EMMA LAWRENCE

Strike it Lucky or Strike Out: the arbitrary effects of changing sentencing law.

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Abstract

"Finality is a good thing, but justice is a better" – Lord Atkin[1]

Statute and common law are dynamic, so change is inevitable. This characteristic of the law is desirable and necessary to better the future. However, the courts have both retrospective and prospective jurisdiction. Therefore, a change in law can have retrospective effect in order to enable equality across cases. This is not an undesirable effect as it is unreasonable for those charged under the old law to be able to start over when the law changes. The principle of finality protects the legal system from being sent into a spiral of never-ending appeals. However, there is an issue of the role of finality when there has been a change in sentencing law. There is a strong argument for overriding finality in the interest of justice when someone's liberty is at risk. However, this perspective is not shared by the courts. Their current approach places undue weight on whether the right to appeal has been exercised, thus producing arbitrary effects. They presume that if the sentence was passed correctly under the law as it was understood at the time, then it should remain unless it would result in an exceptional injustice.

In light of *Fitzgerald v R*, there should be a reconsideration of what place the principle of finality has when sentencing law is changed. The Supreme Court should exhibit a radical exercise of judicial interpretation to protect the rights of an individual. This paper argues *Fitzgerald* provides justification that when sentencing law changes, the courts should prioritise the liberty of the offender not protecting finality.

Key Words: *"finality", "Justice", "Sentence", "Appeal", "Three Strikes".*

[1] *Ras Behari Lal and Others v The King Emperor* (1933) 50 TLR 1; All ER Rep 723.

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I Introduction

An offender (A) committed a crime, was convicted and faced sentencing. The offence A committed was relatively minor, reflected in a sentence of 15 months imprisonment. However, this offence was A's third strike, imposing a maximum sentence of 7 years imprisonment. A few years later, the Supreme Court altered the interpretation of the third strike law, section 86D(2) of the Sentencing Act 2002. The Court held that it is possible to interpret section 86D(2) consistently with section 9 of the New Zealand Bill of Rights Act (NZBORA). This section states, "everyone has the right not to be subjected to torture or cruel, degrading, or disproportionately severe treatment or punishment."[2] As a result, the courts have regained their complete discretion in third-strike sentencing. If imposing a maximum sentence would breach s 9, then ordinary sentencing principles would apply. There is no dispute that A's sentence is in breach of s 9. A is serving a sentence that is disproportionality severe. Luckily, A has not appealed their sentence. Therefore the right to appeal remains. A can apply for leave to appeal out of time based on the Supreme Court's decision. If A's application is successful, the court will quash the 7-year sentence and resentence A under the new, more permissible law. Now imagine the same situation, except A exercised their right of appeal in time. Now when the Supreme Court changes the interpretation of the third strike, A cannot benefit from it. A will remain in prison, serving a sentence that is disproportionality severe.

The scenario above highlights the injustice that can arise from changes in the law—the irrational method of determining who will benefit and who will not benefit from the difference. Two offenders were sentenced to a term of imprisonment that breached their rights under s 9, yet only one had their liberty restored. The only factor distinguishing the two was when they appealed. The presumption is when finality is engaged, when appeal rights are exercised, the ability to benefit from a future change in the law is near impossible. There is a hesitation to allow changes in the law to apply retrospectively because of the risk it poses to the legal system.

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[2] New Zealand Bill of Rights Act 1990, s 9.

Justice Stephen Kós highlighted the issue of the current method:[3]

> Any change in the law, whether common law or by legislation, has the potential to produce arbitrary effects. People whose rights have already been adjudicated may feel aggrieved that – if their appeal rights are spent, or the legislation is non-retrospective – they do not gain the benefit of the change.

This paper will explore whether the general common law principle of finality that a litigant who lost a case they would have won under the law, as it is understood now, cannot start again;[4] is an appropriate starting point in sentencing. There will be a focus on the potential for change in light of the Supreme Court's decision in *Fitzgerald v R*[5]*,* where the offender's liberty was prioritised. The question will be whether the decision will be limited to the context of the Three Strikes Regime or whether we will see courts follow similar reasoning. Furthermore, if this will result in a more desirable method of determining how changes in sentencing law are applied retrospectively. A method that is rooted in individual justice, not whether the right to appeal has been exercised.

The first chapter of this paper will address, how *Taylor v R* outlines the issue of change in sentencing law and appeals out of time. The approach taken by Kós P demonstrates how preserving finality is the core focus of the court and how this creates arbitrary effects. This will lead to an analysis of the development of the *Fitzgerald* decision. The third section will outline the justification for changing how changes in sentencing laws are applied retrospectively. Finally, the findings of this paper will be summarised in a proposal; when there is a change in the interpretation of sentencing law when considering an appeal out of time or a recall of a decision, the prioritisation should not be on finality. Rather, Courts should follow the approach of interpretation used in *Fitzgerald,* starting by prioritising the rights of the individual.

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[3] *Morgan v R* [2022] NZCA 112, at [10].

[4] *Taylor v R* [2018] NZC 498; [2019] 2 NZLR 38, at [4].

[5] *Fitzgerald v R* [2021] NZSC 131; 1 NZLR 551.

II For the sake of finality

The case of *Taylor v R* demonstrates the issue that the courts face when there has been a change in sentencing law. Specifically, how appeals out of time give rise to conflicts of finality and retrospectivity. Although *Taylor* ruled in the offenders favour, their reasoning shows how finality dictates who can and cannot benefit. After a summary of *Taylor,* the place of finality in other judgements will be analysed..

