance and fairness that lie at the heart of her conception of the prosecutorial role:

as Crown you don’t want to overstate it.... The best way to ensure ... the moral nub of a case, because you want to convey that to get the sentence that you think is [appropriate], is to make sure that your submission on facts is clean, no melodrama, and thorough.

For Rolf, the balance challenging prosecutors is often between their assessment of the moral dynamics at play in individual cases and principles of general application, such as equality:

if you have a theft where someone stole because they’re desperate, I think at that point you’re compassionate... there is some leeway. .... But the problem is you have to be treating individuals the same too. You can’t just say because two individuals did the same thing and one person gets a break because you happen to agree with their views and the other person doesn’t because you don’t...

Allison, the Crown at First Nations Court, agreed that considering all offenders ‘equally’, according to an unbiased analysis of the *Criminal Code*’s relevant sentencing principles, is important to her role, even in a court that takes an unorthodox approach:

my position doesn’t stray from what I would normally look at in the traditional courts. It would be the same thing, depending on the different factors that I have to weigh. If I have an individual who’s coming through First Nations Court and they have a ten page criminal record that has many serious violent offences and they happen to come back through the Court again for a serious violent offence, I’m not going to take the position [that] just because they are a First Nations person in First Nations Court that... I’m not going to consider jail as possibility. It always depends on each individual.<sup>19</sup>

Ultimately, Hannah concluded,

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<sup>18</sup> Interview with “Trent”, February 15, 2010. All following quotations are taken from this interview.

<sup>19</sup> Interview with “Allison”, April 12, 2010. All following quotations are taken from this interview.

whether you're Crown or defence, making sure... that you highlight the facts appropriately permits the court to make the best moral decision possible. Isn't that what a sentence is right? It's the imposition of a moral decision.

The vehemence with which all participants, whether Crown or defence, northern or urban, described the barrier between their personal moral orientations and their professional responsibilities suggests this to be a core and pervasive belief among criminal lawyers. This barrier was generally expressed as extending throughout the professional relationship with a client or case file. All participants agreed that 'good' lawyers do not let their moral values affect the flow of advice or discretionary decisions they are called upon to make. The law itself, including established ethical or policy-based guidelines, was upheld as necessary and sufficient for competent practice, with anything more 'personal' seen as imperilling this standard.

Queries regarding defence counsel involvement in any moral aspect of a client's decision to plead guilty were generally met with the same insistence that such guidance should not be allowed to affect the legal and factual calculus that must drive this crucial choice. Further, defence participants maintained that although the decision to plead is ultimately the client's (who may have their own morally-based reasons for accepting responsibility for an offence) lawyers' legal expertise and obligations can fairly counsel persons away from pleading guilty even when clients may feel or seem so. Patrick voiced this perspective especially forcefully, even casting the process of asserting an accused person's rights as a moral duty he owes each one of his clients. Lawyers were less clear about the degree to which they direct and are directed by their clients in the consultative process leading up to a decision on how to plead. Mary, in particular, told me that she would not want to know whether or not a client 'thought' they were guilty before she had advised them of their legal situation. She did not specify how a client's expression of guilt, whether factual, moral, or both, would compromise her ability to represent them if they ultimately decided to contest its legal establishment in court. Certainly, she could not advise a client to state or imply at trial that factual guilt was at issue, if it had already been disclosed to her.<sup>20</sup> There is much more ambiguity, however, reflected both in Mary's statement and in the professional *Codes* of conduct that guide and bind lawyers'

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<sup>20</sup> As per The Law Society of British Columbia, *Professional Conduct Handbook*, Chapter 8 "The Lawyer as Advocate" (Victoria: Law Society of B.C., 2010), online: Law Society of B.C. <[http://www.lawsociety.B.C..ca/publications\\_forms/handbook/chapter-08.html#8-10](http://www.lawsociety.B.C..ca/publications_forms/handbook/chapter-08.html#8-10)>.

behaviour, with regard to how moral quandaries in pre-plea discussions (whether counsel's, a client's, or both) are meant to be resolved. Faced with a client who voices inconsistent or contradictory information about their responsibility for a given offence, it seems that each lawyer's individual moral compass is left to point the appropriate way forward. As Patrick and Nita's comments illustrate, this challenge can arise both when a client who expresses guilt desires to proceed to trial, and when a client who professes innocence decides to plead guilty. Where certain counsel might strictly follow a client's instructions,<sup>21</sup> others, such as Nita, would have significant moral reservations in allowing the legal process to be employed in such a baldly instrumental manner.

Participants did begin to acknowledge some permeability between strictly 'legal' and moral norms and values in the period after a guilty plea has been decided upon, at least by way of an openness towards or even active encouragement of lay persons' engagement with the moral dimension(s) of unlawful conduct. As most agreed, these considerations become more palpable at the post-conviction stage of legal proceedings. Hannah was especially expansive on this topic in stating her view on the appropriateness and utility of engaging with her clients in a therapeutic, 'soul baring' fashion.

When it comes to making sentencing submissions, both Crown and defence lawyers agreed that their roles do involve representations as to the appropriate moral light in which a court ought to assess offenders and offences. This incorporation of moral themes and claims was cast, by defence counsel, as always subservient to the adjudged 'best interests' of clients, and, by prosecutors, as channelled and moderated by their quasi-judicial obligations of substantively fair and equal treatment. Finally, it must be noted that the focus from both Crown and defence perspectives in responding to this query was squarely directed on the needs and rights of offenders, not victims or other 'third parties'.

#### **3.2.4 The Moral Content and Character of Guilty Pleas**

The capacity of guilty pleas to contain and convey normative meaning is among this thesis' central inquiries. From Chapter Two's literature-based analysis, it would appear that the plea is

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<sup>21</sup> I note that this view was not explicitly adopted by any participant.

a suspect or, at best, insufficient indicator of a defendant's moral orientation towards their conduct. I was thus interested in how the views of practitioners themselves would bear upon this assessment. I asked participants to reflect on the moral dimension(s) of guilty pleas, in terms of pleas' formation, communicativeness, and reception by sentencing judges.

#### **3.2.4.1 Motivation(s) for pleading**

Patrick agreed that a majority of his clients do plead guilty, and stated that he needed to know the reason(s) behind a client's decision to plead, in order to offer competent legal representation at this stage:

it's absolutely essential because I have to... understand what they're pleading out to, and [whether] they can actually admit all of the circumstances. I have had clients that have terminated me because I've told them that they can't plead guilty because they don't admit each and every element of the offence, and yet they've gone into court and actually plead out.

Mary, when I asked her whether a guilty plea was itself an admission of having done something wrong, stated "yes... that's universally accepted by the court that a guilty plea is saying 'I did this wrong'".<sup>22</sup> Mary did not, however, go so far as to endorse the communication of a plea as conveying remorse. "In discussions with clients, sometimes there are other reasons why they're giving a guilty plea other than that they're sorry". All participants acknowledged that various pressures and inducements often affect a person's decision to plead guilty, which they recognized as obscuring or distorting any specifically moral rationale that someone may have in taking this step.

Hannah enumerated some of these reasons, as well as her professional response thereto:

[The] first impulse is... they just want to get it over with. And at the plea, you never let that motivate someone to plead guilty. You stay well clear of that as defence, and even as Crown... The other reason can be that they are genuinely a good person who made a terrible mistake usually under the influence of alcohol and they do not want to make excuses, they want to take responsibility for it, get it done. ...The other reason can be sheer reality. They finally realize, and maybe it took you months to get them there as defence, that actually they are looking at a losing situation or the risks [are] too high to be fighting this and they should be thinking of pleading out.... usually I'm the one driving it in the sense that I've given them the advice that's gotten them to that place. Because

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<sup>22</sup> Gerald echoed this belief: "in almost every case, the client, if they're pleading guilty, [gets] it that it was wrong".



normally people plead out for that last reason. They finally do realize that this is the best path for them.

As indicated by Hannah, the burdens of the legal process, as well as the risks of an unpredictable or adverse outcome, are a major influence in the production of guilty pleas.

Instrumental pressures and inducements were also cited by Bruno, a Vancouver-based lawyer:

[whether] you get bail or not seems to have a big impact on how you end up pleading... If they get bail then they want to stretch it out, but if they don't get bail they want to plead guilty. Often it's because you get a good deal from the Crown. Often it's because the Crown has an excellent solid case and there's no hope at trial so you hope that the court will see the guilty plea as a mitigating factor. I would say that regret or remorse really doesn't have much to do with it.

These comments infer that lawyers (if not courts) know and understand why persons choose to plead guilty. They further implied that most people's reasoning process is coloured by practicality and self-interest, and driven by the overt and covert influences embedded in the system itself.

In contrast to these claims, Patrick, speaking from his experience in northern B.C., noted how guilty pleas, in their meaning and consequence, may be differently interpreted depending on the interpreter's informing cultural reference:

you have to recognize that [Aboriginals] come from a tradition and a heritage that has a very different moral view [than that of the Canadian justice system]... in the First Nations' community your obligation is to take responsibility within your community, to acknowledge what you did was wrong. To have a shame feast and make amends directly to the person and the family of the person and then their house for what you did, and if that's satisfactory, then you're brought back into the community. Unfortunately what our system does is, we draw on that moral responsibility, because these people do have a high degree of moral conscience. But we draw on that, they say they're guilty not understanding the full implications of what that's going to mean. That's how we end up with an overrepresentation of aboriginal people in jails. They don't understand that look, I made amends, I went to the elders, I apologized, I had gifts given to the family, I took responsibility, now I'm here because your court says I have to be here, so I'm continuing that process not realizing I'm going to be going to jail.

Patrick's reflection illuminates the interpretative disequilibria that hobble the concepts of guilt and responsibility. What these admissions mean and require in a local context, he seems to imply, do not hold the same value in the court system's (officially authoritative) interpretation. The absence of a shared normative language thus does damage to the moral ordering that

courts are able to provide. Mike, who has developed his perspective working with Aboriginal people in criminal courts, including First Nations Court, as a non-lawyer advocate and liaison, added to Patrick's sense of the plea's dislocated meaning:

I don't think many [clients] are even aware [of the ramifications of their plea]... they don't look at it as that they're pleading to something, they look at the end result. They look at it as an opportunity to step in front of someone that's gonna hear them, so it's like a no-contest rather than as a guilty plea ... I don't know if they're even aware that [the courts] make a distinction.<sup>23</sup>

Neither set of perspectives – that which imparts predominantly instrumental rationales to plea decisions, or that which questions the extent to which such decisions are based on common understandings of the terms employed – bodes well for the moral ordering that a court receiving a guilty plea can contribute to extending, to individuals as well as to communities. Below, I enquire more directly into how participants sense that guilty pleas are interpreted by the courts within which they work.

#### ***3.2.4.2 How guilty pleas are considered by sentencing courts***

Participants did not express a high degree of confidence that most judges inspected beneath the surface of a formal admission of guilt. For Nita, this is not so much the result of naïveté (“the court... may not always know when [a plea is] sincere but it should always know when it's for a strategic purpose”) as it is a lack of moral integrity, within a context of pre-trial pressures that lead to absurd situations:

I find it offensive when judges will take pleas from someone who's, after saying yeah but I didn't really do it, and then they'll take the plea anyway, and that's wrong.... I've seen judges say, well then I'm not, I'm striking the plea. You know, we're going to adjourn you over a week, you think about it. And then the words, if you're smart enough to come back next time and just shut your mouth you can enter your plea... I've never liked that, never liked it at all.... to see a judge take a guilty plea from someone who just absolutely pounded the table, I'm not guilty, I'm not guilty, I'm not guilty, and says but I'm going to plead because you just detained me and I don't want to spend the next three months in jail when the Crown's only asking for 30 days. Okay well we'll take your plea. Are you kidding me? It's a horrible situation for this guy but it still doesn't make it right.

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<sup>23</sup> Interview with “Mike”, February 11, 2010. All following quotations are taken from this interview.

Nita's discomfort highlights the problems confronted by a system that uses the concepts of moral responsibility (and formally expects their interpretive adherence) yet which operates in a context wherein defendants cannot help but privilege their instrumental self-interest.

Gerald and Patrick, who practice in northern B.C., expressed similar frustrations. Patrick told me that

a lot of people are just so frustrated with how far behind the court system is, the back log, because they know they're going to be under bail conditions that are restrictive and difficult, that even though they may not be guilty or they have a defence, will... even terminate your representation and go in and plead guilty because they just want it over.

Mike, for his part as a non-lawyer justice worker, told me that many of his clients pleaded guilty simply to gain access to the services and approach available at First Nations Court:

the court in my mind should not have to force a person to plead guilty to something that is defensible simply to have access to something that should be provided to them as course of right.... I deal with individuals throughout the province, and because of some practices, [they] are being remanded into custody without having their Gladue rights, and are having their charges waived down to be dealt with in First Nations Court as opposed to having their matters dealt with in their home jurisdictions.

Participants, overall, noted how difficult it is, for both defendants and sentencing courts, to rely on guilty pleas as bases for normative dialogue. Flowing from this general viewpoint, participants agreed that guilty pleas, in and of themselves, don't convey much in the way of rich or contextualized moral information.

As all participants acknowledged, there are various reasons why people choose to plead guilty. Their responses suggested that practical, self-interested rationales outnumber normative motivations, although it was recognized that criminally accused persons often possess multiple, overlaid and even internally inconsistent reasons for making this crucial decision. Confirming Malcolm Feeley's findings on this point,<sup>24</sup> some participants also pointed out that the pressures and inducements of the pre-sentence period (including a person's bail status, the economic and non-economic costs of defending cases, and 'deals' made available by the prosecution) are highly challenging to the maintenance of the freedom and voluntariness that are meant to characterize and protect the choice of plea. The distortions occasioned by 'plea based' justice,

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<sup>24</sup> See Malcolm Feeley, *The Process is the Punishment* (New York: Sage Foundation, 1979) at 30.

in these participants' views, remain in plain evidence as a dominant reason for why sentencing courts are not (and, perhaps, cannot be) forums for constructive moral ordering.

Patrick and Mike, while not disputing the above critique, focused on the particular cultural insufficiency of the Canadian justice system, with its attendant interpretive orthodoxies, in understanding what a plea of guilt may mean in a given Indigenous frame of reference. In this view, it is not so much instrumental pressures as normative incoherencies that provide the biggest obstacles to moral ordering, at least for these individuals and communities.

Despite all the caveats and complexities that are brought into sentencing courts when pleas are delivered, participants echoed Oonagh Fitzgerald in expressing some frustration at the lack of scrutiny and integrity present to receive these admissions.<sup>25</sup> The consensus was that whatever moral substance is contained in or presumptively demanded by the plea is overwhelmed by the court system's impatient willingness to trade meaningful inspection for instrumental efficiency. This situation results, participants generally concluded, in sentencing hearings that do not, and indeed cannot, comprehensively consider many offenders' perspectives upon the offence or their self-adjudged responsibility therefor, due to the un-scrutinized legal mechanism of a plea that is non-communicative, if not downright deceptive, about its formation and content. This somewhat disturbing finding is more fully developed in the following section.

### **3.2.5 Sentencing Hearings as Forums for Moral Discernment, Dialogue, and Expression**

This thesis has argued for criminal law's fundamental concern for moral ordering, and for sentencing courts, in particular, as the deliberative, communicative forums wherein this concern is most explicitly manifest. As has already been seen, the 'plea based' nature of these courts, and of guilty pleas themselves, imparts serious challenges to this ideal. These claims have had comparatively little to say, however, about how individual courts are engaged in practicing their normative purpose. In order to test and contextualize the evidence that prior scholarship has compiled, I asked participants to reflect upon how, in their experience, sentencing courts view *themselves* as forums for the giving and receiving of moral messages.

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<sup>25</sup> See Oonagh E. Fitzgerald, *The Guilty Plea and Summary Justice* (Toronto: Carswell, 1990) at 168-169.

First, I directed their attention to the various tools available for courts to deepen their understanding of the gravity of *this* offence, and the degree of responsibility of *this* offender.

### **3.2.5.1 Pre-sentence reports (“PSRs”)**

Hannah was quite critical of the use and effectiveness of PSRs in the northern B.C. courts in which she practiced:

defence lawyers seem to be inappropriately shy and worried about using them. It’s usually the Crown who seek them. They’re not that well done. The probation officers just could go that extra mile and don’t seem to. They seem to get them in the day of or the day before and really all it is, is a recitation of the person’s history, a rather cynical take on their view of things. [There’s] not enough follow up in terms of they can’t get [offenders] for the interview, and then a not strong enough view on sentence.... the moral place these reports could go would be in talking more about the comments that the accused made about what they did and how they feel about it, whether it was right or wrong, do they want to make amends?... [But] probation officers are not following up enough if the accused don’t make the appointment, or they’re making them too short, and the... the accused aren’t being trained enough by the defence lawyers to be candid.

Nita, the veteran Vancouver defence lawyer, stated that PSRs are “really completely focused on the accused and... risk factors [regarding the likelihood of reoffending]”. Nita’s opinion supports the critical literature, reviewed above at §2.5.1, that suggests PSRs are rarely used to bring normative perspective(s) upon wrongful conduct into focus. For his part, Gerald was less critical of the effectiveness of PSRs in at least attempting to bring certain moral aspects of an offender or offence before a court for its consideration, and commented on Gladue reports in particular as “all about the larger moral dimension of the dynamic between the larger society, the local society, historical impact... in trying to address the overrepresentation of aboriginal folks in jail”. It was uncertain whether this represented Gerald’s idealized understanding of how Gladue reports are meant to function (which itself closely reflects that outlined in Chapter Two) or how these reports are actually being used in northern courts that primarily serve an Aboriginal population. Gerald suggested to me that, while the explicit language of the *Gladue* decision is, in his experience, rarely invoked, courts in his region were engaged in manifesting the decision’s principles on a regular basis. All the other defence counsel participants, however, whether in northern B.C. or the Lower Mainland, reported that they had had no

direct experience with Gladue reports.<sup>26</sup> I discuss the observable uptake of the *Gladue* decision's directives in these courts at greater length in Chapter Four.

Trent, the Court 102 prosecutor in Vancouver, confirmed that in his experience "PSRs are not used very often... unless there's a specific issue that you are really looking to get some information on". He told me that he generally only requested one if an offender is self-represented, or when there is a mental health issue that requires an expert assessment. Otherwise, "it's seen as a better use of time to just have the information come through counsel...". Rolf, for his part, critiqued the usefulness of PSRs from a different angle. While acknowledging that PSRs and psychiatric assessments can be helpful to a court's understanding of an offender's mindset, he stated that he didn't think that any external source could effectively illuminate the "black box" of a person's true moral orientation towards what they had done. There was, in general, little disagreement that this mechanism (except in the case of Gladue reports) is not commonly used as a means of cultivating substantive insight into offenders' valuations of the wrongness of their conduct, but more to enquire into specific risk factors and sentencing options.

### **3.2.5.2 Victim impact statements ("VISs")**

I asked participants about the use of VISs in bringing forth this arguably important 'third party' perspective on the offence. I received a range of responses on such statements' theoretical effectiveness in enriching a court's understanding of the moral dimension(s) of a given case, but all participants agreed that VISs were, in general, rarely employed.

Hannah commented on the reasons for the neglect of this "wonderful" resource, especially on the part of the Crown in the northern region in which she practiced:

[as] a defence lawyer, you hate... victim impact statements.... But as a Crown, victim impact statements are really, really useful... they are very powerful, arguably the most powerful thing a judge could have in front of them regarding the morality of what occurred... [they are] a powerful and underused moral tool.... Crown are overworked... [they] no longer have victim services workers so they have to get the police victim

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<sup>26</sup> I must reiterate here that I did not interview any defence lawyers who practiced at First Nations Court. As will be further explored in Chapter Four, First Nations Court made extensive use of Gladue reports in its proceedings, and, in its very design and approach, may be seen as an attempt to embody this ruling's promise.

services person to help them... so often what happens is guilty pleas happen rapidly or the Crown are not that organized [to ensure that VISs are submitted].

Gerald reflected upon how such statements might resonate with offenders, even if they don't articulate explicitly moral perspectives:

what they do is they note the pain and stress which the victim has been under because of the events and that becomes part of the moral dimension for the offender. Because they look and they say, oh man, I didn't want to do that...

Patrick added that in his view, a VIS

has a lot more effect when it is the victim themselves saying it rather than the Crown simply reading it because the Crown reads it in a dispassionate objective way. The emotion is lost, the anger, the fear, the hurt. And how does the victim ever feel that they've been heard if all that happens is their words are read out but they didn't get to do it. I think that one of the biggest things our system is missing is victims aren't included. They're an afterthought...in the average case, the assaults, even sex assaults, they don't get the chance to say for themselves why this was a problem. And the courts... probably don't want to hear it because it's too painful.

Mary, however, placed responsibility for the use of VISs more squarely upon victims themselves. They tend to be used, she speculated, only by those "who are very upset about what happened... it's just the people who are at the extreme...".

Interestingly, while participants from the defence bar were more apt to endorse the potential value and appropriateness of VISs (notwithstanding that they may result in more onerous sanctions for individual clients) the Crown Counsel I interviewed were more critical of their worth. Rolf commented on VISs general lack of utility:

Sometimes they are effective but most times they're not... I think they're just stating the obvious about the damage that's done. I think the other thing is... you've heard about the suffering so often that it just doesn't seem to register. ... most times I find that people are just... voicing their anger but they are a necessary part of the process and it makes it easier for the Crown because you give the victim a voice... [but] , I think it's better if it's in writing quite frankly... if it's not constructive than I don't think it has a place in the courtroom.

Trent, another Crown, told me that in his experience in Vancouver, only "maybe one of every 50 files" features a VIS: "a lot of the victims just don't care that much... and then on the files when they actually do fill them out... you see some incredibly over the top [statements]".

Since Crown Counsel are the justice professional most responsible for facilitating the presentation of a victim's point of view, such dismissiveness of the mechanism designed for that very purpose may help to explain the paucity of resources and energy that it appears the justice system invests in VISs creation. Rolf's statement, in particular, implies an understanding of the 'justice' privileged in sentencing courts as unconcerned, or at best impatient, with victims' narratives. To the degree that these narratives do not matter to the law's calibration of blameworthiness, Rolf's perspective seems reasonable, indeed orthodox. But when interpreted in the light of J.V. Robert's scholarship on the normative importance of lay participant communication,<sup>27</sup> Rolf's position adds to the improbability of courts' functioning as forums of informed, meaningful moral ordering.

### **3.2.5.3 Allocation**

In contrast to a victim's input, which the prosecution by and large controls, defence lawyers exert primary influence over if, and how, an offender's voice is heard at sentencing. I asked all participants to comment upon the use and effectiveness of the statutory mechanism of allocution, in terms of the value it adds to a court's discernment of a case's moral dimension. There was quite a diversity of responses. Generally, the defence counsel participants practicing in the Vancouver area (Bruno and Nita) expressed caution or outright reluctance in regards to their clients accepting a court's invitation to speak, while those based in northern B.C. (Gerald, Hannah, Patrick and Mary) tended to be more sanguine.

Gerald, a northern lawyer, expressed basic comfort at the prospect:

there are a few [things] which I'll say... keep it short, go directly to the point. Don't ramble ... [But] everybody has an absolute right to address the court and the present themselves for themselves to the court, good, bad, or indifferent. And I generally encourage people to make some statement to the court of some kind if they feel comfortable doing it.

Hannah provided an especially expansive view of this mechanism's effectiveness:

Some of the most powerful and successful sentencing [hearings] I've seen as a Crown and as a defence lawyer is when the accused speaks. When you're a defence lawyer, if you're grinding through high volume it can be easy to skip that, it can be easy not to

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<sup>27</sup> See J.V. Roberts, "Victim Impact Statements and Sentencing" (2002-2003) 47 Crim. L.Q. 365 at 377.



prepare your client to speak to the court. Civilians are understandably intimidated. But what I try to do is sit them down in private and talk to them ahead of time... this is their sentencing.... I don't have a problem with a client speaking to the court. The only time I'll interrupt them is of course if they're being disrespectful or if they're saying something absolutely contrary to their interest.

Hannah acknowledged that it is not common for a client to actually take the opportunity to address the court, but on the occasions when they do it can have a powerful impact on all present.

... nine out of ten times [clients] just want to get it over with. They definitely want to say some things but... they are just dying to sit. Like even as they're finishing they're sitting... But the ones that are the most moving is when they're... [expressing] real feelings of remorse... [and] also when they turn around and they say they're sorry to the community... because it's so unusual, [offenders almost always] get a comment of commendation from the judge...

All participants who spoke on this topic concurred that judges welcome substantive allocution, in the few cases where it occurs. Hannah:

Judges kind of sit up, they're surprised. And they're quite interested and engaged. Pen comes up, they're ready and often even a smile or a soft, male or female judge, a softer look comes across as they want to bring that forward. They want to invite that.

Patrick, for his part, placed an onus on lawyers to nurture the meaningful engagement of allocution:

Unfortunately I don't think most lawyers prepare their clients to speak... what a lot of lawyers do is tell their client, the judge will ask them if they have anything to say [and] it's a good thing if you say sorry, and that's the end of it, because the problem there is the resources ... For lawyers that believe strongly in what you're doing, you make the time because it's important. For most people who are just trying to pay the bills... you may skip that... In 90% of the cases I feel very comfortable having my client speak directly to the court. I always felt speaking on their behalf about the moral issues or their perspective, that's not my job. [But] there are clients that are so vulnerable, or so heinous, I don't want them speaking to the court directly.

Bruno addressed this topic very briefly. When I asked him if his clients spoke in court, he responded "very rarely. It's usually disastrous when they do". Nita said that "I spent the first 23 years of my [professional] life trying to shut my clients up in court... it would be a very rare situation where I would have allowed them to speak to a judge". It was only in her more recent

practice in Vancouver's Downtown Community Court, she told me, that she had relaxed strict control over this aspect of representation.

Participants commenting from a prosecution perspective concurred that, while substantive allocution statements rarely occur, they can make a difference to how a case is understood by those listening.

Rolf spoke about the effect a sincere allocution can have:

When [victims] hear from the offender it has a very powerful effect. I've had times where people will speak at sentencing and I realize it's a human being who just really screwed up. But, then you get people who just sort of you know, they just going through the steps too.... So I mean genuine remorse, sometimes you see people display it and, and when they do you think perhaps there's hope for that individual. Maybe that person can put this behind them.

But Trent, speaking from his experience in a busy Vancouver court, echoed Bruno's point of view, and Patrick's critique, in stating that "lawyers always give clients a chance to address the court but it's never that great an idea to have your client address the court by themselves. You don't know what they're going to say".

In regards to allocution's employment by offenders as an opportunity to, in Kimberly Thomas's words, "humanize" themselves to the court sentencing them,<sup>28</sup> interview participants expressed both hope and cynicism. Although, when judged by recipients to be sincere, remorseful allocutions were noted to have a profound and positive impact, responses also indicated that allocution statements do not commonly fulfill this function. While some participants determined that this is because offenders are generally not confident in opening themselves up in such a way,<sup>29</sup> others pointed to defence counsel as not inclined to take the time or risk of preparing them to voice these personal and potentially volatile opinions.<sup>30</sup> Chapter Four's observation-based study will enquire further into the presence, substance, and influence of offenders' 'voices' in plea and sentencing proceedings in the four Subject Courts.

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<sup>28</sup> See Kimberly A. Thomas, "Beyond Mitigation: Towards a Theory of Allocution" (2006) 75 Ford. L.R. 2641 at 2658-9.

<sup>29</sup> Hannah and Mary explicitly pointed to this as a contributory factor, and also implied that courts themselves tend not to be very facilitative places for such personal revelations.

<sup>30</sup> Patrick, Bruno, and (in a self-critical way) Nita assessed the influence of defence counsel as a restraint on offender speech.

