

Legislative Impediments to Judicial Consideration of Moral Blameworthiness in Sentencing FASD Offenders

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The Fundamental Principle of Sentencing

- The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. (R. v. Ipeelee, para. 36)

Moral Blameworthiness and Proportionality

- the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. (R. v. Ipeelee, para. 37)

Moral Blameworthiness in Practice

- The notion of moral blameworthiness explains why two people charged with the same offence may receive different sentences
- Their personal circumstances may vary and their role in a specific offence may be different

Proportionality and FASD-Affected Individual – R v. Harper YKTC 2009

- The gravity of the offence, here sexual touching of a person under the age of 14, is serious. Mr. Harper, however, has a severe level of cognitive impairment associated with his FASD diagnosis, and this affects his ability to appreciate the harm he causes with his actions. (Para 36)

R. v. Harper

- Where FASD is diagnosed, failing to take it into account during sentencing works an injustice to both the offender and society at large. The offender is failed because he is being held to a standard that he cannot possibly attain, given his impairments... Society is failed because a sentence calculated for a “normal” offender cannot serve the same ends when imposed on an offender with FASD; it will not contribute to respect for the law, and neither will it contribute to the maintenance of a just, peaceful and safe society. (Para. 38)

Mandatory Minimum Sentences (MMS)

- MMS set a floor for sentences that judges cannot go below
- MMS were relatively rare in Canada but since the 2000s have increased significantly
- Now approximately 50 MMS in the Criminal Code and Controlled Drugs and Substances Act
- Most MMS deal with firearms, drugs and sexual offences involving those under 16

MMS, Conditional Sentences and Discretion

- MMS transfers discretion in sentencing from the judge – whose decisions are subject to review, to the Crown, whose decisions are not subject to review.
- This also applies to restrictions on the use of conditional sentences

MMS and FASD-Affected Individuals

- MMS means that a judge may not be able to truly account for the moral blameworthiness of an FASD-Affected individual in sentencing
- A sentence that might be appropriate for someone without FASD may not be appropriate for someone who is affected

What Options Does/Should a Judge Have?

- Under the current law – none.
- Two options for change
- 1) Charter challenge based on disability
- Expensive, time-consuming and the outcome is unclear
- 2) Amendment to the Criminal Code and Narcotics Control Act to allow for a ‘safety valve.’
- Could be done tomorrow