

Fetal Alcohol Spectrum Disorder and the Law: Some Practical Steps for Parents and Legal System Professionals

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I. For Parents

First, please refer to “A Lawyer’s Brief”. I offer it to you as your first practical step. Use this brief; distribute it to anyone you want to educate about Fetal Alcohol Spectrum Disorder (FASD). I wish I had had this lawyer’s brief in February 2001, in courtroom #306 at 222 Main Street in Vancouver, British Columbia, before His Honour Judge K.L. Smith.

At that time, after years and years in criminal court, I knew nothing about FASD. I have since then written about all the mistakes I made, in a piece called “Mistakes I Have Made With Fetal Alcohol Clients”.

The “Mistakes” article is also available at the website of Doctor K. Asante: www.asantecentre.org. I mention Doctor Asante because his website is the best in the world for FASD information, and reading through the listed articles is the second practical step you can take. Doctor Asante is now over 70, a retired paediatrician who still works full-time in his clinic in Maple Ridge, British Columbia.

After you have carefully toured the website and if you have questions, call Audrey Salahub at 604-467-7101. Audrey is the clinic administrator, as well as an adoptive parent of a son with FASD who has put on her shoulders more tribulations than Job ever suffered. Audrey can connect you to more fabulous resources.

From the Asante Centre, I recommend the VHS/DVD by Doctor Julianne Conry. Dr. Conry is also retired. She taught neuro/educational psychology for thirty-four years at the University of British Columbia in Vancouver, and is one of the authors of the only scientific study in the world that asks how many people with FASD are in our jails. Her study says 24%. Privately, she will tell you the percentage is probably about 40%. Several other studies not in peer reviewed journals, done by Corrections Canada, say the FASD population is between 50% and 80% of our penitentiary population. The video with Doctor Conry stars Victor Williams (a 28-year-old with FASD), his caregiver of ten years, his probation officer, and Dr. Conry. I use this 30-minute videotape every time I speak on FASD because it is the quickest way to educate police and probation officers on the topic. It is also an appropriate educational tool for parents, children in school, their teachers and principals, for garage mechanics and brain surgeons and all their families and friends, as well as anyone in government, including judges.

Two other websites are: www.fasstar.com by Teresa Kellerman of Phoenix, Arizona and www.fasdconnections.ca by Jan Lutke of Vancouver, British Columbia.

Dr. Ann Streissguth of the University of Washington (Seattle) has an excellent website at <http://depts.washington.edu/fadu/>. Contact Kay Kelly at 1-206-543-7155 if you have questions on legal issues. For thirty years, Kay was a probation officer in Hollywood. Now, for over five years she has been a co-director of the Fetal Alcohol Project at the University of Washington. She returns calls! The site has excellent legal materials, all downloadable, so you can give them to your lawyer.

A. How To Choose A Lawyer

I assume you know lawyers cost money. There are ways to lower the cost: Legal Aid, law students, pro bono programs, and some agencies that do special interest law: anti-poverty law, special needs/developmental disabilities law, and other similar areas.

A good criminal law specialist is as important to your child as is the pediatrician Dr. Asante. Spend more time finding a lawyer than you would purchasing a new car. The best advice is: do it now, long before you get the call from jail or when the police stop your son with the goods in his hands.

A brief bit about estate law, powers of attorney, capacity issues, and minority/majority law is necessary. Your daughter may be 19 years old and she also may be 10 years old neurologically. You may need a lawyer soon to deal with issues of housing, pregnancy, medicines, and contracts/property because she makes puzzling decisions. For example, your FASD daughter may say: "I never want to see you," and then behave/choose badly, perhaps become a drug mule, get addicted, and get in a fight with her boyfriend. Then some time later, you discover she is in an institution and needs a lawyer. The lawyer you use and trust, for good legal reasons, may be unable to act for your daughter. She needs her own lawyer. Start the process now: get her a lawyer. These are complicated issues beyond this paper, but these are the issues parents ask me about every day!