### **3.2.6 Overall Critiques of Sentencing Courts as Forums for Moral Expression**

As a way to sum up their reflections on such wide-ranging and indeterminate subject matter, I asked participants for their opinions and experiences of what is essentially this thesis's most basic inquiry: how sentencing courts actually function as forums of the discernment and expression of a given case's moral dimension(s). In particular, I invited them to comment upon three aspects of this question: first, how sentencing judges address the wrongness of offences, and the responsibility of offenders; second, the degree to which offenders hear such expressions and articulate their own; third, what factors are most important to the effectiveness of this process.

These three queries presuppose, of course, that courts, and the criminal justice system they represent, actually accept this understanding of their role. All participants, at least as a matter of theory, agreed with the presumption that criminal courts intend to exert moral authority over the cases and in the communities in which they operate. As may be expected, however, the degree to which particular courts can and do realize this aspiration was a matter of much more varied opinion.

#### ***3.2.6.1 Judicial engagement with the moral agency of offenders***

...it should never be easy to sentence an individual. It should be a hard thing to do. It should be unpleasant...<sup>31</sup>

All participants agreed that among the most challenging of a court's roles is the discernment of a 'fit' sentence. While there are many facets to this undertaking, both in process and outcome, I asked my interlocutors to focus specifically on how judges interpret and engage with offenders as moral agents in the course of sentencing them. I group participants' reflections in this section according to the courts with which they had the most experience, whether northern, rural forums or those in Vancouver-area urban settings.

##### **i) Northern Practitioners**

Hannah provided the strongest endorsement of courts' efforts in this regard. She stated

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<sup>31</sup> Author interview with 'Rolf', January 20, 2010.

I can't tell you how many times I've been struck by two things. One is the compassion of the court, the willingness to show grace... to people who are sorry or really made a mistake... the other thing is that even as a Crown... the courts [are] always appreciative of the fact that the Crown wanted to be there and that the state said something was wrong and that even if the court's going to impose a light sentence, it's going to make a point of saying, this behaviour's not acceptable.

Patrick agreed:

... I can honestly say that all of the judges I've worked in front of in the North, there is a moral message sent. Sometimes it's sent directly in terms of the judge admonishes the person and tells them what they did was wrong and why. Other times the moral communication is sir, you are such a bad person and such a threat to the community, I must lock you up. There's no other alternative.

Gerald, likewise in reference to the northern communities in which he practices, also suggested that courts often recognize offenders' interrelatedness with other people in addressing their conduct and punishment:

particularly in this setting... [judges will imply] I'm discharging you because the community needs you.... In the same way they're saying you're receiving a penalty because this affects your family, your friends, the neighbours, your clan, the community in these kinds of ways and often there's a very explicit coverage of that in sentencing in our courts here.

He added that judges, like lawyers, do tend to 'frontload' their pedagogical efforts:

for the first ten cases you see a person, it's a long set of moral instructions from everybody including the court. At a particular point, those instructions tend to go down in frequency and duration but they're never completely absent not matter how problematic the person's understanding is because of course part of the court's role is the provide instruction to the general community. It's not just the person in front of them.

Gerald concluded, however, that in his view defence counsel are more responsible than judges in 'helping' persons develop an understanding of their culpability, in legal if not moral terms, "because otherwise you'd never get to the guilty plea".

Patrick, for his part, pointed out the inherent diversity among judges, which affects their approach to the moral dynamics of a given case:

Some judges... are much more open to factoring moral culpability.... what do they know about the individual? What does defence counsel present about the individual? What

is the individual willing to acknowledge and take responsibility for? That really does guide some judges. Other judges have a much more black and white moral view of it....

On the other hand, Hannah also suggested that it is easy for judges to neglect contextual moral discernment and expression, especially in 'routine' circumstances:

You do get the feeling... that this is a bit of a mill pushing through, same people, same offences.... And sometimes I really do wish, even as defence counsel, that the court would just take a moment, say a few things... are we all that jaded? Let's just stop for a second. This person stole. Is stealing really not that bad anymore? Say a few words. Show a little disgust.

Mary offered a different angle on a similar assessment, suggesting that in her experience, courts leave it up to offenders to 'open the doors' to moral engagement:

I've never heard a judge... ask the person how they feel... [but] if an accused apologizes for what happened then there is a dialogue about that they're accepting blame for what occurred and the court views that as a good thing. And then if there is a situation that society would view as something not good, then the court will say that... [but] if someone drinks and breaches their probation order, I don't usually hear much about whether that's right or wrong.

Mary also criticized the un-nuanced 'rule bound' nature of courts' ability to respond to unlawful behaviour, which in her view obscures or oversimplifies the moral messages that it might seek to send. She used the example of an alcohol dependant offender who breaches his or her condition not to drink:

I feel that the court has no option but to just make them follow more rules. And I think there's... other ways to help these people than to say, well you're not drinking so still don't drink for six more months. Or you're drinking so I'm going to send you to jail for seven days.... I would say there's very few cases where what you've done is a bad thing. It's more, this happened and therefore this happened. And that's why [morality] is not discussed as much. ... I feel that sometimes we're making people feel that they've done something wrong but... what level of wrong they've done is not necessarily [talked about], like they're not bad people, they've just made wrong choices.

Rolf, speaking from his long experience as a Crown in northern B.C., explained why in his view courts don't spend any more time engaging with or expressing moral values:

it's almost like there's two types of offences. There are the ones that are just your mainstream criminal offences and then you have the ones that society just finds... something totally unacceptable... you've crossed the line and you're not someone who's done something, you're a certain type of person...

While the former make up the bulk of provincial courts' business, Rolf suggested, it is usually only in the latter that the moral issues at play are brought forth, and even then not always comprehensively. He added that

most people don't want to know about the background of the offender... you raise them with neglect, with physical and sexual abuse... you create that person.... I think what happens is, regardless of how they got there, eventually it's a problem you have to deal with. You can't undo what they are, and then you just have to sort of make sure they don't do it again. So that's the thing. I think with sentencing sometimes there's this despair, you've run out of options. At that point you know, and maybe that's a moral decision when you say I'm not going to be blinded by my compassion, because I have to think of others....

Although Mary and Hannah noted that the influence of 'rules' and 'routine' does have an impoverishing effect on the moral messages that sentencing courts seek to communicate, the prevailing view among northern-based participants was that judges endeavour, at least, to address offenders as members of discernable normative communities. As related below, this deliberate acknowledgement of the context from which individuals draw meaning (both good and bad) was somewhat less evident in the responses of participants who practiced in Vancouver courts.

## ii) Urban Practitioners

Trent, a Crown in a busy plea court, illustrated how the heterogeneity of offences, offenders, and judges influences the complex, "intuitive" calculation of moral culpability:

It's interesting how different people get punished... last week there was a guy who apparently is before the court all the time but he's a seriously addicted person with real mental health issues. And he's always in for a couple of days and he gets released... I think the theory behind it is that he's not really morally responsible for his acts.... And you get other people who have committed far fewer crimes and they're punished much more harshly because they do have the understanding of what they are doing is wrong.... it depends on the judge a lot of the time.... it depends on the offense. It also depends on how busy the court is that day....

From the defence bar, Bruno predicted that with "the movement towards... less discretion in sentencing", individual judges will feel less and less empowered to discern and apply contextually calibrated moral messages. From his experience in Vancouver, there is already a paucity of explicitly moral references at sentencing hearings:

A court will... look at case law and analyze case law but very rarely will a judge say, this is wrong because as human beings... this offends not just the *Criminal Code* but our innate sense of decency. Very rarely will a judge say that... I think judges might be afraid of coming across as biased or too judgmental or too angry. It's mostly pretty dry, clinical stuff... you hear very little about morality, it's more about pragmatic considerations. Well I'm putting him away for six months he's not going to steal anything for six months. Or, it's mechanical.... if you're a judge you do 30 guilty pleas in one day... you get a bit jaded, you've seen it all... part of it is just the volume of the case load... And I think to some extent there's a feeling of futility... [A judge] could go on about morality but the guy just doesn't get it.

The above quotes, drawn from participants who practice in what is perhaps the busiest plea court in the province, illustrate both the acute challenges to expressive moral ordering encountered in these forums, and the underlying durability of sentencing's normative basis. Judges in these settings, in comparison to less urban courts, may more strongly experience the 'futility' of actually communicating moral messages. Given caseload pressure and the unreceptive mien of certain offenders, many may have indeed, as Bruno noticed, given up trying. Trent's observation that "different people get punished" in different ways, however, indicates that even the busiest of courts remain concerned with moral ordering, although not so much with its expression. Below, I consider participants' reflections on how offenders themselves participate in sentencing courts' discernment of a given case's moral character.

### ***3.2.6.2 Manifestation of offenders' moral agency at sentencing***

To begin, Hannah noted that offenders she has dealt with do tend to understand and accept a court's moral judgment:

usually it's just like a child and a parent, these clients know what they did was wrong... [and] there isn't much variation at all between what the judge and the client feel. What I find more often is the problem is lawyers interjecting themselves.

Gerald agreed that

certainly there are those... folks who just don't get it, who don't have a moral sense or who say what everybody else says is irrelevant... but most... by the time they've concluded [the case], get it... Most offenders apologize in their submissions to the court. Some of them are quite lengthy and they lay out this is how it's affected other people and I feel awful because. Other's just say, I'm sorry. Stand up, sit down, that's it. But most folks will make some effort towards apologizing for their actions in a sentencing hearing...

He tempered this generally positive view, however, with a 'realistic' assessment of the challenges that many individuals bring into sentencing courtrooms, explaining that "we have a high number of people in our area with... foetal alcohol and... other chemically related neurologic problems". In his view, such conditions reduce the likelihood that people are able to self-identify and respond as moral actors, even when engaged as such by the most motivated of judges.<sup>32</sup>

Nita focused on the mixed feelings that many of her clients bring into sentencing hearings, in which the acceptance of responsibility is diluted by competing orientations, and, very often, obscured by addiction:

I would have clients who were very remorseful for what they did but could still justify it to themselves... I suppose you need to justify it if you have any kind of conscience at all, you have to be able to live with yourself, and they're drug addicts. And they really, really believe that at the end of the day, they needed that television more than you did...

I asked Hannah if she noticed any difference between First Nations clients and others when it came to accepting the moral authority and intelligibility of the court process:

most First Nations people I work with are... more scared of their community's disapproval of them, more aware of the long-term ramifications of what's they've done. Not financial. We're just talking moral shame... usually the First Nations clients are more willing to just to give a real authentic, I messed up. And as much as I hate to say it, I think possibly it's because they have been through more... more difficulty, and more poverty, and more being beaten down anyway by life, that what's admitting another failure?

Hannah's response, like the question, implicates a complexity of presumption, observation, and interpretation. To my question regarding her Aboriginal clients' acceptance of the *court's* moral authority, Hannah responded with a reflection upon the effect of their *community's* disapproval. As Chapter One of this thesis pointed out,<sup>33</sup> courts and local communities do not, generally, exercise the same or co-extensive moral authority. Each does, however, influence how moral censure is expressed to, and accepted by, individuals. I explore the relationship between sentencing courts and their community contexts at greater length below, at §3.2.6.3,

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<sup>32</sup> Patrick, like Gerald a northern practitioner, concurred with this view.

<sup>33</sup> Particularly at §1.3.5.



as well as in Chapter Four. Hannah's response also relates an empirical observation of her Aboriginal clients' greater willingness to accept responsibility for having committed a criminal wrong. This statement, which cannot easily be tested or proven, does not speak to whether admissions of responsibility are audibly conveyed in open court. Chapter Four's observational study attempts, in part, to assess this speech, from Aboriginal as well as non-Aboriginal offenders.

Gerald, who practices in the same northern region as Hannah, focused his response to this question more explicitly on the authority of courts. In his experience:

we have folks who say, I don't recognize the authority of the court, period. And I've got three cases like that right now. But that's out of a very large caseload. Most people aren't doing that kind of analysis on it. They say well okay, you've got the power and yeah it looks like what you're doing is correct...

Finally, Allison, the Crown Counsel who works at First Nations Court, traced the evolution that she perceives in many offenders' moral orientation towards their conduct over the course of the sentencing process:

there's the automatic defence mechanism of trying to present yourself in the best possible light and maybe minimize behaviours. But I think as time goes on, usually when people enter a plea, and then there's a report or there's information that's gathered and there's more discussion to be had before getting to the actual talking about the offence and again, I think it's that building that sort of rapport and trust... Most people have been pretty accepting of their behaviour, and acknowledging that because to be able to create a good plan and to work on your healing you have to do that. You have to really look at what created this situation and how did you get here in the first place.

Responses, in general, identified offenders as persons both interested in, and, at base, accepting of, a court's status as moral judge. As Nita and Gerald noted, however, some offenders may have perspectives on the relative or contextual moral wrongness of their conduct that do not mesh easily with the hermeneutics commonly employed by sentencing judges. Especially in settings where the sentencing hearing is conducted as a single, often perfunctory court appearance, these views may rarely be aired, much less considered. Allison, speaking from her experience in a court that takes a more drawn out, collaborative approach to sentencing, indicated that this style of deliberation and decision-making may allow offenders (and perhaps, in certain cases, the court) to develop their understandings of a given case's

normative meaning and consequence. In this chapter's final section, participants reflect upon 'what works' when it comes to the discernment and communication of moral values at sentencing.

### ***3.2.6.3 The effectiveness of courts as forums for moral expression***

When I asked Hannah about what factors in her view were most apt to facilitate communicative moral engagement between judges and offenders, she offered an interesting response:

[i]t's not the judge. It's not even the Crown. The first thing that came to my mind, and this is true because it affects my lawyering, is the physical environment.... when your client can see the eyes, the expression in the eyes of the judge, huge. A little smile, anger, curiosity, I think that's a big thing. It helps us as advocates too.

Mary and Nita both commented that the presence and involvement of a victim in court substantially contributes to meaningful moral engagement, at least between the individuals most intimately affected by the crime. Mary related one experience in particular:

the complainant came to a guilty plea which almost never happens... my client stood up and started crying and apologizing to her and saying I'm sorry that this happened, and I felt that that was because she was there and he had that opportunity to say it to her...

Mary, whose practice is based in northern courts, also suggested that the closer identification between courts and communities would enhance the former's moral relevance and authority:

I don't know how we would do that but, I think it's, I feel like [the court is] very isolated. That the only reason you'd go there is because you have to... the complainant won't just come because they want to see what happens, they only come when they're told to come.... I think if it was more a community saying what you've done is wrong, then there would be more of an understanding.

Patrick concurred, saying that

... I think both mainstream and First Nations peoples view the conduct the same way. That's not good conduct. It's how they [justice processes] treat them [wrongdoers]. Our system... the first time we give somebody the benefit of the doubt and say here, go get some counselling and don't do it again. The First Nations approach is different. The First Nations approach is, it doesn't stop with counselling. It involves them going and sitting with elders and to make an actual amends by hauling firewood, going out hunting and bringing meat into the village, participating in ceremonies as a volunteer, and that [imparts] a moral culpability that's much higher... [If local courts] involved elders from the house of both the offender and the victim I think [that] would be incredibly beneficial... anything that's going to help people relate their offence, their conduct, to

the consequences to the community and that they have to make restitution and compensate those that have been harmed by their behaviour...

He stated that in his experience local courts are alive to the importance of reconciling the moral standards and approaches in a given community with those 'imported' by the justice system. This integration can be accomplished, he noted, when a court's dispositions are imbued with information and guidance about the type and nature of sanction that the community considers appropriate.

Mike, on the other hand, painted a much more fissured picture from his perspective as an indigenous person working in the mainstream justice system:

With the existing court system as it is... it's more about power and control of resources and control of people within the community... that comes from a perspective that is not traditionally aboriginal... in nature, form, or fashion. In many ways the aboriginal community denounces certain behaviours much more significantly and punitively than what the court system could even consider ... but generally within the scope of things it's much more restorative... it's teaching moments, and those teaching moments begin early on, and it continues throughout a person's life. So again I think it's a cultural departure between the two, and that's always led to a great deal of conflict...

Rolf also spoke of the relationship between courts and communities, drawing forth both some of the advantages and challenges of intimacy:

if a judge lives in a community, they have a better idea what needs to be done and what the problems are... they understand the community better... and they have a better idea about what's available, what are the resources and also... unless you live within a community then it's hard to say how the community is going to reflect on, on the moral authority of the court.... [But] you can be close to the community but you can be doing a poor job... [and] sometimes people respect authority when it's distant... they're more intimidated by authority when [it's] distant... the other problem is when you live in the community it may be a bit more difficult to be objective about certain things.

Nita, for her part, focused on the system within which particular judges work and are identified. In her view, this superstructure is far too compromised to allow courts to exercise real moral authority over their subjects, especially in contentious areas of the law:

... anyone trying to exercise moral authority should be above reproach.... I say you leave jail for people that actually hurt someone... So I don't think [courts] can exercise moral authority because they're dealing with laws that in my view are not morally there. So how can you exercise moral authority when you get a judge who says well, and I've

heard it said many times, well if it were up to me... marijuana wouldn't be illegal but I have to enforce the law...

The most consequential factor that participants pointed to, however, was the pre-existing character and capacity of the person being sentenced. For Hannah, an offender's sincere appreciation of the harm they have caused often does, in her view appropriately, result in a mitigated sentence, especially in regards to non-custodial punishments:

... I'm not going to say it's huge. The judge has got a job to do. But what I have noticed is... that the probation term... not the length of it, but the conditions are usually less restrictive when there's been this utter and complete I'm sorry, right? And that's appropriate.... It takes courage to do that... it shows that they've already begun to be punished within themselves and there is more of a chance of them making amends and being deterred from doing this in the future.

Rolf supported this interpretation:

[remorse] makes a difference. For the simple reason... there's hope. If someone has remorse then, they're not condoning what they've done. Also they can change... there can be no rehabilitation without remorse....

Trent, another Crown, spoke of how offenders' expressions of remorse are commonly approached in his experience:

they all say I feel really bad and want to change. Some judges, I think, take it at face value, and some of them take it with a grain of salt and understand that there are a lot of the people who are addicted in here, stealing to pay for their addiction. But generally, if they come up and say look um, I feel really bad I'm sorry, you don't try to crack it too much.... Generally remorse is a mitigating factor....

Rolf maintained, however, that it is not up to courts to nurture or facilitate the expression of this quality:

You can't. It's a courtroom. There's no way to do it... you're in front of a crowd, and you're in court. Most people just will keep their mouths shut and look down.... it's not the format that's going to encourage people to look inwards... you're surrounded by all these angry people that you've hurt. I think it's a very emotionally laden place... one of the more stressful forums you can have and it's not going to encourage people to open up to anything... most people will just be very defensive.

Speaking from their experience as practitioners, participants provided insight into what contributes to the mysterious alchemy of morally resonant sentencing hearings. Many spoke of the relationship between courts and communities as relevant to how sentencing hearings may

substantively 'hear', and be heard by, the individuals whose conduct is being evaluated therein. These communities are commonly conceived of as groupings of populations, but they are also constellations of meaning. Participants who work in First Nations communities were particularly attentive to the importance of courts understanding, and reflecting, local values. In this regard northern participants expressed qualified optimism that courts in that area, although based in pan-Canadian legal culture and doctrine, were able to sustain the moral intelligibility and authority necessary to be places where local individuals and communities can hear, speak, and experience 'justice', while participants from urban settings (Nita in particular) were more concerned with the moral authority that the overarching 'system' does or does not represent.

Some responses indicated that the efforts that courts make to attend to communicative engagement within the sentencing process *can* make a difference to hearings' effectiveness as venues of open, audible moral ordering. Allison spoke of the progression that she notices among offenders in First Nations Court, in terms of how they come to accept and contend with the causes and implications of their offences in the course of multiple appearances. Hannah spoke of the intimacy that some courts instil by their physical layout, and the presence and involvement of victims was also noted as an important marker of moral resonance.

Ultimately, however, participants stressed the overriding importance of the personal qualities, characteristics, and experiences of given offenders; the implication was that while a sensitive judge might be apt to spend time and energy on fostering moral communication, the value of such forays is dependent upon the receptivity of offenders. This receptivity, as Hannah, Gerald, Patrick, Nita, and Trent noted, is itself dependent upon factors that are beyond a judge's control, such as the offender's pre-existing moral, intellectual, social, cultural, and even physical makeup. Mary, indeed, suggested that judges in her experience tend not to initiate explicit enquiries into a person's moral responsibility for a given offence; if offenders themselves do not take active steps to engage with the process as moral actors, such issues, in her view, are rarely discussed. Finally, Rolf contended that courts should not try to facilitate offender engagement, as sentencing hearings themselves are fundamentally inhibitive of these dialogues.

This section identified some differences of opinion and evaluation with regards to the ability, interest, and effectiveness of sentencing courts as sites of expressive or dialogic moral ordering. Some of these differences manifest most strongly between those with experience in different courts, while others can be understood more as personal opinions. While the latter, particularly as they are held and expressed by practitioners who are among the most influential actors in sentencing hearings, are of course relevant to how those hearings practically progress, the former differences are more easily highlighted for occasioning further investigation. Below, I conclude this chapter with a discussion of how the Interview Study provides both substantive and justificatory material for the Observation Study that is presented in Chapter Four.

### **3.3 Conclusion**

Not surprisingly, eleven interviews with eleven different legal professionals, considering a broad variety of topics, results in a complex richness of responses and interpretations. Much of this material concerns inherently subjective perspectives upon the nature of morality itself, how it coincides or interfaces with criminal law, and how the law and legal practitioners ought to discharge the moral responsibilities given them by the nature of their work. The Interview Study, in this respect, was intended to provide a flavour of how these questions are contended with by some of the persons most closely connected to such subjects on a daily basis. I found that those working in criminal law do, in general, accept that there is a moral dimension to their field, and that courts bear some onus of evoking or engaging with the implications of this reality. My enquiries also revealed that, within this encompassing, unavoidably normative framework, both Crown and defence practitioners strive to maintain and uphold boundaries between personal moral values and their professional duties.

This thesis is not meant to critique participants' personal opinions upon these broad topics. This chapter has also canvassed topics of a more specific nature, including the capacity of guilty pleas as a morally communicative mechanism, the use and effectiveness of statutory tools for this purpose, and practitioner reflections upon how various sentencing courts actually function as forums for expressive moral ordering. This chapter's Interview Study thus obtained insights that can be usefully harnessed to, and investigated by, the Observation Study that follows in

Chapter Four. I found that interview participants linked what they understood to be the most fruitful communicative engagements in sentencing proceedings to several factors: judges' time and sensitivity, the composition of courtroom environments, the nature of particular offences, third party and community responsiveness, lawyers' facilitation, and, most importantly, the interest and capacity of individual offenders to speak and listen to the moral themes that inhere in their cases.

The responses of individual participants revealed some interesting differences between how urban, northern, orthodox and innovative sentencing courts engage in the work of moral ordering. I found, for example, that the lawyers who worked in Hazelton were much more likely to consider how the court, and the justice system generally, were perceived in the surrounding community, and how these perceptions in turn influenced judicial concern for the normative content and context of sentencing proceedings. I also heard participants who worked in what may be called the 'problem solving' (Community and First Nations') courts to speak more purposefully, and with less despair or exasperation, about the manifold individual, social, and historical dysfunctions that contribute to criminal offending. These dysfunctions, of course, can be observed in virtually all criminal courts, but are perhaps less easily acknowledged or accommodated in more orthodox environments, such as Vancouver's high-volume plea court (Court 102).

These perspectives, and participants' insights regarding the factors that influence the similarities and differences between courts, provide the impetus for my Observational Study. While not all of the findings canvassed in the Interview Study can be empirically explored through observation, others can be tested and enriched by this method. In particular, the following chapter undertakes an investigation of the incidence and quality of the moral speech that can be heard in the four Study Courts.

## CHAPTER FOUR: The Audibility of Moral Ordering in Four Criminal Courts

### 4.1 Introduction to the Observation Study

Expressive, communicative, engaged. Thus far, this thesis has employed a number of adjectives to convey the manner in which the criminal law's concern for moral ordering *ought* to manifest in plea and sentencing proceedings. As other scholars<sup>1</sup> as well as some of the Interview Study's participants<sup>2</sup> have recognized, however, the moral ordering that courts undertake at this stage is often not performed in such an open manner. Depending upon the acuity of this diagnosis, it is thus difficult, if not impossible, to comprehensively perceive how individual courts actually practice the moral ordering that this thesis has set about investigating. Notwithstanding this important limitation, however, this chapter presents an observation-based analysis of how four provincial courts in British Columbia *audibly* reflect a concern for moral ordering.

I approach this inquiry in both a numerical and qualitative manner, by gauging the composition of in-court communications according to their focus on identifiably moral themes. I refer to these communications as "moral speech". This criterion cannot capture all, or perhaps even most, of the normative understandings that participants bring to and draw from plea and sentencing proceedings. It is proffered, however, as the aspect of moral ordering that is most amenable to observational analysis, and that which relates most closely to the 'expressive' version thereof that this thesis privileges. Moral speech is more expansively defined in §4.1.3. First, I formally introduce the four courts whose proceedings I observed.

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<sup>1</sup> See, for example, Malcolm Feeley, *The Process is the Punishment* (New York: Sage Foundation, 1979) at 15. Feeley's work on the normative ordering that courts conduct is discussed above in Chapter Two, at §2.2.1.

<sup>2</sup> See, for example, Trent and Mary's comments on the bases for judicial decision-making, discussed above in Chapter Three, at §3.2.6.1.



#### 4.1.1 Study Courts

The courts I selected for this empirical study (the “Observation Study”) are the provincial plea court at 222 Main Street, Vancouver (“Court 102”) the Downtown Community Court at 211 Gore Street, Vancouver (“Community Court”) First Nations Court in New Westminster (“First Nations Court”) and the circuit court sitting in Hazelton, B.C. (“Hazelton” or “Hazelton Court”). These four forums (collectively, the “Study Courts”) afford glimpses into a variety of approaches and contexts within which courts operate in B.C. Court 102 offers an urban, high-volume setting for observing the ‘orthodox’ performance of plea and sentencing proceedings. Community Court, located only steps away in the same downtown neighbourhood, handles similar crimes and clientele, but incorporates a more “collaborative... problem-solving” approach to its cases.<sup>3</sup> First Nations Court, based in New Westminster, is a unique court for Aboriginal offenders in the Lower Mainland. It conducts the same proceedings as any criminal court, but operates with a much smaller caseload than the above two courts, and adopts an approach designed to redress the disadvantages experienced by Aboriginals in the mainstream justice system. First Nations Court can, in its design and approach, be seen as an attempt to substantively respond to the concerns articulated by the Supreme Court of Canada in *R. v. Gladue*.<sup>4</sup> Finally, the Hazelton circuit court services a small community in the northwest of the province, located between the larger towns of Smithers and Terrace. Though not a reserve community itself, Hazelton is located in the heart of the Gitksan and Wet’suwet’en First Nations’ territories, and much of the population of the area is Aboriginal. The provincial court travels from Smithers to Hazelton approximately once per month.

The Study Courts share important common features. All are provincial courts in the Province of British Columbia, presided over by provincially appointed judges with identical powers, sworn mandates, and responsibilities. All, moreover, apply the

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<sup>3</sup> Downtown Community Court, “Information for Accused Persons: How Community Court Works”. (Vancouver: Provincial Court of British Columbia, 2008), online: Criminal Justice Reform Secretariat <[http://www.criminaljusticereform.gov.B.C..ca/en/shared/downloads/information\\_for\\_accused.pdf](http://www.criminaljusticereform.gov.B.C..ca/en/shared/downloads/information_for_accused.pdf)>.

