




RESEARCH ARTICLE/ARTICLE DE RECHERCHE

## Interweaving Jurisdictions: A Critical Examination of Legal Authority, Sentencing, and Deportation

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### Abstract

The statutory authorities to remove and to review appeals of removal assigned in the *Immigration and Refugee Protection Act* (IRPA) exist in a complicated, interweaving relationship with the legal power to sentence held by judges of the criminal court. Judges do not retain the legal authority to decide on removal. Judges do, however, hold the jurisdiction to consider deportation at sentencing. The practice of judicial jurisdiction in turn has potentially significant effects for subsequent practices of jurisdiction under the IRPA, including where judges use their legal power to apply sentences protecting permanent residents from removal and/or losing their right of appeal. Despite these important jurisdictional connections, how judicial authority to consider deportation is enacted has not received scholarly examination. This paper draws from an analysis of case law and interviews to address this gap, tracing how judges practice their jurisdiction when sentencing permanent residents.

**Keywords:** jurisdiction; sentencing; removal; inadmissibility; serious criminality

### Résumé

Les pouvoirs légaux de renvoi et les procédures d'appels d'une mesure de renvoi qui sont prévus dans la *Loi sur l'immigration et la protection des réfugiés* (LIPR) existent dans une relation complexe et entremêlée avec le pouvoir légal de prononcer des peines par les juges qui siègent dans les cours de droit criminel. Si ces juges ne conservent pas le pouvoir légal de décider du renvoi, ceux-ci ont néanmoins la compétence d'envisager l'expulsion lors de la détermination de la peine. La pratique de la compétence judiciaire a ainsi des effets potentiellement importants sur les pratiques ultérieures de compétence en vertu de la LIPR, notamment lorsque les juges utilisent leur pouvoir légal pour ordonner des peines protégeant les résidents permanents contre le renvoi et/ou leur droit d'appel. Malgré ces liens juridictionnels importants, la manière dont le pouvoir judiciaire envisage l'expulsion n'a

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pas fait l'objet d'un examen académique. Dans cette foulée, cet article s'appuie sur une analyse de la jurisprudence et d'entretiens pour combler cette lacune afin de retracer — et de décrire — la manière dont les juges exercent leur compétence lorsqu'ils prononcent des peines à l'encontre de résidents permanents.

**Mots-clés:** juridiction; détermination de la peine; renvoi; inadmissibilité; grande criminalité

## Introduction

The jurisdictions to remove migrants from Canada and to sentence exist in a complicated, interweaving relationship. Judges of the criminal court adopt recognizable discursive scripts to claim and/or refuse jurisdiction over the review of deportation at sentencing. The outcome on sentence has the potential to transform the legal power of actors in the immigration system with the jurisdiction to deport migrants. Judicial practices of jurisdiction may, for example, circumvent the exercise of the legal power to hear appeals of removal. How these jurisdictional intersections are navigated in practice has not yet received scholarly attention (for a discussion of migrant prosecution and sentencing from the American context, see Eagly 2010, 2013, 2017; Jain 2016; from the United Kingdom, see Aliverti 2013).

The jurisdictions to sentence and deport appear separate and distinct in law. Section 45(d) of the *Immigration and Refugee Protection Act*, 2001 (IRPA) specifies that Members of the Immigration Division (ID) of the Immigration and Refugee Board have the legal authority to issue a removal order following an admissibility hearing if it is determined that a permanent resident<sup>1</sup> or foreign national<sup>2</sup> is inadmissible to Canada. Grounds for inadmissibility are specified in sections 34–42 of the IRPA and include serious criminality (in section 36(1)(a)), defined as conviction for an offence carrying a possible term of imprisonment of ten years or more, or being sentenced to more than six months' incarceration. Pursuant to subsection 44(1) of the IRPA, an officer of either the Canada Border Services Agency or Immigration, Refugees, and Citizenship Canada (IRCC) may prepare a report identifying a migrant as inadmissible. This report is transmitted to a delegate of the Minister of Public Safety and Emergency Preparedness or of IRCC. If the minister determines that the report is well founded and the migrant is a foreign national identified as inadmissible for serious criminality, then subsection 44(2) of the IRPA and 228(1)(a) of the *Immigration and Refugee Protection Regulations* state that the minister may make a removal order. The report must be referred to the ID, however, if it alleges that a permanent resident is inadmissible for serious criminality. Permanent residents<sup>3</sup> sentenced to less than six months' imprisonment may appeal their inadmissibility on grounds of serious

<sup>1</sup> Defined in s 2 of the IRPA as a person who has acquired and not subsequently lost permanent resident status under s 46.

<sup>2</sup> Defined in s 2 of the IRPA as a person who is not a Canadian citizen or permanent resident.

<sup>3</sup> Pursuant to subsection 63(3) of the IRPA, no right of appeal exists for foreign nationals. Protected persons and persons holding permanent resident visas who have not yet landed in Canada are not permanent residents but do have access to appeal, as per subsections 63(2)–(3). Foreign nationals may seek judicial review of their removal at the Federal Court of Canada and/or a stay of removal.

criminality. Appeals are considered by Members of the Immigration Appeal Division (IAD), pursuant to section 63 of the IRPA. If the appeal is dismissed by a Member of the IAD, then the permanent resident may<sup>4</sup> be removed.

The statutory authorities to remove permanent residents for serious criminality and to review appeals of removal are clearly assigned to Members of the ID and IAD, respectively. Yet, following the Supreme Court decision in *R v Pham* (2013), judges retain the legal authority to consider deportation as a relevant factor in individualizing a sentence (para 11). And, by considering deportation, judges may apply sentences that protect permanent residents from removal and/or losing their right of appeal. Although judges do not hold the legal authority to render decisions on inadmissibility and removal, decision-making on sentence may interfere with and/or subvert the practice of jurisdiction to remove at the ID. Sentencing decisions are also critical to the enactment of authority by Members of the IAD, given that permanent residents' access to appeal is dependent on sentence length. Judicial decision-making on sentence thus contributes to the production of legal authority in the immigration system. The jurisdictions to sentence, remove, and to consider appeals of removal interweave, with practices of jurisdiction in the criminal justice system impacting the enactment of legal powers in the immigration system.

