ARTICLE

Sentencing Vulnerability: An Empirical Study Into the Role of Personal Characteristics and the Foreseeable Experience of Confinement at the Sentencing of Older Adults

Adelina Iftene and Allison Hearns

THIS ARTICLE PRESENTS AND ANALYZES findings from a qualitative and quantitative review of reported Nova Scotia sentencing decisions (2013–2020) of aging individuals. The goal is twofold. First, by investigating the judicial discourse around personal characteristics at sentencing aging individuals, we specifically seek to understand where aging, and characteristics that interplay with aging, fit into current sentencing practices and the potential benefits and challenges of considering these factors. Secondly, and more generally, through the case study of older offenders, this article seeks to contribute to the largely theoretical scholarship that has engaged with the need for a methodical inclusion of a broader range of personal characteristics and experiences in sentencing.

The review highlights a number of things. First, it shows that implementing a "characteristics and experience sensitive sentencing" (CESS) framework is possible because it is already occasionally used. Second, it shows that ignoring characteristics and experiences of offenders is not feasible; even if it was desirable to do so, these cannot always be ignored and they currently make their way into sentencing decisions in inconsistent ways, based on very different approaches, which, in turn, result in very different outcomes. Adopting a coherent approach to the use of personal characteristics and experiences is now a matter of bringing consistency

CET ARTICLE PRÉSENTE ET ANALYSE les résultats d'un examen qualitatif et quantitatif des condamnations prononcées en Nouvelle-Écosse (2013–2020) à l'encontre de personnes vieillissantes. L'objectif est double. Premièrement, en examinant le discours judiciaire sur les caractéristiques personnelles lors de la détermination de la peine de personnes vieillissantes, nous cherchons spécifiquement à comprendre où le vieillissement, et les caractéristiques qui interagissent avec le vieillissement, s'inscrivent dans les pratiques actuelles de détermination de la peine et les avantages et défis potentiels de la prise en compte de ces facteurs. Deuxièmement, et de manière plus générale, à travers l'étude de cas de personnes délinquantes âgées, cet article cherche à contribuer à la recherche largement théorique qui s'est engagée dans la nécessité d'une inclusion méthodique d'un plus large éventail de caractéristiques et d'expériences personnelles dans la détermination de la peine.

L'étude met en évidence un certain nombre de points. Premièrement, elle montre que la mise en œuvre d'un cadre de « détermination de la peine sensible aux caractéristiques et à l'expérience » [ci-après « DPSCÉ »] est possible parce qu'il est déjà utilisé occasionnellement. Deuxièmement, elle montre qu'il n'est pas possible d'ignorer les caractéristiques et les expériences des personnes délinquantes ; même s'il était souhaitable de le faire, ces caractéristiques ne

in sentencing and a matter of promoting substantive over formal equality. Third, the study shows that sentencing decisions are filled with misconceptions about imprisonment and its impact on those sentenced. Some of the beliefs relied upon are not evidence-based, and yet they sometimes ground the sentencing decisions rendered. Implementing a CESS framework would require directly confronting and addressing these misconceptions. Fourth, the study highlights both some of the barriers to the implementation of a CESS framework and some possible solutions that would help overcome these barriers.

peuvent pas toujours être ignorées et elles sont actuellement prises en compte dans les décisions de détermination de la peine de manière incohérente, sur la base d'approches très différentes, qui, à leur tour, aboutissent à des résultats très différents. L'adoption d'une approche cohérente de l'utilisation des caractéristiques personnelles et des expériences est maintenant une question de cohérence dans la détermination de la peine et une question de promotion de l'égalité réelle par rapport à l'égalité formelle. Troisièmement, l'étude montre que les décisions de détermination de la peine sont empreintes de fausses conceptions sur l'emprisonnement et son impact sur les personnes condamnées. Certaines des croyances sur lesquelles l'on s'appuie ne sont pas fondées sur la preuve, et pourtant elles sont parfois à l'origine des décisions de condamnation prononcées. La mise en œuvre d'un cadre de DPSCÉ nécessiterait de confronter et d'aborder directement ces fausses conceptions. Quatrièmement, l'étude met en évidence certains obstacles à la mise en œuvre d'un cadre de DPSCÉ et certaines solutions possibles qui permettraient de surmonter ces obstacles.

CONTENTS

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I. INTRODUCTION

Scholarship has long been documenting the criminal justice system's role in perpetuating and exacerbating disadvantage and oppression.[1] Being of a minority race or ethnicity, mental illness, past trauma, addictions, and lower economic background are criminogenic factors, and thus, not surprisingly, individuals presenting with these characteristics tend to be overrepresented in the criminal justice system.[2] In addition, the number of

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1 See e.g. Marie-Eve Sylvestre, Nicholas Blomley & Céline Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge: Cambridge University Press, 2019); Jason Schnittker & Andrea John, "Enduring Stigma: The Long-Term Effects of Incarceration on Health" (2007) 48:2 J Health & Soc Behaviour 115; Michelle Lee Maroto, "The Absorbing Status of Incarceration and its Relationship with Wealth Accumulation" (2015) 31:2 J Quantitative Crim 207; Stephanie Ewert, Bryan L Sykes & Becky Pettit, "The Degree of Disadvantage: Incarceration and Inequality in Education" (2014) 651:1 Annals Am Academy Political & Soc Science 24; Bruce Western & Becky Pettit, "Incarceration & Social Inequality" (2010) 139:3 Daedalus 8.

2 See e.g. Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada" (2016) 62:3 Can Family Physician 215; Ewert, Sykes & Pettit, *supra* note 1; Western & Pettit, *supra* note 1; Mental Health Commission of Canada, *Mental Health and the Criminal Justice System: 'What We Heard'* (Ottawa: Mental Health Commission of Canada, 2020); Canada, Office of the

individuals who are aging in prison and who present with intersecting age and non-age-related vulnerabilities, such as the ones mentioned, has skyrocketed over the last few decades.[3] The interplay between age and other vulnerabilities often leads to a disproportionate impact on these individuals by the punishment rendered, and in particular, by conditions of confinement, the lack of adequate prison health care, and the lack of feasible early release options from custody.[4]

The characteristics contributing to individuals coming before courts or determining how they will experience punishment are not consistently considered at sentencing. An increasing number of scholars have been arguing for the need to consider both personal characteristics and the foreseeable experiences of punishment on par with the traditionally utilized sentencing factors, like the seriousness of the offence and individual blameworthiness, narrowly construed.[5] Expanding sentencing practices in this direction may help infuse the criminal justice process with substantive

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Correctional Investigator, *Annual Report: 2018–2019* (Ottawa: Correctional Investigator Canada, 2019); Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries, Final Report* (Ottawa: Correctional Investigator Canada, 2013) online: <publications.gc.ca/collections/collection_2014/bec-oci/PS104-8-2013-eng.pdf>; Canada, Office of the Correctional Investigator, Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act, Final Report (Ottawa: Correctional Investigator Canada, 2012) online: <publications.gc.ca/collections/collection_2013/bec-oci/PS104-6-2013-eng.pdf>.

3 Canada, Office of the Correctional Investigator & Canadian Human Rights Commission, *Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody* (Canada, 2019) at 10, 13 online: <publications.gc.ca/collections/collection_2019/bec-oci/PS104-17-2019-eng.pdf> [OCI & CHRC, "Aging and Dying"].

4 See e.g. Kirubel Manyazewal Mussie et al, "Challenges in Providing Ethically Competent Health Care to Incarcerated Older Adults with Mental Illness: a Qualitative Study Exploring Mental Health Professionals' Perspectives in Canada" (2021) 21:1 BMC Geriatrics 718; Amelia Boughn, "Care or Punishment: A Critique of the Treatment of Mentally Ill Persons in Canadian Prisons" (2020) 1:5 Global Health: Annual Rev 108; Adelina Iftene, *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press, 2019) at chs 2–3 [Iftene, "Punished for Aging"].

5 See e.g. Benjamin L Berger, "Proportionality and the Experience of Punishment" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 368 [Berger, "Proportionality"]; John D Castiglione, "Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism" (2010) 71:1 Ohio St LJ 71; Benjamin L Berger, "Sentencing and the Salience of Pain and Hope" (2015) 70 SCLR 337 [Berger, "Pain and Hope"]; Adam J Kolber, "The Subjective Experience of Punishment" (2009) 109:1 Colum L Rev 182; Adam J Kolber, "The Comparative Nature of Punishment" (2009) 89:5 BUL Rev 1565; Adam J Kolber, "Unintentional Punishment" (2012) 18:1 Leg Theory 1; Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2019) 69:1 UTLJ 85 [Kerr, "How the Prison is a Black Box"].

equality values and lead to fairer outcomes for those involved.[6] To understand how a change like this could look practically and what its benefits would be, it would be helpful to first understand the approaches sentencing judges currently take to personal characteristics and experiences. However, as discussed in the next section, international and Canadian empirical scholarship on this issue is extremely limited and dated.

This article presents and analyzes findings from a qualitative and quantitative review of reported Nova Scotia sentencing decisions of aging individuals. The goal is twofold. First, by investigating the judicial discourse around personal characteristics at sentencing aging individuals, we specifically seek to understand where aging, and characteristics that interplay with aging, fit into current sentencing practices and the potential benefits and challenges of considering these factors. Secondly, and more generally, through the case study of older offenders, this article seeks to contribute to the largely theoretical scholarship that has engaged with the need for a methodical inclusion of a broader range of personal characteristics and experiences in sentencing. We also hope that the methodology used here will be replicated and built upon to examine the discourse around aging and aging-related disabilities in jurisdictions other than the one reviewed in this article, and to investigate the use of personal characteristics in other groups of sentenced individuals.

The empirical study undertaken here demonstrates several things. First, it shows that, among the reported decisions, there is significant inconsistency in the role and weight judges attribute to factors such as age and disability. While some judges consider these factors to various degrees in their decisions and use them to mitigate a sentence, others either completely ignore them or reflect on them in ways that may show stereotypical attributions of these factors in the commission of offences. Second, the study shows that most judges who regard age and disability as having a mitigating role have struggled to reconcile these factors with the various goals and principles of sentencing, which in turn leads to a minimal reflection of personal factors in the sentencing decision. Third, the study reveals that many judges have a poor understanding of the conditions of confinement and the administration of the sentence rendered. In a significant number of cases,

6 The present article builds on the theoretical discussion on the need to infuse sentencing with substantive equality values developed by the first author in a previous article (see Adelina Iftene, "Sentencing Vulnerability: Conceptualizing the Incorporation of Personal Characteristics and Experiences at Sentencing", 61:3 Osgoode Hall LJ (forthcoming in 2025) [Iftene, "Personal Characteristics"]).

judges either did not turn their minds to this issue or expressed beliefs regarding conditions of confinement and correctional services that are at odds with the documented realities. While not the focus of the study, it was apparent that this lack of knowledge extends to some degree to Crowns and defence attorneys as well, based on the positions taken. Finally, a few decisions showed that the meaningful integration of age, disability, and other intersecting factors is possible—even if challenging—within the current sentencing framework and irrespective of the severity of the offence.

The article is structured as follows. In Chapter II, we provide an overview of the theoretical framework and the appellate-level jurisprudential landscape guiding this study, as well as a summary of current knowledge about how older individuals experience punishment and the unique challenges they face in prison. In Chapter III, we set up the methodology used to collect and analyze the data from the sentencing decisions reviewed. In Chapter IV, we provide demographic information regarding the individuals sentenced, the offences committed, the personal characteristics reported, and the factors considered at sentencing. In Chapter V, we describe the qualitative findings of our study, based on categories and themes that reflect the approaches judges took in considering various factors and the justifications provided for these approaches. These themes shed light on some of the challenges that judges face in considering personal characteristics alongside other sentencing factors. Possible concerns raised by our findings, as well as some directions for reform, are discussed in Chapter VI.

II. BACKGROUND FOR THE STUDY

A. Theoretical and Jurisprudential Background

A retributivist understanding of proportionality, the fundamental sentencing principle, extensively drives sentencing.[7] Thus, sentence attribution hinges on assessing the gravity of the offence and the offender's blameworthiness, often narrowly construed as responsibility. Responsibility centres around whether the individual has committed the offence and in what capacity; only the characteristics and circumstances connected to these factors tend to impact the assessment of responsibility. On the other hand, culpability, which includes the background and factors that influenced the choices the individual had available at the time of the criminal activity, is sometimes

7 *Criminal Code*, RSC 1985, c C-46, s 718.1.

neglected.[8] Similarly, factors and experiences that would have no bearing on responsibility, but which may influence the impact the sentence has on the individual, are rarely considered for the purpose of determining a proportionate sentence.[9] In other words, personal or sociodemographic characteristics, as well as the likely experience of the punishment based on these characteristics (hereafter, "personal characteristics"), play a very limited role in sentencing decisions, while factors revolving around the offence and the criminal background of the offender (hereafter, "regularly considered factors") weigh heavily.[10]

That said, all major penal schools of thought agree that there is room for significant consideration of personal characteristics at sentencing and that, in some situations, the principle of proportionality, in fact, demands it.[11] Canadian courts have increasingly considered various personal characteristics, albeit inconsistently and to various degrees. In *R v Smith* (*Edward*

8 See e.g. Barbara Hudson, "Punishment, Poverty and Responsibility: The Case for a Hardship Defence" (1999) 8:4 Soc & Leg Stud 583; Barbara A Hudson, "Doing Justice to Difference" in Andrew Ashworth & Martin Wasik, eds, *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford: Oxford University Press, 1998) 223. That said, the *Criminal Code* directs judges to consider background factors at least in the case of Indigenous offenders (*supra* note 7, ss 718.2–718.201).

9 See e.g. Berger, "Proportionality", *supra* note 5; Lisa Kerr, "Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment" (2017) 32:2 CJLS 187 [Kerr, "Sentencing Ashley Smith"]; Chris Rudnicki, "Confronting the Experience of Imprisonment in Sentencing: Lessons from the COVID-19 Jurisprudence" (2021) 99:3 Can Bar Rev 469; Netanel Dagan & Shmuel Baron, "After the Gavel Falls: Rethinking the Relationship Between Sentencing and Prison Functions" (2023) 17:1 Crim L & Philosophy 175.