A Taylor v R

In the case of Mr Taylor, he brought leave to appeal approximately twenty years out of time. He was sentenced in 1997 and at the time he qualified for preventative detention. In 2006 the qualifying age for preventive detention changed in *R v Mist*.[6] Therefore, at the time of offending he did not qualify. He sought legal advice shortly after *Mist* and chose not to seek an extension of time to appeal. Twelve years had passed when Mr Taylor changed his mind and applied for an extension of time to appeal in the Court of Appeal, based on *Mist*.

The presiding Judge Kós P was quick to raise that Mr Taylor's submission highlighted the tension between the principles of finality of judicial decisions and the retrospective jurisdiction of judgments. To set the tone of the judgment, Kós P first outlined the general principle of the common law:[7]

> .. that although a judgment declares the law retrospectively as well as prospectively, a litigant who once lost a case she would have won had the law been understood then as it is understood now, cannot go back and start again.

The key issue was once the right to appeal has been spent, the litigant has no recourse available, "despite the fact the common law has shifted in favour of [their] claim, with

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[6] *R v Mist* [2005] NZSC 77; [2006 3 NZLR 145, at [5] per Elias CJ and Keith J, at [62] per Gault J and at [107] per Blanchard and Tipping JJ.

[7] *Taylor,* above n 4, at [4].

retrospective application to all but [them,]"[8] despite the "rights hav[ing] been adjudicated in accordance with principles later found to be wrong."[9] Nonetheless, Kós P grounded his reasoning in the "powerful, settled principle founded on convenience and procedure"[10] that outweighed this sense of injustice, affirming the prioritisation of finality. There was no inquiry into whether someone who had already appealed could benefit from the change in sentencing laws. The general principle was strictly applied.

However, as Mr Taylor had not exercised his appeal rights, the principle of finality had not been engaged. Thus, he could seek to appeal out of time. Section 248 of the Criminal Procedure Act 2011 outlines first appeals are to be commenced by filing a notice of appeal "within 20 working days after the date of the sentence appealed against."[11] Subsequent appeals are by leave and must be filed within 20 days of the first appeal decision. [12] If the right is not exercised within the time, the right to appeal is lost. However, the statute does authorise the court the discretion to extend the time for filing an appeal. [13] The justification for allowing appeals out of time rests in finality, not access to justice.. The statute is quiet on the near unrestricted scope of the court's power. Therefore, the issue has been how the courts should exercise their discretion.

Kós P drew on another Court of Appeal case *R v Knight* as an authority. The Court gave guidance to discretion in granting extension, finding that it is limited.[14] The court reminds us that finality and time limits on appeals are important as it upholds the societal interest in the final determination of litigation However, this must be balanced with the liberty of

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[8] *Taylor,* above n 4, at[7].

[9] At [7].

[10] At [7].

[11] Section 248(2).

[12] Criminal Procedure Act 2011, ss 253-259.

[13] Section 248(4).

[14] *R v Knight* [1998] NZLR 583, at 587.

the applicant.[15] The balance of the competing principles is held by this as a just departure from finality:[16]

> The applicant must demonstrate some special feature or features particular to the case that lead to the conclusion that in all the circumstances justice requires that leave be given. Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.

In his final statements, he reaffirmed his assumption of finality, phrasing the question of resolving the tension between retrospectivity and finality as "whether preserving finality of a criminal decision in the face of later judicial recognition of evaluative error in the composition of that decision would work a substantial injustice".[17] Furthermore stating:[18]

> Ultimately, we think it objectionable and unjust that Mr Taylor be compelled for the sake of finality to serve a sentence which, had the law been correctly understood at the time, would not have been imposed

Although finality is important to uphold, it should not be one's first assumption when assessing an individual's liberty. If Mr Taylor chose to appeal in time, he would not have had this option available to him. By only allowing retrospectivity for appeals out of time the court are basing someone's freedom on something as arbitrary as when they choose to appeal.

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[15] *Taylor,* above n 4, at 10.

[16] *Knight,* above n 14, at 589.

[17] *Taylor,* above n 4, at [40].

[18] At [20].

B Upholding finality in appeals and recalls

A refusal of leave to appeal is final, once exercised no further applications are permitted. However, the court can recall its earlier decision and reconsider an application for leave.[19] The Supreme Court in *Uhrle v R* approved the grounds for recall in the civil case of *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)*[20] as appropriate in a criminal context. The Court found that these grounds captured the concept of a recall that:[21]

> the decision to reopen an appeal is an exceptional step, but also to ensure the court remains able to respond to the wide variety of circumstances that may necessitate that step in order to avoid injustice.

When Kós P had to decide if to grant a recall of a decision based on fresh evidence in *Lyon v R,* he chose to strictly apply finality.[22] Unlike *Taylor,* the offenders had exercised their right to appeal. Although, His Honour held:[23]

> The law cannot be without recourse to the innocent wrongly convicted, whose rights are deservedly pre-eminent. But the recourse available to those who assert that status will seldom include the reopening of a spent appeal right

The reason behind this conclusion was the importance of finality in the criminal context. It was once observed by Lord Atkin that "[f]inality is a good thing, but justice is a better."[24] Yet this sentiment is not shared by the judiciary today. Kós P deemed Lord Atkin's statement "an appealing aphorism…built on a false paradox."[25] Finality was held to be integral to justice, as justice is concerned with the determination of rights.[26] This is a

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[19] *Uhrle v R* [2020] NZSC 62; 1 NZLR 286.

[20] *Horowhenua County v Nash (No 2)* [1968] NZLR 632; affirm *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2010] 1 NZLR 76.

[21] *Uhrel,* above n 19, at [29].

[22] *Lyon v R* [2019] NZCA 311; 3 NZLR 421.

[23] At [14].

[24] *Ras Behari Lal*, above n 1, at 4.

[25] *Uhrel*, above n 19, at [10].