<sup>4</sup> [1999] S.C.R. 688. This decision is discussed above, at §1.5.

provisions of the *Criminal Code* to similar crimes. As will be seen, while some differences were observed between the kind of offences that each court actually heard, each forum is prospectively open to the same range of subject matters that all provincial criminal courts are empowered to judge. This includes almost every offence in the *Criminal Code*.<sup>5</sup> Finally, although not all of the Study Courts are exclusively ‘plea-based’ (Hazelton Court, alone among the four, conducts trials) 47 of the 48 sentencing hearings I observed across the courts were conducted following the offender’s entering of a plea of guilt.

As introduced above, each Study Court is also distinct from the others, in terms of its workflow, approach, and geographical location. This combination of commonality and difference frames the underlying research questions that this chapter sets out to address. First, as will be seen, each Study Court manifested a different profile in terms of the moral ordering that it was heard to practice. These profiles are individually described and discussed, but, in a concluding assessment, also synoptically considered. This enables an explicit enquiry into possible reasons for observed differences between the four Study Courts. Second, I proceed to suggest some insights these findings might hold (for these forums as well as plea and sentencing courts more generally) for the realization of the law’s mandate of communicative moral ordering, with particular regard to the engagement of offenders.

#### **4.1.2 Parameters and Methods**

This chapter presents findings from data gathered exclusively by this researcher, through direct observation of proceedings in the Study Courts. The data are insufficient to support any statistically significant conclusions. The Observation Study is designed to offer useful insights, comparative and otherwise, into the findings gathered and analyzed in the four courts. Below, I lay out the study’s parameters and methods in this regard.

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<sup>5</sup>A small number of the most serious offences, most notably murder, are outside a provincial court’s jurisdiction. These offences, which can only be tried by a superior court in a province, are listed at s. 469 of the *Criminal Code*.

#### **4.1.2.1 Data Collection**

I personally observed 48 sentencing hearings<sup>6</sup>, in each instance by attending at court with no prior knowledge of that day's cases, and simply watching proceedings from the public gallery.<sup>7</sup> My observations formed the raw data for this study, and I tried to ensure that such collection was divided as equally as possible across the four courts. However, due to each court's scheduling idiosyncrasies, geography, and the fact that some simply dealt with significantly heavier caseloads than others, the 48 hearings I observed were unevenly distributed across the Study Courts: I observed 22 conducted in Court 102, twelve at Community Court, ten at First Nations Court, and four in Hazelton. For these same reasons, the length of my observation of each court was also unevenly distributed: I spent seven hours across five visits in Court 102, eleven hours across seven visits at Community Court, 20 hours across six visits at First Nations Court, and four hours across a single two-day sitting of Hazelton's circuit court.

All observations were conducted between October, 2009 and April, 2010. I was unable to audio-record the hearings themselves,<sup>8</sup> and obtaining transcripts of the court's record of these proceedings was prohibitively expensive and time-consuming. Adopting the role of amateur stenographer, I made contemporaneous notes of what I considered to be presumptively moral speech, by any and all potential voices, in the sentencing hearings I observed. I also collected data on such criteria as an offender's actual or apparent age, gender, Aboriginal status (when explicitly raised) custodial status, legal representation, plea, offence(s) charged, and the sentence each received. I took note of who attended at court, such as victims, friends or family of offenders, or other

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<sup>6</sup> While most of the hearings I observed also comprised the plea itself, in other cases there was an adjournment between plea and sentence. I included in my data set those proceedings where I observed the sentencing itself, but did not include occasions where I was only able to observe the entering of a plea.

<sup>7</sup> As is further discussed below, some of the Study Courts dealt with other procedural and preliminary matters as well as sentencing hearings, with little or no notice of how a given court's business would be scheduled or heard. I therefore sat through a considerable amount of court time that was not directly relevant to the Observation Study, but have excluded these observations from the findings I report here.

<sup>8</sup> I did not seek or obtain leave from the Study Courts to record proceedings, due to my presumption that audio-recording was generally prohibited. Interestingly, I could not locate a specific statutory rule or direction that prohibits this practice in B.C. An emailed request to the Office of the Chief Judge of the Provincial Court for further information on this matter was not responded to.

community members, to the extent that this was apparent to me. Finally, I noted the approximate length of time of each hearing.

After each observation session, I transcribed my handwritten notes, including the speech that I was able to record during the hearings, as well as adding and expanding contextual details from memory.

#### **4.1.2.2 Data Analysis**

I conducted both qualitative and numerical assessments upon the data I collected. The former, which can be defined as simply “non-numerical” legal research,<sup>9</sup> is intended to provide a narrative account of the proceedings I observed, as well as my perception of the depth, influence, and meaning of the expressions that I heard therein. The numerical data provide a ready sense of some key similarities and differences between the sentencing hearings conducted in each Study Court, and the moral speech I heard therein. Narrative and numerical data are presented in an integrated manner, with the intention that each will illuminate the other. This chapter’s qualitative assessment, however, is more important to the study’s usefulness and conclusions than a purely numerical analysis.<sup>10</sup>

#### **4.1.3 Defining “Moral Speech”**

For this empirical study to usefully contribute to my overall investigation of criminal law’s concern for moral ordering, the concept of moral speech must be defined as clearly as possible. Returning to the proposition advanced in Chapter One, that a focus on moral questions is of central importance to the discernment of sentences, I break moral speech down into two distinct sub-categories. Both of these categories refer specifically back to the particular conduct for which an offender has been convicted. The first, incorporating what I call issues of “moral proportionality”, captures claims and comments directed to the gravity of the offence and/or the degree of responsibility of

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<sup>9</sup> Ian Dobinson and Francis Johns, “Qualitative Legal Research”, in *Research Methods for Law*, Mike McConville and Wing Hong Chui, eds. (Edinburgh: Edinburgh University Press, 2007) 16 at 17.

<sup>10</sup> The tables of numerical data that I compiled in the course of my observations are reproduced in Appendix ‘E’.

the offender.<sup>11</sup> Moral proportionality, according to s. 718.1 of the *Criminal Code*, is the fundamental principle driving the apportionment of ‘just’ criminal sentences in Canada. The second captures those representations relating to the offender’s avowed<sup>12</sup> normative orientation towards the conduct for which they have been criminally convicted, or what I refer to as their “moral mind”. The moral mind is usually articulated as statements of remorse, but may also, at least in principle, include defiance, rejection, or indifference.

I advance this definition of moral speech in sentencing hearings, not because it encompasses an exhaustive understanding of morality and its relationship with judicial decision-making, but because it focuses upon two specific, normatively significant areas of a criminal court’s function. One, which corresponds to the sub-category of moral proportionality, regards how the ‘wrongness’ of a particular offence is judicially discerned and communicated in open court. This is important, in my view, both to a court’s legal and expressive duties: as a fundamental principle, moral proportionality must be somehow reflected in the sentence itself. Further, as a publicly accessible and responsible forum, the establishment of this proportionality should be audible to this public constituency, as well as, of course, to a proceeding’s actual participants. In order to assess this quality’s audibility on these terms, I situated myself as a passive listener of moral proportionality, as it was expressed in a given hearing’s proceedings.

The other aspect of moral speech, which corresponds to the sub-category of moral mind, is often conveyed in a more intimately expressive way than moral proportionality. It is also more ambiguously related to a court’s discernment of an appropriate sentence.

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<sup>11</sup> I use the term ‘offender’ throughout this chapter to refer to persons who are being sentenced, although I also follow the terminology employed in my study courts in sometimes referring to these persons as ‘client’, ‘defendant’, or ‘accused’.

<sup>12</sup> Much like any sentencing judge, I was not able to conclusively determine if any expressed representation of an offender’s moral mind actually conveyed their ‘true’ orientation. As some of the participants of Chapter Three’s Interview Study aptly noted, a person’s normative relationship towards the conduct for which they are being prosecuted may be significantly more shaded and complex than what they are able or willing to articulate before a sentencing court, and in some cases their representations of remorse may be inaccurate or intended to mislead. Unlike a sentencing court, however, I did not attempt to assess the credibility of statements regarding an offender’s moral mind, but rather just observed how such representations were audibly made and received.

Moral mind implicates, either directly or indirectly, the offender's inner moral relationship to his or her conduct. It thus exists in uneasy association with the more 'evidence'-based (if not exactly objective) substance of judicial decision-making. I have noted, earlier in this thesis,<sup>13</sup> some of the dangers inherent in criminal courts' endeavouring to perceive, and pronounce upon, an offender's normative orientation. Some critics, indeed, regard an offender's internal moral orientation as an inappropriate, unreliable, and/or irrelevant area of inquiry for a sentencing court.<sup>14</sup> Nevertheless, an offender's remorse (or lack thereof) remains a matter towards which criminal law, and sentencing courts in particular, are drawn, for arguably valid reasons. As some of the participants in the Interview Study related, the expression of remorse can make an appreciable (and, in the view of certain participants, appropriate) difference to a court's assessment of an offender's degree of responsibility.<sup>15</sup> The persons subject to such judgments, for their part, are likely to be interested in managing or influencing such moral characterization. As Rolf recognized, however, courts can be very difficult places for a person to openly speak one's mind.<sup>16</sup>

A sentencing court, as I have argued, is a site that incorporates (whether expressly or not) moral ordering in its decision-making processes. It is arguably important, therefore, for this forum to provide offenders (whom it necessarily deals with as moral agents) with the meaningful opportunity, although certainly not the coercive expectation, for them to personally express their moral mind. This opportunity is given, formally at least, in the statute-based invitation extended to offenders to speak in court before the imposition of sentence.<sup>17</sup> How this invitation is accepted, however, as well as how offenders' expressions of their moral mind are received by courts, are

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<sup>13</sup> See the discussions on judicial inquiries into offenders' 'inner' motivations for and responses to their criminal conduct, at §1.5, and the ambiguity of guilty pleas, at § 2.3.

<sup>14</sup> See, for example, the critiques of George Fletcher and Ekow Yankah, discussed above in Chapter One, at §1.5.

<sup>15</sup> See the perspectives discussed above in Chapter Three at §3.2.3.6, especially Hannah, Rolf, and Trent's comments regarding courts' engagement with an offender's expression of remorse.

<sup>16</sup> *Ibid.*

<sup>17</sup> Found at s. 726 of the *Criminal Code*.

fundamentally empirical inquiries. This study's inclusion of moral mind sets out to further the understanding of these questions, in the context of the Study Courts.

Finally, in order to capture the maximum number of relevant representations, my threshold for numerically counting a communication as moral speech was set deliberately low. That is, I included as moral speech any mention by any participant of any claim or consideration that was audibly connected to the gravity of the offence, the responsibility of the offender, and/or the offender's normative orientation towards the offence. I set this threshold at the outset of my observations, to ensure that the study would not exclude some of the various ways that moral themes are conveyed, by various participants, in the Study Courts. What this means is that, in a numerical sense, in depth discussions of moral themes are noted to be equivalent to cursory, non-dialogic statements. To help account for the distortions that resulted from this broad initial intake of moral speech, I also counted moral "conversations". These are defined as instances when either or both of the sub-categories of moral speech were raised by multiple participants in the same hearing. Again, however, a numerical assessment of these conversations comprises both lively dialogues and summary exchanges, and counts both equally. The Observation Study's shortcomings in this regard thus form another reason for why a qualitative analysis of the data's composition and context is both necessary and important. Interpreting my observations with an eye to the nature, and not merely the incidence, of moral speech allows for an assessment of how closely this speech tracks a court's normative engagement with offenders, in a broader sense. My hypothesis is that moral speech is closely correlated with, and even necessary to, a sentencing court's 'ideal' work of expressive moral ordering. This presumption is tested through qualitative observations of how each of the Study Courts interprets and manifests its normative function. As I outline below, moral speech does not exhaust all of the concerns upon which this function is based.

#### ***4.1.3.1 Exclusions from the Definition of Moral Speech***

Much of the material that courts consider in sentencing hearings lies outside the parameters of moral speech. Extending or resting outside my definition, for example, is

all commentary not audibly linked to the offence itself, and/or the offender's normative orientation thereto. This excludes a significant number of bases upon which 'appropriate' sentences are formulated, including the offender's criminal history, any illnesses or addictions not directly connected to the commission of the offence, and any pre-sentence detention or other privations that offenders may have endured.<sup>18</sup> Also excluded are representations on other 'external' factors, such as regarding an offender's personal background, rehabilitative efforts, or future plans. Moreover, I did not include as moral speech Crown Counsel's factual summary of the offence, unless it included explicit mention of specific aggravating or mitigating factors directed to the gravity of the offence and/or degree of responsibility of the offender. The above factors may constitute the bulk, and in some cases the entirety, of the in-court speech that is audible in sentencing hearings. I have excluded them from my focus not because they are inconsequential or inappropriate considerations, but because I wish to locate and assess those representations that more centrally refer to the immediate offence for which an offender is being sentenced.

This study makes no claims about the 'rightness' or 'wrongness' of any case's resolution. Nor does it suggest that, just because I may not have heard specific moral issues explicitly discussed in a sentencing hearing, that they were not actively influencing the proceedings or outcome. The Observation Study is intended to gauge the incidence and quality of the law's concern for moral ordering as it manifests and is performed in the public, formal setting of sentencing hearings. I recognize, however, that such representations are never made in isolation, nor are they neatly packaged and identified as pertaining to the subjects of moral inquiry that I am interested in. 'Non-moral' communications and decision-making criteria do form part of the full picture in every case, and are often tightly interwoven with moral speech. More substantively, the normative discourses that are audible in some contexts may not emphasize moral speech to the same degree as others. These differences may, or may not, be reflected

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<sup>18</sup> As many participants in Chapter Three's Interview Study related, these factors often assume prevailing influence in determining case outcomes. See, especially, Allison's reference to the influence of criminal records at §3.2.2, and Bruno's comments regarding pre-sentence detention at §3.2.3.



in the normative engagement that a given sentencing court practices, and which this study is fundamentally interested in observing. I encounter and reflect upon factors that extend beyond my definition of moral speech, therefore, not merely to minimize the distortions that would be produced if my findings were presented in isolation, but also to honour the possibility that other normative orders, motivations, and discourses are conveyed in sentencing hearings. This is especially important for understanding how Aboriginal interpretations and experiences are reflected in plea and sentencing processes. Each of the Study Courts, it will be seen, devoted some or all of its practice to the sentencing of Aboriginal offenders. The provisions of the Supreme Court of Canada's *Gladue* decision,<sup>19</sup> therefore, apply to each court's mandate, and I briefly assess how "attention to the circumstances of Aboriginal offenders"<sup>20</sup> is incorporated into the normative ordering observable in each forum, whether via moral speech or otherwise.

Finally, I note that a substantial (and increasing) proportion of what would be included as moral speech if voiced in a court is instead expressed by the codified statements that courts are mandated to follow. This includes statutorily aggravating factors,<sup>21</sup> presumptions of increased penalty, and mandatory minimum sentences. When these legislative directions were explicitly mentioned in the course of sentencing hearings, I included them as instances of moral speech. I also tried to be attentive to the silences that the legislative constraining of judicial discretion may have produced.

#### **4.1.4 Weaknesses and Limitations**

The Observation Study cannot be usefully received without understanding its weaknesses and limitations. This study essentially makes the same investigation of four courts in one jurisdiction, applying one aspect of a legal theory (moral ordering) to gauge the incidence and import of one type of in-court communication (moral speech). The data set is small, and unevenly distributed between courts. Other disequilibria also limited my ability to make comprehensive or comparative findings. In two courts, for

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<sup>19</sup> *Supra* note 4.

<sup>20</sup> *Criminal Code of Canada*, s. 718.2 (e).

<sup>21</sup> Many of which are enumerated at *Ibid.* s. 718.2 (a) (i) through (v).

example, I was able to observe multiple judges interacting with multiple lay and professional participants in multiple situational contexts, while in the two others I heard only a single judge's deliberations, and in one court (Hazelton) over the course of no more than a single court sitting. As many participants in the Interview Study asserted, the influence and approach of individual judges, even within the same court, can make an important difference to how the process of moral ordering is undertaken.<sup>22</sup> Without the ability to observe and account for multiple judicial personalities in each Study Court, I can draw only incomplete and preliminary conclusions about how the various forums themselves impact upon the audibility of moral speech.

With these caveats, I present the Observational Study as a useful and necessary empirical enquiry into one facet of the moral ordering that sentencing courts undertake, and represent. I do this in two stages. First, §4.2 relates my observations and findings with respect to each of the Study Courts. This section, by way of case narratives and data analysis, introduces and explains the key themes that I found most illustrative of the moral speech that I observed in each forum. Second, §4.3 discusses the audibility of moral speech across all the Study Courts, drawing out conjectures and conclusions from what I observed. I return, here, to the research questions outlined above at §4.1.1, to sum up how the variability in the incidence and quality of moral speech is influenced by features both within and outside a court (or court system's) control. This assessment, finally, reflects upon the utility of focusing on moral speech, as I define it, for understanding the normative engagement that a court can be heard to practice.

## **4.2 Four Courts; Four Staging Grounds for Moral Ordering**

### **4.2.1 Court 102 at 222 Main Street, Vancouver**

#### **4.2.1.1 Introduction**

Court 102 is located on the ground floor of the Provincial Court building that occupies an entire block on the east side of Main Street in Vancouver's poorest neighbourhood. There is a police station across the street, and often a queue of people waits to be

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<sup>22</sup> See, for example, the discussion at §3.2.5.1 of the Interview Study, particularly Patrick's comments regarding the heterogeneity of judges.

cleared through the metal detectors that guard the court's entrance. Computer printouts stapled to a notice board in the foyer, and replicated outside each courtroom, alphabetically list the names of accused whose cases will become that day's business. The sheet prepared for Court 102, however, is invariably incomplete; instead, the surnames of those whose lawyers have brought them into court that day are written in erasable ink on a whiteboard inside the court itself, and kept current by the sheriff in charge.

The whiteboard is affixed to the wall adjacent to a glassed-walled prisoner's box; the names that the sheriff writes and erases match the individuals who emerge from the cells downstairs to face the charges that have led to their detention. Bolted to the other wall is a TV monitor, which often animates the head of a prisoner who has chosen not to be brought downtown from the pre-trial detention facility in Surrey; the facilities in Court 102 allow sentencing hearings to be conducted via this closed-circuit telecommunications system.

The television and the whiteboard are two of the most obvious signs of the efficiency and flexibility that this court privileges. It has been physically designed to accommodate a large volume of daily cases, many of which are not completely planned or scheduled very far in advance of their appearance in the person of a body in the dock or a visage on the screen. Persons who are not in custody also appear in Court 102, but my observations suggested it to be unique among the Study Courts in terms of the proportion of those who have been detained prior to sentencing. Not merely a majority, but almost three times the number of the offenders whose hearings I witnessed were in pre-sentence custody, compared with those who appeared for their hearings without shackles and an orange jumpsuit. Finally, Court 102 is a true 'plea court': all those who appear before this court will have indicated, usually by way of their representative, that they wish to plead guilty to some or all of the charges against them.

Court 102 conducts significantly more sentencing hearings than the other courts in the Observation Study: in the seven hours I spent observing its proceedings, over five visits in the winter and spring of 2009-2010, 22 such hearings were held. The actual average

length of the sentencing hearings that I observed in Court 102 was twelve minutes. As Trent, a Crown Counsel at the court, confirmed, this is a court meant for cases that can be completed in 20 minutes or less.<sup>23</sup> Trent estimated that each day in Court 102, an average of ten to twelve criminal cases are brought to their formal conclusion.<sup>24</sup>

In large, part, therefore, Court 102 is a court of convenience for legal professionals, as indeed, arguably, it is for the justice system itself. Nineteen of the 22 hearings I observed involved an offender who was represented by counsel. Defence counsel, along with the prosecutor, are largely responsible for gauging which cases are appropriate for the court.<sup>25</sup> Many different lawyers spoke before the court in the course of my observations, and most seemed fully cognizant of and comfortable with the volume and pace of proceedings. The Crown Counsel who had conduct of the prosecutions during my visits usually entered in the morning with a large stack of briefs, and more would be handed to him as the day's list progressed. Cases were called in quick succession, and there were frequent whispered discussions between counsel who were waiting for their matters to be heard; lawyers came and went through a side door of the courtroom that was restricted from public access. Sitting in the public gallery, which was separated from the professionals' benches by a low wooden wall, it was often difficult for me to hear what was being 'officially' addressed up front.

There were not often more than two or three other people on these public benches; sometimes the friend or relative of an offender sat in anticipation of seeing a familiar face, always unsure of when (and sometimes even if) it would emerge from the door leading down to the prisoners' cells. None were included as active participants in any hearings I observed, and I did not notice the appearance of any victim or victim supporter in the eight cases that dealt with a crime against particular person(s) or their property.

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<sup>23</sup> Interview with "Trent", February 15, 2010.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

Three different judges presided over Court 102 during the days I visited there. Each brought his or her own approach to its challenging demands, but all seemed more or less in tune with the efficiencies prioritized by other legal professionals and the court's very design. Even within the same structure and context, however, different judicial personalities did contribute to different depths and kinds of engagement between the parties during the sentencing hearings I observed. There was a particularly familiar rapport between certain professionals, while in other instances a judge would anticipate or cut short a lawyer's submission to offer their own interpretation of what was important in the case at hand, or to deliver a cursory conclusion. Sometimes a judge would address the offender directly when imposing sentence, but others would issue monotone judgments, without looking up from the Bench.

#### ***4.2.1.2 Case Narratives***

This section describes five of the cases that I found most illustrative of Court 102's sentencing practice. Their significance in relation to the study's thematic focus is incorporated into the subsequent discussions, at §4.2.1.3 and §4.3.

- i) In which neither lawyers nor offender satisfy the judge's sense of justice

A man in his thirties, who had spent two months in pre-sentence detention, pleaded guilty to three property-related counts, including theft and fraud over \$5000.00. As became a commonly observed occurrence in Court 102, another three charges were stayed by the Crown. The actual guilty pleas in this case were entered by defence counsel, and the judge turned to the offender for verbal confirmation: "that's correct, Mr. X?". The man, whose arms were draped over the Plexiglas wall that surrounds the prisoner's box, returned a one word affirmative reply.

After the pleas had been entered, Crown Counsel initiated the evidentiary stage of the hearing by summarizing the facts upon which the charges were based. This consisted of a short, strictly factual account of the circumstances of the offence and the losses that the victims (two banks and a liquor store) had incurred. There was no mention of aggravating or mitigating factors or any other normative submissions that fit my

definition of moral speech. Crown Counsel then entered the offender's criminal record into evidence, with some commentary regarding its most recent and related entries. The most punitive prior sentence this offender had received for a similar offence, the prosecutor noted, was three months in jail. He submitted that a sentence of time already served (two months doubled, as this hearing took place before the coming into force of bill C-25<sup>26</sup>) plus probation and a restitution order to the banks, was the appropriate punishment for these crimes.

Defence counsel spoke next, and he began by agreeing with the Crown's suggested sentence. He took considerable care in attempting to justify the jointly proposed resolution: letters from the offender as well as his spouse, who was present in court to offer her support, were submitted, and the lawyer spoke personally of observing his client's "positive changes" over the past few years of their professional association. He stated that this offender was about to become a father, and styled his criminal lifestyle – evident from the criminal record – as "game over". This individual was, by his lawyer's account, ready to turn over a new, law abiding leaf. Another letter was presented from a parenting course at the jail that the offender was taking. Defence counsel then turned to some of the reasons for why his client had fallen into such a disreputable lifestyle to begin with. The themes he raised would be echoed again and again in other cases. This offender suffered from mental ailments. More significantly, he was also struggling with substance abuse. Finally, the lawyer spoke about the offence itself, characterizing it as "unsophisticated"; a clear, if succinct, submission regarding the principle of moral proportionality.

The judge, however, was left unconvinced by either counsel's submissions. He first wanted to know how this offender was going to repay the \$32,000 that he had defrauded from the banks, and then opined that the lawyers' recommendation was

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<sup>26</sup> This federal legislation, called the *Truth in Sentencing Act*, came into force on February 22, 2010, and amended the Criminal Code to end the widespread practice of judges granting offenders two-for-one credit for the time they had accumulated in pre-sentence custody. One-for-one credit is now the legislated maximum, although up to 1.5-to-one credit may be given to some offenders in 'justified circumstances', if such justification is explicitly set forth by the sentencing judge in his or her decision.

simply not appropriate in light of his criminal record. He indicated that he would be imposing a conditional sentence instead, to which defence counsel agreeably responded that his client was not a danger to re-offend, and would be a good candidate for this community-based jail sentence. The judge then asked the offender if he wished to speak. Although a requirement as per s. 726 of the *Criminal Code*,<sup>27</sup> such an invitation was only extended in 17 of the 22 hearings I observed, and only taken up in twelve instances, including this case. The offender, like only two other individuals whom I observed being sentenced in Court 102, took the opportunity to speak directly of his normative orientation towards the offence, as well as his reformation:

what I did was wrong... a big mistake. Crime doesn't pay... I want to prove to my wife and baby that I'm a real man... it's my first kid, I'm excited and scared... scared of jail.

He spoke of his sobriety and commitment to staying clean. The judge was sympathetic, but unswayed: "I'm glad to hear you want to change your ways, but you've had chances...". He imposed, in addition to double credit for the two months the offender had spent in detention, six months of house arrest, two years' probation, financial restitution to the banks, and an order for the collection of the offender's DNA. Despite the heavier-than-anticipated penalty, the man was visibly relieved at the prospect of being released from 'real jail' later that day, as was his pregnant spouse. The hearing lasted 25 minutes (the longest of any I observed in Court 102).

ii) In which the prosecution prevails in its recommended sentence

A middle-aged man was charged with stealing a cell phone from a police 'bait' car, as well as not reporting to his probation officer. Like 15 other offenders whose hearings I observed, he was already in jail at the time of sentencing. This individual, like all those who were detained pending their sentence, was represented by defence counsel. This lawyer initiated the proceedings in a typically perfunctory manner: "he wishes to deal with all his matters... he's well aware of the charges, and enters guilty pleas. Is that correct Mr. X?". From this style of opening, which I observed to occur in several

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<sup>27</sup> This section of the *Code* goes on to state, however, that the failure of a judge to conform to this requirement does not affect the validity of the sentence.

hearings, I did not anticipate much in the way of moral engagement. Crown Counsel (both provincial and federal in this case) ran through the factual summary, submitted the man's "mostly drug related" criminal record, and recommended a further month in jail for what was the latest in a long string of thefts and breaches. Defence counsel then returned to his feet. He outlined the client's background and circumstantial hardships, including his having been recently laid off work. He stole the phone for money, the lawyer said, and was "scared to return" after missing a single probation appointment. More jail time would have serious consequences, and "he may want to address the court" to provide more details on this point. It was the first, and, as it turned out, only defence counsel-initiated opening for offender speech that I observed in Court 102. The offender cleared his throat in the prisoner's box. "Your Honour", he began, "I realize what I've done is wrong...". He went on to explain that all his construction tools were in an apartment that he was sure to be evicted from unless he returned soon: "if I get more jail, all my possessions will be gone, I'll have to start from scratch...".

The judge appeared to listen, but did not respond. Instead he proceeded to deliver his judgment in a distant monotone, referring to the offender in the third person:

Mr. X was placed on probation last fall, and only reported once... reviewing his record, it's clear he's had a fairly lengthy history of substance abuse and has been convicted of some serious charges. There's no principled reason in this court's view to reduce the sentence from his last time [on a similar charge]...