10 We use "personal characteristics" and "regularly considered factors" for lack of better terms. Some authors refer to "legal" and "extra-legal" factors (see e.g. Darrell Steffensmeier, Jeffery Ulmer & John Kramer, "The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male" (1998) 36:4 Criminology 763). Legal factors are those regularly considered upon sentencing and are generally related to crime and criminal history (*i.e.*, the type of offence, the type of party liability, mandatory minimums, sentence ranges, statutory mitigating and aggravating factors, prior record). Extra-legal characteristics are essentially personal and demographic factors, such as race, age, disability, socio-economic status, *etc*. However, if these factors must be considered in Canada to ensure sentencing practices align with the substantive equality demands under section 15 of the *Charter*, as argued in Iftene, "Personal Characteristics", *supra* note 6, then they would also be "legal factors." To avoid inaccuracies, we chose to refer to the factors related to crime and criminal history as "regularly considered factors" and the factors related to socio-demographics and the experience of punishment as "personal characteristics," even though the content of these two categories somewhat corresponds with Steffensmeier, Ulmer & Kramer's legal and extra-legal factors categories, respectively.

11 For a review of the scholarship on this issue, see Iftene, "Personal Characteristics", *supra* note 6. See also Berger, "Proportionality", *supra* note 5; Kerr, "Sentencing Ashley Smith", *supra* note 9; Rudnicki, *supra* note 9; Dagan & Baron, *supra* note 9.

Dewey), the Supreme Court of Canada noted that in-prison treatment may impact the assessment of a proportionate sentence.[12] In *R v Pham*, the Court, in considering the jeopardy to an offender's immigration status, directed sentencing judges to consider the foreseeable "collateral" consequences of a sentence in the proportionality calculus.[13] *R v Adamo*,[14] *R v Wallace*,[15] and *R v Newby*[16] illustrate the principle that the risks certain groups face in prison can ground sentence mitigation. *R v Boucher*,[17] *R v JKF*,[18] and *R v Snelgrove*,[19] among many others, further establish that post-sentencing issues are appropriate considerations during sentencing. Cases like *R v Gladue*[20] and *R v Ipeelee*,[21] and more recently *R v Morris*[22] and *R v Anderson*[23] engage with the importance of race, social background, and racism at sentencing in the cases of Indigenous and Black offenders. An entire line of jurisprudence also engages with onerous conditions of pre-trial detention or bail conditions and takes them into account at sentencing.[24] The COVID-19 pandemic has also shed new light on the impact of confinement conditions on individual well-being, even though their judicial treatment has been inconsistent.[25]

In a recent decision in *R v Suter*,[26] the Supreme Court of Canada significantly expanded the scope of cognizable "collateral consequences" that bear on sentencing. They include "any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender."[27] *R v Fabbro*[28] and *R v*

12 1987 CanLII 64 at 1073–74 (SCC).
13 2013 SCC 15 at paras 10–11 [*Pham*].
14 2013 MBQB 225 at paras 48–49.
15 1973 CanLII 1434 at 100 (ONCA).
16 1991 ABCA 307 at para 4.
17 2004 CanLII 17719 at para 32 (ONCA).
18 2005 CanLII 5398 at para 3 (ONCA).
19 2005 BCCA 51 at paras 10, 13.
20 1999 CanLII 679 (SCC) [*Gladue*].
21 2012 SCC 13.
22 2021 ONCA 680 [*Morris*].
23 2014 SCC 41.
24 See e.g. *R v Donnelly*, 2014 ONSC 6472 at paras 85–86; *R v Doyle*, 2015 ONCJ 492 at paras 53–54; *R v Nguyen*, 2017 ONCJ 442 at para 40; *R v Persad*, 2020 ONSC 188 at paras 32–34.
25 Rudnicki, *supra* note 9 at 471. On the inconsistent treatment of COVID-19 at sentencing, see Lisa Kerr & Kristy-Anne Dubé, "Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19" (2020) 64:7 Crim Reports 311.
26 2018 SCC 34 [*Suter*].
27 *Ibid* at para 47.
28 2021 ONCA 494 at para 20 [*Fabbro*].

Salehi[29] are post-*Suter* examples of how appellate courts have engaged with personal characteristics that may impact a sentence either because they impact blameworthiness or lead to consequences that render a sentence disproportionately harsh.[30] Most recently, the Supreme Court of Canada in *R v Hills*[31] confirmed that prison-related vulnerability is a relevant consideration at sentencing, removing any lingering doubt that judges have the ability to reflect in the sentence rendered the foreseeable experience of punishment for that offender.

Thus, there is appellate court authority for including personal factors at sentencing. However, as Berger argues, expanding this approach would require an "enlargement of how we think about the nature of punishment," with conscientious attention paid to each offender's background, personal characteristics, and all foreseeable consequences of the punishment.[32] Often, the special needs of those sentenced, or how one experiences incarceration and any foreseeable correctional fails in administering the sentence, are left entirely to prison administrators to deal with. Yet, it is well documented that correctional authorities have repeatedly failed to uphold their obligations of providing humane care for these individuals, release mechanisms are very limited, and accountability is lacking behind prison walls.[33] Maintaining a rigid distinction between sentencing considerations and prison law matters and refusing to consider the latter for the purpose of the former allows administrators to continue to elude the rule of law with impunity.[34]

In addition to the existing scholarly and jurisprudential support for including personal characteristics, one of the authors argued elsewhere that the failure to consider these at sentencing consistently is in dissonance with substantive equality demands and other constitutionally mandated values.[35] Failure to inquire into the unique circumstances of an individual, the experience of punishment, and the consequences that will derive out of that punishment disregards individual struggles and adds to the disadvantage most people coming before courts already face. This, together

29 2022 BCCA 1 at paras 40, 49 [*Salehi*].

30 For a review of these post-*Suter* and other recent cases, and a discussion on their role in expanding the role of personal characteristics at sentencing, see Iftene, "Personal Characteristics", *supra* note 6.

31 2023 SCC 2 at para 86.

32 Berger, "Pain and Hope", *supra* note 5 at 358.

33 OCI & CHRC, "Aging and Dying", *supra* note 3.

34 See e.g. Kerr, "Sentencing Ashley Smith", *supra* note 9 at 190; Rudnicki, *supra* note 9 at 473; Dagan & Baron, *supra* note 9.

35 Iftene, "Personal Characteristics", *supra* note 6.

with over-policing, over-prosecution, and over-charging, is responsible for the high proportions of marginalized people experiencing incarceration.[36]

Through *Charter* section 15 jurisprudence, substantive equality has replaced formal equality in Canada.[37] Formal equality has been discredited as an empty concept that fails to reflect the different ways in which the law impacts people based on their circumstances.[38] The insistence on proportionality measured mostly through offence gravity and very limited aspects of individual blameworthiness, without considerations of factors that did not directly influence the crime and of those that will dictate how the punishment will be experienced, is essentially an insistence on formal equality, on sameness.[39] Canadian conceptions of equality are, however, concerned with how the law impacts various groups and individuals based on their characteristics and life circumstances, not with treating everyone the same.[40]

On this background, one of the authors in a previous work argued for the need to rethink sentencing through a principled approach lens that demands paying attention to individual characteristics and the interplay of these characteristics in each case, while weighing them in the same way as regularly considered factors.[41] The characteristics considered would be based on an open list of characteristics that are either recognized grounds of discrimination, or non-recognized grounds that can be proven

36 See e.g. Maria C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103; *Morris*, *supra* note 22 (Evidence, Akwasi Owusu-Bempah, Camisha Sibblis & Carl James's Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario); Tom Cardoso, "Bias Behind Bars: A Globe Investigation Finds a Prison System Stacked Against Black and Indigenous Inmates" (last modified 11 November 2020), online: <theglobeandmail.com/canada/article-investigation-racial-bias-in-canadian-prison-risk-assessments>.

37 *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

38 Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65:1 Sask L Rev 3 at 22–25.

39 *Ibid*. See also Kent Roach & Jonathan Rudin, "Sentencing Indigenous Offenders: From *Gladue* to the Present and Beyond" in David Cole & Julian Roberts, eds, *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto: Irwin Law, 2020) 226 at 233. On the potential role of section 15 of the Charter in criminal justice more broadly, see Jonathan Rudin, "Tell It Like It Is—An Argument for the Use of Section 15 Over Section 7 to Challenge Discriminatory Criminal Legislation" (2017) 64 Crim LQ 317.

40 For an extensive discussion of these issues, see Iftene, "Personal Characteristics", *supra* note 6.

41 *Ibid*.

to have a disproportionate impact on an individual.[42] Some relevant socio-demographic factors include, but are not limited to, race, ethnicity, age, gender, socio-economic status, disability, mental health, physical health, prior trauma, and sexual orientation.

In practical terms, even when unacknowledged, these factors already impact sentences in a variety of ways. They may, for example, negatively influence sentences directly through stereotypical attributions.[43] They may also have a more indirect influence. For instance, individuals subject to structural inequities receive the same formal sentence as those convicted of similar crimes, irrespective of the former's social disadvantage.[44] Individual characteristics may also affect how an individual will experience a sentence. The conditions of carceral confinement and their interactions with a person's attributes (such as age and disability) experientially define the harshness of the sentence. Thus, failure to weigh personal characteristics does not mean they do not exist or impact the real-world severity of a punishment. However, without intentional and methodical attention to these factors, sentencing itself may perpetuate a systemic pattern of oppression and discrimination.[45]

Age and disability, the focus of the present investigation, are enumerated grounds of discrimination.[46] In addition, as discussed in the next section, they have been proven to lead to much harsher experiences of the punishment imposed. The little international scholarship available on this issue indicates that the failure of a judge to attempt to understand how various and intersecting characteristics may affect the severity of a sentence often leads to certain categories of people being over-punished.[47]

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42 *Ibid*.

43 *Ibid*. On the role of socio-demographic factors and unconscious bias in sentencing, see Kathleen Daly & Michael Tonry, "Gender, Race, and Sentencing" (1997) 22 Crime & Justice 201; Jeffrey S Nowacki, "An Intersectional Approach to Race/Ethnicity, Sex, and Age Disparity in Federal Sentencing Outcomes: An Examination of Policy Across Time Periods" (2017) 17:1 Criminology & Crim Justice 97.

44 See e.g. Leslie Paik, "Critical Perspectives on Intersectionality and Criminology: Introduction" (2017) 21:1 Theoretical Criminology 4; Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR 461; Marie-Eve Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice" (2010) 55:4 McGill LJ 771 [Sylvestre, "Rethinking Criminal Responsibility"].

45 Iftene, "Personal Characteristics", *supra* note 6.

46 All provincial and territorial human rights legislation contain these as enumerated grounds of discrimination. See e.g. *Human Rights Act*, RSNS 1989, c 214, ss 5(1)(h), 5(1)(o).

47 Steffensmeier, Ulmer & Kramer, *supra* note 10; Katrin U Mueller-Johnson & Mandeep K Dhami, "Effects of Offenders' Age and Health on Sentencing Decisions" (2010) 150:1 J Soc

Though older people began to be identified as a social group with distinctive legal needs decades ago, few international studies (and no recent ones) have reflected specifically on how and why older age, health, and other intersecting characteristics might be factored into sentencing decisions.[48] Fewer studies still are available in Canada. Renaud and Manoukian, each through a thematic review of a small number of decisions, found that age is of little consequence in sentencing unless the individual is also significantly ill, although judges seem to hold the fundamental view that no one should die in prison.[49] In a quantitative study of 590 sentencing decisions, Love assessed the relevance of old age as a factor in sentencing.[50] She found no empirical difference between younger and older offenders in the length of the sentences rendered, though some judges noted in their decision that old age may merit leniency in sentencing.[51] In a detailed sentencing decisions review, Love, Kelly & Doron found that judicial discretion tends to be exercised in an age-neutral manner, though it sometimes results in positive or negative ageism.[52]

Before turning to the present study and how judges in Nova Scotia reflected aging and aging-related disabilities in their decisions, it is useful to understand the documented challenges encountered by incarcerated individuals with these characteristics.

B. Background on Older Individuals

Scholarship, the investigation of the Office of the Correctional Investigator (OCI) and the Canadian Human Rights Commission, and one of the Standing Senate Committee's on Human Rights reports have documented the

Psychology 77; C Wayne Johnston & Nicholas O Alozie, "The Effect of Age on Criminal Processing: Is There an Advantage in Being 'Older'?" (2001) 34:4 J Gerontological Soc Work 65.

48 Israel Doron, "A Judicial *Rashomon*: On Ageism and Narrative Justice" (2012) 27 J Cross-Cultural Gerontology 17. There are a handful of older studies on this issue. See e.g. William Wilbanks, "Are Elderly Felons Treated More Leniently by the Criminal Justice System?" (1988) 26:4 Intl J Aging & Humam Development 275; Mueller-Johnson & Dhami, *supra* note 47.

49 Gilles Renaud, "Sentencing Elder Offenders: A Thematic Review of the Principles" (ADGN/RP-094) in Alan D Gold, ed, *Collection of Criminal Law Articles* (Canada: LexisNexis Canada, 2000); Vartan HS Manoukian, "Immaturity of a Youthful Offender v Maturity of an Elderly Offender" (February 2012) online: (WL Can) RegQuest.

50 Helene Love, "Canadian Sentencing Practices in Relation to Older Adults" (2011) 89:3 Can Bar Rev 729 at 744.

51 *Ibid* at 729.

