

FASD, The Sentencing Theory Debate and Proposed Criminal Code Amendments

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Relevant Non-Sentencing Issues

- Awareness
- Assessment, Diagnosis and Definition
- Fitness
- Statements Obtained from Accused
- Resources

Major Sentencing Impediments

- S.742: Increased limitations on availability of conditional sentences
- Mandatory Minimum Sentences
[to be discussed by Jonathan Rudin]

Canadian Sentencing Framework

- **718.** The fundamental purpose of sentencing is 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;
 - (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 and to the community.

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

- **718.2** A court that imposes a sentence shall also take into consideration the following principles:
- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

- *(b)* a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- *(d)* an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- *(e)* all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

More Recent Additions

- **718.01** When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it **shall give primary consideration to the objectives of denunciation and deterrence** of such conduct. [2005]
- **718.02** When a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court **shall give primary consideration to the objectives of denunciation and deterrence** of the conduct that forms the basis of the offence.[2009]

Individualization

- Sentencing is as an **"inherently individualized process"** -- wherein the sentencing judge's task is to develop **a composite picture or understanding of the offender**, including his past and present circumstances as well as his prospects for rehabilitation and the danger that he will re-offend, with a view **to crafting a just and appropriate sentence** [R. v. Levesque, [2000] 2 SCR 487, at para. 50]

Proportionality and Degree of Responsibility

- The "degree of responsibility of the offender" as used in s. 718.1 certainly includes the *mens rea* level of intent, recklessness or wilful blindness associated with the *actus reus* of the crime committed. Parliament evidently intended "degree of responsibility of the offender" to include other factors affecting culpability. These might relate, for example, **to the offender's personal circumstances, mental capacity or motive for committing the crime.**
Alta,CA, Arcand,[2010] A.J. No.1383

Sentencing Theory Challenge

- How should FASD be factored into the sentencing matrix in a way that is consistent with proportionality that focuses on the relative gravity of the offence?

Sentencing Theory

- H.L.A. Hart:
- Norval Morris
- A. Von Hirsch/A. Ashworth
- The New “Limiting Retributivists”:
Tonry, Reitz, Frase

H.L.A Hart

- Capacity to comply with the law

Norval Morris

- Parsimony
- Room for individual circumstances and utilitarian goals within range of deserved sanctions
- Need to consider non-custodial sanctions as essential part of range of deserved sanctions

A. Von Hirsch/A. Ashworth

- Sentencing requires censure supplemented by hard treatment
- Restraint
- Fairness constraints [mitigated culpability] e.g. Youth, aged, infirmed, mentally ill

The New Limiting Retributivists

- Proportionality provides a range
- Guidelines require scope for individualized deviation
- Room for utilitarian objectives when empirical basis supports individualized sentence especially re:treatment options

ALI Model Penal Code: Sentencing

- **sentences need to fall “within a range of severity proportionate” to gravity, harm and blameworthiness**, followed by a second purpose:
- 1.02(2) (a) (ii) in appropriate cases, to achieve offender rehabilitation, general deterrence, incapacitation, and restoration of crime victims and communities, provided these goals are pursued with the boundaries of sentence severity permitted in subsection (a)(i)

- ...the personal characteristics of offenders may be included as considerations within the guidelines when indicative of circumstances of hardship, deprivation, vulnerability, or handicap, but only as grounds to reduce the severity of sentences that would otherwise be recommended.

Implications for FASD

Current Practical Impediments

- Definition: Explicit or inclusive/exclusive
- Proportionality and parity
- Reliance on deterrence and denunciation
- Mandatory minimum sentences
- Limitations on conditional sentences

Definition: A legal/scientific issue

- **1. Definition must be intelligible to both the scientific and legal community**
- **2. Should be both inclusive and exclusive** i.e.
Broad enough to include FASD but clear enough to exclude issues like intoxication, substance addiction

Proposed Triggering Definition for Sentencing Purposes

- Intellectual deficiency or neurodevelopmental condition or disorder.

Responding to Proportionality Concerns

- Sentencing Framework Needs to be Amended to encompass FASD

Proposed Criminal Code Amendments

- **718.1 (a)** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- (b) **Degree of responsibility includes consideration of the offender's diminished capacity to comply with the law due to any intellectual deficiency or neuro-developmental condition or disorder.**

- **718.03 (a)** When a court imposes a sentence for any offence, and there is evidence that the offender suffers from an intellectual deficiency or neuro-developmental condition or disorder, the court shall give primary consideration to the objective of rehabilitation and the imposition of a community-based sentence.
- **(b)** For the purposes of this section, rehabilitation includes a reasonable prospect of management in the community.

- **718.04** When a court imposes a sentence for any offence, and there is evidence that the offender suffers from an intellectual deficiency or neuro-developmental condition or disorder, the court may decline to impose a mandatory minimum sentence or apply any of the limitations to the availability of a conditional sentence under s.742.

- 718.2 A court that imposes a sentence shall also take into consideration the following principles:
- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

- (vi) Evidence that an offender suffers from an intellectual deficiency or neuro-developmental condition or disorder which impairs or diminishes the offender's ability to make judgments, foresee consequences, or perceive risks

shall be deemed to be a mitigating factor.