Sentencing in Line with Society: *R v Bunn* and the Manitoba Court of Appeal's Use of Social Understanding as a Justification for Increased Sentences

N O A H   L E S I U K [*]

ABSTRACT

Ever since the pivotal judgement in *R v Friesen* was given by the Supreme Court of Canada, courts around the country have continued to grapple with its legacy. Recently, the Manitoba Court of Appeal adopted the spirit of *Friesen* in its recent ruling, *R v Bunn*, and held that the principles espoused within *Friesen* should not be limited solely to cases of sexual assault involving children. Building on this principle, the Manitoba Court of Appeal provided non-quantitative guidance citing society's and the courts' deepened understanding of harm as a justification to call for increased sentences for sexual assault involving adult victims. This paper analyzes this approach by the Manitoba Court of Appeal through theoretical, practical, and hypothetical lenses. It determines that the MBCA's approach is underpinned by Durkheimian functionalism and bolsters the courts' role in upholding societal values, enhances proportionality in sexual assault sentencing, and has hypothetical

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application as a general rule for raising, or lowering, sentences for offences through non-quantitative guidance.

I. INTRODUCTION

Sentencing is an intricate process that seeks to convey the viewpoints of society through the imposition of a sanction.[1] As recognized by the Supreme Court of Canada ("SCC"), appellate courts must occasionally "bring the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders."[2] This signals that courts play a pivotal role in ensuring consonance between societal values and sentencing initiatives. In the seminal case of *R v Friesen*, the SCC recognized that departures from prior sentencing precedents and ranges should occur when two conditions are met. These two conditions are when the maximum sentence for an offence is raised by parliament, and when society's understanding of the severity of harm arising from that offence increases.[3] Although the SCC in *Friesen* opted not to provide a sentencing range, they utilized this logic to rule that sexual offences against children should generally be punished more severely.[4] Interestingly, in the recent case of *R v Bunn*, the Manitoba Court of Appeal ("MBCA") held that the principles espoused in *Friesen* should not be limited to cases involving sexual offences against children.[5] In doing so, the MBCA provided non-quantitative guidance indicating that society and the courts' have a deepened understanding of sexual assault involving adult victims and "judges must feel free to respond to these considerations" by "increasing sentences where appropriate."[6] What differentiates this ruling from *Friesen*, is that the MBCA notes that parliament has not increased the maximum sentence for sexual assault, but has legislated sentencing considerations guiding judges

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1 See *R v Friesen*, 2020 SCC 9 at para 35 [*Friesen*]; *R v Lacasse*, 2015 SCC 64 at paras 4-6 [*Lacasse*].

2 See *R v Stone*, [1999] 2 SCR 290 at para 239.

3 See *Friesen*, *supra* note 1 at para 108; *Lacasse*, *supra* note 1 at paras 62-64, 74.

4 See *Friesen, supra* note 1 at paras 96-98, 106-107, 114.

5 See *R v Bunn*, 2022 MBCA 34 at para 72 [*Bunn*].

6 *Ibid* at para 122.

to consider this deepened understanding of harm.[7] Although the increase of the maximum sentence was lacking, the MBCA nevertheless instructed lower courts to consider increasing sentences for sexual assaults involving adult victims.[8] This is significant as the MBCA essentially conveyed that society and the courts' deepened understanding of the harm arising from an offence, paired with legislative intent guiding sentencing judges to consider this deeper understanding of harm, was sufficient to substantiate appellate guidance in favour of higher sentences. This paper seeks to analyze this direction by the MBCA and comment on its underlying ethos, enhancement of proportionality in sexual assault sentencing, and potential application beyond sexual assault. Principally, it shall be contended that the MBCA's approach is underpinned by Durkheimian functionalism and bolsters the courts' role in upholding societal values, enhances proportionality in sexual assault sentencing, and has hypothetical application as a general rule for raising, or lowering, sentences for offences through non-quantitative guidance.

To advance these arguments, the following four-part structure will be implemented. First, a brief explanation of the MBCA's ruling in *Bunn* will be provided to instill the reader with an understanding of the principles therein. Second, Emile Durkheim's functionalist approach to punishment will be explored and contrasted to the principles espoused by the MBCA in *Bunn*. This will consist of arguments detailing how this theory seems to underpin the ethos of the MBCA's logic, which is premised on supporting contemporary social values. Third, a more focused analysis of how the MBCA's guidance affects sexual assault sentencing will be offered. Specifically, how proportionality is enhanced in sexual assault sentencing through this instruction will be discussed. Lastly, it will be suggested that a hypothetical general rule can be extrapolated from *Bunn*. Such a rule will be deemed to allow courts to provide non-quantitative guidance calling for higher or lower sentences for an offence based on societal values and legislative intent.

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[7] *Ibid* at para 115.

[8] *Ibid* at para 122.

II. AN APPROACH TO SEXUAL ASSAULT SENTENCING GALVANIZED BY SOCIETAL IMPETUS: THE MANITOBA COURT OF APPEAL AND *R V BUNN*

Before the tenets advanced in *Bunn* can be outlined, it is first necessary to explain the foundational principles upon which it rests. This requires a summary of the relevant concepts articulated by the SCC in their seminal sentencing cases, *R v Lacasse* and *R v Friesen*.

