

The Victimization of Individuals with Fetal Alcohol Syndrome/ Fetal Alcohol Effects
BY KATHRYN ANN KELLY

When a crime is committed against a person with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Effects (FAE), it is highly unlikely that the criminal justice system will react to protect and serve the victim. Cases in which the disability can generally be seen or surmised by police and prosecutors — blindness or deafness, for example — have at least a possibility that the criminal justice system will respond with the vigor and force used to protect and serve victims without disabilities. Although the disabilities caused by Fetal Alcohol Spectrum Disorder (FASD) are not as obvious as blindness or an inability to walk (indeed, they are usually not visible except to the trained eye), they warrant particular attention when the individual with that disability is the victim of a crime.

There Is No Safe Level of Alcohol a Mother-to-be Can Use Before and During a Pregnancy

FAS and FAE (referred to collectively as Fetal Alcohol Spectrum Disorder (FASD)) affect two to three million adults and children in the United States.¹ Police, prosecutors and the general public know very little about the disability. Further, there is a widespread but mistaken assumption that FASD is limited to children whose mothers were seriously and repeatedly intoxicated during pregnancies. Damage from even small quantities of alcohol occurs because of the mother's unique metabolism and her liver function at the time

of the pregnancy. Many mothers stop drinking only after they know they are pregnant, but damage to the developing fetus may already have been done. The Surgeon General's recommendation is that a woman refrain from drinking during pregnancy and even earlier if she is planning to become pregnant.²

Although police and prosecutors may realize that alcohol use during pregnancy can cause birth defects, few law enforcement officials have any idea that the birth defect is a pattern of tell-tale facial features: a smooth philtrum (the space between the nose and upper lip), a small head, eyes that are short in length, a flat midface and a thin upper lip.

Children and some adults with Fetal Alcohol Syndrome may have these distinctive facial features, however, these facial features are never present among individuals with Fetal Alcohol Effects. It is important to note that there are other physical problems impacting on eyes, ears, bones and heart.

The most important disability caused by a mother's prenatal use of alcohol is seriously debilitating and yet, invisible to the naked eye — organic brain damage. The organic brain damage associated with FASD often impairs the individual's executive brain function -- the ability to understand and adapt to the world.

Individuals with Fetal Alcohol Spectrum Disorder frequently have problems planning and organizing information and daily life, have trouble comprehending the consequences of their behavior, find they have difficulty drawing conclusions from past experience, have trouble understanding social cues and norms of behavior, and have difficulty controlling impulsive conduct. These individuals typically have an excessive desire to please others, an attitude which may lead them to take (or acquiesce in) actions that are harmful to their own interests.

Frequently those with FASD also have a below average I.Q., but most do not have a label of mental retardation. Whatever their I.Q., their level of social functioning is usually substantially lower than other

individuals with the same I.Q. Most individuals with an average I.Q. lead productive and organized lives. Individuals who have an average I.Q. but who also have brain damage caused by alcohol in utero, often struggle unsuccessfully to deal with the usual demands of life.

The characteristics of Fetal Alcohol Spectrum Disorder — invisible to police in a brief interview — could be quite obvious to a perpetrator who lived with or knew the victim. A criminal case in which FASD is present, more often than not, requires special care and handling. Charges against an individual who has had sexual contact with a minor would be particularly appropriate where the minor has FASD, and, resultantly, is less able than others his or her age to resist sexual advances. Although the testimony of the victim with FASD is important, these victim-witnesses can compromise a case because they are both credulous and very eager to please.

A victim-witness with Fetal Alcohol Spectrum Disorder may believe that the correct response must be whatever answer the questioner may appear to want, whether or not the response is factually true. The victim-witness with FASD may respond with inaccuracies, not conscious falsehoods, but simply responses that are the proper answer. The police and prosecuting attorneys must carefully question such victims, taking pains not to lead them in a particular direction but, rather, to let them tell their stories.³ This applies both in questioning possible crime victims and in preparing witnesses for trial.

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Courts, Recognizing that Crimes Committed with Awareness of the Vulnerability of the Victim, Impose Harsher Penalties on the Offenders

The resulting collection of behavioral disabilities render individuals with FASD, both as children and as adults, easy prey for criminal conduct. They are likely to accept criminal abuse, or to refrain from complaining to authorities, because they do not fully understand the inappropriateness of the treatment, or because they want to avoid displeasing the offender.

A child with Fetal Alcohol Spectrum Disorder might easily fail to grasp the importance of parental admonitions about sexual contacts with adults, and might fail to recognize the dangerousness of a situation. Some 72% of adolescents and adults with FAS/FAE have been physically or sexually abused.⁴ Sexual abuse of children with FASD by adults in their own home is a particularly serious problem.