This offender was sentenced to another month in jail, as per the Crown's recommendation.

iii) In which the judge is sympathetic to the offender's circumstances

A 29 year-old Aboriginal male was charged for an assault that had left the victim (the offender's intimate partner) with significant bruising. In his submission of the facts to support the charge, Crown Counsel acknowledged the offender's gross intoxication at the time of the incident, but submitted, with reference to his criminal record, that "this is not an isolated incident... the only response is a long jail sentence". The Crown in this case noted other mitigating factors. The offender, he stated, had apologized to his



partner immediately after the assault. The Crown had also met with this victim (something I did not hear occurring in any other case) and reported that she continued to offer “unwavering and well-considered support” for the man as he sought help for his alcohol addiction. Defence counsel, in this like in 14 other hearings I observed in Court 102, joined in with the Crown’s sentencing submission. He agreed that his client must serve a jail sentence for this crime, but told the judge that both he and the Crown proposed that this sanction should be made via a conditional sentence in the community, which would allow the offender to enter a residential treatment program. The offender’s Aboriginal background and difficult personal history, including alcohol abuse that began in childhood, were put forward to justify the recommendation. “He remembers very little” about the incident, defence counsel stated, was “sincerely upset about his behaviour”, and had no intention of drinking again. “This is a tough problem you’re dealing with,” the judge said, briefly addressing the offender in the course of accepting the joint submission.

iv) In which an unrepresented offender dialogues with the judge

A middle aged man, appearing without a lawyer, was charged with domestic assault. The judge took it upon himself to state: “you don’t have to plead guilty, but I’ll read the charge... do you plead guilty?” Upon receiving an affirmative answer, and hearing the Crown’s (characteristically short and ‘fact’-based) account of the incident, the judge asked “is this what happened sir?” Without counsel to moderate or intercede, the offender responded with an explanation, complete with pantomime, of how he had not actually pushed his wife’s face into the ground, but just covered it with his hand. “That’s still an assault”, the judge confirmed. He imposed a conditional discharge with nine months’ probation, but did not order the counselling the Crown had requested: “Everything’s settled with your wife? Ok, then no contact with her, just keep your nose clean for nine months. I think it’s a one-off...”. As with seven of the eight cases I observed in this court that featured an identifiable personal victim, there was no mention of the soon-to-be former spouse’s perspective. The hearing was completed in five minutes.

- v) In which the court becomes a forum for intense moral feeling

This case concerned an assault upon an elderly woman by a young man. I arrived, unfortunately, after the hearing had already commenced, while the judge was directly lecturing the offender: “your acts were despicable... you accosted a 60 year-old woman, unprovoked, because she petted your dog... any right-thinking member of society is undoubtedly appalled”. The judge noted that the “only mitigating factor is your intoxication”, but he also explicitly took the offender’s guilty plea into consideration: “notwithstanding that you don’t remember [the offence], I accept that you have some degree of remorse”. In accordance with the pre-sentence report (this was the only observed case in Court 102 in which such a report was prepared) the judge also credited the offender with being open to treatment for his problem, in the form of alcohol counselling. These rehabilitative terms were built into the probationary component of the sentence, but, as the judge confirmed, all parties understood that a period of imprisonment was also necessary: “you expected to go to jail, and you are, but only briefly because you have no related criminal record”. The offender, who appeared with defence counsel and also with an interpreter, was sentenced to 30 days’ custody, along with probation and an order not to go to the area of town where the offence took place.

#### **4.2.1.3 Discussion**

I chose to observe Court 102 for two important reasons. Primarily, as a high volume plea-based setting, I (correctly) anticipated that it would yield the greatest number of sentencing hearings to include in the Observation Study. I was also interested in the content and quality of the hearings themselves: in light of my thesis that moral speech and communication are important aspects, even requisites of a sentencing court’s duty towards specific parties and the community at large, I wondered how a high volume, plea-based court would incarnate this idea. In a sense, before even beginning my observations, I thought that Court 102 would present an extreme manifestation of some of the critiques of summary justice that were considered in Chapter Two: explicitly

designed to favour speedy resolutions, dominated by lawyers, dealing primarily with persons under the state's detention, located in a neighbourhood marked out as 'troubled'. How, I asked upon first coming through its doors, could this forum discharge the obligations of open, morally referenced discernment and expression that I believe just sentencing requires?

My actual findings can be interpreted as both reinforcing and challenging my expectations about how an orthodox plea court functions. The following discussion examines some of the themes I found most important to understanding the moral ordering that Court 102 could be heard to practice.

*Most hearings featured moral speech*

A solid majority of the cases I observed did feature audible claims or conclusions regarding the moral dimension of the criminal conduct that this court was judging. In terms of moral speech, professional and/or lay participants explicitly spoke to the moral proportionality of the offence in 16 of 22 cases. Further, in five of these 16 cases (including cases (i) (ii) (iii) and (v) described above) audible statements were made concerning an offender's moral mind. On their own, of course, these figures say little about the depth or centrality of Court 102's engagement with the themes of moral ordering, or its viability as a forum for the meaningful communication of these themes among a given hearing's participants. They do, however, provide evidence that moral speech is commonly voiced in this environment, at least in numerical terms, even given the meagre conditions that Court 102 seemed to offer for its sustenance.

*Moral Speech primarily involved representations of proportionality, and was primarily voiced by defence lawyers. The sub-category of moral mind was voiced most often by offenders, but heard in only a small minority of cases*

Beyond noting that moral speech was, in a majority of cases, audible in this high volume plea court, I was interested in hearing who spoke, and upon what topics. It is perhaps not surprising that in Court 102 defence counsel were the most common articulators of moral speech. Defence counsel spoke regarding moral proportionality in 13 of the 16

cases where it was raised, compared to five instances by the judge, three by the prosecution, and three by the offender. It was apparent that in cases in which they were represented, most offenders were silent on the subject of moral proportionality; their lawyers made these submissions on their behalf.

In regards to their own moral mind, offenders spoke on the subject in three of the five cases where it was heard, in each instance offering statements of remorse. Judges commented upon moral mind in two cases, and the defence in two as well. The Crown was not heard on the subject.

I note the above two findings as unsurprising because they reflect my presumption of which party is best placed to give voice to these two aspects of moral speech. As others have recognized,<sup>28</sup> competent and motivated representatives, on both sides of the counsel table, can adequately speak to most of the factors relevant to a judicial discernment of moral proportionality. Judges, further, while they cannot guarantee that offenders will be responsive to their admonishments or encouragements, can at least communicate the acceptance or rejection of the factors of moral proportionality in open court. As reflected in the above narratives, the statements concerning moral proportionality that I heard Court 102 were almost invariably made by lawyers. These submissions required no participation of the offender him or herself. Because of the inherently intimate, subjective nature of moral mind, however, offenders are *personally* implicated, either directly or indirectly, whenever this subject is discussed. I thus used representations upon this sub-category of moral speech as a bellwether of offender engagement. The fact of its presence in a given hearing does not, of course, thereby establish an offender's meaningful inclusion in the moral ordering a court conducts, just as its absence does not prove a lack of engagement. It is simply one measure – but, from an observer's perspective, one of the few that are accessible – of how courts and offenders are engaging with each other's normative perspectives, to the extent that

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<sup>28</sup> See, for example, Kimberly A. Thomas, "Beyond Mitigation: Towards a Theory of Allocution" (2006) 75 Ford. L.R. 2641, discussed above in Chapter Two, at §2.5.3.

they are interested in and capable of doing so. According to this measure, I observed Court 102 to be a place of rather shallow and infrequent communication.

In §4.2.1.2, I described two of three observed occasions when claims about an offender's moral orientation towards their conduct issued directly from the offender. In these cases, the offender's expression was responded to by other parties, once by defence counsel and once by the judge. In the third case, which concerned an offender with a mental illness who had threatened a police officer, the offender stated that he "had to take responsibility" for what he had done. In none of the three cases did the judge state that they were moderating their sentence in light of an offender's adjudged or expressed remorse. Indeed, in the five cases where this sub-category of moral speech was explicitly raised, judges either accepted joint submissions or inclined towards more punitive dispositions than the defence had sought. This observation provides some evidence for the proposition that expressions of remorse are, most often, coupled with appeals for lenience, and that, most often, judges in Court 102 place little weight on such representations. This does not mean, of course, that offenders who do speak of their remorse during sentencing are insincere, or that those who do not voice such feelings are stoic or indifferent. It does, however, empirically support the idea that the result-oriented nature of criminal proceedings, particularly when coupled with Court 102's privileging of efficiency, make this forum an unlikely place for the offender's moral mind to express itself free from the taint of suspicion or the air of irrelevance.

*Moral conversations tended to be cursory, and dominated by professionals*

I heard moral conversations take place in eight of the hearings I observed. Seven involved discussions of moral proportionality, while one (hearing (i) above) concerned the offender's moral mind. These conversations, such as they were, involved only two parties in every instance, in a number of configurations. The offender and judge featured in three, the Crown and defence in two, and the Crown and judge, defence and offender, and defence and judge in one each. I was particularly interested in the conversations between offender and judge, since these exchanges conceivably

represented the dialogues that I posited engaged moral ordering at sentencing should ideally feature. With an occurrence rate of three in twenty-two, the incidence of these conversations in Court 102 was not altogether encouraging, given my hypothesis regarding their centrality to the criminal law's fundamental purpose. It is further worth noting that two of these three conversations featured unrepresented offenders; in 18 of the 19 hearings I observed with defence counsel present, the offender him- or herself did not engage in any dialogue with their sentencing judge.

*Guilty pleas were sometimes treated as criterion of mitigation, but not as openings for normative engagement*

Upon undertaking the Observational Study, I wondered if guilty pleas would be audibly interpreted, by judges, as worthy of consideration for their instrumental or moral value. As was discussed in Chapter Two,<sup>29</sup> one of the major critiques and rationales for the pervasive practice of plea bargaining is that it allows the justice system to more quickly dispose of cases without engaging the cumbersome repertoire of proofs and procedures that a trial requires. A plea's instrumental value, however, (as compensated for by a discounted sentence) would seem to question if not contradict its use as a normative conveyance. Indeed, a solid majority of the hearings I observed in Court 102 skirted this issue entirely, by not referring to the significance, timing, or circumstances of the offender's plea at all. It was explicitly referred to in seven hearings. I observed that although the *fact* of a plea was accorded mitigating value in these instances, its *performance* added little if anything to an offender's normative engagement with the proceeding in which it was made. As can be seen in the above descriptions of cases (i) and (ii) it was common for a representative to effectively enter a guilty plea on their client's behalf, simply asking for *post facto* confirmation thereof.

On three of the occasions in which it was raised, a judge referred to the "early" entry of a guilty plea. In another, it was defence counsel who pointed out an offender's timely plea. In all of these cases, this representation supported mitigation of punishment,

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<sup>29</sup> See the discussion at §2.4.

although it was always left unsaid whether or not credit was being given for instrumental efficiency or because it displayed evidence of the offender's quick-flowering remorse. In another three hearings, somewhat clearer connections were drawn between a guilty plea and the offender's normative orientation. This link was made by the judge in two cases, who noted the plea in the same breath as the offender's adjudged remorse or acceptance of responsibility. In the third, it was defence counsel who stated that his client "recognizes that something has to be done... he has plead guilty", as indication that the plea was more than a mere stratagem. The offender him- or herself, however, did not speak to this point in any of the seven hearings.

By neither explicitly repudiating nor openly accepting the notion that guilty pleas, in and of themselves, are worthy of consideration on either instrumental or moral terms, the hearings I observed in Court 102 maintained the communicative ambiguity of this legal instrument. In a system characterized by broad discretion and partially submerged reasoning, this ambiguity may actually be useful to judges, if not to offenders who cannot be certain of how it will be interpreted or employed by a given judge in a given case. From my observations of this court, the guilty plea retained its protean character, and was used to bolster arguments or decisions regarding sentence mitigation when deemed advisable by lawyers or judges. It was not, from my observer's point of view, a particularly incisive or expressive conduit of an offender's moral orientation. Court 102 required a guilty plea as a condition of hearing a given case; it did not require, expect, or, from the preponderance of judicial commentary I observed, particularly concern itself with remorse. As mentioned in the introduction to the court, Court 102 is a court of convenience for legal professionals, and privileges the efficiency that guilty pleas deliver. Particularly for offenders who have been held in custody pending their conviction, this approach may benefit lay participants as well. Court 102's concern for systemic efficiency, however, is mirrored in its tendency to summarily assess each

individual case.<sup>30</sup> Without a specific (instrumental) reason to explain or question the normative orientation behind a plea, therefore, it is unlikely that any such discussion would take place. For an offender, as cases (i) and (ii) illustrate, this reason can come in the form of an impending jail sentence. For a judge, as case (v) indicates, it may come as part of a justificatory exercise for imposing a particular sentence.

Case (v) is noteworthy because it provides evidence of the significant, explicitly moral representations that Court 102 can afford. Clearly, when the professional participants to a case consider it important, either (as counsel) to defend a sentencing recommendation, or (as judge) to impress upon an offender the gauged wrongness of their conduct, Court 102's prioritized efficiency does give way to the accommodation of normative expression. It is far less certain, however, that the court's structure and constraints are sufficiently flexible to meaningfully engage offenders in these discussions. I did not observe any sustained, substantive lay-professional dialogues regarding the wrongness of an offence or the responsibility of an offender in the hearings I observed.

*The offender's past tended to be more influential in determining sentences than the circumstances of their present offending*

The final feature that I present as necessary to an understanding of Court 102's operation does not concern moral speech *per se*, as I defined it for the purposes of this study. This is the reliance that I observed to be placed upon an offender's past, in contrast to the immediate circumstances of their present offending. In particular, representations in 19 of the 22 sentencing hearings that I observed in Court 102 focused on the existence and relevance of the offender's criminal record, as a consideration for the judge's determination of an appropriate sentence for the offence before the court. While the judicial use of a person's prior criminal history as an aid in determining his or her degree of responsibility for a subsequent offence is standard practice in most

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<sup>30</sup> There are, of course, exceptions to this rule. Cases (i) and (v) described above, were notably longer and more normatively engaged than the others I observed in Court 102.



sentencing courts,<sup>31</sup> its employment in Court 102 was often the dominant, and sometimes the only, audible reference point for a sentence imposed. The degree to which Court 102's observed reliance on criminal records varied from that of the other Study Courts is discussed in §4.3.

The above analysis does not touch upon all of the factors that influenced the moral speech I observed in Court 102. As is evident from the numerical data outlined in Appendix 'E', there is an array of criteria by which the audible practice of moral ordering can be interpreted and assessed. This section laid out what I considered to be the themes most necessary to an understanding of this particular forum's manifestation of moral speech; the synoptic discussion in §4.3 incorporates some of the other findings from my observation of Court 102, and integrates these as well as the above themes in a comparative analysis. Below, I proceed to introduce and explore the moral speech I heard in the second Study Court.

#### **4.2.2 Vancouver's Downtown Community Court**

##### **4.2.2.1 Introduction**

Vancouver's newest, and most formally distinctive provincial court is located just a few steps away from 222 Main Street, in the same building, in fact, that once held prisoners waiting for their cases to be heard there. Community Court was established in 2008 with the express aim of fostering a more "responsive, connected, collaborative" problem-solving approach to criminal offending, in particular that which arises from addiction, mental illness, and the related social dysfunctions that are found in such high incidence in the poor neighbourhood in which the court operates.<sup>32</sup>

Given that it is located in the basement of a former detention centre, Community Court is a remarkably warm and attractive space. Children's colourful representations of

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<sup>31</sup> This researcher's experience as defence counsel in three Canadian jurisdictions lends support to this claim.

<sup>32</sup> Downtown Community Court, "Statistical Information: September 10, 2008 to September 30, 2009" (Vancouver: Provincial Court of British Columbia, 2009), online: Criminal Justice Reform Secretariat <[http://www.criminaljusticereform.gov.bc.ca/en/shared/downloads/statistics\\_through\\_sept\\_09.pdf](http://www.criminaljusticereform.gov.bc.ca/en/shared/downloads/statistics_through_sept_09.pdf)> at 1.

'Justice' hang in frames upon the wall, and the waiting area is adorned with a mural that has transformed white concrete into a legend-laden forest, where giant sockeye swim through the Aurora Borealis, ancestor faces blend in with evergreens, and someone scatters seeds into a mountain stream. It is an evocation of beauty that can be difficult to perceive on the hard streets just outside, but nonetheless seems quite intimately resonant of this community's memories and aspirations. The courtroom itself is wood-panelled in bright ash and pine, and lit not with the fluorescent tubes that my eyes grew accustomed to in other courts, but with small and stylish halogen lamps suspended from the ceiling. Instead of wooden benches, the counsel and spectator benches are comfortably upholstered. There is, of course, the glassed-in prisoner's box, the raised judicial dais, and the coat of arms that mark this place as a site of legal authority.

As with most other criminal courts in Canada, Community Court's jurisdiction is primarily geographic: at least initially, it deals with all persons who have been charged with offences alleged to have occurred within a defined area of downtown Vancouver. From September 2008 to the end of July, 2009, this amounted to 1,786 individuals, approximately 60% of whom resolved one or more of their cases in that forum.<sup>33</sup> As Community Court does not conduct trials, persons who choose to contest their charges are transferred to the trial courts at 222 Main Street.

There are two resident judges, and although two courtrooms are available, from my observations only one was ever used; the judges presided in an alternating schedule over different days or weeks. Two Crown Counsel also alternated prosecutorial duties during my visits. There is one full-time duty counsel on staff, a rotation of ad hoc duty counsel to assist her work, and various privately retained lawyers shuttling in and out the common door at the rear of the courtroom. In keeping with Community Court's ethos of integrated services, various non-legal professionals are also based at the court. These include "probation officers, forensic liaison workers, a forensic psychiatrist, a nurse, health-justice liaison workers, employment assistance workers, a victim services

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<sup>33</sup> *Ibid.*

worker, a BC Housing support worker and an Aboriginal courtworker”.<sup>34</sup> These professionals work together in ‘case management teams’ (“CMTs”) to offer integrated assistance to individuals who have multiple needs.

Like Court 102, I observed Community Court to be a busy place. Moreover, unlike the high volume plea court around the corner, its business included preliminary and procedural matters (including bail, adjournments, and applications) as well as dispositions. I observed eleven hours of proceedings over the course of seven visits, and in that time, only twelve sentencing hearings were completed. This averages out to one each 55 minutes. Controlling for the court’s other business, the average length of the sentencing hearings I observed in Community Court was 16 minutes, or four minutes longer than at Court 102. This is, perhaps, in keeping with Community Court’s mandate of hearing cases

quickly[,] so that offenders can begin making reparation almost immediately, instead of being sentenced to time already served while waiting for their case to be heard.<sup>35</sup>

In terms of the proportion of cases, the problem of ‘time-served’ sentences was only slightly more marked in my observations of Court 102 than Community Court: ten of the 16 in-custody offenders at Court 102 were adjudged to have already served their custodial punishments by the time they were sentenced, while this occurred in three of six cases at Community Court. The length of time between detention and sentence was, however, much lower in the latter forum: offenders in Court 102 waited an average of 25.5 days in custody before their hearings, while in Community Court the average was 16.5 (and aside from one case, which involved charges waived in from another jurisdiction, this average would have been only seven days). Considered from this perspective, there is considerable evidence that persons appearing in Community Court are more quickly sentenced and returned from detention to the community, commonly

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<sup>34</sup> British Columbia Ministry of Attorney General, “Backgrounder: Vancouver’s Downtown Community Court”, (Victoria, Ministry of Attorney General, September 6, 2008), online: Government of B.C. <[http://www2.news.gov.bc.ca/news\\_releases/2005-2009/2008OTP0218-001343-Attachment1.htm](http://www2.news.gov.bc.ca/news_releases/2005-2009/2008OTP0218-001343-Attachment1.htm)>.

<sup>35</sup> *Ibid.*

with probationary terms that include the “reparations” of service work, as well as targeted rehabilitative supports.<sup>36</sup>

#### **4.2.2.2 Case Narratives**

From the twelve hearings I observed, I selected six for narrative description. These cases are grouped according to their illustration of one of the three key themes that I found characteristic of Community Court’s practice. The first, represented in the first two cases, encompasses offenders with little or no previous involvement with the law, either at Community Court or elsewhere. The second, represented in the third and fourth cases, includes offenders who were suffering from some form of crisis when they come before the court. The last, described in the fifth and sixth cases, deals with offenders with extensive criminal histories and ongoing patterns of offending. As can be seen, these categories are roughly drawn and overlapping, and are not notably differentiated by the kind of offence specifically before the court. I advance the categorization as useful, however, to an understanding of how moral speech at Community Court manifests in relation to the different circumstances of the offenders who are the subjects of (and, sometimes, active interlocutors in) its sentencing hearings.

- i) In which offenders benefit from their lack of criminal background (2 cases)

The two hearings related below both concerned interpersonal assaults. In both instances, the accused person was not in custody, and was represented by duty counsel.

The first involved two counts of assault; one was stayed by the Crown after duty counsel enters a guilty plea to the other “on his behalf”. The Crown’s summary of relevant facts revealed that the victim and offender had recently ended an intimate relationship; while drunk, the offender had accosted the victim in the lobby of his apartment building, punching, choking, and “smacking” his head on the wall. The victim of this assault was not in court, although the Crown did submit a written statement that

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<sup>36</sup> Community Court’s “Statistical Information” factsheet, *supra* note 27, details that 568 offenders received social, health, and mental health programming, 209 received shelter and housing, 35 received income assistance, and offenders contributed 6,055 hours of community service work between September 2008 and the end of July, 2009.

spoke of the effect the incident had upon him. This was the only victim impact statement entered in any of the 48 hearings I observed.<sup>37</sup> The Crown initially sought a probationary term, although, at the conclusion of his submission, he indicated that he might support a conditional discharge “if I hear more about this defendant”.

Duty counsel acted as this offender’s mouthpiece throughout the hearing; the offender himself declined a judicial invitation to speak.<sup>38</sup> This individual merited a discharge, duty counsel submitted, because of his lack of prior criminal record. He also “works full-time, has some college, and wants to work with the disabled”. Through counsel, the offender agreed that “he’s much nicer when he’s not drinking”, and “feels a great deal of remorse” about his behaviour; he knows, duty counsel submitted, that there are better ways of handling his problems. Although the victim has tried to contact him, she stated, the offender had refused to respond, in accordance with his bail conditions.

The Crown, at this point, told the court that he wouldn’t oppose a conditional discharge, but did want a sample of the offender’s DNA to be taken. The judge took a moment to consider counsels’ submissions and read the documents that had been provided, and then addressed the offender directly:

this appears to be an isolated incident. It had a significant effect on [the victim], but I’m satisfied that a conditional discharge is appropriate. If you stay out of trouble for twelve months, you won’t have a criminal record.

The judge did not impose a DNA order. The hearing was completed in 16 minutes.

The next case also involved an assault charge, and again the Crown stayed a second count (this one of mischief). It was clear that the lawyers had agreed that a peace bond was the appropriate disposition in this case; although the offender had a criminal record, there was no “history of violence”, in the Crown’s words, and the offence was provoked by mental health issues which had since stabilized. Duty counsel offered further contextualization: this individual was burdened with a “dual diagnosis” of

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<sup>37</sup> Of course, not all of these hearings involved an identifiable victim. I counted 17 cases in which such a statement could conceivably have been submitted, for an incidence of 6%.

<sup>38</sup> Unlike in Court 102, the judges at Community Court were punctilious about extending this invitation in every case.

mental illness and alcohol abuse, and since the incident has been helped into housing and connected with a mental health agency. In respect of the event, in counsel's words the offender "felt that [the victim] had disrespected him, but acknowledges acting inappropriately". The offender himself, when invited by the judge to speak, stated that he was "grateful that this situation came about because it allowed me to get some help – I would have killed myself!". The judge's decision, directly following this statement, was brief and direct: "you did act inappropriately, but I am satisfied with a peace bond". The offender was ordered to keep the peace and have no contact with the victim (whose views were not referenced) for a period of twelve months. The hearing lasted eleven minutes.

ii) In which offenders in crisis are sympathetically treated (2 cases)

Both cases concerned accused persons who had been detained in custody. Both were represented by retained lawyers. In the first, a young man was charged with breaching his conditional sentence order ("CSO") by being in Vancouver contrary to his conditions, carrying a screwdriver, and, most flagrantly, by using it to break into parked cars and steal items inside. Another charge of cocaine possession was stayed by the Crown. It was clear that all of the professional actors at the hearing were "pretty familiar" with this individual. The offender's defence counsel even admitted that, with his mental health and addiction issues, he was simply "not able to follow a conditional sentence", and submitted that he be held in custody for the balance of the CSO, which amounted to almost five months. The Crown was seeking a six-month jail sentence on the substantive offences, but agreed with defence counsel in the recommendation that it be served concurrently to his terminated CSO. No one spoke about the 'wrongness' of these offences, and it seemed evident that no one felt the need to; in this case, it was the management of the offender's afflictions that was the central issue. For his own part, the subject of the hearing made a plaintive apology for his behaviour:

I'm sorry, I feel like I've wasted everyone's time... it's very hard to stop using drugs... I still want a better life, but don't want to go back to [a certain mental health treatment centre].

The judge briefly spoke to the offender on this point, telling him such a placement “isn’t mandatory, it’s up to you and the Case Management Team”. He imposed the recommended sentence, and the hearing concluded in twelve minutes.

The second case also concerned an offender in crisis, also facing charges of theft and breaching court orders. This was a middle-aged woman who, as her defence lawyer submitted, did not have a criminal record and until a year ago had worked as a nurse in another community. She had since been diagnosed with a mental illness, been the victim of a serious domestic assault, dealt with the death of her daughter, and moved to the downtown eastside, where she became involved with drug use and was further victimized. Her counsel submitted:

She stole for her own needs, knows it is wrong, and can’t imagine being here... she’s working with the CMT, but also dealing with serious charges in another court... a mental health assessment is being considered in that case.

The lawyer told the Court that her client wanted to regain the community’s confidence, re-establish her stability and become a contributing law-abiding citizen again, and “she welcomes any assistance”. The judge asked counsel why she couldn’t return to her home community, to which the offender personally replied that she lost her house and her job there, and can’t return. She addressed the Court in tears:

I apologize for my behaviour, it’s such an embarrassment, I’m just glad my parents aren’t alive to see it. I’m not doing drugs anymore... hoping for better...

The judge made no further comment, but accepted the joint submission for a probationary term, in addition to the two days this offender had been held in custody. The hearing lasted 21 minutes.

iii) In which ‘hardened’ offenders test the court’s rehabilitative ethic (2 cases)

Two cases illustrate this category. The first involved an elderly man charged with shoplifting two frying pans. His defence lawyer entered a guilty plea on his client’s behalf, ending with a confirmatory “is that correct Mr. X?”. Crown Counsel quickly summarized the facts, noting that the offender had been cooperative when apprehended, and although he had a lengthy, recent, and related record,

he's working with the CMT... he had a work-related accident several years ago, and suffers from chronic pain. His offences support getting drugs to deal with it... he's in supportive housing now, and is also getting help regarding his anxiety and depression. The CMT is helping him reconnect with his family, to help with his pain.

Finally, the Crown noted that this individual hadn't re-offended in almost five months, "which is a significant change for him". She recommended a short probationary sentence with some community service work. After this remarkably balanced submission, the defence lawyer had little to add. She did note, on her client's behalf, that "he disappointed himself as much as the CMT when he got involved with this latest offence". But, the lawyer stated, her client didn't hide from or deny the relapse, or his feelings of shame: "he wanted everybody to know [about it]". Defence counsel adopted the Crown's recommendation, concluding that service work was hard for her client, but that she was confident the CMT would find him appropriate work. The hearing was over in ten minutes, the judge merely adopting the lawyers' recommendation, and briefly telling the offender "you did commit this offence while on probation, but have had no trouble since". When asked if he had anything to add, the subject of the hearing responded "I think it's all been said".