[26] At [10].

prejudiced interpretation of Lord Atkin's statement. It undermines the necessity to protect the rights and freedoms of the offender, especially considering *Fitzgerald*. In the context of sentencing, it is wrong to hold public interest in the final judgement over the individual whose rights are in breach. There must be a balance when applying changes in sentencing law.

The starting point when balancing finality and retrospectivity is the principle that a conviction obtained according to law as it was then understood and applied should stand."[27] In *Cheung v R*, Kós P uses this point to justify why a change in law will not cause the previous decision to be a substantial injustice as a decision is correct if it was reached pursuant to law applicable at the time. [28] This extends to assessing the merit of an application for an appeal out of time.[29] As seen in *Fitzgerald*, the courts have a duty to interpret any statutory provision consistent with rights and freedoms. Where possible statutes must be given right-consistent meanings. Interpreting judicial discretion to grant extensions and recalls with the starting presumption outlined above does not corollate to what is seen in *Fitzgerald.*

III Three Strikes Regime

In 2010 the Three Strikes Regime was enacted by a National-led government. The New Zealand law has 40 qualifying three-strike offences, consisting of violent and sexual crimes with a maximum of seven years or more imprisonment. The "purpose of the Bill is to create a three-stage regime of increasing consequences for the worst repeat violent offenders."[30]

The strike system works as follows; strike one is a warning, and ordinary sentencing principles apply. On strike two, an offender recovers their second and final warning, and if

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[27] R v Knight, above n 14, at 588–589.

[28] *Cheung v R* [2021] NZCA 175; 3 NZLR 259, at [36]

[29] At [53].

[30] Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at 1.

sentenced, they must serve the entire sentence without parole. On strike three, the court must impose the maximum punishment of the offence without parole unless the court considers it would be manifestly unjust to do so.

The regime appeared impenetrable to Judges trying to exercise an ounce of discretion. For a decade the only way the courts could mitigate the injustice that arose from the third strike was to grant parole. However, in the twilight hours of the regime, after Labour had made its intention to repeal it clear, the Supreme Court catalysed a chain of judicial activism. Effectively jumping ahead of the Government's intent. The progression of the case *Fitzgerald v R* demonstrates an aggressive approach to judicial interpretation. An approach that could influence the future of judicial interpretation, especially when rights are involved.

A Fitzgerald v R

The three-strike regime was intended for the worst violent repeat offenders.[31] Yet, New Zealand has seen offenders who do not fall within this category being caught under the harsh regime. Mr Fitzgerald is one of these offenders. He had severe mental illness for a period stretching 30 years and has been admitted at least 13 times to mental health facilities. His past offences are at the lower end of a serious violent offences.[32]

The offence in question was committed in December 2016, when he indecently assaulted one woman by grabbing her arms, pulling her towards him, and trying to kiss her on the mouth. She could move her head, so the kiss landed on her cheek. Described by the sentencing Judge as falling "at the bottom end of the range" for indecent assault, the kiss was still attributed as Mr Fitzgerald's third strike.[33]

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[31] *R v Fitzgerald* [2021] NZHC 2940. [125].

[32] *Fitzgerald,* above n 5, at [15].

[33] *Fitzgerald,* above n 31, at [19].

Although it was not an issue on appeal, during the hearing, the Supreme Court raised the question of whether third strike provision, section 86D(2) of the Sentencing Act could be:[34]

> …interpreted as subject to a limitation that the requirement to sentence an offender to the maximum sentence does not apply where to do so would breach s 9 of the Bill of Rights and New Zealand's international obligations.

The appellant did not bring up this issue, yet Mr. Fitzgerald had his appeal granted based on it. The majority held that Mr Fitzgerald's sentence "went well beyond excessive punishment and would shock the conscience of properly informed New Zealanders" and therefore, was so disproportionately severe as to breach s 9 of NZBORA.[35] In turn, the precedent was set that the courts had the discretion not to impose the maximum penalty where to do so would breach s 9.

The judgment of Winkelmann CJ encapsulates the approach and justification of the Supreme Court majority. Her Honour outlined the steps taken to justify her decision. The issue was divided into two sub-issues. Firstly, looking at the relationship between the s 6 NZBORA direction and other possible meanings. Secondly, how far courts should go in the interpretive exercise to find rights-compliant interpretation.

1 Section 6 and other possible meanings

(a) Bill of Rights

The crux was that some rights and freedoms in NZBORA, including s 9, are too vital to be limited. Therefore, s 5 of NZBORA, that rights and freedoms affirmed are subject "only to such reasonable limits prescribed by law as can be demonstratable justified in a free and democratic society" is not a relevant consideration.

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[34] *Fitzgerald,* above n 5, at [2].

[35] At [79]–[81] per Winkelmann CJ, [239] per Glazebrook J and [167] per O'Regan and Arnold JJ. William Young J agrees that the sentence imposed was contrary to s 9: at [283].

On the first issue, Winkelmann CJ determined that s 6 of NZBORA was the central provision and starting point.[36] Section 6 states, "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."[37] The six-step test of NZBORA interpretation by Tipping J in *R v Hansen*[38] was quickly dismissed by Winkelmann CJ because s 5 of NZBORA was not an issue. Rather, The Chief Justice addressed the interpretation task herself, holding Bill of Rights-consistency is at the heart of the statutory interpretation process.[39] In practice, when rights and freedoms are engaged, the starting presumption of interpretation will be a rights-consistent meaning.

The only parameter of possible interpretations is s 4 of NZBORA, instructing that courts cannot: [40]

> …decline to apply any provision or enactment and cannot hold any provision to be impliedly repealed, revoked, invalid or ineffective, by reason only that the provision is inconsistent with any provision in the Bill of Rights.

