

THE CRIMINALIZATION OF FETAL ALCOHOL SYNDROME (FAS)

Many persons with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Effects (FAE) end up in the criminal system. Persons with FAS/E are often not correctly diagnosed, do not receive the type of support they need and have unreasonable expectations placed upon them. Persons with FAS/E often have adaptive functioning abilities in the mentally handicapped range though their cognitive IQ's may be borderline to low average/average. The secondary disabilities that develop from the primary organic damage place persons with FAS/E at risk of victimization, criminalization, substance abuse and psychiatric illness.

Maternal drinking of alcohol during pregnancy causes permanent physical and neurological damage to the fetus. Alcohol is a teratogen and has a direct toxic effect on cell growth and development. The timing of the alcohol ingestion during the pregnancy, nutritional status of the mother and the unique physiological responses of the fetus to alcohol determine the degree and distribution of the damage

Persons who have been affected by maternal ingestion of alcohol during their embryonic and fetal development may have a wide range of disabilities and “no two individuals with FAS present with the same constellation of anomalies and disabilities. Growth, facial phenotype, CNS dysfunction and alcohol exposure all vary along separate continua. The term FAS only conveys that the condition is permanent and was caused by prenatal alcohol exposure. The term does not convey what the individual’s disabilities are” (Astley 1999). The diagnosis of FAS is not black and white but many shades of grey because of the range of variability of disability.

Astley and Clarren (2nd edition 1999) have developed a 4 point diagnostic system for FAS that is attempting to address the amount of variability and is trying to bring more precision to the diagnosis of FAS and other disabilities associated with in utero alcohol exposure. At the Univ. of Washington they have produced a CD-ROM that teaches clinicians how to do the facial measurements that are part of the diagnostic work-up for FAS. The terminology for FAS is still undergoing a transition. and in the literature there are good discussions as to why the terms Fetal Alcohol Effects (FAE) or Partial FAS (PFAS) should not be used (but they are still used so they must still serve a purpose that has not been filled by newer terminology). There were also new concepts introduced in 1996, in Kathleen Stratton et al's book (4): Alcohol Related Birth Defects [ARBD] which includes heart, skeletal, brain and midline facial defects and Alcohol Related Neurodevelopmental Disorder [ARND], which describes someone with a history of prenatal alcohol exposure, without the characteristic physical features but with the behaviour, adaptive functioning and language (receptive) difficulties.

The initial descriptions of FAS described persons with all the hallmarks of the syndrome ['classic features']-1) pre/post natal growth/weight deficiency (below 10th percentile); 2) a characteristic set of minor facial anomalies {short palpebral fissures or eye openings; flat nasal bridge; flat/smooth philtrum or vertical groove between upper lip and nose; thin upper lip}; and 3) evidence of central nervous system involvement-including

microcephaly, tremulousness, poor coordination, learning disabilities, memory deficits, motor problems, seizures, developmental delays, mental retardation and behavioural dysfunction {including hyperactivity}. Persons with a history of prenatal exposure to alcohol may not have all of the classic physical characteristics but do seem to have the adaptive behavioural dysfunction. The lack of facial anomalies in some persons has sparked the discussion over the use of different terms such as FAE or partial FAS. [The reason some persons do not have the facial anomalies is that the timing and the amount of the alcohol exposure can account for the differences in physical defects. In the first 7 weeks of development all the organ systems develop but the brain continues to grow and develop throughout pregnancy, therefore alcohol's toxic effects on the brain can happen through all or any of the 9 months of pregnancy].

Ann Streissguth in 'The Challenge of FAS' (1997) describes the secondary disabilities of persons with FAS/E as "those that a person is not born with and that could presumably be ameliorated through better understanding and appropriate interventions". The secondary disabilities include "mental health problems, disrupted school experience, trouble with the law, inappropriate sexual behaviours, alcohol and drug use, difficulty with independent living, difficulty with employment and problems with parenting" (1997). Ann Streissguth and colleagues at the University of Washington have followed hundreds of persons with a diagnosis of FAS/E over 20+ years and tracking what happened to them forms the basis for their descriptions and statistics of secondary disabilities. They found out what made things worse and what the protective factors were (early diagnosis is a very important protective factor).

The secondary disabilities associated with alcohol exposure in utero often lead to the criminalization of these people. The characteristics of persons with the effects of prenatal alcohol exposure can lead them to become criminalized. Some of these characteristics are: impulsivity, poor judgement, lack of understanding of cause and effect, difficulty predicting and/or understanding consequences of behaviour, inability to learn and generalize from past mistakes, poor and fluctuating memory so confabulation may occur, suggestible/easily manipulated, poor social skills/abilities but a desire to socialize, and difficulty with concepts of time and money (poor math skills). As well persons with FAS/E often have better expressive language skills than receptive language skills so they appear to understand more than they actually do.