Some Practical Points

1. Always avoid a lawyer who calls himself a generalist, unless you live in a town with only three lawyers.
2. Start in the yellow pages; ask friends who work in the courthouse. Go to court to watch the local lawyers; it takes only a few days to get to know who is first- and who is second-rate. Ask a judge. Ask a probation officer. Ask a prosecutor for the three best defence lawyers in his courthouse; then ask her which one she would send her sister to. Ask a police officer. Prosecutors and police know who the best defence lawyers are.
3. Get a criminal defence specialist. Ask, "How many cases like this have you done this year?" And the result? The cost? Does the lawyer charge for first meetings?
4. The key is to find someone you **like and trust**.

5. Ask if he ever had any complaints about him as a lawyer by clients to the Law Society? Almost all criminal Lawyers have had difficult and unhappy clients; it comes with the territory.
6. What happened? How he answers this personal question will give you lots of information on who he is and how he deals with difficult personal issues. Remember: like and trust.
7. Get a problem solver/litigator. Only interview Lawyers who go to Court and argue strenuously for a living. The Lawyer who did your Will or did your real estate transaction, will not be helpful on a criminal charge. Some Lawyers are problem solvers, some waste your money. Time is money, says Ben Franklin. Remember that 80% of criminal cases are guilty. So solve the problem, do not send his kids to college on your dime.
8. You will need to see several lawyers to get a sense of who is right for you. Do not worry if the lawyer knows nothing about FASD. No one learns faster than a lawyer with a case coming to trial soon.
9. Do not judge a lawyer by the furniture in the waiting room or his patter in the first meeting or whether he has won any community awards. Has he defended in difficult, unpopular cases? This is a better indicator. Look for problem-solving competence, not outward signs of material success.

B. The Different Voices and Different Roles of the Players in Law

“The Several Languages of Law” is another article on the Asante Centre Website. Briefly, there are various dialects spoken in the legal system and newcomers confuse these special coded languages with ordinary English. Police speak “who dunnit”. They seek facts to prove a case. They are not interested in the difficult story about an FASD child. Never assist the police about any investigation into your child, as this never helps the child. Pretend you are a US senator or a major league hockey player. Your son or daughter has the same rights as Todd Bertuzzi. Learn to make this statement to the police: **“My son is exercising his constitutional right to silence. He wants a lawyer now. Do not ask him any questions.”**

Prosecutors are the legal voice for your entire community. They do not take your child’s case personally. As professionals, they have policies, procedures, and legal requirements to follow. They are not out to get your child. However, **parents you MUST treat prosecutors like police officers and let your lawyer do the talking.**

Probation Officers are court-appointed parents, paid to make sure your child follows the court order designed to stop his/her offending. Unlike anyone else in the system, they have tremendous discretion; they can jail your son or talk to him. Parents **MUST** have a

good relationship with probation. Even though the probation officer is also a police officer, she is also a “parent” appointed by the judge and does want to stop crime. Speak to a probation officer as you would to a psychologist or doctor. These people can help, if you educate them about FASD.

C. How to View Your Case with Prosecution Eyes

Prosecutors try cases they think they can win. So what does the prosecutor see in your son’s case that you do not? Ask yourself this question over and over until all the emotion about the situation has evaporated. Facts drive cases, not your son’s invisible brain-based birth defect. Look at the facts and prepare for a guilty verdict. If a not-guilty verdict happens, treat it as a gift. It is my experience that persons with FASD issues are nearly always guilty, for reasons parents know all too well.

D. How to Help Your Lawyer

Create a FASD biographical binder. Audrey Salahub of the Asante Centre suggests each parent create a three-ring binder of information containing:

- a one- or two-page chronology giving a brief history of your child
- a recent photograph
- adoption details
- medical issues
- behavioural difficulties
- a list of any psychological tests done, or formal diagnoses made, for example Oppositional Defiant Disorder, Attention Deficit Disorder, Hyperactivity
- a list of any contacts you may have, such as teachers, doctors, employers, police, probation, lawyers, and any expert or professional who has seen this person
- information if ever arrested, what sentences were imposed, the outcomes
- all court papers from all previous cases, including file numbers and previous lawyers or social workers involved
- a list of progress in school
- any letters of reprimand from schools
- a list of positive skills (e.g., musical, loves dogs, artistic) or some significant achievement that gives an idea of interests and positive abilities

Also include in the binder articles by Diane Malbin, Deb Evenson, Teresa Kellerman, Kathryn Paige, Ann Streissguth, Julianne Conry, David Boulding and other explainers.