Where the criminal was aware that a crime victim was particularly vulnerable is, under both federal and state law, a well established reason to impose a more severe sentence.⁵ A heavier sentence would be common, for example, for the mugging of a victim who uses a wheelchair or other mobility device. Some courts have recognized that harsher sentencing rules are entirely applicable to crimes against persons with Fetal Alcohol Spectrum Disorder.⁶ More courts should impose a harsher sentencing rule, and more prosecutors should ask for it.

It is not sufficient to prosecute with particular vigor crimes against individuals with disabilities, including those with FASD. Those individuals are uniquely vulnerable to criminal abuse, and preventative measures should be taken to protect them from criminal acts. Because of their vulnerability to sexual abuse, special care should be taken in placing children with Fetal Alcohol Syndrome/Fetal

Alcohol Effects in foster care, and in monitoring any children with FAS/FAE who are within the jurisdiction of government social welfare agencies.

Adults with FAS/FAE, if left to fend for themselves, will too often end up living on the streets or in other circumstances where they are likely to be particularly vulnerable to crime. The social services that many of these adults need, ranging from supported community living environments to job training, are as important to preventing victimization as they are to preventing poverty.

The Florida Supreme Court observed in its 1994 decision in *Dillbeck v. State*,⁷ "we can envision few things more certainly beyond one's control than the drinking habits of a parent prior to one's birth." For the millions of individuals who already have FAS/FAE, it is too late to protect them from the harm that maternal alcohol caused their developing brains. But it is still possible to take effective measures to protect them from criminal abuse.

Recent Scientific Developments Make It Easier to Diagnose FASD

Although some criminals may quickly recognize the vulnerability of a victim with FASD, in the past formal diagnosis has often been difficult in adolescents and adults, except in the case of those with full-blown FAS facial features. Often there are no obvious facial features, drinking patterns are not definitive and frequently undocumented, and neuropsychological testing may be more effective in detecting the existence of cognitive problems than in explaining their origin.

According to a study recently published by a team of researchers at the University of Washington, it is possible to differentiate FASD-diagnosed brains from "normal" brains with 80% accuracy using magnetic resonance (MR) brain images.⁸ Abnormalities of the corpus callosum, a cluster of transverse nerve fibers connecting the two hemispheres of the brain, underlie the measure permitting this discrimination. The same measurements can be applied to brain images of other adolescents and adults, such as those of victims in a forensic context, when the images are

produced using the same protocol as those that were used in the original study. This sharp new quantitative tool, based on new scientific methods, is available to both prosecuting and defense attorneys.

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References

- ¹ The incidence/prevalence of FASD is approximately 1 in 100. "Incidence of Fetal Alcohol Syndrome and Prevalence of Alcohol-Related Neurodevelopmental Disorder," Paul D. Sampson, Ann P. Streissguth, Fred L. Bookstein, Ruth E. Little, Sterling K. Clarren, Philippe Dehaene, James W. Hanson and John M. Graham, Jr., *Teratology* 56:317-326 (1997).
- ² Surgeon General's Advisory on Alcohol and Pregnancy, *FDA Drug Bulletin*, July 1981.
- ³ This problem is discussed in *Devereux v. Abbey*, 263 F. 3d 1070 (9th Cir. 2001)(en banc), *United States v. Allen J.*, 127 F. 3d 1292 (10th Cir. 1997), and *United States v. Butterfly*, 1999 WL 369954 (9th Cir.), 1995 WL 729484 (9th Cir.).
- ⁴ *Understanding The Occurrence of Secondary Disabilities in Clients With Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE): Final Report 1996*, Ann P. Streissguth, Helen M. Barr, Julia Kogen, Fred L. Bookstein.
- ⁵ See e.g., *Commonwealth v. Eller*; 569 Pa. 622, 807 A. 2d 838 (2002); *Commonwealth v. Crosby*, 791 A. 2d 366, 2002 Pa. Super. 10 (2002).
- ⁶ *United States v. Lee*, 141 F. 3d 1171, 1998 WL 165722 (8th Cir.).
- ⁷ 643 So. 2d 1027, 1029 (Fla. 1994).
- ⁸ "Geometric Morphometrics of Corpus Callosum And Subcortical Structures in the Fetal-Alcohol-Affected Brain," Fred L. Bookstein, Paul D. Sampson, Ann P. Streissguth and Paul D. Connor, *Teratology* 64:4-32 (2001); "Corpus Callosum Shape and Neuropsychological Deficits in Adult Males With Heavy Fetal Alcohol Exposure," Fred L. Bookstein, Ann P. Streissguth, Paul D. Sampson, Paul D. Connor and Helen M. Barr, *NeuroImage* 15, 233-251 (2002); "Midline Corpus Callosum Is A Neuroanatomical Focus of Fetal Alcohol Damage," Fred L. Bookstein, Paul D. Sampson, Paul D. Connor and Ann P. Streissguth, *Anatomical Record (New Anatomist)* 269:162-174 (2002).