Proportionate Justice: An Examination of Fetal Alcohol Spectrum Disorders and the Principles of Sentencing in Saskatchewan

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I. INTRODUCTION
The principles of sentencing in the Canadian criminal justice system ("CJS") require courts to consider the background of offenders as well as the circumstances of the crime committed. This is in part due to the fundamental principle of sentencing stated in s. 718.1 of the Criminal Code:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.1

In some situations, there are also mandates to consider particular aspects of an offender's background. For example, the Supreme Court of Canada emphasized in R. v. Gladue2 and R. v. Ipeelee3 that courts are under an obligation to pay “particular attention to the circumstances of Aboriginal offenders.”4 This article will focus on the impact of Fetal Alcohol Spectrum Disorders (“FASD”) on sentencing decisions and dangerous offender designations in Saskatchewan. Using examples from recent Saskatchewan case law, I argue that links made between symptoms of cognitive impairment and the necessity of lengthier sentences result in disproportionate sentences contrary to s. 718.1 as well as inappropriate dangerous offender designations.

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1 Criminal Code, RSC 1985, c C-46, s 718.1 [emphasis added].
4 Criminal Code, supra note 1, s 718.2(e).
This article seeks to build on previous work involving FASD in the CJS to demonstrate ways the disorder is simultaneously considered an aggravating and mitigating factor in sentencing decisions and why this mode of reasoning is insufficient, unjust, and contrary to the principles of sentencing stated in the Criminal Code. This article is premised on the assumption that incarceration is not an appropriate or fair response to the symptoms of cognitive impairment and, as such, those symptoms should not be used as justifications for requiring longer sentences or dangerous offender designations. At a minimum, I hope to demonstrate that relying on incarceration as a means of managing risks caused by FASD is ineffective and diminishes the ability of the CJS to produce just outcomes. This reality demands that lawyers, judges, and communities coordinate with each other and inform themselves on the nature of FASD and relevant services available, and engage in conversation, innovation, and implementation of supports so that incarceration does not become the most proportionate option available. This topic is significant because of the high prevalence of FASD in the CJS and the ethical implications of incarcerating a person because they acted on symptoms caused by a lifelong cognitive impairment such as FASD.

First, this article will provide a brief overview of the role of neurodevelopmental disorders and neurocognitive impairment in the CJS. Second, it will discuss FASD specifically and the issues it raises for the CJS and its processes. Third, it will look at sentencing in recent Saskatchewan decisions involving offenders with FASD. Fourth, it will address the implications of a statement from the Court of Appeal for Saskatchewan in R. v. Otto and the role of FASD in the context of dangerous offender designations. Fifth, this article will examine available services in Saskatchewan for offenders with cognitive impairment as well as opportunities for diversion. Finally, it will conclude with recommendations for moving forward and making the criminal justice system more effective and just when applied to offenders with FASD.

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7 2006 SKCA 52, 279 Sask R 182.
II. NEURODEVELOPMENTAL DISORDERS, NEUROCOGNITIVE IMPAIRMENT, AND CRIMINAL LAW IN CANADA

High rates of mental illness and cognitive impairment in the CJS\(^8\) are caused by a web of influences that include: stereotyping and discriminatory practices; socioeconomic factors; and, in some cases, the nature of the disorder and its symptoms. For example, common symptoms of FASD (such as impulsivity, vulnerability to social manipulation, and lacking foresight into the consequences of one’s actions) often create circumstances where a person is more vulnerable to breaching laws or being influenced by others to breach laws. Glen Luther has noted that the shift away from mental health institutions in the 1960s led to a corresponding increase of individuals with mental illness in the CJS, making it a front line in assessing and responding to mental illness.\(^9\) Richard D. Schneider, Anne G. Crocker, and Marichelle C. Leclair have further described the Criminal Code as a “mental health act of last resort;”\(^10\) there is an inverse relationship between the mental health care services available and use of the criminal system.\(^11\) What lacks in community resources must be compensated for in the CJS as a matter of necessity. Various innovations have resulted from this reality—including the creation of mental health courts—but in terms of the legal system itself, most issues are addressed at the sentencing stage\(^12\) where judges have wide discretion to evaluate the circumstances of the offence committed and the offender.\(^13\)

Neurocognitive impairment and neurodevelopmental disorders impair the functioning of the brain and, although complex and


\(^{9}\) “Mental Health, Treatment and the Criminal Justice Process” in Law and Mind: Mental Health Law and Policy in Canada, supra note 8, 283 at 283-284.

\(^{10}\) Supra note 8 at 308.

\(^{11}\) Ibid.

\(^{12}\) It is interesting that although sentencing is the primary mechanism to consider any effects mental health may have had in the commission of the offence, s 672.11 of the Criminal Code does not leave room for mental health assessment orders at the sentencing stage (supra note 1). This is unlike the Youth Criminal Justice Act which allows medical or psychological assessments “at any stage of proceedings” (SC 2002, c 1, s 34(1)).