In *Lacasse*, the SCC was tasked with determining whether the Quebec Court of Appeal erred in reversing a sentence on the basis that the trial judge deviated from the sentencing range.[9] The majority endorsed the view that sentencing ranges are not rigid straightjackets and departure from one does not constitute an error in principle or law.[10] Consequently, departure from a range itself was deemed insufficient to automatically justify appellate intervention in sentencing unless the sentence imposed departed significantly from prior precedent without reason.[11] One of the important concepts conveyed by the majority was that sentencing ranges and points can be parted from when societal understanding of the harm from an offence increases, and when parliament raises the maximum sentence for that offence.[12] In *Friesen*, the SCC unanimously entrenched this concept, articulating that "sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of the harm arising from that offence increases."[13] Although opting not to set a national sentencing range, the SCC in *Friesen* applied this logic to sexual offences against children and held that sentences for such offences should generally increase.[14]

In *R v Bunn*, the MBCA took the principles enunciated in *Friesen* and held that they "should not be limited to cases involving sexual offences

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9 See *Lacasse*, *supra* note 1 at paras 17, 35.

10 *Ibid* at para 60.

11 *Ibid* at para 67.

12 *Ibid* at paras 62-64, 74.

13 See *Friesen*, *supra* note 1 at para 108.

14 *Ibid* at paras 109, 114.

against children."[15] Although both the accused and Crown brought forth unsuccessful grounds of appeal, the MBCA took the opportunity to comment extensively on the Crown's arguments. The Crown asserted that *Friesen* should apply to sexual assault involving adult victims and that the trial judge failed to appreciate the seriousness of the offence and the moral blameworthiness of the accused.[16] It was the Crown's position that society and the courts' deepened understanding of the harm caused to victims of sexual assault should be reflected through increased sentences for the offence.[17] Agreeing with the Crown that sentences should adequately represent contemporary social values, the MBCA turned to the guidance provided by *Friesen* to inform its analysis. In particular, it drew upon the SCC's instruction that sentencing ranges or points should be departed from where Parliament raises the maximum sentence for an offence and when society's understanding of the harm arising from that offence increases.[18] While the MBCA recognized that society and the courts have an increased awareness of the harm caused to adult victims of sexual assault, it also recognized that parliament has maintained the maximum sentence for sexual assault since 1983.[19]

Although the maximum sentence for sexual assault had not been raised, the Crown nevertheless contended that legislative changes warrant an increase in sentences for this offence. In particular, the Crown suggested that the enactment of section 718.2(iii.1), amendments to section 718.2(e), and the enactment of s. 718.04, supported its position. [20] Section 718.2(iii.1) stipulates that sentencing courts should take into consideration evidence that the offence in question had a significant impact on the victim.[21] In its analysis, the MBCA did not interpret this as a direct signal from Parliament to increase sentences for sexual assault specifically.[22] Turning to section 718.2(e), the amendments in question were the

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15 See *Bunn*, *supra* note 5 at para 72.

16 *Ibid* at paras 1-2.

17 *Ibid* at paras 69, 91.

18 *Ibid* at para 73; See *Friesen*, *supra* note 1 at para 108.

19 See *Bunn, supra* note 5 at paras 76-80, 111.

20 *Ibid* at para 2; See generally *Criminal Code*, RSC 1985, c C-46, ss 718.2(iii.1), 718.2(e), 718.04 [*Code*].

21 See *Code*, *supra* note 20, s 718.2(iii.1)

22 See *Bunn, supra* note 5 at para 87.

inclusion of the consideration of harm done to victims and the community. [23] Commenting on the purpose of this amendment, the MBCA held that it helps a court strike a proper balance between the harm done to victims and communities and an offender's conduct and circumstances. [24] This balancing act aids a court in determining whether to exercise restraint and consider all sanctions other than imprisonment under section 718.2(e). Lastly, the MBCA addressed the enactment of section 718.04. This section requires that deterrence and denunciation be primary considerations where an offence involves the abuse of a vulnerable person – including because that person is Aboriginal and female.[25] Although this provision does not generally apply to sexual assaults, it prompts a harsher sentence where a vulnerable person is victimized.[26] Considering the heightened vulnerability of Indigenous women to violence and sexual victimization, this provision is particularly impactful in elevating sentences where the victim is an Indigenous woman.[27]

Balancing the deepened societal understanding of the harm done to adult victims of sexual assault with the legislative provisions advanced by the Crown, the MBCA deemed it necessary to provide direction and bring the law into harmony with this societal understanding.[28] The court firmly expressed that the "significant harm" suffered by adult victims of sexual assault is "manifestly clear" and society and the courts' understanding of this harm continues to deepen.[29] Regarding the legislative provisions, the MBCA found that sections 718.2(a)(iii.1) and 718.2(e) are signals from Parliament guiding sentencing judges to consider the significant harm done to victims or communities. In terms of section 718.04, it was held to apply more specifically to vulnerable persons.[30] While not stated outright, the MBCA's logic is that, since sections 718.2(a)(iii.1) and 718.2(e) direct a sentencing judge to consider the harm done to victims and society, the

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23 *Ibid* at para 89; See *Code*, *supra* note 20, s 718.2(e).

24 See *Bunn*, *supra* note 5 at paras 89-92.

25 See *Code*, *supra* note 20, s 718.04.

26 See *Bunn*, *supra* note 5 at para 110.

27 See generally Canada, Research and Statistics Division, *Victimization of Indigenous Women and Girls* (Ottawa: Department of Justice, July 2017).

28 See *Bunn*, *supra* note 5 at para 115.

29 *Ibid* at para 111.

