RESEARCH BRIEF

Is There Justice in the Juvenile Justice System? Examining the Role of Fetal Alcohol Spectrum Disorders*

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Abstract

Webster defines justice as "the maintenance or administration of what is just, especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments." This article explains the importance of understanding the role of fetal alcohol spectrum disorders (FASD) in adjudicating juvenile offenders. The author notes a systemwide lack of critical knowledge of FASD and provides a historic overview and explanation. She also includes data on the prevalence of FASD in the juvenile justice system and demonstrates how social adaptive behaviors, learning disabilities, and behavior problems associated with FASD affect individuals in the juvenile justice system. The author concludes by calling for recognition of the effects of FASD on juvenile offenders and recommendations for systemic changes.

About the Author

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Introduction

The cognitive processes that most people use to regulate their conduct and to adapt to their social environments are located primarily in the anterior lobe of the brain. The effect of alcohol on the fetal brain is such that this region does not develop sufficiently to allow the fetal alcohol syndrome (FAS) individual to appropriately control his or her actions.

The Yukon Territorial Court[1]

Civilization is predicated on the concept that individuals can and will demonstrate behaviors that conform to societal norms, and systems of justice are designed to punish or to rehabilitate those who fail to do so. The system leaves little room for those whose capacity to control their actions has been impaired by prenatal exposure to alcohol. According to researchers, a significant number of people who enter the criminal justice system—especially youth—are affected by fetal alcohol spectrum disorders (FASD) (Fast, Conry, & Loock, 1999).

While researchers have made significant progress in the identification and understanding of FASD, the legal system has been slow to grasp its impact on juvenile crime. Many professionals who work within the juvenile justice system are unable to deal appropriately with individuals with an FASD because they lack critical knowledge and training about the disorders. The result is a failure to recognize individuals with an FASD and to ensure that they receive appropriate services and support, from arrest through reentry into society. To understand the link between FASD and juvenile criminal behavior and to begin to build a system in which young

people with an FASD truly receive justice, one must first become familiar with the nature and cause of FASD.

Understanding FASD

In the early 1970s, prompted by recurrent cases of children of alcoholic mothers presenting with similar dysmorphology, or malformations, scientists began to pay close attention to the specific teratogenic effects of alcohol on a developing fetus. By June 1973, scientists had identified a set of physical and neurologic abnormalities that would become known as fetal alcohol syndrome (FAS). Today, we know that FAS is only the tip of the iceberg.

FASD is an umbrella term describing the range of effects that can occur in an individual whose mother drank alcohol during pregnancy. These effects may include physical, mental, behavioral, and/or learning disabilities with possible lifelong implications. FASD is not a diagnostic term used by clinicians. It refers to conditions such as FAS, alcohol-related neurodevelopmental disorder (ARND), and alcohol-related birth defects (ARBD). FASD affects nearly 40,000 newborns each year (May and Gossage, 2001).

The term FAS refers to a pattern of physical, neurologic, behavioral, and cognitive deficits that can interfere with growth, learning, and socialization. The major components of FAS are distinctive facial features, growth deficiencies (such as low birth weight), and brain damage. People with FAS have small eye openings, an indistinct or flat philtrum (the vertical groove between the nose and the upper lip), and a thin upper lip. Signs of brain damage may include a small skull at birth, structural defects, and neurologic signs such as impaired fine motor skills, poor eye-hand coordination, and tremors. Behavioral or cognitive problems may include mental retardation, learning disabilities, attention deficits, hyperactivity, poor impulse control, and

social, language, and memory deficits. The prevalence of FAS in the United States is estimated at 0.5 to 2 cases per 1,000 births (May and Gossage, 2001).

ARND refers to various neurologic abnormalities, such as problems with communication skills, memory, learning ability, visual and spatial skills, intelligence, and motor skills. Children with ARND have central nervous system deficits but not all the physical features of FAS. ARBD refers to defects in the skeletal and major organ systems, including abnormalities of the heart, eyes, ears, kidneys, and skeleton.