This paper traces the nature and effects of these jurisdictional intersections. It begins with a review of the methods and conceptual tools employed to support the analysis of jurisdiction. Part II traces the evolution of intersections between the jurisdictions to sentence and remove, and to consider appeals of removal. I examine how judges have historically practiced their legal authority to consider removal through an analysis of the discourses employed that justify both the promotion of jurisdiction to review deportation and the disavowal of this legal power. Part III then provides a more fulsome review of the decision in *R v Pham*. I explain that this decision instructed judges on how to consider deportation when practicing their legal authority during the sentencing of migrants. Finally, Part IV examines how decisions on sentence post-*Pham* contribute to the production of legal authority to remove permanent residents and to consider appeals of removal assigned to the ID and IAD.

## I. Conceptual Resources

I rely on the scholarship of Dorsett and McVeigh (2012) in my examination of jurisdiction. These authors explain that the word “jurisdiction” refers to both legal authority and “the act of speaking—of declaring the law” (Dorsett and McVeigh 2012, 4). Dorsett and McVeigh write that jurisdiction can be defined as “the practice of pronouncing the law. It declares the existence of law and the authority to speak in the name of the law” (Dorsett and McVeigh 2012, 4). This

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<sup>4</sup> The deportation of foreign nationals and permanent residents may be prevented through the provision of protected persons status via an application for Pre-Removal Risk Assessment, permanent residence under Humanitarian and Compassionate Grounds, or the issuance of a Temporary Resident Permit.

approach moves beyond descriptive conceptions of jurisdiction as the technical bracketing of legal authority (Blomley 2014; Dorsett and McVeigh 2012; Ford 1999; Valverde 2009, 2015). Jurisdiction is instead conceptualized as the practice of declaring legal authority assigned in law.

Building from these insights, I seek to understand how jurisdiction has been practiced in the criminal courts in cases involving migrants. Whether judges hold the legal power to consider deportation has been historically contested. I provide an examination of the discourses employed by judges pre-*Pham* to either assert or deny the legal power to consider removal. Discourse is understood as a way of using language to represent knowledge held on “a particular topic at a particular historical moment” (Hall 1997, 44). I demonstrate that judges draw from three distinct discourses of deportation in practicing their jurisdiction, namely that removal is an administrative penalty, a personal circumstance, and/or a collateral effect of conviction and sentence.

Critical to this study is a recognition that practices of jurisdiction are productive (Dorsett 2022; Dorsett and McVeigh 2012; Ford 1999; Moffette and Pratt 2020; Pasternak 2014; Valverde 2009, 2015). These practices specifically function to bring descriptions of bracketed legal power “into existence” (Dorsett and McVeigh 2012, 4). The production of legal power contributes to resolving ambiguities that arise due to the interweaving of multiple jurisdictions. Legal spaces are intersected by a plurality of legislation and regulations that dynamically intertwine. The assignment of legal power varies across these interweaving laws resulting in confusion, and even contestation, over who has legal authority (Dorsett 2022; Pasternak 2014; Valverde 2009, 2015). Practices of jurisdiction produce boundaries described in law, thereby resolving these ambiguities by bringing legal authority into “existence.”

I consider how practices of legal authority in the criminal system function to produce the legal powers to remove permanent residents and to hear appeals of removal assigned to the ID and IAD. I demonstrate that decision-making on sentence for permanent residents may promote and/or subvert the jurisdiction of the ID and IAD. Consider, for example, where ambiguity in the legal authority to remove exists because inadmissibility is not confirmed based on conviction alone. The decision on sentence that meets the legal requirements for inadmissibility in this scenario would effectively act as a “switch,” turning on (and thus bringing into “existence”) the jurisdiction of Members of the ID to remove.<sup>5</sup> I contend herein that sentencing can thus be conceptualized as a practice of jurisdiction that produces the authority of Members of the ID and IAD.

My analysis is based on an examination of forty-one criminal court decisions: twenty-two rendered pre-*Pham*, the decision in *Pham*, and eighteen issued thereafter. The twenty-two pre-*Pham* decisions were selected based on their discussion of judicial jurisdiction to examine deportation. The remaining eighteen cases were chosen for analysis because they demonstrate the productive effects of sentencing for legal authority in the immigration system post-*Pham*. These sentencing decisions all involved permanent residents and were all

<sup>5</sup> Thank you to one of the anonymous reviewers for offering the language of “switch” to explain the jurisdictional practices under examination.

rendered by provincial, superior, and/or appellate courts in Ontario. I restricted the analysis to decisions rendered in Ontario after *Pham* to promote the manageability of my data set. I also limited my review to cases with permanent residents given that the interweaving of legal authorities to sentence, remove, and to hear appeals of removal only appears in decisions involving these migrants. Finally, I draw from two interviews that I conducted with judges who sit in Ontario that engage with questions of jurisdiction.<sup>6</sup> I recognize that the select sampling of cases and interviews limits the generalizability of conclusions drawn. Further research is required to address these limitations, including via the consideration of jurisdictional practices at sentencing outside of Ontario and in cases involving foreign nationals.

## II. Evolution of Practices of Jurisdictions

The legal authority to remove was first assigned via the 1906 *Immigration Act*. While migrants had been deported prior to the enactment of this legislation, there was no clear description of the power to remove in law (Drystek 1982; Kelley and Trebilcock 2010). The 1906 Act specified that deportation would be ordered by the Minister of the Interior, following their consideration of the facts of a migrant's criminality. Migrants did not have a right to appeal this decision. The wide legal authority granted to the minister to decide on removal was justified as necessary by then-Minister of the Interior, Frank Oliver, "in order to make the provisions effective." Minister Oliver further contended that there must be trust placed in "the government not to do injustice under the enlarged power" ("*Immigrants and Immigration Act*" 1906, 5256).