30 *Ibid* at para 112.

courts' deepened understanding of the harm done to adult victims of sexual assault will help to inform a fit sentence.[31] Applying this reasoning, and because the maximum sentence has not been raised for sexual assault, the MBCA opted to provide non-quantitative guidance rather than alter the starting point.[32] This instruction directed that "sentencing judges must feel free to respond to these considerations and impose sentences that reflect society's and the courts' deepened understanding of the harm caused in light of the legislative provisions discussed by increasing sentences where appropriate."[33]

As can be discerned, the MBCA's ruling instructs lower courts to apply the deepened societal understanding of the harm arising from sexual assault to elevate sentences where warranted. The MBCA certainly proceeded in this non-quantitative manner as Parliament had not increased the maximum sentence for sexual assault. This elevated maximum sentence would need to be present for the court to provide quantitative guidance instructing departure from a previous sentencing range or point.[34] Instead, the MBCA relies upon the heightened understanding of harm to discreetly communicate to lower courts that sentences for sexual assault should reflect this and be increased accordingly.

Extracting the law that was used to justify the MBCA's instruction yields an interesting result: Where the following two factors are present, there is a sufficient basis to justify non-quantitative appellate guidance in favour of elevated sentences for an offence. First, that society has a deepened understanding of the harm arising from that offence, and second, legislative intent directs this harm to be considered in sentencing. Although it could be suggested that *Friesen* already advances this concept by stating that appellate courts should bring the law into harmony with a new societal understanding of an offence, *Bunn* narrows this broad statement and conveys that non-quantitative instruction can be provided where the abovementioned factors are met.[35] Irrespective of whether *Friesen* already

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31 *Ibid* at paras 111-112.

32 *Ibid* at para 122; The starting point for a major sexual assault is 3 years, *See R v Sandercock*, 1985 ABCA 218 at para 17.

33 See *Bunn, supra* note 5 at para 122.

34 See *Friesen*, *supra* note 1 at para 108.

35 *Ibid* at para 35.

justifies the underlying principles of *Bunn*, it is sensible to scrutinize the MBCA's ruling and examine its position within the law.

III. SENTENCING AND SOCIAL SOLIDARITY: EMILE DURKHEIM'S FUNCTIONALIST APPROACH TO PUNISHMENT AND THE COURTS' ROLE IN HARMONZING SOCIAL VALUES WITH THE LAW

There exists a significant amount of literature that examines state-sanctioned punishment via theoretical perspectives. Such theories on punishment offer a diverse array of considerations related to both the efficaciousness and purpose of criminal sanctions. While theoretical in nature, "[p]unishment and sentencing theory influence legal argument and judicial reasoning, shape legislative categories, and provide metrics by which legal outcomes are assessed."[36] For instance, the utilitarian theory of punishment which is largely associated with English philosopher Jeremy Bentham, views punishment as an apparatus that can be wielded to produce socially useful outcomes.[37] Bentham's utilitarianism is premised on the concept that punishment is a means to an end for the greater good of society.[38] To utilitarianism, the greater good fostered by punishment is the bolstering of crime control through principles such as deterrence.[39] From a practical standpoint, punishment theories are directly relevant to sentencing and judicial reasoning. As recognized by the SCC in *R v M (CA)*, "in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment."[40] Considering that punishment theory receives judicial consideration and can act as a rationalization for punishment, it is useful to dissect important jurisprudence in the realm of sentencing to examine the theoretical foundations upon which they rest. With this in mind, a discussion of the punishment philosophy upon which the MBCA's

[36] See Lisa Kerr, "How the Prison is a Black Box in Punishment" (2019) 69:1 UTLJ 85 at 3 [Kerr].

[37] *Ibid* at 6-7.

[38] See Karolina Gombert, "An 'Opportunistic Interpretation' of Bentham's Panopticon writings" (2014) 14:1 Journal of Bentham Studies 1 at 9-10.

[39] See Kerr, *supra* note 36 at 6-7.

[40] See *R v* M (CA), [1996] 1 SCR 500 at para 82 [M *(CA)*].

approach rests in *Bunn* is an apt area of analysis. It is evident that the primary rationale underlying this judgement is societal sentiment. As illustrated, the MBCA's logic stands on "society's and the courts' deepened understanding of the harm caused" by sexual assault.[41]

The MBCA's focus on the views of society shares similarities with the functionalist theory of punishment posited by French sociologist Emile Durkheim. While there is criticism surrounding Durkheim's theory of punishment, this paper does not intend to dispute the evidentiary-based veracity of Durkheim's claims but apply its general perspective as a lens through which to view the MBCA's ruling.[42] To Durkheim, punishment is a social and moral phenomenon rather than simply a penological device.[43] The range of beliefs and sentiments held by the average members of a society was deemed by Durkheim to represent a collective consciousness.[44] Criminal law embodies the moral values held by the collective consciousness of a society and those that transgress these sentiments are punished.[45] It is the violation of the norms held sacred by the collective consciousness that prompts a punitive reaction. According to Durkheim, this reaction is meant to reaffirm and strengthen the collective consciousness by punishing the breach of its shared values.[46] This has the functional effect of enhancing the solidarity of the collective consciousness by expressing through punishment that violating society's norms will not be tolerated.[47] In this sense, punishment constitutes "an automatic solidarity, a spontaneous reaffirmation of mutual beliefs and relationships which serve

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41 See *Bunn*, *supra* note 5 at para 122.

42 See Steven Lukes and Andrew Scull, "Introduction," In Steven Lukes and Andrew Scull, eds, *Durkheim and the Law* (Oxford: Robertson, 1983) at 5-8.

43 See David Garland, "Sociological Perspectives on Punishment" (1991) 14 C&J 115 at 123 [Garland 1991]; see also Phil Johnson et al., "Legal Origin and Social Solidarity: The Continued Relevance of Durkheim to Comparative Institutional Analysis" (2017) 51:3 Sociology 646 at 649.

