

FASD and the Legal System

"FASD is not an excuse, it is a reason".

Fetal Alcohol Spectrum Disorder (FASD) is a range of clinical conditions including Fetal Alcohol syndrome (FAS), Partial Fetal Alcohol syndrome (pFAS), Alcohol-related Neurodevelopmental Disorder (ARND) and Alcohol Related Birth Defects (ARBD). Many of these individuals go unrecognized as they appear "normal" with above average IQ's and are often defiant or disruptive. The spectrum of neurological damage with FASD causes many different cognitive and behavioral problems.

Currently our legal system is based on fundamental principals of freewill and choice. However, the whole issue of FASD challenges these precepts.

Whether or not we are able to overcome the issues of identification and diagnosis of FAS in the court system is not the context of this discussion. Diagnosis or not, we are still left struggling to understand the issue of FASD and its relationship to offending and the law. There are a number of issues we must begin to understand and address.

- 1. Individuals with FASD have an increased susceptibility to involvement with the legal system.**

FASD individuals are highly suggestible, often have a negative self-image and almost always get caught by the legal system because they can't plan ahead. These individuals have poor adaptive behavior, poor language ability, they acquiesce when they don't understand, confabulate because their memory is faulty, and fail to reason through issues. Julie Conry's study (Conry, 1999) reports that approx 25% of youth prison populations in British Columbia are FAS affected and 50% have other disabilities. This results in a high representation of disabled youth who are now labeled criminal. A Seattle study found 60% of FAS affected individuals were in conflict with the law (Conry, 1999)

- 2. Courts are designed to deal with a model of intervention that assumes a person is responsible for their future behavior.**

The court system is inappropriate and unworkable for FASD affected individuals. The model of the courts is based on the notion of freewill and choice and that the accused is responsible for their future behavior. Judges need to ask that people affected with FASD have a fixed point of responsibility who monitors the specific and concrete plans for day-to-day living. A fixed point of responsibility requires someone who knows how to advocate for access to those services in the community that will best facilitate the FASD individual's needs. FASD affected are often without family supports that could act as such for them. A model that has been successful in the deinstitutionalization of the handicapped is the individual program plans (I.P.P.'s). Should we not consider the concept of Individual Sentencing Plans (I.S.P.'s) where the emphasis is on the individual's plans and there is identification of a fixed point of responsibility to ensure that those needs are met?

- 3. FASD affected individuals have little or no concept of cause and effect. We must ask**

whether or not their actions can then be deemed to be criminal.

An FASD affected individual is not able to link cause and effect which of course limits their ability to anticipate consequences. They are unable to integrate all of the information from cause and effect situations, leading to an inability to look at the "whole picture". These are serious cognitive impairments. We must ask ourselves if it is morally or ethically acceptable to punish handicapped individuals. More humane methods of dealing with FASD in the legal system can be utilized.

4. FASD are victimized in the court system and the jail setting.

FASD display a number of characteristics, which have a negative effect in the court and in the prison system where there is a definite expectation of ability to comply with "appropriate behavior". They are often non-compliant, "stubborn", misinterpret cues, go to far, don't respond to adult approval, ignore verbal limit setting, have trouble adjusting in social situations, over or under react, may show flat affect or lack of eye contact, are spacey or lack initiative, have inappropriate responses to situations and have an apparent lack of remorse. Failure to engage in appropriate behavior leads to the desire to "teach the youth a good lesson", one which he will usually be unable to learn.

5. We don't spend enough time early in their conflict with the law, trying to understand the underlying causes for why people come into the system.

Criminal lawyer's are taught to ask the question of guilt and innocence but these are not the right questions to ask FASD affected. We need to ask "why are you here", "What should happen to you now", "Why did this happen" and "what can we do to ensure that this doesn't happen again"? The vast majority of accused do not warrant incarceration. This could be reduced by 50% if we focused on these questions. (Canada places second in the Western World for number of incarcerated citizens)

6. We can lower the risk of re-offending by establishing effective strategies for working with FASD individuals.

Incarceration is not the only form of punishment in our society. The increased use of the principles of restorative justice could assist in diverting these disabled individuals from the legal system and ensure appropriate community supports. There are no restrictions on the kinds of offenses that can be diverted so as long as the issues of public protection and the needs of the individual are addressed there is a potential here to decriminalize people with disabilities.

Viable Alternatives

Judges are asking for alternatives. They are becoming more aware of the need to deal with this disability in a more proactive way. An "aggressive, comprehensive, intervention and treatment program" is required. Information Management Systems that keep track of FASD affected people are required and Therapeutic Courts like those used in the Toronto Drug Courts should be developed.

Circle Courts are being explored in Saskatoon (Judge Turpel-LaFond, Saskatoon Provincial Courts, 2001). These team-based, mediation oriented, interagency courts create a "circle of care" support network that utilizes the inter-community expertise and family supports to create a solid support network for the FASD affected. The provision of appropriate legal services for FASD affected is not

specialized treatment. It is however differential treatment with the goal of ensuring an outcome of equality. All disabilities deserve to have an outcome of equality in our society.

References

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