The second hearing was far less gentle, and much more normatively contentious. A young, Aboriginal man was in custody for three counts of breaching his conditional sentence, along with two property-related offences from another jurisdiction involving stolen gift cards. The offences themselves were no graver than many others I observed being dealt with in Community Court, but this offender's history was placed in particular emphasis by the prosecution. He had a criminal record, the Crown stated, dating back to 1995 (when he would have been an early adolescent) and an adult record from 2000, which included

72 priors, seven breaches, two CSO breaches... he's obviously intelligent, and fully understands that he was bound [by the orders]... he's shown a complete, blatant disregard for Your Honour's orders.

The community's safety, she concluded, wouldn't be guaranteed if he was released from custody, where he had already spent over two months. She asked for his CSO, which



had almost 18 months' remaining, to be terminated (meaning he would have to spend the remainder of that period in jail) with an additional sixty days' jail on the substantive charges.

In her submissions, defence counsel also shed light on the offender's history, although through a markedly different interpretive lens. He had been addicted to drugs since he was 14, she submitted, and although "he does deserve to spend more time in custody... he also deserves a second or third chance to spend more time on his CSO in the community". She asked for a suspension of the community jail sentence, not full termination. Counsel went on to relate that her client was able to work, and that he had the support of his mother and aunt, who were in the body of the court. These family members submitted a letter for the Court to read, and the mother also spoke directly to the judge about the difficult circumstances that lead to this latest bout of offending:

He was released in October, and came back [to his home community] with nowhere to go... he was staying at shelters, where drug pushers know him... it was an impossible situation.

The offender himself told the Court why he breached his order not to return to Vancouver:

I wasn't able to secure any treatment while in custody... I couldn't amend my probation order to go to Vancouver for treatment, but I just needed a bed, somewhere.

Both the offender and his counsel agreed that he was still in need of treatment, and mentioned one facility where he was planning to go once released. Crown Counsel resisted this proposition: "he talks the talk, but doesn't walk it... I've never heard of his intended recovery house... termination of his CSO is absolutely required".

The presiding judge, who had clearly dealt with this offender in the past, enquired about the possibility of him attending in-custody treatment programs, but the offender replied that he had had problems at both the available centres and was not welcome back. "I haven't had a chance to walk the walk, Your Honour...". In imposing sentence, the judge referred to the offender in the third person: "He has great difficulty following through

with his promises... he needs to be in custody for some time". He declined, however, to follow the Crown's recommendation, and instead imposed what amounted to a further six months in custody, with the offender's CSO to resume upon his release. The offender took the chance to utter a few final words: "I think it's a fair sentence...", but with disgruntlement evident on his face. At 51 minutes, this turned out to be the longest of any of the hearings I observed in the four study courts. It also seemed to be among the least satisfying for any of the participants.

#### **4.2.2.3 Discussion**

I was interested in gauging how Community Court's distinctive approach, which combines collaborative problem solving with a concern for efficiency, influenced the audibility of moral themes in its sentencing proceedings. In numerical terms, this court did manifest moral speech in every hearing I observed: ten of the twelve contained representations on moral proportionality, two on the offender's normative orientation (or "moral mind") towards the offence, and four featured both. These rates of incidence are higher than those observed in Court 102; most notably, while only five of 22 cases in Court 102 included commentary on the offender's moral mind, six of the twelve hearings I observed at Community Court explicitly raised this topic.

Before beginning my observations, I thought that Community Court would present one of the strongest models for the participatory moral engagement I was intent on hearing. The court's guiding principles of "timeliness", "integration", and "connection to community"<sup>39</sup>, indeed, were made explicit in its evocation as an innovative justice model. The two justice professionals that I interviewed who worked in Community Court, moreover, touted its collaborative, problem solving approach. Bruno, a defence lawyer who appeared regularly in the court, confirmed that "the services that are

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<sup>39</sup> British Columbia Criminal Justice Reform Secretariat, "Vancouver's Downtown Community Court: Guiding Principles" (Victoria: Province of British Columbia, 2010), online: Criminal Justice Reform Secretariat <[http://www.criminaljusticereform.gov.bc.ca/en/justice\\_reform\\_projects/community\\_court/how\\_it\\_works/guiding\\_principles/index.html](http://www.criminaljusticereform.gov.bc.ca/en/justice_reform_projects/community_court/how_it_works/guiding_principles/index.html)>.

offered [in Community Court]... are much more integrated. The approach is to have everything under one roof".<sup>40</sup> He also told me that

I find that some clients form a bond with the members of the community management team that you don't really find in a traditional busy probation office. I find it much more efficient for a certain class of clients, people that have mental health problems, drug addiction and so on, in terms of helping people access services and giving them some support, some follow up. Often [clients'] greatest form of human companionship or bonding... [is] with members of the community management team.<sup>41</sup>

Likewise, Nita, a dedicated duty counsel at the court, spoke highly of Community Court's cohesive, integrated body of legal, social service, mental health, and probation workers, who provided the court – and its clients – with information and resources that were not as comprehensively available elsewhere:

We have all of these people that bring information to the table... I know there have been debates about what exactly is the point of Community Court and some people think it should be faster to a resolution and I'm not sure that that's necessarily better... But in terms of what we do it's more informed so you may not get there as fast as they do at Main Street [Court 102] because at Main Street... half the time, they don't have a clue what's going on....[there is a] massive difference I think in terms of the level of information on which people are making decisions...I think Community Court offers an opportunity not just to kind of blindly point fingers at people and say we think you're the problem... We should at some point I hope have the ability to say we now actually have some real data about what it means to be homeless in terms of your criminal behaviour as opposed to being a drug addict, as opposed being crazy...that's the theory.<sup>42</sup>

These perspectives foreshadowed, for me, a forum where the root causes of crime could be frankly and comprehensively discussed, where offenders, victims, and other interested participants might be more encouraged and supported to voice their moral perspectives than in a setting such as Court 102.

To a significant extent, my observations validated this presumption, but also noted some tension between the goals and principles the court endorses and the reality of its

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<sup>40</sup> Interview with "Bruno", March 25, 2010.

<sup>41</sup> *Ibid.*

<sup>42</sup> Interview with "Nita", March 10, 2010.

day to day operation. Community Court certainly did present as one of the most morally audible of the Study Courts. Roughly half of all hearings featured speech on both of the subcategories of moral speech and/or moral conversations between participants. Offenders themselves appeared to be quite comfortable with speaking in court, neither coerced to do so nor dismissed when they did speak. Sentences themselves were frequently the outcome of joint submissions, although the plea bargaining that lawyers in the court clearly engaged in did not seem to shut down opportunities for communicative engagement. Most significantly perhaps, when it came to the most serious cases, where an offender was being sentenced to a jail term, the court and its participants, both lay and professional, appeared to make extra time and effort to practice deliberative decision-making. Offenders spoke most audibly upon moral themes in these cases, which represented a significant difference from those offenders facing similar situation in Court 102. As mentioned above in related to Court 102, I was also interested in the prevalence of representations on an offender's moral mind in Community Court. From my observations, there was little indication that these statements were being made, by offenders or by their representatives, simply in order to extract a mitigated punishment; rather, the more relaxed, solicitous nature of the court seemed to facilitate such moral speech.

*Professional 'regulars' created patterns of moral speech*

As in Court 102, defence lawyers were the most audible moral speech-makers at Community Court, although, unlike the former court, not only in regard to moral proportionality, but the offender's moral mind as well. The resident duty counsel was involved in three of the six hearings wherein the offender's moral orientation towards their conduct was raised, and made comments on this point on each occasion. Her influence, clearly, contributed to the high incidence of this kind of moral expression. In both of the cases described above under point (i) relatively lenient sentences were imposed for crimes of violence. The court in both instances was satisfied that the offences did not result in serious harm, did not represent a pattern of harmful conduct, and that the offenders (although in neither case from their own mouths) acknowledged

the ‘wrongness’ of what they had done. The judge spoke directly to the offender in both instances, albeit briefly, and in both cases incorporated commentary on the moral bases of his decisions.

Interestingly, the incidence of direct communication from judge to offender was actually higher in Court 102 than Community Court. I observed judges in Court 102 addressing offenders in 18 of 22 hearings, although such addresses incorporated moral themes on only five occasions. At Community Court, judges spoke directly to offenders at sentencing in seven of twelve hearings, with three of these including some amount of moral speech. Although there were less occasions of direct judge-to-offender communication at Community Court, therefore, a higher proportion of the times that it occurred included statements about the adjudged morality of the offence or offender. Moreover, in a manner that particularly distinguished the operation of Community Court from Court 102, in all the cases in which probation orders were prepared, the judge would call offenders up to the Bench so that he<sup>43</sup> could personally review with them the terms and conditions of these orders, and confirm their understanding of these legal orders.

*The court’s focus on offender rehabilitation moderated the relevance, but not incidence, of moral speech*

It is impossible to conclusively ascertain the degree to which the higher incidence of moral speech, and in particular that regarding the offender’s moral mind, influenced case outcomes at Community Court. A large part of its mandate concerned the appropriate linking of afflicted offenders to rehabilitative supports that would reduce the risk of re-offending. The court thus assumed an explicitly forward-looking orientation, which indelibly coloured deliberations on moral themes relating to the specific conduct that had brought an offender before the court. While moral speech relating to the offence or offender was voiced in every case, it was almost always either overshadowed by, or explicitly linked to a drug, alcohol, and/or mental health ailment

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<sup>43</sup> Both of the regular judges in Community Court were male.

from which the offender was suffering, and to which Community Court has been specifically designed to respond.

Part of Community Court's express mandate was to help counteract the causes of chronic offending. Some of the court's challenges in this regard are apparent in the case of the young repeat offender suffering from mental illness (the first hearing described above under (ii)). Like other courts, Community Court also contended with persons who had exhausted much of the rehabilitative opportunities that the system had afforded them. Faced with repeat offenders, the judges in Court 102 frequently invoked a non-statutory, but jurisprudentially standard principle known as the 'step up': simply put, an offence of similar gravity, once found to be repeated, will incur incrementally more severe sanctions. It is a simple and seemingly common sense retributive principle, and communicates (if with arguably dubious effectiveness) a court's clear frustration with offenders who fail to respond to rehabilitative programs or seemingly ignore previous punitive messages. Given Community Court's focus on reducing re-offending while also giving voice to the community's repugnance of crime, I was interested to see how it approached 'hard' cases involving chronic offenders. As the two cases related above under point (iii) demonstrate, the court was capable of extending both sympathetic lenience and relatively strict desert. The viability of the offender's rehabilitative prospects, to perhaps an even greater degree than their criminal past, could be seen to influence the court's determination of the most appropriate approach.

*Third party and community perspectives were indirectly represented*

Community Court did not particularly stand out from the other Study Courts when it came to the cultivation of victim and community perspectives. In part, this may be because other channels had been provided by the court for community input and involvement, whether in the broader aspects of its design and operation, or in the 'fruits' of sentencing in the form of community work service.<sup>44</sup> The formal sentencing

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<sup>44</sup> These avenues of community involvement are mentioned in the Community Court's promotional material. See British Columbia Criminal Justice Reform Secretariat, "Community Connection" (Victoria: Province of British Columbia, 2010), online: Criminal Justice Reform Secretariat

processes I observed in Community Court largely retained the same characteristically 'legal' tenor and distribution of participation (with lawyers' voices being by far the most audible) as found in other more orthodox settings. While this arrangement tended, in some cases, to privilege the instrumental concern of efficiency above sustained dialogue on moral themes, neither did it seem to impoverish or prohibit meaningful opportunities for such expression to develop. To the contrary, these opportunities, although not always taken, were significantly more well-informed by contextual information (although more about the offender's circumstances than the offence's impact upon others) than I observed to be the case in Court 102. Further, I observed the Crown Counsel who appeared in Community Court to be somewhat more interested in articulating the normative concern of proportionality by way of reference to public needs (as can be seen in the second case under point (iii)) or a victim's experience (as in the Victim Impact Statement submitted in the first case under point (i)). Third party perspectives were not, however, central to the court's deliberations; Community Court was unabashedly focused on reducing crime in the community by assisting offenders to stabilize their own lives.

Like all courts, Community Court engaged in the moral ordering of its cases, and did so via both implicit and explicit means. By its willingness to incorporate more information and perspective into a given crime's contextual makeup, it allowed itself more enriched opportunities for moral dialogue about this offence and this offender. In doing so, however, the court also encountered pressing instrumental questions about the most appropriate harm reductive response. The apparent tensions between retributive deserts and harm reduction are not, it must be noted, absolute; in many cases they may be resolved through informed deliberation. Some of the hearings described above may be seen to illustrate the progress that Community Court was making in this regard. In other cases, the court's concern for closure, and its own adjudged sense of what was right, was observed to trump (if rather more gently than in Court 102) lay participants'

expressed interest in debating the ‘morals’ of the story being told. All in all, although I caught only a brief glimpse into Community Court’s approach to the sentencing of criminal offenders, it served to increase my appreciation for its integrative intentions. My observations led me to believe that, if permitted by the encompassing justice system to develop its methods, resources, and trust, Community Court could become a place where the unmistakable instrumental needs of offenders are addressed in tandem with dialogues on the moral dimensions of a given legal breach.

#### **4.2.3 First Nations Court**

##### **4.2.3.1 Introduction**

First Nations Court is based at the Provincial Court in New Westminster, and, during the period I observed it, sat one day per month as a provincial court empowered, as is any, to conduct bails, applications, pleas and sentencing hearings. Its ‘clients’, for lack of a better word, are self-identifying Aboriginal people living in local urban centres, and cases are brought into its purview, upon agreement by the prosecution, from across the Lower Mainland and sometimes even beyond. First Nations Court has no dedicated facility, official funding envelope, or special support apparatus, being virtually entirely driven by a single judge and a few other committed professionals, with the necessary cooperation of the Office of the Chief Judge of the Provincial Court (to allow for scheduling requirements) and the regional Crown Counsel (to facilitate client referrals).

Unlike Community Court, no media backgrounders or information pamphlets were available regarding First Nations Court; it was not included as part of the provincial government’s publications regarding its initiatives in the way of criminal justice reform. Indeed, I only heard about its existence by word of mouth. The court I observed was, nevertheless, particularly unique in the approach it took to the adjudication of offences, and I include it in this study for its distinctive manifestation of communicative engagement with criminal wrongdoing. As mentioned in this chapter’s introduction, First Nations Court may be understood as a comprehensive attempt to remedy the concerns raised in the Supreme Court of Canada’s *Gladue* decision.



I observed ten sentencing hearings at First Nations Court in 20 hours of observation, which were spread over the course of six visits to its monthly sessions from the fall of 2009 through the spring of 2010. This averages to only one completed hearing in every two hours of court time; a far cry from Court 102's rate of one every 19 minutes. As with Community Court, other proceedings did occupy a significant amount of First Nations Court's business. Controlling for this, the actual average length of the sentencing proceedings I observed was 29 minutes – still almost twice as long as those at Community Court, and more than double the average length of hearings in Court 102. Unlike other courts, however, the largest proportion of First Nation Court's 'other business' consisted not in preliminary procedures, but rather post-adjudication review hearings with offenders who were in the course of serving sentences in the community. The basis for review hearings is located in the *Criminal Code*,<sup>45</sup> but I never observed it being used in the other Study Courts.<sup>46</sup>

Over the course of my six visits, First Nations Court occupied three different courtrooms. The first was little more than a small office boardroom, with a single table around which sat all professionals, lay participants, and observers. Although the space was cramped and overcrowded (necessitating the Court's subsequent move to larger quarters) it served well for the environment the judge was intent on fostering. Everyone sat at the same level, looking not just at the judge but at each other. Although we stood as usual when she entered the room in regular judicial robes, the judge proceeded to introduce herself and invite all those present to do the same. Court was concluded with a warm "thank you for coming".

The second sitting I observed took place in a much larger, traditional courtroom. The judge explained that the move was necessary "because of all the visitors", who on that day included students from a college counselling course, some Aboriginal interns from provincial ministries, and the regular support personnel: two Native Courtworkers, a

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<sup>45</sup> At s. s. 732.1(2)(b).

<sup>46</sup> Indeed, I have never experienced this function being employed in any other context outside of First Nations Court.

liaison from the Office of the Chief Judge, and a drug-and-alcohol counsellor. The clerk invited us to push the tables together to create a more intimate space, and again the judge joined us at this level. The cavernous space, however, made communication difficult. At several junctures the judge mused that she wasn't "keen" on the space.

The third courtroom the First Nations Court occupied became its regular home, at least over the course of the rest of my visits. It was a smaller, although still 'regular' courtroom, which the Court had attempted to make its own by creating a square of tables for participants to sit around. There was not enough room for observers or supporters, who instead sat on two benches in the public gallery. The judge herself was forced to crane around an inconveniently located pillar to make eye contact with offenders, which she did frequently.

#### **4.2.3.2 Case Narratives**

Due to the sheer length of the hearings in First Nations Court, I cannot comprehensively describe them here. The following four case summaries are meant to illustrate how the Court's dialogic, healing approach to its subjects and subject-matter influenced the manifestation of moral speech in the sentencing hearings I observed.

- (i) In which a repeat offender is offered a 'step up' in encouragement

A middle aged woman appeared with a student representative. She was scheduled for a review of her existing sentence, but there was a new charge on the docket as well. The judge approached this matter directly: "I can tell by the look on you that you want to tell me something...". The new charge was for stealing meat from a grocery store, and the judge herself formally read it to the offender (a function fulfilled by the Court Clerk in the other Study Courts). The judge concluded by asking "how do you plead?", to which the offender replied that she was guilty.

The Crown, in her submissions, noted that the offender committed this offence a mere six days after being sentenced to a conditional discharge in First Nations Court:

I'm aware that change takes time, but it's concerning when a First Nations Court client pleads [guilty], and efforts are made to help them, then commits another crime days later. This is troubling to the client, who's trying to walk a new path, and also troubling to this court, which is also trying a new approach... the Crown isn't asking for a harsh sentence, but this offence calls for... firm words... and hard work, so that [the offender] can start to walk on an authentic path.

The judge, in a reversal of the practice I observed in the other Study Courts, then asked if there was anything the offender's representative wanted to say, to which the student replied: "she can tell you in her own words what she's going through, but she's been a pleasure to work with..."

The next ten minutes were taken up in dialogue between the offender and judge. The former explained:

I'm very ashamed... sadly, I was starving that day... I have been clean for about five-and-a-half weeks – it's awesome. I see my kids twice a week, and my daughter's here today – she's pregnant and I'm helping her with that... I'd like to continue the counselling I'm on.

The judge, after having asked the offender about various aspects of her existing conditions, told her that

the healing plan I impose today is going to be the same, we're just going to extend it a bit longer... I'm proud of the work you're doing, your plan for residential treatment... [but] I'm going to change the sentence to what's called a suspended sentence, because of the new offence. This means that if you breach I can bring you back to court.

The new sentence included 40 hours of community service work, which, the judge stated, "may include participating in cultural events", and told the offender that she would see her next month to see how she was doing. The hearing lasted 20 minutes, and turned out to be the shortest I observed in First Nations Court.

(ii) In which the offender's need for healing eclipses the offence's severity

This hearing concerned a middle aged man, who had entered a guilty plea at his last appearance for a single count of breaching his probation. A pre-sentence report had been prepared, which the judge and Crown had already read. The offender himself was

not appearing with any representative or support person. The circumstances of the present offence were barely mentioned in the hearing; the original probation order, however, was clearly related to an intimate relationship gone wrong. The Crown, herself an Aboriginal woman, spoke directly to the offender (something I did not observe in any other court): “I’m not here to tell you who to love... but to ensure healthy communication and put safety plans in place”. She told the Court that she had met with the offender’s mother regarding her concerns about the offender’s relationship with his ex-spouse, and mentioned a ‘Respectful Relationships Program’ that the offender might want to attend. The offender interjected at this point to say he wanted nothing to do with his ex-spouse anymore, that he couldn’t stop her using drugs and she had to go her own way. “I have a letter [for the court]”, he said, “it’s pretty deep... I’m not sure who belongs here”. He was clearly hesitant about reading it in open court, so the judge suggested they take a ten-minute break so her and the Crown could review it in private. When court resumed, the judge asked the offender about the sentence (“healing plan”) that would be developed at this hearing: “what do you think you need?” The offender mentioned counselling, treatment, a desire to return to work, and then spoke of his burden of grief regarding a beloved nephew who had recently died of an overdose: “why him and not me... he and I used [drugs] together... I don’t know how to seek forgiveness... I just think about trying to help the youth”. The judge accepted the tangential, but obviously important, course of his submissions, while very gently bringing focus back to the hearing’s purpose: “are you ready to try [treatment] again?...” His response disclosed a deep well of suffering: “I don’t want to be where I am anymore...still dealing with what happened to me as a kid... something happened... I lack compassion... but I do hurt.” Judge and offender traversed the highs and lows of his life, from the salvation of competitive lacrosse to his sadness at a family torn apart: “I have four [kids]. One I don’t even see, another... dope broke that up... I don’t know how to deal with things except my old ways.” The judge called for another short recess when the offender broke down in tears. She resumed the session by telling him “you are a

remarkable person... one of the reasons we run this court". The offender concluded for himself: "the bottom line is I need to change my life or I'll be a very lonely man".

At this juncture, the Court turned to a consideration of the offender's healing plan. A number of specific programs were suggested to him by some of the service workers gathered around the table. Potential services included a recovery home, substance abuse, trauma, and anti-violence counselling, and vocational training. The offender expressed both hope and fear about the comprehensive plan that was being developed for him: "the opportunities I'm being presented with... I don't think I've had before... [but] I get scared of someone [else] controlling my life... if things don't work out". The judge responded with a tone of warm, almost maternal encouragement that I heard throughout my observations of First Nations Court: "I know it's scary... you have to take the first step, but we're all here to support you... I think you're ready". She then moved on to official requisites:

this is where I put my judge hat on... technically it's called a suspended sentence, and it will run for about 18 months but if you're doing well we can shorten it... I'd like to see you [next month]... if you need a kick in the behind I'll give you one!

The hearing lasted 44 minutes. The sentence itself – 18 months' probation for a single breach charge – was longer than any other comparable disposition I observed in the other Study Courts, but its driving intent seemed emphatically therapeutic, not punitive.

(iii) In which an offender exhibits resistance to the court's approach

A 19 year-old man appeared with duty counsel, as well as his mother, charged with contravening the term of a peace bond to attend alcohol counselling. The judge began by asking him how he pleaded, to which he replied "guilty". Crown Counsel told the Court that the underlying peace bond involved a suggestion of domestic violence, which was "alcohol related"; the offender was ordered, as part of the peace bond, to attend a substance abuse program. He missed several of the meetings, and the Crown asked for a probation order "to ensure his completion of the program".

Duty counsel provided a quick account of the young man's life history, which was littered with lamentably predictable references to his dislocated upbringing. The lawyer

stated, however, that the offender was currently working, had had no contact with his former girlfriend, and only missed the meetings because of job-related conflicts; he feared, the Court was told, that his only choice was between being fired and breaching his order. As for the present disposition, duty counsel submitted that the offender would rather pay a fine than take the program over again, since he felt it was “beyond his needs”; he really just wanted to get this over with. Duty counsel concluded by asking the judge to consider a conditional discharge for this individual – a simple breach of a peace bond, he stated, shouldn’t lead to a criminal record.

As she always did, her Honour asked the offender if he had anything to say. Unusually for First Nations Court, however, he declined to speak. The judge barely paused in her direct questioning: “are you still living with your grandma? ...Going to school?... Any contact with your mother? ...do you speak your [Indigenous] language?”. The offender was quickly drawn into a conversation, and a support worker jumped in to offer information regarding trade programs he may be eligible for. The judge remarked, with wry humour, that “we’re going to take over your life for a little while...”. The young man, speaking for himself now that duty counsel had quietly withdrawn, expressed some reluctance: couldn’t he just pay a fine? The judge, however, was undaunted:

I understand you’ve plead guilty. I don’t necessarily agree with your reasons, but I understand. With a conditional discharge, you need to work to avoid a criminal record... I want you to upgrade your schooling – I don’t want you do be doing [this general labour work] at 45 years old... you also need to deal with anger.

She imposed a six-month discharge, with detailed conditions regarding education and training. “Do I have to?” the offender rejoined, “I already have three jobs!”. “I understand it’s comfy where you are now,” the judge answered, “but there are great opportunities for you... I won’t order [alcohol] counselling... I’ll take a chance. If you’re upgrading your skills, other things will take care of themselves”. The offender expressed his pleasure at this prospect with audible irony, muttering that he didn’t have any problems worth counselling anyway.

The judge, as with all other offenders whose sentencing hearings I observed, told the young man that she wanted to see him again, for an update. “I have a bunch of work

coming up next month,” he responded, “I’ll lose my job if I don’t show up... what about I just pay a fine?”. The judge’s smile didn’t falter:

then you’d have a criminal record! I’m giving you a massive break! Keep in touch with duty counsel – tell him if you can’t come. Six months, stay out of trouble, get training, and you’ll have no record.

“Thank you, your Honour,” the offender finally acknowledged, “for the break”. The hearing concluded in 27 minutes.

(iv) In which the Crown’s idea of ‘just’ punishment is rejected by the Court

A middle-aged woman, charged with fraud and theft under \$5000.00, appeared with her lawyer and several family members for her sentencing hearing. The Crown, who was not one of the two ‘regulars’ I had noticed during my previous visits, detailed how she impersonated a bank customer to draw a significant sum of money from the person’s account. He also briefly summarized a later minor shoplifting she had committed, but told the court that the Crown was more concerned with the first offence, given that it involved planning, sophistication, and a “confidence game” this woman played to defraud the victim bank. Further, her criminal record was described as “really concerning... [it] includes recent related offences...”. The Crown further stated: “I realize this Court invariably makes community dispositions, but [the offender’s] success here is very much in doubt.... A form of custody should be imposed... [I] leave it to the Court to consider... it’s up to her to persuade your Honour that a conditional sentence is appropriate”.

In his submissions, defence counsel turned immediately to the progress that this offender had been making, which was detailed in the pre-sentence report. He suggested that as she spent 62 days in custody in respect of the fraud, a community disposition should be imposed. The judge tipped her hand in responding directly to the offender: “I hope you give yourself a pat on the back”, she said, in regards to the offender’s efforts at staying sober and participating in various programs. The offender proceeded to speak eloquently about turning her life around, regaining custody of her children, and preparing for more intensive rehabilitation at a healing lodge. She also

spoke of the offence itself: “I haven’t forgotten the crime I committed... I wear it like a second coat... trying to shake off the guilt, [I] know I can’t do anything to change the past but I’m moving forward. ...Coming to this Aboriginal Court has really made me feel equal... [there’s] no red tape where what [the] judge says goes. I’ve been opening up more on rape relief... finally willing to talk about what happened in the past”.

The judge and offender went on to develop the latter’s healing plan, which the judge described as already well underway: “it sounds like you’ve already done my job for me!” The judge also made mention of specific resources she would like to see the offender pursue: “I’m thinking counselling... [a] psychiatric assessment... I’d like to see you have a little more education”. She imposed a twelve month probationary sentence, with the only punitive condition being not to enter into certain businesses in the municipality where the theft occurred, and not to possess other people’s banking documents. The Crown managed to add a one-word request: “restitution?”, to which the judge replied that she would make a stand-alone order to the bank: “what that means is that the bank can come after you, but [repaying the money] is not part of the probation order”. The hearing lasted 38 minutes.

#### **4.2.3.3 Discussion**

There was much besides environmental idiosyncrasies that I found distinctive about First Nations Court, and which related specifically to the incidence and quality of moral speech in sentencing hearings. Below, I discuss the themes that I found most important to understanding how this court operated.