Individuals who are affected neurologically by prenatal alcohol exposure, including those who lack "the face of FAS," often experience developmental delays, attention deficits, learning disabilities, self-injurious behaviors, impulsivity, and emotional and social adaptive disturbances (Sampson, et al., 1997; Streissguth, 1997). They typically exhibit specific characteristics that may increase their risk for criminal behavior. Examples include poor impulse control, information processing deficits, inability to relate behavior to consequences, lack of a sense of connection to societal rules, poor short-term memory, poor sense of personal boundaries, confusion under pressure, difficulty grasping abstract concepts, inability to manage anger, and poor judgment (McCreight, 1997). Individuals with an FASD also exhibit naiveté and a tendency to be easily led by others.

Magnetic resonance imaging (MRI) has confirmed the brain damage that can result from prenatal exposure to alcohol, including smaller overall brain size and specific reductions in the cerebral vault, cerebellum, basal ganglia, and corpus callosum. Other brain abnormalities have been identified in subcortical structures and brain shape. These permanent effects correlate with the behavioral dysfunction described above.

FASD in the Juvenile Justice System

While FAS is frequently cited as the most preventable cause of mental retardation, limited information is available on the prevalence of FASD among juvenile offenders. Many adolescents and adults with an FASD have not been diagnosed, making it difficult to identify them within the justice system. The first successful attempt to quantify the prevalence of FAS in the system was made in 1997 by researchers studying the criminal justice system in British Columbia. This study, which involved youth who were remanded for a forensic psychiatric/psychological assessment, revealed that 23.3 percent of the youths were found to have FAS (Fast, Conry, & Loock, 1999). American researchers followed with a study of youths with an FASD as they became teenagers and adults. Sixty percent of those ages 12 and older reported having experienced trouble with the law (Conry & Fast, 2000).

The Journey through the System

Problems for a child with an FASD typically begin when he or she enters the school system and is unable to learn at the expected rate or lacks age-appropriate social skills. What often follows is an inability to navigate the school system due to problems such as learning disabilities, inability to reason, language deficits, and poor social skills. Children with an FASD may repeat grades, be placed in special education, and ultimately drop out of school. Often, the underlying reason for the child's behavior problems remains undetected, especially if there are no physical symptoms.

During and beyond the school-age years, the individual may struggle with basic social interactions and with managing work, finances, and self-care. For individuals with an FASD who experience social adaptive disturbances, day-to-day responsibilities can be a recipe for disaster. Adaptive disturbance essentially refers to a person's inability to meet the standards of personal

independence and social responsibility that are expected of an individual of the same age and cultural group (Grossman, 1983). Because justice systems basically are designed to punish social irresponsibility, it is not surprising that many individuals with an FASD ultimately enter the juvenile justice system.

The juvenile justice system is composed of many parts, and a person with an FASD faces seemingly insurmountable challenges at every stage. The process begins when an individual with an FASD is arrested. Due to learning disabilities and/or information processing deficits, the person's account of any incident or his or her understanding of matters such as Miranda warnings, illegal search and seizure, and the right to counsel is, at best, questionable. Individuals with an FASD may even confess to a crime they did not commit in an effort to end the questioning and be allowed to return home. In addition, the arresting officer probably is unaware of the juvenile's inability to cope with the questioning and to make decisions regarding representation.

At the next stage, the juvenile enters court. There, he or she must deal with a complex system of order, processes, and fact finding. The child is also expected to comprehend the gravity of the situation and the consequences of his or her alleged actions. However, the child is ill equipped to navigate the court system, just as he or she was unable to navigate the structure and content of the school system. Often, officers of the court are equally unprepared. They approach the situation as if they are dealing with just another youth in trouble, rather than dealing with a child whose actions result from damage inflicted before birth.