The above list of characteristics is a 'recipe for disaster' in terms of how someone could come into contact with the law and how easily they could become a repeat offender. FAS when diagnosed, forces lawyers and judges to question whether persons with FAS are fit for trial and whether they have the ability to instruct counsel. Many persons without the full physical signs of FAS, but with the neurodevelopmental disability, who come into conflict with the law, are not recognized as disabled and are not assessed to find out their level of ability. When they are convicted and sent to jail they are often sexually and physically abused by fellow inmates and/or 'befriended', end up learning more about criminal acts and will not have made the connection as to why they are even in jail. Even persons with a previous diagnosis of FAS may not have that diagnosis passed on to their lawyer or the Crown or the Judge and accommodations may not be made for their learning disability or vulnerability. This is not justice-this is criminalizing the mentally compromised.

As a psychiatrist, practicing for 17 years, I can report from personal experience that there is a lack of awareness and knowledge about FAS. There is a lack of political will to do the right thing for disabled offenders/substance addicted offenders in the criminal system and within the government.

Mental health screening, of persons charged with criminal code offenses, that would include screening for FAS is an absolute must. Mr. Justice David Vickers in the Foreword to 'Fetal Alcohol Syndrome and the Criminal Justice System' (2) states "Seldom are people prepared to link criminal conduct in their community to an inadequate social support system. Many first offenders have never had an assessment of any nature whatsoever. ...Failure to address the underlying reason for criminal behaviour, at a much earlier date, may lead to more serious conflicts with the law. More often than not, precious years have passed without any help and support for the individual offender and his or her family before the question 'why' is asked in the sentencing process. Often underlying reasons are not even addressed at sentencing. How can that be in the interest of public safety and protection?"

What to do?-The most important thing is to become informed and as knowledgeable as possible about FAS whether you are a probation officer, a judge, a lawyer, police officer, a psychiatrist, social worker, psychologist, parent, politician, bureaucrat, physician, or guard.

As a psychiatrist I believe that only physicians with expertise in diagnosing FAS should be assessing persons for FAS. Developmental Paediatricians have the background and developmental approach that is needed in diagnosing FAS (in children and in adults-but there are funding issues for assessing adults). Psychiatrists generally have not been trained to recognize/diagnose the full spectrum of alcohol related birth disorders which surely must lead to the diagnosis being missed not just by Forensic Psychiatrists but by Child and Adolescent Psychiatrists and general Psychiatrists. As FAS is not (yet) included in the Diagnostic and Statistical Manual (DSM) that North American Psychiatrists use as the basis for psychiatric diagnosis, FAS has been ignored/dismissed or not recognized by many Psychiatrists. This lack of knowledge needs be reversed. Any Psychiatrist working in the Forensic system needs to have considerable knowledge/awareness of FAS, as they will definitely come into contact with persons with FAS/E and ARND. Knowledge of the 'FAS' behavioural phenotype and cognitive limitations will have an impact on decisions around consent to treatment and should influence therapeutic approach. Streissguth et al (6) have shown in their long term prospective study that persons with FAS have a high incidence of mental health disorders including depression/mood disorders, anxiety, addictions. The 'Forensic System' can only benefit from collaboration with Paediatricians in assessing persons for FAS.

I have spoken with many persons as I prepared this paper. A Neuropsychologist asked me to pass on this advice –if a full psychological assessment can not be done for someone that is suspected of having FAS then the most important part is to assess their Adaptive Functioning. [use: The Scales of Independent Behaviour-Revised {SIB-R} or The Vineland Adaptive Behavior Scale]. Persons with FAS/E tend to have markedly impaired adaptive functioning.

Judges and lawyers I have spoken with want to be able to have persons assessed for FAS because they have a concern about the accused's cognitive or adaptive functioning (before sentencing). Judges and lawyers want to have a flexible and supportive system that will allow for alternate ways of sentencing that will not result in the disabled person being put at risk of victimization or repeat offenses. Accommodation for cognitive/learning disabilities must be made, as rehab programs/groups designed for non-cognitively impaired offenders will be of no use to someone with a learning disability. The lack of accommodation to a person's cognitive/adaptive disability may result in the person not getting parole as they have not demonstrated 'progress' in rehabilitation. As well, sending persons with FAS, who have difficulty understanding cause and effect, to jail does not serve as a deterrent to future criminal activity and as stated earlier it may well introduce them to offenders that will take advantage of them in and out of prison. A network of community support outside of jail is needed, as without it persons with FAS will not be able to navigate normal societal rules. Persons with FAS do best with structure, black and white rules and consistency-knowledgeable persons in this field refer to the concept of the 'external brain'.

Who pays?-Persons with FAS are not just one ministry's 'problem' and perhaps the reluctance to acknowledge the enormity of the problem does come down to money but society pays now or pays later. Jailing people is expensive. Perpetuating criminal behaviour is expensive in terms of the cost to the public on an emotional as well as monetary level. Persons with FAS have organic brain damage-a birth defect that is caused by a legally sold substance (in Canada alcoholic products are as yet unlabelled and do not have warnings about FAS). FAS is 100% preventable. But persons will continue to be born with FAS because, as members of the forensic community, as well as being citizens, voters, parents, we have not shown the determination to solve this problem.

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