44 See Roger Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Stanford: Standford University Press, 1999) at 66.

45 *Ibid* at para 67; see also Garland 1991, *supra* note 43 at 122.

46 See David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990) at 33 [Garland 1990].

47 See Emile Durkheim, "Crime and Punishment" In Steven Lukes & Andrew Scull, eds, *Durkheim and the Law* (Oxford: Robertson, 1983) at 68-69 [Durkheim].

to strengthen the social bond."[48] Stated simply, Durkheim's functionalist perspective views punishment as an expressive institution that draws upon the collective sentiments of the community to effect justice. By relying upon the shared values of this collective consciousness, the state reinforces the social solidarity of the community by punishing those who violate their values. In essence, the expression of punishment is functional as it legitimizes a community's shared values and solidarity by punishing in accordance with them.

Although Durkheim was a 19th-century sociologist, his theory is not trapped within the confines of this period and accounts for the possibility of change in societal sentiments. According to Durkheim, the function of punishment does not change but the forms and degree of punishment transform as a society's collective values shift.[49] For instance, while medieval punishment still functioned to reinforce social solidarity, the harsh forms of punishment were a by-product of the values held by the collective conscience during this time. In contrast, the collective conscience in modern Canadian society has evolved and focuses on individual rights and freedoms rather than absolutist values and religious tenets. Those who breach the shared values of the Canadian collective conscience are still dealt with punitively, but it is simply that these "values themselves dictate that punishments should be less destructive of human life."[50] In this sense, Durkheim's theory places social values in a position of paramount importance to the justice system. Not only does punishment function to express these shared morals by holding those who transgress them accountable, but the actual severity of punishment is also informed by those values. With Durkheim's functionalist theory of punishment adequately contextualized, it is now apt to apply it to the decision in *Bunn* to show how the MBCA's guidance is underpinned by similar logic.

As previously discussed, the MBCA in *Bunn* focused extensively on societal sentiment to ground its contentions. The main justification for the MBCA's position hinged on society and the courts' increased understanding of the harm caused to adult victims of sexual assault. This focus on social values does not itself evince that the MBCA's approach is similar to Durkheimian functionalism, but it is how it applied these morals

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48 See Garland 1990, *supra* note 46 at 33.

49 See Garland 1991, *supra* note 43 at 123.

50 *Ibid* at 123-124.

that proves illuminating. Various times throughout the judgement, the MBCA invoked the concept that sentences must be harmonized "with prevailing social values."[51] Inherent in this acknowledgment by the MBCA is the principle that punishments imposed by the justice system are reflective of societal sentiment and aid in dictating their severity. Lending further credence to this assertion is the MBCA's statement that in terms of sexual assault, sentencing judges should "impose sentences that reflect society's and the courts' deepened understanding of the harm caused."[52] To the MBCA, this deepened understanding of harm "must be reflected in sentences imposed by the courts."[53] In this sense, the chain of logic is as follows. First, society's views have evolved and there is now a deepened understanding of the harm caused to adult victims of sexual assault. Second, because society now has a deepened understanding of the significant harm caused, the punishment for sexual assault must reflect this sentiment. Third, sentences for sexual assault increase in response to these values to express society's views. And, lastly, society's values are legitimized through their mobilization by the state in punishment. Breaking this down even further, society's values inform the state of what it deems a greater transgression of those values and the state replies by punishing this wrongdoing more severely. In effect, the state expresses the will of society and legitimizes its values through this process.

Taking this into consideration, it is clear that the MBCA's logic shares significant similarities with Durkheim's functionalist theory of punishment. Society's values inform the non-quantitative guidance provided and the call for increased sentences is reflective of these sentiments. The punishment flowing from this guidance is both an expression of, and informed by, the collective conscience of Canadian society. The result is a legitimization of these values through the state's punishment being rendered in accordance with them. This is the process Durkheim envisaged – the state drawing upon society's values to effect punishment, thereby expressing those values and legitimizing their validity.[54] Although beyond the scope of this paper, this Durkheimian appeal to social values appears to be a larger trend amongst the jurisprudence. For instance, the SCC in both *Friesen* and *R v Parranto*,

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51 See *Bunn*, *supra* note 5 at paras 72, 115.

52 *Ibid* at para 122.

53 *Ibid* at para 80.

54 See Durkheim, *supra* note 47 at 68-69.

invoke society`s understanding as an important tool in informing an appropriate punishment.[55] Nevertheless, now that it has been established that the MBCA's decision in *Bunn* is underpinned by Durkheimian functionalism, it is prudent to comment on the positives of this societal focus.

While courts focus on sustaining the rule of law, they have also become an important social institution within Canadian society.[56] At various times throughout history, the SCC has created cohesion between society's morals and the law by taking social values and crystallizing them into the legal realm.[57] The SCC has been vocal about the courts' role in upholding the values of society, recognizing that, "while our justice system must retain a high degree of certainty and stability, it must also be just and responsive to the needs of contemporary Canadian society."[58] Further, as recognized in *R v M (CA)*, sentences should be imposed in a way that "instills the basic set of communal values shared by all Canadians."[59] By utilizing social understanding to inform its call for increased sentences, the MBCA in *Bunn* is engaging in conduct that harmonizes the law with societal sentiment. Consequently, this strengthens the idea that courts have a role in upholding society's values, lending further legitimacy to this principle. Bolstering this notion is particularly important in modern times as the courts' face criticism from the media for being out of touch "with community values in their sentencing of offenders."[60] By creating a degree of cohesion between sentencing and social values, the MBCA is progressing in a manner that reconciles community views and justice. Consolidating the bond between the courts and society could help to increase the repute of the justice system and foster increased trust in the judiciary.[61] Although *Bunn* is only one

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55 See *Friesen*, *supra* note 1 at paras 100, 108; *R v Parranto*, 2021 SCC 46 at para 86.