##### *Offenders were engaged in normative dialogue, but not necessarily moral speech*

All of First Nations Court’s proceedings featured sustained dialogue between the judge and offender. Lawyers did appear – seven of the sentencing hearings I observed involved a represented offender – and of course Crown Counsel was present in every instance to fulfil the state’s prosecutorial function, but communication primarily flowed between the judge herself and the individual offender. Out of the four Study Courts, offenders appearing in First Nations Court were by far the most loquacious, as, indeed,



was the judge. Defence counsel appearing in this court were notably more apt to take on less audible roles as background advisor, as the judge encouraged their clients to speak for themselves.

First Nations Court's unique position among the Study Courts, as a forum that deliberately selected a certain class of offenders (self-identifying Indigenous persons) allowed for its particularly tailored approach to sentencing. This privilege doubtlessly facilitated First Nations Court's ability to communicatively engage with offenders. The rich conversations that I heard, however, did not include commensurately more moral speech than in the other Study Courts.

Four of the ten hearings I observed (including the cases described above under points (ii) and (iii)) featured no moral speech at all, at least as I strictly defined it as representations explicitly considering the moral proportionality of the offence before the Court and/or the offender's normative orientation thereto. Six of the ten hearings contained representations regarding the offence's moral proportionality, with four of these including audible references to the offender's normative orientation towards their criminal conduct. The hearings I observed were, by and large, more centrally concerned with the offender's personal background, circumstances, and future plans. As in the other Study Courts, although here in its highest rate of incidence, offenders' afflictions occupied centre stage: all of the ten hearings contained discussion of the person's struggles with drug and/or alcohol abuse, and one of these also included a reference to the offender's mental health. Unlike in the other Study Courts, however, these issues were rarely explicitly linked to the commission of the offence itself: in only one of the hearings I observed was addiction mentioned as a motive or contributing factor behind the person's offending.

All ten hearings I observed shed light on First Nations Court's overarching normative approach to the complexities and sensitivities it encountered in its subjects. Every offender who appeared in the Court was Aboriginal, and all had prior experience in the criminal justice system. Some had very extensive criminal histories, including those

(such as the offender in case (ii)) whose present offending was only the thinnest manifestation of a mass of personal troubles and afflictions. The judge distinguished herself, and in the process deepened the engagement of those she was sentencing, by her willingness to consider the widest context of why a given person had come before her, and how the Court might help them on their “healing journey”. Somewhat like Community Court, but in a more intensely inter-personal manner, First Nations Court’s focus on the person of the offender took precedence over the audible consideration of the offence itself.

*The Court extended both the invitation and expectation to offenders to actively participate in hearings. Its focus on healing prevailed over other considerations*

The construction of sentences that I witnessed in First Nations Court was, as far as the judge could make possible, undertaken jointly with the offender and any other interested lay participants who were in attendance. As the judge told many of those appearing before her for the first time, “I work hard in this Court, and I expect you to do the same”. Although challenged to take active part in their own sentencing to a degree not found in the other Study Courts, only one of the offenders whose hearings I observed seemed less than entirely comfortable with the Court’s embrace. This was the young man whose hearing is described above under point (iii). As can be observed from this case, when faced with resistance, the Court did not waver from its therapeutic, interventionist approach. The judge took a deeply felt view of the appropriateness of this ethic into each case; unlike in a forum such as Court 102, where this offender would likely have been granted his initial wish to ‘get this over with’, First Nations Court deliberately inserted itself, with its opportunities and expectations, into the course of people’s lives. It is, of course, impossible to prescribe either approach as the ‘correct’ one in all instances, but the enthusiastic, even eager receptiveness exhibited by most of First Nation Court’s clients suggests that the Court’s demands are recompensed by its fulfillments.

I also observed First Nations Court to encounter, and (gently) repudiate competing ideas of ‘just’ punishments. The case described above in point (iv) shows the Crown, on fairly

standard justificatory grounds, submitting that a punitive, custodial sentence was required for a repeat offender who had committed a fairly significant and sophisticated fraud. The judge, however, engaged with this offender as someone who was already undertaking a healing journey, for whom punishment would offer no purpose. In this sense, First Nation Court's focus was almost exclusively on the needs of perpetrators, not victims (whose views were never considered in the hearings I observed) or countervailing principles of just deserts. Depending upon one's perspective, this approach may arguably trivialize or diminish the moral 'wrongness' of a given crime. Beyond the rather half-hearted resistance offered by the Crown Counsel in this case, however, I did not observe First Nation Court's philosophy in this regard to be seriously challenged. Because it is so 'up front', lay and professional persons inclined to dispute the Court's approach may simply choose to avoid it. The Court's unorthodox commitment to offender healing may also effectively bar it from considering more serious cases, given the Crown's control over who is admitted entry.

*The Court fashioned cooperative "healing plans", not punishments*

A distinctive judicial philosophy was apparent in First Nations Court's very use of language. The reinterpretation of the core concepts of sentencing was audible in all the hearings I observed, and was most potently conveyed in the judge's purposeful substitution of the term "healing plan" for "sentence".

I observed the cooperation between the Court's participants to be central to its effectiveness. The judge directed an explicitly problem-solving approach, which included all legal and other professionals as resource persons for an offender's healing. Offenders themselves, as we have seen, were expected to be actively, indeed centrally, involved in this process, and most responded with enthusiasm. I did not observe any adversarial positioning between counsel that obscured this ethic, although in two of ten cases the Crown and defence offered different positions on the appropriate sentence. In both cases (described above under points (iii) and (iv)) the judge inclined towards the

defence submission, but in a way that privileged direct dialogic communication between her and the offender.

The judge visibly tried to make everyone in the courtroom feel welcome, and offenders who claimed that they had “never really spoken in court before” were regularly engaged in lengthy dialogues about their background, upbringing, cultural ties, work, and personal lives. Other voices were also heard, whether directly in oral representations (family members, for example, were much more visible and audible in First Nations Court than in other courts, and in one memorable exchange other offenders waiting in the Courtroom verbally encouraged the person before the Court for his progress and courage) or in written form. The judge, in particular, made particular use of Gladue reports. Five of the ten hearings I observed included such a report, and in some of the other cases, it was clear that the Court had previously had the benefit of reviewing a pre-sentence report in respect of the offender. As will be discussed below in §4.3, this observation raises a sharp contrast to the practice of the other Study Courts with regard to PSR and Gladue reports.

Although I did not observe any victim presence or input (only one of the hearings concerned an interpersonal offence) more than anything else First Nations Court was a place of lay participation and therapeutic support. It was also a place, not surprisingly, of significantly more Aboriginal involvement and self-direction than what I observed in the other Study Courts, and not merely by offenders. The judge and one of the two regular Crown Counsel were Indigenous women, and at least one of the defence counsel who appeared on multiple occasions was Métis.

The three justice professionals I interviewed who worked in First Nations Court – all Indigenous persons – also focussed on the Court’s culturally appropriate, inclusive nature. Allison, one of the Crown Counsel who appeared regularly at the Court, expressed her view of its “difference”:

the way in which the sentencing is conducted and the manner how we come to that decision is different certainly from the traditional court where it’s more of a

pedagogical kind of set up whereas here it's much more inclusive and really sort of looks at the issues on a much deeper level... in traditional Courts you don't have the time or the opportunity to engage in those sort of exercises or discussion with people or to get the information as detailed as you are perhaps getting in First Nations Court... the accused themselves have a more active role than in the traditional [courts]. Usually in the traditional system it's the lawyers speaking on behalf of the accused and although they are able to articulate their client's views and to advocate their position around sentence or what they think is appropriate in this individual circumstance, it has much more, different impact I think and um, character to it when it's coming directly from the person themselves as to what they believe they need to address.<sup>47</sup>

Mike, the Court's Aboriginal liaison to the Office of the Chief judge, also commented on the personal engagement of offenders that First Nation Court effectively requires:

... this person's being asked to stand there and speak for themselves, rather than having a counsel speak for them. [It's] absolutely imperative if they're going to be accountable that they've gotta speak for themselves....<sup>48</sup>

Mike held up the role of the judge herself in fostering the Court's distinctively non-adversarial, non-bureaucratic atmosphere:

it's the same laws, but how the judge interprets those, and how they are effectively translated to the individual before the Court, there's substantial difference. ...it's more effective, it speaks to the level of the people that are coming before it, which is one of the reasons I appreciate when [the judge] sits at the same level as the people – there's a visible reminder to people coming before the Court that you're not sitting above them in judgment, that you're sitting with them and trying to make restorative justice.

Finally, Jane, one of the counsellors who works closely with First Nation Court clients, spoke of the Court's connection of the broad, historical context of colonialism with the pressing needs of individuals:

what I get from the Court is that what the person did was wrong, but it's also trying to address some of those vital needs that this person has... [First Nations Court] shows it's been acknowledged and accepted that our First Nations brothers and sisters don't need to be locked up again.<sup>49</sup>

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<sup>47</sup> Interview with "Allison", April 12, 2010.

<sup>48</sup> Interview with "Mike", February 11, 2010.

<sup>49</sup> Interview with "Jane", March 30, 2010.

*Review hearings extended the Court's influence over offenders, and offenders' influence over the course of their sentences*

As mentioned, sentencing review hearings constituted a substantial part of First Nations Court's proceedings. Those I observed were varied affairs, sometimes amounting to little more than a five- or ten-minute chat with the judge about the course of a person's rehabilitation, while others were almost as long and involved as the original sentencing itself, with multiple representations from the offender, service workers, and family or friends. Probation orders were often varied, or shortened, to best meet the offender's adjudged needs, and many of the review hearings I observed were also occasions of heartfelt sharing. Some of the comments I heard spoke deeply of the First Nations Court's role in changing a person's behaviour or very life. One woman's comment is illustrative: "I'm so grateful I got a conditional sentence in this Court... I never thought I'd let go of my institutionalization so quickly!".

The judge was effusive in her encouragement of clients who were doing well: "I just want to make sure you're ok... you've done a great job [so far]". She praised those who had reached the end of their orders: "I'm going to miss you – but I don't want you to commit more offences to come back!" I witnessed several review hearings whose original dispositions I had previously observed. To the middle-aged man who had been given an 18-month probationary healing plan (described above in case (ii)) the judge counselled hope and perseverance against his ongoing struggles with sobriety and sadness: "I still think you're one of the most amazing people to come into this Courtroom... someday there'll be a movie about you". As for the young man who had simply wanted to "get this over with" by paying a fine (case (iii)) he returned with his mother and a new charge of possessing a weapon. In this case, the Court dealt with a refinement to his existing sentence (the offender's mother expressed that "programs aren't really working... he's getting stressed out... would rather work", to which the judge demurred, "ok, let's forget about programs, maybe what he needs is courses like First Aid, forklift...") and developed a battle plan for waiving his most recent legal trouble into First Nations Court.

Allison commented upon the importance of review hearings to the development and maintenance of effective community-based sentences:

[offenders] get an opportunity to reflect on the process... perhaps the counselling or the service that they received was working [or] was not working. And so I think it's something that's just constantly evolving and changing, with the people that are coming through and where something's not working, usually they're pretty honest to come in and say you know this counselling or this particular program that I'm in isn't really working.

Mike, from his perspective as a liaison worker at the Court, also opined that the collaboration between Court and client at review hearings instilled in the latter "a sense that they have the capacity, have some control over what is going on in their lives".

I observed First Nations Court to spend comparatively little of its expressive energy on the moral 'wrongness' of the offence, and somewhat more on the offender's normative orientation towards their conduct, although only when raised by the offender him- or herself. The only admonishment I heard the judge make to an individual concerning the actions that had brought them into her purview was rather general, and hardly condemnatory: "when you commit an offence, you show disrespect not only to yourself, but to everyone else...". This is not to imply, however, that the Court did not manifest a powerful normative orientation towards its work, a moral compass that allowed it to make sense of and respond to the difficult problems it encountered. Put in a nutshell, this might be articulated as an engaged awareness of the basic goodness of the persons before it, the manifold personal and social problems behind their offending (none of which were ever referenced as their own fault) and the failure of orthodox criminal justice structures and philosophies to nurture the indigenous concepts of restoration and healing. The kind of offence- and offender-focussed moral speech that I had come to hear, in this context, often seemed to be besides the real point and purpose of the Court's proceedings. Despite this departure from, or unorthodox interpretation of, the norms that Canadian sentencing law is premised upon, however (most particularly the principle of proportionality) I found First Nations Court to be deliberately engaged in moral ordering, of a kind that had both individual and systemic rationales.

The Court, as I observed it, did attempt to inculcate responsibility in its subjects, but via an ethos of forward-focused healing rather than one of offence-focused indignation and blame. The sincerity and dedication manifested by those who came before the Court, coupled with the struggles and injustices most had endured on their journeys up to that point, seemed adequate justification for this forum to set aside further inquiries or judgments upon the past. First Nations Court gave little room for assignations of wrongness, regarding either act or actor. Although the absence or overshadowing of such discussion disconcerted me at times, especially in light of what I theorized criminal jurisdiction and authority to centrally concern, First Nations Court's approach ultimately convinced me of its suitability. In cultural terms, this suitability was most pronounced for the Indigenous persons who had been previously subject to so many of the justice system's presumptions of 'appropriate' treatment: these individuals had clearly suffered personal harm from these experiences, just as their nations and traditions had suffered harm from similar presumptions applied on a wider scale. First Nations Court deliberately placed Indigenous actors and approaches at the centre of its practice.

The Court also seemed to offer a defensible approach to *any* offender willing and able to accept meaningful responsibility for their past and future conduct. This conclusion has both practical and normative aspects. In regards to the former, my observations convinced me that the Court's encouragement and supervision of offenders represented the most helpful and effective kind of community-based sentence. On moral grounds, the Court's approach seemed a generally suitable one for those whose offending was the result of past harm, and which involved as much, if not more self-harm than it did harm to others. Healing, in these circumstances, has a persuasive claim as the most 'just' response, although it need not be the exclusive one.

While not so much audible as "moral speech" within the hearings I observed, the Court itself, in its very existence and orientation, represented a distinctive normative conception of justice as much as it did a forum designed to further instrumental problem solving. While Community Court, in comparison, could be said to take an



integrated, holistic approach to identifying and rehabilitating the causes of *offences*, First Nations Court adopted an integrated, holistic – and culturally resonant – approach to the ‘seeing’ and healing of *offenders*. In doing so, the Court implicitly, but palpably, repudiated the idea that the universally applicable framework of criminal wrongs that Canada has adopted must necessarily lead to one universal approach to these wrongs’ resolution. This contextual tailoring of the post-conviction stage of criminal proceedings, as I argued in Chapter One, is to a certain extent provided for in the theoretical and textual fabric of Canada’s justice system. First Nations Court, however, through its own, small-scale response to the widespread problem of Aboriginal over-representation in and alienation from orthodox justice models, made perhaps the most remarkable use of the flexibility Canadian law purports to offer. If the Court’s approach attenuated some of the moral focus and expression that this thesis has proposed as central to sentencing courts’ function, it recompensed, perhaps, or even challenged this ‘shortcoming’ in the deep engagement it offered to and expected from offenders to be active participants in a justice-as-healing ethic.

First Nations Court, of course, is but a single court, limited in its reach by both practical resources and, arguably, the prosecuting state’s normative presumptions regarding the appropriateness of its approach to serious offences. Below, I consider one example of the many ‘mainstream’ courts engaged in manifesting the criminal law’s concern for moral ordering among a largely Aboriginal constituency.

#### **4.2.4 Hazelton Circuit Court**

##### **4.2.4.1 Introduction**

The Province of British Columbia currently maintains 44 “circuit courts” as part of its administration of the justice system.<sup>50</sup> Each of these courts is based out of a permanently staffed provincial courthouse, and each travels to rural communities that do not have a permanent court. Many of the communities serviced by circuit courts are

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<sup>50</sup> Provincial Court of British Columbia, “Court Locations Map” (Vancouver: Office of the Chief Judge, 2002), online: Provincial Court of British Columbia <<http://www.provincialcourt.bc.ca/judicialadministration/courtlocationsmap/index.html>>.

on First Nation reserves, and many others operate in areas with substantial Aboriginal populations. Hazelton, located between Terrace and Smithers in northwestern B.C., can be counted among the latter group; while the town itself is not on reserve, the local area encompasses several Gitxsan and We'tsuwe'ten communities. Court is held in a multi-use provincial government building, off of a secondary highway that rumbles with laden logging trucks heading south.

Unlike in some of the more remote places where circuit courts operate, Hazelton's courthouse includes most of the features familiar to courtrooms in more urban areas of the province – there is even a raised judicial dais and a coat of arms facing out at a few rows of public benches from a wooden box mounted on the wall. Court is in session a few days out of each month, with judges travelling here from one of the larger towns within a few hours' drive east or west.

I was only able to visit Hazelton once during the course of my study, and observed two days of criminal court proceedings in January 2010. All of the offenders whose sentencing hearings I observed were Aboriginal, and all were represented by a retained lawyer. None of the legal professionals I observed were identifiably Aboriginal. None of the offenders were in custody at the time of their hearing, and none were sentenced to jail.

#### ***4.2.4.2 Case Narratives***

Below, I describe three of the four sentencing hearings that I observed in Hazelton. Each is relayed to illustrate an aspect of the Court's sensitivity to the local context in which its dispositions were rendered, as well as its manifestation of moral speech.

i) In which a trial is avoided by a joint submission for leniency

This hearing concerned a young woman who was scheduled for trial on charges of assault with a weapon, uttering threats, and possessing a weapon for a dangerous purpose. Defence counsel announced that her client was prepared to enter a plea on one of the counts (the weapons dangerous charge) and the Crown entered stays on the other two. Crown Counsel told the Court that the offender had no criminal record,

worked as a nurse, and that the charges stemmed from an argument she had with her spouse in which she threatened him with a knife, in the course of which the knife happened to “drop” on his foot. “She took a knife and pointed it at [the victim]. ... He wasn’t afraid”, the Crown said, submitting that he was not opposed to a conditional discharge with a no-alcohol clause, and that the offender and victim were still in a relationship.

Defence counsel fleshed out this balanced submission. Her client was a licenced nurse, worked in home care in local communities, had been with her partner eight years, and was engaged to be married. The offence itself happened in “the heat of the moment” – the injury itself was an accident. Her client, the lawyer continued, had not drank alcohol since the date of the incident, and was willing to keep abstaining, as well as take counselling. Although not explicitly stated, there was a strong suggestion in both counsel’s submissions that if this offender did not receive a discharge, she would be unable to continue her work as a nurse. The judge, before making any of his own comments, invited her to speak. “What I did I know was wrong”, the offender acknowledged, “[but] only yesterday did I get the opportunity for a discharge... with me not drinking, it made a big difference”. The judge proceeded to gently inquire about the place of alcohol in her home and relationship. She answered that alcohol was not in their home anymore, and that her partner disapproved of drinking as well – abstention had been good for them. The offender then pointed to her mother and sister who were in court to support her. The mother stood to ask if the judge wanted to hear their family background regarding alcohol abuse. There was a family history of violence while drinking, the offender herself added; some counselling would benefit them all. The judge thanked everyone for their submissions, and then restated the facts as he understood them, stressing the accidental aspect of the offence and the influence of alcohol. He explicitly stated that the offender “has taken responsibility” for her conduct, and that a discharge was in her interest because of her employment. He then

turned to the second branch of the statutory test for determining the viability of a discharge:<sup>51</sup> whether granting one would be contrary to the public interest:

Because this is spousal violence, it's a difficult question... but here it was a one-time incident, and not the intention of your actions [to hurt the victim]... so the principles of sentencing can be met by a conditional discharge.

He ultimately imposed a nine-month term of probation as a condition of the discharge, with counselling and a clause to dissociate from her partner if she has consumed alcohol. The hearing lasted 18 minutes.

ii) In which an offender's plea grounds a discussion of moral responsibility

I observed two other hearings that issued from guilty pleas. The one described here involved a young man, whose trial on drug trafficking and breach of probation was scheduled to be heard that day. His lawyer announced that his client now "chooses to plead guilty" to the two charges (two other counts were stayed by the Crown).

Prosecutors from both the provincial and federal offices made submissions. First, the federal Crown stated that the offender was arrested, following a search warrant, with dozens of marijuana joints and other trafficking paraphernalia. He related the statement the man made to police about selling pot while looking for a job, and submitted a criminal record that contained entries for violence and theft, but no prior drug-related convictions. The federal prosecutor forwarded a joint submission for a three-month conditional sentence, along with probation, 20 hours of community service, and a lengthy firearms ban (required by statute). The provincial Crown, however, did not join in with this submission. The breach charge, he told the Court, arose from the offender's missing probation appointments. There are related priors, which "did not dissuade [him] from committing this offence", and he asked for a sentence of 30 days in jail.

Defence counsel based his submission on the substantial gains that this offender had apparently made in the year-and-a-half since the offence was committed. He submitted certificates regarding his client's attendance at high school and trades programs, and

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<sup>51</sup> Found in s. 730(1) of the Criminal Code.

told the Court about a film the offender had made which had been accepted to festivals across the country. He “regrets selling [drugs]”, but was a heavy user at the time, defence counsel stated; the offender has made improvements since, but is not yet ready for residential treatment. As for the recommended sentence, he requested an exemption from the firearms ban to allow the offender to continue sustenance hunting, and, in regards to the breach charge, suggested that seven days in jail was more appropriate: his client simply “wasn’t structured” at the time he missed his appointments. He also asked if the offender could serve this sentence on weekends, to allow him to continue attending school.

When defence counsel had concluded his submissions, the judge asked if the offender had any outstanding commitments on his existing probation order, to which his lawyer admitted that yes, he actually didn’t attend his counselling appointments, and didn’t complete his community service hours. The offender himself was then invited to speak. As did the three other offenders whose hearings I observed, the young man did take up the invitation:

I’d just like to say... since [I was] charged, I’ve been trying to put my life back on track... [I’m] growing so much... I live a structured life now... can’t imagine going back [to a former lifestyle].

“Why do you say you’ve changed?” the judge asked, to which the offender replied:

The way I look at people, the way I treat them and myself, I just try not to give into temptation... I hope to get beyond my legal issues because the rest of my family lives [in the U.S.] and I’m not able to be there...

After inquiring about the offender’s involvement in school, sports, and the community’s cultural life, the judge proceeded to deliver his judgment. He was concerned, he said, about the man’s history of breaches, but his guilty pleas

indicate some recognition of unlawful behaviour... he has had a fairly steady stretch of anti-social behaviour, but since last fall has gone to school steadily, a program trying to give him skills, self-confidence, and the ability to provide for himself.

It is especially difficult, the judge noted, to find a job in this area of the province, and the offender hoped to provide for his two children, eventually. He also mentioned the

profit motive behind the offender's drug trafficking, although not as an aggravating factor. He accepted the joint submission in respect of the drug charge, imposing three months of house arrest with the exception of attendance at school and other specified appointments: "you don't need to hear from me again... that that kind of activity [i.e. selling drugs] is a dead end". In respect of the breach charge, the judge validated the "appropriateness" of the Crown's request for a jail term, but declined to send this offender to prison. Citing the sentencing principle of rehabilitation, he stated that

I also have to take at face value [the offender's] representations regarding improving his life... reflected in his guilty plea and also in the material presented [regarding courses and programs that the offender had taken]... I can't say I know you've changed, but the indicators are there... I'm prepared to take a chance.

The judge then proceeded to address the offender directly:

Mr. X, you probably deserve to go to jail, just on the facts... but I'm prepared to over-emphasize rehabilitation... I'm going to impose a \$500 fine, plus the victim surcharge, with six months to pay... I hope that all this is a true representation of your change of mind, your change of heart – you've caught a break from me today – I work with limited information, but I take what you say at face value.

The hearing concluded in 35 minutes.

- iii) In which the unsuccessful contestation of guilt poses no barrier to a lenient sentence

I observed one complete trial, conviction, and sentencing proceeding, which all amounted to approximately two-and-a-half hours of court time. An older woman was charged with assault against another woman, while both were drinking at a house party. Her lawyer argued self-defence. The judge heard testimony from the accused and the complainant, as well as supporting eye-witnesses on either side. He rendered his judgment immediately after the lawyers' closing statements, providing his understanding of what the evidence established, and concluding that "moving away would have been the right thing to do – striking [the victim] isn't self-defence... so there will be a finding of guilt". In his brief sentencing submission, the Crown asked for a 12-month term of probation, noting that the offender had no prior record. The defence

lawyer asked for a conditional discharge, as his client was a youth care worker who hadn't been able to work in six months due to these charges – she needed a clean criminal record to be able to resume her employment. She was living on social assistance, he told the court, and hadn't consumed any alcohol since the incident. The judge asked the Crown for his position on a discharge, and was told that the prosecution would not object, given that provocation was “somewhat at issue” in the assault, and that a conviction shouldn't prevent the offender from working. The offender herself then spoke, saying that she appreciated the Court's time in hearing her case, and could accept being found guilty, but that it was never her intention to hurt anyone. The judge granted the conditional discharge, repeating the mitigating factors both counsel had articulated. The conviction itself “should be sufficient deterrence”, he reasoned, simply ordering the offender not to have any contact with the victim for six months.

#### **4.2.4.3 Discussion**

Although my inclusion of Hazelton in this study was based on a very small sample, chiefly affecting the number of cases I was able to observe and reducing my opportunity to observe different legal professionals working within the Court, it also afforded some interesting inquiries. Four sentencing hearings were conducted during my visit – three as a result of guilty pleas, and one after a contested trial. I was thus able to ask, in this one context, whether there were any observable differences in the practices of moral speech as between guilty plea cases and a sentencing hearing conducted after conviction at trial.

I also wanted to include a circuit court in my study to explore how practices of moral communication and engagement might manifest in what I hypothesized to be the particularly challenging environment of itinerant courts, especially those bringing the ‘law’, with all its cultural and historical baggage, directly into Indigenous communities. As mentioned, such a small study obviously does not allow me to answer these questions. I am able to offer a sliver of insight into how one circuit court operated in one of its incarnations, in terms of the audibility and content of moral speechmaking therein.

*The court's professional actors are conscious of the need to foster cross-cultural normative engagement*

In an attempt to compensate somewhat for the paucity of my personal observations, I interviewed more justice professionals who worked in Hazelton than I did in respect of the other Study Courts. Five of the eleven participants in the Interview Study were 'northern' lawyers (although none were members of local Aboriginal communities) and their perspectives shed additional light on Hazelton Court as a forum for moral ordering.

First, the Court's physical layout was noted as a positive influence on communicative engagement between participants. Hannah noted that "Hazelton is a nice set-up.... just in terms of the lighting. There's light, natural light. It's a smaller court room. You're close enough to the judge to see his or her eyes".<sup>52</sup> Mary also mentioned that "if anything I think our court is less imposing [than others] because you're waiting in the hallway [to] go in... there's not many people there".<sup>53</sup> Participants generally expressed the opinion that Hazelton Court was a relatively comfortable place for offenders, due to its small size. The Court's intermittent presence, however, was also noted to undermine some of its authority. Hannah:

Because [in] circuit court the accused are in court less often, I think it can make the impact of the court a little less powerful because they're only there every week, and it becomes a bit of a social thing where they're going to see their buddies at court...

While this observation may be valid in a general sense, I did not find it to be a notably influential factor in terms of the respect that the Court seemed to be accorded by the offenders whose hearings I observed. Nor did Hazelton's status as a circuit court observably attenuate the moral speech I heard therein; it was audible in each of the four hearings.

Second, the lawyers I interviewed tended to speak quite highly of judicial efforts to increase the moral resonance of their work for local communities. Hannah observed that "the judges who go [to Hazelton] usually make a point of commenting about that

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<sup>52</sup> Interview with "Hannah", January 17, 2010.