\(^{13}\) Although the role of mental illness in sentencing is beyond the purview of this article, for information on the topic see Glen Luther, Q.C., “Mental Health, Treatment and the Criminal Justice Process”, supra note 9; Glen Luther, Q.C. & Dr. Mansfield Mela, “Mental Illness and Sentencing: Blaming the Mentally Ill for their Lack of Cooperation with Inadequate Treatment in R v Maier” (30 March 2015), online (blog): ABlawg <https://ablawg.ca/2015/03/30/mental-illness-and-sentencing-blaming-the-mentally-ill-for-their-lack-of-cooperation-with-inadequate-treatment-in-r-v-maier>, archived: <https://perma.cc/N3B3-MWLD>.
diverse, often affect an individual's ability to follow basic rules, structures, and norms. Neurodevelopmental disorders form during a child’s early development and include conditions such as attention-deficit/hyperactivity disorder, autism spectrum disorder, and intellectual disability. These disorders often impair “personal, social, academic, or occupational functioning” and their causes may be genetic or environmental. Neurocognitive impairments occur later in life and can include traumatic brain injury, damage caused by substance abuse, and degenerative diseases such as Alzheimer’s disease or dementia. Neurocognitive disorders can lead to personality changes, apathy, socially inappropriate behaviours, and poor judgment.

It is also relevant to note that disorders may co-occur in individuals, particularly when looking to neurodevelopmental disorders, and may also be worsened by negative environmental factors such as poverty, discrimination, or abuse. The effects of neurocognitive impairment and neurodevelopmental disorders challenge the CJS and many of its underpinning principles.

The CJS is largely built on the principle of individual responsibility. Kent Roach and Andrea Bailey poignantly summarize that “[t]he justice system is premised on assumptions that people act in a voluntary manner that is determined by free will and that they can make informed and voluntary choices both with respect to the exercise of their rights and the decision to commit crimes.” Marie-Eve Sylvestre has noted that the reasons the CJS is used to punish are first, to promote the general good of society and second, to punish offenders for their crimes while deterring others from engaging in similar conduct. It is increasingly being recognized that many aspects of the approach of the CJS are counterproductive and that incarceration often contributes to criminality and socioeconomic inequality. These observations demonstrate that emphasizing individual responsibility between people of unequal socioeconomic status and capacity can cause significant damage to the overarching aims by which the justice system is guided.

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15 Ibid at 31.
16 Ibid at 591.
17 Ibid.
18 Ibid.
19 Streissguth et al, supra note 6.
20 Supra note 5 at 3.
22 Ibid at 12.
Most provisions in the *Criminal Code* on mental disorder do not apply to permanent cases of neurocognitive impairment or neurodevelopment disorders. For example, under s. 672.34 of the *Criminal Code*, a person may be found not criminally responsible on account of mental disorder ("NCRMD"). The NCRMD regime addresses circumstances where a mental disorder (typically a short-term episode) renders the accused “incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.” These mechanisms do not address cases of permanent cognitive impairment and impulsive disorders where an accused understood what they were doing or that their conduct was wrong but was unable in the moment to restrain themselves from engaging in that conduct.

An exception to this is the fitness to stand trial requirement under s. 2 of the *Criminal Code*. Section 2 states the following definition of unfitness:

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\text{unfit to stand trial means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel;} \]

Where an accused has a mental disorder and is deemed by a court to be unfit to stand trial, the provincial Review Board is passed jurisdiction under the *Criminal Code*. The Review Board reviews the fitness of the accused and, where deferred to by a court, makes disposition orders regarding discharge or hospital detention. If the Review Board finds an accused permanently unfit, the Review Board may also recommend a stay of proceedings to the court. In cases of severe cognitive impairment, this portion of the *Criminal Code*...
Code may apply; otherwise, considerations of cognitive impairment find most relevance in the sentencing stage.

The principles of sentencing provide significant discretion for judges to consider the circumstances of the crime and the offender. Balancing a cognitive impairment with the nature of the offence is a complex exercise, especially in cases where the impairment causes ongoing violent and disruptive behaviour or where the offence committed is particularly severe and public safety is a concern. Section 718.1, quoted above, indicates that sentences must account for the gravity of the offence as well as the degree of responsibility of the offender, creating a challenging dynamic if an offender has a cognitive impairment substantially limiting his or her degree of responsibility but where the circumstances of the offence are so severe that it creates equally or more significant concerns around safety, public protection, and reparation to the victim and community.

Additionally, where there are no adequate community alternatives, incarceration may become the most proportionate response, however, it may be an inadequate and unjust default solution.