56 See Shimon Shetreet, "On Assessing the Role of Courts in Society" (1980) 10:4 MLJ Man LJ 357 at 357.

57 See e.g. *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Same-Sex*]; *R v Morgentaler*, [1988] 1 SCR 30; *Vriend v Alberta*, [1998] 1 SCR 493.

58 See *R v Kirkpatrick*, 2022 SCC 33 at para 221.

59 See *M (CA)*, *supra* note 40 at para 81.

60 See Anne Wallace and Jane Goodman-Delahunty, "Measuring Trust and Confidence in Courts" (2021) 12:3 International Journal for Court Admin at 3.

61 *Ibid* at 8.

judgment, this is a move in the right direction that supports the idea that courts uphold society's values, not differentiate from them.

Having established that the MBCA's society-based judgment is underpinned by Durkheimian functionalism and strengthens the perception that courts uphold the values of society, how *Bunn* enhances proportionality in sexual assault sentencing will now be assessed.

IV. Sexual Assault Sentencing Post-*Bunn*: Contemporary Understanding of Proportionality

When a court of appeal provides sentencing guidance for a particular offence, it is salient to determine how the proportionality assessment for that offence is affected. Proportionality is the cardinal rule in sentencing and must prevail in every case. A fit sentence is one that proportionately balances the gravity of the offence with the degree of responsibility of the offender. [62] Both of these factors take into account a multitude of different considerations in order to reach a proportionate sentence. The gravity of the offence looks at the seriousness of the accused's conduct and considers the harm or likely harm caused to the victim and broader community.[63] On the other hand, the degree of responsibility of the offender focuses on the moral culpability of an accused with regard to intentional risk-taking, the normative character of the accused's conduct, and "the consequential harm caused by the offender."[64] By providing instruction which impacts both the gravity of the offence and the degree of responsibility of the offender, the MBCA's guidance in *Bunn* directly affects the proportionality assessment for sexual assault. As will now be contended, this effect enhances the attainment of proportionality as it increases legal understanding of the offence to ensure a commensurate sentence can be imposed.

In *Bunn*, the MBCA directed lower courts to increase sentences for sexual assault involving adult victims based on society's deepened understanding of the harm caused by this offence.[65] Beginning with the gravity of the offence, an increased understanding of the harmfulness flowing from an offence helps in determining the seriousness of an

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[62] See *Lacasse*, *supra* note 1 at para 12; *R v Suter,* 2018 SCC 34 at para 56.

[63] See *R v Arcand,* 2010 ABCA 363 at 57; *R v Siwicki*, 2019 MBCA 104 at para 44.

[64] See M (CA), *supra* note 40 at para 80.

[65] See *Bunn*, *supra* note 5 at para 122.

accused's conduct. In *Bunn*, the MBCA is conveying to lower courts that sexual assault must be recognized as having significantly harmful and damaging physical, mental, and financial effects on adult victims.[66] This directly relates to the harm or likely harm caused to victims and the community which, as aforementioned, is an important consideration in assessing the gravity of the offence. Specifically, the MBCA referenced the SCC's judgement in *R v Goldfinch* which recognized that sexual assault victims suffer a "constellation of physical and psychological" issues that impact them for the rest of their lives.[67] This understanding was also held to relate not only to physical and emotional harm, but financial costs flowing from lost productivity due to mental health issues, medical costs, and costs from pain and suffering.[68] In this sense, the likely harm caused by sexual assault can be significant. Not only does it result in physical pain caused by nonconsensual sexual advances, but the victim is often left with psychological trauma stemming from the situation. [69] This physical and psychological trauma can also impose a further financial burden upon the victim due to potential medical costs and mental health issues affecting their ability to work.[70] These financial costs also affect the larger community due to the loss of productive work and the cost incurred by the use of medical and mental health resources.[71] By pointing out these likely harms and prompting lower courts to consider them in sentencing, the MBCA is utilizing society's deepened understanding of harm to create a better understanding of the gravity of sexual assault. Drawing attention to this evolution in the understanding of the gravity of the offence allows sentencing judges to employ this deepened knowledge to craft a truly proportionate sentence.

In terms of the offender's degree of responsibility, the MBCA's guidance also proves informative. By endorsing the concept that the

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66 *Ibid* at para 76.

67 See *Bunn*, *supra* note 5 at para 76 citing *R v Goldfinch*, 2019 SCC 38 at para 37.

68 *Ibid*.

69 See Nadine Wathen, *Health Impacts of Violent Victimization on Women and their Children*, Catalogue No J2-377/2013E (Ottawa: Department of Justice Canada, 2012) at 11-12.

70 See Rebecca Loya, "Rape as an Economic Crime: The Impact of Sexual Violence on Survivors' Employment and Economic Well-Being" (2015) 30:16 Journal of Interpersonal Violence 2793 at 2794-2797.

71 *Ibid* at 2795.

principles in *Friesen* apply to adults, the MBCA provides a degree of instruction on how the deepened societal understanding of harm affects the degree of responsibility of the offender.[72] In *Friesen*, the SCC held that courts must take the "modern recognition of the wrongfulness and harmfulness of sexual violence into account when determining the offender's degree of responsibility."[73] This includes an assessment of the harm intended by the offender, or that they were reckless or wilfully blind to such harm.[74] With this in mind, a sentencing judge can factor in the deepened modern understanding of the harm arising from sexual assault into an accused's degree of responsibility. For instance, a sentencing judge may find that an accused's moral blameworthiness is elevated due to the deepened contemporary understanding of the physical, emotional, and financial anguish inflicted by sexual assault. Further, while an accused may allege that they did not intend the victim to incur these mental and financial harms, a judge can employ this modern understanding to find that the accused was reckless or wilfully blind to them.