52 Helene Love, Fiona Kelly & Israel Doron, "Age and Ageism in Sentencing Practices: Outcomes from a Case Law Review" (2013) 17:2 Can Crim L Rev 253 at 278.

increased needs of those over 50 years of age serving time in federal prisons and the significant challenges prisons have in meeting those needs.[53] Intersecting vulnerabilities include age, mental health, addictions, disability, chronic and acute illnesses, racism experienced, and trauma.[54]

The number of older individuals in prisons has increased dramatically over the last decade (now compiling over 25% of the federal prison population), partially because of the aging of the community population and partially because of changes in the criminal justice system, including the introduction of new mandatory minimum sentences, increased prosecution of historical crimes, and restrictions imposed on parole availability.[55] Because half of the individuals over 50 are serving a life or indeterminate sentence, and many others have been in prison before, there is a stacking effect among the prison population, resulting in a high number of geriatric and palliative care populations behind bars.[56]

It is thus not surprising that the rate of natural deaths has seen a significant spike in the last years, with those over 50 being at much higher risk of dying behind bars.[57] The rate of chronic and mental illnesses, as well as that of comorbidities (*i.e.*, people presenting with more than one condition), are higher than among either younger prisoners or those in

53 See e.g. Iftene, "Punished for Aging", *supra* note 4; Amanda Mofina et al, "The Functional Health Needs of Older Persons in Custody: A Rapid Review" (2022) 91 J Forensic Leg Medicine 1; Jim A Johansson, Dave Holmes & Etienne Paradis-Gagné, "Canada's Aging Federal Prison Population: Health Disparity, Risk, and Compassionate Release for Persons Convicted of Sexual Offenses" (2023) 19:2 J Forensic Nursing 115; *Mussie* et al, *supra* note 4; Amber Colibaba et al, "Community Reintegration of Previously Incarcerated Older Adults: Exploratory Insights from a Canadian Community Residential Facility Program" (2023) 35:4 J Aging and Soc Pol'y 521; Shelley Peacock et al, "Living With Dementia in Correctional Settings: A Case Report" (2018) 14:3 J Forensic Nursing 180; Senate of Canada, Standing Committee on Human Rights, *Human Rights of Federally-Sentenced Persons* (June 2021) (Chair: Salma Ataullahjan) at 115–18. Similar issues likely arise in provincial jails as well, but there is not much documentation available. However, the fact that health care is devastatingly bad in all provincial jails, and generally worse than in federal penitentiaries, has often been documented. See e.g. Kouyoumdjian et al, *supra* note 2; Fiona G Kouyoumdjian & Aaron M Orkin, "Improving Health and Healthcare Access for People Who Experience Imprisonment in Ontario" (2020) 23:1 Healthcare Q 6; Ontario's Expert Advisory Committee on Health Care Transformation in Corrections, *Transforming Health Care in Our Provincial Prisons* (2019); David Dorson, "Two Years Less a Day or Three Years: Which is Better?" (21 July 2022), online: (Law360) LexisNexis Canada; East Coast Prison Justice Society Visiting Committee, *Conditions of Confinement in Nova Scotia Jails Designated for Men: Annual Report 2021–2022* (East Coast Prison Justice Society, 2023).

54 OCI & CHRC, "Aging and Dying", *supra* note 3 at 18–19.

55 *Ibid* at 10.

56 *Ibid* at 11.

57 *Ibid* at 57.

the community.[58] The health decline for those experiencing incarceration, known as "accelerated aging," is steep.[59] That means the health of those in prison is comparable to those 10–15 years older than them in the community.[60] As a result, the life expectancy of someone incarcerated is under 65, compared to 80 in the community.[61] There is evidence that the steep decline in the health and abilities of older individuals is in part due to the prison environment itself.[62]

Most individuals over 50 experience at least one chronic illness, and 24 percent are likely to live with a debilitating disability.[63] In turn, disability correlates statistically to unaddressed chronic pain and higher rates of abuse by staff and other prisoners.[64] There is no systematic palliative or hospice care available in any prison.[65] The housing conditions, resources and expertise are very limited and cannot respond to the needs this population presents.[66] Chronic pain is often inadequately addressed, which greatly impacts the quality of life of the individual.[67] The older prisoner is also at high risk of suffering from chronic depression, high anxiety, PTSD, and dementia.[68]

Infrastructurally, penitentiaries pose issues for those who have mobility issues. Many institutions have no disability ramps, handicap showers, or toilets, the cells are on upper floors, distances can be significant in large penitentiaries, and walkways are improperly cleaned in the winter, leading

58 *Ibid* at 18. See also Mussie et al, *supra* note 4 at 12.

59 OCI & CHRC, "Aging and Dying", *supra* note 3 at 7.

60 Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 116; Mussie et al, *supra* note 4 at 5–6; Mofina et al, *supra* note 53 at 1.

61 OCI & CHRC, "Aging and Dying", *supra* note 3 at 57.

62 Mofina et al, *supra* note 53 at 8.

63 Iftene, "Punished for Aging", *supra* note 4 at 37, 42. See also Mussie et al, *supra* note 4 at 5. For a detailed description of issues that impair the activities of daily living of older incarcerated people see Mofina et al, *supra* note 53 at 4–8.

64 Adelina Iftene, "The Pains of Incarceration: Aging, Rights, and Policy in Federal Penitentiaries" (2017) 59:1 Can J Corr 63 at 74–75 [Iftene, "Pains of Incarceration"]. Regarding abuse by peers, see also Mussie et al, *supra* note 4 at 10.

65 Iftene, "Pains of Incarceration", *supra* note 64 at 73.

66 Mussie et al, *supra* note 4 at 6–8.

67 OCI & CHRC, "Aging and Dying", *supra* note 3 at 46; Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 116–17.

68 Adelina Iftene, "Unlocking the Doors to Canadian Older Inmate Mental Health Data: Rates and Potential Legal Responses" (2016) 47 Intl J L & Psychiatry 36. See also OCI & CHRC, "Aging and Dying", *supra* note 3 at 14; Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 116; Peacock et al, *supra* note 53 at 181.

to falls and injuries.[69] Double bunking remains a reality, and related injuries have been documented.[70] Many devices are not consistently available, even when the individual is willing to pay for them, including orthopedic shoes, orthopedic mattresses, knee braces, and sometimes canes and wheelchairs.[71] Only a handful of institutions have peer caregivers (none in the Atlantic region), often improperly trained. There have been regular accounts of peer caregivers stealing food and medication, and of abuse.[72] In many institutions, the waiting lines to pick up medication form outside, and people must stand for hours bracing against the elements.[73]

There are serious issues regarding access to health care.[74] Most institutions do not have a nurse available 24/7.[75] There is a chronic lack of psychiatrists, psychologists, and other therapists.[76] Accessing specialized services like dialysis and chemotherapy requires visits to community hospitals. These are sometimes cancelled unexpectedly due to a lack of officer escorts.[77] The transport is done in Correctional Service Canada (CSC) steel vans, where individuals are shackled and handcuffed and are not wheelchair accessible.[78] Inadequate diagnosing and treatment (including some that may have contributed to premature death) have been documented by the OCI in their mortality reviews.[79]

The OCI also noted that, due to institutional conscious and unconscious biased beliefs that older individuals cannot be rehabilitated, very few resources have been invested in this category of people in terms of programming, social activities, and preparation for release.[80] The OCI con-

69 Iftene, "Pains of Incarceration", *supra* note 64 at 74; Mussie et al, *supra* note 4 at 7; Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 117; Mofina et al, *supra* note 53 at 2–8.

70 Iftene, "Punished for Aging", *supra* note 4 at 45–46.

71 Iftene, "The Pains of Incarceration", *supra* note 64 at 73–74.

72 Mussie et al, *supra* note 4 at 10.

73 OCI & CHRC, "Aging and Dying", *supra* note 3 at 37. See also Iftene, "The Pains of Incarceration", *supra* note 64 at 72–73.

74 For a brief overview of many of the issues with the provision of health care and housing conditions, see Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 117.

75 Iftene, "Punished for Aging", *supra* note 4 at 41.

76 *Ibid*. See also Mussie et al, *supra* note 4 at 7.

77 Iftene, "Punished for Aging", *supra* note 4 at 41.

78 See e.g. OCI & CHRC, "Aging and Dying", *supra* note 3 at 40–43; Office of the Correctional Investigator, *Annual Report: 2021–2022* (Ottawa: Office of the Correctional Investigator, 2022) at 34, online: <oci-bec.gc.ca/sites/default/files/2023-06/annrpt20212022-eng.pdf>.

79 Canada, Office of the Correctional Investigator, *An Investigation of the Correctional Service's Mortality Review Process* (Ottawa: Correctional Investigator Canada, 2013) at 26.

80 OCI & CHRC, "Aging and Dying", *supra* note 3 at 25–26.

cluded that people over 50 face systemic and pervasive discrimination in federal prisons.[81] Additionally, they are at a heightened risk of being bullied, assaulted, and having their property stolen.[82] Their safety and dignity are constantly under attack from both their peers and the prison staff.[83]

Finally, older individuals tend to spend significant periods "warehoused" in prison, past the time they are no longer a threat to society, despite the fact that statistically they are the least likely group to return to prison, and despite their serious decline in health.[84] This results from a combination of challenges in obtaining release, including inadequate preparation for release, lack of support and poor health, and the lack of functioning compassionate release mechanisms.[85]

It is on this background that we now turn to how age, age-related, and other types of disabilities, as well as the foreseeably harsher experience of incarceration for older people, are reflected in sentencing decisions.

III. METHODOLOGY

The sample for this study consists of all reported sentencing decisions (94) from January 2013 to December 2020 of individuals aged 50 years or older at the time of sentencing for a criminal conviction in Nova Scotia, Canada. Due to accelerated aging, 50 is often the lower limit of seniority in punishment-related research.[86] Nova Scotia was chosen as a location of convenience because it is a smaller province (and hence the number of cases is more manageable for qualitative analysis) and because the authors are familiar with its sentencing landscape.

It is also worth mentioning that the focus of the analysis was solely on the exercise of judicial discretion at sentencing for those cases that made it before a judge. We did not look at how other legal actors (*i.e.*, police, prosecution) exercise their discretion to arrest or lay charges against older adults. The role these other actors play is essential in ensuring a fair and non-oppressive legal system; however, their decision-making process

81 *Ibid*.

82 *Ibid*.

83 *Ibid* at 3, 27–30. See also Iftene, "The Pains of Incarceration", *supra* note 64 at 74–75.

84 OCI & CHRC, "Aging and Dying", *supra* note 3 at 63. See also Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 118.

85 OCI & CHRC, "Aging and Dying", *supra* note 3 at 63. See also Adelina Iftene, "The Case for a New Compassionate Release Statutory Provision" (2017) 54:4 Alta L Rev 929; Johansson, Holmes & Paradis-Gagné, *supra* note 53 at 118; Peacock et al, *supra* note 53 at 181.

86 OCI & CHRC, "Aging and Dying", *supra* note 3 at 3, 7–8.

was outside the scope of this study. We also did not focus directly on the positions taken by the parties at sentencing, even though their position influenced the decision of the judge. For instance, judges often adopt joint sentencing submissions. If the sentencing is contested, the judge often adopts one of the positions. Throughout our analysis, the focus was less on the sentencing outcome itself (*i.e.*, the type or duration of the punishment imposed) and more on the reasons provided by the judge in adopting the position they did. Thus, even though the parties' arguments play an important role in ensuring the fairness of the system (and we return to this issue in the last section of the article), they are not the main focus of this study.

The cases were identified using the Searchable Database of Decisions of the Courts of Nova Scotia (Level of Court—Supreme Court and Provincial Court). While the number of cases retrieved and analyzed is greater than is common for qualitative content analysis studies, it is a politically important sample that is inclusive of sentencing decisions since the *Safe Streets and Communities Act*[87] came into force and effect, with revisions to the *Criminal Code* including mandatory minimum sentences for some types of offences.[88] As this study aims to understand the comfort and willingness of judges to work with personal characteristics, legal provisions that limit their ability to do so are relevant to this assessment.

The personal characteristics of the individuals being sentenced in each decision were gathered and organized in a tabular format, in order to arrive at a basic quantitative description of this population as described by judges in their decisions. We distinguished these factors from regularly considered factors which include the type of offence, mandatory minimums, criminal history of the accused, guilty pleas, the role of the offender in the commission of the offence, and statutory aggravating and mitigating circumstances. We extracted data on the use of these factors as well. As we only reviewed sentencing decisions, we were restricted to the information provided by the judge in the sentencing transcript. There may have been other relevant factors that were not listed and which, as a result, were not considered at all in this study.

The factors extracted were codified using a system of values and variables, and SPSS software was used to run frequencies. These frequencies offer a numeric description of the demographic and legal characteristics

87 *Safe Streets and Communities Act*, SC 2012, c 1.

88 Matthew B Miles & Michael A Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*, 2nd ed (Thousand Oaks, CA: Sage Publications, 1994).

of the sentenced population in this age group and provide context to the thematic analysis of the decisions.

To try to understand how judges apply information about personal characteristics, the four main stages of qualitative content analysis were followed: decontextualization, recontextualization, categorization, and compilation.[89] The analysis of extracted data encompassed both manifest (providing descriptions of visible and obvious statements regarding the factors considered) and latent analyses (seeking to understand the meaning included in decisions regarding these factors).[90] Microsoft Word, Acrobat Reader DC, and DropBox were used to code, analyze, organize, and store the data. Based on the data extracted and organized, general and individual themes were created and sorted, and connections were drawn between the various units of meaning within the texts.

Trustworthiness of the analysis was ensured through the following measures: (1) two researchers completed a sample of the cases separately, then discussed and obtained consensus on the emerging themes worth exploring, (2) the researchers had prolonged engagement with the data by a complete reading and multiple re-readings of the included sentencing decisions, and (3) the researchers used thick descriptions of all information relevant to the purpose of the research.

There are some limitations to this study. It is exploratory in nature, and limited both jurisdictionally and in terms of the personal characteristics the targeted group presents. First, the findings are particularly relevant for Nova Scotia, and they cannot comfortably be extrapolated outside the province given potential jurisdictional differences. Second, the personal characteristics identified are influenced by the fact that the investigation was focused on individuals above 50 years of age. It is unclear how the judicial discourse around similar or different characteristics would look like in a younger group. Third, the study is limited to the reported sentencing decisions. Many decisions are not reported. The ones that are reported tend to be those dealing with more serious offences, which may have influenced how judges treated personal characteristics. We hope to expand the present study in the future, which will allow for findings of broader application.

89 Mariette Bengtsson, "How to plan and perform a qualitative study using content analysis" (2016) 2 NursingPlus Open 8.

90 *Ibid* at 10.

IV. DEMOGRAPHICS

Of the 94 sentencing decisions published during the relevant period, and where the accused was 50 or older at the time of sentencing, 36 (38 percent) were in Provincial Court and 58 (62 percent) in Supreme Court. The distribution of cases was consistent (between 12–14 percent every year), with the exception of 2020, where due to courts being closed part of the year on account of the pandemic, there were significantly fewer sentencing decisions (six percent).