III. A BRIEF OVERVIEW OF FETAL ALCOHOL SPECTRUM DISORDERS AND THE CJS

Fetal alcohol spectrum disorders capture a range of conditions caused by prenatal exposure to alcohol and affect an estimated 1-2 per cent of the Canadian population. The proportion among those incarcerated

\[32\] Ibid, s 718-718.2. Section 718 states:

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.

\[33\] See ibid, s 718. Although jurisprudence has indicated that principles of deterrence and denunciation will hold less weight where an offender has a cognitive impairment, public safety remain significant concerns (see e.g. R v Harper, 2009 YKTC 18 at para 43, 65 CR (6th) 373; R v Ramsay, 2012 ABCA 257 at para 25, 292 CCC (3d) 400). The analysis is highly contextual.

\[34\] Egon Jonsson, Sterling Clarren & Ian Binnie, eds, Ethical and Legal Perspectives in Fetal Alcohol Spectrum Disorders (FASD): Foundational Issues (Cham, Switzerland: Springer International, 2018) at vii.
with FASD is estimated to be far higher, but it is difficult to measure due to the low number of official assessments and diagnoses.\textsuperscript{35} It is clear however that a significant number of individuals with FASD experience “trouble with the law and confinement.”\textsuperscript{36}

FASD can cause physical, psychological, and behavioural effects including characteristic facial features,\textsuperscript{37} learning and attention deficits, poor memory, impulsivity, and an inability to appreciate the consequences of one’s actions.\textsuperscript{38} Diagnosing FASD continues to be a complex and contested issue but Canadian standards typically operate through the assessment of several domains.\textsuperscript{39} Severe impairment in at least three domains is required for a FASD diagnosis.\textsuperscript{40} Although FASD is often discussed in youth contexts, it is a permanent condition with effects lasting throughout the individual’s lifespan.

\textsuperscript{35} Nguyen Xuan Thanh \& Egon Jonsson, “Total Costs of FASD Including the Economics of FASD Associated with Crimes” in Jonsson, Claren \& Binnie, eds, supra note 34, 49 at 57. Pooling together previous studies on FASD, Thanh and Jonsson estimate the FASD rate to be approximately 10.1% (range: 5.0% to 17.9%). The Correctional Investigator of Canada noted that the number of people with FASD in the CJS has been estimated from 9.8% to 23.3% but that without the implementation of FASD screening processes by Correctional Service Canada, it is difficult to assess accurately (Annual Report of the Office of the Correctional Investigator 2014-2015 (Ottawa, 2015) at 13). This topic also raises the challenges of the screening process itself. Many physicians are not trained in diagnosing FASD and several types of professionals are required to make an official diagnosis (“Fetal Alcohol Spectrum Disorder and the Criminal Justice System” (2008), online: <https://www.publicsafety.gc.ca/cnt/rsrchnts/ftl-lchl-spctrm/index-en.aspx#s3>, archived: <https://perma.cc/89SW-F4JM>).

\textsuperscript{36} Streissguth et al, supra note 6 at 233. In their study, Streissguth et al. found that 60% of adolescents/adults with FASD had experienced trouble with the law and of those, 67% of adolescents and 87% of adults were charged, arrested or convicted (ibid). Of all adults and adolescents, 35% reported having been incarcerated for a crime (ibid at 234).


\textsuperscript{38} Ibid.

\textsuperscript{39} Jocelynn L Cook et al, “Fetal Alcohol Spectrum Disorder: A Guideline for Diagnosis Across the Lifespan” (2016) 188:3 CMAJ 191. Cook et al. note the following criteria for diagnosing FASD:

A diagnosis of FASD is made only when there is evidence of pervasive brain dysfunction, which is defined by severe impairment in three of [sic] more of the following neurodevelopmental domains: motor skills; neuroanatomy/neurophysiology; cognition; language; academic achievement; memory; attention; executive function, including impulse control and hyperactivity; affect regulation; and adaptive behaviour, social skills or social communication (ibid at 193, s 4.1).

\textsuperscript{40} Ibid.
FASD is associated with secondary conditions, such as attention
deficit disorders, learning disorders, and substance abuse, as well as
social/environmental challenges such as unemployment, poverty, and
abuse.\textsuperscript{41} A study by Streissguth et al. linked these negative environmental
factors to adverse life outcomes for individuals with FASD.\textsuperscript{42} They
found that in cases where individuals with FASD lacked stable or
nurturing homes or were victims of physical abuse, sexual abuse, or
violence, they would be more likely to experience adverse life outcomes
and engage in socially problematic conduct such as inappropriate
sexual behaviour or trouble with the law.\textsuperscript{43} Those affected by FASD
are often vulnerable to abuse or manipulation because they typically
desire social interaction and connection but face rejection due to
behavioural challenges.\textsuperscript{44} FASD is difficult to address in the CJS because
an accused may not only have FASD but their condition may also
have been aggravated by environmental circumstances and secondary
conditions that create additional behavioural challenges or further
hinder cognitive functioning.