The authority to remove was quickly reassigned via the passage of a new *Immigration Act* in 1910. The (re)bracketing of legal power was based on the perceived arbitrariness of decisions to deport issued by the minister, exposing the absurdity of calls for trust in the government. Section 42 of the 1910 *Immigration Act* extended to Members of Boards of Inquiry the jurisdiction to "sit and decide on the merits of the cases" with "a record of each case being kept." Boards of Inquiry formerly retained the power to decide on admissibility at the border and/or at ports of entry; the new legislation expanded this authority by assigning boards the jurisdiction to deport migrants already within the nation. Decisions to remove could then be challenged to the minister (as per s 42) (Kelley and Trebilcock 2010; Roberts 1988). The minister thus retained the legal power to examine decisions to remove, namely on appeal, and issue a final determination on deportation.

Additionally included within the 1910 Act was section 23, which read:

No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding,

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<sup>6</sup> Questions asked included: In your role as an actor of the criminal justice system, how do you understand what is meant by "jurisdiction"? How do you understand the way jurisdiction works at the intersection of criminal justice and immigration systems?

decision or order of the Minister or of any Board of Inquiry, or officer in charge ... relating to the detention or deportation of any rejected immigrant ... upon any ground whatsoever.

Section 23 of the 1910 Act represents the first instance of intersection in law between criminal jurisdiction and the legal authority of actors in the immigration system. The amendments bracket the legal power to remove to Boards of Inquiry and the Minister of the Interior while also *retracting* the jurisdiction of judges to examine deportation. The legal authority of courts to review removal was thereafter limited in law to decisions where it was determined that immigration actors had exceeded their legal authority by, for example, ordering removal where the substantive conditions for deportation defined in the Act were not met (*Samejima v The King* 1932; Roberts 1988, 198–99).

Courts produced the limits on their jurisdiction described in law. Judges declaring the limits on their legal authority would justify their refusal to examine decisions on detention and/or deportation by discursively distinguishing between penalties imposed in the criminal system and removal. This is exemplified in the case of *R v Alamazoff* (1919). The defendant in this case was a citizen of Russia who was detained in June 1919, having been accused of creating or attempting to create a riot or public disorder in Canada and of having, without lawful authority, assumed powers of government in the city of Winnipeg. The defendant was subject to immigration detention and was awaiting a decision on whether he would be deported for his alleged criminality.

Alamazoff applied to the criminal court for review of his detainment via a writ of habeas corpus in July 1919. Defence counsel made the argument that deportation proceedings are criminal, given that orders for removal are issued following charge and sentence (*R v Alamazoff* 1919, at 145). The court replied, however, that a reading of the *Immigration Act* could not sustain this conceptualization because “the object and purpose” of administrative removal “proceedings is not to punish for an offence against the law of Canada” (*R v Alamazoff* 1919, at 145). Instead, these proceedings “ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken” (*R v Alamazoff* 1919, at 145). Deportation is thus applied following an administrative decision that a migrant has failed to abide by immigration legislation, while punishment is applied based on conviction. This distinction between deportation and punishment was confirmed by the Supreme Court of Canada in 1933. The court explained that deportation is “not attached to the criminal offence as a legal consequence following *de jure* upon conviction... They flow from an administrative process” (*Reference as to the effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings* 1933, at para 37; see also *Re Mah Shin Shong; Re Sing Yin Hong* 1923).

The discourse separating punishment and deportation guided the judicial practice of jurisdiction in *Alamazoff* (1919). The judge declared the limits on their legal authority described in the *Immigration Act*, which they rationalized by distinguishing between deportation as an administrative decision and punishment as the result of conviction. The court also produced the technical

bracketing of legal authority that assigns the power to remove to Members of Boards of Inquiry and the Minister of the Interior through this discourse. These jurisdictional practices point to the interweaving of legal power across the immigration and criminal domains; practices of legal authority in the court that deny the jurisdiction to examine removal brought into existence the legal power of immigration actors to deport.

These intersections in authority were notably renegotiated in 1967 when the provisions explicitly restricting the jurisdiction of the court to examine decisions on deportation were removed from immigration law (Haigh and Smith 1998). Removal decisions were now under the authority of front-line immigration officers (named Special Inquiry Officers via the 1952 *Immigration Act* (Canadian Council for Refugees 2000)). These decisions could be appealed to an independent Immigration Appeal Board (IAB) (also established in 1952). There were no limits placed on access to the IAB; decisions on sentence would not, for example, affect the practice of jurisdiction to review removal.

These legislative amendments might suggest an unweaving of jurisdiction across the immigration and criminal systems. Immigration legislation no longer explicitly constrained the legal authority of judges to examine removal. Yet, with these shifts in law, judges of the criminal court began to declare their legal authority to consider deportation at sentencing. Courts continued to produce the legal authority of immigration actors to decide on removal. They justified the examination of deportation, however, by describing removal as a factor relevant to the *circumstances* of the defendant (*R v Chiu* 1984; *Dubuc v R* 1978; *R v Melo* 1975). Consideration of removal through the lens of “circumstance” avoided interference with the legal authority to deport, with courts contending that they were not deciding on removal. Instead, courts were considering these immigration outcomes as one of many “circumstances” relevant to the practice of their legal authority at sentencing. These judicial practices of jurisdiction then produced both the legal authority of courts *and* the legal power of immigration officers to remove.

The shift away from discourses positioning deportation as distinct from punishment, and towards the promotion of removal as a “circumstance” of the defendant, supported the practice of judicial authority. Judges also drew from traditional sentencing principles to rationalize declarations of their legal authority to consider removal post-1967. Courts contended that they held the legal power to consider deportation by, for example, discursively positioning removal as a “mitigating” factor (*R v Johnston and Tremayne* 1970; *R v Sullivan* 1972). These diverse discourses maintained the separation between the authority to remove and sentence; judges were not deciding on deportation through their examinations of removal, but were instead enacting their jurisdiction to apply principles of the criminal law, which required the consideration of all factors relevant to the circumstances of the defendant.