A wise parent will have a few copies of such a binder and keep updating it so you can be prepared to act fast when bad things happen.

E. What to Do in Response to a Criminal Complaint

Start taking the complaint/behaviour/actions/crime seriously. Employ swift consequences now for two reasons. First, because the legal community needs to know you are prepared to make the necessary consequential interventions now and if you do make serious changes in your child's daily routine, you may be able to convince a judge that jail is not necessary or less jail is required. Sometimes you must act just to show the community you are not a "problem parent". Sometimes just solving the problem is enough for the police/judge.

Later, I discuss learning theory and the limits of consequential actions. Consequences mean limits on liberties: curfews, "no go" areas, no contact with certain people. Consequences mean swift actions that follow negative behaviour. They also mean you need to begin to construct an External Brain.

F. How to Create an External Brain

This is the single most vital task you as a parent can do for your son or daughter. This means gathering people: family, employers, friends, who can help probation officers supervise your son. Here you must be candid with all members of the External Brain team. Give them the medical information you have if you have a diagnosis. Give them any material you have gleaned from excellent websites such as: www.asantecentre.org. Your child has a brain-based birth defect: your team aims to fill in those missing brain functions the alcohol in the womb destroyed when it dissolved brain cells . This means different people might have different functions. Some might be there to make sure appointments are kept. Some might ensure certain "undesirables" have no contact with your son, while others work to keep him at work or on task.

The concept of the External Brain is helpful to lawyers, judges and probation officers because the External Brain intends to "make up" for the missing brain cells and for the missing brain functions. In legal language, by creating an External Brain we are making an accommodation, in the same way we provide interpreters in Court for deaf people. We create an External Brain for persons with FASD issues for the same reasons we give persons with their legs amputated electric wheelchairs to drive. We are trying to make them as successful as they can be given the disability. Probation orders are a fine tool to create success, if we set out to create success.

The External Brain is a team including, but not limited to:

- Judge
- Prosecutor
- Defence Counsel
- Probation Office
- Mental Health Advocates
- Poor Law Advocates

- Job Training Persons
- Teachers
- Coaches
- Church Members
- Employers
- Fellow Employees
- Police
- Sheriffs
- Local business people with establishments the person frequents
- Corrections Staff
- Doctors
- Psychologists
- Any health care provider
- Neighbours
- Friends

and anyone who can contribute time and a positive, non-judgmental, caring energy, because this is going to be hard work. The more effort you spend creating this team, and the more willing they are to help, the more likely the judge might say, “Jail is not necessary in this case.”

II. For Lawyers, Police, and Probation Officers, and for the Parents who Need to Educate the Legal System.

A. How to Interview a Person who may have FASD

Here I assume all concerned are competent experienced interviewers and all use checklists in your interviews. A good example of a criminal interview checklist can be found at the websites of the Law Society of British Columbia:

http://www.lawsociety.bc.ca/practice_support/checklists/docs/C-1.pdf

Checklists are an important tool often ignored by experienced lawyers. In 2000, for seven hours I was in the cockpit of a 330 Airbus flying from Paris to Montreal. I learned by watching a professional take his Captain’s exam that checklists work because life and flying jetliners is complex and people sometimes forget the details. Sometimes people assume Bob (with FASD) is like Joe (who is an accomplished drug dealer) and fail to pick up on the details of this invisible brain-based birth defect. Jet pilots and persons who interview those charged with criminal offences cannot make mistakes. Below are ten questions you may find of assistance if you think FASD may be an issue in your interview. Read these and then ask what is not on my checklist. Examine your assumptions, check your blind spots.

1. After birth date information, ask if the person was adopted or in foster care; if the latter, about foster placements, visits to various professionals (doctors, educational professionals, psychologists, speech therapists, etc.).
2. Ask about maternal drinking. This may be as innocent as “Have your parents ever spent the night in jail?” Clearly, some sensitivity is required here. You may have to gather collateral information from other relatives about maternal drinking. Do not worry if you get firm negative answers. Be informative and open, not judgmental.
3. Inquire about developmental delays. Ask about developmental milestones, i.e. tying shoes, riding a bike, age-appropriate friendships; are the answers reasonable? Ask about school ages, matching chronological age to grade. For example, ask:

Grade 6, age___

Grade 7, age___

Grade 8, age___

Develop a grid of age and development, and note disparities between chronological age and adaptive age. Ask the individual whether a “special person” at school ever tested him/her. Find out about his/her marks in school. Ask yourself, “Was this person a ‘social pass’?”

