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The effects of punishment on the offenders' relatives: Difficulties and discussion regarding their problematization at the sentencing stage

Les effets de la peine sur les proches des contrevenants. Difficultés et discussion quant à leur problématisation lors de la détermination de la peine

Las consecuencias de la pena sobre los familiares de los detenidos: dificultades y discusión en cuanto a su problematización en la etapa de la determinación de la pena

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Résumé de l'article

Cet article s'intéresse à la problématisation des effets de la peine sur les proches des personnes contrevenantes dans le contexte de la détermination de la peine. Pour observer cet objet, nous aborderons la manière dont le droit criminel moderne organise l'absence des proches des contrevenants, et réfléchirons aux rationalités oeuvrant en coulisse pour construire et sédimenter cette absence. Nous verrons aussi comment s'organisent, en filigrane, des espaces de reconnaissance des effets de la peine sur les proches des contrevenants, et observerons les émergences qui viennent irriter les rationalités disqualifiantes pour les proches, rationalités qui dominent encore la pensée et les pratiques en matière pénale. Enfin, nous proposerons une réflexion sur la manière dont le dévoilement des absences et des émergences pourrait contribuer à enrichir et modifier ces rationalités, dans la perspective de construction d'un droit criminel inclusif.

The effects of punishment on the offenders' relatives: Difficulties and discussion regarding their problematization at the sentencing stage

Sophie de Saussure

Abstract

This paper looks at the problematization of the effects of punishment on offender's relatives, specifically at the sentencing stage. To do this, we discuss the way modern criminal law organizes the absence of offenders' relatives and the reasoning that contributes to creating and solidifying this absence. We also look at how, in the background, some acknowledgment of the effects of absence takes place and affects the reasoning behind maintaining absence, reasoning that still dominates thought and practice in penal matters. Finally, we show that exposing the effect of absence and recognizing the possibility of overcoming it could contribute to informing and modifying this reasoning, making it possible to build a more inclusive system of criminal law.

Keywords

Sentencing, offender's relatives, consequences of punishment, modern penal rationality, social ties.

Introduction[1]

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That which is not named does not exist.

Ilhan Berk

Nonexistence is produced whenever a certain entity
is disqualified and rendered invisible,
unintelligible, or irreversibly discardable.

Boaventura do Sousa Santos

In political forums, much as in media spaces, the relatives[2] of offenders are conspicuous by their absence. Beyond the "social invisibility" (Lehalle, 2017, p. 21) characterizing this population, this article focuses on their "non-existence" with regard to legal institutions, specifically at the sentencing stage. What does this absence reflect? What impacts result from it? How can these individuals be made to "exist" in the eyes of the law and public policy?

In *Epistemologies of the South* (2014, previously published in French in 2011), sociologist Boaventura de Sousa Santos develops a framework for what he refers to as *the sociology of absences and emergences*. This "double transgressive" sociology (p. 46) pursues goals described thusly by Santos: the *sociology of absences* aims to "transform impossible into possible objects, absent into present objects," (p. 172), while the *sociology of emergences* "consists of replacing the emptiness of the future (according to linear time) with (…) plural and concrete possibilities, utopian and realist at one and the same time," (p. 182).

Following Santos' invitation, this article takes as its starting point an observation of the absence and emergence of offenders' relatives during the sentencing stage, while also questioning the reasoning underlying the invisibilization of these actors at this stage of the penal process.[3] Underlying the intention to reveal this absence, lies the proposal, put forth by Santos, to "explain that what does not exist is in fact actively produced as nonexistent, that is, as a noncredible alternative to what exists," (2014, p. 171). By contrast, behind the intention to reveal the

[2] In this article, the term "relatives" will be used in the sense intended by Paugam (2013), that is, in reference to individuals with a filial or elective relationship (spouses, friends, and chosen relatives) to an individual with a criminal record.

[3] Without limiting itself to it, the study of the Canadian context will be emphasized in this article.

emergence, lies the proposal, again put forth by Santos, of "amplifying the present by (…) adding to the existing reality the realistic possibilities and future expectations it contains" (2014, p. 184).[4]

To address this agenda: 1) we will discuss the way modern criminal law organizes the absence of offenders' relatives and the reasoning that contributes to creating and solidifying this absence; 2) we then observe how positive law (understood here as being constituted by norms and jurisprudence) structures both the absence and the presence of relatives during the sentencing stage; and 3) finally, by exposing the absences and emergences, we show how challenging the disqualifying reasoning targeted at offenders' relative can contribute to informing and modifying this reasoning, with the aim of building an inclusive system of criminal law more open to considering the impacts of sentencing on social ties.