As can be seen, the MBCA's ruling in *Bunn* certainly influences the proportionality assessment for sexual assault. Both the gravity of the offence and the degree of responsibility of the offender are informed by the deepened understanding of harm articulated by the MBCA in *Bunn*. By telling sentencing judges "to impose sentences that reflect society's and the courts' deepened understanding of the harm caused," it is implicit that the proportionality evaluation is to be determined with this in mind.[75] In this sense, proportionality in sexual assault sentencing is enhanced by the MBCA's guidance. This direction provides a sentencing judge with an updated understanding of harm which accurately reflects contemporary knowledge in sexual assault sentencing. As a result, this modern understanding of harm helps in crafting a proportionate sentence as it can inform both the gravity of the offence and the degree of responsibility of the offender.

Regarding this claim of enhanced proportionality, it is not solely speculative. Although *Bunn* is a recent case, it has seen application within the jurisprudence. In *R v Derksen*, the Manitoba Court of King's Bench was

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72 See *Bunn*, *supra* note 5 at para 72.

73 See *Friesen*, *supra* note 1 at para 87.

74 *Ibid* at para 88.

75 See *Bunn*, *supra* note 5 at para 122.

tasked with sentencing an accused convicted of sexual assault.[76] In conducting the quantum of assessment for reaching a proportionate sentence, Justice Toews turned to the guidance provided in *Bunn*.[77] Specifically, he claimed that "the Appeal Court's explicit recognition of our growing understanding of the profound impact sexual violence can have upon a victim's mental and physical health allows this court to consider that impact as a factor in fashioning a fit and proper sentence."[78] This statement directly acknowledges that the instruction provided in *Bunn* is relevant to formulating a fit and proportionate sentence as it helps to ensure that this deepened understanding of harm is factored into the determination. As can be seen, the ruling in *Bunn* has already begun to enhance the proportionality assessment for sexual assault in lower courts in Manitoba. Interestingly, *Bunn* has also seen some application across provincial borders. For instance, the British Columbia Supreme Court (BCSC) in *R v Thomas* was tasked with sentencing an accused found guilty of sexual assault.[79] When discussing sentencing and proportionality, Justice Macdonald cited *Bunn* as precedent that the comments made in *Friesen* have application to sexual assault, and that there is a deepened understanding of the harm caused by this offence in terms of adult victims.[80] In reference to this intensified comprehension of harm, Justice Macdonald explicitly stated that "courts are required to focus their attention on emotional and psychological harm, not just physical harm."[81] Considering that before this statement, Justice Macdonald noted that the gravity of the offence is informed by the harm arising from that offence, it is evident that the understanding of harm from *Bunn* aided in the BCSC's sentencing assessment.[82] What this demonstrates is that, similar to *Derksen*, the BCSC is utilizing the MBCA's guidance regarding the harm caused by sexual assault as a consideration in crafting a proportionate sentence. In effect, this is a practical demonstration of the enhanced proportionality resulting from *Bunn* as this modern

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76 See *R v Derksen*, 2022 MBQB 118 at para 1.

77 *Ibid* at paras 14, 15.

78 *Ibid* at para 26.

79 See *R v Thomas*, 2022 BCSC 2297 at para 1.

80 *Ibid* at para 41.

81 *Ibid*.

82 *Ibid* at para 36.

understanding of harm is being used by lower courts to fashion a proportionate sentence.

Ultimately, the MBCA's approach in *Bunn* clearly enhances the proportionality analysis as it relates to the offence of sexual assault. Not only does the new understanding of harm espoused by the MBCA inform both the gravity of the offence and the degree of responsibility of the offender, but lower courts have already begun to apply this practically in crafting sentences. While *Derksen* and *Thomas* are only two examples of this reality, the 2022 judgement in *Bunn* is still relatively new. However, these two cases illustrate that *Bunn* has started to penetrate into the jurisprudence, even outside of Manitoba.

V. HYPOTHETICAL APPLICATION OF *BUNN* AS A GENERAL RULE FOR RAISING OR LOWERING SENTENCES

Because we have considered *Bunn* from both a theoretical and practical perspective, shifting to hypothetical considerations of its future application is an appropriate area of analysis. As discussed previously, the decision to provide non-quantitative guidance to increase sentences for sexual assault was premised on the existence of two conditions. First, that society had a deepened understanding of the harm arising from sexual assault involving adult victims, and second, legislative intent directing this harm to be considered in sentencing.[83] Reducing this further yields a hypothetical general rule. This being that where (1) society has a deepened understanding of the harm arising from an offence, and (2) there is legislative intent directing this harm to be considered, non-quantitative guidance calling for increased sentences is warranted. While *Friesen* and *Lacasse* stipulated a similar rule for creating new quantitative guidance such as starting points or ranges, no concrete rule for non-quantitative direction was provided.[84] Although it could be argued that *Friesen* already establishes such a precedent as it states that appellate courts should bring the law into harmony with a new societal understanding of an offence, there is a conceptual difference.[85] *Bunn* narrows this broad statement and conveys that non-quantitative instruction can be provided where the abovementioned factors are met,

[83] See *Bunn*, *supra* note 5 at paras 111-112.