Still, there were judges who continued to render decisions refusing the legal authority to consider deportation during criminal proceedings. These courts declared that the power to deport is bracketed to actors in the immigration system. It was contended that, by considering removal, judges were offending the assignment of this legal authority to deport in law, since Special Inquiry

Officers would be unable to enact their power to deport based on court practices of jurisdiction. For example, in *R v Fung* (1973), the Appellate Division of the Supreme Court of Alberta stated that “the immigration authorities are entitled to know that the appellant committed the offence. They are entitled to take that into consideration in determining whether to allow the appellant to remain in Canada” (at para 1).

Still other courts denied the relevance of deportation for sentencing. For example, Justice Finlayson in *R v Smith* (1997), wrote: “I consider the fact of deportation to be irrelevant. The appellant committed serious crimes in this jurisdiction and he should be sentenced appropriately for them regardless of his immigration status. In all the circumstances, I am not persuaded that there was any error in principle in the sentence imposed” (at para 28; for similar refusals to consider deportation, see *Antonecchia v The Queen* 1959; *R v Kerr* 1982).

Like courts that were willing to review removal, these judges produced the technical bracketing of legal authority in immigration law through their *refusal* of jurisdiction to consider deportation. The jurisdictions to remove and to sentence continue to interweave. How these intersections should be navigated in practice was clearly unsettled, however. While some courts were willing to examine removal through discourses that repositioned deportation as relevant to the practice of judicial authority, other courts denied this jurisdiction, including by focusing on the effect of these practices for the production of the legal authority to remove.

The IRPA was passed in 2002. This legislation assigns the legal authority to remove permanent residents for inadmissibility on grounds of serious criminality to Members of the ID, as noted. At the time that this legislation was enacted, permanent residents found to be inadmissible for serious criminality retained the right to appeal their removal to the (renamed) IAD if sentenced to less than two years of incarceration (pursuant to subsection 64(2)). By limiting access to the right of appeal based on sentence length, this legislation introduced the intersections between judicial authority and the legal authority to consider appeals of removal made by permanent residents. If judges sentenced a permanent resident to less than two years’ incarceration, for example, this would produce the legal authority to review removal at the IAD. If, however, judges refused to examine these outcomes, based on arguments of a lack of legal authority or relevancy, this could<sup>7</sup> interfere with practices of jurisdiction at the IAD. The complex ties that bind the domains of immigration and criminal justice were thus further entrenched via the passage of the IRPA, with the jurisdictions to remove and to hear appeals of removal being impacted by the enactment of judicial authority.

Courts continued to be divided with respect to the legal power to examine deportation at sentencing post-passage of the IRPA. Some judges were willing to review removal as a “circumstance” of the offender, or a “collateral consequence” of conviction and sentence (*R v Guzman* 2011; *R v Kanthasamy* 2005; *R v Morgan* 2008). These courts were also willing to reduce a sentence to

<sup>7</sup> Note that the IAD may continue to practice jurisdiction, including through the refusal of legal power to examine removal.

protect a migrant from inadmissibility and/or their right of appeal (*R v Arganda* 2011; *R v Critton* 2002; *R v Hamilton* 2004). Other courts comparatively refused to vary sentences for migrants, even where the amendment would have been for a single day, citing a lack of jurisdiction (*R v Ariri* 2010).

The intersections between the jurisdiction to hear appeals of removal and to sentence were further complicated with the passage of the *Faster Removal of Foreign Criminals Act* (FRFCA) in June 2013. This legislation restricted access to the appeal process following issuance of a removal order for serious criminality. With the enactment of the FRFCA, only permanent residents sentenced to less than six months' imprisonment retain the right to appeal their deportation. This shift in legislation places a clear restriction on the practice of legal authority by Members of the IAD. Yet, Conservative Parliamentarians promoting these amendments also argued that limits on the right of appeal would function to constrain judicial power. These Parliamentarians held that judges were interfering with the legal authority of Members of the ID and the IAD to decide on removal. Limits on the right of appeal were thus positioned as necessary to curb judicial review of removal in practice. This is suggested in the following statement made by then-Minister of Citizenship and Immigration, Jason Kenney, before the House of Commons on 24 September 2012:

We have all witnessed, on a regular basis, serious crimes that receive a minimum penalty, whether by judge or jury, of a minimum of two years. However, we have noticed across the country that courts are often using two years less a day to penalize individuals for their crime... the scope of the current legislation does not allow us to pursue those individuals for the purpose of getting them out of the country and deporting them. Therefore, we would lower that threshold of two years down to six months. (House of Commons 2012)

Judges could continue to examine removal at sentencing post-passage of the FRFCA; their ability to impose sentences that protect migrants from removal based on the consideration of deportation was, however, restricted. Permanent residents would as a result be more easily deportable without interference, including by the court. By limiting the jurisdiction of the IAD to hear appeals, the FRFCA impacted the practice of judicial authority and, perhaps more importantly, the opportunities to resist removal.

### III. *R v Pham* and the Legal Authority to Consider Removal at Sentencing

It is, of course, paradoxical that the judicial authority to review removal had not been confirmed when the legislature was moving to curb this legal power via the FRFCA. This issue was instead being considered concurrent with debates of the FRFCA before Parliament by the Supreme Court of Canada in the matter of *Pham*. *Pham*, a permanent resident of Canada, was sentenced in 2011 to two years in prison for the production and possession of marijuana for the purposes of

trafficking. As a result of his sentence, Pham was found to be inadmissible to Canada for serious criminality. Section 64(2) of the IRPA still allowed permanent residents facing removal to appeal their deportation if they had been sentenced to less than two years' imprisonment. The result of Pham's sentence was therefore to remove his right of appeal.