Here, Winkelmann CJ sets the standard that a rights consistent meaning should be the presumption of statutory interpretation. Therefore prioritising the rights of the individual over everything but clear statutory language.

(b) Section 5 of the Interpretation Act

Another point that is applicable beyond the context of the three strikes is the relationship between s 6 of NZBORA and s 5 of the Interpretation Act, the section that outlines how to ascertain the meaning of the legislation.[41] Winkelmann CJ characterised s 6 as a direction

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[36] *Fitzgerald,* above n 5, at [49].

[37] New Zealand Bill of Rights Act 1990, s 6.

[38] *R v Hansen* [2007] NZSC 7; 3 NZLR 1. at [92].

[39] *Fitzgerald,* above n 5, at [49].

[40] At [50].

[41] Interpretation Act 1999, s 5

for the courts to presume the statutory purpose will not breach the affirmed rights or freedoms of NZBORA. Again, only statutory language that clearly excludes a rights-consistent meaning will override this presumption.

(c) Principle of legality

The principle of legality is found in common law to protect fundamental rights independent from NZBORA. Its consequences tend to be political as Parliament is sovereign, yet it does confirm the presumption of a rights consistent meaning. In *R v Secretary of State for the Home Department, ex parte Simms* Lord Hoffmann remarks;[42]

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

It was affirmed in *D v New Zealand Police* that Parliament cannot override fundamental rights by general or ambiguous words.[43] Importantly, the court held parliamentary materials suggesting a right infringing purpose is insufficient.[44] Although s 6 and the principle of legality are the same, s 6 is not a statutory embodiment of the principle. Winkelmann CJ believes that s 6 goes further than the principles of legality in that it allows for "reading down otherwise clear statutory language, adopting strained or unnatural meanings of words, and reading limits into provisions".[45] Furthermore, it requires the courts to presume a rights-consistent purpose, mandating a rights proactive approach to interpretation. From this judgment, it is clear that the status of s 6 is placed high and can only be overridden by the explicit statutory language.

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[42] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL), at 131.

[43] *D v New Zealand Police* [2015] NZCA 389. at [77]–[82]..

[44] At [77]-[82].

[45] Jason NE Varuhas "Conceptualising the Principle(s) of Legality" (2018) 29 PLR 187, at 202.

2 How far should the courts go to find a rights-consistent meaning

On the second issue, the court must then ask how far it should go to find a rights-consistent meaning. This is done through statutory interpretation of "reading in," and "reading down" provisions. How the process of interpretation should proceed depends on the nature of the right and the breach sought to be avoided. Winkelmann CJ held possible in s 6 of NZBORA to mean a rights-consistent meaning must only be possible. It did not need to be most likely or even a likely meaning.[46] This power is constrained by the principle of parliamentary sovereignty. As summarised by Lord Bingham, a rights-compliant interpretation is not possible if:[47]

> … such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, … or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation.

This applies in the context of New Zealand legislation, and s 4 of NZBORA precludes such inconsistent interpretations. Within this parameter, courts may "read down" broadly expressed statutory powers to align with the purpose of the legislation.[48] In addition to "reading in" mandatory considerations, such as NZBORA and New Zealand's international obligations.[49] As Winkelmann CJ commented, the most relevant in criminal cases is "reading in" fundamental common law values such as the requirements of natural justice.[50] An example could be the reading down of a general power to be guided by the principles of natural justice, reaching an outcome that is consistent with s 6 of NZBORA.[51] However,

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[46] *Fitzgerald,* above n 5, at [58].

[47] *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264, at [28].

[48] *R v Wall* [1983] NZLR 238.

[49] *Fitzgerald,* above n 5, at [63] examples given *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [91]; and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.

[50] *Fitzgerald,* above n 5, at[63].

[51] See example *Drew v Attorney-General* [2002] 1 NZLR 58, at [67]-[68].

this is all within the parameters of s 4 of NZBORA, which draws the line between legitimate interpretation and illegitimate judicial amendment of a provision.

The Crown argued that interpreting s 86D(2) consistently with NZBORA would require the Court "to create its approach to sentencing in the context of an otherwise tightly codified subpart of the Sentencing Act", a task that is beyond the court's "institutional competence."[52] The Courts in the United Kingdom have been reluctant to rely on their equivalent of s 6[53] in cases raising complex social policy questions, as the courts are ill-equipped to decide and it should be left to Parliament.[54] Acknowledging limitation "where the rights-consistent interpretation imposes on the court a task beyond its institutional competence."[55]

Winkelmann CJ believes the expressed limitations are applicable in New Zealand. How this limitation will be applied is uncertain. Winkelmann CJ remarks that New Zealand must develop its own Bill of Rights jurisprudence and not rely on the United Kingdom.[56] What is required is hitting a balance between using s 6 as an interpretative tool and not a tool to legislate. At some point, the courts must recognise their constitutional limits and what should be addressed by Parliament. This point shall be found where the court determines a provision clear enough to exclude the possibility of a rights-consistent meaning, as per s 4 of NZBORA.

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[52] *Fitzgerald,* above n 5, at [69].

[53] Human rights Act 1998 Section 3(1): So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

[54] Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, LexisNexis, London, 2020), at 924; *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21; 2 AC 467.

[55] *Fitzgerald,* above n 5, at [69].

[56] At [72].

3 A rights-consistent meaning for s 86D(2)

The rights-consistent interpretation of s 86D(2) requires the proviso "except where to do so would breach s 9 of the New Zealand Bill of Rights Act 1990".[57] In effect this proviso would be reading down the broad provision.