Complicating matters further is the possible involvement of an innocent victim. In our system of justice, we feel duty bound to "make the victim whole" by punishing the offending party. The system fails the juvenile offender with an FASD, a victim in his or her own right, not

in its attempt to vindicate the victim, but in its innate inability to recognize the role of FASD in the offending behavior. As stated by Fast and Conry, "The test is not an objective one of the 'reasonable man' but a subjective test that encompasses the particular accused, the complexities of the case, and the fairness of the trial itself"(Grossman, 1983).

In most cases, sentencing is driven by principles of general deterrence. The child is placed in some form of juvenile detention, an environment that he or she again is ill equipped to navigate. For an individual with an FASD, the objective of general deterrence cannot be achieved beyond the period of detention because (1) the juvenile's actions probably were not taken with the intent to commit a crime, (2) the underlying cause of the dysfunctional behavior has not been addressed, and (3) treatment has not been provided. Corrections, by definition, indicates that while in the detention facility the juvenile will be "fixed"—either by being detained or through rehabilitative measures such as drug treatment, counseling, or structured physical exercise. Instead, because of a lack of appropriate services as well as poor social and adaptive behaviors, the child with an FASD may be victimized while in confinement or overly influenced by his or her peers in detention, marking a path toward future criminal activity.

At the end of the sentence, the child reenters society with the behavioral characteristics that propelled him or her into the system intact. Now the child may be more disturbed as a result of victimization that occurred during detention or more knowledgeable about criminal activity. With 31 years of knowledge of FASD, it is time to examine this devastating cycle and to reform the juvenile justice system's treatment of youth with an FASD.

FASD and the Courts

Juvenile justice professionals who are unfamiliar with FASD often blur the lines between criminal susceptibility and criminal liability. In general, criminal liability requires two elements:

mens rea, the criminal mind, and *actus reus*, the criminal act. When a juvenile commits a crime, both elements are presumed to be present. However, the mind of a person with an FASD is not criminal but rather has been damaged by prenatal exposure to alcohol. In the words of a Florida court, "We can envision few things more certainly beyond one's control than the drinking habits of a parent prior to one's birth."[2] Recognition of FASD as a potential cause of criminal behavior should not, however, preclude criminal liability in juvenile matters. Rather, it raises two fundamental questions in cases of youth with an FASD: (1) Does the accused meet the *mens rea* requirement necessary for criminal liability and, if so, (2) how should FASD serve as a mitigating factor? The following cases illustrate the significance of these questions in juvenile courts.

In *State v. E.A.J.*, a 13-year-old defendant was charged with sexual assault of a 5-year-old girl. A physician testified that the defendant's family history and behavior indicated the possible presence of an FASD.[3] Clearly, FASD should have been an instrumental factor in determining whether the defendant did in fact have the requisite *mens rea* at the time of the alleged assault. If the *mens rea* requirement was satisfied, the court should have been concerned not only with vindicating the victim but also with finding treatment and rehabilitation services for the defendant's fetal alcohol spectrum disorder, the underlying cause of the offending behavior.

In *State v. Sidwell*, the State juvenile court declined jurisdiction over Sidwell, who was charged with a murder that occurred when he was 14 years old. Generally, once a murder case is transferred out of juvenile court, the potential penalties are much more severe, with no opportunities for rehabilitation. Sidwell had been diagnosed with FAS about two years before the murder.[4] One of the reasons the juvenile court offered for declining jurisdiction was that the juvenile facility did not have a specific program for treating FASD. It is unacceptable to move an

individual with an FASD out of the juvenile justice system, where services are flawed, to the criminal justice system, where services are nonexistent.

