

Fetal Alcohol Spectrum Disorders and the Criminal Justice System

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**SPECIAL ISSUE: FETAL ALCOHOL
SPECTRUM DISORDERS (PART I)**

**SPECIAL ISSUE INTRODUCTION: Fetal Alcohol Syndrome and
Fetal Alcohol Spectrum Disorders**

Kenneth Jones, M.D. and Ann Streissguth, M.D.

A Proposed Model for Forensic Assessment of Fetal Alcohol Spectrum Disorders

*Natalie Novick Brown, Ph.D., Hon. Anthony P. Wartnik, Paul D. Connor, Ph.D., and
Richard S. Adler, M.D.*

A model protocol is proposed for multidisciplinary assessment of Fetal Alcohol Spectrum Disorders (FASD) in the forensic context. Used effectively on both sides of the courtroom in the United States in criminal and post-conviction matters in state and federal courts, the model relies on the FASD literature and best-practice standards of care in terms of clinical as well as forensic evaluation. It is suggested that FASD diagnostic criteria for older adolescents and adults in the criminal system may need different emphasis if facial features have diminished with age and confirmation of prenatal exposure is impossible.

Adaptive Behavior and Fetal Alcohol Spectrum Disorders

William J. Edwards, J.D. and Stephen Greenspan, Ph.D.

Adaptive Behavior is a construct originally invented as a prong for diagnosing Mental Retardation, but it has come to also play a role in diagnosing Fetal Alcohol Spectrum Disorders (FASD). In this paper, we: (a) describe the meaning and measurement of adaptive behavior, including the need for improved measures (b) illustrate clinical and research uses of the construct, in establishing the diagnosis and behavioral profile of people who have FASD and (c) discuss the forensic uses of adaptive behavior for people with FASD in establishing a mitigation case in criminal proceedings, including possible extension of Atkins (death penalty exemption) protection for people with organic impairments who function just as if they have mental retardation in spite of possessing IQ scores in the borderline range.

**Bringing Morphometrics into the Fetal Alcohol Report: Statistical Language for the
Neurologist/Psychiatrist**

Fred Bookstein, Ph.D. and Arthur P. Kowell, M.D., Ph.D.

The components of a diagnosis in the fetal alcohol spectrum consider, among other domains, evidence of prenatal alcohol exposure, facial features, neurological or neuropsychological deficits, and neuroanatomical form. Most of these assessments are based on traditional sorts of quantifications (e.g., length measures, IQ scores, quantity of alcohol drunk by the mother), but for one of the domains, the morphometric assessment of neuroanatomical form as abnormal in a way suggesting fetal alcohol damage, the associated quantifications are relatively recent. For purposes of a forensic report, this morphometric component of the diagnostic judgment would seem to go best in the form of one classic statistical quantity, the likelihood ratio (odds ratio) of two hypotheses as they both attempt to explain the form of a particular structure within the defendant's brain (in our approach, the midcurve of the corpus callosum). On one hypothesis, the subject is presumed to be from a normal population; on the other, he is from a group all characterized by diagnosable fetal alcohol damage. Our article explains in simple terms how the forensic physician might wish to couch that component of the FASD diagnostic system for the purpose of aiding those in the courtroom who have the task of determining guilt or culpability.

Screening, Diagnosis and Intervention with Juvenile Defenders
*Eileen Bisgard, J.D., Suzette Fisher, S.N.D., Ed.S., Susan Adubato, Ph.D., and
Meghan Louis, B.A.*

This article overviews the research regarding youth with FASD in the juvenile justice system and describes three programs in the United States in which juvenile offenders are screened for FASD, then diagnosed and provided interventions specific to their needs. Programs in Colorado and Minnesota identify youth placed on probation and a program in Ohio was within an inpatient facility for delinquent youth. Each program has raised the awareness of providers so that the needs of the youth with FASD can be met more appropriately. The goals are to help these youth function better so that they will have lower rates of recidivism and a better chance of becoming productive citizens. The large number of youth identified in these projects demonstrates the importance of increasing awareness and identification of FASD in juvenile courts.

Children with Fetal Alcohol Spectrum Disorders in the Dependency Court System:
Challenges and Recommendations

Blair Paley, Ph.D. and Barbara E. Auerbach, J.D.

Children with Fetal Alcohol Spectrum Disorders (FASD) are at a greatly increased risk for developmental delays, learning disabilities, and behavioral, social, and emotional problems. High rates of secondary disabilities have been reported in this population, including mental health problems, school failure, delinquency, plus alcohol and substance abuse problems. Long-term outcomes for adolescents and adults with FASD include increased risk for unemployment, suicidal ideation and behavior, and confinement in psychiatric facilities and correctional institutions. Many children impacted by prenatal alcohol exposure are raised in out-of-home placements, and thus will likely have extensive involvement with the child welfare and dependency court systems. However, child welfare agencies and dependency courts are often not well-equipped to handle cases involving these children. This article will address the challenges that children with FASD and their families face in those systems, as well as recommendations for improvements in how those systems respond to the needs of these highly vulnerable children.