Incarceration poses particular risks and challenges for individuals
who have disorders that affect impulsivity and understandings of
consequence. Although on its face the structure of incarceration is
generally understood to be beneficial for individuals with FASD,\textsuperscript{45} there
are significant risks, especially where the incarcerated individual
is undiagnosed or where staff members are untrained on FASD and its
effects.\textsuperscript{46} Staff members may misunderstand disruptive behaviours
or an inmate's persistent inability to follow basic rules, leading to
impatience and ineffective management of the inmate's symptoms.\textsuperscript{47}
Social situations in confined spaces often become overwhelming,
leading to victimization or rule breaking.\textsuperscript{48} Additionally, the desire
for social acceptance can make individuals with FASD particularly
vulnerable to abuse or exploitation by other inmates.\textsuperscript{49}

Symptoms and effects of FASD are critical to consider in the
context of the CJS because they can make people with FASD more

\textsuperscript{41} Kaitlyn McLachlan & Carmen Rasmussen, "Understanding the Neurobehavioral
Deficits and Psychosocial Capacities of Individuals with FASD in the Criminal
Justice System" in Jonsson, Clarren & Binnie, eds, \textit{supra} note 34, 145 at 162.
\textsuperscript{42} Streissguth, \textit{supra} note 6 at 234.
\textsuperscript{43} \textit{Ibid}.
\textsuperscript{44} Roach & Bailey, \textit{supra} note 5 at 9.
\textsuperscript{45} Diane K Fast & Julianne Conry, "The Challenge of Fetal Alcohol Syndrome in the
\textsuperscript{46} Fred J Boland et al, \textit{Fetal Alcohol Syndrome: Implications for Correctional Service
(Ottawa: Correctional Service Canada, 1998) at 71-72.}
\textsuperscript{47} \textit{Ibid}.
\textsuperscript{48} \textit{Ibid} at 71-73.
\textsuperscript{49} Fast & Conry, \textit{supra} note 45 at 164-165.
susceptible to becoming involved in the system and also create vulnerabilities to the system itself. As stated above, the combination of vulnerability to social manipulation, socioeconomic challenges, and impulsivity is a mixture that can lead to trouble with the law. Beyond this, individuals with FASD are prone to becoming trapped in the system in a so-called "revolving door" as poor memory and other issues lead to the accumulation of condition breaches, failing to appear at court, and further convictions. Vulnerability to the CJS itself has been covered thoroughly by Kent Roach and Andrea Bailey who discuss the impact of FASD on various stages of the criminal process and speak to challenges related to the protection of pre-trial rights (such as the right to silence), false confessions, and fitness to participate at trial. FASD is a complex condition with a complicated role in the CJS but properly addressing and understanding it is critical to ensure that the CJS is effective, productive, and fair.

IV. FASD IN SENTENCING DECISIONS: THE DOUBLE-EDGED SWORD

In searching decisions from the past year mentioning FASD, few criminal decisions in Saskatchewan directly dealt with or considered FASD, possibly indicating that defence lawyers may be resistant to bringing up a FASD diagnosis or requesting an assessment. This phenomenon would make sense given that it is well established that FASD often becomes a "double-edged sword" in the sentencing process and is treated an aggravating factor as well as a mitigating factor. It is a mitigating factor because it is a condition outside of the offender's control which logically lessens their level of culpability in the context of certain offences, but it is often also factored into the analysis as an aggravating factor for the perceived danger that impulsivity and lack of foresight poses to the public, especially when combined with violent behaviour or anger issues.

A recent Saskatchewan case considering FASD was R. v. J.P. J.P. was facing convictions for several offences related to two robberies. Justice Elson noted that although he had been unable to order a mental health assessment for the purpose of sentencing due to the limits of s. 672.11 of the Criminal Code and jurisprudence from British

51 Supra note 5. See also Jonsson, Clarren & Binnie, supra note 34.
52 Roach & Bailey, supra note 5 at 12-17.
53 Ibid at 17-22.
54 Ibid at 29-38.
55 Ibid at 51-52; Jampolsky, supra note 50 at 197.
56 2018 SKQB 96.
Columbia, the defence counsel secured funding and an assessment was made. In considering the diagnosis in the context of the offender's Gladue factors, Elson J. made the following statement regarding the diagnosis:

Such a reality might arguably impact the moral blameworthiness of an offender's conduct. At the same time, a sentencing court must be mindful of its objective to protect the public, particularly from offenders whose diminished insight reduces their ability to appreciate the objectives of denunciation and deterrence. This consideration triggers an inquiry into the likelihood of the offender's rehabilitation. Where the likelihood is low, a sentencing court may be well advised to emphasize public protection.

It is interesting that the Court discusses the likelihood of rehabilitation and the risks of diminished insight in the context of a person with FASD. There are ways to manage the effects of FASD but, as a permanent cognitive impairment, behavioural challenges will persist throughout the person's lifetime.

