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"A Tailored Response to Criticisms of Courts Striking Down Mandatory Minimum Sentencing Provisions"

Robson Crim previously published an article entitled "Rethinking Courts Mandating Against Mandatory Minimums—a student perspective" ("Rethinking"). (1) This piece broadly criticizes courts in general for striking down mandatory minimum penalties ("MMPs") for serious offences, in part, because doing so interferes illegitimately with the political process of crafting legislation responsive to the preferences of the electorate. Given the Supreme Court of Canada's ("the SCC") recent related decision to strike down victim surcharge fees as inconsistent with s 12 of the *Canadian Charter of Rights and Freedoms* ("s 12"; "the *Charter*"), and the unanimous Manitoba Court of Appeal's late-2018 decision to strike down the MMP of one-year incarceration for sexual interference under s 151(a) of the *Criminal Code*, some response is warranted even in general terms. (2)

I will contend that "Rethinking", in its analysis, wholly swaps a principled legal approach to sentencing for a self-justifying and abstract political calculus. This approach, while superficially attractive at first blush, is one that dismisses *Charter* jurisprudence, sentencing principles under the *Criminal Code*. In doing so out, I will begin by briefly outlining what MMPs are, their relationship to s 12, and the principles of sentencing under the *Criminal Code*, before moving on to more substantive criticism.

A Crash Course in MMPs

In brief, MMPs typically refer to jail sentences wherein Parliament has prescribed the minimum length upon conviction for a particular criminal offence. (3) Judges may not impose a punishment falling below that length. (4) In other words, Parliament, rather than the courts, imposes a starting point for the sentence. As "Rethinking" points out, the use of MMPs has grown significantly since 1982, although it is worth noting that the rate of proliferation under the Harper administration was disproportionately high. (5) From 2006 to 2017, at least 11 new discrete MMPs were introduced, and even more were enacted to respond to aggravating facts surrounding the commission of substantive offences. (6)

MMPs have long been a contentious subject amongst academic lawyers, judges and lawyers, with many disputing, in general terms, their consistency with the *Charter* and overall efficacy as borne out by the data, amongst other things. (7) The SCC, however, has taken an observably cautious approach to s 12 litigation of mandatory minimums, striking down MMPs on s 12 grounds in only three out eight cases since 1982—a rate of less than 38 per cent. (8)

Arguments in favour of MMPs are commonly of a utilitarian flavour tending to frame MMPs as mechanisms through by which to reduce disparities and inequality in sentencing and protect the public. (9) More often than not, MMPs are justified based on perceptions of public opinion and the will of the democratic majority—indeed, "Rethinking" strongly relies on this reasoning. (10)

Purpose and Principles of Sentencing: Very, Very Briefly

Sections 718 and 718.1 of the *Criminal Code* respectively outline the fundamental purpose and principle of sentencing. (11) Section 718 provides that:

> "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…" (12)

The objectives of sentencing are denunciation, deterrence (general and specific), separating offenders from society, rehabilitation, reparations, self-responsibility. (13) Section 718.1 stipulates, as a fundamental principle, that "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence must be no greater than an *offender's* moral culpability, and, at the same time, reflect the seriousness of the criminal conduct. (14)

An Issue of Scope

From a legal standpoint, the absence of a custodial sentence does not amount to hesitation to hold criminals responsible for their actions. Indeed, denunciation and deterrence can be met without a prison sentence. (15) *Convictions* are declarations of criminal guilt, and, therefore, are the mechanism through which criminal responsibility is assigned; *sentences* are the judicial vehicle through which punishments are discharged. This is not merely a distinction without a difference—these are discrete stages in the criminal process with related but separate functions.

To be fair, I would assume that "Rethinking" uses somewhat colloquial language to argue that sentences that fail to sufficiently incapacitate a convicted criminal are most appropriately viewed as unfairly lenient consequences. In some instances, such a view may be true, and in those instances, such a sentence may be vulnerable to appeal. This, however, is only half of the argument as it goes for MMPs. The issue with MMPs for many offences is that they impose compulsory starting points usually better-suited for the "average offender" but not necessarily offenders occupying the lower rungs of "seriousness". Indeed, that is what the SCC gets at in *Lloyd:*

> "[I]n the present case, the mandatory minimum sentence provision covers a wide range of potential conduct. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. [emphasis added]" (16)

When not carefully crafted, MMPs can to catch out conduct that society would view as reasonably expected or at least not criminally concerning. In doing so, they distortions judicial and public/social understanding of what precisely is criminally condemnable conduct. Indeed, the SCC in *Nur* struck down a three-year MMP for possessing loaded firearms contrary to s 95(1) of the *Criminal Code* by pointing out that the related MMPs would catch out a person with "who has a valid licence for an unloaded restricted firearm at one residence, [who] safely stores it with ammunition in another residence, e.g. at her cottage rather than her dwelling house". (17) While such conduct would meet the letter of the law, surely it is contrary or inconsistent with the spirit. In other words, MMPs create self-contained issues of overbreadth since they demand judges depart from the principle of proportionality when an MMP may be an otherwise disproportionate sentence. Clearly, the *Criminal Code* and the case law requires judges in tailoring sentences to factor in the public's abhorrence of particular types of crimes as per the

objective of denunciation. (18) If the citizenry, however, is put on notice that certain offences are abhorrent, one would expect that those consequences would be responsive to the specific conduct at issue rather than a monolithic generality.