Pham applied to the Alberta Court of Appeal for review of this sentence on the basis that the immigration outcomes he was facing were unknown at the time of sentencing. He asked that his sentence be reduced by one day, which would allow him to retain the right to appeal his removal from Canada in the immigration system. Counsel for Pham argued that courts had, at times, previously intervened to amend sentences that would render the individual inadmissible and removable without appeal. The Crown in contrast argued that the original sentence imposed was "fit," and thus consistent with the principles of parity (which requires that similar offences committed under similar circumstances by similar offenders receive similar sentences, as per s 718.2(b) of the *Criminal Code of Canada*, 1985) and proportionality (with parity understood as "an expression of proportionality" (*R v Friesen* 2020, at para 32)).

The Court of Appeal ultimately sided with the Crown, going so far as to reason that, given Pham's previous (albeit dated) convictions, the defendant had clearly "abused the hospitality that has been afforded to him by Canada" (*R v Pham* 2012, at para 24). The court found that a reduction in sentence would "undermine the provisions of the *Immigration Refugee Protection Act*" (*R v Pham* 2012, at para 24). This decision is clearly consistent with earlier practices of jurisdiction that denied judicial legal power to consider removal through discursive reference to the impact of sentencing on the legal authority to deport.

Pham appealed to the Supreme Court of Canada. Counsel for Pham adopted the discourse of deportation as a "personal circumstance" to argue that, even though removal may be imposed outside the criminal system, it forms a part of the web of factors that must be considered in the process of designing a sentence. According to Pham's counsel, to ignore deportation would offend the fundamental principle of sentencing, namely proportionality (see Berger (2020) for further clarification on this approach to proportionality). As stated in section 718.1 of the *Criminal Code of Canada*, 1985, proportionality requires that a sentence imposed reflects the seriousness of an offence and the degree of responsibility of an offender. On its face, this principle does not specifically permit an examination of "personal circumstances" in devising a sentence. Counsel clarified though that proportionality requires that a sentencing court consider the severity of conviction and sentence on the individual as a whole and not simply with respect to their "blameworthiness." In its Factum to the Court, Pham's counsel wrote that:

proportionality means that the punishment must fit the offence and the offender. The impact of a criminal conviction and sentence, particularly on the immigration status of an individual, is relevant in determining a fit sentence for that individual. While it cannot justify the imposition of a manifestly unfit sentence, it can and should affect where along a range an appropriate sentence will fall. (*Pham*, 2013, Factum of the Appellant, at 6)

The Crown comparatively continued to hold that the original sentence was fit and thus should not be reduced. The Crown further argued that removal is not a relevant factor at sentencing and that the sentencing process should not be used to circumvent the legal authority of the Members of the ID to remove migrants.

In its final decision, the Supreme Court adopted the discourse that removal is a “collateral consequence” of conviction and sentence. The court defined “collateral consequences” as “any consequences for the impact of the sentence on the particular offender” (*R v Pham* 2013, at para 11). The court further held that these consequences may be considered during sentencing as personal circumstances relevant to the application of the corollary principles of parity and individualization (*R v Pham* 2013, at para 11). A consideration of collateral consequences would specifically ensure that any sentence imposed on a permanent resident (for example) would be similar to sentences applied to similar offenders (i.e., other permanent residents) who commit similar offences under similar circumstances. As long as the final sentence imposed fitted within the range of sanctions available for the offence (thus ensuring parity, see *R v McDonnell* 1997), a sentence could be varied to account for the collateral consequences that the defendant would face (*R v Pham* 2013, at para 18). The final sentence imposed would then remain proportionate, being consistent with the principle of parity.

Finally, the Supreme Court warned that judges must not use the sentencing process to circumvent the intent of Parliament to deport migrants with convictions. The court wrote:

The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament’s will.

These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a de facto if not a de jure special range of sentencing options where deportation is a risk. (*R v Pham* 2013, at paras 15, 16)

Pham’s appeal was ultimately allowed and his sentence was reduced by the Supreme Court from two years’ incarceration to two years less one day.

The Supreme Court decision in *Pham* effectively bridges the earlier varied court approaches to the jurisdiction to review immigration outcomes at sentencing. The discursive positioning of deportation as a “collateral consequence” of conviction and sentence directs the Supreme Court’s decision. This discourse operates to maintain the limits on judicial legal authority to decide on removal, acknowledging that deportation is not a sentence, but an outcome of sentencing. Yet, through these discursive moves, the court produces the legal authority of judges to examine removal via their power to apply criminal law principles. The court is clear, though, that judges must not use their legal power to circumvent the will of Parliament. Judges cannot, for example, use their jurisdiction to apply

a sentence simply to protect a migrant from removal. This would offend the statutory bracketing of authority to deport to Members of the ID. While resistance to removal may be possible in the court, it is thus not guaranteed.

#### IV. Productive Jurisdictional Practices Post-Pham

The decision in *Pham* was rendered in March 2013. The FRFCA was then enacted in June 2013. While the FRFCA indirectly constrains the legal authority of judges, consideration of removal is a requirement at sentencing following the Supreme Court decision in *Pham*. These almost simultaneous events raise critical questions regarding how judges now navigate the intersections of their jurisdiction to sentence with the legal authorities to remove and to hear appeals of removal. How do judges practice their jurisdiction to sentence post-*Pham* and passage of the FRFCA? And how does judicial decision-making affect the production of legal authority at the ID and/or IAD?

My analysis of case law and interview data suggests that judges are willing to consider collateral immigration consequences in practicing their jurisdiction to sentence following *Pham*. Removal is specifically positioned by judges as a relevant factor to review when developing a proportionate, individualized, and fit sentence. Judges also hold that sentences must not undermine the will of Parliament, thereby producing the statutory assignment of legal authority to remove and to review removal in the IRPA. This approach to the assessment of deportation is confirmed, for example, in the following statement from one of my interviewees:

from an immigration perspective, it would be clearly inappropriate for a criminal judge to try to game this immigration system and cause a particular result... favourably or unfavourably to the accused, but it would equally be inappropriate for a criminal court judge not to consider what might happen, right, that's a factor just like job loss is a factor, just like licensing is a factor, just like driving prohibition is a factor, those are all relevant factors to the denunciatory, deterrent and rehabilitary elements of a sentence. Because we don't decide what's going to happen, we consider the possibilities. (Interview Q, March 2022)

My interviewee clearly communicates that removal must be considered at sentencing, including because of the impact of deportation on the achievement of sentencing objectives (as per s 718 of the *Criminal Code of Canada*, 1985). This individual also declares the jurisdiction of Members of the ID and IAD as separate and distinct from their legal authority.