A. Personal Characteristics

In terms of personal characteristics, 87 (91 percent) of the accused were male. Most accused were between 50–59 (61 or 64 percent) or between 60–69 (25 or 26 percent) years of age. Six people were between 70–79 and two were over 80 years old. Race distribution was impossible to establish because of inconsistent information in the sentencing decisions. In seven cases (seven percent), it was clear that the accused was non-white, either because the judge specifically referenced their race, or because a *Gladue* report was relied upon. In all other cases, race was never mentioned. Even though race is an important demographic factor, and its impact (or lack thereof) would be important to assess, it was impossible to draw any statistical conclusions regarding the race of the individuals in the sample based on the available information.

17 individuals (18 percent) were reported as living with a physical disability, 41 (43 percent) were living with at least one mental illness, and 42 (44 percent) were living with some physical illness. Generally, judges only reported those conditions for which a professional diagnosis was available, so most undiagnosed conditions would not have been included in these numbers. Relying mostly on pre-sentencing reports (which were specifically referenced in 82 percent of the decisions), sentencing judges noted that 16 (17 percent) of the individuals had a low education level, 37 (39 percent) had a negative employment history or were destitute, ten (ten percent) had no family or other supports, and 15 (16 percent) had a history of sexual or physical abuse. For many individuals, more than one personal factor was mentioned or discussed. For instance, 12 people who had a history of abuse were also living with mental illnesses, and eight of them were living with physical illnesses. Similarly, 18 of those with negative employment history, or who were destitute, were living with mental illness.

B. Regularly Considered Factors

In terms of the circumstances surrounding the offences, 69 (72 percent) were committed within the previous five years, eight were historic crimes (*i.e.*, committed 20 years or more prior), and another eight were committed over ten years prior. Some accused were sentenced for more than one offence, but the split between those who committed at least one violent offence (49 or 51 percent) and those who committed only non-violent offences was relatively even (45 or 47 percent).

Sexual offences were the most common type of violent offence and amounted to 29 percent of all offences. The most common non-violent offences were drug related (amounting to 19 percent of all offences), followed by administration of justice offences (14 percent of all offences). Some aggravating factors were listed in 91 percent of the decisions, including prior criminal records (46 percent of all cases). In 52 percent of cases, the individual had no prior record, or the judge deemed it irrelevant (generally on account of the record being very old). The legislation provided a mandatory minimum sentence for at least one of the offences the individual was sentenced for in 23 cases (24 percent).

C. Sentence Imposed

Most individuals received a custodial sentence (77 or 81 percent), with nearly 65 percent receiving over two years to be served in a federal penitentiary. Five individuals received a life sentence. Two individuals received a long-term offender designation and two received a dangerous offender designation. A victim surcharge was imposed in 39 cases (42 percent). In just over 35 percent of cases, the judge recommended that the individual receive specialized programming or accommodation for their health or social needs while in prison. Various orders were included in the sentence, sometimes related, other times not related, to the offence committed. The most common orders were weapon prohibitions (59 percent) and DNA orders (60 percent). Reflective of the rate of sentences for sexual assault, an obligation to register under the *Sex Offender Information Registration Act* (*SOIRA*) was present in 27 percent of cases. Most sentences were never appealed, or the appeal was dismissed or abandoned. In three cases, there was an appeal that resulted in a modification of the sentence.

Among the age group reviewed, people who committed violent offences were much more likely to receive a custodial sentence than a non-custodial

sentence, and more likely to receive a custodial sentence than those who committed only non-violent offences. That said, regardless of the type or the number of offences committed, it was still more likely to receive a custodial sentence than a non-custodial sentence, including for non-violent offences, irrespective of age or health status. In other words, statistically, custodial sentences were the norm in this sample.

TABLE 1. TYPE OF OFFENCE BY TYPE OF SENTENCE

		Non-Custodial sentence		
		Yes	**No**	**Total**
Non-violent offence	**Yes**	13	32	**45**
	No	5	44	**49**
	Total	**18**	**76**	**94**

Chi-square = .021; df 1

V. THEMATIC ANALYSIS OF JUDICIAL DISCOURSE

A. Analysis

We have identified three main categories that reflect *the approaches* judges took in engaging with personal characteristics and experiences. Many decisions fell neatly in one of these large categories, but there was some overlapping, as the decisions did not always illustrate a consistent approach in terms of what the judge seemed to consider a relevant personal factor and why. Within each of these categories, two or three different major themes were observed which reflected *justifications* for the approach chosen by the sentencing judge. Some decisions reflected all themes from their respective category, while in others, one theme appeared particularly developed. In some of the themes observed, several subthemes were also identified. The subthemes generally added a layer of precision to the justification for the approach taken or provided nuance to the circumstances in which the approach was adopted. The three categories with their themes and subthemes will be discussed below.

TABLE 2. CATEGORIES, THEMES, AND SUBTHEMES

Category	Theme	Subtheme
Personal factors cannot positively impact a sentencing decision 38 cases (40%)	Because they are not factors salient to proportionality	N/A
	Because they are aggravating factors	N/A
Personal factors may positively impact a sentencing decision but only in limited circumstances 71 cases (77%)	Because of misconceptions regarding health, age, prison services and programming	Health, age, and intersecting characteristics
		Prison services
		Prison as a site for rehabilitation
	Because of difficulty reconciling personal characteristics with other sentencing principles and goals	Legal factors and deterrence goals
		Mandatory minimum sentences
		The need to rely only on evidence put forward by the parties
	Because they are deemed salient only when there is a proven link between them and the commission of the crime	N/A
Personal factors may positively impact a sentencing decision 13 cases (14% cases)	The public interest can be served by a sentence that does not compromise the individual's well being	N/A
	How someone experiences the sentence matters to its proportionality	N/A

* The percentage of cases is over 100 because there is some overlapping between categories, specifically some cases fit both in Category 1 and Category 2, and a handful fit both in 2 and 3.

1. *Personal Factors Cannot Positively Impact the Sentence*

(a) *Because They Are Not Factors Salient to Proportionality*

In *R v Barker*, the judge noted that "[j]ail is not ruled out merely by virtue of poor health … a doctor's note might excuse an absence from school or work; it will not keep someone from being imprisoned, should prison be an appropriate sentence."[91] In this case, the 30-year difference in age

91 2019 NSPC 24 at para 21 [*Barker*].

between the co-accused and the health challenges of the older individual were deemed irrelevant in measuring the proportionality or otherwise appropriateness of a sentence. Thus, the same sentence was justified for both. Fortunately, the sentence for both accused was a community sentence, but this was deemed appropriate based on the regularly considered factors present.[92]

In *R v Russell*,[93] the judge concluded that the offence was not related to the accused's personal circumstances (addictions, three heart attacks, three stents, required medication, had diabetes, and suffered from a thoracic aortic aneurysm). These health factors did not impact the sentencing outcome, even though the judge acknowledged the individual will have a more difficult time in prison and perhaps require certain programs and treatment for rehabilitation.[94]

Thus, in these cases, as well as in a set of other decisions, the judges subscribed to a strict understanding of proportionality as the product of offence seriousness and blameworthiness understood as responsibility.[95] Only regularly considered factors were used to determine proportionality. Emphasis was placed only on the gravity of the offence, the existence of prior records, and the jurisprudential ranges for offences committed in similar circumstances, with personal characteristics, including serious health conditions and high medical needs, mentioned mostly as background information.

This strict view of proportionality seems interconnected in judicial discourse with the need to achieve deterrence and denunciation goals. Deterrence was construed in these cases both as (1) a feasible goal that

92 *Ibid* at para 24.

93 2019 NSSC 353 at para 8 [*Russell*].

94 *Ibid* at paras 33, 39, 43.

95 *R v Miller*, 2018 NSSC 6 at para 12 [*Miller*]; *R v Levy*, 2015 NSSC 164 at para 21 [*Levy*]; *R v Rhyno* 2013 NSSC 217 at para 59 [*Rhyno*]; *R v Pilgrim*, 2013 NSPC 60 at paras 19–20; *R v MacLeod*, 2013 NSSC 137 at paras 29–31 [*MacLeod*]; *R v Aird*, 2013 NSPC 63 at para 6 [*Aird*]; *R v Polley*, 2014 NSSC 283 at para 24 [*Polley*]; *R v Aoss*, 2016 NSPC 42 at paras 9, 16 [*Aoss*]; *Russell*, *supra* note 93 at paras 18, 32; *R v Beals*, 2015 NSSC 129 at para 3 [*Beals*]; *R v IGL*, 2015 NSSC 277 at paras 8–9 [*IGL*]; *R v MNP*, 2015 NSSC 158 at paras 54–55 [*MNP*]; *R v GHE*, 2017 NSSC 281 at paras 35–43 [*GHE*]; *R v Rancourt*, 2017 NSSC 158 at paras 32, 36–37 [*Rancourt*]; *R v Colpitts*, 2018 NSSC 180 at para 114; *R v Rouse*, 2018 NSSC 240 at paras 54, 75 [*Rouse*]; *R v Willis*, 2018 NSSC 238 at para 69 [*Willis*]; *R v Burnett*, 2019 NSSC 212 at para 32; *R v Matheson*, 2015 NSSC 42 at 55 [*Matheson*]; *R v JP*, 2017 NSPC 54 at para 54; *R v Baxter*, 2018 NSSC 299 at paras 5, 16, 29 [*Baxter*]; *R v Clarke*, 2016 NSSC 101 at paras 35, 41, 45 [*Clarke*]; *R v Halpenny*, 2018 NSSC 30 at paras 35–36 [*Halpenny*]; *R v Chevrefils*, 2019 NSPC 16 at para 29 [*Chevrefils*]; *R v McNutt*, 2020 NSSC 219 at paras 75–78 [*McNutt*].

can be achieved through punishment, and (2) a goal that is only achieved through punishment such as a custodial term.[96] In some cases, the judge's commitment to this understanding of deterrence led them to either reject a joint sentencing submission for a stiffer sentence, or to criticize the joint submission as too lenient, despite accepting it.[97]

(b) *Because They Count as Aggravating Factors*

In some cases, old age was part of the argument as to why deterrence should be emphasized over other goals and was essentially integrated in the decision as an aggravating factor that justified a more severe sentence.[98] When the accused had a prior record, the relationship between age, prior record, and inability to reform tended to be further emphasized.[99]

In *R v Rouse*, in light of personal circumstances, including his age, and the fact that there is nothing to suggest otherwise, the offender was deemed incapable of learning from his past mistakes.[100] In *R v Baxter*, reoffending in older age was described as a personal decision of the individual to spend the rest of his life in prison: "At some point you are going to have to make a decision as to where you intend to spend the rest of your life, whether it's going to be in prison, or not. At your age, maybe the decision is already evident. It will be up to you to decide how you want to spend your old age."[101]

In *R v Rhyno*, the judge juxtaposed the prior record with the age of the accused and his long term mental health problems to imply that an age of 51 is too old to rehabilitate mental health.[102] Occasionally, personal challenges such as disability and illiteracy, have been described as "setbacks" and the burden of overcoming them or seeking treatment rested solely with the individual, even when these factors have influenced the commission of the offence.[103] The potential lack of community or prison resources that may hinder individual efforts to overcome "setbacks" was not acknowledged.

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96 *Aird*, *supra* note 95; *Aoss*, *supra* note 95; *R v Sinclair*, 2013 NSSC 86 [*Sinclair*]; *R v Dunbar*, 2019 NSSC 96 [*Dunbar*].

97 *R v MacPherson*, 2014 NSPC 13 at para 28 [*MacPherson*]; *R v ESM*, 2017 NSPC 56 at paras 20, 23 [*ESM*].

98 *Matheson*, *supra* note 95 at para 54; *R v Bowen*, 2013 NSPC 117 at para 130 [*Bowen*].

99 *Matheson*, *supra* note 95 at paras 55, 57; *R v Pelley*, 2015 NSPC 30 at para 12 [*Pelley*]; *Bowen*, *supra* note 98 at para 130.

100 *Rouse*, *supra* note 95 at para 61.

101 *Baxter*, *supra* note 95 at para 29.

102 *Rhyno*, *supra* note 95 at paras 54, 58.

103 *R v JO*, 2014 NSSC 365 at paras 4, 5, 34 [*JO*]. See also *R v Dockrill*, 2016 NSSC 56 at para 127 [*Dockrill*]; *R v Farrow*, 2018 NSSC 242 at para 16 [*Farrow*]; *Miller*, *supra* note 95 at paras 9, 13;

Absent any perceived hopes for rehabilitation, the older individual was deemed deserving of a hard lesson ("you've got to stay away from that bad medicine. You understand that now, don't you?").[104] At the very least, a stiffer sentence imposed on someone who was older was seen as valuable for general deterrence.[105] In these cases, the lack of hope for individual rehabilitation served as an argument to justify heightened emphasis on deterrence. Yet, as discussed in the next category, in the case of historic offences (and occasionally others), despite proof of rehabilitation or potential for rehabilitation, the judge still noted the importance of emphasizing deterrence.

Occasionally, the argument for age as an aggravating factor was linked to the narrative of the dangerous old man that has little value to society, where society still needs protection from him.[106] For instance, talking about a 51-year-old accused and the need to impose a long prison sentence, the sentencing judge in *R v Bowen* noted that 70-year-old "psychopaths" can still find ways to be dangerous despite being less physically capable of acting in a dangerous way.[107]

Interpreting personal circumstances indicative of vulnerabilities as aggravating factors and using them to justify stiffer sentences is not unique to the context of aging prisoners, but it is problematic. Researchers have raised concerns about how *Gladue* factors, intended to provide individual and systemic context for the crimes committed by Indigenous people, are sometimes used to identify risk, and thus are factored as aggravating.[108]

2. *Personal Factors May Positively Impact the Sentence but Only in Limited Circumstances*

In a large set of cases, judges engaged quite extensively with personal characteristics. Yet, as discussed below, assessing their exact role and weight appeared to be a struggle for many, either when trying to reconcile them with seemingly incompatible principles of sentencing, with other legal requirements, or when judges did not have adequate information about

R v Jardine, 2014 NSPC 59 at para 40 [*Jardine*]; *Pelley*, *supra* note 99 at para 12; *MacLeod*, *supra* note 95 at para 25; *Beals*, *supra* note 95 at para 9.

104 *Beals*, *supra* note 95 at para 9.

105 *Chevrefils*, *supra* note 95 at para 29; *R v Taweel*, 2014 NSSC 310 at para 116 [*Taweel*].