1. The social isolation of the offender: A feature of modern criminal law

While the Durkheimian perspective supposes that a symbolic function of punishment is to maintain social cohesion and the stability of social ties (Décary-Secours, 2016), this purported "unifying" function, according to which criminal justice represents "the final bulwark (...) used to protect society from serious attacks against [...] the [social] bond" (Sanchez, 2012, p. 67, our translation), nevertheless appears to be in conflict with the means employed by penal intervention in achieving its objectives. We can thus ascertain that the application of criminal law can paradoxically contribute to limiting, or even hindering, social cohesion,[5] while also weakening certain concrete social ties, notably those maintained by the offenders with their relatives.[6]

Before we more deeply examine the ways in which legal institutions structure the absence of offenders' relatives, we first consider the sources of this absence. In this respect, two closely related elements emerge as decisive in the construction of an *isolating* form of cognitive support: first, the atomistic nature of the sentencing theories that make up the dominant reasoning underlying the modern criminal law system (Pires, 2001a); and second, the central role assigned to

[4] It should be noted, however, that the intent of this article is modest. It is to offer new perspectives and contribute to the emerging debate regarding the relatives of offenders.
[5] See Mauer and Chesney-Lind (2002).
[6] See Ricordeau (2008) and Touraut (2012).

the offender during the sentencing stage (Norrie, 2014), which can notably be tied to the individualized nature of the sentence.

1.1. The atomism of the sentencing stage: An attribute of modern penal rationality

Modern penal rationality (MPR) and its contributions have proven themselves to be particularly useful for studying the modern criminal law system's relationship to the relatives of individuals with a criminal record, especially during the sentencing stage. Prior to describing this relationship, a brief overview of the MPR theory, first put forth by Alvaro Pires, is provided. MPR continues to evolve as the work of Pires and researchers at the Canada Research Chair in Legal Traditions and Penal Rationality progresses.

MPR theory focuses on the system of ideas of modern criminal law. Criminal law is here viewed as a subsystem of the larger legal system, one distinct from other legal subsystems, and therefore considered autonomous (Pires, 2001a). MPR's starting point was Beccaria's *On Crimes and Punishments* (1764/1991; see Pires, 2008). This system of ideas later took form in the West through four theories of sentencing: deterrence, retribution, denunciation, and custodial rehabilitation (Garcia, 2013). The ideas these theories contain "form the dominant 'system of thought' in modern criminal law, from earliest modernity to the present day" (Garcia, 2013, p. 47, our translation), notwithstanding "various timid attempts to support alternatives" (Dubé, 2008, p. 24, our translation).

Four shared points characterize these theories, albeit to different degrees: 1) the right to punish is perceived as an obligation to punish; 2) as part of this obligation, afflictive and socially exclusionary punishments are valorized; 3) prison sentences are presented as the "punishment of reference"; and 4) alternatives to incarceration are devalorized (Garcia, 2013). Based on these core traits, MPR constitutes "(...) an epistemological obstacle (...) to innovation, specifically in regard to developing both a new form of reasoning and an alternative normative structure" (Pires, 2001a, p. 184, our translation).[7]

[7] This observation should not, however, be viewed as fatalistic: indeed, it "(...) does not imply an absence of alternative ideas or practices to the dominant discursive model (...). Alternative proposals exist (...) but there is no clear indication that these proposals have been selected, let alone codified, into the West's modern system of penal law" (Cauchie and Kaminski, 2007, para. 9).

The lens provided by MPR theory identifies four features of sentencing valorized by modern criminal law's system of thought (Pires, 2001a), one of which we focus on here: the *atomistic* nature of sentencing. For Pires, sentencing in the context of MPR is "...atomistic, because [it]...need not concern itself with the concrete social ties individuals share, other than in a very secondary and incidental manner" (2001a: 184, our translation). Conceptually, the *atomism* term traditionally refers to a conception of human nature which assumes an individual is completely autonomous (Taylor, 1985), so much so that "their identity is not even partially made up of their social relationships" (Karmis, 1993, p. 85-86, our translation). This contrasts with the Aristotelian perspective, based on the idea that humans are by nature social animals incapable of self-sufficiency. Dominant in modern political theory (Taylor, 1985), atomism comprises one of liberal individualism's traditional values (Mercure, 2005), resulting in an overemphasis of the primacy of individual rights. Thus, individuals "have no *obligation* to support either society or *all* its members" (Pires, 2001b, p. 167, our translation).