[84] See *Friesen*, *supra* note 1 at para 108; *Lacasse*, *supra* note 1 at paras 62-64, 74.

[85] See *Friesen*, *supra* note 1at para 34.

producing what can be deemed a concrete two-part rule. This rule could be utilized as a universal instruction to raise or lower sentences for offences generally.

As this rule can already apply to call for an increase in sentences, as was demonstrated in *Bunn*, one must wonder whether it could function in the opposite way to lower sentences where society and legislative intent warrant such a departure. Seeing as this rule is based on the two factors of society having a deepened understanding of harm and legislative intent directing this harm to be considered, it is arguable that it could apply inversely. While societal understanding and legislative intent are still present, the fundamental structure of the rule stays intact. As such, where societal understanding and legislative intent recognize that an offence is not as harmful as previously thought, non-quantitative guidance to lower sentences is warranted. This respects the principle laid down in *Friesen* that an appellate court must bring 'the law into harmony with a new societal understanding."[86] In this sense, the hypothetical rule from *Bunn* could certainly be applied to provide non-quantitative instruction that sentences for an offence should be lowered.

Although this would not alter the substance of the rule, its form would slightly change. To reiterate, the hypothesized general rule from *Bunn* is that, where (1) society has a deepened understanding of the harm arising from an offence, and (2) there is legislative intent directing this harm to be considered, non-quantitative guidance calling for increased sentences is warranted. Inverting this leads to the following articulation of the rule: where (1) society has a deepened understanding that an offence is not as harmful, and (2) there is legislative intent directing this understanding of lessened harm to be considered, non-quantitative guidance calling for lower sentences is warranted. While this would only see use in exceptional circumstances, its applicability already has practical implications within the law. As will now be shown, it could be applied to the offence of drug possession under section 4(1) of the *Controlled Drugs and Substances Act*.[87]

Turning to the first prong of the rule, it can be contended that society's understanding of drug use has evolved in a manner that now views possession as a social and public health problem rather than a harmful criminal justice issue. In a recent report on Canada's approach to dealing

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86 *Ibid*.

87 See *Controlled Drugs and Substances Act*, SC 1996, c 19, s 4(1) [*CDSA*].

with substance use, the government's position on drug use centred on it as a public health and safety issue.[88] It stated that a public health approach premised on reducing the harms of substance use through support and treatment was an effective way to deal with drug use.[89] In juxtaposition, the report explained that those who use substances and interact with the criminal justice system due to possession, often suffer further harms of stigma, loss of employment, losse of income, and loss of housing.[90] Diverting those who commit possession offences to health and social services was deemed a better alternative than criminal justice system involvement.[91] This report also recognized that substance use can be spurred by socioeconomic factors of poverty and marginalization and groups facing these problems are at elevated risks for addiction and use.[92] Overall, the report conveys that substance use is a public health issue spurred by social factors and an approach focused on support and treatment, rather than criminal justice intervention, will be more effective.

This focus on substance use and possession as a social and public health issue to be dealt with through support rather than punitive criminal justice measures has seen increasing support. An official report by the Canadian Association of Chiefs of Police ("CACP") echoed that substance use is a public health issue and supported the use of "alternatives to criminal sanction for simple possession."[93] In the debates surrounding Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act* ("Bill C-5"), members of parliament took a similar stance.[94] It was recognized that "a response to addiction based on health measures and social action is far more effective than other means, namely criminal justice

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88 See Health Canada, *The Canadian Drugs + Substances Strategy*, Cat no. H134-35/2023E (Ottawa: Health Canada, 30 October 2023) at 1.

89 *Ibid* at 12.

90 *Ibid* at 18.

91 *Ibid*.

92 *Ibid at* 6, 10.

93 See Canadian Association of Chiefs of Police, "Decriminalization for Simple Possession of Illicit Drugs: Exploring Impacts on Public Safety & Policing" (July 2020) at 2, online (pdf): <https://www.cacp.ca/resources.html> [perma.cc/PTS5-KH46].

94 See generally "Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*," 2nd reading, *House of Commons Debates*, 44-1, No 17 (14 December 2021).

measures"[95] and that, "when it comes to simple drug possession, nobody is really worse off except the person who has committed the crime."[96] Similar thoughts have been advanced by the Office of the Public Health Officer in British Columbia which asserts that criminal justice measures increase harm for those who use substances as it "does not address what is ultimately a health issue."[97] As can be seen, there is an increasing societal understanding of drug use, and by extension drug possession, as a health and social issue to be addressed through alternative means. Sanctioning through the criminal justice system only serves to aggravate harm against substance users and resources are better used to target the health and social issues prompting drug use. On this basis, it can be argued that the first part of the general hypothetical rule to call for lower sentences is met. The sources explored show that societal understanding of drug use and possession has evolved. This evolution views drug use more as a health and social issue requiring rehabilitative treatment rather than a harmful criminal matter necessitating punishment. With this first portion of the rule satisfied, it must now be determined whether the second part is also met.

Recent legislative intent reflects the idea that drug use and possession is a health and social issue that requires community support rather than criminal justice intervention. Bill C-5, which received royal assent on November 17, 2022, implemented various amendments to both the *Criminal Code* and *Controlled Drugs and Substances Act* ("CDSA").[98] One of these additions was section 10.1 of the *CDSA*. This section recognizes that "substance use should be addressed primarily as a health and social issue" and that criminal sanctions imposed in respect of the possession of drugs . . . are not consistent with public health evidence."[99] This section further instructs that judicial resources are better utilized for offences posing a risk to public safety, conveying that diversionary methods targeting the root

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95 *Ibid* at 1130, (Emmanuella Lambropoulos).