106 See e.g. *R v Stewart*, 2013 NSPC 64 at para 27 [*Stewart*]; *R v Terriak*, 2019 NSPC 40 at para 124 [*Terriak*].

107 *Bowen*, *supra* note 98 at para 130.

108 See e.g. Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 83–84.

the implications of the individual's health status or the availability of services in prisons.

(a) *Because of Misconceptions Regarding Health, Age, Prison Services and Programming Available*

(i) *Misconceptions Regarding Health, Age, and Other Intersecting Characteristics*

People with significant physical disabilities (*i.e.*, using a wheelchair or not having function of half their body) were occasionally described as healthy, without a reflection on the prison infrastructure in correctional institutions that would make it challenging for the individual to be accommodated. Addictions or mental disabilities were sometimes not regarded by courts as health issues.[109] As such, despite an enumeration of addictions and mental health issues, the judges in some cases concluded that the individual was in good health.[110] In other cases, this conclusion followed a listing of numerous physical health concerns, or a mix of physical and mental illnesses. For instance, in *R v JSM*, the individual was diagnosed with high cholesterol, high blood pressure, asthma, and needed a knee replacement, but was deemed in "good health".[111] A similar characterization was provided in *R v Hamilton*,[112] despite the individual having pancreatitis and a disabled leg. Furthermore, in this case, the court implied that his disability was brought on by his alcoholism and hence he was somehow responsible for it.[113] In *R v Dunbar*, the accused's health was accepted as "okay", despite the individual being diagnosed with arthritis, diabetes, epilepsy, hepatitis C, anorexia, ADHD, and bipolar disorder.[114]

To make the conclusion of good health in these situations is likely based on a presumption that each of these conditions is "manageable" with treatment. First, such a characterization does not consider that the impact of several conditions on one individual is greater than the sum of those diseases, as they each interact with an overall debilitated body.[115] Second, the

109 *JO*, *supra* note 103 at para 21; *R v RRI*, 2016 NSPC 66 at para 60 [*RRI*].

110 See e.g. *R v Burton*, 2017 NSSC 181 at para 8 [*Burton*]; *R v Howe*, 2018 NSSC 274 at para 81; *Dunbar*, *supra* note 96 at para 15.

111 2016 NSSC 158 at para 28 [*JSM*].

112 2018 NSPC 18 at para 16 [*Hamilton*].

113 *Ibid*.

114 *Dunbar*, *supra* note 96 at para 15.

115 See e.g. Barbara Starfield, "Threads and Yarns: Weaving the Tapestry of Comorbidity" (2006) 4:2 Annal Family Medicine 101; Martin Fortin et al, "Multimorbidity's Many Challenges" (2007) 334:7602 British Medical J 1016; Ronald Gijsen et al, "Causes and Consequences of Comorbidity: A Review" (2001) 54:7 J Clinical Epidemiology 661.

presumption also does not consider that the impact of health conditions is much more severe in older than in younger age.[116] The impact is also more severe on people who have a history of addiction or living in poverty.[117] Third, the presumption does not consider the fact that absent adequate treatment, these are all very serious conditions. Lack of proper care, accommodation, nutrition, and prevention of acute conditions, like infections, lead to significant complications in patients with comorbidities.[118] As discussed above, medical treatment, as well as accommodation, and adequate nutrition in prisons are far from a guarantee, even though they often seem to be taken for granted by judges.[119] In other words, someone in their 30s, with access to proper treatment and nutrition, living in an accommodating community, may be described as in good health if they have asthma, a disabled leg, high cholesterol, and high blood pressure. A 60-year-old with the same conditions, whose access to treatment is at best intermittent, and who lives in a stressful prison environment with a challenging infrastructure, should probably not be described as being in good health.

Thus, Courts rarely contextualized minor health issues on the background of age. Courts also missed the intersections and interactions of various markers of vulnerability. Furthermore, in these cases, or in cases where there did not appear to be any health conditions, judges did not engage with age at all. Judges rarely appeared to be concerned with the length of incarceration and the age the individual will have reached when eligible for release, despite jurisprudence holding that a sentence that contemplates the individual dying in prison will amount to an excessive

116 See e.g. Jennifer L Wolff, Barbara Starfield & Gerard Anderson, "Prevalence, Expenditures, and Complications of Multiple Chronic Conditions in the Elderly" (2002) 162:20 Archives Internal Medicine 2269; Alessandra Marengoni et al, "Aging with Multimorbidity: A Systematic Review of the Literature" (2011) 10:14 Ageing Research Rev's 430; Bruno P Nunes et al, "Multimorbidity and Mortality in Older Adults: A Systematic Review and Meta-analysis" (2016) 67 Archives Gerontology & Geriatrics 130.

117 See e.g. Elizabeth R Walker & Benjamin G Druss, "Cumulative Burden of Comorbid Mental Disorders, Substance use Disorders, Chronic Medical Conditions, and Poverty on Health Among Adults in the USA" (2017) 22:6 Psychology, Health & Medicine 727; Sukyong Seo et al, "Is Transient and Persistent Poverty Harmful to Multimorbidity?: Model Testing Algorithms" (2019) 16:13 Intl J Envtl Research & Pub Health 1; Raphael Mendonça Guimarães & Flavia Cristina Drumond Andrade, "Healthy Life-Expectancy and Multimorbidity Among Older Adults: Do Inequality and Poverty Matter?" (2020) 90 Archives Gerontology & Geriatrics 1.

118 See e.g. Bo Chen et al, "Effect of Poor Nutritional Status and Comorbidities on the Occurrence and Outcome of Pneumonia in Elderly Adults" (2021) 8 Frontiers in Medicine 1; Lisa Söderström et al, "Malnutrition is Associated with Increased Mortality in Older Adults Regardless of the Cause of Death" (2017) 117:4 British J Nutrition 532.

119 See e.g. OCI & CHRC, "Annual Report: 2018–2019", *supra* note 2.

and crushing sentence not aligned with principles of reintegration and rehabilitation.[120] Judges generally did not reflect on the challenges of aging in a prison, or on how fast health deteriorates in older age (in and outside prison). For instance, in *R v Surette*,[121] the judge noted that because the individual said he was in good health, but otherwise did not give any consideration to how prison would impact him, given his age.

The challenge in understanding the relationship between age and health may be further complicated by the fact that individuals in their 50s and 60s are often not considered "elderly" within the community. This could explain why judges were less likely to consider age as a factor when individuals were in their 50s or early 60s, except in cases where age was seen as an aggravating factor, as discussed in the first category.[122] However, as the research discussed above shows, aging in the community is very different than aging in prison. Even a few years in prison can have long lasting consequences on health, which contributes to the phenomenon of "accelerating aging" among prison populations. Failure by legal professionals and prison administrators to understand the interplay between age (even below the seniority limit used in the community) and various health conditions, and to adequately engage with these needs, explains accelerated aging and lower life expectancy are prevalent in prisons.

The way these cases engaged with age (*i.e.*, a neutral factor, absent any health condition perceived as very serious) is very similar to how the studies conducted by Renaud and Manoukian reportedly treated it decades ago.[123] This is despite the fact that there is a lot more information available now about the impact incarceration has on health generally and in older age specifically.

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120 *R v M (CA)*, 1996 CanLII 230 at paras 42, 74 (SCC) [*M (CA)*]. See also *R v Adams*, 2010 NSCA 42 at para 21.

121 2019 NSPC 46 at paras 16, 103.

122 *Sinclair*, *supra* note 96; *Rhyno*, *supra* note 95; *R v Reddick*, 2013 NSSC 70 [*Reddick* 2013]; *MacLeod*, *supra* note 95; *R v Donovan*, 2013 NSPC 83; *R v Murphy*, 2014 NSSC 14 [*Murphy*]; *R v GKN*, 2014 NSSC 150 [*GKN*]; *R v DJM*, 2014 NSSC 370 [*DJM*]; *R v Connolly*, 2014 NSPC 68; *R v Sheppard*, 2015 NSPC 23 [*Sheppard*]; *MNP*, *supra* note 95; *IGL*, *supra* note 95; *R v FH*, 2015 NSSC 43 [*FH*]; *R v Villeneuve*, 2016 NSSC 223 [*Villeneuve*]; *R v Shea*, 2016 NSSC 20 [*Shea*]; *R v Rushton*, 2016 NSSC 313 [*Rushton*]; *R v Greene*, 2016 NSSC 332 [*Greene*]; *R v Cain*, 2016 NSPC 54 [*Cain*]; *R v Reddick*, 2017 NSSC 189 [*Reddick* 2017]; *Rancourt*, *supra* note 95; *GHE*, *supra* note 95; *ESM*, *supra* note 97; *R v Delgado*, 2017 NSPC 74 [*Delgado*]; *R v Comeau*, 2017 NSSC 208 [*Comeau*]; *Willis*, *supra* note 95; *R v Lyle*, 2018 NSSC 124 [*Lyle*]; *Russell*, *supra* note 93.

123 Renaud, *supra* note 49; Manoukian, *supra* note 49.

(ii) *Misconceptions and Misinformation Regarding Prison Services*

In another set of cases, judges did recognize that the health of the individual before them was poor. Yet, the judges often did not engage with the issue of whether health care services were available to manage those conditions in prison at all. For instance, in *R v Connolly*[124] the individual had gone through open heart surgery and multiple strokes, had an aneurysm, bowel cancer, prostrate problems, cardiovascular problems, and depression; yet, there was no discussion on how these health conditions would be managed in prison.[125] This suggests either that the judge regarded the availability of health care as implicit or did not believe that it should have any impact on the decision.

In a number of cases, the judge turned their mind to service availability and expressed their belief that prisons provided the treatment, programing, accommodation, or even highly specialized medical care that would meet the prisoner's needs.[126] In most cases, it is unclear what informed this belief, and it stands in contrast with the scholarly research and governmental reports discussed above that reach a very different conclusion on the availability and adequacy of basic medical care, let alone specialized care in prisons. In a couple of cases, judges noted that there is "no evidence" for them to believe that the prison could not attend to the high needs of the individual, and that, ultimately, the prison has an obligation to provide adequate care, so absence of care cannot be a salient sentencing factor.[127] "No evidence" probably means "no evidence brought forward by the defence", because there otherwise is significant evidence that prisons cannot attend to high needs. Additionally, when judges directly or indirectly disregard the availability and quality of prison services as salient factors, they distance themselves from any responsibility regarding the experiential impact of the sentence they render by fully separating sentencing from

124 2013 NSSC 215 at para 1 [*Connolly*].

125 *Reddick* 2013, *supra* note 122 at para 7; *Reddick* 2017, *supra* note 122 at paras 7–10; *DJM*, *supra* note 122 at para 8; *MacLeod*, *supra* note 95 at paras 24–25; *R v Brewer*, 2014 NSSC 109 at para 3; *MNP*, *supra* note 95 at para 26; *FH*, *supra* note 122 at para 23; *Villeneuve*, *supra* note 122 at para 4; *Rouse*, *supra* note 95 at para 1; *Farrow*, *supra* note 103 at paras 13–16, 19–22; *R v LeBlanc*, 2019 NSSC 192 at para 40 [*LeBlanc*]; *Murphy*, *supra* note 122 at para 5; *Dockrill*, *supra* note 103 at para 127.

126 *Sinclair*, *supra* note 96 at para 37; *Shea*, *supra* note 122 at para 11; *Villeneuve*, *supra* note 122 at para 11; *Stewart*, *supra* note 106 at para 16; *JO*, *supra* note 103 at para 21; *Murphy*, *supra* note 122 at para 15; *Baxter*, *supra* note 95 at para 28.

127 *R v Heickert*, 2020 NSPC 9 at para 70 [*Heickert*]; *Comeau*, *supra* note 122 at para 60.

prison law.[128] This is keeping in tune with the formal equality-grounded view that sentence severity is just the product of its duration and not of how it impacts the individual.

Finally, in a few other cases, such as *R v CRA*,[129] the judge sought confirmation through counsel, from prison authorities, that cancer treatment was available. The individual was 72 and was undergoing cancer treatment.[130] He had been convicted of a historic crime, and the judge noted the fact that the accused had clearly been rehabilitated in the years since and that he was very remorseful.[131] Yet, without a mandatory minimum in place and without any further discussion on the availability of adequate medical services, he received a custodial sentence.[132] Unfortunately, a confirmation that "yes, there is some cancer treatment available", does not reflect the documented challenges of treatment transfer between community and prison, as well as the challenges in obtaining specialized treatment that requires trips to community hospitals.

Additionally, there may be a difference between policies on paper and their implementation on the ground. Even when prison officials are called to testify in court on policies, their representation of how these policies are implemented may be inaccurate. This may be either because senior officials are unfamiliar with what happens on the ground or because saying they cannot provide adequate care is problematic, given that prisons have an obligation to provide such care.

(iii) *Misconceptions Regarding Prison as a Site of Rehabilitation*

In some cases, judges relied on their belief of the services available in prisons not only to justify why a custodial sentence is not detrimental to the person sentenced, but also to suggest further that a prison sentence is needed by the individual. For instance, where the individual did not have social support or family, the judge made a point of highlighting that the best place for an individual to improve was prison.[133] In fact, the more heightened the needs of the individual in terms of social support and health programming, the more likely some judges were to impose longer sentences so that the accused would have time to benefit from prison resources and

128 On this common pattern, see generally Dagan & Baron, *supra* note 9.

129 2017 NSSC 348 at para 21 [*CRA*].

130 *Ibid* at para 18.

131 *Ibid* at para 19.

132 *Ibid* at paras 41, 46.

133 *R v Garland*, 2013 NSPC 27 at paras 79, 86 [*Garland*]; *R v JP*, 2013 NSSC 65 at paras 18, 84 [*JP* 2013].

have a "productive time".[134] Even when judges acknowledged the positive steps towards self-improvement, they sometimes still viewed prison as a necessary part of the rehabilitation journey.[135]

In addition, where judges tried to reconcile deterrence and rehabilitation as sentencing goals, they underscored the belief that rehabilitation is possible (and sometimes only achievable) in prison. Thus, judges were more readily accepting of the idea that prisons serve as sites of rehabilitation than, as discussed under the next subtheme, they were of the notion that deterrence could be achieved through a sentence served under community supervision.[136]

Yet, socio-legal scholarship has been skeptical about the rehabilitative value of prisons since the 1970s.[137] This is because prison programs have regularly proven to be deficient in design, implementation, and availability, and because the prison environment itself has extensive negative psychological effects on the individual, which hinder rehabilitation.[138] In Canada specifically, the OCI has regularly reported significant and prevalent deficiencies of CSC's correctional programs, while the Senate's Standing Committee on Human Rights report on incarcerated people provides strong criticism on the poor quality of programming in federal institutions.[139] In addition, appellate courts in other provinces have found it inappropriate to impose a custodial sentence so that people "benefit" from correctional programs.[140]

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134 *GKN*, *supra* note 122 at paras 57–58; *Jardine*, *supra* note 103 at para 44.