Elson J. seems to be working to balance the principles and purposes of sentencing but I argue that the balance achieved in this case falls short of the overarching principle of sentencing in s. 718.1 to consider the degree of responsibility of the offender as well as the gravity of the offence. Treating FASD as something that warrants public protection rather than a consideration of diminished responsibility only serves to punish the offender for his or her FASD and its effects rather than for the crime itself. As a lifelong disability, there needs to be a better answer than to use sentencing as a mechanism to control or mitigate risks caused by cognitive impairment. I am not suggesting that a FASD diagnosis should excuse criminal liability but rather that it is ethically problematic to treat FASD as an aggravating factor because the individual, without significant assistance, is likely to engage in future impulsive behaviours beyond their control for the rest of their lives. As Elson J. noted, "[o]ffenders with such a disorder

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58 R v J.P., supra note 56 at para 54. Assessment is a particularly challenging aspect when it comes to sentencing an offender suspected of having FASD. Section 672.11 of the Criminal Code does not include sentencing as a stage where a mental health assessment can be ordered. Additionally, jurisprudence rejects the possibility of taking judicial notice of FASD, even where it is "practically impossible for an adult to be assessed for FAS/FAE/ARND" (R v Harris, 2002 BCCA 152 at para 18, 167 CCC (3d) 246. See also R v Gray, supra note 57 at para 30; R v J.P., supra note 56 at paras 29-30).
59 R v J.P., supra note 56 at para 79 [emphasis added].
I would favour considering the issue as Justice B.R. Burrows did in *R. v. Yatchotay*\(^6\) at the Court of Queen’s Bench of Alberta. In this case, Burrows J. made the following statement regarding risk to society:

> That Mr. Yatchotay presents a high risk to commit further crimes is a situation for which he is largely not to blame. Certainly, given Mr. Yatchotay’s tragic background and poor psychological health, *lengthy incarceration is not an appropriate or just way for society to try to address that risk.*\(^6\)

In that case, Mr. Yatchotay similarly had cognitive impairment caused by prenatal exposure to intoxicants, as well as *Gladue* factors.\(^6\) Additionally, the case was serious and involved charges for sexual assault and unlawful touching of a person under the age of sixteen, contrary to s. 151 of the *Criminal Code.*\(^6\) The Court recognized that the crime committed was serious and harmful to the victim and community while simultaneously acknowledging that there were psychological factors affecting his level of culpability and that those psychological challenges alone should not warrant further punishment than the crime merits. This reasoning is a better balance of the principles in s. 718.1 as it focuses on ensuring that the severity of the crime is addressed while appropriately acknowledging the level of culpability of the offender and implementing conditions\(^6\) that will address psychological challenges rather than punish the individual for future inevitable challenges.

A second recent example of this line of reasoning was in *R. v. Flett*\(^6\) at the Provincial Court of Saskatchewan in 2017. Mr. Flett became violent at a party and when RCMP arrived, Mr. Flett attacked the peace officer by punching the Constable in the head several times even after the Constable fell unconscious.\(^6\) In this case, there were

\(^{60}\) *Ibid* at para 79.

\(^{61}\) 2017 ABQB 679.

\(^{62}\) *Ibid* at para 45 [emphasis added].

\(^{63}\) *Ibid* at para 44.

\(^{64}\) *Supra* note 1.

\(^{65}\) *R v Yatchotay*, *supra* note 61. Burrows J. held that a fit sentence is two years, which was already met by his pre-trial time in custody. Additionally, he was placed under conditions to report to probation officer, participate in addictions counselling and drug treatment, and comply with *Sex Offender Information Registration Act* (SC 2004, c 10) for twenty years (*R v Yatchotay*, *supra* note 61 at paras 51-53).

\(^{66}\) 2017 SKPC 80.

\(^{67}\) *Ibid* at paras 1-3.
Gladue factors to consider but no official FASD diagnosis; although, Mr. Flett’s aunt stated she felt he may have FASD.68 Because there was no official diagnosis of FASD for the Court to consider, the analysis cannot be directly attributed to FASD, however, there are relevant connections to make. For example, Judge I.J. Cardinal stated the following regarding culpability:

Mr. Flett’s moral culpability and blameworthiness are high. He knew what he was doing when committing the assaults but attempted to justify his actions. He does not seem to understand the significant harm he caused to the victims, especially the peace officer. He does not appear to have any insight into his offending behaviour or the root cause of his anger.69

Without stretching too far due to the lack of an official diagnosis, this decision at a minimum demonstrates the reason why FASD is often treated as an aggravating factor. The offender’s failure to understand the root of his behaviour and violence elevated his level of blameworthiness. For an individual with impulsivity issues, it is unlikely that they would understand their behaviour yet this would be seen as a factor warranting the need to protect the public. Additionally, this case demonstrates that where there is no official diagnosis but FASD is present, the symptoms will nonetheless work against the offender where a pattern of impulsivity or lacking insight is identified.

These cases demonstrate that FASD continues to be a complex factor to balance among the principles of sentencing. I suggest that the continued consideration of FASD as an aggravating and mitigating factor is an unjust approach, punishing the offender beyond what the gravity of the offence and culpability call for, due to risks perceived in the offender’s likely future engagement in impulsive behaviours. Protecting the public is a primary purpose listed under s. 718 but, in the context of an offender with FASD, care ought to be taken to evaluate whether the sentence is effectively punishing the offender for his or her condition. A further point related to the efficacy of the justice system is whether it is appropriate or productive to imprison a person vulnerable to abuse and social manipulation. The general purposes of punishment are to promote the general welfare of society and find retribution against offenders for their wrongs70 but we must be aware of the ways that the CJS can be counter-productive to these

68 Ibid at para 7.
69 Ibid at para 28 [emphasis added].
70 Marie-Eve Sylvestre, supra note 21.
This counter-productivity is exemplified by Judge Lilles in *R. v. Harper* who made the following statement:

Not only can traditionally calculated sentences be hopelessly ineffective when applied to FASD offenders, but the punishment itself, calibrated for a non-disabled individual, can have a substantially more severe effect on someone with the impairments associated with FASD.