Consequently, the *atomism* that characterizes sentencing, as highlighted by Pires, results in a disconnect between the imposed sentence and the offender's social life, given that MPR's sentencing theories are radically indifferent to the social ties maintained by the offender:

> retributive and deterrence-based theories are atomistic-belligerent. That is, they not only fail to sufficiently take into account the *moral and legal obligation* towards positive protection of social ties; they also contribute to the destruction of these ties, resulting in the creation of both an enemy-based form of criminal law and a "cold war" style of politics. (Pires, 2001b, p. 167, our translation)

Having become an "enemy of society" (Pires, 2008), even a "monster" (Sylvestre, 2010), the offender finds himself excluded from the social world. As aptly put by Norrie (2014), "the ideologies of punishment constantly fail to see the social wood for the individual trees" (p. 363).

This atomistic reasoning provides powerful cognitive support for constructing the absence of relatives, thus contributing to a deadening of thought, while also enabling the court to lock up "a man or woman while neglecting their constituent affective ties in the name of abstract reasoning regarding either the social order their crime flouted or the threat to the security of society the offender represents" (Kaminski, 2008, p. 1, our translation). Cleansed of its material consequences,

a sentence imposed in the context of MPR is free to ignore the potential damage it inflicts not only on the offender, but also their entourage.

1.2. The individuality of the sentence

As a corollary to this atomistic reasoning, modern sentencing theories originally anchored themselves in a fiction, namely the individuality of the sentence. This principle, not to be confused with that of sentence *individualization*,[8] is a pillar of modern criminal law (Norrie, 2014), despite not being codified in the Canadian Criminal Code.[9] The individuality of the sentence can be divided into two phases. In the first phase, the *individual* responsibility of the accused must be determined,[10] with a rejection of the family's responsibility for an act committed by one of its members being viewed as a form of "progress" in modern criminal law. During the second phase, criminal sanction is inflicted upon the *individual found guilty*, with *individual* punishment presiding over modern criminal law. Although a shift from abstract individualism to concrete individuality can be observed in conjunction with the emergence of the rehabilitative model, sentencing theories remain centred on the individual, albeit understood in varying ways (Norrie, 2014). Thus, even if collective punishment still exists in certain countries and cultures,[11] Christie (1986) notes that "punishing some family member for the acts of others (…) has no great appeal in the value-systems of Western humanity" (p. 97).

As such, sentence determination, which is tied to criminal responsibility, is officially no longer collective. The emphasis on the individual, however, obscures the fact that a sentence does not solely affect the individual on whom it is publicly imposed as part of the legal process. The scope of the so-called "individual" sentence is in fact much broader than it appears at first glance, with this qualifier assisting in the *invisibilization* of the collective dimensions the sentence can take on in its material form. We could say, somewhat provocatively, that while individually determined,

[8] The latter generally refers to the fact that a sentence is tailored to the specific circumstances of the offender in a given case.
[9] In other legislative systems, traces of this principle can be found in positive law, such as in France, where Article 121-1 of the Penal Code stipulates that "No one is criminally responsible for anything other than his or her own actions" (our translation).
[10] For a consideration of the emergence of a form of collective responsibility in Canadian jurisprudence, see Sylvestre (2013).
[11] See, for example, Darcy (2003) on the Israeli policy of destroying the homes of families of individual Palestinians who committed acts classified as terrorism.

the sentence is, in its impact, collectively served, resulting in notable impacts on an array of additional actors (Comfort, 2007), despite not directly targeting them. This *collective* sentencing experience, which is the subject of this special issue, is however well and truly a reality, highlighted in particular by Touraut (2013) via the term "extended prison experience." This expression "translates the hold prisons have on individuals who are not secluded, but nonetheless experience prison on a daily basis" (p. 94, our translation).

Thus, the individuality of sentences principle has an obscuring effect, with the offender's central role contributing to the construction of a myth whereby the sentencing process impacts only a single individual. This fiction contributes to producing the absence of the offender's relatives, which is a testament to both the abstract nature of modern criminal law, as well as its disconnect from the concrete social relationships individuals maintain. As Bülow (2014) notes: "no man is an island, and neither are offenders" (p. 776).