Fetal Alcohol Spectrum Disorder as a Marker for Increased
Risk of Involvement with Corrections

*Larry Burd, Ph.D., Diane K. Fast, M.D., Julianne Conry, Ph.D., and
Andrew D. Williams, M.P.H.*

Fetal alcohol spectrum disorders (FASD) may be common in adolescents and adults in the corrections systems.

However, current prevalence estimates for FASD suggest that nearly all affected people are undiagnosed in corrections systems. In this article we provide an overview of our experience with FASD in corrections populations and present strategies for screening, assessment and intervention. We conclude with a plan to provide training to corrections staff in response to identified preferences and needs identified by Canadian and American corrections staff.

An Arctic Judge's Journey with Fetal Alcohol Spectrum Disorders

Hon. Michael Jeffery

A trial court judge knowledgeable about Fetal Alcohol Spectrum Disorders struggles with adapting the operations of his court to the needs of FASD-affected individuals in the Alaskan Arctic. His background in learning about FASD through cases and training and the methods he has brought to the Barrow Superior Court to attempt to make the justice system more understandable and fair to persons affected by FASD are described. His frustration at not being able to evaluate the degree of impairment from FASD experienced by the affected persons in the courtroom and the appropriate accommodations needed for each person are also described.

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SPECTRUM DISORDERS (PART II)**



Ethnic and Cultural Factors in Identifying Fetal Alcohol Spectrum Disorders

George Woods, M.D., Stephen Greenspan, Ph.D., and Bhushan S. Agharkar, M.D.

A large percentage of those involved in the criminal justice system are poor and represent ethnic minorities, and many of them were born to mothers who drank during pregnancy. In this article, we review literature pertaining to physical, social, cognitive, and neurological deficits of individuals with Fetal Alcohol Spectrum Disorders (FASD), exploring the possibility that these deficits or their outward expression may be affected by cultural and ethnic influences. For the most part, the evidence suggests that the indicators of FASD are universal across all racial and cultural groups. These indicators are, however, often obscured in individuals from certain backgrounds, due to the salience of what might be termed "cultural overshadowing." This could be considered a form of unconscious or institutional discrimination, in that it denies criminal defendants from certain cultural backgrounds the opportunity to have courts take into account the possibility that their alleged or proven offenses were affected by serious brain-based impairments in reasoning and judgment. The law allows for consideration of these impairments in both sentencing and mitigation.

Suggestibility and Fetal Alcohol Spectrum Disorders: I'll Tell You Anything You Want to Hear

Natalie Novick Brown, Ph.D., Gisli Gudjonsson, Ph.D., and Paul Connor, Ph.D.

This article reviews the role of suggestibility as a psychological vulnerability in people with FASD who are arrested and questioned by police. After a review of relevant literature on suggestibility and FASD, preliminary data are presented from a small pilot study on suggestibility involving defendants with FASD in the United States who were involved in either a pre-trial or post-conviction adjudication process. Results of that study suggest that persons with FASD may be highly suggestible in interrogative situations, which appears to stem from a combination of neurologically based tendencies to acquiesce to leading questions and change responses to questions as a function of negative feedback. Interrogative suggestibility found in the FASD population, which is likely due to central nervous system dysfunction, has broad forensic implications.

A Judicial Perspective on Issues Impacting the Trial Courts Related to Fetal Alcohol Spectrum Disorder

Hon. Anthony Wartnik, J.D. and Hon. Susan Shepard Carlson, J.D.

This article explores issues that judges, prosecutors, defense counsel, treatment providers, and defendants face when a person who has, or may have, Fetal Alcohol Spectrum Disorders (FASD) is charged with a crime. The article is divided into three sections: the first section discusses basic legal concepts and how they relate to those in the criminal justice system who suffer from FASD; the second section examines case studies and lessons learned from the therapeutic drug court, a program of the King County Superior Court in Seattle, Washington; the final section presents case studies of serious felonies, and explores constitutional issues.

Fetal Alcohol Spectrum Disorders and Victimization: Implications for Families, Educators, Social Services, Law Enforcement, and the Judicial System

Karen Smith Thiel, J.D., Ph.D., Nora Baladerian, Ph.D., Katharine R. Boyce, J.D., Olegario Cantos VII, J.D., Leigh Ann Davis, M.S.S.W., M.P.A., Kathryn A. Kelly, B.A., Kathleen Tavenner Mitchell, M.H.S., and James Stream, M.B.A

Individuals with Fetal Alcohol Spectrum Disorders (FASD) are vulnerable to many forms of victimization.

FASD is associated with cognitive deficits and a set of behaviors that may limit an individual's ability to recognize and report victimization experiences and provide testimony in judicial proceedings. Services must be established and provided to educate and train individuals with FASD, their family members, teachers, and social service workers to prevent victimization and report victimization when it occurs. Law enforcement and the judicial system also should develop systems to protect the rights of individuals with FASD who are victimized, especially when they appear as witnesses.