In fairness to judges and the CJS, as David Milward has noted, "Canadian governments have not provided the resources and services to match the increased judicial willingness to use alternatives to incarceration," demonstrating that support also needs to come from outside the CJS. Alternatives will be discussed further in section VI but it is clear that communities and the CJS need to work together to innovate and find solutions that protect the public and the wellbeing of the offender by addressing and meeting his or her needs by managing, rather than punishing, the manifestation of disability.

**V. R. v. OTTO AND ITS APPLICATIONS: THE ROLE OF FASD IN DANGEROUS OFFENDER DESIGNATIONS**

The shift to discussing dangerous offender designations is interesting as the dangerous offender analysis is focused primarily on public safety and protection and has different requirements than the balancing exercise involved in sentencing decisions. In the dangerous offender regime, public protection is paramount to the concerns relevant in the ordinary sentencing process, such as rehabilitation.

*R. v. Otto* is a Saskatchewan case from 2006 appealing the Trial Judge's finding that there was no likelihood the offender could be controlled in the community and was therefore a dangerous offender. The predominant concern was the offender's alcoholism as he became

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71 See Diane K Fast & Julianne Paley Blair, “Fetal Alcohol Spectrum Disorders and the Criminal Justice System” (2009) 15:3 Developmental Disabilities Research Rev 250 at 256. Fast and Blair note that individuals with FASD are at a higher risk of being negatively impacted by jail time due to vulnerability to physical, emotional, and sexual abuse as well as the difficulty of "getting the rules," leading to misunderstandings by staff and time in solitary confinement (*ibid*).

72 *Supra* note 33.


75 *Criminal Code, supra* note 1, s 753(1). Although beyond the scope of this paper, for discussion and explanation of the dangerous offender regime, see Jordan Thompson, "Reconsidering the Burden of Proof in Dangerous Offender Law: Canadian Jurisprudence, Risk Assessment and Aboriginal Offenders" (2016) 79:1 Sask L Rev 49.

76 Thompson, *supra* note 75 at 52.

77 *Supra* note 7.
violent when intoxicated. There was a medical report suggesting a possible Fetal Alcohol Syndrome diagnosis for the offender, but it was not fully confirmed. The statement most pertinent to this discussion was in paragraph twenty-two where Justice Gerwing stated the following:

Further, there is no indication in the evidence or by the psychologist that this individual who, at the age of 47, has never succeeded in living independently will ever cease to need supervision on an intensive basis for 24 hours a day. This is a life-long problem and the prognosis for an end to the need for supervision was not indicated and indeed negated by the expert evidence. Any person who requires 24 hour a day supervision for the indefinite future cannot be said to be reasonably likely to be controlled in the community.

This statement on supervision has been repeated in subsequent dangerous offender cases and raises interesting questions when applied to an offender with FASD. Dangerous offender cases necessarily involve disturbing and violent circumstances which undoubtedly warrant a serious response; however, to suggest that the effects of a mental illness that requires twenty-four-hour supervision merits an indefinite sentence is a concerning statement. As noted by Roach and Bailey, the “designation of a person with FASD as a dangerous offender is an extreme step and a sign that both society and the legal system have utterly failed a person with a permanent mental disability.” Mental illnesses are associated with countless effects and symptoms, some of which may be challenging to society and some of which can be accommodated easier than others. Violence is not something which should be accepted or tolerated but treating illnesses and people with severe symptoms as intolerable and unmanageable, like Roach and Bailey state, is a complete failure to those individuals.

Looking at a more recent application of the Otto statement, R. v. Morrison dealt with an offender with “profound ongoing mental health issues” and who was a high risk for engaging in future acts of physical and sexual violence. Justice Dovell noted the following:

The only expert evidence the Court has is that Mr. Morrison’s mental health and cognitive abilities will in all

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78 Ibid at para 16.
79 Ibid [emphasis added].
80 Supra note 5 at 59.
81 2017 SKQB 256.
82 Ibid at para 1.
83 Ibid at para 70.
likelihood decline in the future. The effects of his inhalant abuse are irreversible. As testified by Dr. Lohrasbe, Mr. Morrison would require 24-hour, seven-day a week external supervision if he were to be released into the community. Those resources simply cannot be put in place in Dillon, Saskatchewan, or anywhere else in the province or even the country that the Court is aware of.\textsuperscript{84}

This was likely the most appropriate solution in this case given that the nature of the dangerous offender regime is to protect the public. Nonetheless, Dovell J.’s statement indicates that those with the highest needs and most severe behaviours will ultimately be left to incarceration as there are no extra-judicial resources to support this level of risk to the community. Some may argue that prisons are the most appropriate way to deal with these needs and risks but, from another perspective, equating disability to lifelong criminality is a disappointing reality. The dangerous offender regime starkly demonstrates that insufficient community infrastructure and services are a significant component of this problem. In the following section, I will consider the connections between treatment or care and the CJS.