If from the perspective of the offender, "(...) there is an un-traversable gap between the act of sentencing and the experience of suffering through punishment" (Berger, 2015, p. 21), this observation can be extended to the experience encountered by relatives following sentencing. Drawing freely from Pires' (2013) reasoning, it can be said that a criminal law system that imparts sentencing must and will rely on ideas that prevent it from seeing that which it is doing. In this regard, the central role of the offender and the atomistic nature of sentencing theories appear to function as neutralizing mechanisms with respect to both the visibility of relatives and the harmful impacts of penal intervention upon them. A deeper understanding of both the familial and social context of the individual facing sentencing would, hypothetically, render the radical nature of a prison sentence more *visible* in terms of its impact on social ties. As Sylvestre (2010) notes, based on the notion of "totality of knowledge" evoked by Christie (2000), repression appears more "reasonable" when little is known about the individual being punished…

2. The legal organization of the absence and presence of relatives

In Canada, the family breakdown that can follow a prison sentence has been highlighted by several reform commissions: the Canadian Committee on Corrections: Criminal justice and corrections (Ouimet commission of 1969) showed particular concern for the "impact on the offender's life trajectory [and] family resulting from the trial, conviction and sentencing (...)" (Dubé, 2008, p. 3,

our translation), while the Canadian Sentencing Commission (Archambault commission of 1987) emphasized the breakdown of families and the importance of their preservation at this stage of the judicial process. Canada's legal sentencing framework, however, remains silent vis-à-vis the existence of offenders' relatives. In this section, we describe the differential organization of the absence and presence of offenders' relatives found in positive (norms- and jurisprudence-based) Canadian law.

2.1. The silence of the law: The formal crystallization of absence

While in the context of sentencing an organization, the court must take into account the related impact on the economic viability of the business and the retention of its employees (s. 718.21(d) Cr.C.), there is no comparable provision addressing the impact of a sentence on an offender's relatives (nor on the offender).[12] Of note, in the entire legal framework governing the sentencing stage (s. 718 et seq. Cr.C.), this section represents the sole provision inviting the courts to consider certain *potential impacts* of sentencing.[13] Canadian legislation does not take into account the existence of relatives,[14] except to aggravate the sentence in cases where they are the victims of the offence,[15] thereby reconducting the *isolating* form of reasoning described above. The various objectives contained in the component MPR sentencing theories have been "enshrined in the Criminal Code (...)" (Lachambre, 2013, p. 16), dating to a 1996 sentencing reform. These objectives result in the punishment of an isolated individual stripped of his social fabric, as well as the invisibilization of third parties to the proceedings. As such, given that the guilty offender's individual rights are barely recognized at the sentencing stage (Garcia, 2014), one can equally question the resulting impact on the rights of third parties potentially affected by the sentence.

[12] This is true for all the offenders' social ties. However, because the focus of this article is on relatives, we will limit ourselves to them. For a review of the specific consideration of offenders' children during the sentencing stage, see de Saussure (2017).

[13] The relatives of offenders do, however, emerge in certain international legal instruments. See, for example, the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (Bangkok Rules, 2011), in particular rules 58 and 64, which state that family ties should be considered in sentencing, while calling for non-custodial sentencing for pregnant women and women with dependent children (this rule also applies to male prisoners under paragraph 12 of this convention).

[14] This is also true for other stages of the criminal process, including arrest and pre-trial detention decisions.

[15] Sections 718.2(a)(ii) and 718.2(a)(ii).1 Cr.C. create aggravating circumstances if the victim is the spouse or child of the offender, respectively.

In this respect, the law meets us with a deafening silence, one which helps normalize the extensive "social costs"[16] generated by the penal system by way of its impact on the entourage of offenders. This normalization stems from a form of logic marked by a notable absence of reflexivity. As Desprez (2009) notes, *reflexivity* is the "reflection taking itself for an object," with the term "evoking repercussion" (p. 481, our translation). The penal system, however, appears at a loss when it comes to considering the repercussions resulting from its interventions. The principles associated with the sentencing stage emphasize the necessity of repairing the harm done to the victim and the community as a result of the *offence* (s. 718(a) and (e) Cr.C.) but fail to problematize the harm caused by the opposing *reaction* to the offence, which therefore represents a blind spot in criminal law.

Interestingly, it is only once the convicted individual is actually incarcerated that his relatives appear as subjects of the norms tied to the sentence's execution: the Corrections and Conditional Release Act contains provisions for maintaining ties (including family ties) while in prison,[17] with the Correctional Service of Canada viewing this "as a factor assisting in the social reintegration of inmates" (Lalonde, 2007, our translation). This temporal deferral corresponds logically to the MPR agenda, which overvalues prison sentences (Garcia, 2013). Relatives emerge at the execution stage of the sentence, due to reasoning that serves the mission and interests of the correctional services. Considerable responsibility is attributed to families, who are assigned a key role in the successful reintegration of the inmate (Touraut, 2013).[18] This role is, however, not recognized for the family during the sentencing stage, despite both reintegration being a legal objective of sentencing under section 718(d) of the Criminal Code, and the risk that a sentence of imprisonment can "cut [the offender] off from all social ties that could further stimulate their rehabilitation" (Dubé & Labonté, 2016, p. 709, our translation). If the important role played by relatives during imprisonment "in identifying strategies to protect family ties" (Lehalle, 2017, p. 22, our translation) is insufficiently recognized, this observation is equally true at the time of sentencing.