4. Note the individual’s vocabulary in his/her answers. Are there any words that seem to be “above” his/her learning? If you suspect the person may be speaking above his/her learning, ask, “What do you mean by that word?” Note if he is using words but is unable to define their meanings. Is there a gap between expression and the comprehension of his expression? Do you suspect he heard this and misunderstands the appropriate context?

Again, there is good research to help you. Dr. Julianne Conry is a neuropsychologist who has developed a helpful tool called ALARM. The acronym stands for:

A...Adaptive behaviours

L...Language

A...Attention

R...Reasoning

M...Memory

Go through each category and note what you discover. Here you need to give yourself some credit for common sense, as well as your ability to ask questions and make observations.

For example: Do you see problems with memory, language, reasoning, attention, and those behaviours we use to get through the day? No one expects you to be the next Dr. Conry. But, you have skills! Use them! You have conducted enough interviews to know how to ask curious questions. ALARM is a guideline checklist that may enable you to consider whether the person in front of you has FASD issues. All you are doing is exploring. Experts give a complete diagnosis. Still, much good can come from skillful exploring. Your exploration notes may be enough for a judge to order a proper assessment. If that order for an assessment is made, you have done your job 100%.

There are three other issues I must mention here: **Sensory Systems, Processing Pace, and Time.**

Sensory systems: When you see fidgety, distracted, agitated and irritated behaviours, there may be over- and/or under-sensitivity to input. FASD individuals may “shutdown”. These persons may not respond as you would in similar circumstances.

Processing pace refers to slow cognitive and auditory processing speed. Think: this may be a 10-second kid in a one-second world. The best demonstration of this notion of processing pace combined with sensory inputs was by Karen Serret, Ph.D. given at a conference on FASD, for judges and lawyers, in 2005 in Edmonton, Alberta. Karen had us wear funny hats, put constricting cloth elastic bands around our necks, then added head bands that obscured our vision by jiggling coloured balls in front of us, and gave us New Year’s Eve noise makers to twirl and rattle; she then played some loud rock music and had assistants walk around the room making more noise and distracting movements. Then, using a Power Point screen show, the good doctor gave us a furiously fast spelling/word match/geography test of 20 questions. I gave up at about question 11. I was sitting at a table with five judges; none finished, most had wrong answers, several, like me, threw down their pencils. Doctor Serret began her presentation by saying: “Welcome to the world of FASD.”

I add Time to a list of problematic notions to consider when interviewing persons with FASD. This may not be your experience, but it is mine. With these clients there is sense of them living in the moment, as if the past and the future do not exist. I suspect this may be connected to their inability to understand “value” also. Minutes and hours can be interchangeable, just as dollars and cents; they may know what time or money are, but the intellectual competence that we have is sometimes missing. Lower your expectations. These people may not have your skill with abstract thought.

Once, I had a client tell me in the Young Offender holding cells that each night she put “the bad day over there” before she went to sleep so that when she woke up “all the bad was gone”. She was a 14- or 15-year-old sex worker who did not know what condoms were for. If you want this client to “tell you” about her being

sexually assaulted, you will have difficulties if you rely on the same checklist you use for all interviews. Go through each category in the ALARM guide and note what you discover. Here, you need to give yourself some credit for common sense, and your ability to ask questions and make observations.

For example: Do you see problems with memory, language, reasoning, attention, and those common daily behaviours (adaptive behaviours) we use to get through the day? No one expects you to be a pediatric psychiatrist. But you have skills! Use them! You have conducted enough interviews to know how to ask curious questions. The ALARM is a form of specific checklist that may get you thinking that the person in front of you could have FASD issues. All you are doing is exploring. Experts give a complete diagnosis. But much good can come from skillful exploring.