135 *Cain*, *supra* note 122 at paras 11–13, 22.

136 *Ibid* at 18–19; *Baxter*, *supra* note 95 at para 28; *MacPherson*, *supra* note 97 at paras 13, 28; *GKN*, *supra* note 122 at para 57; *Garland*, *supra* note 133 at para 86.

137 Craig Haney, "The Psychological Effects of Imprisonment" in Joan Petersilia & Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections* (Oxford: Oxford University Press, 2012) 584 at 585.

138 Doris Layton MacKenzie, "The Effectiveness of Corrections - Based Work and Academic and Vocational Education Programs" in Joan Petersilia & Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections* (Oxford: Oxford University Press, 2012) 492 at 492–514; Haney, *supra* note 135; John D Wooldredge, "Inmate Experiences and Psychological Well-Being" (1999) 26:2 Crim Justice and Behavior 235; Allison Liebling et al, "Revisiting Prison Suicide: The Role of Fairness and Distress" in Allison Liebling & Shadd Maruna, eds, *The Effects of Imprisonment* (Cullompton: Willan Publishing, 2005) 209.

139 Canada, Office of the Correctional Investigator, *Annual Report: 2019–2020* (Ottawa: Correctional Investigator Canada, 2020) at 67–86, online: <oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20192020-eng.pdf>; OCI & CHRC, "Aging and Dying", *supra* note 3 at 25; Senate, *supra* note 53 at 187–227.

140 *R v Sharma*, 2020 ONCA 478 at para 160.

(b) *Because They Are Difficult to Reconcile with Other Sentencing Principles and Goals*

(i) *Personal Characteristics and Deterrence Goals*

In several cases, judges were prepared to consider personal factors such as age and health, but only where the gravity of the crime and the need for deterrence did not require otherwise. These cases are similar to those discussed in the first category, where the gravity of the crime was given primary consideration. However, unlike in that set of cases, the judges here accepted that additional factors may play a role, but these were of secondary importance and were trumped by the seriousness of the offence.[141] For instance, in *RRI*, the judge noted that poor health is a factor to be considered at sentencing, but it is outweighed by personal characteristics.[142] The judge tried to mitigate the health concerns by making recommendations for accommodation in prison.[143]

It also appears that judges sometimes believed that deterrence and denunciation are incompatible with rehabilitation, and that aiming for the latter would allow for an investigation into the circumstances of the accused, whereas the former could be undermined by such an inquiry.[144] In addition, judges used the need for deterrence and denunciation as a benchmark even in some cases where they expressly noted that the individual was not a safety risk, was rehabilitated, and would not gain any benefit from imprisonment.[145] This was common for historic offences.[146] Thus, where the *Criminal Code* or the jurisprudence emphasized deterrence and denunciation as main goals for a specific offence, the tendency was to afford less weight to the circumstances of the accused.

In other cases, the judge concluded that while a serious offence, it was not among the most serious of offences, allowing for a slight reduction in sentence to account for some personal circumstances. In *JSM*, the judge considered old age as a mitigating factor, which was reflected in the sentence; however, the judge dismissed the individual's numerous health

141 *Heickert*, *supra* note 125 at para 71; *Terriak*, *supra* note 106 at para 128.

142 *RRI*, *supra* note 109 at para 60.

143 *Ibid* at para 73.

144 *JP* 2013, *supra* note 133 at para 69; *Aird*, *supra* note 95 at para 9; *Taweel*, *supra* note 105; *Pelley*, *supra* note 99; *Polley*, *supra* note 95; *Halpenny*, *supra* note 95; *Terriak*, *supra* note 106 at para 119; *R v Landry*, 2014 NSPC 46 at para 26 [*Landry*].

145 *JP* 2013, *supra* note 133 at para 69; *Aird*, *supra* note 95 at para 9; *Taweel*, *supra* note 105; *Pelley*, *supra* note 99; *Polley*, *supra* note 95; *Halpenny*, *supra* note 95; *Terriak*, *supra* note 106 at para 119; *Landry*, *supra* note 144 at para 26.

146 *CRA*, *supra* note 129; *ESM*, *supra* note 97; *McNutt*, *supra* note 95; *Clarke*, *supra* note 95.

concerns.[147] In *JSM* and other cases where the judges may have reduced sentences due to some personal factors deemed mitigating, judges typically did not engage with whether medical services and accommodations were available in prison.[148] This is likely because they had already decided that the severity of the crime warranted some significant custodial time.

While it may not be unusual to grant less weight to some mitigating factors when the offence is very serious, denunciation cannot be the sole objective a sentence aims to achieve.[149] It is unclear what other goals the sentences in some of the above cases achieved. There is also Supreme Court of Canada authority that supports the proposition that even where deterrence is of paramount importance, other principles and goals, including rehabilitation and reintegration, have a role to play, and calls into question the deterrent effect of harsh sentences that are insensitive to the offender's circumstances.[150] Moreover, there are appellate level cases that make it clear that deterrence can be achieved in various ways, including, and perhaps especially, through sentences that fit the circumstances of the offender, including non-custodial sentences.[151] Thus, some of the cases in this subgroup (and all of the cases in the first category discussed above) may be at odds with appellate jurisprudence.

(ii) *Mandatory Minimum Sentences*

In several decisions reviewed, judges were bound by mandatory minimum sentences for the crimes the individuals had been convicted of. In some of these cases, judges seemed to consider whether community sentences would be better suited to respond to the needs of the individual. For instance, in *R v MacDonald*,[152] the Court noted that they were bound by the mandatory minimum but acknowledged that community mandatory counselling would better meet the person's needs. As a result, they imposed the minimum time in custody and added probation with orders of mandatory community

147 *JSM*, *supra* note 111 at paras 28, 46.

148 *Connolly* 2013, *supra* note 124 at para 20; *DJM*, *supra* note 122 at para 10; *Cain*, *supra* note 122 at para 11; *Rushton*, *supra* note 122 at paras 36–37; *Comeau*, *supra* note 122 at para 73; *Lyle*, *supra* note 122 at para 19; *R v WFB*, 2015 NSSC 353 at paras 104–106 [*WFB*]; *R v Fizzard*, 2020 NSSC 54 at para 32 [*Fizzard*].

149 *R v Lacasse*, 2015 SCC 64 at para 79 [*Lacasse*]; *M (CA)*, *supra* note 120 at para 82.

150 See e.g. *R v Bissonnette*, 2022 SCC 23 at paras 92–94. See also *R v Proulx*, 2000 SCC 5 at para 107 [*Proulx*]; *R v Nur*, 2015 SCC 15 at paras 112–14; *Gladue*, *supra* note 20 at paras 79–80.

151 *Proulx*, *supra* note 150 at paras 22, 112, 107. See also *Lacasse*, *supra* note 149 at paras 132–34 (dissent); *R v Anderson*, 2021 NSCA 62 at paras 150–59 [*Anderson* 2021]; *Gladue*, *supra* note 20 at para 92.

152 2015 NSPC 56 at para 47 [*MacDonald*].

programs. This may indicate that the judge believed that the accused would not get the best rehabilitative programs in prison, and that they will likely need treatment after serving their mandatory custodial sentence.[153]

In *Dockrill*, the Court noted that the mandatory minimum demanded prison time, despite the significant challenges faced by the individual.[154] The judge then proceeded to place the burden on the accused to seek out and access programs and services provided in prison that would help him better himself. The availability of these services, in contrast to *MacDonald*, is taken for granted by the judge.[155] In other cases, judges noted some personal factors, and sometimes even highlighted their impact on the crime, but did not address them any further in the context of the mandatory minimum sentence they had to impose.[156]

(iii) *The Need for the Judge to Rely on Evidence Put Forward by the Parties*

In another set of cases, judges both turned their minds to the individual struggles of the person before them and, after discussing their health issues, expressed concerns regarding the fact that a prison sentence may further jeopardize their health. However, even in these cases, judges were generally reluctant to conclude that prisons are unable to fulfill the high needs of individuals, or to impose a non-custodial sentence. For instance, in *Comeau*, the judge noted that without positive evidence from the defence that prisons *cannot* respond to the needs of the sentenced person, they could not factor those concerns, in any way, into the decision.[157] This contrasts with *R v Al-Awaid*[158] (discussed below), where the judge refused to impose a prison sentence because there was no evidence that the prison *could* respond to the needs of the sentenced individual.

(c) *There Must Be a Proven Nexus Between the Personal Characteristics Considered and the Offence Committed*

When the personal circumstances of the individual being sentenced could be construed as having influenced the commission of the crime, it was

153 *Ibid* at para 25.

154 *Dockrill*, *supra* note 103 at paras 126, 144.

155 *Ibid* at para 142.

156 *R v Calnen*, 2016 NSSC 35; *Greene*, *supra* note 122; *Rushton*, *supra* note 122; *R v Mercer*, 2017 NSPC 20.

157 *Comeau*, *supra* note 122 at para 73. A comparable approach was taken in some cases regarding the consideration of other personal struggles that may have directly influenced the commission of the offence, see e.g. *R v Gerald Desmond*, 2018 NSSC 338 at para 29; *R v Blumenthal*, 2019 NSSC 35 at para 9.

158 2015 NSPC 52 at para 153 [*Al-Awaid*].

much more likely that they would be considered at sentencing, generally as mitigating factors impacting the blameworthiness of the person. For instance, if the individual had an addiction that influenced their actions, some judges took that into account.[159] In these cases, the nexus between the salient characteristics, the offence, and the responsibility of the accused were highlighted. Notably, in *Baillie*, the judge noted that addiction was the root cause of the offence and that the individual could go long stretches of time without offending until he fell back into using drugs.[160] The judge juxtaposed the use of drugs with diminished responsibility, which justified a more lenient sentence. The judge also refused to consider the prior record as aggravating because those sentences were served, and the individual should not be punished for past offences.[161]

Some judges also highlighted the fact that unless the root causes of crime are addressed, a sentence would not deter the individual from reoffending. In *MacDonald*, the judge noted that, given that the crime was likely committed due to addiction, "it is questionable whether someone similarly inclined—and impaired—as Mr. MacDonald would be deterred very much, on the spur of a drunken moment, by a punishment imposed in a court room that might come to the attention of very few."[162]

This direction is not surprising as it is rooted in jurisprudence. It has long been the case that factors bearing on responsibility ought to be reflected in the sentence as mitigating.[163] Similarly, where *Gladue* factors are present, these ought to be given effect. For instance, in *Gloade*, the extensive health issues of the individual were discussed together with the *Gladue* factors.[164] The Court here also noted the successful efforts by the sentenced person towards rehabilitation. With some regularity, if the person made efforts towards treatment and rehabilitation, judges factored that in, together with the addiction that impacted the crime, as a mitigating factor that sometimes justified less emphasis on deterrence.[165]

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159 *R v Baillie*, 2016 NSPC 11 at para 5 [*Baillie*]; *Delgado*, *supra* note 122 at para 141; *Hamilton*, *supra* note 112 at paras 13, 19, 48; *MacDonald*, *supra* note 152 at paras 5, 36.

160 *Baillie*, *supra* note 159 at para 7.

161 *Ibid* at para 8.

162 *MacDonald*, *supra* note 152 at para 63.

163 The issue of mitigating factors and nexus to crime has been most recently discussed in the context of race and racism in *Morris*, *supra* note 22 at paras 97–100.

164 *R v Gloade*, 2019 NSPC 55 at paras 14–27.

165 *Ibid* at para 157; *Delgado*, *supra* note 122 at paras 64, 141, 158; *Reddick* 2013, *supra* note 122 at paras 15–16; *Burton*, *supra* note 110 at para 8; *Hamilton*, *supra* note 112 at paras 17–23, 30–34; *R v Redden*, 2017 NSSC 172 at paras 16–17, 29, 33 [*Redden*].

Looking for a nexus between characteristics and the offence is part of the degree of responsibility analysis and thus it is not anything novel in Canadian sentencing. These approaches, even if on solid jurisprudential ground, stand out in our sample and are not necessarily the norm. They are in contrast with the cases discussed above where judges held the individual accountable for failing to take control of their addictions or mental health challenges, construed them as aggravating factors, especially when juxtaposed with a criminal record, or simply ignored individual struggles and efforts made towards rehabilitation.

In the final category discussed below, judges took the inquiry into personal characteristics a step further and did not stop at those personal factors that had a nexus to the crime itself. This is a different way of engaging with personal characteristics because it recognizes that characteristics may impact the experiential severity of a punishment, and hence the proportionality of the sentence rendered, even if there is no nexus between them and the offence committed. Instead, in this final category, judges took a holistic approach to proportionality and inquired into the health of the individual at sentencing, their foreseeable experience of the punishment, and the likelihood of them dying in prison.