[16] Expression borrowed from Landreville, Blankevoort and Pires (1981).
[17] These provisions are directed at the detainee, whose relatives do not have any codified correlative rights. See, for example, Article 71(1) of the law, which enshrines the right of the detainee to maintain relationships with the outside world.
[18] This role can also be seen at the time of release in the pre-sentencing phase, as well as for non-custodial sentencing; see Devresse (2012) for work sentences and electronic monitoring.

2.2. Observable emerging trends in jurisprudence

While Canada's legal framework remains closed off to the effects of sentencing on offenders' relatives, the courts, for their part, have shown themselves to be less indifferent and more pragmatic in this regard, taking note in certain cases these impacts in their decisions. The problematization of these impacts nonetheless remains diverse and unsystematic. We intend, in this regard, to bring attention to the observable conceptual, ideological and semantic divergences in the jurisprudence. We describe three "ways" highlighted in our research to problematize the impacts of sentencing on relatives. Without claiming to be exhaustive,[19] the three observed "ways" nonetheless allow us to develop an interesting empirical description of the problem.

2.2.1. The impact of sentencing on relatives: A consequence of the offence

At times, the courts consider that the impact of sentencing on relatives stems from the criminal offence, as observed in *R. v. Spencer* (2004): "It is a grim reality that the young children of parents who choose to commit serious crimes necessitating imprisonment suffer for the crimes committed by their parents" (para. 46).

This problematization takes strong inspiration from Kantian retributivist logic, according to which the offender chooses his sentence, and therefore its consequences, when committing to the act. Here, the material result *of the act* is used to legitimize the material result *of the sentence*. This causal imputation appears to us artificial and deserving of deconstruction: the impacts of the sentence derive from the sentence, not from the reproached act. Further, beyond creating confusion, this perspective helps free the criminal law system of responsibility for the consequences of its intervention. The system is autonomous with respect to this transgression; the sentence *comes from it*, not from the convicted person.[20] In this respect, as part of their research into the "social costs of the penal system," Landreville et al (1981) rightly call for avoiding the conflation of these costs with the "costs of crime," while insisting on the importance of distinguishing the "logic of the problem" from the "logic of the intervention."

[19] The purpose of the proposed analysis is to provide a portrait of the various observable problematizations, not to provide a systematic analysis of sentencing jurisprudence in Canada.

[20] This contrasts with a Hegelian perspective on sentencing, where punishment is intended by the offender and constitutes their *right* (see Jodouin and Sylvestre, 2009).

2.2.2. The impact of sentencing on relatives: A mitigating factor

A second way to problematize the impact of sentencing on relatives is to classify them as "mitigating circumstances," in accordance with the principle of proportionality of sentencing set out in section 718.1 of the Criminal Code.[21] For example, in *R. v. Bunn* (2000), the Supreme Court of Canada found it mitigating that the offender needed to provide for his daughter, as well as his wife, who suffered from multiple sclerosis and was disabled. More recently, in *R. v. Landry* (2016), the court took into consideration as mitigating factors the accused's stable marital relationship and the fact that he had two children with health problems. It refused to apply the mandatory minimum sentence of one year's imprisonment for the offence, declaring it contrary to s. 12 of the Canadian Charter of Rights and Freedoms, stating that "such a sentence would have a wholly disproportionate impact on the accused and his family" (para. 46, our translation). It is however surprising that the mitigation is justified based on the health-related "handicap" of the relatives, already present prior to sentencing, with the sentence on its own not considered a handicap. In these examples, it is only when added to other misfortunes that the sentence becomes too heavy a burden for the relatives.

2.2.3. The impact of sentencing on relatives: "Collateral" or "indirect" consequences

The third way to problematize the impact of sentencing on relatives is to describe it as an *indirect* or *collateral* consequence of the sentence. This third way emerged from *R. v. Pham* (2013), in which the Supreme Court addressed the consideration of immigration-related consequences of sentencing. While this ruling does not deal with the consequences for relatives, it does shed some interesting light on the issue of taking them into account, as the court problematizes the concept of "indirect consequences of sentencing"[22]:

> [11] (…) the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender (...) However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the

[21] This principle updates the "crime-sentencing" relationship, a necessary imperative present in all MPR theories of sentencing (see Garcia, 2013; Pires, 2008).

