



Prenatal alcohol exposure: An assessment strategy for the legal context



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ABSTRACT

Studies over the last two decades have shown that people with fetal alcohol spectrum disorders (FASD) have the kind of brain damage that increases risk of criminal behavior. Thus, it is generally accepted that FASD is likely to affect a sizable minority of individuals involved in the justice system. Most of these defendants have never been diagnosed because they lack the facial abnormalities and severe intellectual deficiency that would have improved identification and diagnosis in childhood. Despite the fact that an FASD diagnosis and associated cognitive deficits may be directly relevant to offense conduct and post-arrest capacities, screening for prenatal alcohol exposure (PAE) by legal teams remains relatively rare. This article addresses the relatively straightforward screening process with strategies that may be used singly or in combination to produce information that can establish PAE and provide a foundation for diagnostic assessment by medical and mental health experts.

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1. Introduction

Fetal alcohol spectrum disorders (FASDs), which include fetal alcohol syndrome (FAS), partial FAS (PFAS), and alcohol related neurodevelopmental disorder (ARND), are commonly associated with abnormalities in anatomy, growth, cognition, and behavior (Kodituwakku, 2007; Nash et al., 2006; Sokol, Delaney-Black, & Nordstrom, 2003). Brain damage with associated behavioral dysfunction is a key feature in FASD. Since outward physical manifestations of FAS (i.e., facial abnormalities and growth impairment) may attenuate over time (Bertrand et al., 2004; Klug, Burd, Martsof, & Ebertowski, 2003; Wetherill & Foroud, 2011) if such symptoms ever existed, and most individuals with FASD have IQs that fall above the intellectually deficient range (Streissguth, Barr, Kogan, & Bookstein, 1996), the possibility that a suspect or criminal defendant suffers from FASD may be overlooked. Since FASD and its associated brain damage could explain offense conduct, screening for PAE by the legal team in the early stages of pretrial investigation is a relatively efficient and low-cost way to determine if there is justification for multi-disciplinary diagnostic assessment by experts in FASD.

Despite government health advisories and warning labels on alcoholic beverages in the United States, there is no indication that rates of FASD have declined over the last decade or so (<http://www.cdc.gov/features/dsalccholchildbearingagewomen/>). In fact, alcohol use among women of childbearing age is still common. For example, recent epidemiological studies have found that over half of all non-pregnant women

of childbearing age report alcohol use, with nearly 13% reporting binge drinking in the month prior to survey (CDC, 2009). This statistic has important implications in the forensic context because nearly half of all pregnancies in the United States are unintended (Finer & Zolna, 2011). Of four million pregnancies in the United States each year, approximately one in eight women (500,000 pregnancies) report using alcohol during pregnancy, and nearly 2% of pregnant women (80,000 pregnancies) report heavy drinking (CDC, 2009; Floyd & Sidhu, 2004). Conservatively, these figures suggest a possibility of PAE in up to 12.5% of all infants born annually and, by extension, a substantially increased risk for FASD in the forensic population.

Arrest rates in the general population in the United States are around 4.5% (Federal Bureau of Investigation, 2010), but risk of arrest for those with FASD is much higher. For example, Streissguth et al. (1996) found that approximately 60% of a large sample of individuals diagnosed with FASDs experienced trouble with the law (e.g., arrest and conviction) at least once in their lives. A study in British Columbia found that nearly a quarter of youth in a forensic psychiatric sample met diagnostic criteria for FASD (Fast, Conry, & Looock, 1999). A review of several studies in Canada and the United States found that adolescents with an FASD were 19 times more likely to be arrested than unaffected adolescents (Popova, Lange, Bekmuradov, Mihic, & Rehm, 2011). Thus, it is logical to conclude that a sizable minority of individuals in the juvenile and adult criminal justice systems have histories involving PAE.

The forensic relevance of FASD is beginning to be recognized. The Substance Abuse and Mental Health Services Administration (SAMHSA) in the United States has posted several fact sheets about individuals with FASD who offend on its FASD: Center for Excellence website. A brief review of FASD's forensic relevance was included in a recent

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revision of a major treatise on the U.S. corrections systems (Cohen, Burd, & Beyer, 2006). FASD is relevant across the legal spectrum from offense behavior and arrest through the entire adjudication process to incarceration. For example, the brain damage in FASD may be relevant to diminished capacity when it reduces an individual's self-control and ability to recognize when his/her conduct is subjecting others to harm. After arrest, the cognitive impairments in FASD (e.g., attention, comprehension, memory, communication, social judgment) may affect competency to proceed to trial by causing significant misunderstanding about the implications of waiving rights to silence and legal counsel before and during police questioning (Brown, Gudjonsson, & Connor, 2011). Indeed, as such deficits stem from permanent brain damage, competency restoration may be impossible. Many individuals with FASD also are suggestible, which can lead them to inaccurate statements during questioning simply to satisfy police and end the interrogation process. Generally, individuals with FASD tend to agree with authority figures when they don't understand implications or consequences (i.e., abstract concepts), which also can affect the way they respond to their attorneys. Once incarcerated, persons with FASD often have initial difficulty adjusting to the structure in detention facilities, but after growing accustomed to the routine, functioning typically improves significantly as they no longer have to make self-regulation decisions on their own.