3. *Personal Factors Reduce the Severity of a Sentence*

(a) *Because the Public Interest Can Be Served by a Sentence That Does Not Compromise Individual Well-Being*

Not surprisingly, the need for deterrence was discussed in almost all the decisions reviewed, which indicates both the importance the criminal justice system places on it and the fact that many other factors and goals are interpreted in relation to deterrence. This is not something that can be simply imputed to individual judges; the law, despite decades of scholarly work undermining the notion that deterrence can be achieved through severe punishments, insists on the fact that sentences must be tailored to achieve this goal, sometimes with priority.[166]

166 See e.g. Anthony N Doob & Cheryl Marie Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis" (2003) 30 Crime & Justice 143; Raymond Paternoster, "How Much Do We Really Know About Criminal Deterrence?" (2010) 100:3 J Crim L & Criminology 765; Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:4 Man LJ 149; Ellen A C Raaijmakers et al, "Why Longer Prison Terms Fail to Serve a Specific Deterrent Effect: An Empirical Assessment on the Remembered Severity of Imprisonment" (2017) 23:1 Psychology, Crime & L 32 at 32–55; *Criminal Code*, *supra* note 7, ss 718(b), 718.01–718.04;

That said, a few judges went out of their way to emphasize that deterrence can be achieved by imposing less severe prison sentences or sometimes even non-custodial sentences.[167] In other words, in these cases, unlike the cases from Categories 1 and 2, deterrence was not equated with a long prison sentence. Instead, these judges decided on a sentence that is not unduly harsh for that individual by considering their individual needs and the importance of access to community programs that would serve them best. This is because ensuring people get the best support to overcome their struggles serves public safety.[168]

In negotiating the relationship between deterrence and rehabilitation, these judges did not see them as incompatible. For instance, in *Beaton*, the Court gave effect to personal characteristics, noting that being older (51) did not mean he could not be rehabilitated. On the contrary, the personal circumstances were indicative of an understanding that a long prison sentence was not needed to achieve a deterrent effect and that a non-custodial sentence would help with the individual's rehabilitation.[169] In addition, the judge emphasized the collateral consequences of the crime on the life of the sentenced person in explaining why deterrence should not be a main consideration in deciding upon a fit sentence. In *Sheppard*, despite the individual having a lengthy record and the victim's frustration with the restitution order, the judge recognized the sentenced person's older age, and other personal circumstances and needs, as reasons for accepting a joint submission for a non-custodial sentence that would allow the individual to access rehabilitative community resources.[170]

In other cases, judges factored in age and health to justify the fact that the individual was in a situation where they were unlikely to reoffend, and therefore a less severe sentence was warranted. This conclusion departs from those reached by some judges in the historic cases discussed above where—despite concluding that the individual was rehabilitated, remorseful, and had high needs—primary effect was given to deterrence through a stiff custodial sentence. In *Redden*, for instance, the Court recognized the

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Lacasse, *supra* note 149 at paras 73–105, 127–34; *Morris*, *supra* note 22 at paras 69–86, 126–31, 149–54.

167 As already mentioned above, this approach is aligned with existing appellant authorities, see e.g. *Proulx*, *supra* note 150; *Gladue*, *supra* note 20.

168 *Reddick* 2013, *supra* note 122 at para 41; *R v Beaton*, 2014 NSSC 186 at paras 72, 85 [*Beaton*]; *Burton*, *supra* note 110 at paras 26–28; *Delgado*, *supra* note 122 at paras 158, 163; *Hamilton*, *supra* note 112 at paras 39, 44–50; *MacDonald*, *supra* note 152 at para 36.

169 *Beaton*, *supra* note 168 at paras 72, 85. See also *Al-Awaid*, *supra* note 158 at paras 92, 153.

170 *Sheppard*, *supra* note 122 at para 78.

diminished public threat a senior with health issues posed. The judge also noted that this, along with other personal circumstances, indicated that he was low risk, rehabilitated, and remorseful.[171] As the individual was not a danger to the public, deterrence was no longer seen as a salient goal.

Similarly, in *LeBlanc*, the judge distinguished the two co-accused based on age, health, and date of their respective criminal records, in addition to their potentially different roles in the commission of the crime.[172] The decision specifies that, for the older individual, the presence of certain personal factors leads to a diminished need for the goals of deterrence and denunciation to be emphasized. Based on these factors, the older person received a different, less severe sentence than his co-accused.

(b) *Because the Experience of Punishment Matters to Sentence Proportionality*

In a few cases, judges noted that factors that influence how the individual will experience incarceration, such as age and poor health, are mitigating factors for the purpose of sentencing.[173] The gravity of the offence would still be accounted for; however, just like any other mitigating factors, personal factors were not excluded from consideration because of the presence of aggravating factors. In contrast with the cases discussed in Category 1, and some cases from Category 2, all factors, including personal characteristics, were discussed together and given similar weight, which meant the final sentence for an old, sick individual was less severe than it would have been for someone younger and in better health who committed a similarly serious offence.[174]

In a small number of cases, judges went as far as to discuss at length the impact a sentence might have on people with various characteristics and deemed this experience directly relevant to sentence proportionality. In *Al-Awaid*, a decision that seems to have anticipated in some respects the Supreme Court of Canada's more recent *Suter* decision, the judge specifically recognized the fact that the same sentence imposed on someone who presents with health risks and someone who is healthy will have a disproportionate effect on the former, and thus needs adapting.[175] The judge

171 *Redden*, *supra* note 165 at paras 16–17, 29, 33. See also *Beaton*, *supra* note 168 at paras 83, 85.

172 *LeBlanc*, *supra* note 125 at paras 52, 54.

173 *WFB*, *supra* note 148 at para 9; *Lyle*, *supra* note 122 at paras 7, 19; *Fizzard*, *supra* note 148 at para 32.

174 *LeBlanc*, *supra* note 125 at paras 54–55; *R v Withrow*, 2019 NSSC 270 at para 34.

175 *Al-Awaid*, *supra* note 158 at para 154; *Suter*, *supra* note 26.

noted that, where some custodial time is needed, the CSC has a concrete obligation to prevent health tragedies. However, after careful consideration of the numerous comorbidities the individual presented with (hypertension, hypothyroidism, elevated cholesterol, gout, type 2 diabetes, kidney and eye damage) and of his care needs, the judge noted that she would impose a community sentence because she was:

> [S]imply not satisfied that the Correctional Service of Canada can safely and effectively monitor and treat Mr. Al-Awaid's very significant health issues. This is not a case where I am dealing with an offender who is a danger or has committed a violent offence. What I am dealing with is an offender whom, I believe, stands a real risk of experiencing a life-threatening medical event in prison. Even short of that, the evidence of … [multiple doctors] establishes that Mr. Al-Awaid could experience vision loss and renal failure amongst other severe health complications if there is a sub-optimal glycemic control of his diabetes.[176]

The defence here provided extensive medical evidence of illness and health care needs. Still, there was no evidence conclusively showing that the CSC *could not* provide the care needed. In contrast to the decisions discussed under Category 2, where judges refused to impose a community sentence absent such evidence, the judge looked for evidence that the CSC *could* meet the proven high needs of the individual: "I am not prepared to send Mr. Al-Awaid to prison and in this case trust that CSC and/or the National Parole Board will avert a tragedy… I am not prepared to put Mr. Al-Awaid's precarious health status to the test."[177]

The need to avoid suffering was reconciled with the need for deterrence for the offence committed in the sentence imposed by this judge. She noted that while it is true that sentencing for fraud revolves around general deterrence, this goal could still be achieved through non-custodial sentences.[178] As discussed in Section II.A of this paper, there is both theoretical and jurisprudential support for the holistic inclusion of personal characteristics for the purpose of sentence attribution, and this case is an example of how this can be done even for offences where deterrence and denunciation are deemed primary sentencing goals.

A few other judges specifically acknowledged that prison impacts individuals differently based on age and health, and seemed to have factored

176 *Suter*, *supra* note 26 at para 151.

177 *Al-Awaid*, *supra* note 158 at 153.

178 *Ibid* at 147.

this reality into their decisions. However, it is unclear how much the outcome reflected that assessment given the very stiff custodial sentences imposed. In *R v Landry*[179] for instance, the Court noted that the individual would be much more impacted by prison because of his age. The judge also noted that the individual had a "bad day" when the offence was committed.[180] Despite this, a 14-year prison sentence was imposed.[181]

B. Summary of Findings

There are variations in the approaches judges take in considering personal characteristics at sentencing, the weight they place on them, and their justifications for doing so. The general tendency was to focus on the gravity of the offence, and to a lesser extent, on the responsibility of the accused in the commission of the crime. Factors that would contextualize the culpability in the commission of the offence or that would provide foresight into the challenges the person may encounter when serving their sentence (including health, age, past trauma, history of abuse, and addictions) were sometimes not considered at all or their salience was dismissed. In a small but concerning set of cases, personal characteristics indicative of intersecting vulnerabilities were construed as aggravating factors and led to a stiffer sentence.

In the majority of cases, judges turned their minds to and recognized the uniqueness of the individual in front of them but struggled with accounting for personal factors in their sentence. It was not unusual for the judge to find that the gravity of an offence trumps most considerations of personal characteristics. The gravity of an offence was often juxtaposed with the need for deterrence and was often believed to only be adequately reflected by stiff, often custodial, sentences. The theme among this group of cases was that deterrence and rehabilitation often cannot be achieved at the same time, especially when the offence is serious. While personal characteristics might matter when rehabilitation is the primary goal, their role drops dramatically when deterrence is the focus. In other cases where judges turned their mind to personal characteristics, they either expressed the belief that the high needs of the person could be attended to in prison, or sometimes, even that these needs could *only* be addressed in prison.

179 2015 NSSC 78.
180 *Ibid* at para 26.
181 *Ibid* at para 36.

Encouragingly, personal characteristics tended to be considered at least by some judges when they could establish a nexus between the characteristic and the commission of the crime. In fact, in some cases discussed, judges went through pains to explain the nexus, juxtaposed it with efforts the individual took towards rehabilitation, and explained why the needs would be better met in the community. This approach was taken even in some cases where the offence was serious, or the statute demanded focus on deterrence.

The nexus between characteristics and an offence impacts responsibility and, as seen in this group of cases, can mitigate the sentence. However, even without a nexus, in some cases, characteristics may impact the experiential severity of a punishment, and thus the sentence proportionality, and so should also have a mitigating effect. These are two distinct roles that characteristics could play at sentencing, and both may result in mitigation but for different reasons. Hence, both lines of inquiry should be undertaken. Yet, it was only in a handful of cases, the final category we identified, that judges undertook this second line of inquiry.

The cases in this final category illustrate a holistic methodology that considers the seriousness of the offence, the impact on the victim, the responsibility and culpability of the offender, the collateral consequences of the sentence, and the manner in which the individual will experience the sentence. In these cases, the various sentencing goals were reconciled through an understanding that supporting the individual and avoiding harsh penalties that further debilitate the person also serves public safety. Here, judges framed proportionality not just as a quantitative, but also a qualitative inquiry. Concerns for substantive equality infused these cases, and many of them, regardless of the gravity of the offence, resulted in non-custodial sentences, or otherwise lower prison sentences.

VI. REFLECTIONS AND RECOMMENDATIONS

The current reliance on offence gravity, ranges, and other retributivist tools can be attributed to attempts to limit perceived idiosyncrasies in decision making by achieving formal parity in sentencing. However, given the highly individualized exercise sentencing is, try as one may, the individual experience cannot be removed from this process. As a result, judges, depending on their fluency in understanding the impact of intersecting characteristics on an individual, still factor them in to some extent, including in ways that reflect unconscious bias and ageism. In addition, the apparent

reliance of judges on various assumptions regarding sentence administration seems to influence the sentence rendered. This leads to sentence disparity depending on the judges' knowledge of health issues and prison conditions. Providing decision makers with accurate sources of information and guidance on how these issues may influence the experience of the sentence—and outlining how they ought to be considered in sentence attribution—would bring more consistency, predictability, and fairness to sentencing and would root the process into substantive equality values.

We are providing, in what follows, a set of concrete steps that will need to be taken to make the methodical and consistent consideration of age, disability, and other personal characteristics in practice feasible. These recommendations would serve and respond to the needs identified in the Nova Scotia sentencing landscape. Many of these recommendations, we suspect, may be beneficial across the country to the extent to which the same challenges may be present. Future studies investigating other jurisdictions will hopefully confirm that and add to the list of recommendations.

A. The Statutory Law of Sentencing

Sentencing in Canada is mostly common law based and there is little statutory guidance on how judges' discretion should be exercised. Yet, the proliferation of mandatory minimums over the last two decades has significantly limited the exercise of judicial discretion across a wide array of common offences, both violent and non-violent. Many mandatory minimums have been struck down by courts as unconstitutional.[182] Nonetheless, they still exist for dozens of offences.[183] Scholarship has been documenting the impact mandatory minimums have, especially on marginalized offenders, and their contribution to the overrepresentation in prisons of Indigenous people, Black people, people with mental illnesses and addictions, and those living in poverty, as these minimums are based solely on offence gravity to the exclusion of any other considerations.[184]

182 Government of Canada, "Policy Qs and As – Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act" (1 January 2023), online: <justice.gc.ca/eng/trans/bm-mb/other-autre/c5/qa-qr.html>.

183 *Ibid*.

184 See e.g. Marie Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-Representation of Aboriginal People in Prisons" (2015) 71 SCLR 277; Debra Parkes, "Punishment and Its Limits" (2019) 88 SCLR 351; Faizal R Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism"

In 2021, noting their impact on marginalized groups and the failure to deter crime, the Liberal government introduced Bill C-5,[185] which became law in 2022.[186]Among other things, this Bill repealed some mandatory minimum sentences in the *Criminal Code* and all mandatory minimums in the *Controlled Drugs and Substances Act*.[187] This is a promising step forward for increasing judicial discretion. Yet, it is unfortunate that the opportunity to remove all mandatory minimums was missed. The rationale for the need for Bill C-5 applies to all offences, including those that continue to have mandatory minimums such as some firearms offences and murder.[188]

Mandatory minimums are a very significant limitation to judges' abilities to meaningfully consider personal characteristics at sentencing. However, mandatory minimums are not the only such limitation, and perhaps not even the main limitation. In the sample reviewed here, mandatory minimums were only present for a handful of offences and were not the primary reason why there was so much variation in the way judges reflected personal characteristics in their decisions. In other words, the elimination of mandatory minimum for all offences is a necessary step if personal characteristics are to be methodically considered at sentencing, but it is not a sufficient step.

Other statutory changes could be beneficial. Section 718 and most sentencing provisions include a seemingly encompassing list of principles and goals that should guide sentencing – from deterrence and denunciation to rehabilitation. However, various legislative amendments have increased the number of types of offences for which deterrence and denunciation are listed as the main goals.[189] In itself, this is not an issue. Some sentencing judges, as well as some courts of appeal have been clear that custodial sentences are not the only way of achieving deterrence, and that deterrence and rehabilitation are interconnected.[190] The issue, however, is that in the

(2001) 39:2 Osgoode Hall LJ 491; Jeffrey Kennedy, "Justice as Justifiability: Mandatory Minimum Sentences, Section 12, and Deliberative Democracy" (2020) 53:2 UBC L Rev 351.