[22] Since the initial filing of the draft of this text, the Supreme Court has issued *R. v. Sutter* (2018), in which it clarified the definition applicable to "collateral consequences of sentencing." We will not go into detail here, but the reader may wish to consult paragraphs 46 to 49 of that decision for the Court's most recent position on this issue. It should be noted that the Court in this case limits these consequences to those affecting the offender, as in *Pham*.

> gravity of the offence or to the degree of responsibility of the offender (…). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (…). (we underline)

Although the Supreme Court limited the definition of "indirect consequences of sentencing" to the impact on the offender, this decision has subsequently been used to support consideration of the impact of sentencing *on the offender's relatives*. For example, in *R. v. Stanberry* (2015), the court had to determine sentencing for a woman who pled guilty to a cocaine importation offence. At the time of the sentencing hearing, Ms. Stanberry had two daughters, ages three and seven, one of whom had a severe hearing impairment; she was the sole source of income and emotional support for her daughters. The court felt it needed to consider the "collateral consequences" of the sentence it was about to impose and expanded the definition set out in *Pham*:

> [19] First, the evidence presented makes clear that Ms. Stanberry's children will be separated from each other for the duration of her term of incarceration. The effects of this fragmentation of the family in the development of young children, even long after the expiry of the term of imprisonment, are not subject to precise measurement: but they are certain to follow. Second, Ms. Stanberry will be separated from her younger daughter who suffers from serious medical difficulties that will have long-lasting effects.
>
> [20] These two collateral consequences are not mitigating factors because they have no bearing on the gravity of the offence or the degree of the offender's responsibility. <u>They are collateral in the sense that they are incidental to the terms of an appropriate sentence. In every other sense these collateral consequences will be direct and they will endure with great force not only for the duration of the term of imprisonment but beyond its expiry.</u> They will entail what can only be described today as incalculable adverse effects both for the offender and her children. (...) (we underline)

At the discursive level, an unexpected element appears in this decision, a "deviant change" (Cauchie and Kaminski, 2007) with respect to the atomistic reasoning normally present in the communications of the criminal law system: the social ties of the offender are visible and the consequences that a prison sentence would have on her relatives are recognized. That being said, the court then turns to the objectives of denunciation and deterrence, and devalues the conditional prison sentence (para. 25). The consideration of relatives is ultimately reduced to a mathematical calculation, i.e., a reduction in the *duration* of a sentence, with a sentence of 45 months being imposed on Ms. Stanberry. The consideration of the relatives did not impact the *nature* of the

imposed sentence as might have been expected given the court's reference to the concrete and "incalculable" risks associated with the fragmentation of this family.

This same reasoning can be observed in several subsequent decisions, where certain sentencing theories appear to function as an obstacle to a consistent consideration of the effects of sentencing on relatives,[23] that is, a consideration that would preserve the ties these relatives share with the offender, which would in turn impact the selection of the favoured *type of sentence*. In terms of ideas, the positive support represented by the highlighting of the ties maintained with relatives is insufficient for overcoming the logic of incarceration, as the criminal law system does not substantially value the preservation of these ties.

2.2.4. Three forms of problematization, a single outcome

Regardless of the endorsed form of problematization, we note that the impact of sentencing on relatives "operates on the periphery of sentencing, on the margins of judicial activity" (Parent and Desrosiers, 2016, p. 192, our translation). This finding should in no way be taken as an indication that judicial actors do not care about offenders' families. However, the *ideas* dominant during the sentencing stage, while not decisive with regard to *practices*, nonetheless guide these actors by indicating the favoured possibilities in terms of punishment (Garcia, 2013), thereby acting as a barrier to substantial consideration of the relatives' existence. Thus, these three ways of problematizing the impact of sentencing on the offenders' entourage all appear to lead to a similar result: the recognition of the importance of family ties does not necessarily go hand-in-hand with their protection, with the courts seemingly finding it difficult to make substantial use of their discretionary power to conceive of solutions more attentive to the circumstances of relatives. Finally, while there has been a recent surge in research on the harmful impact of prison sentences on families, and particularly on children,[24] case law does not appear to be evolving in such a way that would take this "empirical evidence" into account during the sentencing stage.[25]

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[23] See, e.g., *R. v. Grondin* (2015), *R. v. Kaneza* (2015), *R. v. Brown* (2015), and *R. v. Zhou* (2016), where courts emphasize the goals of denunciation and deterrence.