96 *Ibid* at 1135, (Emmanuella Lambropoulos).

97 See British Columbia, Office of the Provincial Health Officer, *Stopping the Harm: Decriminalization of People Who Use Drugs in BC* (British Columbia: Office of the Provincial Health Officer, 2019) at 4.

98 See generally Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2021 (assented to 17 November 2022), SC 2022, c 15.

99 *CDSA*, *supra* note 87, ss 10.1(a), 10.1(c).

causes of drug use should be used in lieu.[100] The language used in this section is a clear signal from parliament that possession and drug use is better understood as a health and social issue to be addressed through rehabilitative support rather than harsh criminal sanctions. This undoubtedly directs justice system participants to consider this understanding in determining how to deal with an individual charged with substance possession. While this legislative intent clearly calls for the use of diversionary methods, if a possession offence came before a judge for sentencing, this would lead them to impose lower community-based sentences focussed on treatment instead of imprisonment.

Based on the societal understanding and legislative intent explored concerning drug possession, both parts of the hypothetical rule to call for lower sentences are satisfied. First, societal understanding of drug use and possession has evolved to recognize it as a health and social issue requiring treatment rather than a criminal matter demanding punitive sanctions. Second, legislative intent mirrors this and instructs justice system participants to consider such an understanding in determining how to proceed with an individual charged with possession. With both of these conditions met, non-quantitative guidance calling for lower sentences is warranted as the proposed rule from *Bunn* applies to drug possession. Although this is simply a hypothetical exercise, it demonstrates that the suggested rule from *Bunn* can also be utilized to call for lower sentences. In light of this discovery, it can be claimed that the MBCA's approach in *Bunn* can be condensed into a general rule for raising, as well as lowering, sentences through non-quantitative guidance.

VI. CONCLUSION

This paper set out to examine the MBCA's non-quantitative ruling in *Bunn* that sentences for sexual assault involving adult victims should increase. The impetus behind this decision was premised on society and the courts' deepened understanding of harm arising from sexual assault along with legislative intent guiding judges to consider this harm. In providing this instruction, the MBCA essentially conveyed that society and the courts' deepened understanding of the harm arising from an offence, paired with legislative intent guiding sentencing judges to consider this deepened

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100 *Ibid*, s 10.1(e).

understanding, was sufficient to substantiate appellate guidance in favour of higher sentences. Three contentions were sought to be made regarding this approach by the MBCA: first, that it is underpinned by Durkheimian functionalism and bolsters the courts' role in upholding societal values; second, that it enhances the attainment of proportionality in sexual assault sentencing; and, lastly, that it has hypothetical application as a general rule for raising, or lowering, sentences for offences through non-quantitative guidance.

Following a brief explanation of the principles espoused by the MBCA in *Bunn*, Durkheim's functionalist theory of punishment was contextualized and contrasted to the ruling in *Bunn*. The process envisaged by Durkheim's theory was the state drawing upon society's values to effect punishment, thereby expressing those values and legitimizing their validity in the process.[101] It was illustrated that the MBCA in *Bunn* mirrored this idea. Society's values informed the non-quantitative guidance provided and the call for increased sentences for sexual assault was reflective of these sentiments. This instruction to increase sentences was an expression of, and was informed by, the Canadian collective conscience. By punishing in accordance with these collective values, the state then legitimizes their veracity. This focus on social standards was also deemed to foster cohesion between sentencing and societal sentiment. In doing so, the MBCA reconciled community views and justice, strengthening the perception that courts have a role in upholding society's values.

Shifting to the practical implications of the ruling in *Bunn,* its effect on proportionality in sexual assault sentencing was discussed. It was demonstrated that the deepened understanding of harm articulated in *Bunn* helps to inform both the gravity of the offence and the degree of responsibility of the offender. By providing an updated understanding of harm reflecting contemporary knowledge, this insight can be utilized to inform both of these factors. This guides a sentencing judge to employ this modern awareness of harm in the proportionality analysis, thus enhancing the attainment of proportionality in sexual assault sentencing. Such a claim was shown not to be solely speculative, as examples were provided of lower courts conducting their sentencing analysis in accordance with this understanding of harm from *Bunn*.

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[101] See Durkheim, *supra* note 47 at 68-69.

Lastly, it was determined that a hypothetical general rule to raise or lower sentences through non-quantitative guidance could be extracted from the judgement in *Bunn*. This was proposed to be that, where (1) society has a deepened understanding of the harm arising from an offence, and (2) there is legislative intent directing this harm to be considered, non-quantitative guidance calling for increased sentences is warranted. While this could be used to call for increased sentences as was demonstrated in *Bunn*, it was also hypothesized that the rule could apply to call for lower sentences where societal understanding and legislative intent view an offence as less harmful. To illustrate the legitimacy of this prospect, the rule was applied to the offence of drug possession under section 4(1) of the *CDSA*. After producing evidence showing societal understanding and legislative intent deeming drug possession as less harmful from a criminal justice perspective, the rule was deemed applicable. As such, it was shown that the MBCA's approach in *Bunn* can be condensed into a general rule for raising or lowering sentences through non-quantitative guidance.

Ultimately, *Bunn* is an important case. Not only does it provide guidance to lower courts to increase sentences for sexual assault involving adult victims, but it also represents society's values, enhances proportionality in sexual assault sentencing, and creates a potential framework for increasing or lowering sentences through non-quantitative guidance. Appeal courts should continue to engage in such opportunities to reconcile the law with modern values and knowledge. Doing so ensures the justice system is not only up to date, but also representative of the society it is sworn to protect.