\textbf{VI. FASD CARE AND TREATMENT OPTIONS IN SASKATCHEWAN}

As a permanent cognitive impairment, FASD “treatment” refers to facilities and services which offer the structures necessary for individuals to manage their disability and symptoms and may range from programming and support worker check-ins to full-time live-in facilities. Although judges have significant discretion when sentencing individuals, the ability to craft creative sentences built around the needs of the offender depends on the knowledge on and availability of community resources and services. Building resources and awareness among the legal community—which includes judges, defence lawyers, and Crown prosecutors—is a critical step in ensuring that offenders with FASD are not being punished beyond what is demanded by the crime due to the nature of their symptoms.\textsuperscript{85} Understanding and

\textsuperscript{84} Ibid at para 128 [emphasis added].

\textsuperscript{85} See Justice Melvyn Green, “A Judicial Perspective” (Paper delivered at the Fetal Alcohol Syndrome Disorders Symposium for Justice Professionals, 1 March 2006), online: <http://www.fasdjustice.ca/media/JudgeGreenSpeech.pdf>, archived: <https://perma.cc/VND6-X686>. Green J. speaks to the role that awareness and education plays in the justice system and the reliance judges have on Crown and defence counsel in informing them of a FASD diagnosis (\textit{ibid} at 7). There likely have been improvements since the time this speech was made but awareness remains an important piece of the solution to deciding proportionate sentences.
expanding the tools available to manage behavioural challenges caused by FASD may help end the cycle of recidivism that has been identified among offenders with FASD instead of setting them up for failure. Additionally, it is important to note that government and social services hold significant influence over available treatment through the funding, services, and policies they provide.

*R. v. K. (L.E.)*86 was a Saskatchewan case that demonstrated tensions created between the jurisdiction of provincial judges, the availability of resources, and the willingness of some judges to find innovative sentencing to meet the needs of offenders with FASD. This case involved a youth convicted under the *Young Offenders Act*87 but its issues are equally relevant in the adult sentencing context. At issue was an order by Judge Turpel-Lafond in Provincial Court that the youth offender be assigned a worker with training in organic brain impairment and that they should make a case plan upon release which includes placement in a treatment centre, Aboriginal-focused care, educational support, and special residential supports.88 The Court of Appeal recognized that there had been calls for treatment options for offenders with FASD from members of the justice system but that the terms ordered were beyond Turpel-Lafond J.’s jurisdiction. Turpel-Lafond J. had no authority to “order the creation of a new program or an expenditure of money for a particular purpose.”89 The case demonstrates that even where the knowledge and passion to find innovative solutions exists, most communities are restrained in their ability to craft non-custodial sentencing options due to a lack of appropriate programs and facilities.

Several programs and services exist in Saskatchewan which directly and indirectly target the needs of individuals with FASD but their incorporation and interaction with the CJS are currently limited and are used haphazardly. The Saskatchewan FASD Network has a Justice Support Worker dedicated to advocating for clients with FASD, making community service referrals, and providing support during incarceration and upon release.90 Despite these kinds of support

86 2001 SKCA 48, 153 CCC (3d) 250.
87 RSC 1985, c Y-1. Although I focus on the adult system, an important principle in the youth system regarding available services is Jordan's Principle which comes from *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2017 CHRT 14. Jordan's Principle states that First Nations children must be able to access the services they need without delay regardless of jurisdictional disputes over funding (*ibid* at para 2). The child must come first (*ibid* at para 135).
88 *Supra* note 86 at para 8.
targeted at the justice system, Mental Health Approved Homes and other shelters do not supervise individuals as an alternative to sentencing and therefore, where convicted, most offenders will be sentenced to prison. One community initiative supporting individuals with mental illness facing trouble with the law is the Salvation Army’s Community Alternatives to Remand Program (“CAR Program”). Located in Regina, the CAR Program provides a short-term alternative to incarceration prior to trial and provides intensive support and intervention, including mental health reviews and management. A news release on the Government of Saskatchewan’s website writes that “[a]dditional funding in 2018-19 will be used for staff and resources to enhance the partnership with the Salvation Army and develop similar partnerships with community partners in Saskatoon and Prince Albert.” Resources appear to be expanding but there seems to be limited integration with the justice system and with sentencing in particular.