<sup>53</sup> Interview with "Mary", January 19, 2010.



this is not something [i.e. a given crime] they perceive the community wants to see happening there". Gerald also stated that

in some ways it's better in this court than some other courts I've practiced in because the Court itself will try to get to a proper resolution notwithstanding what the black letter law says. And, the Court will stretch or contract their findings and penalties or judgments or orders to try to fit the circumstances that are peculiar and unique to the community here.... I've found that the larger the percentage of First Nations residents generally the more the court takes the time to deal with the moral dimension. The more it looks like European civilization... the less generally there is of that except in kind of a more formal denunciation from the Bench.<sup>54</sup>

Patrick confirmed that

We're privileged to have [judges]... who as part of their sentencing always have a comment about the morality of what's happened. Whether that's praising them for stepping up and taking responsibility and acknowledging what they did was wrong or condemning the behaviour and sentencing them appropriately.<sup>55</sup>

Reports of Hazelton Court's approach, however, were not uniformly positive. Mary related that

in our community most people in criminal court are Aboriginal and no [professional] in the court is Aboriginal.... it's a poverty ridden community as well and then there's this group of people basically telling you what to do... many of the offenses are related to people's lifestyles and what they're drinking or... domestic violence issues because that's what they saw from their parents. And I don't feel that our Court knows how to handle that... nor do they respond to it appropriately.

My observations supported the above perspectives concerning judicial efforts to appreciate and reinforce local community values. While there was no explicit input from community members (beyond those personally interested in a given hearing) regarding the appropriateness of sentences, the judge was audibly interested in offenders' participation in community life. As can be seen in the above case narratives, he also exhibited concern for how his decisions would affect people's ability to contribute to local interdependencies, most particularly gainful employment. Mary's concern regarding the gap between those imposing and those receiving sentences,

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<sup>54</sup> Interview with "Gerald", January 19, 2010.

<sup>55</sup> Interview with "Patrick", January 17, 2010.

while obvious in terms of socio-economic standing and community membership, was not observed to be normatively significant. Simply put, all four offenders expressed understanding for why they were being punished, and the punishments meted out by the Court were, to the extent the judge was able to do so, informed by sensitivity towards their personal and contextual circumstances.

Third, participants in the Interview Study indicated that the human communities in and around Hazelton are interested in the moral (re)ordering of criminal conduct, and that the Court is generally recognized as an important contributor to this process. Gerald:

The local people I think do understand that within the constraints of all of this [colonial] background the courts are trying to do something that's, that's morally and socially responsible and that it's not just the imposition of power. There's a moral force to what the judges are doing.

Respondents also noted, however, that the Court itself does not represent the most substantive, culturally appropriate opportunity for the local community interpret and apply concepts of justice. Patrick expressed the sense that “they want their own system. They want a more First Nations focused system,” while, in response to my question of what it would take to make Hazelton Court a more effective moral authority, Gerald responded

sign a treaty! ....having the legal underpinnings to actually have the legal authority would give much greater moral authority to the court. And in not dealing with those issues it undermines the moral and legal authority of the Court.<sup>56</sup>

On a broad, structural level, Gerald's comment holds much force. At the more intimate level of the proceedings I witnessed, however, Hazelton Court did manage to convey a strong sense of function as an accepted, and authoritative, forum for moral ordering. It did so, I observed, by exhibiting compassion and restraint in the sentences it imposed, with a deliberate eye to the local consequences of its decisions. As I reflect on further below, this approach bore fruits in terms of the moral speech I heard in the Court.

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<sup>56</sup> Supra note 49.

*The court was a forum of moral engagement for both lay and professional participants*

Contrary to my general presumptions about the irrelevance and inappropriateness of circuit courts' aspirations for moral ordering in the communities in which they operate, Hazelton Court featured some of the richest and most inclusive expressions of moral speech of all the sentencing hearings I observed. All of the four hearings I observed featured audible moral speech; in each case moral proportionality was discussed, and three of the four (with the exception of the sentencing held after the contested trial) also contained representations on the offender's moral mind. Further, the offender him- or herself made moral speech in all four cases, and there were direct exchanges, on a moral theme, between the judge and offender in three of the four (again, the exception being the hearing conducted after the trial).

These representations were not, in the main, perfunctory or professionally-managed 'sound bites' of the like that tended to occur with greater incidence in Court 102. Although (understandably) made with the aim of achieving a desired sentence outcome, most of the moral speech I heard seemed to be sincerely felt. The judge himself was an engaged listener and speaker, who addressed offenders directly and appeared keen to employ his mandate in a manner designed to balance the diverse objectives of sentencing, or justify the privileging of some (for example, rehabilitation and closure) above others (such as retribution). He clearly and intelligibly communicated the reasons for his decisions. The judge's approach, moreover, appeared sensitive to the local context to which the court was a relative outsider. Offenders, whom I expected would manifest a higher degree of alienation from an institution that was not based in their community or culture, instead seemed interested in and encouraged to audibly participate in the Court's deliberations.

*The only observed difference between post-plea and post-trial sentencing hearings regarded the offender's articulation of remorse*

Unlike the other Study Courts, which only conducted sentencing hearings after pleas of guilt, Hazelton functioned as a trial court as well. Not surprisingly, the moral speech that I heard in the one post-trial hearing (described above at point (iii)) did not feature any representations regarding the offender's remorse or other normative orientations towards her conduct. The fact that this offender had pleaded not guilty, however, did not inhibit her from adding to the narrative about the contextual wrongness of her crime (by expressing that it was not her intention to hurt anyone). Interestingly, the sentencing hearing contained less audible engagement with the offence itself, likely because so much discussion about what had happened had already been undertaken in the trial. This allowed for all participants, and observers, to know the factual and legal basis upon which the conviction was founded. As will be discussed more completely in reference to my observations of the other Study Courts, the sentencing hearing in this case seemed to benefit from the preceding trial's canvassing and clarification of the facts. At least in this instance, the offender's ability to comprehend precisely why she was found guilty – even though she contested its confirmation – facilitated her subsequent engagement in the determination of sentence.

The above represents only a very limited reflection of Hazelton Court's practice of moral ordering in trial, plea, and sentencing proceedings. What my observations and interview findings do suggest, however, is that sincere, and at least somewhat constructive, efforts were being made to harness the legal, practical fact of the Court's presence in the community to cultivate local (individual as well as community) engagement in the moral ordering of criminal wrongs. The frank and fulsome moral speech that I heard, while not perhaps representative of the Court's general operation in this regard, offered a signal that circuit courts can be places of meaningfully shared normative discernment and expression, even in a context of historical and structural inequity between local and state-based conceptions of justice.

### **4.3 Moral Speech across the Study Courts: Influences and Import**

This chapter has been concerned with just one way of locating and assessing the moral ordering that sentencing courts practice, which is the audible engagement with certain moral themes that I have argued to be crucial to these institutions' core business. As has already been developed in the discussions relating to each Study Court, all four forums can be seen as engaged in the active practice of moral ordering, although this is undertaken in different ways and intensities depending upon the particular approach, personalities, and situational contexts discernable in each. This study has grouped these four courts together to gauge the incidence and quality of their moral speech, and has done so according to the same criteria. In an important sense, however, they must be judged as unique and non-transferrable representations of different attempts to fulfill the complex, multifaceted mandate that criminal sentencing courts confront. None of these forums is designed to do the exact 'job' of any other, and although I have upheld a certain description of this job – namely the open discernment and discussion of contextual moral norms and perspectives, leading to clearly articulated, intelligible case outcomes – it is clear that each court also had agendas and pressures that were at best tangential to this concern.

Despite this important recognition of their separate identities, a synoptic assessment of my findings in regards to the practice of moral speech in all four Study Courts can help discern some of the criteria that influence how moral ordering is audibly practiced in plea and sentencing proceedings, in these forums but also, in an extrapolative way, more generally. To return to the research questions outlined at this chapter's outset, what are some possible reasons for observed differences between the moral speech audible in each of the four Study Courts? Further, what are the factors, both within and beyond a sentencing court's control, that either nurture or inhibit an offender's communicative engagement with the normative nature of a court's work? I begin, below, with the key finding that moral speech and offender normative engagement, although related, are not as closely correlated as I presumed.

#### 4.3.1 Findings

*Not all communicative moral ordering required moral speech, and moral speech did not require communicative engagement*

Interpreting my observations of the four Study Courts required me to reflect upon the utility and appropriateness of my focus on moral speech as the primary locator of a court's normative practice. While my definition of this concept was grounded in the language of the *Criminal Code* regarding the fundamental principle of sentencing, it became clear through my observations that the mere audibility of representations on the gravity of an offence and the degree of responsibility of an offender did not always mean that an offender was actively participating, or that professional participants were using more than rote heuristics to contextualize a given legal breach. As First Nations Court in particular challenged me to conclude, the reverse was also possible: sentencing hearings need not explicitly take up the themes of moral speech in order to exert powerful normative force, and can indeed reflect alternate understandings of what is most important about *this* offence and *this* offender. While this study's focus on moral speech thus produces findings that are relevant to understanding the practice of moral ordering in plea and sentencing courts, they are not determinative thereof. The study also showed how much sentencing hearings, and sentencing courts themselves, are informed by other concerns, values, and motivations. I try to honour this observation in the more specific conclusions and suggestions set out below.

*Guilty pleas were rarely employed to support offender engagement*

An offender's guilty plea, given in 47 of the 48 hearings I observed, was explicitly discussed in only ten.<sup>57</sup> This does not mean that the fact and formation of pleas do not affect the moral ordering that a court conducts; only that their influence is often not audible to an observer in open court. I further interpret this finding to imply, echoing Oonagh Fitzgerald's critique of judicial practices in plea courts,<sup>58</sup> that judges may not be

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<sup>57</sup> For a court-by-court breakdown of this incidence, see Table 5 at Appendix 'E'.

<sup>58</sup> Oonagh E. Fitzgerald, *The Guilty Plea and Summary Justice* (Toronto: Carswell, 1990) at 168-169. See the discussion on this point in Chapter Two, at §2.6.2.

sufficiently enquiring into the context of guilty pleas, in terms of the pressures on their formation but also the factual basis upon which they are founded. My observations suggested that this danger particularly arose in contexts where the influence of legal professionals and/or a focus on efficient outcomes undermined the ability of interested parties (whether lay or judicial) to cultivate, collaborate on, or contest the narrative, normative conceptions that may be submerged beneath a simple plea. Hazelton Court seemed to afford the time and focus necessary to establish the foundations for substantive moral speech in its plea-based hearings; these foundations were less evident in the high-volume urban settings of Court 102 and Community Court. The tendency for these courts to rush over the fact of an offender's plea was most pronounced in minor or 'routine' cases.

If guilty pleas themselves were rarely employed as indicators of an offender's understanding of, and/or orientation towards their conduct (and, as others have argued, there may be good reasons not to interpret them as such<sup>59</sup>) neither were they often used as opportunities to probe into the meaning(s) that a plea conveys. A judge's reluctance to ripple the surface of these communications, whether due to the influence of plea bargaining,<sup>60</sup> caseload pressures, or a simple lack of concern for further inquiry, did not necessarily lead to sentencing hearings that were without moral speech and/or the engaged participation of offenders. None of the ten hearings in First Nations Court, for example, audibly considered the offender's plea, but all ten featured engaged communication (not necessarily moral speech). Guilty pleas were explicitly referenced, by contrast, in seven of the 22 hearings I observed in Court 102. They tended to be employed in this latter forum, however, more as cursory indications of an offender's remorse or the plea's benefits in conserving court resources; judges neither asked for nor received further elaborations on the context of an offender's guilty plea.

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<sup>59</sup> See, for example, Greg Lafontaine and Vincenzo Rondinelli, "Plea Bargaining and the Modern Criminal Defence Lawyer: Negotiating Guilt and the Economics of 21<sup>st</sup> Century Criminal Justice" (2005) 50 *Crim L.Q.* 108 at 125-26, and the discussion on this subject in Chapter Two, §2.3 and §2.4.

<sup>60</sup> The presence and influence of plea bargaining cannot be comprehensively assessed through an observational study such as this one. I can note, however, that joint submissions on sentence, one of plea bargaining's key indicators, were made in 29 of the 48 hearings I observed, and accepted in 23.

The single hearing that issued from a finding of guilt after a contested trial offered an interesting insight into one potential consequence of un-inspected guilty pleas. In this case, which was heard in Hazelton Court, the trial itself seemed to give all participants a notably well-developed understanding of the factual and legal bases of the conviction; this contributed to a lively and engaged sentencing hearing. For me, this observation underscores the general importance of communication in post guilty-plea sentencing hearings. By not clarifying exactly what an offender is pleading to and being sentenced for, sentencing hearings are less likely to act as forums of open normative engagement upon the offence itself.

From the preponderance of these findings, I can conclude that guilty pleas are not well-used, or, in the pressured and obfuscating context in which they are often conveyed, particularly useful vehicles of normative communication. When it comes to plea-based courts (such as are three of the four Study Courts) a plea simply gets offenders ‘through the door’: what happens thereafter depends, as is explored below, on a constellation of factors.

*Speed kills: offender engagement benefited from a court’s preparation and patience*

My observations of Court 102, as well as interviews with those who worked there, showed it to be a forum confronted with a relatively high quantity of hearings, and motivated to dispense with its sentencing obligations as efficiently as practicable. This orientation – which may be defended as in the instrumental interest of all Court 102’s constituents, lay as well as professional – did not, as I observed, prohibit moral speech, and even its intense expression in some cases. It did, however, seem to constrain the ability of offenders to audibly engage in the quickly constructed and resolved narratives that occurred in the course of short hearings.

The explicitly rehabilitative, harm reductive ethic that I observed at Community Court, by contrast, did provide somewhat more space for moral speech to be shared. Hearings were longer, counsel more contextually well versed and informed, and offenders



apparently more able and/or willing to voice their perspectives. Interestingly, the judges at Community Court manifested less moral speech than I expected, perhaps due to the Court's abiding concern with instrumental goals – here, less in terms of strict efficiency than in solving the problems contributing to the commission of offences.

First Nations Court, for its part, was equally intent on problem solving, but in a way that focussed on what may be called the cultural, even spiritual worth and integrity of its clients, as well as their particular instrumental needs. This afforded an abundance of communicative, therapeutic engagement, but little moral speech *per se*. Instead, the engagement that I observed in this forum seemed to represent, perhaps, an essential (and, in other courts, arguably overlooked) precursor to the explicit deliberation upon the wrongness of a criminal act. For me, the suffering and alienation manifest in the stories that First Nations Court encountered fundamentally informed its normative orientation. The Court's manifest emphasis on an offender's integrated healing coloured, and often eclipsed, any audible focus on the themes of moral proportionality and moral mind that I had arrived listening for. Whether this focus manifests a remedial approach to the sentencing of Aboriginal offenders, an Indigenous concept of the most appropriate way to 'right' wrongs, or a combination of the two, cannot be conclusively addressed here. Here, I only suggest that my observations of this court's practices showed that its patient, supportive framework for the development of offenders' voices did allow for a rich depth of normative engagement. This finding is expanded on below.

Finally, although I can make the weakest observational claims regarding Hazelton Court, what I did hear – through its proceedings as well as from justice professionals – is that, given sufficient time, trust, and judicial attention, meaningful moral dialogues can occur even in the challenging context of itinerant circuit court justice. Some courts may be deliberately designed not to afford such 'luxuries'; but others, even in similar neighbourhoods and dealing with similar cases, can foster sustained, substantive opportunities for normative engagement. I observed that both the orientation of individual judges and the institutional context within which they worked contributed to these differences.

*Offenders were most likely to speak when the context supported it*

The audibility of offenders was a core, virtually essential aspect of the normative engagement I tried to measure in the Observation Study. I presumed that when offenders' voices are heard, sentencing courts are more likely to be normatively communicative enterprises, and vice versa. In testing this presumption, I found that each Study Court presented different conditions and opportunities for offenders to speak.

The most supportive forums in terms of offender speech were First Nations Court and Hazelton; every offender in these two contexts made substantive representations. By contrast, eight of twelve offenders spoke at their hearings in Community Court, as did twelve of 22 at Court 102.<sup>61</sup> The distribution of speech by offenders who were identifiably Aboriginal was particularly interesting. In Court 102, only one of the five Aboriginal offenders whose hearings I observed made an audible representation. Two of three did so at Community Court, and of course all those at First Nations Court and Hazelton. This (very limited) observation indicates, for me, that Court 102 presented as a particularly difficult environment for Aboriginal offenders to personally impart their perspectives. This observation does not mean, of course, that Court 102 represses or is consciously hostile to the engagement of Aboriginal offenders. Indeed, I did not notice any difference in the way that such cases were conducted, beyond defence counsel submissions on an offender's background and the occasional supportive presence of a Native Courtworker, who never actively participated in the hearings I observed. In particular, I did not observe any of the directives contained in the Supreme Court of Canada's *Gladue* decision to be reflected in Court 102's practices in regards to Aboriginal offenders. Formal equality in terms of procedural treatment, however, did result in a measurably different level of audibility as between Aboriginal and non-Aboriginal offenders in this court.

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<sup>61</sup> For the numerical data on this subject, see Table 3 at Appendix 'E'.

Some recent scholarship with regard to judicial use of the *Criminal Code*'s direction in s. 718.2 (e) to pay "particular attention to the circumstances of aboriginal offenders" may help to explain this discrepancy. Andrew Welsh and James Ogloff, in their article "Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions", found that, in a sample of 691 reported decisions, an offender's Aboriginal status was not a significant predictor of a custodial sentence, relative to the other legally relevant aggravating and mitigating factors.<sup>62</sup> In particular, factors such as a prior criminal record, lack of employment, education, and community supports, and the severity of present offending, which themselves are over-represented among Aboriginal populations, are more influential in predicting whether or not a prison sentence is imposed.<sup>63</sup> While there is no indication that judges are consciously minimizing or repudiating the relevance of Aboriginal status, Welsh and Ogloff's findings suggest that the remedial intent of s. 718.2 (e) and the Supreme Court's interpretation thereof in *R. v. Gladue*,<sup>64</sup> has not been sufficient to substantially impact the incarceration rates of Aboriginal offenders.

Although my own research does not have the numerical depth to support statistically significant conclusions on this point, the differential audibility of Aboriginal offenders' voices as between Court 102's 'orthodox' setting and those at First Nations Court and Hazelton courts speaks, perhaps, to the importance of *process* and *context* to s. 718.2 (e)'s demand, as Welsh and Ogloff's study does to outcomes. Simply put, a consideration of the circumstances of Aboriginal offenders, while it can be partially conveyed by way of professional submissions and reports,<sup>65</sup> reasonably benefits from the active engagement of offenders themselves. I observed First Nations Court and Hazelton to be most successful in fostering the conditions for this to happen.

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<sup>62</sup> Andrew Welsh and James R.P. Ogloff, "Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50 Can. J. Crim. & C.J. 491.

<sup>63</sup> *Ibid.* at 508-510.

<sup>64</sup> *Supra* note 4.

<sup>65</sup> As I discuss below, however, such Gladue reports were only observed to be prepared in First Nations Court.

*Offenders expressed remorse most often when outcomes were uncertain, and when a jail sentence was possible*

I was particularly interested in discerning influences upon the expression of an offender's moral mind (in practical terms, acknowledgments of remorse or regret). As noted in this chapter's introductory section, I thought that these expressions would be important indicators of a court's viability as a forum for normative engagement. My findings, however, disclosed stronger evidence that remorse was raised most often as a means of pleading for a court's lenience or understanding, in circumstances where it held (or was thought to hold) instrumental advantages for an offender's sentence.

In regards to Court 102, I observed that expressions of remorse only occurred when an offender was in custody, and facing a possible jail sentence (three instances). For me, this is an indication of an expectation borne by offenders in this forum that there is only an instrumental rationale (i.e. the possibility of a more lenient sentence) for speaking about their orientation towards their conduct. This theory applied, to a slightly weaker degree, at Community Court as well: while eight of twelve offenders spoke, two of the three who made statements of remorse were in custody, and facing the possibility of further jail.

Expressions of remorse or regret were not commonly voiced in First Nations Court; only two of ten offenders made such comments. I interpreted this relatively low incidence to be due, in large part, to the forward-looking focus of the dialogic engagement that the judge encouraged. The prosecutor actively or passively acquiesced to this orientation in most cases; it seemed an acknowledged aspect of this court's animating ethos. But in both instances where an offender did speak of their moral mind in regards to the offence (described above in §4.2.3.2, cases (i) and (iv)) the Crown had first made explicit critical reference to the circumstances of their offending.

In Hazelton, offenders expressed remorse in all three of the cases I observed that resolved by way of guilty plea. While two of these representations (described above in §4.2.4.2, cases (i) and (ii)) can be interpreted as speech made in the face of uncertain

punishments, the entirety of my observations suggests that the judge's manifest solicitousness facilitated their expression.

In general terms, my observations indicated that an offender's articulation of their moral mind stemmed from direct or indirect 'prompting' by professional participants and/or the uncertainty of outcome. Expressions of remorse were not spontaneously given.

*The 'type' of offence for which an offender was being sentenced had some bearing on moral speech: substantive offences are more fruitful than administrative breaches*

I attempted to trace any correlations between moral speech and the offence(s) for which an offender was being sentenced. I did this by classifying the most serious or primary offence in a given case into one of four groupings: crimes of violence, dishonesty, drugs or driving, or administrative offences (mostly breaches of court orders).<sup>66</sup> Across all the Study Courts, moral speech was most prevalent in three of the four categories of offences: all seven drug or driving offences featured such speech, as well as 13 of the 15 hearings relating to a charge of violence and 16 of 19 of those relating to crimes of dishonesty. By contrast, the administrative category featured moral speech in just two of the seven hearings I observed. The distribution of moral speech *simpliciter* was not significantly different across the four forums, although the disequilibria of categories of offence dealt with in the Study Courts arguably contributed to the lower total incidence of moral speech in some courts, particularly First Nations Court, which dealt with most of the breach charges I observed.

While it is not surprising that moral speech was more prevalent in hearings that primarily related to categories of so-called 'substantive' offences, and less audible in the hearings that primarily dealt with administrative crimes, a consideration of the moral speech that encompassed representations of both moral proportionality and moral mind results in a somewhat different distribution. Only two of the seven drug or driving crimes featured this dual-aspect speech, and six of the 13 cases of violence in which any

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<sup>66</sup> For the numerical data, see Table 7 at Appendix 'E'.

moral speech was heard. None of the hearings in the administrative category contained dual-aspect speech. The category in which it was most audible was crimes of dishonesty: in nine of the 16 cases in which any moral speech was heard, it featured representations on both moral proportionality and the offender's moral mind.

When one considers the cases in which multiple parties and offenders themselves voiced moral speech, the difference between administrative crimes and the other categories of offence is even more noticeable. The moral engagement of multiple parties at sentencing was audible in six of seven drug or driving cases, ten of 15 cases of violence, and eleven of 19 cases of dishonesty, but in none of the seven cases in the administrative category. Finally, offenders spoke on a moral subject in three of the seven drugs or driving hearings I observed, eight of the 15 cases of violence, and ten of the 19 hearings relating to crimes of dishonesty, but again, were not heard to voice moral speech in any of the seven administrative cases.

My synthesis of these findings suggests that, if a court is interested in cultivating normative engagement in regards to the offence for which an offender is being sentenced, substantive crimes provide the best opportunities. As First Nations Court's approach reveals, however, even minor or presumptively 'meaningless' breaches can indeed ground substantive dialogues. In that court, of course, these discussions did not so much comprise moral speech as speech about an offender's total well-being.

*Most sentencing hearings considered an offender's disadvantages or afflictions; it was a major topic of moral proportionality in all courts except First Nations Court*

One of the most noticeable topics raised in the sentencing hearings I observed concerned the offender's struggles with substance abuse and/or mental health issues.<sup>67</sup> Out of 48 hearings, the matter was raised in 41. Looking more closely, problems related to substance use were brought up in 36 cases, while mental health issues were raised in nine. These figures include four cases where the offender's substance use and mental

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<sup>67</sup> See the numerical data in Table 4, at Appendix 'E'.

health were both raised as relevant considerations for the sentencing judge. Most of these representations were made by defence counsel in aid of mitigation.

All four courts featured similarly high percentages of claims related to the offender's substance use, ranging from eight of twelve hearings at Community Court and 15 of 22 hearings at Court 102, to three of four hearings in Hazelton and ten of ten at First Nations Court. Mental health issues were heard less often, and with more variability across the Study Courts: the matter was raised in none of the cases in Hazelton, one of ten of those at First Nations Court, four of 22 at Court 102, and four of twelve of the hearings I observed at Community Court.

I considered as moral speech discussions regarding substance use and/or mental health only when they were explicitly connected to the commission of the offence AND identified as 'problems' that the offender was struggling with. This means that a case of drug possession or impaired driving, for example, wasn't automatically included in this category.

The issues of substance use and mental health were voiced as moral speech (in all cases, as related to moral proportionality) in 24, or half, of the hearings I observed. Out of the nine cases that considered the offender's mental health, seven explicitly linked it to moral proportionality, meaning that the court heard that the offender's mental health somehow precipitated or contributed to their offending. In contrast, of the 36 cases where the offender's substance use was put at issue, it was raised as a matter of moral proportionality (meaning that the offender was said to be intoxicated at the time of offending, and/or suffering from an addiction that propelled their conduct) in 17.

There was noticeable variability across the Study Courts in terms of how these issues were considered. While substance use and/or mental health were raised in all ten cases in First Nations Court, they were spoken of in relation to the charged offence(s) in only one instance. By contrast, the same issues were voiced as moral speech in ten of the eleven hearings in which they were considered at Community Court, eleven of seventeen in Court 102, and two of three cases in Hazelton.

Clearly, all of the Study Courts, and very likely all sentencing courts generally, frequently hear representations about the afflictions or disadvantages that contribute to offenders appearing before them. The more important question is how they are interpreted and responded to. My observations indicate that Community Court was particularly attuned to the causal factors relating to the particular breach for which an offender was being sentenced, while First Nations Court represented an approach which equally considered these ‘contributory disadvantages’, but in such a way as not to audibly emphasize a connection between offenders’ afflictions and their particular crimes. All four courts seemed to accept that such considerations were relevant to their sentencing work, but discharged this recognition in various ways. Community Court most explicitly harnessed its dispositions to the problems of substance abuse and/or mental illness; in this forum, more so than in the others, most moral speech concerned the appropriate calibration of causal factors to case outcomes. Offenders themselves were not particularly engaged in such discussions. In First Nations Court and Hazelton, by contrast, I observed offenders to take more active participation in speech involving issues of substance abuse.

*The significance of criminal records as a sentencing consideration attenuated the importance of moral speech*

An offender’s criminal record was routinely raised and referred to in sentencing hearings, and used to gauge his or her moral responsibility for the offence before the court; the worse the history, the more severe the punishment.<sup>68</sup>

Criminal records were a topic of commentary in 35 of the 48 hearings, which represented a majority of cases in all courts except Hazelton. They were most frequently employed at Court 102, where the offender’s record was entered into evidence in 19 of 22 of the cases I observed, and explicitly used by the judge as an aggravating factor on sentence in eleven of these occasions. Criminal records were less likely to be argued or accepted as justifying increased punishment at Community Court, where although entered into evidence in nine of twelve cases, they were only used to

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<sup>68</sup> The numerical data on this topic are found in Table 6 at Appendix ‘E’.



support more punitive sentences four times. Records were still less likely to be advanced in this regard in First Nations Court: while six hearings featured commentary on the offender's criminal history, it was only accepted as an aggravating factor in one case. Although I was not able to inspect the documents directly, the audible references to criminal records in these courts did not evidence significant differences between the length and severity of offenders' criminal histories.