Adult defendants with an FASD generally have not fared well in criminal courts, which portends a bleak outcome for juveniles with an FASD who are tried as adults. See *People v. Arias*, in which the defendant was convicted and sentenced to death after the trial judge denied a motion to consider FASD as a mitigating factor.[5] Similarly, in *Brown v. State*, the defendant was convicted of two murders and sentenced to 50 years in prison on each; the judge failed to consider FASD as a mitigating factor.[6]

Although Sidwell's diagnosis did not persuade the court to properly consider the role of FASD, individuals with an FASD generally fare better in the juvenile justice system if they have received a diagnosis. To better appreciate the difference a diagnosis can make, see *People v. Michael A*, a juvenile proceeding. A psychologist retained by the defense determined that Michael was grossly unable to assist counsel in his defense. The basis for this conclusion included the fact that Michael had been diagnosed with FAS. Nonetheless, the trial court, without a hearing, ruled that Michael was competent to stand trial. The appellate court reversed this decision, holding that the trial court was required to hold a hearing on Michael's competency to stand trial.[7] Had Michael not been diagnosed, the entire course of his journey through the system would have been changed to his detriment. In the eyes of the court, he would have been seen as normal, responsible, and competent to stand trial.

Contrast the court's decision in *Michael* with *In the Matter of the Welfare of G.A.R.B.* G.A.R.B., a minor, was charged with second-degree murder. In an attempt to prevent G.A.R.B. from being tried as an adult, the defense asserted FAS as a mitigating factor. While it was suspected that G.A.R.B. had been born with FAS, no diagnosis had ever been established. Thus

the appellate court upheld the decision of the district court that stated that no mitigating factors were present, allowing G.A.R.B. to be tried as an adult.[8]

Unfortunately, an FASD is rarely detected in adolescents and adults due to systemic barriers to screening and diagnosis, including a lack of training among health providers, educators, and social services providers. In cases in which an FASD is suspected but has not been diagnosed, it is incumbent upon the justice system to find alternative ways of determining whether prenatal alcohol exposure should be considered.

Conclusion

Punishment is the traditional purpose of justice, and it no doubt still has its place within the system. However, the system fails to protect the innocent and the vulnerable, and we fail as a civilized society, when we process individuals with an FASD through the system without recognizing their limitations. Essentially crimes committed by persons with an FASD are crimes where there are two victims—the victim of prenatal alcohol use and the third-party victim of its consequences. For justice to truly be served there must be systemic changes that include:

- Increasing FASD training among professionals in the system.
- Incorporating FASD training at all entry points into the system.
- Increasing the number of referrals for diagnosis.
- Recognizing FASD as a mitigating factor or, where appropriate, an exculpatory factor.
- Developing alternative sentencing options.

The first step toward systemic change must be training among professionals. Absent such training, screening, referrals for diagnosis, alternative sentencing, and any other corrective measures are but mere goals, unlikely to produce systemic change because the gatekeepers are still unable to recognize FASD and its effect on the accused.

When professionals are trained, the system is then poised to adapt communication styles and legal strategies to accommodate the limitations that result from FASD. Successful efforts at systemic change will be marked by replacing punishment with treatment, the path toward further criminality with a safe environment that fosters appropriate interventions for FASD, and human indignity with human compassion.

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Notes

[1] *Regina v. J. (T.)* (1999) Y.J. No. 57 (Yukon Territorial Court).

[2] *Dillbeck v. State*. 643 So. 2d 1027 (Fla.).

[3] *State v. E.A.J.* 67 P. 3d 518 (Wa. Ct. App. 2003)

[4] *State v. Sidwell*, 1997 WL 1340003 (Wash. App. Div. 1)

[5] *People v. Arias*, 13 Cal. 4th 92, 913 P. 2d 980, 51 Cal. Rptr. 2d 770 (1996).

[6] *Brown v. State*, 659 N.E. 2d 671 (Ind. Ct. App. 1996).

[7] *People v. Michael A.,* 2003 WL 2240513 (Cal. App. 5th).

[8] *In the Matter of the Welfare of G.A.R.B., 2004 WL 51814 (Minn. App).*