The need for increased awareness of PAE and FASD in the legal community was officially endorsed in a resolution passed by the American Bar Association (ABANow, 2012). The inspiration for the ABA resolution was a stronger and more detailed resolution passed by the Canadian Bar Association (2010). In 2013, the Canadian Bar Association went a step further and urged the federal government to amend the Criminal Code and related legislation so that the diagnostic requirement for evidence of PAE may be waived by the court if there was a good reason why such evidence was unavailable, such as when the birth mother had died or could not be identified or found. Here, the Canadian Bar Association recognized the difficulties facing legal professionals in establishing PAE long after a defendant had reached adolescence or adulthood.

Given the magnitude of implied risk for FASD, one might expect routine PAE investigation in the criminal justice setting. However, screening and assessment are the exception rather than the rule, even in juvenile pretrial investigation (Herrick, Hudson, & Burd, 2011). Thus, it is not surprising that perceived rates of diagnosed FASD in the United States corrections systems appear unreasonably low (Burd, Selfridge, Klug, & Bakko, 2004), which may lead legal teams to assume FASD is unlikely. We suggest that a primary factor limiting pretrial investigation of PAE is a lack of screening measures which can be administered easily by legal teams. Thus, the objective of this article is to structure the task of confirming PAE by outlining procedures which legal professionals can use to screen for and perhaps confirm PAE during the pretrial investigation process.

1.1. Preliminary PAE pre-screening by the legal team

Given the likelihood that the cognitive deficits associated with FASD are directly relevant to pivotal legal issues (e.g., planning, decision-making, judgment, impulse control) and that the diagnosis itself establishes that those deficits preexisted any alternative explanations for the offense conduct at issue, screening for FASD should begin in the initial stages of pretrial investigation prior to formulating case strategy. Since PAE information is typically not readily available and often is difficult to obtain for defendants who were born two or more decades in the past, we suggest that legal teams consider using multiple screens depending upon funding and time constraints. With careful review of the federal government's diagnostic guidelines for FAS (Bertrand et al., 2004) and further informed by diagnostic criteria in the DSM-5 for Neurodevelopmental Disorder associated with Prenatal Alcohol Exposure (ND-PAE), social workers on the legal team should be able to conduct such screening prior to counsel deciding if multidisciplinary FASD assessment by medical and mental health experts is warranted.

It is important to keep in mind during the screening process that the amount of damage in a fetus that a teratogen such as alcohol can cause largely depends on timing, dose, and frequency of exposure. Because alcohol's specific teratogenic threshold is unknown (e.g., Burd, Blair, & Dropps, 2012), the U. S. Surgeon General's health advisory in 2005 indicated that there was no known "safe amount" of alcohol consumption during pregnancy (U.S. Surgeon General, 2005). It appears that at each exposure level, some fetuses are less susceptible to damage than others since only 5–10% of exposed pregnancies are later found to have a child with a diagnosable FASD (Abel, 1998). Thus, it is clear that beyond timing, dose, and frequency, other factors affect the extent of harm, such as maternal health, nutrition, smoking, drug use, and maternal and fetal genetics (Paintner, Williams, & Burd, 2012). Notably, twins may be discordant for FASD (Abel, 1998). Thus, even low levels of fetal exposure may harm some individuals while others may be impervious to relatively high levels of exposure.

Women at highest risk for producing a child with FASD appear to be those who engage in binge drinking. Binge drinking, defined as alcohol intake that brings blood alcohol concentration (BAC) to 0.08 grams percent or higher, equates to four or more drinks in a 2-hour time period for women (National Institute of Alcohol Abuse & Alcoholism (NIAAA), 2004). Binge drinking represents a particularly dangerous pattern of exposure (Stratton et al., 1996) as such episodes are often coupled with high BACs that produce an intensely toxic amniotic environment for a fetus (Burd et al., 2012; Paintner et al., 2012). In contrast, the toxic effects of low level PAE are unclear and controversial (Stratton et al., 1996), although low levels of exposure may cause FASD.

The timing of a birth mother's drinking is important as PAE during critical periods of gestation affects brain development differently, producing varying neurocognitive deficits (Abel, 1998; Bookstein & Kowell, 2010; Lipinski et al., 2012; Stratton et al., 1996). For instance, exposure during the first few weeks of pregnancy, when cells are forming and migrating to areas in the embryo where brain structures will eventually form, can be quite destructive (US Department of Health et al., 2002; Whitty & Sokol, 1996). Since many women do not learn they are pregnant until the second or third month of pregnancy, they may drink regularly during much of the first trimester without knowing they are exposing their unborn children to risk of brain damage.

1.1.1. Screen no. 1. Record review

Contemporaneous records may contain information that confirms PAE. Thus, record acquisition should be thorough and completed as early as possible in the pretrial process. While it is appreciated that obtaining and reviewing records can be labor intensive and difficult for public defenders with large caseloads and thus beyond many public defense budgets, this is a task for which investigators and social workers are well trained. At a minimum, the legal team should obtain complete medical records for both the client and birth mother, including birth records and lifetime emergency room visits for both. For example, such records may reveal that a birth mother was intoxicated when she presented for medical care during the index pregnancy, which would confirm PAE. Likewise, birth records may show that a client was born with alcohol or drugs in his or her system. Given the correlation between drug and alcohol abuse, if a birth mother is known to have abused drugs, it is highly likely she also abused alcohol (McGlone, Mactier, Cooper, Hassan, & A4–A5, 2012).

Other records involving the birth mother may contain information relevant to her alcohol use around the time of the pregnancy, including:

- mental health records (including psychological and/or psychiatric evaluations);
- substance abuse treatment records;
- child protective/welfare services and dependency records (including court transcripts);
- foster care and/or adoption records;

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