The relationship between the legal authorities to remove and sentence was addressed by a separate interviewee. This individual specifically recognized that the judicial consideration of immigration outcomes may impact the legal authority to deport, thus acknowledging the interweaving of legal powers across the immigration and criminal system. The interviewee stated:

I have the jurisdiction to deal with the offender who is before me. So, implications, what I do with that offender ultimately, may impact on other domains but ... certainly it seems clear to me after the likes of *Pham* and after the likes of *Suter*<sup>8</sup> that this is indeed a jurisdiction that I have to exercise and that I can exercise, I can't do it in a way that works the doctrine of proportionality, I can't do that. Nor can I do it in a way that frustrates the intent of Parliament under IRPA [as amended by the FRFCA] so long, unless in doing so under my breath I still maintain the doctrine of proportionality or adhere to it. All right? To be truthful I think that that's very well the case. It may be that whatever I do frustrates IRPA. But so long as, the Supreme Court has in my view made clear, so long as what I'm doing is exercising fundamental proportionality and individualized proportionality, that's part of the grist for my mill as a sentencing judge. (Interview P, March 2022)

By acknowledging that judges cannot use their jurisdiction to “frustrate the intent of Parliament,” my interviewee produces the legal authority to deport that has been bracketed to the ID under the IRPA. At the same time, this individual acknowledges that removal may impact the application of key legal principles, namely proportionality and individualization. This judge thus contends that they retain the legal authority to review removal in practicing their jurisdiction to sentence. Removal may then be resisted through the practice of the legal authority to sentence, according to this interviewee. The authorities to remove and sentence are confirmed through this statement as existing in a complicated and interweaving relationship.

A review of case law demonstrates consistency between the suggested approaches to navigating jurisdictional intersections promoted by my interviewees and actual practices of legal authority at sentencing post-*Pham*. Consider, for example, the case of *R v Layugan* (2016). The defendant in this case struck a security guard with his car while leaving his place of employment late at night. He was thereafter found guilty of manslaughter, failing to stop, and criminal negligence causing death. These convictions rendered Layugan inadmissible for serious criminality, pursuant to subsection 36(1)(a), given that criminal negligence causing death and manslaughter both carry possible terms of imprisonment for life. Whether Layugan had access to the right of appeal if ordered to be removed remained ambiguous at the time of sentencing.

In the decision on sentence, the court noted that Layugan had no prior criminal record, significant positive familial relationships, and was married with three children. He had worked in Canada continuously since his arrival in 2007 (*R v Layugan* 2016, at paras 33–40). At the time of the offence, Layugan was not intoxicated; he was not driving erratically, recklessly, or at a dangerous speed; he did not instigate the situation that led to the accident; the situation resulting in the death of the victim was not his fault, given that it was very dark and noisy,

<sup>8</sup> The Supreme Court in *R v Suter* (2018) again explains that collateral consequences of sentence (like removal) are personal circumstances relevant to the application of principles of individualization and parity (see para 48).

and the victim was not wearing reflective gear; he had just finished a long shift; on first collision, he did not have time to think about what to do and he returned twenty to twenty-five seconds after the collision, even staying to help after medical and emergency personnel arrived (*R v Layugan* 2016, at paras 7–25). When Layugan was released on bail, he did not breach bail conditions that prohibited him from driving, even when his child was so sick that she needed to be taken to the hospital. This child ultimately died from pneumonia (*R v Layugan* 2016, at para 39). This very shocking and sad circumstance specifically contributed to mitigating the sentence imposed.

Crown counsel in this matter argued for the imposition of a two-year sentence for the offence of manslaughter, nine months for failure to stop, and a stay for the remaining offence (*R v Layugan* 2016, at para 68). The defence asked for a sentence of six months less a day, given the defendant's exemplary life and his potential deportation (*R v Layugan* 2016, at para 62). Both counsels submitted case law in support of their suggested sentences to demonstrate parity, and both argued that the proposed sanctions would meet the principles of sentencing required in this case, namely deterrence and denunciation.

The judge ultimately imposed a sentence of imprisonment for six months less one day, followed by eighteen months' probation and 100 hours of community service. In rendering this decision, the judge specifically tied the sentence imposed to the immigration consequences that Layugan faced (*R v Layugan* 2016, at para 103). The judge wrote that the defendant was not a risk to public safety or security and that, regardless of the sentence, the victim could not be revived. The judge then stated that, given Layugan's potential deportation, a sentence of six months less a day would be proportionate (*R v Layugan* 2016, at para 103). Layugan thus retained access to appeal if found to be inadmissible and subject to removal.

The judge in *Layugan* practiced the legal authority to review removal assigned to judges via *Pham*. They discursively positioned deportation as a "collateral immigration consequence" relevant to sentencing (*R v Layugan* 2016, at para 103). The judge then imposed a term of imprisonment of less than six months based (in part) on the consideration of removal, stating that this sentence was proportionate. Interestingly, the judge did not explicitly declare that the authority to remove is statutorily assigned to Members of the ID and IAD. The practice of legal power by the judge still contributed to bringing the legal authority of Members of the IAD into reality, however, through the imposition of a sentence that protected Layugan's right of appeal. The judge's practice of legal authority specifically created the opportunity to resist removal, if ordered.

The sympathetic nature of the circumstances in *Layugan* are unique. Courts have been swayed to render sentences that produce the authority to hear appeals of removal in cases with less sympathetic facts. In the matter of *R v Saffari* (2019), for example, the defendant was found guilty of offences related to communicating with a minor for sex. These offences carried possible terms of imprisonment of more than ten years, rendering Saffari inadmissible for serious criminality under section 36(1)(a) of the IRPA. Mandatory minimum sentences of one year's imprisonment were additionally attached to these offences, ensuring not only that Saffari would be inadmissible for serious criminality based on conviction and

sentence, but that the defendant would lose the right to appeal if ordered removed.