[24] See Murray and Farrington (2008).

[25] However, such evidence has been used successfully in several cases involving conditions of confinement confinement ne me semble pas le bon terme, il ne s'agit pas d'isolement ici mais de privation de liberté, de détention: in *Inglis v. British Columbia (Ministry of Public Safety)* (2013) regarding programs allowing mother-child cohabitation

3. Imagining the future: Relatives of offenders as drivers of inclusive criminal law

Our intention in this article is to offer avenues for reflection that enable the construction, for both relatives of offenders and penal intervention, of a "Not Yet," in the sense that Santos (based on the work of Ernst Bloch) understands it. To him, the Not Yet "expresses what exists as mere tendency, a movement that is latent in the very process of manifesting itself. The Not Yet is the way in which the future is inscribed in the present" (Santos, 2014, p. 183), while also expanding it. In this respect, we propose including the consideration of relatives in the framework for an *inclusive* criminal law that prioritizes maintaining the offender in the community, so as to anchor within the system the possibility of substantially taking relatives into account, while making them artisans of the material preservation of social ties.

For penal intervention to be able to consider this proposal, requires a dialogical and reflexive model. Specifically, one which acknowledges at all levels the concreteness of social interactions, while also recognizing the importance of each individual to both their restricted community (family, friends, relatives), as well as the community as a whole, so as to protect them from a potentially devastating social breakdown. A punishment that demonstrates respect for social ties is however only possible if it is embedded in a context where social interactions are meaningful to the system. As Pires (2001b) notes,

> the obligation towards the social tie does not allow itself to be completely obnubilated by either the transgression or sentencing. This requires taking into account the *concrete, immediate and positive expression of values within the very reaction seeking to protect them* (p. 168, our translation).

Equally important is making visible and problematizing the impact of sentencing, from the moment of its determination, on relatives. A word of caution is nonetheless in order regarding the possible pitfalls of bringing this impact to light: as Maggie Nelson (2017) rightly expresses in *The Argonauts*, while "[v]isibility concretizes, (...) it also disciplines" (p. 127). To make visible, in the sense of *showing*, has the additional effect of outlining reality, of defining it. Behind the visibility

in detention, or in *British Columbia Civil Liberties Association v. Canada (Attorney General)* (2018) as to indefinite solitary confinement measures.

illumination provides, there remains a shadowy side, while at the same time, visibility also has the power of reduction. It can also be a source of justification and legitimization. It must thus be revealed without omitting its potential impacts. Put otherwise, alternative reasoning, such as the critical argument aimed at MPR, must also be reflexive and mindful of its own "repercussions." For example, Wandall (2008) notes the repressive social profiling associated with the consideration of an offender's familial circumstances in sentencing: single and isolated individuals who lack social relationships worthy of protection in the eyes of the court could be penalized, with this basis being used to *justify* decisions to imprison.[26] The author thus calls for an inclusive sentencing strategy, *including* for the socially marginalized.

This is the thread we believe should be followed, by reflecting on an alternative manner of intervention that views social inclusion, the preservation of social ties, as well as their *development* as central goals of the project. In this respect, the new *self-description* of criminal law that emerged from the latest Ouimet Commission report, which favoured the second modernity theory of rehabilitation, appears to us to still be relevant and of particular value: "it is a matter of keeping inclusion in the foreground, of considering different types of intervention (...) within the community and of concretely protecting social ties *against the destructive intervention of criminal law*" (Dubé, 2008, p. 55, our translation). This theory clearly constitutes a departure, being "the only one to have escaped the dogmatism of modern penal rationality and to have succeeded in tracing the initial contours of a different system of thought" (p. 57, our translation). As Pires (2012) notes, sentencing theories "remain indifferent to social inclusion, and are without proposed 'brakes' or mechanisms of self-limitation or self-containment tied to anything beyond the crime's characteristics in regard to sentencing (...)" (pp. 14-15, our translation). Relatives appear precisely as an element of exteriority vis-à-vis the crime; their highlighting at the time of sentencing could thus constitute a fertile basis for outside-the-box thinking in regard to penal intervention and counter "the radical indifference" (Pires, 2012, p. 15) criminal law demonstrates when it comes to the destruction of social ties.

Conclusion

[26] See also Laberge, Landreville, Morin, Casavant and Charest (1998).