5. Note unusual behaviours and manner of dress. If it was -40°F and he was hitching a ride without a coat, write that down! Often, persons with FASD have marked sensory threshold issues. They frequently have high tolerances for pain and cold. Be aware of cleanliness and type of clothing: this may be a sign of tactile defensiveness (the person does not like scratchy clothing or wrist bands and tight collars); dental hygiene: oral defensiveness (lisps or speech defects like cleft palette); posture, gait and fidgeting: postural defensiveness (being hunched over as if expecting a blow, concave chest, no eye contact). Speak in a louder voice for signs of auditory defensiveness (sensitivity to loud noise).

Ask about hospitalizations and/or injuries, as these can be clues of risky behaviours and inability to predict outcomes. Again, observe carefully. Make notes.

6. Ask your subject to write something. Provide a pen and paper and ask her to draw a family tree of relatives, or something related to the interview: a map of the offence, a diagram of the city; you will be amazed at what you learn. Again, proceed heart first. Notice gaps and what is missing.
7. Try a brief mental health quiz. Ask whether the individual has ever taken Ritalin or any anti-depressant, has ever seen a psychiatrist, psychologist, or suicide counselor. Inquire about problematic behaviours in school, any expulsions. Has she been considered lazy, disruptive, or violent?
8. Ask about family. Get a sense of siblings, birth order, ages, size, body build. Ask about unusual birth defects (e.g., cleft palettes, dental defects). Get a sense of how the person is in weight-to-age ratio. Not every question will bear perfect fruit.
9. Ask other questions and make observations to assess the following:
 - Is there a “victim” quality present?
 - Could this person be taken advantage of easily?

- Do you sense that this person likes repetition, structure, and stable environments?
- Is he uncomfortable with noise and activity, and multi-stimuli environments?
- Does she not “get” the notion of consequences?
- Does he have difficulty generalizing from experience?
- Is this person extremely literal minded? Perhaps she does not pick up on sarcasm or idiomatic expressions?
- Has this person ever had a driver’s license?
- Do you sense this person does not understand some of your questions?
- Does this person appear eager to please?

What questions are you not asking because they do not seem necessary? You will be surprised what you assume, so check your assumptions. Stand back and do the interview as if the person was from a distant country. Remember the interviews you did early in your career. Be aware of how much you have learned since. Review your past mistakes, and credit yourself with what you have learned over those years. If there are any sexual issues, use the Yuille Stepwise Protocol. Every police station in the free world now uses a similar protocol when interviewing children in sex cases. The reasons are clear: bad interviews make bad cases.

I suggest the above questions will give you some new information that could suggest the person may have Fetal Alcohol Spectrum Disorder. Armed with this new information, tell the probation officer, tell Crown counsel, tell defense counsel, and make sure the judge knows.

We look for what we see. We look for what we know. ~ Goethe

The treasure you find depends on the map you use. ~ Boulding

B. How Do I Create Successful Probation Orders?

Going back to the “External Brain”, this means finding language your son or daughter understands—not the language of lawyers and judges—to separate your child from the problem-causing behavior and create structure, so that opportunities for more criminal offences do not happen.

I suggest you make probation orders “fridge proof”—that is, put the same language in probation orders you use when you leave notes for family members, attached by fridge magnets. Do not assume that because a judge read the probation order aloud in Court and your son agreed by nodding, that he has any real understanding of all that it means.

Probation orders work when they assist in stopping your child from repeating crimes, or from attempting or completing new criminal offences. Use your years of experience as a parent to translate what the Court wants into “parental” language you use in the home everyday.

Here, you can set out for your lawyer, for the Court, and for the probation officer, simple sentences that, in your mind, that will achieve these goals, because you know what works for your son. To the criminal system people, he is just another offender, and they usually know nothing about FASD issues. Then tell your lawyer about your ideas for probation orders as a part of the process of educating your lawyer about FASD.

You know your son; now look to these orders as a tool to continue your parenting.

The probation order must be able to fit on the back of the probation officer's business card: simple, clear, concrete language; no legalisms; no idiomatic language. Write like it was a traffic sign.

C. How to Use the Orders to Build Structures for Success, Not For Punishment

Here, as you know from working with this brain-based birth defect for years, learning is slow and failure is common. I suggest you review Teresa Kellerman's, Jan Lutke's, and Dr. Asante's websites for ideas. These sites have excellent links, excellent articles, and much excellent information that you can give your lawyer, that he can then give to the judge and probation officers.