Defence counsel argued that the mandatory minimums in this case violated Saffari's section 12 right under the *Canadian Charter of Rights and Freedoms*. Counsel stated that these mandatory sentences were grossly disproportionate given Saffari's age, lack of criminal record, and potential deportation. Counsel asked that a sentence of six to nine months of imprisonment be imposed (*R v Saffari* 2019, at paras 35, 36). The Crown objected, stating that a sentence of twelve to fifteen months would be proportionate based on the principle of parity. As a result, the Crown held that the defendant did not meet the burden of establishing the applicability of section 12 of the *Charter* (*R v Saffari* 2019, at para 5).

Saffari was described in the sentencing decision as a twenty-five-year-old, first-time offender with mental health "frailties" (*R v Saffari* 2019, at para 6). He was born in the Netherlands to Iranian parents and had been in Canada since the age of eighteen (*R v Saffari* 2019, at para 12). A letter provided in this case from immigration counsel made it clear that Saffari would be inadmissible because of his conviction. The letter also stated that Saffari would have no access to appeal if sentenced to a term of imprisonment of six months or more (*R v Saffari* 2019, at para 14).

The judge began their consideration of this matter with a review of the potential *Charter* infringement. It was explained that section 12 of the *Charter* helps to balance Parliament's aim to fashion appropriate penalties with an individual's right not to be subject to punishment that is grossly disproportionate. The test for "gross disproportionality" requires a determination of whether the sentence would be so excessive as to outrage the standards of decency so that Canadians would find it abhorrent or intolerable (*R v Saffari* 2019, at paras 20, 21). The judge determined that a sentence of five months' imprisonment would be fit, based on an assessment of precedent, the defendant's personal circumstances (significantly, his potential deportation), and the application of the principles of denunciation and deterrence (*R v Saffari* 2019, at para 84). Given the discrepancy between the "fit" sentence and the mandatory minimum, the judge determined that the imposition of the mandatory sentence would be shocking to Canadians and thus grossly disproportionate (*R v Saffari* 2019, at para 88). In rendering this decision, the judge specifically referenced the defendant's potential deportation, as follows:

In my view, sentencing Mr. Saffari to one year in jail when the fit and proportionate sentence would be five months, having regard to his personal circumstances, frailties, and the collateral consequences, is intolerable and would be shocking to Canadians. In my view to impose the one-year mandatory minimum sentence, even having regard to the gravity of the offence, is grossly disproportionate. It is not merely excessive but is a sentence that is "so excessive as to outrage the standards of decency" and "abhorrent or intolerable" to society. It is a cruel and unusual punishment and violates s. 12 of the Charter. (*R v Saffari* 2019, at para 90)

Referencing *Pham*, the judge in *Saffari* uses their legal authority at sentencing to review removal, which is discursively positioned as both a “personal circumstance” and a “collateral consequence” relevant to the application of key legal principles. This review of removal critically shaped the judge’s determination of the proportionate sentence for this matter. The judge then held that the application of the mandatory minimum sentence would be grossly disproportionate. A sentence was applied that protected Saffari’s right of appeal, thus producing the authority of Members of the IAD (for a similar decision on the unconstitutionality of mandatory minimum sentences, given specifically the impact of these sanctions on deportation, see *R v Vu*, 2018).

Finally, in *R v Nassri* (2015), the Ontario Court of Appeal was called on to replace a sentence that had been imposed prior to the passage of the FRFCA. The appellant in this matter had been sentenced to nine months’ imprisonment for robbery and possession of a weapon for a dangerous purpose. He was, as a result, inadmissible for serious criminality based on conviction and sentence. With the coming-into-force of the FRFCA, Nassri faced the possibility of deportation to Syria without a right of appeal (*R v Nassri* 2015, at para 1). Nassri was a twenty-one-year-old permanent resident who had immigrated to Canada ten years earlier (*R v Nassri* 2015, at para 7). He had no prior criminal record and demonstrated good rehabilitative prospects, being both in college and operating his own small business. Nassri enjoyed strong familial support and had many positive references (*R v Nassri* 2015, at para 8).

The appellate court considered the potential immigration consequences flowing from the sentence imposed by the trial court. A letter from an immigration lawyer was submitted that detailed how any attempt by Nassri to avoid deportation would be futile, given his conviction and sentence (*R v Nassri* 2015, at para 19). Information on the conditions in Syria was also filed as an exhibit. These materials detailed the deteriorating situation in that country, supporting the argument of the defence that Nassri would almost certainly be subject to conscription if returned, leading to his involvement in the civil war that was underway in Syria (*R v Nassri* 2015, at paras 22, 23). The appellant argued that, given these collateral consequences, the original sentence was grossly disproportionate. A sentence of six months was also held to be available in this matter based on precedent (*R v Nassri* 2015, at para 34).

The consideration of removal ultimately shaped the appellate court’s practice of jurisdiction to review lower court sentences. The Court of Appeal determined that, while incarceration was required, there was no lower limit to the range of imprisonment for the offence committed (*R v Nassri* 2015, at para 29). A custodial sentence of just under six months was thus available and would not offend the principle of parity. The appellate court further determined that Nassri’s potential deportation was relevant to the application of the principle of proportionality. The court stated that depriving Nassri of a right to appeal their removal to “one of the most dangerous places on earth” would be grossly disproportionate to the offence and to the circumstances of the offender (*R v Nassri* 2015, at para 33; for a similar decision considering the conditions in the country of return, see *R v Ismail* 2017). Nassri’s sentence was reduced to six months less fifteen days, thereby producing the authority of Members of the IAD.