The Majority held this was a legitimate interpretation as clear language is necessary to overrule s 9 and "despite any other enactment" it did not meet the threshold.[58] As stated by Winkelman CJ;[59]

> "The words 'despite any other enactment' do not in themselves show that Parliament intended s 86D(2) to operate in breach of s 9, and do not preclude a proviso being read into s 86D(2) in accordance with s 6 of the Bill of Rights if such a proviso could be shown to align with the underlying purpose of the provision and the wider three strikes regime."

In finding a rights-consistent meaning possible, the Majority did not intend to provide broad protection for all third-strike offenders. It was held that in the "rare cases" where imposing a maximum sentence would breach s 9 of NZBORA, an offender should be sentenced under ordinary sentencing principles.[60] The threshold for a sentence that would be so "disproportionately severe" as to breach s 9 of NZBORA was expected to be significantly high. The Chief Justice referred to *Taunoa v Attorney-General*[61], to outline a breach would be "so out of proportion to the particular circumstances as to cause shock and revulsion", "so excessive as to outrage standards of decency", or be a sentence that was "so severe as to shock the national conscience".[62] O'Regan and Arnold JJ further defined that "a sentence which is simply severe, disproportionate or manifestly excessive

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[57] *Fitzgerald,* above n 5, at [112].

[58] At [121].

[59] At [121].

[60] At [252] per Glazebrook J and [231] per O'Regan and Arnold JJ.

[61] *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429.

[62] At [172] per Blanchard J; at [92] and [289] per Eliass CJ.

would not meet the test".[63] In spite of the majority's intent, the aftermath of this decision suggests a breach of s 9 is not so rare.

What can be taken from this case and applied to other contexts is the statement of Winkelmann CJ:[64]

> The courts will be very slow to conclude that Parliament wished to direct another branch of government to breach a right as fundamental as that affirmed in s 9, and in a manner that implicates that branch in a breach of New Zealand's international obligations

When tasked with interpreting legislation, the courts should presume consistency with NZBORA. The Chief Justice did state that the "approach to interpretation will depend on the right engaged and the nature of the inconsistency to be avoided."[65] Therefore, the reasoning of finding a breach in this case should be taken as a guide rather than a rule of thumb. There will need to be an assessment on the facts which will determine to what degree Parliament must show intent to override the rights and freedoms affirmed and if reasonable limits apply. However, what should be taken away from this judgment, is the presumption should be rights-consistent when tasked with interpreting legislation.

A Development of Fitzgerald: a breach of Section 9 not so uncommon

The addition of the s 9 proviso on s 86(2) of the Sentencing Act 2002, created an opportunity for offenders caught under the Three Strike regime to be resentenced consistent with NZBORA. Meaning, that the change in interpretation would apply retrospectively to previous sentences. However, this was only available to those who had not exercised their right to appeal as demonstrated in the scenario at the beginning of this paper. The offenders below were successful in their appeals, however, given the current system, if they had exercised their right of appeal in time, they would not have been able to benefit from *Fitzgerald.* What this section focuses on is how the courts have stretched the decision of

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[63] *Fitzgerald,* above n 5, at [161].
[64] At [119].
[65] At [120].

Fitzgerald to protect many offenders. It is important to note if the offenders choose to appeal in time, it is likely they would have remained imprisoned.

1 Phillips v R

As one of the first sentence appeals based on *Fitzgerald,* the Court of Appeal further defined how to determine when imposing ss 86D(2) of the sentencing Act would breach s 9 of NZBORA with this case. Mr Phillips was convicted and sentenced for indecent assault, his third qualifying conviction on March 25th 2021. The High Court expressed that if it were not for the Three Strike regime, Mr Phillips would have received a sentence of 15 months, however, the Court was bound to impose the maximum sentence for indecent assault of 7 years.[66]

The Supreme Court delivered its judgment of *Fitzgerald* seven months after Mr Phillips' sentence. As, Mr Phillips had not exercised his right to appeal he was able to apply for an extension of time to appeal shortly after the judgement of *Fitzgerald*. There was no issue with the finality of the original sentence and his application was not contested by the Crown, therefore it was granted.[67] The opportunity to uphold justice clearly outweighed any concern of overriding finality. Collins J held that the imposition of the maximum sentence would breach s 9 of NZBORA and therefore the sentence was quashed and substituted with 15 months imprisonment.[68]

For the purpose of the paper, the focus of this case is on Collins J's development on defining when a sentence may "constitute disproportionately severe treatment or punishment" rather than a sentence that is merely disproportionate. In *Fitzgerald* the Supreme Court concluded determining a breach is fact-dependent. Collins J went further

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[66] *R v Phillips* [2021] NZHC 610, at [26].

[67] *Phillips v R* [2021] NZCA 651; [2022] 2 NZLR 661, at [4].

[68] *Phillips* above n 67, at [40].

by outlining factors that should be assessed on the facts that are likely to influence finding a breach of s 9;[69]

a) Any difference in the nature of the sentence that would otherwise have been imposed and the fact that s 86D(2) requires the imposition of a prison sentence;

b) The difference between any prison sentence that would have been imposed but for the three strike regime, and the prison sentence imposed pursuant to ss 86Dd(2); and

c) The nature of the offending, and whether the defendant is plainly an inadvertent and unforeseen causality of the three strike regime given that a: stage three sentence is meant to be a very serious penalty for an offender who is continuing to commit very serious offences that victimise people.

The above analysis affirms the lens *Fitzgerald* adopted for the task of interpretation and translates it into the application of the law. Focusing on the individual and their circumstances provides a practical method to find a breach.

2 Matara v R

Mr Matara's appeal is significant as it raised the question of how *Fitzgerald* would apply to second strike cases. The Court of Appeal unanimously held *Fitzgerald* was applicable and gave s 86C of the Sentencing Act a rights-consistent meaning.