Make sure your lawyer, the prosecutor, the judge, and the probation officers know that there will be missed appointments, some failures, and some future difficulties. Plan for the future successes by relying on the "External Brain" you have created.

III. Learning Theory and the Criminal Justice System (despite the title, this section contains the most practical information)

The Basics

FASD is a physical disability in the same way a person with an amputated limb has a physical disability. The alcohol in the womb acts as a solvent and kills individual brain cells. The baby is born missing brain cells, and later in life there are missing brain functions. Our brains operate differently when we are missing some brain functions. The damage is permanent and profound, and the disability is invisible.

We see the missing brain functions when we observe the behaviour of persons with FASD. Dr. Ann Streissguth has detailed these behaviours in her research, and every parent or caregiver sees them everyday. As the criminal legal system is learning about these behaviours, as more and more public education about FASD occurs, we are now ready to make some concrete suggestions on probation orders.

The research on FASD divides behaviours into primary and secondary. Primary behaviours are "presenting" behaviours including, but not limited to:

- impulsivity
- distractibility
- suggestibility
- failing to demonstrate remorse
- dysmaturity
- being socially or developmentally younger than chronological age
- slower brain processing rate/pace
- memory problems
- inconsistent performance
- clear strengths in some areas (e.g., art, music interpersonal skills, computers)
- difficulty generalizing, forming links and making associations
- difficulty abstracting and predicting outcomes
- not understanding value, time, worth, and other abstract notions
- over- and under-sensitivity to stimuli
- concrete language styles
- perseveration (being stuck in repetitive loops of behaviour)
- missing social cues, not “getting” sarcasm
- inability to understand others’ points of view
- living in the moment, not understanding notions of the future
- failing to understand consequences
- listening but seeming not to hear
- being easily overwhelmed, easily led
- other behaviours that end up being described by criminal charges.

Secondary behaviours include, and are not limited to:

- | | |
|---|---|
| <ul style="list-style-type: none"> ▪ fatigue ▪ frustration ▪ anxiety and fearfulness ▪ rigidity ▪ resistance ▪ argumentativeness ▪ feeling overwhelmed ▪ feeling shut down ▪ having feelings of failure ▪ self-aggrandizement | <ul style="list-style-type: none"> ▪ attempts to look good ▪ being isolated ▪ having few friends ▪ being picked on by others ▪ having school problems ▪ expulsion ▪ truancy ▪ criminal record ▪ feeling suicidal |
|---|---|

Many of these persons have learned early on in school to be “bad” rather than seem “stupid” to their peers, to teachers, and to themselves. They have learned to protect themselves psychologically with behaviours we call negative, because the other option is to feel continually as if they do not make the grade. They may be class clowns, troublemakers, have discipline problems, or be annoying and difficult. They often do not comprehend and rather than risk being vulnerable by asking the same embarrassing questions over and over again, they take the easy road and act out their frustrations—and we see them as difficult.

Shame may be the core difficulty. Shame and the associated grandiosity are secondary behaviours that are not going to go away with warm words and pleasant suggestions. This reality must be considered. Diane Malbin advises: the greater the shame the greater the grandiosity. Grandiosity is a defensive protective response to failure and internalized shame. Shame then breeds defensive behaviour and we interpret the behaviour as difficult.

We fail to see non-comprehension; we fixate on what we interpret as noncompliance. But the behaviours we see and classify as negative are clues to careful observers that there is a problem with the brain. Their brain is not working like our brains.

Jan Lukte has some pregnant advice: Separate non-compliance from non-comprehension. When we see troubling behaviour, we quickly label it right/wrong, positive/negative, good/bad, criminal/legal. Use Diane Malbin's suggestion and consider the behaviour as a cue to observers that this may be a brain function problem. Understanding that there is a brain function problem is the first step in seeing non-comprehension instead of assuming non-compliance.

It is helpful to see and understand the invisible FASD disability as a physical limit in the same way we would never expect the one-legged child to race in the 100-yard dash against the child with two legs. The physical disability of being one-legged alerts us to a fact and we alter our perceptions. Make the same adjustment with FASD.

If you can accept that there is a physical limit to what we expect from these brains, Diane Malbin's four cautions make sense:

1. Match the task to the brain before you.
2. Identify your personal assumptions.
3. Lower your expectations.
4. Change their environment.