For me, these findings, beyond supporting the well-established principle that a recent or relevant criminal record is an aggravating sentencing factor, suggest that a background of prior offences can be employed in various ways, depending upon a court's orientation and interest. Again, the difference between Court 102 and First Nations Court in this regard is starkest; while in the former, a criminal record was used as a judicial heuristic for determining the quantum of punishment, in the latter the existence of a record was used as a basis for deepening the discussion about an offender's personal history and present needs. While neither approach encompassed moral speech, as I defined it, the treatment of criminal records in First Nations Court was significantly more facilitative of offender engagement in their hearings.

*Victim impact statements and pre-sentence reports were rarely used to cultivate normative engagement with the gravity of an offence. Gladue reports were, however, commonly employed in First Nations Court to enrich this forum's understanding of an offender*

Following from the perspectives raised in the critical literature and the Interview Study in regards to the assistance of victim impact statements and pre-sentence reports to a court's discernment and expression of moral themes, I was interesting in observing their use and effectiveness in the Four Study Courts. My observations largely confirmed the pessimistic diagnoses outlined in previous chapters. Only one victim impact statement was filed (at Community Court) out of the 17 cases that I identified as touching upon an identifiable individual victim, while in three other cases (one at Court 102, one more at Community Court, and one in Hazelton) was a victim's perspective conveyed through Crown counsel's submissions. Just in terms of the normative engagement of offenders,

therefore, this finding suggests that sentencing hearings in none of the four courts were particularly conducive to deepening an offender's appreciation of the impact of their conduct on persons whom it may have harmed.

Pre-sentence reports were also rarely used, being submitted in six of 48 hearings. Five of these reports, however, were Gladue reports, all of which were presented in First Nations Court. This finding represents another observed departure of approach and process as between this forum and the other three Study Courts. While the Gladue reports received in First Nations Court's did not observably contribute to moral speech, they appeared to be an integral part of the Court's ethic of comprehensively informed, collaborative decision-making. I observed these reports to be the foundation of substantial dialogue between the judge and individual offenders, in most cases concerning the details of their personal, family, and Aboriginal histories. This knowledge was incorporated into the tailored, multi-factored healing plans that First Nations Court developed as its sentences.

#### **4.3.2 Conclusion**

I undertook the Observation Study with the idea that listening for and analyzing a court's moral speech would afford the best available way to appreciate the moral ordering that it conducted, and the offender engagement that it cultivated. What I learned from the study, and what I offer as its findings and ultimate worth, is considerably more nuanced and complex. First, it quickly became apparent that guilty pleas themselves were poor vehicles of normative communication. This was, to a large degree, predicted by Chapter Two's review of the critical literature on this subject, but empirically reinforced by my observations. If I was interested in gauging moral speech and offender engagement in sentencing proceedings, it was obvious that I would need to assess its strength on other terms.

Next, and more strikingly, I found that moral speech was not always correlated to, or predictive of, a court's vitality as a forum for communicative, normative engagement. I am led to conclude that while the articulation of prescribed moral themes related to *this*

offence and *this* offender may be important signifiers of a sentencing court's expressive moral ordering function, the presence or absence of this speech does not 'tell the story' of a given court's adherence to its obligations in this regard. Neither did I find moral speech to always equate to the engagement of offenders as givers or recipients of messages about the normative meanings raised by their presence in a criminal sentencing court. For these reasons, it became necessary to disambiguate moral speech from offender engagement, where I noted differences between the incidence and nature of these qualities. The findings outlined above and the synopsis that concludes this chapter are attempts to illustrate the interrelation of these two concepts, and explain why it matters.

Two of the Study Courts presented features of intentional design and operation that resulted (whether intentionally or not) in a relatively low uptake of the themes of moral proportionality and moral mind. In general, Court 102's privileging of instrumental efficiency, the prevalence of professional representatives, and its judges' reliance on heuristics such as a criminal record resulted in a somewhat cursory focus on, and interpretation of, the *Criminal Code's* "Fundamental Principle" of sentencing. It also diminished the observable indicia of offender engagement: they were less likely to speak, less likely to engage in dialogue with their judge, and less likely to offer insights into their own orientation towards their conduct.

First Nations Court also manifested a low incidence of moral speech, although for dramatically different reasons than did Court 102. In this forum, the moral theme of proportionality, or the gravity of *this* offence and the responsibility of *this* offender, instead of being a core topic of discussion, was sublimated by what the court seemed to consider a more important concern. This was articulated as an offender's "healing journey", and included aspects of both instrumental problem solving and reintegration into a healthy normative community. While moral speech was somewhat incidental in most cases, the communicative engagement of offenders was remarkably high, and, to my observation, extremely empowering for most of them.

Community Court and Hazelton Court, although best understood on their own terms, can also be said to represent forums that more explicitly manifest their concern for moral ordering, and the communicative engagement of offenders, by way of moral speech. As a dedicated problem solving court, the former placed resources and emphasis on comprehending the causes of a person's offending. It also manifested, by way of its design and the dedication of its professionals, a palpable concern for mutual intelligibility between itself and lay participants. This contributed to quite a high rate both of moral speech and observable offender engagement. For me, Community Court demonstrates that it is possible, even with chronic or 'hardened' offenders, even in a notoriously troubled neighbourhood, for a criminal sentencing court to be a place of active participation. More progress on this front is required, but I observed the court's fundamentals to be relatively well functioning in this regard.

I found the qualities of moral speech and offender engagement to be similarly strong in Hazelton Court. Due to the small sample size and limited period of observation, all I can draw from my analysis of this forum's work is that possibilities for open, audible normative ordering are present in this circuit court context, and were constructively realized in a few hearings under the guidance of a sensitive, solicitous judge.

This chapter's Observation Study serves to suggest that different courts, while operating in the same legal environment, and encountering similar offences and offenders, do have different ranges and volumes when it comes to the audibility of offender engagement at sentencing. The factors that influence this engagement (which, as I observed, is only partially reflected in moral speech) are, in turn, susceptible to the control or influence of a number of forces. Without presuming to exhaustively enumerate or classify these forces, I found that a sentencing court's engagement of offenders in its normative work did depend, in part, on the willingness of offenders themselves. Simply put, without some active interest on the part of these lay participants, courts are less likely to put significant time and energy into cultivating offenders' narratives and normative views. I observed that the time and energy that individual courts invest in this regard, however, is even more responsible for

communicative engagement than qualities intrinsic to offenders. These two variables are impossible to fully parse, of course, but my observations showed that a court that exhibits care and attention towards the moral dimensions of an offence or offender is more likely to cultivate engagement, even among initially reluctant offenders, than a court that is impatient or apparently unconcerned with these matters. A court's character in this regard is formed most importantly by its presiding judge, but also influenced by Crown and defence lawyers as well as supporting professionals. Finally, the overarching intentions and decisions of the justice system itself contribute to the design of the 'justice' that courts perform. As this study has demonstrated, sentencing hearings can be forums for in-depth dialogue and intense moral expression, just as they can be exercises in shallow formalism.

Every court, in its way, embodies the concern for moral ordering that I have forwarded as criminal law's fundamental purpose. Whether its practice of this concern is shaded by pre-sentence negotiations, squeezed by instrumental pressures, or clearly discharged through the channels that the law provides, depends on a confluence of factors, none of which is determinative or fully predictive of what is, essentially, an organic process. Further, the normative concepts underlying this process are not, and need not be, monolithic. At least in terms of the audible offender engagement that this study was able to observe, the aptitude of structures for their function depends on the agency of individual actors. These actors' abilities to nurture normative expression, in turn, require structural and ideological support. The fundamental flexibility of Canada's sentencing law is essential to the maintenance and enrichment of these supports, which must be amenable to a diversity of local contexts. I observed the law to exercise its flexibility in innovative forums that audibly engaged offenders in normative dialogue, even if these conversations were not captured by an orthodox conception of moral ordering. Similarly, I observed an orthodox forum to articulate moral speech, but exhibit less suppleness towards the meaningful engagement of offenders with the law's claims and expectations. What is 'right' about a given process of resolving wrongs,

ultimately, depends upon the values and perspectives to which each approach gives voice.

## CONCLUSION

In a liberal society, criminal law and justice systems grapple with the challenge of simultaneously acknowledging and disciplining the heterogeneity of their human subjects, while simultaneously cultivating and restraining the potency of ‘common’ values. In a society composed of different cultural and normative communities, this realm of law encounters the added challenge of balancing the overarching ‘goods’ of coherence and consistency with more localized ideas of what constitutes wrongful conduct, as well as its appropriate response.

This thesis began with the hypothesis that Canadian criminal law charts its course through these difficult waters by way of two principal directives: first, with the ‘universality’ that characterizes criminalized conduct, and then via the apportionment of ‘individual’ culpability and punishment. I focused on the latter of these tandem practices as a way to explore the law’s concern for moral ordering, in particular the discernment and expression of proportionality and remorse in guilty plea and sentencing proceedings.

By reviewing textual sources and critical literature, I developed a general argument of how plea and sentencing proceedings *ought* to regard and discharge their normative obligations. I upheld this stage of the legal process as a formal, crucial opportunity for conducting inter-informing dialogues between professional and lay participants, wherein the blameworthiness of guilt was to be imbued with personal relevance, and calibrated by contextual concerns. This is what, I argued, Canadian law allowed, and expected.

Clearly, the expressive function that I imparted to this legal process is never undertaken in a general or abstract sense. The courts that accept pleas and render sentences, while they may be creatures of the same textual inheritance, perform their duties in specific situations. Accordingly, this thesis devoted the bulk of its length to exploring the practical expression of the law’s concern for moral ordering, as it channels through, and is challenged by, guilty pleas and sentencing hearings in provincial level courts.

First, I queried the meaning that guilty pleas themselves convey, including whether they provide reasonably firm ground for sentencing courts to discern and dialogue the moral

concerns raised by a given legal breach. Ultimately, I found that such pleas are weak and insecure vehicles in this regard. While the formal intention of Canadian jurisprudence requires that pleas of guilt be normative admissions, neither the preponderance of critical literature, nor my empirical interviews and observations, supported this interpretation. It remains an undeniable fact, however, that pleas of guilt do provide the basis for the vast majority of the sentencing hearings that provincial courts undertake. If pleas themselves are suspect conveyances, how, I asked, do sentencing courts undertake the task of determining, and communicating, the normative content that sentencing requires?

As a second foray into the viability of ‘plea based’ practices of moral ordering, I canvassed the means that sentencing courts have to cultivate the narratives necessary for normatively informed decision-making. Both in the literature and through my empirical research, I found that statutory tools such as victim impact statements and pre-sentence reports, while they may represent the justice system’s formal aspiration for currying lay participant perspectives, are rather poorly used to actually do so. My empirical enquiries settled on the communicativeness of sentencing hearings themselves, in terms of the normative messages that flow between in-court participants. I spent considerable time listening to, and assessing, this “moral speech”, as the most amenable way to gauge the nature and vitality of the moral ordering manifest in a given court and given hearing.

In a final analysis, I found moral speech to be a partial, insufficient measure of which courts engaged most audibly with the moral agents (i.e. offenders) appearing before them, and the moral subject matter implicated by these persons’ offences. Not all courts, I learned, are principally concerned with what I initially took to be the core ordering principle of their work, being the gravity of *this* offence and the responsibility of *this* offender. In practice, other issues – some closely related to this focus, others tangential or distinct – channelled how, and how well, normative communication occurred in sentencing hearings. I observed, for example, the articulation of moral speech to be attenuated, and often drowned out, by offenders’ struggles with their own health, addictions, and social instability. When sentencing courts focused upon these issues as problems to address, less attention was audibly paid to the relevance of such



factors to the assignment of moral blame for a given offence. Similarly, I observed that the existence and relevance of an offender's criminal record was often more consequential in the calibration of punishment than his or her present offending. These findings, however, say little about a court's status or effectiveness as a site of normative expression, dialogue, and ultimate authority. To most aptly measure these qualities, I had to look both outwards from my observations, to the fundamentals on which courts operate, and intimately inwards, towards the human bridges that are built and crossed (or not) between participants in individual hearings.

Canada's criminal law can be read, reasonably clearly, as a set of moral standards and directives, and its justice system structures can be seen as carrying these instructions out. In imposing order upon individuals for legal breaches, the law inevitably implicates the context within which those individuals act, and from which they draw meaning. Sentencing courts, being invested with coercive power, and being impelled to uphold the system's need for efficiency, finality, and fairness, are from the start hard-pressed to offer sustenance for 'local' meanings to be heard, much less honoured. As we have seen, it is often simpler to resort to rote heuristics and hollow rituals to ensure that the formal necessity of offenders being heard does not trip up the efficiency of their hearings. But we have also seen that judges do make efforts to convey moral messages, just as offenders do respond to meaningful chances to speak their views. The basic constituents of moral conversations are present in many, if not most cases. Their occurrence, in the end, depends on the nurturance of a common language.

My research has, optimistically, showed that such languages are being spoken in some of B.C.'s sentencing courts. These dialogues are not, entirely, muted by the abiding interferences of power differentials and 'plea based' instrumental pressures, although such forces indubitably attenuate a court's communicative vigour. But while I set out to listen to a single language, I heard multiple tongues. In very general terms, while Court 102 conveyed the 'straight talk' of moral ordering expected of a busy, orthodox plea court, it was not much interested in an offender's response. Accordingly, very few conversations of this nature were attempted. Community Court manifested somewhat more interest in the moral messages of its process and product, but most communicative exchanges were coloured by that forum's focus on instrumental problem solving. First Nations Court, for its part, offered a substantively different,

and arguably richer, manifestation of moral ordering than that which I had theorized. This court engaged offenders as persons in need of guidance and support as they reconstructed healthy identities. The normative language audible in this forum was not so much intent on calibrating blame as sharing wisdom, whether as won from a judge's perspective, or from the hard experience of being judged. Finally, in Hazelton I heard one judge exhibiting palpable sensitivity towards the local interpretations and impacts of the legal decision-making in which he was engaged, and in doing so assisting to transform what could easily be seen as a foreign imposition into a site of resonance for local voices.

None of the hearings I observed embodied my theory of an 'ideal' communicative practice, wherein the moral dimensions of a legal breach are comprehensively enunciated, not merely with regard to court and offender perspectives, but including those of victims and community representatives. It is unlikely that any sentencing court, given the many constraints I have noted as impinging upon their work, could ever sustain such expressiveness. Indeed, as First Nations Court in particular taught me, there is not, and perhaps in a flexible justice system need not be, one overarching ideal or appropriate practice in the resolution of criminal wrongs. That said, the most communicative hearings were those least fettered by the law's expectations of uniformity, and most creative in their use of the law's discretion.

As has been implied at various points in this thesis, a sentencing court's flexibility is among its greatest attributes; employed with willingness and care, it allows the diversity of acts and actors that flow into the criminal justice system to be met with commensurate responsiveness. This flexibility, however, is threatened and impoverished by a variety of forces. These include countervailing instrumental pressures and concerns, but also more hegemonic ideas of what justice ought to look and sound like in each and every case. The imposition of uniform statutory mandates for sentencing courts to follow, for example, could potentially undermine the establishment of innovative experiments in and experiences of reaching just resolutions in particular contexts. Most of the offences dealt with in the sentencing hearings I observed were not subject to significant statutory restrictions upon the degree and type of their sanctioning, and this may remain the prevailing norm in the foreseeable future. Future research may be

required, however, to assess how the encroachment of mandatory punishments impacts upon the viability of diverse, locally resonant sentencing processes.

In this thesis, I have argued for a type of moral ordering that privileges the open, deliberative engagement of multiple voices at the sentencing stage, each speaking to the gravity of *this* offence and the responsibility of *this* offender. Clearly, not all of the practices or perspectives considered here follow this prescription for approaching just outcomes, but they all, in their various ways, represent the interaction of ‘universal’ prohibitions with their ‘individual’ responses. This dynamic, compromised and imperfect as it may be, is the essence of a notion of justice that incorporates both common and deeply contextual frames of reference to further its work of moral ordering. I hope that I have demonstrated some of this tradition’s appropriateness for a diverse, multi-national country such as Canada, even as I have observed the law’s limitations in this regard. It is an inheritance that requires continual upkeep and re-imagining as understandings of best practices in this area evolve; practices that make sense in some contexts, for some stakeholders, may not benefit others. This inheritance is also of a fragile kind. The criminal law’s promise of resonant, responsive ordering has perhaps never been fully realized, but whatever progress it has made remains susceptible to being sacrificed for other unrealized, unrealizable ideals, notably efficiency and uniformity. These bargains ought to be diligently resisted. If made in any sweeping way, I fear, they would siphon core strength from the moral stories that Canada’s diverse sentencing courts are striving to listen to and speak.

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## APPENDICES

### Appendix A: Letter of Introduction to Observation Study

#### THE UNIVERSITY OF BRITISH COLUMBIA RECRUITMENT FOR SUBJECTS TO PARTICIPATE IN A RESEARCH PROJECT

#### THE MORAL CAPACITY OF PLEA COURTS

Dear Criminal Justice Professional,

How is 'morality' understood, and communicated, in criminal court? While the gauging of moral wrongs arguably lies at the heart of criminal law, there is little scholarship exploring how court processes articulate this concern. I am a criminal lawyer and Masters of Law student at UB.C., and my thesis addresses this question in relation to plea-based courts in B.C.. As professionals, your insights are key to this study's success. In turn, I hope the study will prove useful to the ongoing development of informed, effective justice institutions.

Interviewees will be asked about their views and experiences with regard to the use, appropriateness, and capacity of plea courts as sites of moral communication (both for parties and the surrounding community) as well as your professional role in influencing this process. You will NOT be asked about or expected to identify or discuss particular cases or clients. This study will focus on your work in one or more of the following courts:

- Provincial Court at 222 Main Street, Vancouver
- Downtown Community Court at 211 Gore St, Vancouver
- First Nations Court in New Westminster
- Provincial Court sitting in Hazelton, B.C.

I expect that interviews will take approximately one hour, one time only, and can be scheduled at a time and place of your convenience.

Participation, of course, is completely voluntary. If you decide to participate, you will be asked to sign a consent form (attached) in accordance with UB.C.'s ethics policies. While the findings of interviews will contribute to this study's conclusions, particular statements you may make during your interview, and information that may identify you, will NOT be published without your explicit prior consent.

Please contact Simon Owen at [crim.law.morality@gmail.com](mailto:crim.law.morality@gmail.com) or 778 996 4336 if you have any questions, or to arrange an interview. Mr. Owen's supervisor for this study is Dr Emma Cunliffe, Assistant Professor at the UB.C. Faculty of Law, who may also be contacted with any questions or concerns, at 604 822 1849 or [cunliffe@law.ubc.ca](mailto:cunliffe@law.ubc.ca).

Thank you for your time and consideration in assisting with this project.

## **Appendix B: Interview Script (Crown Counsel)**

1. How do you understand 'morality', in the sense in which you experience it in your work?
2. How closely, in your view, do law and morality coincide, according to your experience in [court, community]? Upon what does this coincidence depend (type of offence, views of participants, views of community/society, etc)?
3. Do you feel that this court operates as a moral authority in this community? Do you think it is generally effective as such? Why or why not?
4. For a given offence to have a moral dimension, it must be personally (by the actor) and/or socially (by others in a given community) judged to be worthy of denunciation.
  - a. Do you accept this definition? In your capacity, do you (always, sometimes, never) become a spokesperson for a moral perspective? Whose?
5. In your experience, what are the various reasons that people plead guilty?
  - a. It seems clear that there are both moral and 'practical' reasons behind guilty pleas. Are some, in your view, more concerning than others?
6. In your view, do (all, most, some, none) of the guilty pleas which you deal with in your court have a moral dimension?
7. Do you feel that, once a guilty plea has been entered, that this court spends any time on moral communication? If so, do you find it effective? Why or why not?
8. There are several provisions of the *Criminal Code* designed to increase and enrich the information that a court may avail itself of at a sentencing hearing. Examples include:
  - a. Pre-Sentence Reports (s. 721)
  - b. Gladue Reports
  - c. Victim Impact Statements (s. 722)
  - d. Submissions on Facts (s. 723)
  - e. Opportunity for Offender to Speak to Sentence (s. 726)

In your experience, are these mechanisms effective in revealing or articulating the various moral perspectives at work in a given case? Why or why not?

9. Have you experienced any particularly powerful moral moments in your court?
10. Do you consider it an important or legitimate aspiration for a criminal court to be a forum for moral communication? What, if anything, would make it more effective as such?

## Appendix C: Interview Script (Defence Counsel)

1. How do you understand 'morality', in the sense in which you experience it in your work?
2. How closely, in your view, do law and morality coincide, according to your experience in [court, community]? Upon what does this coincidence depend (type of offence, views of participants, views of community/society, etc)?
3. For a given offence to have a moral dimension, it must be personally (by the actor) and/or socially (by others in a given community) judged to be worthy of denunciation.
  - a. In your view, do all, most, some, or none of your cases that are resolved by way of guilty plea have a moral dimension?
  - b. Have you experienced cases in which your client clearly had a different understanding than the court, in terms of the morality of their offence?
  - c. Did or would this affect your representation of them in pleading guilty?
4. In your view, what are the various motivations or reasons for guilty pleas?
  - a. It seems clear that there are both moral and practical reasons people plead guilty. Are there reasons that particularly concern you, as a lawyer, or help/hinder your representation?
  - b. Is it important for you to know why a client is pleading guilty?
5. As defence counsel, do you (always, sometimes, never) feel you are in a position to talk with clients about the moral dimensions of their offence, in the course of representing them through a guilty plea?
  - a. If so, what are some considerations that guide you in this process?
6. Do you feel that, once a guilty plea has been entered, that this court spends any time on moral communication? If so, do you find it effective? Why or why not?
7. There are several provisions of the *Criminal Code* designed to increase and enrich the information that a court may avail itself of at a sentencing hearing. Examples include:
  - a. Pre-Sentence Reports (s. 721)
  - b. Gladue Reports
  - c. Victim Impact Statements (s. 722)
  - d. Submissions on Facts (s. 723)
  - e. Opportunity for Offender to Speak to Sentence (s. 726)In your experience, keeping in mind your duties as your client's advocate, are these mechanisms effective in revealing the various moral perspectives at work in a given case? Why or why not?
8. Do you (always, sometimes, never) feel comfortable with your client speaking directly to the court? Do you feel comfortable speaking on their behalf about moral issues or perspectives?



9. Have you experienced any particularly powerful moral moments in the course of your work?
10. Do you feel that this court operates as an effective moral authority in the community it serves?  
Why or why not?
11. How does this court compare with others you've appeared before, in terms of the opportunities it makes for moral engagement?

## **Appendix D: Interview Script (Courtworkers)**

1. How do you understand 'morality', in the sense in which you experience it in your work?
2. How closely, in your view, do law and morality coincide, according to your experience in [court, community]? Upon what does this coincidence depend?
3. Do you feel that this court operates as a moral authority in this community? Do you think it is generally effective as such? Why or why not?
4. For a given offence to have a moral dimension, it must be personally (by the actor) and/or socially (by others in a given community) judged to be worthy of denunciation.
  - a. Do you accept this definition? Is denunciation important for the people you work with? Is it effective or understood?
5. Do you feel, generally, that this court understands the people you work with? Do you feel that your clients are able to have their voices heard, in a moral sense, in this setting? Why or why not?
6. Most people who come before this court plead guilty. Do you feel that there is (always, sometimes, never) a moral dimension to this way of resolving cases? How do your clients understand what is important in this process?
7. In your experience, what are the various reasons that people plead guilty?
  - a. It seems clear that there are both moral and 'practical' reasons behind guilty pleas. Are some, in your view, more concerning than others?
8. Have you experienced any particularly powerful moral moments in this court?
9. Do you consider it an important or legitimate aspiration for a criminal court to be a forum for moral communication? What, if anything, would make it more effective as such?
10. These are all the questions I have for you today. Is there anything else you would like to add at this time?
11. Would you be willing to be contacted again if I need to clarify any of the information contained in this interview?

Thank you for taking the time to do this interview.

## Appendix E:            Tables of Numerical Data

Table 1 Moral Speech across the Study Courts

	Court 102	Community Court	First Nations Court	Hazelton	Total
Sentencing hearings	22	12	10	4	48
Average minutes per hearing	12	16	29	21	17.5
Hearings with Moral Speech	16	12	6	4	38
Moral Proportionality (MP)	16	10	6	4	36
Moral Mind (MM)	5	6	4	3	18
Both MP and MM	5	5	4	3	17
Moral Conversations	8	6	3	3	19

Table 2 Communicators of Moral Speech, by Participant

	Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
Expressions of MP	16	10	6	4	36
Offender	3	3	1	1	8
Judge	5	3	2	4	14
Crown	3	3	4	1	11
Defence	13	8	1	2	24
Other	0	1	0	0	1
Expressions of MM	5	7	4	3	19
Offender	3	3	2	3	11
Judge	2	0	0	2	4
Crown	0	1	0	0	1
Defence	2	5	2	0	9
Other	0	0	1	0	1
Expressions of both MP and MM by same speaker	3	4	2	2	11
Offender	1	1	1	0	3
Judge	1	0	0	2	3
Crown	0	1	0	0	1
Defence	1	3	1	1	6
Other	0	0	0	0	0

Table 3 Offender Speech, Moral and Non-Moral

	Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
<b>Total Offender Speech</b>	12	8	10	4	34
<b>Moral Speech</b>	5	3	2	4	14
<b>Moral Proportionality</b>	2	1	0	1	4
<b>Moral Mind</b>	2	2	1	3	8
<b>Both MP and MM</b>	1	1	1	0	3
<b>Aboriginal Offenders</b>	5	3	10	4	22
<b>Total Speech</b>	1	2	10	4	17
<b>Moral Speech</b>	0	0	2	4	6

Table 4 Discussion of Drug, Alcohol, and Mental Health Issues at Sentencing Hearings

	Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
<b>Drugs and/or alcohol</b>	15	8	10	3	36
<b>As Moral Speech</b>	9	7	1	2	19
<b>Mental health</b>	4	4	1	0	9
<b>As Moral Speech</b>	2	4	0	0	6
<b>Both (Substance and Mental health)</b>	2	1	1	0	4
<b>Neither</b>	5	1	0	1	7

Table 5 Discussion of Guilty Pleas at Sentencing

	Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (3)	Total (47)
<b>GP raised at sentencing</b>	7	2	0	1	10
As instrumentally mitigating	4	2	0	0	6
As morally mitigating	3	0	0	1	4

Table 6 Discussion of Criminal Records at Sentencing

	Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
<b>CR raised</b>	19	9	6	1	35
As aggravating	11	4	1	1	17
As non- aggravating	8	5	5	0	18

Table 7 Moral Speech in Relation to Primary Charge

		Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
Violence		7	5	1	2	15
	Moral Speech	6	5	0	2	13
	Both MP and MM	3	2		1	6
Dishonesty		9	5	5	0	19
	Moral Speech	7	5	4	n/a	16
	Both MP and MM	2	3	4		9
Drugs/Driving		3	2	0	2	7
	Moral Speech	3	2	n/a	2	7
	Both MP and MM	0	0		2	2
Administrative/Other		3	0	4	0	7
	Moral Speech	0	n/a	2	n/a	2
	Both MP and MM	0		0		0

Table 8 Moral Speech in Relation to Contested or Non-Contested Submissions

		Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
<b>Contested hearing</b>		4	3	3	2	12
	Moral Speech	3	3	3	2	11
<b>Non- contested hearing</b>		18	9	7	2	36
	Moral Speech	12	9	4	1	26



Table 9 Moral Speech and Offender's Custodial Status

		Court 102 (22)	Community Court (12)	First Nations Court (10)	Hazelton (4)	Total (48)
<b>In custody at hearing</b>		16	7	0	0	23
	Moral Speech	11	7			18
	Offender MS	3	3			6
<b>Sentenced to custody</b>		7	3	0	0	10
	Moral Speech	6	3			9