Mr Matara was convicted in 2017 of attempted murder and sentenced to 10 years and two months' imprisonment.[70] As this was his second strike offence, per ss 86C(4) of the Sentencing Act, Matara was required to serve the full sentence without parole. In the High Court hearing, the Judge stated but for the second strike requirement, Mr Matara would have been sentenced to a minimum period of imprisonment (MPI) of 40 percent, that is Mr Matara would have to serve four years and 24 days and then he would be eligible for parole.

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[69] At [28].

[70] *R v Matara* [2017] NZHC 2198, at [18]–[19] and [22].

In 2021, Mr Matara sought leave to appeal to the Court of Appeal out of time against his sentence. The application was based on the implications of *Fitzgerald* for the sentencing of second strike offences. The extension of time to appeal was granted due to the merits of the appeal rather than the reasons for the delay. The Court considered that the appeal had substantial merit, but did not develop it further.[71] However, if Mr Matara appealed in time then he would not have benefited from the change in law, even though the reasons for his appeal stayed the same.

Mr Matara's main submission was "that s 86C(4) must be read subject to the same unexpressed qualification as s 86D(2)."[72] Based on this approach, he submitted that his sentence was so disproportionately severe that it breached s 9 of NZBORA.[73]

However, the Crown opposed the application of *Fitzgerald* as it should be limited to third strike offences only. This is because *Fitzgerald* focused on the mandatory sentencing under s86D of the Act, whereas, s 86C does not dictate the length of sentence imposed.[74] However, the Court dismissed this submission and found even though s 86C was only a direction to the sentencing judge, it was inexorable and must be read subject to NZBORA.[75] Unlike the decision in *Fitzgerald,* there was a unanimous decision to grant Mr Matara's appeal and apply *Fitzgerald* to second strike offences. The Court held;[76]

> "In light of Fitzgerald we consider that s 86C(4) of the Sentencing Act must be read as subject to an unexpressed qualification that it is subject to s 9 of NZBORA. A Judge is not required to order that a second strike sentence be served without parole if making such an order would be inconsistent with s 9 of NZBORA because it would result in a punishment that is disproportionately severe."

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[71] *Matara v R* [2022] NZSC 68, at [23].

[72] At [24].

[73] At [24].

[74] At [27].

[75] At [57-58].

[76] *Matara, above n 71,* At [4].

The reasoning of the Supreme Court was affirmed and held applicable in second strike cases. There must be very clear language to override the presumption of a rights-consistent meaning per s 6 of NZBORA. As there is no express provision in s86C, nor elsewhere in the regime, requiring the imposition of sentences inconsistent with s 9 of NZBORA, the section is subject to s 9 of NZBORA.

It was held to be disproportionality severe for Mr Matara to serve his sentence without parole. The factors considered included that the sentence of 10 years and two months with an MPI of 40 per cent would be proportionate and sufficient to meet all the objectives of the Sentencing Act. Anything more severe would not be justified and therefore disproportionate. The current sentence would result in him being incarcerated without the opportunities for rehabilitation otherwise available to him and his first warning was not a rational justification to remove parole.[77] Here there is an emphasis on what parole provides–hope, encouragement and support– and identifying what can justify taking them away. The Court's reasoning has lowered the threshold for a breach of s 9 further than what the majority of the Supreme Court anticipated. The factors above are likely to apply to almost all second strike offenders, as it is a feature of the second strike system to deprive offender of the hope and incentive for rehabilitation that parole provides.[78] Therefore, a breach of s 9 will not be as rare as the Supreme Court anticipated. The Court observed:[79]

> Experience since Fitzgerald suggests that in practice such cases are not rare. Third strike sentencing is capable of producing grossly disproportionate outcomes whenever the otherwise appropriate sentence for the index offending is a fraction of the maximum penalty.

Again, what can be gathered from this case is a continuation of the courts choosing to prioritise the rights of the offender. As of 4 March 2021, there were 189 people serving a

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[77] At [5].

[78] Singh Tania and Joshua Grainger "All Rights are Equal, but Some Rights are more Equal than Others: Fitzgerald, Matara and Chisnall," [2022] NZLJ 57, at 59

[79] *Matara,* above n 71, at [73].

second strike sentence and *Matara* has given a basis for them to appeal.[80] However, what about those who have already appealed? The question remains whether the courts would continue the mission of protecting the rights of offenders and allow them to benefit as well.

C Giving a non-retrospective legislation retrospective effect

The Three Strike Legislation Repeal Act 2022 was passed on August 15th 2022, and will no longer be applicable in New Zealand. It was passed with no retrospective effect, meaning those who are sentenced under the law will serve out their sentence as originally imposed. The Courts are clearly restricted in their inability to resentence. If the offender cannot appeal under *Fitzgerald,* there is no recourse available to them. Ultimately. this group who are at the mercy of Parliament. Nevertheless, there is another group of offenders who are not facing such a forlorn prospective. While the repeal bill was in the process of becoming an act, three strike cases were still being heard. The cases of *Morgan v R* and *R v Wirihana* demonstrate the Courts trying to navigate the rugged terrain of an impending but not yet enacted law change.

1 Morgan v R

In December 2021, Mr Morgan was convicted of one charge of unlawful detention for sexual connection.[81] As this was his third strike offence, he was prima facie liable to the maximum sentence of 14 years imprisonment. The issue was whether Mr Morgan's sentencing should be adjourned. So if the Bill was passed, he would avoid facing a mandatory maximum sentence.[82] Mr Morgan sought leave to appeal to the Court of Appeal after the High Court declined his application for adjourning of sentencing.[83]

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[80] Singh Tania, above n 78, at 60.

[81] *Morgan,* above n 3, at [2]; Crimes Act 1961, s 208(b).