In this article, we observed the difficulties criminal law encounters in regard to problematizing the impact of sentencing on the offending individuals' relatives. The latter occupy an ambivalent place during the sentencing stage, somewhere between absence and emergence. We also observed the blockage that occurs when courts reveal themselves to be sensitive to the existence of offenders' relatives at the time of sentencing: their consideration competes with the *exclusionary* agenda of modern penal rationality, while *negative* theories of sentencing concurrently undermine the positive elements associated with the presence of relatives, preventing their ties from being considered in a manner that would substantially preserve them. The ways in which these impacts are currently problematized and "counted" during the sentencing stage remains wedded to the principle of proportionality in sentencing, which is tied to ideologies that value social exclusion and affliction, while being fundamentally indifferent to the social fabric of individuals.

These difficulties call for a new and early problematization of these impacts, in advance of sentencing, so that they can be taken seriously by criminal law and policy. A renewed problematization will however remain insufficient as long as it is inscribed in the dominant reasoning of the modern criminal law system. This contribution has highlighted the straitjacket in which the ideas related to this problematization are trapped, that is to say, a reasoning which, at its heart, has already built up a cognitive prison around the offender that dissociates him from his relatives from the very start of the process. In this respect, this reasoning acts as an isolating barrier, limiting possibilities for taking into account the social relationships of the offenders as part of the reflection regarding punishment.

The problematization of the impact of sentencing on the entourages of offenders must thus be theoretically anchored in an alternative reasoning: the emergences occurring within the MPR framework are barely able to challenge this reasoning, which is without any theoretical and cognitive support that could allow for taking into account relatives who favour the social inclusion of the offender, as well as the preservation or the development of his social fabric. This reasoning must necessarily be questioned in order for a problematization to prove transformative and generative of new ideas, in the sense that Garcia and Dubé (2017) understand it: a problematization that can contribute to conceiving "a new ideal, (...) a normative utopia that while autonomous from that of the past takes into account its pitfalls and problems (...)" (p. 22, our translation). We need to outline the contours of a future enriched by the emergences observed in this article and

characterized by a relationship with the past that seeks to learn from it, rather than be loyal to it, as Garcia and Dubé (2017) suggest. It is thus not only a matter of "making visible" our object, but also of "making it possible," as Santos (2014) invites us to do.

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cont

Les effets de la peine sur les proches des contrevenants. Difficultés et discussion quant à leur problématisation lors de la détermination de la peine

Résumé

Cet article s'intéresse à la problématisation des effets de la peine sur les proches des personnes contrevenantes dans le contexte de la détermination de la peine. Pour observer cet objet, nous aborderons la manière dont le droit criminel moderne organise l'absence des proches des contrevenants, et réfléchirons aux rationalités œuvrant en coulisse pour construire et sédimenter cette absence. Nous verrons aussi comment s'organisent, en filigrane, des espaces de reconnaissance des effets de la peine sur les proches des contrevenants, et observerons les émergences qui viennent irriter les rationalités disqualifiantes pour les proches, rationalités qui dominent encore la pensée et les pratiques en matière pénale. Enfin, nous proposerons une réflexion sur la manière dont le dévoilement des absences et des émergences pourrait contribuer à enrichir et modifier ces rationalités, dans la perspective de construction d'un droit criminel inclusif.

Mots clés

Détermination de la peine, proches des contrevenants, conséquences de la peine, rationalité pénale moderne, liens sociaux.

Las consecuencias de la pena sobre los familiares de los detenidos: dificultades y discusión en cuanto a su problematización en la etapa de la determinación de la pena

Resumen

Este artículo se interesa por la problematización de los efectos de la pena sobre los familiares de las personas detenidas en el contexto de la determinación de la pena. Para observar este objeto, trataremos de la forma en la que el derecho penal moderno organiza la ausencia de los familiares de los detenidos y reflexionaremos sobre las racionalidades que trabajan tras bambalinas por la construcción y la sedimentación de esta ausencia. Veremos también cómo se organizan, en filigrana, los espacios de reconocimiento de los efectos de la pena sobre los familiares de los detenidos, y observaremos las emergencias que vienen a irritar a las racionalidades descalificantes hacia los familiares, racionalidades que dominan todavía el pensamiento y las prácticas en materia penal. Finalmente, propondremos una reflexión acerca de la manera en la que la confesión de las ausencias y de las emergencias, podría contribuir a enriquecer y a modificar estas racionalidades, dentro de la perspectiva de construcción de un derecho penal inclusivo.

Palabras clave

Determinación de la pena, familiares de detenidos, consecuencias de la pena, racionalidad penal moderna, vínculos sociales.