Altogether, it appears from these decisions that judges abide by the guidance in *Pham*, upholding the discourse that removal is a relevant collateral consequence that must be examined when practicing the legal power to sentence. Through the legal authority to speak in the name of criminal law at sentencing, judges may contribute to resistance to removal. The decisions of the court impact whether permanent residents either avoid inadmissibility altogether or, if found to be inadmissible, retain the right to appeal the resulting order for deportation (for additional examples of judges' using their legal authority to impose sentences that protect a permanent resident's right of appeal, see *R v Al-Masajidi* 2018; *R v Gaurino* 2017; *R v Branco* 2019; *R v Sohail* 2018; *R v Wheatley* 2017; *R v Zhou* 2016). Courts are generally clear, though, that they do not hold the legal power to deport. Although complicated, these steps allow judges to navigate their own legal power to review removal at sentencing, while also producing the legal authority of Members of the ID and IAD.

And yet, the pathway through these interweaving jurisdictions is not standardized. There are judges who continue refuse to vary sentences based on a consideration of removal in practice. These judges specifically contend that deportation is not definite or confirmed, and that to amend a sentence because of the *potential* for removal would be akin to "wagging the tail of the dog" (*R v Urbe* 2013, at para 58). Attempts to resist removal may fail in these instances. The production of the legal authority to review removal orders by Members of the IAD may also be undermined, with courts' refusing to lower sentences to protect a permanent resident's right of appeal.

We see this approach in *R v Garcia* (2019). Garcia was convicted of arson causing damage to property, rendering the defendant inadmissible for serious criminality under section 36(1)(a) of the IRPA. Defence counsel requested that the court apply a sentence of less than six months to protect Garcia's right to appeal their removal (*R v Garcia* 2019, at para 25). The judge spent significant time at sentencing reviewing this request, focusing on the limits of their own legal authority. They explained, for example, that they "cannot assume the Minister will seek a removal order" nor that "a lost appeal right in these circumstances would have been a successful appeal" (*R v Garcia* 2019, at para 30). The judge confirmed that they are "not the gatekeeper with authority to decide who stays and who goes" and that the criminal court is not equipped to decide on deportation (*R v Garcia* 2019, at para 30). Instead, it was held that it is the role of the judge to fashion a fit and proper sentence, which requires "considering immigration consequences as a component of personal circumstances but not manipulating them" (*R v Garcia* 2019, at para 34). The judge confirmed that they must "walk a very fine line" by assessing the circumstances of the offender (including deportation) but not skewing the sentencing process to avoid deportation (*R v Garcia* 2019, at para 35). A sentence of twelve months' imprisonment was applied. While the judge clearly produces the legal authority to remove bracketed to Members of the ID, the sentence imposed via these practices of jurisdiction effectively circumvents the legal power of the IAD to review removal.

The promotion of the discourse of removal as *potential* in support of practices of jurisdiction undertaken by the court can also be traced back to the decision of

*R v Benhsaien* (2018). Benhsaien was convicted of aggravated assault and assault with a weapon (*R v Benhsaien* 2018, at para 3). Crown counsel applied to have Benhsaien designated a “Dangerous Offender” (pursuant to s 752.1 of the *Criminal Code of Canada*, 1985). The Crown asked the judge to consider the limits of any “Long Term Supervision Order” (LTSO) as a sentence if the Dangerous Offender application was accepted. The Crown asserted that an LTSO would be futile given that Benhsaien would likely be deported (*R v Benhsaien* 2018, at para 132). The judge, however, reasoned that what *might* happen “should not determine the appropriate sentence imposed” (*R v Benhsaien* 2018, at para 133; see also *R v Carrera Vega* 2015). Instead, the judge held that the sentence should be resolved based on guidance contained in the *Criminal Code of Canada*, 1985, concluding that “the hypothetical whether the offender is deported to another country without supervision should not stand as a bar to the court from fashioning an appropriate sentence” (at para 134). Benhsaien was sentenced to twelve years’ imprisonment, to be followed by a ten-year supervision order (*R v Benhsaien* 2018, at para 149).

The decisions in *Garcia* and *Benhsaien* suggest that there is ongoing variability in approaches to navigating the interweaving jurisdictions to remove, to hear appeals of removal, and to sentence. The courts in these cases discursively reposition deportation as a *potential* outcome, which then justifies their refusal to vary a sentence based on a consideration of removal. We see similar approaches in the decisions on sentence in *R v Mugabo* (2019), *R v Munga* (2017), and *R v NJ* (2017). While other courts navigate the complex jurisdictional intersections noted by promoting their legal authority to review removal, the judges in these cases avoid these entanglements in legal power, producing the jurisdictions to remove, to hear appeals of removal, and to sentence as separate and distinct. As a result, any effort to resist removal in the legal space of the court is foreclosed.

## Conclusion

The work herein has drawn attention to the jurisdictional practices enacted within the criminal court. It has demonstrated the long-standing variability in judicial approaches to the consideration of immigration outcomes. Judges initially adopted discourses that distinguished punishment and deportation to reject the legal authority to review removal. The subsequent repositioning of immigration outcomes as a “circumstance” of the offender then supported the enactment of judicial jurisdiction and introduced the potential for resistance to removal. These practices were not widely adopted until the decision in *Pham*, which confirmed that judges must examine collateral immigration consequences at sentencing. The Supreme Court was clear, though, that these outcomes cannot dominate the sentencing process and/or result in the application of an inappropriate or artificial sentence. The material examined suggests that courts have generally followed the approach promoted in *Pham*, engaging with removal during the performance of their authority to sentence. This creates space for resistance to deportation, namely through the application of sentences that protect the right of appeal. Courts also produce the authority of Members of the

ID and IAD through these decisions, and even facilitate the practice of legal power at the IAD. Yet, some judges adopt the discourse of deportation as a “potential” outcome and thus refuse to practice their jurisdiction to review removal. The legal authority of Members of the ID and IAD is produced through these decisions as separate and distinct from the jurisdiction at sentencing. Migrants who are then sentenced to six months or more of imprisonment may be subject to the removal process and/or deported from Canada without access to review of their removal. A doorway to legal resistance is slammed shut via these practices of jurisdiction.

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