PHL271 Handout 9: Sentencing and Restorative Justice

We're going to deepen our understanding of the problems surrounding legal punishment by closely examining a recent sentencing decision handed down in *R. v. McGill* [2016] by Justice Melvyn Green (hereafter 'J. Green') of the Ontario Court of Justice.

> *The Case*: Robert McGill is an Aboriginal man living in Toronto. He was arrested for possession of 300g of cocaine. After being released on bail, he took significant steps towards turning his life around: he went to school, re-connected with his Aboriginal heritage, and refrained from further drug-use and drug trafficking. Though McGill was found guilty of possession of cocaine for the purposes of trafficking—a verdict that usually comes with a sentence of several years in prison—Justice Green takes the unusual route of imposing a suspended sentence (roughly: no jail time, but a relatively demanding period of probation within the community).

Justice Green's decision is a sophisticated engagement with some of the issues raised last class about the moral justification of punishment.

Recall that the central questions about legal punishment are *justificatory*:

1. *System Justification*: What justifies the creation and maintenance of a system of punishment?
2. *Target Justification*: What justifies the selection of who can be punished?
3. *Sentencing Justification*: Which factors justify the particular sentences the system assigns to individuals?

Our focus today will be the third question. However Justice Green's answer to this question often engages with (somewhat messy) answers to the first question that have held sway (to a greater or lesser extent) within the Canadian legal system. Here is the expression (in the Canadian Criminal Code) of the 'Canadian' answer to the first justificatory question:

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;
>
> **(d)** to assist in rehabilitating offenders;
>
> **(e)** to provide reparations for harm done to victims or to the community; and
>
> **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Combined with some later sub-sections of s. 718, this piece of the Canadian Criminal Code takes on board elements of all four of the answers we canvassed to the first justificatory question.

§1 The Fundamental Principle of Sentencing

Remember that one answer that seems obvious to many is that punishment should track *desert*: if someone violates the law—especially the criminal law—they've wronged an individual or society (or both), and so *deserve* some kind of punishment. A theory of punishment that makes essential justificatory appeal to desert is often classified as 'retributivist'. In pithy form: retributivists say we (morally) ought to punish the guilty because they deserve it.

We saw last time that retributivists endorse certain constrains on punishment. The most important of these constraints (at least for our purposes) are the demands that punishments be proportional and fair. These demands show up in the Canadian Criminal Code, in part because the Criminal Code embodies a (partly) retributivist framework for thinking about legal punishment.

A demand for *proportionality* constitutes the *fundamental principle* of sentencing:

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

What I called the constraint of 'fairness' (what J. Green calls 'the principle of parity') shows up as s. 718.2 (b) of the Criminal Code:

> **718.2 (b)** A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

To a certain extent, one could read R. v. McGill as an extended reflection upon how best to reconcile (in light of the aims expressed by s. 718) ss. 718.1, 718.2 (b), and a third principle that governs sentencing:

> **718.2 (e)** All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

s. 718.2 (e) was created by a 1996 parliamentary amendment to the Criminal Code (the *Sentencing Reform Act*). It was introduced partly in order to address the significant over-representation of Aboriginals in the prison system. The principle's implications for sentencing—especially the sentencing of Aboriginal offenders—were first articulated in *R. v. Gladue* [1999], a Supreme Court of Canada decision that now binds every other court in Canada. These implications were later clarified and expanded in later Supreme Court decisions (*R. v. Wells* [2003] and *R. v. Ipeelee* [2012]).

> In response to the *Gladue* decision, many courts began to institute different sentencing procedures for Aboriginal offenders. These procedures—most importantly so-called 'Gladue Reports'—are meant to ensure that courts take the unique circumstances of Aboriginal offenders into account. The new procedures are not designed to *always* change the eventual sentence; instead, they are meant to

ensure that the sentence reflects (and thus respects) a full consideration of the special circumstances of Aboriginals living in Canada.

Note: There remain interesting and important questions about the implications of s. 718.2 (e) for *non-aboriginal* offenders. That the section extends to non-Aboriginal offenders is made clear in §36 of *R. v. Gladue*: 'As a general principle, s. 718.2(*e*) [directing restraint in sentencing] applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.'

Question: after reading R. v. McGill, do you think a similar decision (using similar reasoning) could be reached in a case involving a non-Aboriginal offender? If not, why not?

§2 Deterrence

Another option in answering the first justificatory question would be to appeal to the alleged *deterrent* role of punishment: a system of punishment serves to deter people from breaking the law. There are two sides to deterrence. Punishment might serve to deter not only *actual* law-breakers but also *potential* law-breakers. [Compare §97 of *R. v. McGill*: the two dimensions of deterrence are called 'specific deterrence' and 'general deterrence']

General Empirical Worry: there exists empirical evidence supporting the view that punishment (especially imprisonment) isn't an effective deterrent.

For a version of this worry, see §105 of *R. v McGill*. Apparently the Supreme Court (again in *R. v. Lacasse*) reasoned that punishment is most likely to serve an effective 'deterrent' role for other members of society (i.e. it is most likely to serve as a 'general deterrent') when 'law-abiding people' constitute the target audience.