Malbin suggests "Think younger—much younger. The person may have had 18 birthdays, but may actually be only 9 years old neuro-cognitively. Malbin discusses learning theory in her book *Trying Differently Rather Than Harder*. Buy the book. Her second chapter is called "Reframing perceptions from 'won't' to 'can't'". Clearly, she, like all in the field of FASD, sees much in the Lutke distinction between non-compliance and non-comprehension.

The Malbin flow chart goes like this:

- (a) we see gaps in neurological skills
- (b) we make an interpretation of willfulness
- (c) we give out a punishment
- (d) the FASD person uses his defenses as a reaction
- (e) the defenses become rigid and automatic over time

My addition to this chart would be a discussion of shame. These kids learn it is safer psychologically to be viewed as bad rather than to feel stupid. Over the years, they have been ashamed over and over again, to the point that shame is a fundamental life experience. Consequently, the shame and other preventable secondary (read: defensive) behaviours end up being more destructive than the FASD. These individuals have internalized shame. It is their key life experience.

Shame is a core body experience: it is not going away with warm and pleasant suggestions. FASD people will want to please you, to please all questioners. They have been rejected many times, so they want friends because they are isolated in their disability. They will say what they “think” you need to hear. We label these behaviours as “untrue”, as “lies”, or call them “confabulations”. So often these people are lonely beyond anything we can imagine and it often seems they will do anything for “friends”.

Shame is invisible. Their brain-based birth defect is invisible. This physical disability is invisible in most of the cases since the window of the timing of alcohol exposure that results in classic facial characteristics is considered to be three days in pregnancy, between days 18 and 21. Accordingly, only a small percentage of people exposed even to significant amounts of alcohol and other drugs have the “face” of FASD. Their language skills may be lower than your expectations, as are their rational thinking processes; their predicting skills are compromised, and their memory may be poor compared to other witnesses.

You and I learn easily because we can predict, remember, abstract, generalize, and perform all kinds of thinking. We have “cantaloupe” brains while FASD persons I describe as having “avocado” brains, based on the remarkable brain pictures used by the Dr. Ann Streissguth.

You and I learn with: time outs, extra work, ignoring, shaming, star charts, contracts, grounding, and incarceration. You and I learn because for us the following three assumptions are correct:

1. We can remember Monday’s lesson on the playground and generalize, abstract, or form associations that are helpful to Thursday’s lesson in Social Studies class.
2. We can remember we did not like jail or the grounding for a week. We can remember and predict the same result when presented with similar facts.
3. We will generate different behaviours based on our abilities to learn.

But as Malbin says:

What if you have difficulty linking words with actions and understanding?

What if you cannot form associations linking punishments with past actions?

What if you have difficulty remembering or retrieving information in different settings?

What if you find generalizing, abstracting, and predicting difficult?

The point again is not that learning-theory-based techniques never work. Rather, if the technique seems ineffective, it may be useful to explore whether or not the technique fits the person.

This shift from standard learning theory to matching the task to the brain before you is difficult, and I have watched judges, lawyers, police, and probation officers struggle with the twin barrels of non-compliance versus non-comprehension.

When you experience behaviour that troubles you, or causes you to wince, or perhaps to form a negative judgment because you see:

- no apparent remorse
- nodding “yes” but not understanding
- refusing to look at you
- seeming bored in Court
- getting easily distracted, fidgety behaviour
- failing to “get” idiomatic or sarcastic language
- missing obvious social cues
- perseveration
- maintaining a position clearly not true
- failing to note the most obvious facts.

then Diane Malbin suggests you use that behaviour that is frustrating to you as a message: **Use the behaviour as a cue to yourself** that the brain before you may be dysfunctional and you need to make adjustments and accommodations.

THE ANSWERS

1. The External Brain. Create one; use it.
2. Practise matching the task to the brain before you.
3. Educate everyone about FASD.
4. Expect failures, setbacks and disasters.
5. Review the “Lawyer’s Brief”.
6. Make the required accommodations to create success.
7. Take your local judge to lunch.
8. Take your chief of detectives to lunch.
9. Take your county attorney to lunch.
10. Never stop educating: FASD is not an excuse for criminal behavior, it is an explanation. The fix is in the External Brain.