Community support programs that offer financial support for disability, residential accommodation, or wellness monitoring are therefore important to be aware of; in particular, this is important for defence lawyers seeking to make service referrals to their clients or judges who must consider what resources are available in order to craft appropriate sentences in line with the proportionality requirement of s. 718.1 of the Criminal Code. The Cognitive Disability Strategy offers benefits for individuals with a cognitive disability in the form of cognitive disability consultants or funding which addresses unmet needs caused by their impairment. Saskatchewan Assured Income for Disability also offers income support for individuals with long term or permanent disability. An example of wellness monitoring services are those offered at the CUMFI Wellness Centre in Saskatoon,

91 See Saskatchewan Health Authority, “Mental Health & Addictions Adult Community Services”, online: <https://www.fhhr.ca/ApprovedHomes.htm>, archived: <https://perma.cc/Y4DF-LGWS>.
95 Ibid.
organized by the Central Urban Métis Federation Inc. The CUMFI Wellness Centre provides mentoring services for individuals with cognitive impairment and offers assistance in a wide range of areas from housing to justice issues. These examples, as well as many others, are important to manage the symptoms of FASD as well as the secondary conditions and social challenges that often co-exist with FASD. These supports may allow a person with FASD to be adequately supported in the community so that lengthier incarceration does not become the most proportionate option available.

Alberta has moved towards implementing increased programming and services targeting FASD as a part of a ten-year strategy established in 2008. The strategic plan focused on providing services in the areas of awareness and prevention, assessment and diagnosis, and supports for individuals and caregivers. The strategy has dedicated annual funding of $16.5 million since 2008/2009 to support twelve FASD service networks as well as ministry objectives. Although Alberta is not a perfect example, the initiative of concretely investing in FASD treatment is an example Saskatchewan should follow. The CJS will require creativity in sentencing by counsel and judges, and communities will require investment in services and infrastructure that meets the needs of individuals with FASD. Incarceration should not become the default where, despite lower culpability, the person’s symptoms are deemed a risk to society.

VII. CONCLUSION
Through this article, I hope I have demonstrated my argument that the CJS, policymakers, and society generally must undertake significant work, investment, and innovation to make the CJS and its responses just and proportionate for offenders with FASD. Assessing a proportionate response for an offender where the options are either incarceration or an ill-equipped community is like being

98 Ibid.
101 Ibid at 11.
stuck between a rock and a hard place; nonetheless, punishing a person for symptoms of a lifelong disability is inefficient and unethical. Additionally, having a person with FASD entrenched in the CJS and repeatedly going through incarceration, trial, and probation supervision is expensive.

Moving forward, Saskatchewan and the rest of Canada should begin to invest in alternatives to incarceration that genuinely support the individual and manage their symptoms rather than punishing them beyond their level of culpability due to the nature of their condition and the risks it poses to society if unsupported. The legal system ought to demonstrate caution when sentencing individuals with FASD. Given that research indicates that a majority of individuals with FASD encounter trouble with the law, the legal system must understand the nature of the condition and its effect on his or her ability to meet legal standards. To meet the balance required by s. 718.1, ongoing investment and education on FASD within and outside the legal system will be important so that FASD can be assessed, understood, and properly accounted for when sentencing offenders.

The ethical imperative of finding better ways to address FASD in sentencing attains an even stronger footing when one looks to the Truth and Reconciliation Commission’s Calls to Action. Calls to Action #33 and #34 state the following in relation to FASD:

33) We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.

34) We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of

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103 A recent statement by Alberta FASD Service Networks noted that funding has stagnated for the Network’s operational funding since 2014, although funds have been added for new projects. The Network reports being unable to meet demands under their budgetary constraints; though positively, initiatives to implement new diagnosis services and supportive housing projects have been successful (Alberta FASD Service Networks, “Alberta Fetal Alcohol Spectrum Disorder (FASD) Service Networks—An Alberta FASD Cross-Ministry Initiative”, online: <https://centrafasd.org/wp-content/uploads/2018/09/FASD-Service-Network.pdf>, archived: <https://perma.cc/7FFR-L8UX>).

104 Streissguth, supra note 6.
offenders with Fetal Alcohol Spectrum Disorder (FASD), including:

i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.

ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.

iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.

iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.105

It is important to recognize the role FASD may have in the over-incarceration of Indigenous people and the importance of meaningfully addressing it as a part of acknowledging the harms of colonization and seeking reconciliation and healing.

A necessary step in moving forward in the legal system may be to use a system paralleling the approach in R. v. Gladue106 and R. v. Ipeelee.107 These cases emphasized that courts are mandated to consider the background of Aboriginal offenders in sentencing as stated in the Criminal Code.108 Such an approach to FASD was put forward in a private member’s bill, Bill C-235.109 The bill proposed implementing processes in the CJS for FASD assessment as well as requirements to consider FASD as a mitigating factor.110 The Canadian Bar Association put forward its support of the proposals,111 adding its recommendation to create an exception for individuals with FASD convicted of offences with mandatory minimum sentences

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106 Supra note 2.

107 Supra note 3.

108 Supra note 1, s 718.2(e).


110 Ibid.

attached. The bill was defeated at second reading with many concerns suggesting that considerations for FASD at the exclusion of other disabilities would be problematic. Whether or not this change would be a slippery slope, it is clear that individuals with FASD are likely to encounter the CJS on account of brain damage caused before birth. Not being able to appreciate that fact in criminal sentencing without it also becoming an aggravating factor leaves many questions on what kind of justice the justice system is currently achieving.

112 Ibid at 2-3.