J. Green argues (cf. §§114-115) that the conditions imposed by a suspended sentence satisfy the requirements for specific deterrence. And he argues that the demand for general deterrence is effectively outweighed in this case by the potential for rehabilitation, and thus by the demands imposed by the fundamental principle of sentencing.

§3 Rehabilitation

Some think that a primary justification for punishment is the *moral education* or *rehabilitation* of wrongdoers [Compare §§99-100 of *R. v. McGill*; see also s. 718 (d) (f)]. On the assumption that wrongdoing results from a failure to appreciate the moral landscape and one's place in it, the role of punishment on this view is to train wrongdoers to develop the proper appreciation. This conception of punishment treats wrongdoers as autonomous agents capable of evaluating reasons, duties, and so on.

J. Green quotes a passage from *R. v. Lacasse* (a SCC decision) that recognizes the *intrinsic moral value* (rather than mere *instrumental* value) of rehabilitation: 'One of the

> main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.'

For the connection between this recognition of the moral value of rehabilitation (at least within Canada) and the fundamental principle of sentencing (i.e. proportionality), see §§106-107 of *R. v. McGill*.

§4 Restorative Justice

A fourth (and increasingly prominent) answer to the first justificatory question is that a system of punishment is justified insofar as it furthers the ideals of restorative justice (see also s. 718 (d)(e)(f)). Central to the concept of restorative justice is the idea that offenders should seek to *repair* the wrong they've done. Hence the primary objective of punishment is the restoring and/or minimizing of the harm done to communities and individuals.

s. 718.2 (e) was introduced partly in order to further the ideals or aims of restorative justice with respect to the Aboriginal community in Canada. J. Green characterizes the principle of restorative justice as 'a concept that contemplates both objectives and process and that, as earlier outlined, focuses on the acknowledgement of harm, healing, and reintegration into the community.' (cf. §118)

Given the role s. 718.2(e) assigns to restorative justice in sentencing Aboriginal offenders, what results is a particularly broad holistic procedure for determining an appropriately proportional sentence. Compare §81 of *R. v Gladue* (quoted by J. Green in §118 of *R. v McGill*):

> The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing … the judge must strive to arrive at a sentence which is just and appropriate in the circumstances.

The application of this holistic regard for restorative justice gets extended to 'serious' crimes in §49 of *R. v. Wells*:

> [T]he reasons in *Gladue*, *supra*, do not foreclose the possibility that, in the appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime.

Given this background precedent, J. Green sees no *general* barrier to the application of s. 718.2(e) to the case of Robert McGill. The problem then becomes to show that a suspended sentence (as opposed to a period of imprisonment) is truly a proportional sentence that respects the various principles governing sentencing (those in s. 718.2) and the aims of sentencing (enumerated in s. 718).

§5 Parity, Proportionality, and Sentencing Ranges

Some of the most interesting portions of *R. v. McGill* are those parts where J. Green wrestles with how to balance proportionality, parity, and restorative justice. Many parts of his discussion will apply to cases that don't involve the special circumstances unique to Aboriginal offenders.

Here's the fundamental principle of sentencing (once again):

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Read plainly, s. 718.1 requires that a decision about proportionality take into account *both* (a) the gravity of an offense and (b) the various factors which combine to determine the degree of responsibility of the offender.

In the case of drug possession, the gravity of the offense is determined by the *amount* possessed. Appellate courts in Canada have recognised 'sentencing ranges' that reflect discrete categories of drug offense, where these categories are determined solely by the amount possessed.

> The status and implications of these sentencing ranges forms the focus of a great deal of *R. v. McGill*: §§52-87.
>
> > J. Green argues that these ranges, which on their face seem to mandate certain punishments for certain kinds of possession (except when special circumstances obtain—so-called 'exceptional circumstances'), are not rules with strong normative force but rather guides as to what sorts of decisions have been reached in (narrowly) similar cases by other judges (cf. §65; and especially §§78-82).
> >
> > > Talk of 'exceptional circumstances' becomes inapt if the ranges aren't rules: exceptional cases are simply unusual ones, rather than decisions in need of a special justification. See §82.
>
> One reason for being suspicious of sentencing ranges is that they seem to run afoul of the sensitivity to *individual* circumstances mandated by fundamental principle of sentencing.

Of course, J. Green has to contend with an obvious objection to treating sentencing ranges as merely descriptive. The objection goes like this: by attending to particular circumstances of a crime or offender, without strong regard for what other judges have decided in (narrowly) similar cases, we risk violating the principle of parity (i.e. 'treat like cases alike').

Yet what does it mean to treat 'like cases alike' when we're talking about punishment? (See §§78-87 of *R. v. McGill*; also s. 718.2(b)).

J. Green points out (though not in these terms) that we can have a narrow 'categorical' conception of what counts as a 'like case' even while maintaining the importance of individualized sentencing:

> *Example*: suppose we want to impose a fine as a punishment for breaking some minor law. Should we set a specific dollar amount (say $100) as the fine? Or should we set the fine as a percentage of an offender's *gross* monthly income? Or should we set it as a percentage of an offender's *disposable* monthly income?

Upshot: while the criterion for determining 'like cases' might be 'categorical', the criterion for determining 'like treatment' need not be.