The *Charter*

Much of the criticism in "Rethinking" is reserved for the Courts' perceived role as inappropriate role as partisan political actors. Indeed, much of the criticism reflects a broader debate on judicial activism, particularly with respect to the *Charter*. "Rethinking" links these serious accusations with the claim that:

> "It seems unreasonable to say that [MMPs for certain drug, weapons and child sex offences], even in the case of a hypothetical sympathetic and minimally culpable party, are inherently cruel and unusual punishment. [emphasis added]" (19)

Certainly, MMPs for the above, or any, offences, may not be *inherently* cruel and unusual but, respectfully, that assertion misses the point. MMPs are considered cruel and unusual *based on the circumstances*, actual or hypothetical. (20) The s. 12 jurisprudence assesses claims of cruel and unusual punishment as a function of gross disproportionality, itself subject to a number of sub-tests. (21) This is an exercise in relativity not absolutes. For such criticism to hold water, one must revisit the decades-old "gross disproportionality" test and its analytical implications.

Moreover, the *Charter* exists, in part, to modulate imbalances between prevailing and countervailing social values to the extent that such an imbalance represents a problem as a matter of constitutional principle. Certainly, creating law from the bench, is, in some sense, "political" but that does not necessarily make it partisan or even opposed to the public's interests. It is hard

to argue that courts enforcing *Charter* rights is a "political calculation" when (1) *Charter* rights exist as a counterbalance to the state, and, (2) neither the courts nor the *Charter* are necessarily majoritarian or counter-majoritarian institutions—they resolve and adjudicate disputes on a principled, not a political, basis. If exercising the public will functionally exempts MMPs from s 12 scrutiny, there is little point to *Charter* rights at all.

Whether Courts striking laws down prevents public debate probably depends on which side you fall with respect to judicial activism and dialogue theory. In my view, legislation *is* the product of debate (although it is hard to see how meaningful that debate can be when one strategically forces 900-page long bills through the House of Commons). Court decisions happen long after the fact. The debate already happened. The Court is saying that the initial debate was inadequate. Resume debate.

Conclusion

At the end of the day, sentencing provisions may be crafted in the chambers of the Centre Block, but they are applied in everyday courtrooms. Sentencing is less about determining "What is an appropriate sentence?" and more a question of "What is the most appropriate sentence under the circumstances?" They are highly fact-driving inquiries, and fact-driven inquiries require weighing facts against other facts, not simply weighing interests against other interests. An accused's background is not some psychoanalytical curiousity that the courts merely indulge at the behest of special interest groups. Hearing the other side of the story is ancient practice, one which drives the adversarial process as we know it, one which asks, "Who is this person before the court and why did they do what they did?"

The SCC in *Lloyd* takes the first half of this question to its logical conclusion. Indeed, the SCC did not simply ask whether the mandatory minimum sentence at issue was appropriate for a repeat drug offender. The Court in that case also had to ask *who* is a reasonably foreseeable example of a repeat drug offender, and whether the mandatory minimum sentencing provision at issue is grossly disproportionate for that individual. After all, laws must apply equally to everyone. While the SCC found that the MMS at issue was appropriate for a professional drug dealer, for example, it could not possibly be appropriate for an "addict who is charged for sharing a small amount of drugs with a friend or spouse, and finds herself sentenced to a year in prison because of a single conviction for sharing marihuana in a social occasion nine years before." (22)

Ultimately, sentencing should not start and end with the premise that an offender's moral culpability is an absolute function of the seriousness of the offence. While the seriousness of an offence may be determined in part by reference to a maximum available penalty, the seriousness of a given offence, in practice, is not determined in the abstract or in a factual vacuum. "Seriousness" is a matter of gradation. While an offence may be serious, it does not follow, as a matter of logic and common sense, that every iteration of that offence is equal in its seriousness. To argue so is a fallacy of division. Moreover, the argument that conduct is uniformly serious because a criminal offence *per se* is serious, therefore, individual conduct is serious is somewhat circular. How do you account for cases where the offender is a teenager? What about cases of first-offenders? What about exigencies in the Crown's case? What if the offence has left no lasting emotional impact on the victim?

One is not a bleeding heart for upholding a principled and equitable approach to sentencing. Moreover, one does not assume a position of moral relativism to acknowledge that

different instances of the same offence may give rise to dissimilar levels of seriousness—that is just paying attention to the facts. We all accept that fires are inherently dangerous; I would imagine most of us accept that not every fire will burn down your house.

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