[82] At [3].

[83] *R v Morgan* [2021] NZHC 3352.

Kós P gave the Court of Appeal's reasoning. He observed that "[a]ny change in the law, whether common law or by legislation, has the potential to produce arbitrary effect".[84] His Honour was sympathetic, acknowledging the injustice of applying a law that would end in three months.[85] However, Kós P drew a clear line between the role of the courts and that of Parliament, concluding there was no legitimate basis for adjournment of sentencing.[86]

This case concerns legislative change, pending but not yet enacted, and requires a greater level of caution as Parliament has not spoken authoritatively.[87] It is a constitutional function that Parliament speaks to the courts only through enacted legislation.[88] The prospect of a legislative change cannot deflect the duty of the courts to carry out their present responsibilities.[89]

His Honour concluded that "to apply a more tolerant statutory sentencing regime applicable at a later date is to pre-empt a choice Parliament has made by not giving the later enactment retrospective effect."[90] It is not the role of the courts to pre-empt Parliament's decisions. Ultimately, Kós P limited the power courts have in this situation, stating:[91]

"Parliament must make the decision whether to repeal the current sentencing framework and if so whether to do so retrospectively. The choices before Parliament are stark ones, but they are Parliament's stark choices."

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[84] *Morgan,* above n 3, at [10].
[85] At [25].
[86] At [25].
[87] At [12].
[88] At [12] Kós P referred to *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84; [2019] 1 NZLR 116, at [114] and [116].
[89] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84; [2019] 1 NZLR 116, at [116].
[90] *Morgan,* above n 3, at [20].
[91] At [23].

Morgan demonstrates the respect given to parliamentary sovereignty, that despite the "deeply unfortunate consequence for Morgan and for others"[92] the courts must respect the intention of Parliament.

2 R v Wirihana

Mr Wirihana was facing sentencing for his manslaughter conviction, his second strike offence. Therefore, the Court was required to order Mr Wirihana to serve the entire term of his sentence without parole unless "it would be so disproportionately severe as to contravene s 9 of the New Zealand Bill of Rights Act 1990."[93]

After applying the relevant sentencing law, Edwards J settled on a sentence of four years and six months imprisonment.[94] Moreover, Edwards J considered Mr Wirihana's eligibility for parole. Her Honour observed that Mr Wirihana appeared to be the type of offender to whom the three-strikes regime was directed.[95] Due to his history of offences and because the current offence was more severe than those of *Fitzgerald* or *Matara.* Additionally, Wirihana did not experience the same severity of mental health issues as the defendants in those cases.

As the repeal bill was yet to be enacted at the time of sentencing, Mr Wirihana would not benefit from the repeal and would remain ineligible for parole.[96] In light of Morgan's recent Court of Appeal decision, Edward J must apply the law as it is currently in force. However, Her Honour limited this decision to the context of adjournment of sentencing, stating;[97]

> [I] do not interpret the Court of Appeal as saying that I should ignore the possibility (and I put it no higher than that) of the law being repealed and the reasons for that

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[92] At [26].

[93] *R v Wirihana* [2022] NZHC 863, at [8].

[94] At [62].

[95] At [68].

[96] *Wirihan*a, above n 93, at [69].

[97] At [70].

> proposed repeal when considering whether ineligibility for parole would result in a disproportionately severe sentence.

The *Fitzgerald* decision has been further developed by Edwards J as Her Honour used the purpose of a repeal not yet enacted to influence excising her discretion. In only using the reasons of Parliament to inform her decision, Edwards J has demonstrated another clever exercise of judicial discretion. Her Honour's actions come close to pre-empting a decision of Parliament given the repeal was not passed. Edwards J continued the trend of stretching judicial interpretation and discretion to avoid imposing a harsh sentence despite her admission that Mr Wirihana was the type of offender to whom the three-strikes regime was directed.[98]

The reasons for repealing the regime were the mandatory sentencing resulted in "unjust outcomes that affect Māori disproportionality and have raised concerns inconsistent with the New Zealand Bill of Rights Act 1990." and "excessive and disproportionate sentence outcomes by preventing Judges from taking the individual circumstances of the offender and the offending into account".[99] Edwards J found these to be directly relevant to this case. Therefore, Edwards concluded that it would be a real risk that an order declining eligibility for parole will "simply compound the impact of social deprivation further [and she] considers that to be an unjust and overly severe response".[100]

Furthermore, Edwards J makes an interesting observation of the timing of this case. She found that the proximity of Mr Wirihana's case to the enactment of the Bill was relevant. This is because if his sentencing took place only a few months later, there is a real possibility that Mr Wirihana would be eligible for parole. Edwards J took this to suggest that if the Bill was passed with no retrospective power, "[Mr Wirihana's] eligibility for

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[98] At [68].

[99] Three strike Legislation Repeal Bill 2021 (79-1) (explanatory note), at 1.

[100] *Wirihan*a, above n 93, at [72].

parole turns on the arbitrariness of the chosen date for sentencing".[101] Her Honour concluded that:[102]

> "the potential for arbitrariness in whether you are to be eligible for parole, particularly in light of the reasons for the proposed change in regime, adds to the disproportionality of a sentence to be served without parole."

Parliament favoured finality, whereas the Edwards J favoured justice. Her Honour allowed an offender to benefit from a change in the statute that was not meant to benefit them. This is yet another demonstration of how far Courts have gone to protect the rights of offenders.