185 *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022 [Bill C-5].

186 For a critique of the limits of Bill C-5, see Appointed: A Canadian Senator Bringing Margins to the Center, "A Conversation with Professor Debra Parkes: Mandatory Life Sentences, Constitutionality, and Bill C-5" (20 July 2020), online (podcast): <appointedpod.simplecast.com/episodes/a-conversation-with-professor-debra-parkes-mandatory-life-sentences-judicial-discretion-and-bill-c-5> [Appointed].

187 SC 1996, c 19; Bill C-5, *supra* note 185.

188 Appointed, *supra* note 186.

189 *Criminal Code*, *supra* note 7, ss 718–718.04.

190 See recently, *Anderson* 2021, *supra* note 151; *Fabbro*, *supra* note 28.

framework that governs sentencing in Canada, the goals of deterrence and denunciation are more often than not interpreted as demanding a harsh custodial sentence. As seen in the sample reviewed, many judges found deterrence and rehabilitation to be incompatible goals, and found that where deterrence is the focus, personal characteristics have no role to play. With respect, this take is empirically wrong. As discussed above, it has long been proven that while the criminalization of an action in itself may act as a general or individual deterrent, the severity of a sentence is not. In addition, the use of harsh sentences to achieve deterrence discounts the fact that the causes of crime are, more often than not, rooted in addictions, mental illness, poverty, or exposure to racism, rather than in some complex cost-benefit analysis individuals conducted before deciding to engage in criminal behaviour.[191]

Thus, the *Criminal Code*'s commitment to deterrence and denunciation must be tempered, and adequate guidance on how these goals may be achieved ought to be given to judges. This guidance must be evidence-based and must reflect the empirical knowledge of what can realistically be achieved through criminal punishment.[192] The blind faith that harsh sentences deter people will only increase overreliance on incarceration, especially for marginalized individuals, and will obstruct the use of personal characteristics and experiences to achieve substantive parity in sentencing, without addressing the causes of crime.

191 Dugas, *supra* note 36; David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" in Jamie Cameron & James Stribopoulos, eds, *The Charter and Criminal Justice: Twenty-Five Years Later* (Toronto: LexisNexis Canada, 2008) 655; Sylvestre, "Rethinking Criminal Responsibility", *supra* note 44; Brandy F Henry, "Adverse Experiences, Mental Health and Substance Use Disorders as Social Determinants of Incarceration" (2020) 48:3 J Community Psychology 744; Dale E Ives, "Inequality, Crime and Sentencing: Borde, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30 Queen's LJ 114; Mikko Aaltonen, Janne Kivivuori & Pekka Martikainen, "Social Determinants of Crime in a Welfare State: Do They Still Matter?" (2011) 54:2 Acta Sociologica 161.

192 For the importance of aligning sentencing practice with evidence-based scholarship on penal goals in the American context, see Mirko Bagaric, Nick Fischer & Gabrielle Wolf, "Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law" (2017) 45:3 Hofstra L Rev 785.

B. Inconsistent Appellate Guidance and Sentencing Guidelines

The appellate guidance on the use of personal characteristics has been fraught with inconsistencies.[193] On one hand, there has been a distinct move towards increasing consideration of the impact of sentences on offenders and of collateral consequences, broadly defined, of the sentence.[194] The COVID-19 pandemic has accelerated this move.[195] On the other hand, the Supreme Court of Canada has affirmed that courts of appeal may continue to set ranges and sentencing points which are built on the idea that individuals who commit like-offences deserve like-sentences and thus, advance a formal understanding of parity and proportionality.[196] While the Supreme Court of Canada has emphasized that these are simply guidelines and not binding, they continue to be quite strictly enforced by courts of appeal.[197] In addition, appellate guidance on the role of race and background factors, on what kind of a nexus needs to be between the factors considered and the crime, and how they may impact a sentence, remain divergent.[198]

Moving towards a more consistent and methodical incorporation of personal characteristics into the sentencing decisions will require new guidelines that further de-emphasize ranges and starting points and encourage the use of substantive equality-based principles together with existing sentencing principles. This guidance will have to develop in appellate jurisprudence, but the government can take steps towards making that a reality. Sentencing guidelines focused on explaining intersectionality and the need to expand sentencing considerations beyond regularly considered factors would be particularly useful. Over the last few years, the scholarship providing theoretical, and now empirical support for such an approach has significantly increased, and policy guidelines may be grounded in this work.[199]

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193 For a detailed review of these inconsistencies, see Iftene, "Personal Characteristics", *supra* note 6.

194 See e.g. *Suter*, *supra* note 26 at paras 47–48; *Salehi*, *supra* note 29; *Fabbro*, *supra* note 28; *Anderson* 2021, *supra* note 151.

195 *R v Hearns*, 2020 ONSC 2365; *R v Morgan*, 2020 ONCA 279; *R v Fairbarn*, 2020 ONCA 784; *R v Dawson*, 2021 NSCA 29; *R v Doering*, 2020 ONSC 5618; *R v Marsan*, 2020 ONCJ 638; *R v Rudolph*, 2021 NUCJ 23.

196 *R v Friesen*, 2020 SCC 9 at paras 30–33 [*Friesen*]; *R v Parranto*, 2021 SCC 46.

197 *Friesen*, *supra* note 196 at paras 37, 40.

198 *Anderson* 2021, *supra* note 151; *Morris*, *supra* note 22.

199 Kerr, "Sentencing Ashley Smith", *supra* note 9; Dugas, *supra* note 36; Kaiser-Derrick, *supra* note 108; Rudnicki, *supra* note 9; Dagan & Baron, *supra* note 9; Terry Skolnik, "Criminal Law during (and after) COVID-19" (2020) 43:4 Man LJ 145; Iftene, "Personal Characteristics", *supra* note 6.

While there will always be variation in how individual judges reflect various factors, there ought to be some consistency in how goals and principles are interpreted, as well as how characteristics indicative of individual vulnerabilities are assessed. A Sentencing Reform Commission may also be helpful in further investigating the need for a substantive equality approach to sentencing and in providing recommendations for statutory and policy sentencing guidelines. These may help reduce some of the glaring inconsistencies in how key goals, principles, and factors are interpreted and reconciled.

C. Continuing Legal and Judicial Education

As the analysis of this sample illustrates, all legal professionals—judges included—struggle with understanding the impact of various intersecting characteristics on crime, individuals, and the experience of punishment. There is also a significant schism between sentencing and prison law.[200] This schism is fuelled by a belief that the two are separate and that sentencing judges do not have an obligation to consider what will happen to the individual they sentence, or by the fact that they are unfamiliar with what happens behind bars.[201]

All judicial and continuing education for lawyers programs, whether offered by the National Judicial Institute, the Canadian Bar Association, or other institutions, need to contain regular sessions on socio-legal matters that are relevant to the experience of sentencing. There is a need for sessions looking at intersectionality and vulnerabilities; the difference between responsibility and culpability; the impact of addictions, poverty, and disability on culpability; the experience of punishment in old age and for those in poor health; the impact of prisons on health; prison services and their impact on individual needs; and the rehabilitative value (or lack thereof) of prison programs. Education on where objective information on such issues can be found, what kind of experts would be relevant, and the potential role of unconscious bias in assessing personal characteristics would also be helpful. Sessions discussing empirical evidence on how custodial sentences and various conditions meet deterrence or rehabilitation goals would provide increased insight into the feasibility of the idea that sentences can reach certain goals judges render them for.

200 Kerr, "How the Prison is a Black Box", *supra* note 5.
201 *Ibid* at 88.

Such sessions would go a long way towards raising awareness and improving literacy in including the use of personal characteristics and experiences in sentencing to achieve substantive equality. Defence lawyers would be more aware of the relevance of various pieces of evidence that could benefit their clients and of the arguments they could raise, Crown attorneys would be more mindful of the impact their submissions have, and judges would be better equipped to utilize the information put before them.[202]

D. Access to Justice

Access to justice is a notorious issue in criminal justice, as it disproportionately impacts marginalized individuals who are overrepresented in the system. Many accused are represented by legal aid or underpaid lawyers working on certificates. Access to legal aid is itself limited. Achieving substantive justice can only be done by increasing access to procedural justice. It is beyond the purpose of this article to revisit the significant policy and academic work that shows the need for increased legal aid funding to adequately cover for sentencing matters, legal counselling, representation, expert evidence, and other needs associated with the criminal process.[203]

As some judges in our sample indicated, they would have been willing to consider personal characteristics and experiences, but they felt bound by the evidence presented to them. A lack of evidence, whether because it did not exist or because the defense could not secure it due to a lack of representation, funding, or knowledge, negatively impacted the outcome of the sentence, at least in those cases.

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202 On the impact continuing education may have on raising awareness on specific issues that impact litigants and increasing fairness, see e.g. Justice Donna Hackett & Richard F Devlin, "Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges" (2005) 4 JL & Equality 157; Rosemary Cairns-Way & Donna Martinson, "Judging sexual assault: The shifting landscape of judicial education in Canada" (2019) 97:2 Can Bar Rev 367; Richard F Devlin, "Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education" (2001) 27:1 Queen's LJ 161.

203 See e.g. Patricia Hughes & Mary Jane Mossman, "Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs and Responses" (2002) 13 Windsor Rev Legal Soc Issues 1; Faisal Bhabha, "Institutionalizing access-to-justice: Judicial, legislative and grassroots dimensions" (2007) 33:1 Queen's LJ 139; Trevor CW Farrow, "Crisis and Creativity: Shifting the Culture of Justice" (2021) 102 SCLR (2d) 329; Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and understanding legal aid priorities: A paper prepared for Legal Aid Ontario" (2010) 29 Windsor Rev Legal Soc Issues 149.

Meanwhile, other steps can be taken to mitigate the disproportionate impact of lack of access to justice. While most other judges who showed willingness to consider the impact of age and health on the experience of the sentence were either satisfied with the testimony of a prison official or noted that there was no evidence on prison services provided by the defence, in *Al-Awaid*, the judge essentially reversed the burden.[204] Once the individual showed the significant health problems they presented with and their need for adequate and complex health care, the judge expected the Crown to show that prison services have the capacity to meet these needs, noting that CSC has an obligation in this respect.[205] The risk of the individual dying in prison if the care was inadequate was a defining reason why the judge imposed a non-custodial sentence.[206]

This approach seems both reasonable and necessary. When demanding a custodial sentence for someone with known health conditions or likely to develop them due to age or other risk factors, once the defence has proven their client's specific needs, the Crown should have an obligation to provide evidence of the concrete services provided, the standards at which they are provided, their proven effectiveness in the past in similar cases, and how the overall safety and wellbeing of the person will be ensured without recourse to extensive isolation. It is true that this is a departure from the current status quo, where the defence has the obligation to prove mitigating factors on a balance of probabilities.[207] However, unlike many other mitigating circumstances, evidence regarding the ability of governmental correctional authorities to provide adequate care is not within the easy reach of the defendant. It is the government that best knows and has evidence regarding the services they provide, hence the burden should be on them to prove it. The need for such a burden reversal is amplified by the significant body of evidence from certain governmental bodies and independent researchers suggesting that correctional authorities struggle more often than not to discharge their duty of providing adequate health care, and that conditions of confinement are not well suited for aging in prison.[208] Given this reality, it would be reasonable to ask the Crown to prove that in a particular case these concerns would not apply. A legal burden on the Crown will also go a long way in ensuring that custodial sen-

204 *Al-Awaid*, *supra* note 158 at paras 153–54.
205 *Ibid* at para 101.
206 *Ibid* at paras 152–53.
207 See e.g. *R v Tokhi*, 2014 ONSC 3142 at para 6.
208 See e.g. OCI & CHRC, "Aging and Dying", *supra* note 3.

tences will not be sought in the first place in cases where they are harmful and counterproductive.

In addition, as another avenue in mitigating access to justice issues, judges should make more use of judicial notice on matters that are now well-documented.[209] Things like health decline in older age, the impact prisons have on aging individuals, the process of accelerated aging, and the decrease in criminogenic factors as individuals advance in age are beyond dispute at this point and could be judicially noticed. Further, the relaxed application of the rules of evidence at sentencing hearings would help facilitate this exercise and allow for a less rigid application of the standard for judicial notice on sociological issues.[210]

VII. CONCLUSION AND NEXT STEPS

The present review has highlighted a number of things that may be relevant when considering reforming sentencing in the direction of increasing its sensitivity toward personal characteristics and experiences. First, it showed that including personal characteristics such as age and disability is possible because it is already occasionally used. Second, even if it was desirable not to give effect to such characteristics (which, we do not believe it is), personal characteristics and experiences cannot always be ignored and they currently make their way into sentencing decisions in inconsistent ways and on very different approaches, resulting in very different outcomes. Adopting a coherent approach to the use of personal characteristics and experiences is now a matter of bringing consistency in sentencing and a matter of promoting substantive equality over formal equality. Third, the study shows that sentencing decisions are filled with misconceptions about imprisonment and its impact on those sentenced. Some of the beliefs relied upon are not evidence-based, and yet they sometimes ground the sentencing decisions rendered. Directly addressing and confronting any potential misconceptions about how punishment will be implemented should become part of the sentencing process if we are committed to bringing criminal justice in alignment with substantive equality values.

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209 The importance of judicial notice for marginalized litigants, even in adversarial processes where the rules of evidence apply fully, has been discussed in the scholarship. See e.g. Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups" (2009) 6:2 JL & Equality 201.

210 *R v Gardiner*, 1982 CanLII 30 at 406 (SCC).

The present study is focused on a group of individuals with characteristics influenced by their age and age-related disabilities, and the recommendations provided are of direct application to the issues raised by sentencing within this group. It would, however, not be surprising if similar patterns and concerns emerged when looking at groups with other types of intersecting vulnerabilities, so at least some of the recommendations provided here may be of broader application. Future studies looking at other subgroups of sentenced individuals with perhaps other characteristics should be undertaken to confirm that. In addition, it is the authors' plan to continue building on the empirical findings in this and future studies, as well as theirs and others' theoretical work to assess how the use of personal characteristics at sentencing can move the basis of sentencing praxis from formal to substantive equality for the longer term goal of helping to address issues of over-use of incarceration, overrepresentation of certain groups in prisons, and perpetuation of discrimination and oppression in the criminal justice system.