The Criminal Justice System's Disparate Treatment of Individuals with Fetal Alcohol Syndrome Disorders in Cases Involving Sexual Activity

Jacqueline McMurtrie, J.D.

Individuals with Fetal Alcohol Spectrum Disorders (FASD) are treated differently by the criminal justice system in sex offense prosecutions, depending upon whether they are categorized as victims or perpetrators. The primary and secondary disabilities associated with prenatal alcohol exposure are often taken into consideration when assessing the capacity of a victim to consent to sexual activity, but generally not considered in determining whether a defendant had the mens rea to engage in criminal sexual conduct. This article traces the historical underpinnings of the mens rea requirement in criminal law and discusses its elimination in most prosecutions for statutory rape. The article recommends that additional research be conducted to determine the impact of prenatal alcohol exposure on an individual's capacity to consent to sexual activity. It suggests that fundamental principles of culpability require an examination of how FASD impacts an individual's capacity to engage in meaningful, responsible, decision making about sexual activity before criminal sanctions are imposed.

A Court Team Model for Care of Young Children in Foster Care: The Role of Prenatal Alcohol Exposure and Fetal Alcohol Spectrum Disorders

Larry Burd, Ph.D., Hon. Constance Cohen, J.D., Rizwan Shah, M.D., and Judy Norris, B.S.

Prenatal alcohol exposure (PAE) is common with about 80,000 women continuing to drink through all three trimesters of pregnancy each year. PAE is also associated with postnatal adversities, including abuse and neglect, which increase risk for foster care placement. Each day 700 children enter the foster care system. A diagnosis of Fetal Alcohol Spectrum Disorders (FASD) also increases the risk for foster care placement. Among children diagnosed with FASD 70% are or have been in foster care. FASD prevalence rates are increased 10- to 15-fold in foster care systems. Foster care is an important opportunity to detect FASD and provide services to infants and children with FASD. FASD is the third most common identifiable cause of mental retardation in the United States. We describe a court-team-based model of care developed to improve management of children with PAE or FASD entering foster care. The programmatic objectives include: enhancing detection of PAE; screening for FASD; increased consideration of FASD as a potential issue in treatment planning with foster parents; improved entry into treatment; and increased surveillance for parents with an FASD.

Legal and Psychological Implications of Non-Disclosure in the Adoption of a Child with Fetal Alcohol Spectrum Disorder

Sharon James Williams, J.D., M.P.H., Daniel Dubovsky, M.S.W., and Jason Merritt, M.A.

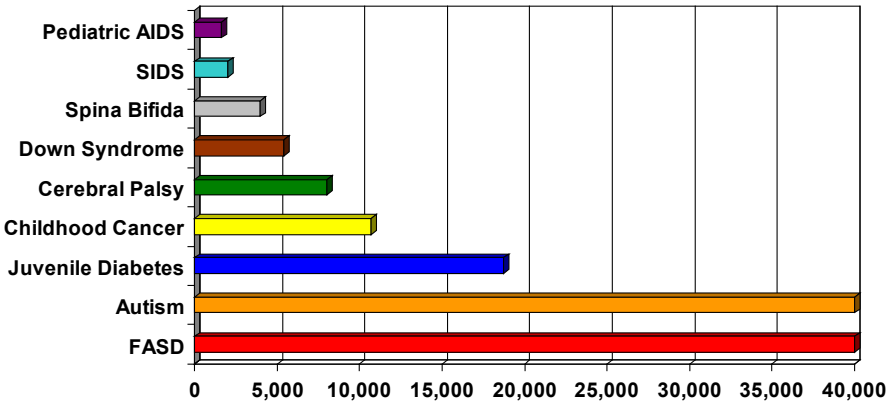
Approximately 127,000 children were adopted in the United States in 2000 and the same number in 2001. When adoptions go well, the events that follow are mostly private family matters. On other occasions, families discover that they have adopted a child who is suffering from mental and/or physical ailments. In cases where the adoptive parents are not aware of the child's medical history, adoptions can have unfortunate endings, including adoption disruption, litigation, interfamily violence, and even death. This article focuses on the issues involved when a family discovers post-adoption that the child has Fetal Alcohol Spectrum Disorder (FASD). The article will first discuss the evolution of adoption and disclosure in the United States, then provide background on the nature of FASD and the difficulties of recognizing cases. The article will then focus on (a) the psychological impact on parents who have adopted a child who is found to have FASD and (b) the impact of disclosure upon state, national, and international law. The article concludes with recommendations for improving disclosure standards and reducing the risk of FASD going undetected and undisclosed in adoptive children.

NOFAS AND FASD

NOFAS is a non-profit public health advocacy organization striving for a nation where all children are born alcohol free. NOFAS prevents alcohol use during pregnancy and **Fetal Alcohol Spectrum Disorders (FASD)** through primary prevention, education and advocacy. **FASD** describes the range of effects that can occur in an individual whose mother drank alcohol during pregnancy. These effects may include physical, mental, behavioral, or learning disabilities with possible lifelong implications.

FASD is the nation's leading known preventable cause of intellectual disabilities and birth defects.

Estimated Annual New Cases in the United States



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