D Summary

The *Fitzgerald* saga is an illustration of the Judiciary's power. Through statutory interpretation and discretion, the courts have effectively achieved what Parliament had taken over ten years to do. When the repeal's enactment was in sight, the courts effectively ended the three-strike regime. The Supreme Court enabled discretion when applying s 86D(2), and lower courts have utilised and developed the judgment beyond what the Supreme Court anticipated. Since *Fitzgerald,* courts have avoided using the three-strike regime to the extent that a non-retrospective repeal has been given retrospective effect. Despite failing to adjourn his sentence, Mr Morgan avoided being sentenced under the regime as he satisfied a breach of s 9. Effectively, the courts have made the legal change, and the repeal is a symbolic and political move.

If there had been more time, we might have seen *Fitzgerald's* decision evolve further allowing those who have already appealed to benefit from the change in law.

As observed by lawyer Tania Singh:[103]

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[101] At [75].
[102] At [75].
[103] Singh Tania, above n 78, at 61.

> …Fitzgerald should be a call to criminal practitioners everywhere: if a law is leading to unjust results, it does not simply have to be accepted. Justice sometimes requires changing the system — not just working within it.

The unjust results are easy to see if we just think of Mr Phillips and Mr Matara. What if they had exercised their right to appeal? All the factors, their mental health, the loss of liberty, encouragement and support would remain, yet they would still be subjected to their sentence. A sentence held to be disproportionately severe and unjustified. Courts should strive to interpret legislation and use their discretion to avoid breaching freedoms and rights, even if at first glance it may appear challenging

IV A new balance: presumption to protect rights

To increase an offender's sentence after it was made final is fairly regarded as highly objectionable and unfair. This perspective is reflected in NZBORA, stating that no one shall be punished for an act or omission that was not an offence at the time it was committed.[104] However, the opposition to the retrospective reduction of a sentence is not as strong, nor should it be. This perspective is reflected in NZBORA s 25(g) which states:

> the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

Although this only applies to those convicted yet to be sentenced, it aligns with the idea that when retrospectivity would benefit the offender it should be allowed. Retrospective sentencing changes should be easily obtainable to all offenders where their sentence diverges from what is newly required for proportional punishment. The courts' role–to strive to uphold rights as shown in *Fitzgerald*–can be applied in the context of general changes to sentencing law. It follows that when there is a change in sentencing law, appealing out of time or recalling the sentence should not be considered an indulgence.

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[104] Section 26(1).

A Easier access to justice: No longer an indulgence.

There must be a balance between finality and retrospectivity, that is clear. However this section proposes an alternative method to that currently used by courts. The decision of Fitzgerald justifies a departure from the presumption that a sentence passed correctly at the time should stand despite a change in the law. The presumption should be rights-consistent, upholding the offender's right to justice. Therefore, this will avoid the arbitrary breach of rights based on allowing retrospective application of changes in law based on when the right to appeal was exercised. The decision on who should benefit should revolve on the rights in question, what degree of breach are the courts trying to evolve and does finality outweigh the breach.

The courts mention that a mere change in law is not enough to override finality[105]. However, a change of sentencing law carries with it the weight of someone's liberty. A 'mere' change in sentencing law might determine whether someone will remain in prison with no justification. The threshold, as in *Matara*, is whether upholding the original sentence would go beyond what is proportionate and sufficient to meet the objectives of the Sentencing Act.[106] The purposes of sentencing include holding the offender accountable, protecting the community from the offender, promoting a sense of responsibility of the harm in the offender and providing for the interest of the victims.[107]

Furthermore, the issue of opening the floodgates to endless appeals should not be a strong consideration against justice. Although it is not to be entirely disregarded given the risk to the administration the judicial system, the weight that this concern carries in the balancing discourse should be lessened. Firstly, in *Matara* the issue of floodgates was not raised despite the hundreds of offenders who could have a basis for appeal. The Court of Appeal

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[105] *Cheung,* above n 28, at [34].

[106] *Matara, above n 71.*

[107] Sentencing Act 2002, s 7(1)

extended *Fitzgerald* regardless of the potential influx of appeals. It is another demonstration of where finality should yield to justice. What strengthens this point is courts have already questioned the influence of floodgates. In *Taylor* there was not an issue of floodgates, however it was questioned whether "a multiplicity of individual injustices can collectively diminish the case for correction."[108] However Kós P then referenced a quote from Cooke J in *Bowen v Paramount Builders Ltd* that suggested he did not think it would. Cooke J stated:[109]

> The floodgates argument seems to me specious. If many meritorious claims follow, the desirability of the development is proved; who would now retreat from Donoghue v Stevenson... ? And the courts should be able to ensure that unmeritorious claims do not succeed.

It is possible that the influence of *Fitzgerald* will end with the enactment of the repeal bill. Legal professionals, scholars and the judiciary might put the judgment to one side given its niche context. However, restricting the reasoning in *Fitzgerald* to Three Strike cases would be a loss of revolutionary progress in protecting rights. As stated by Lord Dyson the demands for fairness and justice will change alongside the changing of views, the developing social and moral value.[110]

V Conclusion

The case of *Fitzgerald* and the subsequent demonstration of judicial activism encourages courts to move away from a strict application of finality. There should be a move to presume when balancing the need for finality and access to justice, the courts exercise their discretion consistently with the rights and freedoms in NZBORA. The high value placed on the need for finality will limit the how far the courts can go to uphold the liberty of an offender. The presumption of a rights-consistent interpretation will take strides in

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[108] *Taylor,* aabove n 4, at [15].

[109] *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394, at 422.

[110] Lord Dyson "Time to Call it a Day: Reflections on Finality and the law" in Justice Continuity and Change (Hart Publishing, London, 2018) 134. at 156.

mitigating the arbitrary effects of changes in law. The balance will be conducted on the merit of the appeal and therefore, a more just result will be met. If an offender is denied the benefits of a change in sentencing law, it will not be based on when they choose to appeal, it will be based on the merits of their appeal, in the balance of interests.

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